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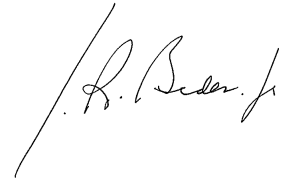
Memorandum of January 6, 2023

The President

Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961**Memorandum for the Secretary of State**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State the authority under section 506(a)(1) of the FAA to direct the drawdown of up to \$2.85 billion in defense articles and services of the Department of Defense, and military education and training, to provide assistance to Ukraine and to make the determinations required under such section to direct such a drawdown.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 6, 2023

Rules and Regulations

Federal Register

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

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. USCBP–2022–0039]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security U.S. Customs and Border Protection–020 Export Information System System of Records

AGENCY: U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled “DHS/CBP–020 Export Information System (EIS) System of Records” from certain provisions of the Privacy Act. Specifically, the Department exempts portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective January 18, 2023.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Debra Danisek, *Privacy.CBP@cbp.dhs.gov*, (202) 344–1610, CBP Privacy Officer, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. For privacy issues please contact: Lynn Parker Dupree, (202) 343–1717, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Department of Homeland Security (DHS), Customs and Border

Protection (CBP), published a notice of proposed rulemaking in the **Federal Register**, 80 FR 53019, September 2, 2015, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. DHS issued the new “DHS/CBP–020 Export Information System (EIS) System of Records” in the **Federal Register**, 80 FR 53181, September 2, 2015, to provide notice of the records maintained by CBP concerning individuals who participate in exporting goods from the United States.

DHS/CBP invited comments on both the notice of proposed rulemaking (NPRM) and System of Records Notice (SORN).

II. Public Comments

DHS received one non-substantive comment on the NPRM and one non-substantive comment on the SORN. After consideration of the public comments, the Department will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS amends chapter I of title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.*; Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301; 6 U.S.C. 142; DHS Del. No. 13001, Rev. 01 (June 2, 2020).

Subpart A also issued under 5 U.S.C. 552.

Subpart B also issued under 5 U.S.C. 552a and 552 note.

■ 2. In appendix C to part 5, add reserved paragraph 88 and paragraph 89 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

88. [Reserved]

89. The DHS/U.S. Customs and Border Protection (CBP)–020 Export Information System (EIS) System of Records consists of electronic and paper records and will be used by DHS and its components. CBP uses EIS to collect and process information to comply with export laws and facilitate legitimate international trade. CBP is charged with

enforcing all U.S. export laws at the border and the exporting community is required to report export data to CBP that contains personally identifiable information (PII).

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 552a(c)(3); (e)(8); and (g)(1). Additionally, the Secretary of Homeland Security pursuant to 5 U.S.C. 552a(k)(2) has exempted records created during the background check and vetting process from the following provision of the Privacy Act, 5 U.S.C. 552a(c)(3).

Further, no exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels from the United States and crosses the border, nor shall an exemption be asserted with respect to the resulting determination (approval or denial). After conferring with the appropriate component or agency, DHS may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained. Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, when information in this system of records may impede a law enforcement, intelligence-related, or national security investigation:

(a) From subsection (c)(3) (Accounting for Disclosures) because making available to a record subject the accounting of disclosures from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a violation of U.S. law, including investigations of a known or suspected terrorist, by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation (e.g., destroy evidence), intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(b) From subsection (e)(8) (Notice on Individuals) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on DHS and other agencies and could alert the subjects of counterterrorism or law enforcement investigations to the fact of those investigations when not previously known.

(c) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Lynn P. Dupree,
Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2023–00580 Filed 1–17–23; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF AGRICULTURE**Food Safety and Inspection Service****9 CFR Parts 352, 354, 362, and 412**

[Docket No. FSIS–2019–0019]

RIN 0583–AD78

**Prior Label Approval System:
Expansion of Generic Label Approval**

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: FSIS is amending its regulations to expand the circumstances under which it will generically approve the labels of meat, poultry, and egg products. Also, as of the effective date of this final rule, FSIS will no longer evaluate generically approved labels that establishments and egg products plants voluntarily submit for FSIS review. FSIS is also announcing the availability of revised guidelines on the types of labels that must be submitted to FSIS for approval.

DATES: This rule is effective March 20, 2023. Submit comments on the revised FSIS Guideline for Label Approval on or before February 17, 2023.

ADDRESSES: A downloadable version of the revised FSIS Guideline for Label Approval is available to view and print at <https://www.fsis.usda.gov/inspection/compliance-guidance>. No hard copies of the guideline have been published.

FSIS invites interested persons to submit comment on the revised FSIS Guideline for Label Approval. Comments may be submitted by one of the following methods.

- **Federal eRulemaking Portal:** This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to <https://www.regulations.gov>. Follow the on-line instructions at that site for submitting comments.

- **Mail:** Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.

- **Hand- or Courier-Delivered Submittals:** Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350–E, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2019–0019. Comments received in response to this docket will be made available for public inspection and

posted without change, including any personal information, to <https://www.regulations.gov>.

Docket: For access to background documents or comments received, call (202) 720–5627 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development, by telephone at (202) 205–0495.

SUPPLEMENTARY INFORMATION:**Executive Summary**

FSIS is finalizing its September 14, 2020, proposal to expand the circumstances in which FSIS will generically approve the labels of meat, poultry, and egg products (85 FR 56538). This final rule will expand generic approval to products only intended for export that deviate from domestic labeling requirements and permit generic approval of the labels of products that receive voluntary FSIS inspection. This final rule will also expand generic approval to: (1) “Organic” claims that appear in a product label’s ingredients statement; (2) “Geographic landmarks” displayed on a product label; (3) “Negative” claims made on product labels that identify the absence of certain ingredients or types of ingredients. Furthermore, as of the effective date of this final rule, FSIS will no longer evaluate generically approved labels voluntarily submitted to the Agency for review. FSIS will, however, continue to provide industry with relevant resources, including updated generic labeling guidance, and timely answers to generic labeling questions via phone, askFSIS, and the Small Plant Help Desk.

Considering these changes, FSIS has revised and reissued the FSIS Guideline for Label Approval¹ to provide the public with updated information on the types of labels that must be submitted to FSIS for approval consistent with this final rule.

As is shown in Table 1, this final rule has net benefits of \$799,507, annualized at the 7 percent discount rate over 10 years. Of which, industry will experience cost savings of \$517,888, annualized at the 7 percent discount rate over 10 years, from the reduction in preparing and submitting certain labels for FSIS evaluation. FSIS will experience cost savings of \$281,619,

¹ The latest revision of the FSIS Guideline for Label Approval is available at: <https://www.fsis.usda.gov/inspection/compliance-guidance>.

annualized at the 7 percent discount rate over 10 years, from the reduction in label evaluations. This final rule does not create any new cost burden for industry or FSIS.

TABLE 1—NET BENEFITS
[Cost savings]

	Annualized net benefit (7% discount rate, 10 years)
Industry	\$517,888
Agency	281,619
Total	799,507

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I. Background

The Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*) (hereinafter, “the Acts”) direct the Secretary of Agriculture to maintain inspection programs designed to ensure that meat, poultry, and egg products are safe, wholesome, not adulterated, and properly marked, labeled, and packaged. These laws prohibit the sale of products under any false or misleading name, marking, or labeling and require the Secretary to approve product marking and labeling (21 U.S.C. 457(c), 607(d), and 1036(b)). The Department’s longstanding interpretation² of these provisions is that they require the Secretary or his or her representative to

² See, e.g., 60 FR 67444, December 29, 1995; 76 FR 75809, 75810, December 5, 2011; 78 FR 66826, November 7, 2013; 85 FR 56538, 56539, September 14, 2020.

approve all labels to be used on federally inspected and passed, domestic and imported, meat, poultry and egg products, before the products may be distributed in commerce. To implement these provisions, FSIS uses a prior approval program for labels on federally inspected meat, poultry, and egg products (9 CFR part 412). Without approved labels, meat, poultry, and egg products may not be sold, offered for sale, or otherwise distributed in commerce.

To receive FSIS approval, meat, poultry, and egg product labels must comply with the Acts and the labeling regulations implemented thereunder. As discussed in the proposed rule (85 FR 56538, 56539), the regulations contain provisions to ensure that no statement, word, picture, design, or device that is false or misleading in any particular, or that conveys any false impression, or that gives any false indication of origin, identity, or quality, appears in any marking or other labeling (9 CFR 317.8, 381.129, and 590.411(f)(1)). Also, as discussed in the proposed rule, FSIS regulations require that meat, poultry, and egg product labels display up to eight features, to ensure that consumers have the information necessary to make informed purchasing decisions (85 FR 56538, 56539). The required features include: (1) The standardized, common or usual, or descriptive name, of the product (9 CFR 317.2(c)(1) and (e), 381.117, and 590.411(c)(1)); (2) an ingredients statement containing the common or usual name of each ingredient of the product listed in descending order of predominance (9 CFR 317.2(c)(2) and (f), 381.118, and 590.411(c)(1)); (3) the name and place of business of the manufacturer, packer, or distributor (9 CFR 317.2(c)(3) and (g), 381.122, and 590.411(c)(2)); (4) an accurate statement of the net quantity of contents (9 CFR 317.2(c)(4) and (h), 381.121, and 590.411(c)(4)); (5) the inspection legend, including the number of the official establishment³ (9 CFR 312.2(b), 317.2(c)(5) and (i), 381.96, 381.123, and 590.411(c)(5)); (6) a handling statement if the product is perishable, *e.g.*, “Keep Frozen” or “Keep Refrigerated” (9 CFR 317.2(k), 381.125(a), and 590.410(a)(1)–(2)); (7) nutrition labeling for applicable meat and poultry products (9 CFR part 317, subpart B; part 381, subpart Y; and 590.411(e));⁴ and (8) safe handling

instructions if the meat or poultry component of the product is not ready-to-eat (9 CFR 317.2(l) and 381.125(b)). In addition, imported meat, poultry, and egg products must bear the country of origin under the product name (9 CFR 327.14(b)(1), 381.205(a), and 590.950(a)(2)).

Under the prior label approval program, certain categories of labels receive “sketch approval,” meaning they must be submitted to FSIS for review and approval before use. However, FSIS regulations allow some product labels that bear all required labeling features and comply with the Agency’s labeling regulations to be “generally approved” (9 CFR 412.2(a)(1)), meaning they may be used in commerce without prior FSIS review. Establishments, therefore, do not need to submit generically approved labels to FSIS’ Labeling and Program Delivery Staff (LPDS) for evaluation. Instead, as discussed in the proposed rule, Inspection Program Personnel (IPP) perform surveillance and enforcement tasks in the field to verify that generically approved labels comply with labeling requirements (85 FR 56538, 56543).

Generic label approval has been in place in some form since 1983 (48 FR 11410, March 18, 1983). FSIS previously expanded the categories of labeling claims eligible for generic approval in 1995 (60 FR 67444, December 29, 1995). FSIS completed an assessment of the modified system in 1998 (76 FR 75809, December 5, 2011) and concluded that the great majority of establishments effectively used generically approved labels and that the gradual implementation of generic label provisions under the 1995 final rule was effective. FSIS expanded generic approval again in 2013 (78 FR 66826, November 7, 2013) and, in 2016, conducted a limited assessment of generic labels under the modified system, which found a high level of compliance with the requirements.

In June 2020, the USDA Office of Inspector General (OIG) concluded an audit of FSIS product labeling oversight (OIG audit #24601–0002–23, “Controls Over Meat, Poultry, and Egg Product Labels”).⁵ In response to the audit recommendations concerning FSIS oversight of generic labeling, the Agency agreed that it would continue to enhance its outreach efforts to ensure establishments are aware of applicable

Cosmetic Act and the Fair Packaging and Labeling Act [9 CFR 590.411(e)].

⁵ OIG’s audit report is available at: <https://www.usda.gov/sites/default/files/audit-reports/24601-0002-23.pdf>.

mandatory labeling features for generic labels. FSIS also agreed to update its internal policies to improve IPP label verification activities. FSIS took subsequent action to satisfy OIG’s audit recommendations and, based on such action, the USDA Office of the Chief Financial Officer (OCFO) closed the audit on June 29, 2021.

Since the 2013 rulemaking (78 FR 66826), FSIS has gained significant, additional experience evaluating labels required to be submitted and approved. From that experience, FSIS has observed through its prior label approval system that most labels in the categories discussed in this final rule are compliant and do not require changes. Therefore, the Agency concluded that the current label regulations continue to require industry to submit for approval a significant number of labels that could successfully be generically approved. Therefore, on September 14, 2020, FSIS published a proposed rule to amend the meat and poultry products inspection regulations to expand the circumstances under which labels of meat and poultry products would be deemed to be generically approved by the Agency (85 FR 56538). FSIS also proposed to cease evaluating generically approved labels submitted to FSIS for review (85 FR 56538, 56542). FSIS proposed these changes to its regulations to reduce the number of labels submitted for evaluation by FSIS and to lessen the paperwork burden on official establishments (85 FR 56538, 56541). As stated in the proposed rule, the reduction in staff time spent approving these labels will allow the Agency to better focus on other consumer protection and food safety activities, such as developing guidance materials, answering labeling policy questions, providing outreach to stakeholders, and ensuring IPP effectively verify that establishments meet labeling requirements (85 FR 56538, 56541). FSIS is now finalizing the proposed rule with minor changes to clarify label approval requirements with respect to voluntarily inspected poultry.

II. Final Rule

This final rule is consistent with the proposed rule. First, the final rule will extend generic label approval to products only intended for export that deviate from domestic labeling requirements, by removing 9 CFR 412.1(c)(2). As explained in the proposed rule, FSIS maintains an Export Library that lists requirements for exported products that foreign authorities have officially communicated to FSIS, including

³ For purposes of this document, the term “establishment” includes official meat and poultry establishments and egg products plants, unless otherwise indicated.

⁴ Nutrition labeling for egg products must comply with the provisions of 21 CFR part 101, promulgated under the Federal Food, Drug, and

labeling requirements.⁶ At times, foreign country labeling requirements conflict with domestic requirements. FSIS regulations (9 CFR 317.7 and 381.128) permit export product labels to deviate from FSIS' domestic labeling requirements in order to comply with foreign country requirements or to be marketed more easily in a foreign country.⁷ FSIS IPP verify whether product for export meets requirements listed in the Export Library, including labeling, when certifying products for export. Verification of foreign requirements is ultimately determined by each foreign country's competent authority.

Second, the final rule will revise the types of "special statements and claims" requiring label submission by providing for generic approval of three additional types of claims. As explained in the proposed rule, FSIS has, through its prior label approval system, routinely evaluated these types of claims for several years. From that experience, FSIS has observed that errors, omissions, and misrepresentations are rare on these types of labels. FSIS has, therefore, decided to expand generic approval to such claims. As with all generically approved labels, IPP will continue to conduct routine verification tasks in establishments to verify ongoing compliance with labeling requirements. FSIS is amending 9 CFR 412.1(e) and 412.2(b) to make these changes.

Under this final rule, the following types of claims will be generically approved:

a. "Organic" claims that appear in a product label's ingredients statement, which designate an ingredient as certified "organic" under the Agricultural Marketing Service's (AMS's) National Organic Program. The ingredients statement on these product labels designates specific ingredients as "organic" (e.g., "organic garlic"). Under this rule, FSIS will no longer require the submission and evaluation of supporting documentation to verify that such ingredients are indeed certified as "organic" by an AMS-recognized third-party certifier. However, FSIS will continue to require establishments to submit labels certifying a total product as organic to FSIS for evaluation.

b. "Geographic landmarks" displayed on a product label, such as a foreign

country's flag, monument, or map. For example, the following claims displayed on a product label will no longer require FSIS review prior to entering commerce: a Polish flag depicted on a Polish sausage product label, or an outline of the State of Nevada depicted on a product label for beef produced in Nevada.

c. "Negative" claims made on product labels that identify the absence of certain ingredients or types of ingredients. For example, statements such as "No MSG Added," "Preservative Free," "No Milk," "No Pork," or "Made Without Soy," on product labels that do not list these ingredients in the ingredients statement will no longer have to be evaluated by FSIS before use. However, FSIS evaluation of labels that bear negative claims relating to the raising of the animal from which the product is derived (e.g., "no antibiotics administered") or negative claims relating to the use of genetically modified ingredients will continue to be required.

Third, the final rule will permit generic approval of the labels of products that receive voluntary FSIS inspection. FSIS provides several types of voluntary inspection services under the authority of the Agricultural Marketing Act (AMA) (7 U.S.C. 1621 *et seq.*), including inspection for: rabbits (9 CFR part 354), certain non-amenable species of livestock and poultry, such as elk, bison, and migratory waterfowl (9 CFR part 352, subpart A, and 9 CFR part 362); and products that contain meat or poultry but are not under FSIS jurisdiction, e.g., closed-faced sandwiches (9 CFR 350.3(c) and 362.2(a)). Before this final rule, labels for some products produced under these voluntary inspection programs were not covered under the Agency's generic approval regulations at 9 CFR part 412. This final rule will permit generic approval for them on the same basis as amenable meat, poultry, and egg products by amending the relevant regulations where needed to include references to 9 CFR part 412.⁸ For clarity, the final rule will also modify 9 CFR 352.1 to update the section heading and remove unnecessary language.

Finally, under the final rule, FSIS will no longer evaluate generically approved

labels submitted voluntarily for FSIS review. Over the years, producers have become more familiar with FSIS' generic labeling requirements, and FSIS has provided additional guidance to assist them in designing compliant labels. Because voluntarily submitted labels receive a lower review priority than other labels, industry can receive more timely labeling assistance by utilizing Agency resources or contacting FSIS for help. Therefore, FSIS' evaluation of otherwise generic labels no longer represents an efficient use of Agency resources.

FSIS will, however, continue to provide industry with generic labeling resources and assistance to help them comply with requirements. For example, FSIS has revised and reissued the FSIS Guideline for Label Approval⁹ to provide updated information on the types of labels that must be submitted to FSIS for approval consistent with this final rule. FSIS will also continue to assist industry with generic labeling issues via phone, askFSIS, and the Small Plant Help Desk.

II. Summary of Comments and Responses

FSIS received 33 comments on the proposed rule from individuals, trade associations, private businesses, non-profit organizations, a consultant, a software company, the European Union (EU), and OIG. Fourteen commenters supported the proposed rule; though, some commenters requested revisions to or clarification on specific provisions of the rule. Most of these commenters stated that they supported the proposed rule because it will streamline the prior label approval system, reduce the label approval backlog, result in a cost savings for industry and government, and allow FSIS to utilize its resources more effectively.

Four commenters opposed the proposed rule, generally citing concerns over reduced oversight of meat, poultry, and egg product labeling claims. Twelve comments expressed concerns regarding specific provisions or language in the proposed rule but did not otherwise express opposition or support for the remainder of the rule. The remaining comments were outside the scope of the rule. A summary of the relevant issues raised by commenters and the Agency's responses follows.

⁹ The latest revision of the FSIS Guideline for Label Approval is available at: <https://www.fsis.usda.gov/inspection/compliance-guidance>.

⁶ The Export Library is available at: <https://www.fsis.usda.gov/wps/portal/ffsis/topics/international-affairs/exporting-products/export-library-requirements-by-country>.

⁷ Although there is no specific equivalent regulation for egg products, FSIS follows the same policy because such products, intended exclusively for export, must comply with foreign countries' requirements and are therefore not considered misbranded.

⁸ Under existing regulations, non-FSIS-jurisdiction products that contain meat or poultry (9 CFR 350.3(c)) and products containing non-amenable species of poultry (9 CFR part 362), which are voluntarily inspected, are already subject to the label approval provisions of 9 CFR part 412. Nonetheless, this final rule adds additional regulatory language to 9 CFR part 362 to further clarify label approval requirements with respect to voluntarily inspected poultry.

A. Industry Compliance and Agency Oversight

Comment: OIG questioned FSIS' conclusion that its previous generic labeling assessments found a high level of industry compliance with requirements and its assertion in the proposed rule (85 FR 56538, 56543) that OIG's audit of FSIS' product labeling oversight (OIG audit #24601-0002-23) does not affect the proposed expansion of generic labeling eligibility. Unlike FSIS, OIG does not believe that the assessments or the audit found a high level of industry compliance with generic labeling requirements. As part of its audit, OIG reviewed 878 generic labels that industry voluntarily submitted to FSIS for review and found that FSIS requested changes to 74 percent of these labels. OIG also noted that three establishments OIG visited during its audit did not make required modifications to their generic labeling records. For these reasons, OIG recommended that FSIS consider performing a statistically valid assessment, before publishing this final rule, to ensure establishments have achieved a high level of compliance with generic label requirements. OIG also asked FSIS to consider ensuring that IPP select generic labels when performing General Labeling Tasks.

Response: As discussed in the proposed rule (85 FR 56538, 56541), FSIS completed an assessment of its generic labeling system in 1998 (76 FR 75809, December 5, 2011). Of the 1,513 labels that FSIS reviewed during its assessment, 1,434 (approximately 95 percent) were either in complete compliance or had only minor labeling errors (e.g., insufficient spacing around the declaration of net weight or an error in the name of the manufacturer, packer, or distributor) that were not of public health or economic significance (76 FR 75813). As discussed in the proposed rule (85 FR 56538, 56541), FSIS also conducted a limited assessment in 2016, with similar results. Thus, FSIS maintains its view that its previous assessments found a high level of compliance from the labels reviewed.

In June 2020, OIG concluded an audit of FSIS' oversight of generically approved and sketch approved labeling.¹⁰ In response to the official draft of the audit, FSIS expressed concerns that the audit was flawed in several areas, and that OIG misinterpreted specific labeling regulations and how they are applied to the labeling review process. FSIS also

expressed concerns that OIG evaluated the label approval program on a rigid set of standards that did not accurately reflect FSIS regulations or consider FSIS' history and expertise in implementing the regulations and review of labels. OIG addressed some, but not all, of these concerns in its final audit report. Despite FSIS' misgivings about the audit, the Agency generally agreed with OIG's recommendations, and OIG accepted FSIS' decisions on all its recommendations.

FSIS took subsequent action to satisfy OIG's recommendations and, based on such action, OCFO closed the audit on June 29, 2021. For example, on June 7, 2021, the Agency revised FSIS Directive 7221.1, *Prior Labeling Approval*,¹¹ to clarify that IPP are to routinely select generically approved labels when performing General Labeling Tasks.¹² FSIS also documented internal Standard Operating Procedures to assist LPDS analysts with the label evaluation process, including formalizing a Quality Control program to randomly review label adjudications.

FSIS also took action to address OIG's finding that three establishments it visited during its audit did not make required modifications to their labeling records. Although this finding was only based on a review of four labels, FSIS nonetheless published a *Constituent Update* to remind all establishments that FSIS label approval, including approval of voluntarily submitted generic labels, is contingent on the establishment making the revisions noted by FSIS.¹³ FSIS also recently updated FSIS Directive 7221.1 to clarify that, as part of the General Labeling Task, IPP are to routinely verify that establishments make required modifications to their labels.

FSIS acknowledges OIG's finding that FSIS requested changes to 74 percent of the generic labels voluntarily submitted to the Agency by industry, which OIG reviewed during its audit. For a number of reasons, however, this finding does not accurately reflect the overall compliance of generically approved labels. First, industry typically submits generically approved labels to FSIS to resolve questions about some aspect of the label's compliance. Thus, the labels

OIG audited were, by their very nature, more likely to have minor deficiencies than generically approved labels not voluntarily submitted to FSIS. Second, nearly all the deficiencies identified were very minor and did not require label revocation. Moreover, none of the identified deficiencies created a health or safety concern or provided the establishment with an economic advantage.

Based on the above, FSIS maintains its view that generic labels typically comply with labeling regulations. The great majority of errors that do occur are minor, do not require label revocation, and are not of public health or economic significance. As such, FSIS did not conduct another assessment prior to publication of this final rule. However, as discussed, FSIS has already taken action to address OIG's recommendations and successfully close the audit, such as reissuing Directive 7221.1 to clarify that IPP are to include review of generic labels as part of the General Labeling Task and verify that establishments have made required modifications, if any, to such labels. In addition, FSIS will continue to train and support IPP on this issue via webinars, askFSIS, and other outreach including participating in IPP training conducted by the FSIS Center for Learning (CFL).

Comment: An individual commenter argued that the sample size of the 2016 assessment was not adequate to effectively gauge industry compliance with generic labeling requirements. The commenter also noted that FSIS did not provide a link to the results of that assessment in the proposed rule. The commenter recommended that, moving forward, FSIS perform additional generic labeling assessments.

Response: As discussed in the proposed rule, the 2016 assessment was a limited assessment conducted to address concerns about the effectiveness of generic labeling and establish protocols for a potential future national assessment (85 FR 56538, 56541). Labeling policy experts reviewed 270 labels for compliance with generic labeling requirements.¹⁴ These 270 labels reflect a representative sample from the five Federally regulated establishments subject to the assessment. Thus, the sample size was adequate to gauge their compliance with generic labeling requirements.

FSIS did not produce a report outlining the comprehensive results of the assessment. Instead, in line with the assessment's methodology, FSIS drafted

¹⁰ Audit Report 24601-0002-23 available at <https://www.usda.gov/sites/default/files/audit-reports/24601-0002-23.pdf>.

¹¹ FSIS Directive 7221.1 is available at: <https://www.fsis.usda.gov/policy/fsis-directives/7221.1>.

¹² The General Labeling Task is a set of surveillance procedures that IPP use to verify the ongoing compliance of labels, including generic labels, at establishments. FSIS Directive 7221.1, *Prior Labeling Approval*, provides instructions to IPP for conducting the General Labeling task.

¹³ *FSIS Constituent Update: Tips for Faster Label Approval Process*. August 9, 2019, available at: <https://www.fsis.usda.gov/news-events/press-releases/constituent-update-august-9-2019-0>.

¹⁴ Methodology available at: <https://www.fsis.usda.gov/guidelines/2016-0019>.

an assessment summary letter for each individual establishment. FSIS also discussed the overall results of the assessment in the proposed rule, noting that the assessment found a high level of compliance with the generic labeling requirements and identified only three labels with deficiencies necessitating label revocation (85 FR 56538, 56541). None of these deficiencies involved food safety.

FSIS may conduct future assessments, as needed, and as Agency time and resources permit to gauge ongoing industry compliance with generic labeling, including the provisions in this final rule. However, the Agency determined that an assessment was not necessary prior to publication of this final rule, given its previous assessments have shown a high level of industry compliance with generic labeling requirements.

B. Cost of Label Review

Comment: One individual stated that the proposed rule is not necessary because the costs associated with FSIS' label review process are already relatively low.

Response: FSIS disagrees. The cost of label submissions and evaluations vary and is dependent on the complexity of the individual label. FSIS estimates that the total industry and Agency net cost savings under this rule from the reduction in FSIS label submissions to be \$5,615,403 discounted at the 7 percent discount rate over a 10-year period, present value. FSIS is focused on making the label approval process more efficient while ensuring food safety and preventing misbranded products.

C. Increase in Deficient Labels

Comment: Several individuals expressed concerns that expanding generic approval to other categories of labels will substantially increase the number of deficient labels in commerce. Some individuals also suggested that expanding generic labeling will encourage establishments to intentionally abuse the labeling system. In addition, some individuals stated that periodic IPP verification of generic labels is insufficient to identify and prevent misbranded labels before they cause harm to consumers.

Response: FSIS disagrees. First, FSIS' experience with generic label approval does not support the assertion that expanding generic approval will substantially increase the number of deficient labels in commerce. Generic labeling has been in place in some form since 1983. This final rule, like previous expansions of generic approval

eligibility, will continue to require that establishments comply with FSIS' labeling regulations. Establishments have been required to include the following features on their product labels for many years: product name (9 CFR 317.2(c)(1) and (e), 381.117, and 590.411(c)(1)); inspection legend/establishment number (9 CFR 312.2(b), 317.2(c)(5) and (i), 381.96, 381.123, and 590.411(c)(5)); handling statement (9 CFR 317.2(k), 381.125(a), and 590.410(a)(1)–(2)); net weight (9 CFR 317.2(c)(4) and (h), 381.121, and 590.411(c)(4)); ingredients statement (9 CFR 317.2(c)(2) and (f), 381.118, and 590.411(c)(1)); signature line (9 CFR 317.2(c)(3) and (g), 381.122, and 590.411(c)(2)); nutrition facts panels (9 CFR part 317, subpart B; part 381, subpart Y; and 590.411(e)); and safe-handling instructions (9 CFR 317.2(l) and 381.125(b)). FSIS IPP will continue to verify that establishments' labels include these features and otherwise comply with labeling requirements. Moreover, as discussed above, FSIS has evaluated the compliance of generically approved labels after previous expansions of generic approval eligibility and found that they typically comply with labeling regulations. FSIS expects that the categories of labels added to generic approval by this rule will have a similarly high compliance rate, and any increase in the number of deficient labels entering commerce resulting from the expansion of generic label approval by this rule will be minimal.

FSIS' experience with generic label approval also does not support the assertion that expanding generic label approval will encourage establishments to intentionally abuse the labeling system. Past incidents of establishments intentionally misusing generic label approval have been rare, and FSIS does not expect that to change with this rule. IPP routinely perform labeling verification activities in federally inspected establishments to identify and deter such activity. Moreover, the costs associated with noncompliance, such as the costs to replace deficient labels or the disruption of production, disincentive such behavior. In addition, if any such activity does occur, FSIS may take action to control misbranded products and take enforcement action under the FSIS Rules of Practice (9 CFR part 500).

In addition, FSIS disagrees with the assertion that IPP verification of generic labels is insufficient to identify and prevent misbranded labels before they cause harm to consumers. IPP have consistently demonstrated their ability to review generic labels and ensure a

high level of compliance with labeling requirements. FSIS will revise and reissue instructions to IPP regarding the verification of generic labels as necessary. For instance, FSIS recently reissued FSIS Directive 7221.1 to provide IPP with updated instructions for conducting the General Labeling task in the Public Health Information System (PHIS)¹⁵ that are consistent with this final rule. As discussed, the Agency has also updated the FSIS Guideline for Label Approval to be consistent with this final rule. FSIS will also update and administer generic labeling training webinars for IPP, as necessary. Moreover, this rule is expected to reduce the number of labels submitted to FSIS, freeing up resources that will allow the Agency to better focus on providing labeling support to industry and IPP. FSIS will focus its time and resources on preventing more non-compliances through new and improved labeling guidance, outreach, and other support services for its stakeholders, including via phone, askFSIS, and the Small Plant Help Desk. In addition, IPP will continue to verify generic labels for compliance on a routine basis and inform establishments of the need to correct any deficiencies they identify.

D. Organic Claims

Comment: A consulting firm and a trade association asked FSIS to expand generic approval to all "organic" labeling on a product, rather than limiting it to "organic" claims listed in the ingredients statement.

Response: FSIS will not expand generic approval to all "organic" labeling at this time. There are additional requirements for labeling a total product as "organic" as opposed to just a particular ingredient. For example, approving an entire product as "organic" requires the review of supporting documentation on "organic" processing, including "organic" certificates. Such claims need to be reviewed by LPDS staff that have expertise in the types of supporting documentation needed to determine compliance. Such "organic" claims are, therefore, not easily verifiable by IPP. Thus, FSIS will continue to require prior approval for labels that display "organic" claims outside the ingredients statement, including those certifying a total product as "organic."

Comment: Several individuals stated that the rule will weaken regulatory oversight of "organic" claims on meat,

¹⁵ PHIS is FSIS' dynamic, comprehensive data analytic system, which was launched as part of the Agency's effort to collect, consolidate and analyze data in order to improve public health.

poultry, and egg products. They also stated that allowing “organic” claims in the ingredients statement will mislead consumers into believing they are buying certified organic products.

Response: The final rule will not weaken oversight of “organic” claims. FSIS regulations will continue to require that all “organic” claims be truthful and not misleading. LPDS analysts will continue to evaluate and approve “organic” claims displayed outside of the ingredients statement. IPP will verify the truthfulness of generically approved “organic” ingredient claims made in the ingredients statement. IPP verify, through record review and observation, that all ingredients used in the production of the product are present on the product formulation record and that all ingredients in the product formulation are declared in the ingredients statement on the product label by common or usual name in descending order of predominance. IPP also verify, through record review and observation, that the appropriate label is applied to the product. IPP directly observe that all ingredients used in a product formulation are appropriately declared on the final meat, poultry, or egg product labels. The AMS National Organic Program will also continue to provide oversight of organic claims.

FSIS also disagrees that listing some ingredients as “organic” in the ingredients statement will mislead consumers. So long as they are truthful, the AMS National Organic Program regulations,¹⁶ which were first published in December 2000,¹⁷ permit “organic” claims to appear in the ingredient statements of non-certified products. FSIS did not propose to change those requirements.

E. Negative Claims

Comment: One producer asked FSIS to clarify whether “gluten free” claims qualify for generic approval under the rule. Another individual specifically opposed any action that would deregulate “gluten free” labeling.

Response: The term “gluten free” is considered a negative claim and will receive generic approval under this final rule. However, the final rule will not deregulate “gluten free” labeling or change recordkeeping requirements. Such claims must still be truthful and not misleading in accordance with 9 CFR 317.8, 381.1, and 381.129. As discussed above, IPP will routinely verify the accuracy of generically approved labels. Specifically, for

“gluten free” claims, IPP will verify that the product does not have any gluten containing ingredients and that there is adequate support for the claims in the labeling record.

Comment: Some individuals stated that the rule will increase the likelihood that meat, poultry, and egg products in commerce contain undeclared allergens or other ingredients that consumers must avoid for health, ethical, or religious reasons. A few individuals also stated that generic approval of “negative” claims would encourage producers to publish fraudulent ingredients statements.

Response: FSIS disagrees that the expansion of generic labeling will increase the likelihood that meat, poultry, or egg products will contain undeclared ingredients or allergens. The final rule will not change the requirement that “negative” claims must be truthful and not misleading. This final rule also will not change any requirements pertaining to product ingredient statements, which must continue to be truthful and list all ingredients in the product formula (9 CFR 317.2 and 381.118).

When LPDS evaluates labels during prior label review, they ensure that: the up to eight labeling features required by the meat, poultry, and egg products inspection regulations are present on the label; any claims are appropriately supported; and that any undefined claims, ad copy, or other information that may be false or misleading is not included on the label. As part of this process, LPDS compares written product formulations provided by establishments to the ingredients listed on their product labels. LPDS does *not*, however, physically inspect products as they are being made to ensure that only the ingredients listed on the label are used in final food products. IPP conduct reviews of this kind in the establishment, after the relevant label has been approved, whether generically or on a per-case basis by LPDS analysts.¹⁸ IPP review labels and compare them to actual product formulations to verify that the ingredients used in the production of the product are listed accurately on the label, that the label is not misleading, and that it is otherwise in compliance with all labeling requirements. IPP will also continue to perform general labeling tasks to verify the accuracy of “negative” claims.

IPP will also continue to verify that establishments accurately control and label the most common food allergens. In accordance with FSIS Directive 7230.1, *Ongoing Verification of Product Formulation and Labeling Targeting the Eight Most Common (“BIG 8”) Food Allergens*, IPP identify products that may contain allergens and routinely conduct allergen formulation verification tasks at the establishment. These tasks include a record review and direct observation component to ensure that all ingredients, including allergens, used in a product formulation are appropriately declared on the final meat, poultry, or egg product labels.

Additionally, the final rule will not expand generic approval to all types of “negative” claims (e.g., “no antibiotics administered”). FSIS is only expanding generic approval to “negative” claims that identify the absence of certain ingredients or types of ingredients that are not listed in the ingredients statement and are easily verifiable by IPP. In FSIS’ experience, errors or omissions for these types of claims are rare.

Comment: A trade association stated that some “negative” claims, including “preservative free,” “no artificial ingredients,” and “no MSG added,” are difficult for IPP to verify. Thus, the commenter asked that FSIS either provide updated guidance on these terms before publication of the final rule or modify the rule to exclude problematic claims from generic approval.

Response: FSIS disagrees that “negative” ingredient claims are difficult for IPP to verify. IPP have access to product formulas for all products produced at Federal establishments, including those products with labeling bearing “negative” ingredient claims. The General Labeling Task and “Big 8” Formulation Verification Task in PHIS require IPP to compare the product formula with the ingredients listed on the label. In doing so, IPP will also verify that “negative” ingredient claims are truthful and not misleading. In addition, FSIS has updated and reissued FSIS Directive 7221.1 and the FSIS Guideline for Label Approval to include additional guidance and instructions pertaining to “negative” claims. FSIS will also continue to answer questions and provide labeling support to IPP and industry through askFSIS. In addition, FSIS will perform more outreach and develop webinars about “negative” claims.

Comment: Some non-profit organizations and individual commenters stated that FSIS should not

¹⁸ See FSIS Directive 7221.1, *Prior Labeling Approval* and FSIS Directive 7000.1, *Verification of Non-Food Safety Consumer Protection Regulatory Requirements*.

¹⁶ 7 CFR part 205.

¹⁷ 65 FR 80548, December 21, 2000.

generically approve animal raising claims, including “negative” claims pertaining to the raising of the animal.

Response: FSIS agrees. As discussed in the proposed rule, some claims, including animal raising claims, benefit from LPDS evaluation due to their complex nature and need for supporting documentation (85 FR 56538, 56545). Therefore, this final rule does not revise any Agency policy or regulation concerning animal raising claims. As stated in the proposed rule (85 FR 56538, 56542), generic approval will not apply to “negative” claims relating to the raising of the animal from which the product is derived, *e.g.*, “no antibiotics administered”.

F. Certified Claims

Comment: One trade association requested that FSIS allow generic approval of any certified claims, *e.g.*, “certified non-GMO,” that are preapproved by a third-party certifier. In the alternative, the commenter asked that FSIS develop specific standards for third-party certifiers, approve certifiers based on those standards, and allow the generic approval of certified claims where the certification was issued by an approved certifier. The commenter argued that IPP can easily verify such claims by reviewing the labeling record.

Response: FSIS will not expand generic approval to certified claims, preapproved by a third-party certifier. FSIS will continue to review such claims, including certified animal raising claims, certified non-GMO claims, and other certifications issued by third party certifiers. Certified claims include the specific claim, identification of the certifying entity verifying the claim, and a web-address for interested parties to obtain additional information on the standards applied that are being certified. Evaluation of these claims includes reviewing the claim, standards for the claim, as well as certificates for applicable products and establishments. The labeling record must include proof of current certification, accompanied by certification criteria, which must be evaluated by labeling experts. Therefore, certified claims are not easily verifiable by IPP.

G. Temporary Label Approval

Comment: A few trade associations requested that FSIS expand generic approval to cover temporary label extensions for time sensitive claims (*e.g.*, “new,” “now,” or “improved”).

Response: FSIS will not expand generic approval to extensions of the use of time sensitive label claims (*e.g.*, “new,” “now” or “improved”). Temporary use of labels bearing a time

sensitive claim beyond six months may not extend longer than 180 days, as stated in the Policy Book, unless FSIS LPDS grants an applicant’s request for additional time (9 CFR 412.1(f)). To receive such an extension, an applicant must demonstrate that denial of the request would create undue economic hardship and that extending use of the label would not misrepresent the product, give the applicant an unfair competitive advantage, or present any health, safety, or dietary problems to the consumer (9 CFR 412.1(f)(1)). Furthermore, according to the Policy Book, applicants seeking an extension for time sensitive claims must demonstrate that production or distribution delays precluded the use of the approved labeling as scheduled or that labeling inventory needs for the 180-day period, were overestimated due to poor sales. The Policy Book also allows the extended use of time sensitive claims in situations where it is customary to distribute “new” products to various geographical regions if the processor can assure adequate controls over the segregation and distribution of the products. In addition, the Policy Book allows FSIS to approve the extended use of time sensitive claims in situations where the applicant is test marketing a product, but only if it can demonstrate that just 15 percent or less of the total market is involved in the test marketing.

Because applicants must demonstrate compliance with several detailed requirements in order to use time sensitive claims beyond 180 days, such extensions are not good candidates for generic approval. IPP cannot easily verify compliance with such criteria and, thus, the Agency is concerned that allowing the extension of time sensitive claims on a generic basis would result in use of the labels well beyond the 180-day limit. FSIS LPDS will continue to evaluate all extension requests for the use of time-sensitive claims to ensure that applicants have demonstrated compliance with pertinent regulations and policy.

Comment: One trade association requested that FSIS allow establishments to submit temporary and permanent label approval requests simultaneously. According to the commenter, companies sometimes need to submit labels for a temporary label approval to account for an alternate ingredient substitution that requires a change to the ingredients statement, after which the labels are updated, or the company reverts to the original ingredient. If the ingredient substitution is made permanent and the label bears a special statement or claim potentially

affected by the ingredient change, the company must again submit the same label to obtain sketch approval for the special statement or claim affected by the ingredient substitution. The result is that the company must submit—and FSIS must review—the same label twice. The commenter states that FSIS should streamline this process by allowing establishments to submit a combined temporary and permanent approval request.

Response: Extending temporary label approval of labeling with deficiencies to include a sketch approval of the corrected label is outside the scope of this rule. Temporary approval of the use of deficient labels requires that the label meets the criteria described in 9 CFR 412.1(f)(1)(i–iv), which is a different set of criteria than that used to evaluate the corrected label.

H. Voluntary Submissions

Comments: Several commenters, including a consulting firm and a few trade associations, stated that FSIS should continue to evaluate generically approved labels voluntarily submitted to the Agency, because, according to the commenters, it is necessary to protect establishments from legal liability. These commenters also noted that the proposal to eliminate this review may lead to more non-compliant labels and product recalls.

Response: FSIS’ decision to no longer review generic labels voluntarily submitted to the Agency will not likely lead to more non-compliant labels and product recalls. FSIS remains committed to helping its stakeholders navigate labeling requirements. However, evaluating generic labels submitted for voluntary review is an inefficient use of Agency resources as the labels may be applied to products entering commerce without formal FSIS approval, provided they meet the conditions in 9 CFR 412.2. Moreover, industry can receive more timely assistance by utilizing Agency resources or contacting FSIS, given that voluntarily submitted labels receive a lower review priority than other labels. Thus, rather than review generically approved labels, FSIS will focus its time and resources on preventing more non-compliances through new and improved labeling guidance, outreach, and other support services for its stakeholders, including via phone, askFSIS, and the Small Plant Help Desk. In addition, IPP will continue to verify generic labels for compliance on a routine basis and inform establishments of the need to correct any deficiencies they identify.

In addition, FSIS review of generic labels was never intended to protect

industry from legal liability. Ultimately, establishments bear full legal responsibility for ensuring that their final product labels are truthful, accurate, and otherwise in compliance with all applicable regulations.

Comment: Some commenters, including a few trade associations, stated that FSIS' review of generically approved labels is sometimes necessary to help industry and IPP resolve labeling issues. The commenters asked FSIS to clarify whether it will continue to assist industry and IPP with generic labeling issues by other means. If voluntary review is eliminated, the commenters requested that FSIS develop additional generic labeling guidance and resources for industry and IPP. One trade association also asked FSIS to establish a help desk for rapid answers to generic labeling questions.

Response: Given voluntarily submitted labels are not prioritized for review, submission of such labels is not an efficient means to resolve labeling questions or other issues for IPP or industry. It is more efficient for industry and IPP to resolve such issues by referencing Agency resources, such as published labeling guidance and webinars, or by contacting FSIS. FSIS will continue to provide IPP and industry with generic labeling assistance and timely answers to generic labeling questions via phone or askFSIS. Thus, there is no need for FSIS to create a new help desk for answering questions or resolving issues. Moreover, a benefit of the final rule is that staff hours that were previously spent adjudicating generic labels, will be redirected toward other Agency priority initiatives that better support IPP and industry through, amongst other things, the development of new and improved training for inspectors, updated instructions for IPP, outreach, and guidance on labeling, including generic labeling.

Comment: Some trade associations and individual commenters stated that the proposal to eliminate review of labels that can be generically approved will hurt new or small producers who do not have the expertise or resources to navigate complex labeling requirements. In addition, one trade association stated the Agency must continue the practice of reviewing generic labeling to fulfill its mission under the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Response: FSIS disagrees with these comments. Although FSIS will no longer review generic labels, the Agency will continue to be responsive to small business inquiries about compliance with the Agency's regulations and otherwise fulfill its obligations under

SBREFA. FSIS will continue to answer inquiries by new or small producers seeking information and advice on compliance with Agency statutes and regulations and the interpretation and application of law to specific sets of facts supplied by the producers. As discussed above, FSIS will continue to provide many resources to help industry, including new and small producers, comply with generic labeling requirements. For example, such producers can directly contact LPDS, whose staff members are readily available to provide detailed answers to their generic labeling questions via phone or askFSIS. Small producers can also utilize FSIS' Small Plant Help Desk to find answers to common questions from small and very small plant owners and operators across the country or submit a question to FSIS subject matter experts. In addition, new and small producers can easily access FSIS' comprehensive labeling guidance, which is readily available on its website.¹⁹ Moreover, FSIS plans to develop additional generic labeling materials, training, webinars, and other support services to assist new or small producers. Thus, new or small producers should not need to hire experts or additional staff to comply with FSIS' labeling requirements.

Comment: One trade association stated that FSIS has a legal duty to continue reviewing any label submitted to the Agency, including generically approved labels.

Response: FSIS disagrees. The Acts require that the labels be "approved" by the Secretary (21 U.S.C. 457(c), 607(d), and 1036(b)); however, they do not require that the approval system be centralized or decentralized. They also do not prescribe any particular type of system for the granting of label approvals. Therefore, the Acts permit the Agency to classify certain types of labels and labeling features as eligible for "generic" approval.

Comment: One individual asked FSIS to clarify whether it conducted a cost-benefit analysis of its decision to stop reviewing voluntarily submitted labels.

Response: The cost-benefit analysis that FSIS published in the proposed rule (85 FR 56538, 56546) and the updated analysis in the "Alternative Regulatory Approaches" section of this final rule considered the alternative of having LPDS continue to evaluate labels that would otherwise be generically approved. FSIS rejected this alternative because, among other things, these labels are reviewed at a slower pace and

industry could more quickly get FSIS assistance on these types of labels via phone, askFSIS, the Small Plant Help Desk, or other Agency resources. Additional information on the analysis of this alternative is found below under the heading "Alternative 2—*The Final Rule, Except Industry Would Still Have the Option to Have LPDS Evaluate Labels that Would Otherwise be Generically Approved.*"

I. Geographic Landmark Claims

Comment: Some trade associations, individual commenters, and the EU opposed generic approval of geographic landmark claims. They are concerned that the rule will eliminate regulatory oversight for such claims, increase the prevalence of misbranded products, and allow establishments to mislead consumers regarding the origin of their products by, for example, using foreign flags on domestic product labels. These commenters also stated that prior label approval of geographic landmark claims is necessary to preempt violations of international agreements.

Response: FSIS disagrees with these comments. This final rule does not change current regulations pertaining to the use of geographic landmarks, such as foreign flags, on product labels or the recordkeeping requirements to support such claims. The Acts require all labeling to be truthful and not misleading (21 U.S.C. 601(n)(1), 453(h)(1), and 1036(b)). Moreover, geographic landmark claims must continue to specifically comply with 9 CFR 317.8(b)(1) and 381.129(b)(2). These regulations permit, under certain conditions, the display of foreign flags on domestic products. As discussed in the proposed rule, IPP will routinely conduct verification and enforcement activities to verify that geographic landmark claims comply with all requirements (85 FR 56538, 56543).

FSIS will also continue to conduct export certification activities for FSIS-regulated products intended for export to foreign countries. During this process, IPP verify that such products meet country-specific requirements, including labeling requirements, that have been officially communicated to FSIS by the importing country. Thus, the Agency does not expect any issues with regards to obligations it may have to its international trade partners.

Comment: A trade association and a non-profit organization stated that allowing generic approval of geographic landmark claims may weaken, delay, or otherwise conflict with future "Product of USA" rulemaking. Thus, they asked that FSIS delay any geographic landmark or country of origin specific

¹⁹ Website available at: <https://www.fsis.usda.gov/inspection/compliance-guidance/labeling>.

label rule changes until after such rulemaking is complete. In addition, the comments stated that this final rule may weaken the oversight and integrity of “Product of USA” labels and similar claims, such as “local” or “regional.” They therefore asked that these geographic landmark labels continue to go through the prior label review process.

Response: This final rule will not conflict or interfere with any future “Product of USA” rulemaking. The rule simply modifies the label approval process to allow for generic approval of graphical representations of geographic landmarks displayed on a product label, such as a foreign country’s flag, monument, or map. It does not modify the provisions of 9 CFR 317.8 and 381.129, which regulate the use of geographic claims to prevent false or misleading labeling. It also does not modify the label approval process for written claims related to geographical significance or those that make a country of origin statement on the label of any meat or poultry product “covered commodity.”²⁰ Such claims are already eligible for generic approval.²¹ It likewise does not affect the current labeling requirements or the label approval process for similar types of written statements, such as “local” or “regional.”

The final rule will also not weaken regulatory oversight of labels that display geographic landmarks. Although geographic landmark claims will now be generically approved, the rule does not change any labeling requirements for such labels. The use of geographic landmarks must be truthful and not misleading. Moreover, IPP will routinely verify the accuracy of such labels.

J. Front-of-Package Nutrition Statements

Comment: A trade association requested that FSIS expand generic approval to include front-of-package (FOP) statements that repeat information from the nutrition facts panel.

Response: FSIS will not expand generic approval to include FOP statements that repeat information from the nutrition facts panel. FSIS considers certain FOP labeling statements, such as those highlighting select nutrients from the nutrition facts panel placed on the principal display panel, to be nutrient content claims. The requirements for defined nutrient content claims are listed in the regulations. However, unlike traditional nutrient content

claims which are defined in FSIS regulations and are eligible for generic approval, such as “low fat,” there are no guidelines for the multiple types of FOP labeling statements on product labels. Therefore, FSIS needs to continue to require prior evaluation by the Agency to ensure these statements are truthful and not misleading.

K. Miscellaneous Comments

Comment: A non-profit organization requested that FSIS modify the final rule to state that illustrations and depictions of farms, animals grazing, and animals’ living environments are animal raising claims and, as such, are not eligible for generic approval. A few non-profit organizations also asked FSIS to adopt uniform standards for common animal raising claims and require third-party verification of all such claims, whether made pictorially or textually.

Response: The purpose of this final rule is to expand eligibility for generic approval to specific categories of labeling. The final rule will not, and is not intended to, exclude certain types of labeling from eligibility or to establish any new regulations or policies regarding animal raising claims.

Comment: One trade association asked FSIS to engage with stakeholders before it updates its labeling guidance to assure the updated guidance meets the needs of end users. The commenter stated that updating guidance without industry input, especially when substantive changes are being made to the guidance, can cause confusion and, in the case of labeling, delay bringing products to market.

Response: Consistent with its current practices for developing all guidance, FSIS is committed to a public process for updating or publishing new labeling guidance. The availability of all FSIS guidance is announced in the **Federal Register** or elsewhere and made available for public comment. FSIS considers all input received from its stakeholders and makes changes, as appropriate, to any guidance documents.

Comment: One individual and a software company stated that FSIS should use existing software to automatically review labels. According to the commenters, this would reduce the time spent by FSIS reviewing labels and allow the Agency to concentrate on other priorities. The software company also proposed that FSIS adopt a public-private label review partnership much like AMS uses for organic certification.

Response: These comments are outside the scope of this rulemaking, as they do not pertain to the Agency’s proposed expansion of generic labeling.

Regardless, FSIS is not convinced that existing software can adequately review labels for compliance with FSIS regulations and policies. FSIS does, however, use an electronic label system to allow for easier label submission. Using the Label Submission and Approval System²² (LSAS), establishments can submit label applications, supporting materials, and appeals to FSIS via the internet. While the system will not check labels automatically for errors, it will scan them for some common mistakes in the label submission process, including illegibility, missing information on the transmittal form, and missing supporting documentation. The system also includes a feature that helps submitters determine whether a label can be generically approved, or if it must be submitted to FSIS for prior approval.

Comment: An individual recommended that FSIS take steps to improve its generic labeling surveillance and enforcement program.

Response: IPP have consistently demonstrated their ability to review generic labels and ensure a high level of compliance with labeling requirements. Moreover, FSIS has already taken steps to improve its verification system by reissuing FSIS Directive 7221.1 to clarify that, as part of the General Labeling Task, IPP are to routinely review generic labels and verify that establishments have made required modifications to such labels. FSIS has also updated Directive 7221.1 to be consistent with this final rule. In addition, FSIS will continue to train and support IPP on generic labeling via webinars, askFSIS, and other outreach, including having LPDS participate in IPP training conducted by CFL. This final rule promotes the effective use of Agency resources and will allow FSIS to devote more time to better supporting IPP through the development of new and improved training and guidance on, amongst other things, the surveillance, enforcement, and verification activities related to generic labeling.

IV. Executive Orders 12866 and 13563

Executive Orders (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

²² FSIS’ Label Submission and Approval System (LSAS) is a web-based software application that integrates and implements an electronic label application process for establishments to submit label applications to FSIS.

²⁰ See 9 CFR 317.8(b)(40) and 381.129(f).

²¹ See 9 CFR 412.2(b).

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 has been designated by the Office of Information and Regulatory Affairs a “significant” regulatory action under section 3(f) of E.O. 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget under E.O. 12866.

Economic Impact Analysis

FSIS has updated the benefits estimates in this final regulatory impact analysis as compared to the preliminary regulatory impact analysis published in the proposed rule. These changes include: updating wage rates to 2021 dollars for food scientists and technologists; updating wage rates to 2021 dollars for labeling analysts in

LPDS; and updating the number of labeling analysts in LPDS during fiscal year 2021.

Need for the Rule

The final rule will expand the types of meat, poultry and egg product labels that are generically approved by FSIS. Therefore, this rule will reduce the number of labels evaluated by FSIS and will reduce the costs to industry. The labels submitted for FSIS evaluation are becoming more complex and more time-consuming for industry to prepare and for FSIS to evaluate. The final rule will improve the efficiency of the label approval system by expanding generic labeling and making the system more convenient and cost efficient for the industry. This final rule also will enhance market efficiency by promoting a faster introduction of new products into the marketplace to meet consumer demand.

Baseline

Based on FSIS’ LSAS data, FSIS evaluated 15,459 unique labels during the 2019 fiscal year (FY). Of these, 5,229 (approximately 34 percent) would have been generically approved if this final rule was in place in 2019. This amount (5,229) includes 632 labels currently eligible for generic approval, which firms voluntarily submitted for FSIS review. Many of the 15,459 labels were evaluated by FSIS more than once because they were returned to the producer to make corrections and then resubmitted for FSIS evaluation. FSIS has observed through its prior label approval system that corrections are rare on the types of claims that can now be generically approved under this final rule. In FY 2019, there were 26,158 label adjudications, which includes the total number of evaluations and reevaluations of labels reviewed. See Table 2 below for additional details.

TABLE 2—LABEL EVALUATIONS AND ADJUDICATIONS, FY 2016–2019

FSIS labels	2016	2017	2018	2019
Labels FSIS Would Not have Evaluated Under the Final Rule	8,534	5,812	6,025	5,229
Total Labels FSIS Evaluated *	22,846	17,958	17,635	15,459
Total Label Adjudications **	30,857	25,125	27,580	26,158

* This is the total number of labels FSIS evaluated, including the labels that would have been generically approved under the final rule.

** Label adjudications include some labels being reevaluated.

FSIS expanded the types of labels and label changes that may be generically approved several times, starting in 1983 when the Agency evaluated 130,000 labels. In 1991, the number of labels evaluated peaked at 167,500. The 1995 final rule (60 FR 67444) amended the prior label approval process by expanding the types of labels and label changes that may be generically approved. From 2003–2010, the number of label adjudication per year averaged 57,457, with a minimum of 43,255 in 2003 and a maximum of 66,061 in 2010. The 2013 final rule (78 FR 66826, November 7, 2013) further expanded generic labeling, decreasing the number of label adjudications to 30,857 in FY 2016 (Table 2). FSIS also finalized a rule permitting generic approval for certain egg product labels in 2020 (85 FR 68640, October 29, 2020).

The number of FSIS label adjudications decreased after the expansions of generically approved labels. However, the remaining label submissions after each expansion are more time-consuming for industry to prepare and for FSIS to evaluate. This is because the labels requiring submission after each expansion are

generally more complex, with special statements or claims that require FSIS to evaluate a significant amount of supporting documentation.

Expected Costs of the Final Rule

The final rule will not impose any new quantifiable costs on producers that submit labels for FSIS evaluation. Instead, the final rule will reduce the regulatory burden on producers that submit labels for evaluation and does not change the recordkeeping requirements. Producers already are using generically approved labels and maintaining all labeling records and thus are experienced in submitting labels for FSIS evaluation.

Expected Benefits of the Final Rule

Industry Impacts

Industry will realize cost savings from the reduction in FSIS label submissions under the final rule. Industry is required to use FSIS Form 7234–1 (OMB control number: 0583–0092) for the initial FSIS label submission. The estimated time to complete this form is 75 minutes per response, which includes reviewing instructions, searching existing data sources, gathering and maintaining the

data needed (recordkeeping), and completing and reviewing the collection of information.²³ FSIS estimates 15 minutes of the 75 minutes are dedicated to recordkeeping. The recordkeeping time is not included in the final rule’s regulatory impact analysis because the recordkeeping requirements will not change under the final rule; that is, even if the establishment does not need to submit the label to FSIS, the establishment is still required to maintain records to support the label. Therefore, the average industry time to prepare one label submission for FSIS evaluation is 60 minutes (75 minutes minus 15 minutes). FSIS also assumed food scientists and technologists perform this work at a mean hourly wage of \$40.46.²⁴ A benefits and

²³ FSIS Form 7234–1 Application for Approval of Labels, Marking or Device. Last modified 11/16/2011. Available at: https://www.fsis.usda.gov/sites/default/files/2020-08/FSIS_7234-1_Approval_of_Labels_2.pdf.

²⁴ BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2021. 19–1021 Food Scientists and Technologists. <<https://www.bls.gov/news.release/pdf/ocwage.pdf#oes/current/oes191012.htm#nat>> Accessed on 9/16/2022. Last Modified 03/31/2022.

overhead factor of two²⁵ was applied to estimate the total labor cost per label submission of \$80.92.

To determine the annual reduction of label submissions, FSIS relied on the average number of labels that FSIS would not have evaluated under the final rule from 2016 to 2019, which was 6,400 labels, ((8,534 + 5,812 + 6,025 +

5,229)/4), Table 2. Accordingly, FSIS estimates a decrease of 64,000 label evaluations over 10 years under the final rule (6,400 * 10). As shown in Table 3, FSIS estimates that industry will realize a discounted cost savings of \$3,637,429 (at a 7 percent discount rate) and \$4,417,690 (at a 3 percent discount rate) by FSIS generically approving an

additional 64,000 labels over a 10-year period. The cost savings is \$517,888 when annualized at the 7 and 3 percent discount rate, over 10 years. The primary estimate is over 10 years, but for illustrative purposes, Table 3 shows the potential cost savings at the 7 and 3 percent discount rate over 20 years.

TABLE 3—ESTIMATED INDUSTRY COST SAVINGS [2021 Dollars]

Total industry cost savings from reduced need for FSIS label evaluation	Present value cost savings at 7%	Present value cost savings at 3%
Total over 10 years	\$3,637,429	\$4,417,690
Annualized total over 10 years	517,888	517,888
Total over 20 years	5,486,513	7,704,866
Annualized total over 20 years	517,888	517,888

Agency Impacts

During FY 2021, FSIS employed 15 labeling analysts in LPDS with an average hourly salary of \$72.21 ((\$53.00 * 36.25%) + \$53.00 = \$72.21 for a GS-13 step 3,²⁶ with an adjusted benefits factor of 36.25 percent).²⁷ Prior to this final rule, on average, LPDS analysts evaluated labels four hours per day, five days a week, at a cost of \$21,663 per week. Under the final rule, LPDS analysts will evaluate labels for three hours per day, five days a week, at a cost of \$16,247 per week, because of the reduction in labels submitted to FSIS.

Under the final rule, the Agency will realize a discounted cost savings of \$1,977,974 (at a 7 percent discount rate) and \$2,402,267 (at a 3 percent discount rate) for adjudicating fewer labels over a 10-year period. The cost savings is \$281,619 when annualized at the 7 and 3 percent discount rate over 10 years. The primary estimate is over 10 years, but for illustrative purposes, Table 4 shows the potential cost savings at the 7 and 3 percent discount rate over 20 years. See Table 4 for additional details.

The Agency plans to utilize any resources made available by this final

rule to work on other Agency priority initiatives, such as developing and updating policy and guidance documents, answering questions from askFSIS and other sources, and performing outreach activities. This change in Agency workload will result in more resources for the industry, which improves efficiencies for the Agency and industry alike.

FSIS also anticipates an overall faster label review process from the decline in LPDS label evaluations. This will allow new labels to enter the market faster.

TABLE 4—ESTIMATED AGENCY COST SAVINGS [2021 Dollars]

Total agency cost savings from reduced need for FSIS label evaluation	Present value cost savings at 7%	Present value cost savings at 3%
Total over 10 years	\$1,977,974	\$2,402,267
Annualized total over 10 years	281,619	281,619
Total over 20 years	2,983,476	4,189,780
Annualized total over 20 years	281,619	281,619

Net Benefits

This final rule will be net beneficial because it will reduce the costs to establishments, from submitting fewer labels for FSIS evaluation, while imposing no additional cost burden.

The net benefit derived from the final rule is estimated to be \$5,615,403 (\$3,637,429 in establishment savings plus \$1,977,974 in Agency savings) discounted at the 7 percent discount rate over a 10-year period. When

annualized at the 7 percent discount rate over 10 years, the net cost savings is estimated to be \$799,507. For illustrative purposes, we also included the net cost savings over 20 years in Table 5. See Table 5 for details.

²⁵ To be consistent with analyses done by the Department of Health and Human Services, this analysis accounts for fringe benefits and overhead by multiplying wages by a factor of 2.

²⁶ Salary Table 2021—DCB for the locality pay area of Washington-Baltimore-Arlington, DC-MD-VA-

WV-PA. Effective January 2021. Available at: https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/DCB_h.pdf.

²⁷ Nussle, Jim. (2008). M-08-13: MEMORANDUM FOR THE HEADS OF

EXECUTIVE DEPARTMENTS AND AGENCIES. Executive Office of the President. Available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2008/m08-13.pdf>.

TABLE 5—ESTIMATED NET BENEFITS
[2021 Dollars]

Total agency and industry cost savings from reduced need for FSIS label evaluation	Present value cost savings at 7%	Present value cost savings at 3%
Total over 10 years	\$5,615,403	\$6,819,957
Annualized total over 10 years	799,507	799,507
Total over 20 years	8,469,989	11,894,645
Annualized total over 20 years	799,507	799,507

Alternative Regulatory Approaches

The Agency considered three alternatives to the final rule. The final

rule was chosen as the least burdensome regulatory approach. The summary of the costs and benefits for the considered

alternatives are outlined in Table 6 below.

TABLE 6—REGULATORY ALTERNATIVES CONSIDERED

Alternative	Benefits	Costs	Net benefit
(1) Take No Action	No Benefit	No potential industry or Agency cost savings.	Net benefits are less than alternative 3.
(2) The Final Rule, Except Industry Would Still Have the Option to Have LPDS Evaluate Labels that Would Otherwise be Generically Approved.	Industry could benefit from additional FSIS evaluation.	Potential for inefficient use of Agency resources. Industry would also incur costs of submitting the labels and waiting for FSIS evaluation.	Net benefits are less than alternative 3. Although industry could marginally benefit from additional FSIS evaluation, sufficient guidance is available for labels that can be generically approved. Also, industry and the Agency would incur costs from submitting and evaluating such labels.
(3) The Final Rule	Potential industry cost savings of \$517,888 and Agency cost savings of \$281,619, annualized at the 7 percent discount rate over 10 years.	No quantifiable costs	Net benefits are \$799,507 annualized at the 7 percent discount rate over 10 years.
(4) Allow All FSIS Labels to be Generically Approved.	The Agency and industry would benefit from time savings by eliminating FSIS label evaluation.	Costs include potentially increasing the number of misbranded products.	Net benefits are less than alternative 3 as the potential costs of misbranded products from eliminating FSIS label evaluation outweighs the time savings benefit.

Alternative 1—No Action (Baseline)

FSIS considered keeping the current regulations and taking no action. Taking no action would mean that industry and the Agency would not experience costs savings from the reduction of labels submitted for FSIS evaluation under the final rule. Industry would therefore not realize the estimated reduction of 64,000 label submissions over 10 years and would not experience an annualized cost savings of \$517,888 at the 7 percent discount rate over 10 years. The Agency would not experience time savings from the reduction of label evaluations. Therefore, the Agency rejects this alternative.

Alternative 2—The Final Rule, Except Industry Would Still Have the Option To Have LPDS Evaluate Labels That Would Otherwise Be Generically Approved

FSIS considered an alternative of finalizing the same generically approved label categories except FSIS would continue to evaluate those labels that would otherwise be generically approved. Prior to the final rule, industry could submit labels that could be generically approved for voluntary FSIS evaluation, although this

evaluation was not needed prior to entering the market. When industry submitted these types of labels for voluntary FSIS evaluation, they were reviewed with a lower priority than other labels, and thus took more time for FSIS to approve. Although industry may marginally benefit from the additional FSIS evaluation, the process is inefficient and raises unnecessary costs. Industry can more quickly get FSIS assistance on these types of labels through other guidance, such as askFSIS.

In addition, FSIS would have to take the time to process and evaluate these labels, when reviewer time could be spent on higher priorities, such as policy related issues (e.g., updating priority labeling regulations or labeling guidance). Industry would also incur costs in preparing and submitting the labels for FSIS evaluation while they can get FSIS help through other outlets without incurring these expenses. For these reasons, FSIS rejects this alternative.

Alternative 3—The Final Rule

The final rule yields cost savings for both the industry and the Agency. There is no additional cost burden from the

final rule. The potential cost savings for industry is \$517,888, annualized at the 7 percent discount rate over 10 years. This covers the time industry saves from not preparing and submitting the labels for FSIS evaluation.

The potential cost savings for FSIS is \$281,619, annualized at the 7 percent discount rate over 10 years. This covers the time FSIS saves from not evaluating the generically approved labels. Since there is no additional burden for this final rule, FSIS determined this to be the preferred alternative.

Alternative 4—All Labels Are Generically Approved

FSIS also considered an alternative that would allow all labels to be generically approved, requiring no prior approval by FSIS. This alternative may increase the number of misbranded products going into commerce, as LPDS would no longer verify the information on complex labels. An increase in misbranded products that contain incorrect, false, or misleading information may result in a loss of consumer confidence in information on food labels. There is also cost associated with discarding and reprinting misbranded labels that the industry may

suffer. Therefore, FSIS believes the labels that will still require prior evaluation under the final rule, such as labels with animal raising, natural, or front of package nutrition labeling claims, benefit from LPDS evaluation due to the complex nature and need for supporting documentation of these claims.

This alternative would yield time savings for industry from no longer preparing and submitting labels for FSIS evaluation. FSIS would also experience time savings from no longer evaluating these labels. However, the potential costs of misbranded products entering commerce, resulting from the elimination of all LPDS label evaluation, would outweigh the benefits of the time savings.

V. Regulatory Flexibility Act Assessment

The FSIS Administrator certifies that, for the purposes of the Regulatory Flexibility Act (5 U.S.C. 601–602), this final rule will not have a significant economic impact on a substantial number of small entities in the United States. This determination was made because small producers will experience costs savings from the reduced number of label submissions for FSIS evaluation.

Based on LSAS and PHIS data, FSIS estimates 92.3 percent (4,825/5,229) of the label submissions in 2019, which would have been generically approved under the final rule, are from small or very small Hazard Analysis and Critical Control Point (HACCP) sized establishments. Under the HACCP size definitions, large establishments have 500 or more employees and small establishments have fewer than 500 but more than 10 employees. Very small establishments have fewer than 10 employees or annual sales of less than \$2.5 million. Small and very small establishments, like large establishments, follow the same standards for generic and sketch approval of labels. Small and very small producers, therefore, will not be disadvantaged because the final rule will minimize the regulatory burden on all producers.

Based on 2019 LSAS data, about 12 percent (627/5,229) of labels that would have been generically approved under the final rule, were submitted from 19 label consultant firms. These firms are very small, usually having one to four employees. Many of these firms provide a range of services, including label courier services, label consultation and regulatory compliance, or label design. This final rule may impact their label courier business. However, the impact

on these firms is small as their other business, such as label consultations, will not be affected. Therefore, this final rule will not have a significant economic impact on the small label consultant firms.

VI. Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements have been submitted for approval to the Office of Management and Budget (OMB).

FSIS is expanding the circumstances under which it will generically approve the labels of meat, poultry, and processed egg products. Under this final rule, more official and foreign establishments will be able to use the generic approval of product labels. As a result, fewer labels will need to be submitted and evaluated by FSIS. The relevant information collection, 0583–0092, Marking, Labeling, and Packaging, has a net reduction of 6,400 burden hours because of the increased use of generic labeling.

VII. USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at

<https://www.ocio.usda.gov/document/ad-3027>, from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

- (1) *Mail*: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;
- (2) *Fax*: (833) 256–1665 or (202) 690–7442; or
- (3) *Email*: program.intake@usda.gov.

USDA is an equal opportunity provider, employer, and lender.

VIII. E-Government Act

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other things, promoting the use of the internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

IX. Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under this rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no administrative proceedings will be required before parties may file suit in court challenging this rule.

X. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation. If a tribe requests consultation, FSIS will work with the OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

XI. Environmental Impact

Each USDA agency is required to comply with 7 CFR part 1b of the Departmental regulations, which supplements the National Environmental Policy Act regulations published by the Council on Environmental Quality. Under these regulations, actions of certain USDA agencies and agency units are categorically excluded from the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) unless the agency head determines that an action may have a significant environmental effect (7 CFR 1b.4 (b)). FSIS is among the agencies categorically excluded from the preparation of an EA or EIS (7 CFR 1b.4 (b)(6)).

FSIS has determined that this final rule, which refines the Agency's existing label approval program, will not create any extraordinary circumstances that would result in this normally excluded action having a significant individual or cumulative effect on the human environment. Therefore, this action is appropriately subject to the categorical exclusion from the preparation of an environmental assessment or environmental impact statement provided under 7 CFR 1b.4(6) of the U.S. Department of Agriculture regulations.

XII. Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: <https://www.fsis.usda.gov/federal-register>.

FSIS will also announce and provide a link to it through the FSIS *Constituent Update*, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS is able to provide information to a

much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: <https://www.fsis.usda.gov/subscribe>. Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

List of Subjects

9 CFR Part 352

Food labeling, Meat inspection, Reporting and recordkeeping requirements.

9 CFR Part 354

Administrative practice and procedure, Animal diseases, Food labeling, Meat inspection, Rabbits and rabbit products, Reporting and recordkeeping requirements, Signs and symbols.

9 CFR Part 362

Food labeling, Poultry and poultry products, Reporting and recordkeeping requirements.

9 CFR Part 412

Food labeling, Food packaging, Meat and meat products, Meat inspection, Poultry and poultry products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, FSIS is amending 9 CFR chapter III as follows:

PART 352—EXOTIC ANIMALS AND HORSES; VOLUNTARY INSPECTION

■ 1. The authority citation for part 352 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

■ 2. In § 352.7:

■ a. Revise the section heading;

■ b. Remove the first sentence of the introductory text;

■ c. Add a sentence to the end of the introductory text.

The revision and addition read as follows:

§ 352.7 Marking and labeling of inspected products.

* * * All labels intended for use on inspected and passed exotic animal products must be approved in accordance with Part 412 of this chapter.

* * * * *

PART 354—VOLUNTARY INSPECTION OF RABBITS AND EDIBLE PRODUCTS THEREOF

■ 3. The authority citation for part 354 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17(g) and (i), 2.55.

■ 4. Revise § 354.60 to read as follows:

§ 354.60 Approval of official identification.

All labels intended for use on inspected and passed rabbit products which bear any official identification must be approved in accordance with part 412 of this chapter.

PART 362—VOLUNTARY POULTRY INSPECTION REGULATIONS

■ 5. The authority citation for part 362 continues to read as follows:

Authority: 7 U.S.C. 1622; 7 CFR 2.18(g) and (i) and 2.53.

■ 6. In § 362.2, revise the second sentence of paragraph (a) to read as follows:

§ 362.2 Types and availability of service.

* * * * *

(a) * * * All provisions of Part 381, Part 412, and §§ 416.1 through 416.6 of this chapter shall apply to the slaughter of poultry, and the preparation, labeling, and certification of the poultry and poultry products processed under this poultry inspection service except for the following provisions: the definitions of “Act,” “animal food manufacturer,” “Inspection Service,” “inspector,” “Inspector in Charge,” “poultry,” “poultry product,” “poultry food product,” “poultry products broker,” “renderer,” and “U.S. Refused Entry” in §§ 381.1 b), 381.3 (a), 381.6, 381.10, 381.13 through 381.17, 381.21, 381.29, 381.39 through 381.42, 381.175(a)(2) and (3), 381.179, 381.185 through 381.187, 381.192, and 381.195 through 381.225.

* * * * *

PART 412—LABEL APPROVAL

■ 7. The authority citation for part 412 continues to read as follows:

Authority: 21 U.S.C. 451–470, 601–695; 7 CFR 2.18, 2.53.

■ 8. In § 412.1, remove and reserve paragraph (c)(2) and revise paragraph (e).

The revision reads as follows:

§ 412.1 Label approval.

* * * * *

(e) “Special statements and claims” are statements, claims, logos, trademarks, and other symbols on labels as defined in this paragraph (e).

(1) The following are considered special statements and claims:

(i) Those not defined in the Federal meat and poultry products inspection regulations or the Food Standards and Labeling Policy Book;

(ii) “Natural” claims, regardless of whether they are defined in the Food Standards and Labeling Policy Book; and

(iii) Health claims (including graphic representations of hearts), ingredient and processing method claims (e.g., high-pressure processing), structure-function claims, claims regarding the raising of animals (e.g., “no antibiotics administered”), products labeled as organic (except for those where only individual ingredients are labeled as organic), and instructional or disclaimer statements concerning pathogens (e.g., “for cooking only” or “not tested for *E. coli* O157:H7”).

(2) The following are not considered special statements and claims:

(i) Allergen statements (e.g., “contains soy”) applied in accordance with the Food Allergen Labeling and Consumer Protection Act;

(ii) Negative claims regarding ingredients not listed in the ingredients statement (e.g., “No MSG Added,” “Preservative Free,” “No Milk,” “No Pork,” or “Made Without Soy”);

(iii) Statements that characterize a product’s nutrient content in compliance with Title 9 of the CFR, such as “low fat”; and

(iv) Claims related to geographical significance, such as “German Brand Made in the US,” or those that make a country of origin statement on the label of any meat or poultry product “covered commodity,”¹ or displays of geographic landmarks, such as a foreign country’s flag, monument, or map.

* * * * *

■ 9. In § 412.2, revise paragraph (b) to read as follows:

§ 412.2 Approval of generic labels.

* * * * *

(b) Generically approved labels are labels that bear all applicable mandatory labeling features (i.e., product name, handling statement, ingredients statement, the name and place of

business of the manufacturer, packer or distributor, net weight, legend, safe handling instructions, and nutrition labeling) in accordance with Federal regulations and do not bear special statements and claims as defined in § 412.1(e).

Done at Washington, DC.

Paul Kiecker

Administrator.

[FR Doc. 2023–00693 Filed 1–17–23; 8:45 am]

BILLING CODE 3410–DM–P

FARM CREDIT SYSTEM INSURANCE CORPORATION

12 CFR Part 1411

RIN 3055–AA19

Rules of Practice and Procedure; Adjusting Civil Money Penalties for Inflation

AGENCY: Farm Credit System Insurance Corporation.

ACTION: Final rule.

SUMMARY: This rule implements inflation adjustments to civil money penalties (CMPs) that the Farm Credit System Insurance Corporation (FCSIC) may impose under the Farm Credit Act of 1971, as amended. These adjustments are required by 2015 amendments to the Federal Civil Penalties Inflation Adjustment Act of 1990.

DATES:

Effective date: This regulation is effective on January 18, 2023.

Applicability date: The adjusted amounts of civil money penalties in this rule are applicable to penalties assessed on or after January 15, 2023, for conduct occurring on or after November 2, 2015.

FOR FURTHER INFORMATION CONTACT:

Lynn M. Powalski, General Counsel, Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102, (703) 883–4380, TTY (703) 883–4390.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act)¹ to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act provides for the regular evaluation of CMPs and requires FCSIC, and every other Federal agency with authority to impose CMPs,

¹ Public Law 101–410, 104 Stat. 890 (Oct. 5, 1990), as amended by Public Law 104–134, title III, § 31001(s)(1), 110 Stat. 1321–373 (Apr. 26, 1996); Public Law 105–362, title XIII, § 1301(a), 112 Stat. 3293 (Nov. 10, 1998); Public Law 114–74, title VII, § 701(b), 129 Stat. 599 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.

to ensure that CMPs continue to maintain their deterrent values.²

FCSIC must enact regulations that annually adjust its CMPs pursuant to the inflation adjustment formula of the amended Inflation Adjustment Act and rounded using a method prescribed by the Inflation Adjustment Act. The new amounts are applicable to penalties assessed on or after January 15, 2023, for conduct occurring on or after November 2, 2015. Agencies do not have discretion in choosing whether to adjust a CMP, by how much to adjust a CMP, or the methods used to determine the adjustment.

II. CMPs Imposed Pursuant to Section 5.65 of the Farm Credit Act

First, section 5.65(c) of the Farm Credit Act, as amended (Act), provides that any insured Farm Credit System bank that willfully fails or refuses to file any certified statement or pay any required premium shall be subject to a penalty of not more than \$100 for each day that such violations continue, which penalty FCSIC may recover for its use.³ Second, section 5.65(d) of the Act provides that, except with the prior written consent of the Farm Credit Administration, it shall be unlawful for any person convicted of any criminal offense involving dishonesty or a breach of trust to serve as a director, officer, or employee of any System institution.⁴ For each willful violation of section 5.65(d), the institution involved shall be subject to a penalty of not more than \$100 for each day during which the violation continues, which FCSIC may recover for its use.

FCSIC’s current § 1411.1 provides that FCSIC can impose a maximum penalty of \$231 per day for a violation under section 5.65(c) and (d) of the Act.

III. Required Adjustments

The 2015 Act requires agencies to make annual adjustments for inflation. Annual inflation adjustments are based on the percent change between the October Consumer Price Index for all Urban Consumers (CPI–U) preceding the date of the adjustment, and the prior year’s October CPI–U. Based on the CPI–U for October 2022, not seasonally adjusted, the cost-of-living adjustment

² Under the amended Inflation Adjustment Act, a CMP is defined as any penalty, fine, or other sanction that: (1) Either is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts. All three requirements must be met for a fine to be considered a CMP.

³ 12 U.S.C. 2277a–14(c).

⁴ 12 U.S.C. 2277a–14(d).

¹ See 9 CFR 317.8(b)(40) and 381.129(f).

multiplier for 2023 is 1.07745.⁵ Multiplying 1.07745 times the current penalty amount of \$231, after rounding to the nearest dollar as required by the 2015 Act, results in a new penalty amount of \$249.

IV. Notice and Comment Not Required by Administrative Procedure Act

In accordance with the 2015 Act, Federal agencies shall adjust civil monetary penalties “notwithstanding” Section 553 of the Administrative Procedures Act. This means that public procedure generally required for agency rulemaking—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.

List of Subjects in 12 CFR Part 1411

Banks, Banking, Civil money penalties, Penalties.

For the reasons stated in the preamble, part 1411 of chapter XIV, title 12 of the Code of Federal Regulations is amended as follows:

PART 1411—RULES OF PRACTICE AND PROCEDURE

- 1. The authority citation for part 1411 continues to read as follows:

Authority: Secs. 5.58(10), 5.65(c) and (d) of the Farm Credit Act (12 U.S.C. 2277a–7(10), 2277a–14(c) and (d)); 28 U.S.C. 2461 note.

- 2. Revise § 1411.1 to read as follows:

§ 1411.1 Inflation adjustment of civil money penalties for failure to file a certified statement, pay any premium required or obtain approval before employment of persons convicted of criminal offenses.

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, a civil money penalty imposed pursuant to section 5.65(c) or (d) of the Farm Credit Act of 1971, as amended, shall not exceed \$249 per day for each day the violation continues.

Dated: January 11, 2023.

Ashley Waldron,

Secretary, Farm Credit System Insurance Corporation.

[FR Doc. 2023–00790 Filed 1–17–23; 8:45 am]

BILLING CODE 6710–01–P

⁵ See Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M–23–05, *Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 15, 2022).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 23, 25, 29, 33, 36, 47, 49, 60, 61, 67, 73, 91, 97, 101, 107, 121, 125, 129, 135, 141, 183, and 440

[Docket No. FAA–2022–1355; Amdt. Nos. 25–148, 33–35, 47–34, 73–9, 101–11]

RIN 2120–AL53

Miscellaneous Amendments; Correction

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

ACTION: Final rule; correction.

SUMMARY: On December 9, 2022, the FAA published a final rule titled “Miscellaneous Amendments”. That document made technical amendments to various parts of the FAA’s regulations, and inadvertently identified the Amendment Nos. for certain parts of the CFR as 25–146, 33–1, 47–32, 73–1, and 101–9. The correct Amendment Nos. are 25–148, 33–35, 47–34, 73–9, and 101–11. This document makes those corrections.

DATES: Effective January 18, 2023.

FOR FURTHER INFORMATION CONTACT: Jesse Holston, Office of Rulemaking, ARM–200, Federal Aviation Administration, 800 Independence Ave. SW, Washington, DC 20591; telephone (202) 267–0810; email jesse.c.holston@faa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

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

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

All documents the FAA considered in developing this correction, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

Background

On December 9, 2022, the Miscellaneous Amendments final rule (RIN 2120–AL53) published in the **Federal Register** at 87 FR 75704. After publication, the FAA discovered that it inadvertently identified the Amendment Nos. for parts 25, 33, 47, 73, and 101 as 25–146, 33–1, 47–32, 73–1, and 101–9. The correct Amendment Nos. are 25–148, 33–35, 47–34, 73–9, and 101–11. This document makes those corrections.

Correction

In FR Doc. 2022–23327, beginning on page 75704, in the **Federal Register** of December 9, 2022, make the following correction in the header of the document. On page 75704, in the first column, in the header of the document, the listing of docket number and amendment nos. is corrected to read as follows:

[Docket No. FAA–2022–1355; Amdt. Nos. 21–106, 23–65, 25–148, 29–58, 33–35, 36–32, 47–34, 49–11, 60–7, 61–151, 67–22, 73–9, 91–366, 97–1339, 101–11, 107–10, 121–387, 125–72, 129–54, 135–143, 141–24, 183–18, 440–6]

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC, on 3 January, 2023.

Brandon Roberts,

Executive Director, Office of Rulemaking.

[FR Doc. 2023–00139 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 47

[Docket No. FAA–2022–1514; Amdt. No. 47–33A]

RIN 2120–AL45

Increase the Duration of Aircraft Registration; Confirmation of Effective Date and Correction

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

ACTION: Direct final rule; confirmation of effective date and correction.

SUMMARY: This action confirms the January 23, 2023, effective date of the *Increase the Duration of Aircraft Registration* direct final rule published on November 22, 2022, and responds to

public comments received regarding the published rule. The direct final rule extends the duration of aircraft registration certificates from three years to seven years. Initial Certificates of Aircraft Registration will expire seven years from the month issued. The FAA is applying this amendment to all aircraft currently registered under existing FAA regulations governing aircraft registration, which will extend valid Certificates of Aircraft Registration to a seven-year duration. This rulemaking also makes other minor revisions to rules related to internal FAA registration processes.

DATES: The effective date of January 23, 2023, for the direct final rule published November 22, 2022 (87 FR 71210) is confirmed. The correction to 14 CFR 47.31 is effective January 23, 2023.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this action, see Section III of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Bonnie Lefko, Program Analyst, Civil Aviation Registry, FAA Aircraft Registration Branch, Federal Aviation Administration, P.O. Box 25504, Oklahoma City, OK 73125; telephone 405-954-3131; email FAA.Aircraft.Registry@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

This action confirms the effective date of the *Increase the Duration of Aircraft Registration* direct final rule¹ and provides FAA’s response to the public comments. The direct final rule amends the duration of all Certificates of Aircraft Registration (certificates) issued under part 47 of Title 14 of the Code of Federal Regulations (14 CFR) from three years to seven years. Aircraft owners will be required to confirm their registration information and renew their certificate every seven years, unless an event or circumstance necessitates a new registration being submitted prior to the expiration of the certificate. Accordingly, the direct final rule adds a paragraph to § 47.40 to require aircraft owners to submit new registration forms to update their certificates prior to the seven-year expiration date if the Administrator determines that their registration information is inaccurate. These amendments apply to initial and renewed certificates, in accordance with § 47.40(b) and (c).

¹ *Increase the Duration of Aircraft Registration* direct final rule, 87 FR 71210 (Nov. 22, 2022).

The FAA also corrects its amendment to 14 CFR 47.31(c)(1) to remove the requirement that the FAA issue a letter extending the temporary authority for an aircraft to operate when a certificate of aircraft registration has not been issued or denied within 90 days after the date the application was signed.

The FAA is also removing expired regulations pertaining to the re-registration requirement detailed in § 47.40(a) and references to re-registration in §§ 47.15(i)(1) and 47.17(a)(7). The re-registration regulations became obsolete January 1, 2014.

II. Discussion of Comments

The FAA received a total of twelve comments in response to the published direct final rule. Commenters included Airlines for America (A4A), Aircraft Owners and Pilots Association (AOPA), National Business Aviation Association (NBAA), and nine individuals. Six individual commenters supported the direct final rule without change. Three individuals expressed alternative approaches to the duration of aircraft registration. However, the FAA has determined that those three comments are outside of the scope of the rulemaking because this rulemaking was solely in response to the statutory requirement contained in Sec. 556, which requires a seven-year duration of aircraft registration. For reasons described in the direct final rule, the FAA does not distinguish between non-commercial general aviation aircraft and commercial aircraft because that distinction could change from one operation to the next. Accordingly, this rule merely effectuates a statutory requirement. Because those three comments are outside of the scope of the rulemaking, the FAA does not consider them to be adverse comments. Regarding comments about implementation, the FAA will provide follow-on information explaining how the FAA will effectuate this rule for existing aircraft registrations.

The NBAA recommended a technical correction regarding a misplaced comma in the regulatory text of 14 CFR 47.31. The FAA agrees with NBAA that a correction is necessary, and has revised the sentence to remove the misplaced comma, as indicated in the correction included in this document. After consideration of the comments submitted in response to the *Increase the Duration of Aircraft Registration* direct final rule, the FAA has determined that no further rulemaking action is necessary. Therefore, the direct final rule published November 22, 2022 at 87 FR 71210, Amendment No. 47-33,

will become effective January 23, 2023. The FAA is making one typographical correction as noted previously.

III. How To Obtain Additional Information

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

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

All documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

Federal Register Correction

In FR Doc. 2022-25289, appearing at 87 FR 71210 in the issue of Tuesday, November 22, 2022, on page 71217, in the third column, in amendatory instruction 4, § 47.31(c)(1) is corrected to read as follows:

§ 47.31 [Corrected]

* * * * *

(c) * * *

(1) This temporary authority is valid for operation within the United States until the date the applicant receives the Certificate of Aircraft Registration or until the date the FAA denies the application, or as provided by paragraph (c)(2) of this section.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC, on January 11, 2023.

Brandon Roberts,
Executive Director, Office of Rulemaking.

[FR Doc. 2023-00794 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2022-1207; Airspace
Docket No. 22-ANE-9]

RIN 2120-AA66

**Amendment of Class D and Class E
Airspace; Manchester and Nashua, NH**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E surface airspace, Class E airspace designated as an extension to a Class C surface area, and Class E airspace extending upward from 700 feet above the surface at Manchester Boston Regional Airport (formerly Manchester Airport), Manchester, NH, and updating the airport's geographic coordinates. Also, this action amends Class D airspace, Class E airspace designated as an extension to Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Boire Field Airport (formerly Boire Field), by updating the name of each airport, and removing unnecessary verbiage from the airport description. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Effective 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC, 20591; Telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone (404) 305-6364.

SUPPLEMENTARY INFORMATION:**Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator.

Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends airspace in Manchester and Nashua, NH, to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (87 FR 60356, October 5, 2022) for Docket No. FAA-2022-1207 to amend Class E surface airspace, Class E airspace designated as an extension to a Class C surface area, and Class E airspace extending upward from 700 feet above the surface at Manchester Boston Regional Airport (formerly Manchester Airport), Manchester, NH, and updating the airport's coordinates. Also, this action proposed to amend Class D airspace, Class E airspace designated as an extension to Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Boire Field Airport (formerly Boire Field), by updating the names of each airport, and removing unnecessary verbiage from the airport description.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and E airspace designations are published in Paragraphs 5000, 6002, 6003, 6004, and 6005, respectively, of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

**Availability and Summary of
Documents for Incorporation by
Reference**

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic routes, and reporting points.

The Rule

The FAA is amending 14 CFR part 71 by amending Class E surface airspace, Class E airspace designated as an extension to a Class C surface area, and Class E airspace extending upward from 700 feet above the surface at Manchester Boston Regional Airport (formerly Manchester Airport) Manchester, NH. This action also updates the coordinates of Manchester Boston Regional Airport. Also, this action amends Class D airspace, Class E airspace designated as an extension to Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Boire Field Airport (formerly Boire Field), by removing unnecessary verbiage from the airport description, as the Class E extensions are not part time, as per Order 7400.2N. This action also replaces the term Notice to Airmen with the term Notice to Air Missions, and the term Airport/Facility Directory with the term Chart Supplement in the airspace descriptions, and updates the name of both airports.

Class D and E airspace designations are published in Paragraphs 5000, 6002, 6003, 6004, and 6005, respectively, of FAA Order JO 7400.11F, dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion

under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant the preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air)

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ANE NH D Nashua, NH [Amended]

Boire Field Airport, NH
(Lat. 42°46'57" N, long. 71°30'51" W)
Pepperell Airport, MA
(Lat. 42°41'46" N, long. 71°33'00" W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 5-mile radius of Boire Field Airport; excluding that airspace within a 2-mile radius of Pepperell Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Surface Airspace.

* * * * *

ANE NH E2 Manchester, NH [Amended]

Manchester Boston Regional Airport, NH
(Lat. 42°55'58" N, long. 71°26'09" W)

That airspace extending upward from surface the within a 5-mile radius of the Manchester Boston Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be

continuously published in the Chart Supplement.

Paragraph 6003 Class E Airspace Designated as an Extension to Class C Area.

* * * * *

ANE NH E3 Manchester, NH [Amended]

Manchester Boston Regional Airport, NH
(Lat. 42°55'58" N, long. 71°26'09" W)

That airspace extending upward from the surface within 3.3-miles each side of the 337° bearing of Manchester Boston Regional Airport extending from the 5-mile radius to 8.5-miles northwest of the airport.

Paragraph 6004 Class E Airspace Designated as an Extension to Class D Surface Area.

* * * * *

ANE NH E4 Nashua, NH [Amended]

Boire Field Airport, NH
(Lat. 42°46'57" N, long. 71°30'51" W)
Manchester VOR/DME
(Lat. 42°52'07" N, long. 71°22'10" W)

That airspace extending upward from the surface within 1.1 miles on each side of the Manchester VOR/DME 231° radial extending from the 5-mile radius to 8.4 miles northeast of Boire Field Airport.

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

* * * * *

ANE NH E5 Nashua, NH [Amended]

Boire Field Airport, NH
(Lat. 42°46'57" N, long. 71°30'51" W)

That airspace extending upward from 700 feet above the surface within a 7.9-mile radius of Boire Field Airport.

ANE NH E5 Manchester, NH [Amended]

Manchester Boston Regional Airport, NH
(Lat. 42°55'58" N, long. 71°26'09" W)

That airspace extending upward from 700 feet above the surface within a 23-mile radius of the Manchester Boston Regional Airport.

Issued in College Park, Georgia, on January 11, 2023.

Andree C. Davis,

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

[FR Doc. 2023–00726 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–0822; Airspace Docket No. 21–AGL–1]

RIN 2120–AA66

Amendment of VOR Federal Airways V–214, V–285, and V–305, and Revocation of V–96 in the Vicinity of Kokomo, IN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends VHF Omnidirectional Range (VOR) Federal airways V–214, V–285, and V–305, and revokes V–96. The FAA is taking this action due to the planned decommissioning of the VOR portion of the Kokomo, IN, VOR/Tactical Air Navigation (VORTAC) navigational aid (NAVAID). The Kokomo VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at 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.

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 modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking (NPRM) for Docket No. FAA–2021–0822 in the **Federal Register** (86 FR 60421; November 2, 2021), amending VOR Federal airways V–214, V–285, and V–305, and revoking V–96. The proposed amendment and revocation actions were due to the planned decommissioning of the VOR portion of the Kokomo, IN, VORTAC NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document will be published subsequently in FAA Order JO 7400.11.

Differences From the NPRM

Subsequent to the NPRM, the FAA published a rule for Docket No. FAA–2021–1030 in the **Federal Register** (87 FR 29039; May 12, 2022), amending VOR Federal airway V–305 by removing the airway segment between the Walnut Ridge, AR, VORTAC and the Cunningham, KY, VOR/Distance Measuring Equipment (VOR/DME). That airway amendment, effective July 14, 2022, is included in this rule.

Also subsequent to the NPRM, the FAA published a rule for Docket No. FAA–2021–0972 in the **Federal Register** (87 FR 38913; June 30, 2022), amending VOR Federal airway V–285 by removing the airway segment between the Victory, MI, VOR/DME and the White Cloud, MI, VOR/DME. That airway amendment, effective September 8, 2022, is also included in this rule.

Additionally, subsequent to the NPRM, the FAA published a rule for Docket No. FAA–2022–0646 in the **Federal Register** (87 FR 54878; September 8, 2022), amending VOR Federal airway V–214 by removing the airway segment between the Martinsburg, WV, VORTAC and the Teterboro, NY, VOR/DME. That airway amendment, effective November 3, 2022, is also included in this rule.

Lastly, in the NPRM, the FAA erroneously stated that, although the

VOR portion of the Kokomo VORTAC was planned for decommissioning, the co-located DME would be retained. The DME will be decommissioned; however, the co-located Tactical Air Navigation (TACAN) is being retained to provide navigational service for military operations and DME service in support of current and future Next Generation Air Transportation System Performance Based Navigation procedures. This does not affect the changes to the airways in this rule.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by modifying VOR Federal airways V–214, V–285, and V–305, and removing VOR Federal airway V–96 due to the planned decommissioning of the Kokomo, IN, VOR NAVAID. The VOR Federal airway actions are described below.

V–96: V–96 extends between the Brickyard, IN, VORTAC and the intersection of the Fort Wayne, IN, VORTAC 071° and Flag City, OH, VORTAC 289° radials (TWERP fix). The airway is removed in its entirety.

V–214: V–214 extends between the Kokomo, IN, VORTAC and the Muncie, IN, VOR/DME; and between the intersection of the Appleton, OH, VORTAC 236° and Zanesville, OH, VOR/DME 274° radials (GLOOM fix) and the Bellaire, OH, VOR/DME. The airway segment between the Kokomo, IN, VORTAC and the Muncie, IN, VOR/DME is removed. As amended, the airway is changed to extend between the intersection of the Appleton VORTAC 236° and Zanesville VOR/DME 274° radials (GLOOM Fix) and the Bellaire VOR/DME.

V–285: V–285 extends between the Brickyard, IN, VORTAC and the Victory, MI, VOR/DME. The airway segment between the Brickyard, IN, VORTAC and Goshen, IN, VORTAC is removed. As amended, the airway is changed to extend between the Goshen VORTAC and the Victory VOR/DME.

V–305: V–305 extends between the El Dorado, AR, VOR/DME and the Walnut Ridge, AR, VORTAC; and between the Cunningham, KY, VOR/DME and the

Kokomo, IN, VORTAC. The airway segment between the Brickyard, IN, VORTAC and Kokomo, IN, VORTAC is removed. As amended, the airway is changed to extend between the El Dorado VOR/DME and the Walnut Ridge VORTAC and between the Cunningham VOR/DME and the Brickyard VORTAC.

All NAVAID radials listed in the VOR Federal airway descriptions below are unchanged and stated in True degrees.

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 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 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

The FAA has determined that this action of modifying VOR Federal airways V–214, V–285, and V–305, and revoking V–96, due to the planned decommissioning of the VOR portion of the Kokomo, IN, VORTAC NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points) and paragraph 5–6.5k, which categorically excludes from further environmental impact review the publication of existing air traffic control procedures that do not essentially change existing tracks, create

new tracks, change altitude, or change concentration of aircraft on these tracks. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 14 CFR 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 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–96 [Removed]

* * * * *

V–214 [Amended]

From INT Appleton, OH, 236° and Zanesville, OH, 274° radials; Zanesville; to Bellaire, OH.

* * * * *

V–285 [Amended]

From Goshen, IN; INT Goshen 038° and Kalamazoo, MI, 191° radials; Kalamazoo; INT Kalamazoo 014° and Victory, MI, 167° radials; to Victory.

* * * * *

V–305 [Amended]

From El Dorado, AR; Little Rock, AR; to Walnut Ridge, AR. From Cunningham, KY; Pocket City, IN; INT Pocket City 046° and Hoosier, IN, 205° radials; Hoosier; INT

Hoosier 025° and Brickyard, IN, 185° radials; to Brickyard.

* * * * *

Issued in Washington, DC, on January 11, 2023.

Brian Konie,

Acting Manager, Airspace Rules and Regulations.

[FR Doc. 2023–00823 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[[Docket No. FAA–2022–1316; Airspace Docket No. 22–AGL–32]

RIN 2120–AA66

Amendment of Class E Airspace; Multiple North Dakota Towns

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Carrington, ND; Cooperstown, ND; Harvey, ND; Rolla, ND; and Walhalla, ND. This action is due to airspace reviews conducted as part of the decommissioning of the Devils Lake very high frequency (VHF) omnidirectional range (VOR) as part of the VOR Minimal Operational Network (MON) Program. The name of Rolla Municipal Airport/Leonard Krech Field, Rolla, ND, is also being updated to coincide with the FAA’s aeronautical database.

DATES: Effective 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Carrington Municipal Airport, Carrington, ND; Cooperstown Municipal Airport, Cooperstown, ND; Harvey Municipal Airport, Harvey, ND; Rolla Municipal Airport/Leonard Krech Field, Rolla, ND; and Walhalla Municipal Airport, Walhalla, ND, to support instrument flight rule operations at these airports.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (87 FR 66634; November 4, 2022) for Docket No. FAA–2022–1316 to amend the Class E airspace at Carrington, ND; Cooperstown, ND; Harvey, ND; Rolla, ND; and Walhalla, ND. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71:

Amends the Class E airspace extending upward from 700 feet above the surface at Carrington Municipal Airport, Carrington, ND, by removing the Devils Lake VOR/DME and the airspace extending upward from 1,200 feet above the surface from the airspace legal description as it is redundant with the airspace extending upward from 1,200 feet above the surface over the State of North Dakota;

Amends the Class E airspace extending upward from 700 feet above the surface to within a 6.3-mile (decreased from a 6.4-mile) radius of Cooperstown Municipal Airport, Cooperstown, ND; and removes the Devils Lake VOR/DME, Hector International Airport, Grand Forks AFB, Jamestown VOR/DME, Barnes City Municipal Airport, and the airspace extending upward from 1,200 feet above the surface from the airspace legal description as it is redundant with the airspace extending upward from 1,200 feet above the surface over the State of North Dakota;

Amends the Class E airspace extending upward from 700 feet above the surface at Harvey Municipal Airport, Harvey, ND, by removing Minot AFB, Bismarck VOR/DME, Devils Lake VOR/DME, and the airspace extending upward from 1,200 feet above the surface from the airspace legal description as it is redundant with the airspace extending upward from 1,200 feet above the surface over the State of North Dakota;

Amends the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7.3-mile) radius of Rolla Municipal Airport/Leonard Krech Field, Rolla, ND; removes the exclusion north of lat. 49°00'00"N. as it is no longer required; removes the Devils Lake VOR/DME and the airspace extending upward from 1,200 feet above the surface from the airspace legal description as it is redundant with the airspace extending upward from 1,200 feet above the surface over the State of North Dakota; and updates the name of the airport (previously Rolla Municipal Airport) to coincide with the FAA's aeronautical database;

And amends the Class E airspace extending upward from 700 feet above the surface at Walhalla Municipal Airport, Walhalla, ND, by removing the Devils Lake VOR/DME and the airspace extending upward from 1,200 feet above the surface from the airspace legal description as it is redundant with the airspace extending upward from 1,200 feet above the surface over the State of North Dakota.

This action is due to airspace reviews conducted as part of the decommissioning of the Devils Lake VOR, which provided navigation information for the instrument procedures at these airports, as part of the VOR MON Program.

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 regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL ND E5 Carrington, ND [Amended]

Carrington Municipal Airport, ND
(Lat. 47°27'04" N, long. 99°09'05" W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Carrington Municipal Airport.

* * * * *

AGL ND E5 Cooperstown, ND [Amended]

Cooperstown Municipal Airport, ND
(Lat. 47°25'22" N, long. 98°06'21" W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Cooperstown Municipal Airport.

* * * * *

AGL ND E5 Harvey, ND [Amended]

Harvey Municipal Airport, ND
(Lat. 47°47'28" N, long. 99°55'54" W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Harvey Municipal Airport.

* * * * *

AGL ND E5 Rolla, ND [Amended]

Rolla Municipal Airport/Leonard Krech Field, ND

(Lat. 48°53'04" N, long. 99°37'15" W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Rolla Municipal Airport/Leonard Krech Field.

* * * * *

AGL ND E5 Walhalla, ND [Amended]

Walhalla Municipal Airport, ND
(Lat. 48°56'26" N, long. 97°54'10" W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Walhalla Municipal Airport, excluding that airspace north of lat. 49°00'00" N.

Issued in Fort Worth, Texas, on January 10, 2023.

Martin A. Skinner,

*Acting Manager, Operations Support Group,
ATO Central Service Center.*

[FR Doc. 2023-00569 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2022-1333; Airspace
Docket No. 22-ASO-24]

RIN 2120-AA66

**Amendment of Class D and Class E
Airspace; Athens/Ben Epps Airport,
Athens, GA**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D airspace, Class E surface airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Athens/Ben Epps Airport, Athens, GA as a result of the biennial airspace evaluation. This action eliminates the excess airspace remaining after the decommissioning of the Bulldog Non-Directional Beacon (NDB) and subsequent cancellation of the NDB Runway 27 approach to Athens/Ben Epps Airport effective October 15, 2015, and updates the geographic coordinates for the airport and the Point of Origin. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Effective 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; Telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: Jennifer Ledford, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; Telephone (404) 305-5946.

SUPPLEMENTARY INFORMATION:**Authority for This Rulemaking**

The FAA's authority to issue a rule regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator.

Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it amends airspace for Athens/Ben Epps Airport, Athens, GA, to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (87 FR 67584, November 9, 2022) for Docket No. FAA-2022-1333 to amend Class D airspace, Class E surface airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Athens/Ben Epps Airport, Athens, GA, as a result of the biennial airspace evaluation.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and E airspace designations are published in Paragraphs 5000, 6002, 6004, and 6005, respectively, of FAA Order 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Differences From the NPRM

Subsequent to the publication of the Notice of Proposed Rulemaking, the FAA found the distances on each side of the Athens Point of Origin 195° bearing and the Athens Point of Origin 076° bearing were incorrect. The dimensions were correct in the Proposal section of the Preamble but were mistakenly transposed in the airspace description. This action corrects the error. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic routes, and reporting points.

The Rule

The FAA is amending 14 CFR part 71 by extending the Class D airspace for Athens/Ben Epps Airport from a 4-mile radius to a 4.6-mile radius surrounding the airport and by updating the airport's geographic coordinates to coincide with the FAA's database. Also, Class E surface airspace, extension to Class D airspace, and transition airspace are being amended for the above airport. Class E surface airspace for Athens/Ben Epps Airport is being extended from a 4-mile radius to a 4.6-mile radius surrounding the airport. The Class E airspace used for an extension to Class D is being reduced from 3 miles to 1.4 miles on each side of the Athens Point of Origin 195° bearing extending from the 4.6-mile radius of the Athens/Ben Epps Airport to 7.6 miles south of the Point of Origin and is being reduced from 3 miles to 2.4 miles each side of the Athens Point of Origin 076° bearing extending from the 4.6-mile radius of the airport to 7 miles east of the Point of Origin. The Class E5 transition airspace extending upward from 700 feet above the surface is being amended to within a 7.7-mile radius of Athens/Ben Epps Airport (reduced from an 11.5-mile radius). This eliminates the excess airspace that remained after the decommissioning of the Bulldog (BJT) non-directional beacon (NDB) and subsequent cancellation of the NDB Rwy 27 approach, effective October 15, 2015 (80 FR 61978). In addition, this action replaces the outdated terms Airport/Facility Directory with Chart Supplement and Notice to Airmen with the term Notice to Air Missions in the airspace descriptions. This action also replaces the VORTAC used for airspace definition with a point-of-origin.

Subsequent to the publication of the Notice of Proposed Rulemaking, the FAA found the distances on each side of the Athens Point of Origin 195° bearing and the Athens Point of Origin 076° bearing were incorrect. The dimensions were correct in the Proposal section of the Preamble but were mistakenly transposed in the airspace

description. This action corrects the error. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraphs 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11G,

Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Athens, GA [Amended]

Athens/Ben Epps Airport, Athens, GA
(Lat. 33°56'55" N, long. 83°19'33" W)

That airspace extending upward from the surface to and including 3,300 feet MSL within a 4.6-mile radius of the Athens/Ben Epps Airport. This Class D airspace area is effective during the specified dates and times established in advance by a Notice to Air Missions. The effective date and time will be continuously published in the Chart Supplement.

Paragraph 6002 Class E Surface Airspace.

* * * * *

ASO GA E2 Athens, GA [Amended]

Athens/Ben Epps Airport, Athens, GA
(Lat. 33°56'55" N, long. 83°19'33" W)

That airspace extending upward from the surface within a 4.6-mile radius of the Athens/Ben Epps Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6004 Class E Airspace Designated as an Extension to Class D Surface Area.

* * * * *

ASO GA E4 Athens, GA [Amended]

Athens/Ben Epps Airport, Athens, GA
(Lat. 33°56'55" N, long. 83°19'33" W)
Athens Point of Origin
(Lat. 33°56'51" N, long. 83°19'29" W)

That airspace extending upward from the surface within 1.4 miles on each side of the Athens Point of Origin 195° bearing extending from the 4.6-mile radius of the Athens/Ben Epps Airport to 7.6 miles south of the Point of Origin and within 2.4 miles each side of the Athens Point of Origin 076° bearing extending from the 4.6-mile radius of the airport to 7 miles east of the Point of Origin. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

ASO GA E5 Athens, GA [Amended]

Athens/Ben Epps Airport, GA
(Lat. 33°56'55" N, long. 83°19'33" W)

That airspace extending upward from 700 feet above the surface within a 7.7-mile radius of Athens/Ben Epps Airport.

Issued in College Park, Georgia, on January 11, 2023.

Andrese C. Davis,

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

[FR Doc. 2023–00814 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734, 736, 740, 742, 744, 762, 772 and 774

[Docket No. 230112–0007]

RIN 0694–A194

Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification; Updates to the Controls To Add Macau

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Interim final rule; update.

SUMMARY: On October 7, 2022, the Bureau of Industry and Security (BIS) updated the Export Administration Regulations (EAR) to implement necessary controls on advanced computing integrated circuits (ICs), computer commodities that contain such ICs, and certain semiconductor manufacturing items, and to make other changes to the EAR to ensure that appropriate controls are in place for these items, including specific activities of “U.S. persons.” This rule makes an initial update to the controls to more effectively achieve the policy objectives identified in previous regulations by adding the same controls implemented on China in that rule to Macau. The public may submit comments on the controls in the October 7 advanced computing and semiconductor manufacturing equipment rule, which BIS is extending to Macau in this rule. BIS intends to publish a subsequent rule to respond to the comments received, including making updates to the controls included in the October 7 advanced computing and semiconductor manufacturing equipment rule.

DATES:

Effective date: This rule is effective on January 17, 2023.

Comments due: Comments must be received by BIS no later than January 31, 2023.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (www.regulations.gov). The *regulations.gov* ID for this rule is: BIS–2022–0025. Please refer to RIN 0694–AI94 in all comments.

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. The corresponding non-confidential version of those comments must be clearly marked “PUBLIC.” The file name of the non-confidential version should begin with the character “P.” Any submissions with file names that do not begin with either a “BC” or a “P” will be assumed to be public and will be made publicly available through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For questions on the license requirements in the October 7 advanced computing and semiconductor manufacturing equipment rule or the updates included in this rule, contact Eileen Albanese, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–0092, Email: rp2@bis.doc.gov. For emails, include “Advanced computing controls” or “Semiconductor manufacturing items control” as applicable in the subject line.

For questions on the Entity List revisions included in the October 7 advanced computing and semiconductor manufacturing equipment rule, contact: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On October 7, 2022, the Bureau of Industry and Security (BIS) put on public display the interim final rule, *Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification* (October 7 advanced computing and semiconductor manufacturing equipment rule) (87 FR 62186), which amended the Export Administration Regulations (15 CFR 730–774) (EAR) to implement necessary controls on advanced computing integrated circuits (ICs), computer commodities that contain such ICs, and certain semiconductor manufacturing items, and to make other changes to the EAR to ensure that appropriate controls are in place for these items, including specific activities of “U.S. persons.”

On October 13, 2022, (BIS) published the October 7 advanced computing and semiconductor manufacturing equipment rule, which made critical changes to the Export Administration Regulations (15 CFR 730–774) (EAR) in two areas to address U.S. national security and foreign policy concerns. First, BIS imposed additional export controls on certain advanced computing semiconductor chips (chips, advanced computing chips, integrated circuits (ICs)), transactions for supercomputer end uses, and transactions involving certain entities on the Entity List (supplement no. 4 to part 744). Second, BIS adopted additional controls on certain semiconductor manufacturing items and transactions for certain IC production end uses. See the Overview of New Controls section in the October 7 advanced computing and semiconductor manufacturing equipment rule for additional information about both. The October 7 advanced computing and semiconductor manufacturing equipment rule, which BIS published on an interim basis, also solicited public comments on the changes it implemented. See the **ADDRESSES** section for instruction on how to submit comments to that rule and information on how to view the public comments submitted in response to the October 7 advanced computing and semiconductor manufacturing equipment rule on www.regulations.gov.

The restrictions implemented in the October 7 advanced computing and semiconductor manufacturing equipment rule followed extensive consideration by the United States government of technologies that are force multipliers for military

modernization and human rights abuses. The assessment considered included, among other factors, whether the items could provide direct contributions to advancing military decision making, designing and testing weapons of mass destruction (WMD), producing semiconductors for use in advanced military systems, and developing advanced surveillance systems that can be used for military applications and human rights abuses. The Government of the People’s Republic of China (PRC or China) has mobilized vast resources to support its defense modernization, including the implementation of its military-civil fusion development strategy, which is contrary to U.S. national security and foreign policy interests.

This rule makes initial updates to the October 7 advanced computing and semiconductor manufacturing equipment rule’s controls to more effectively achieve the identified policy objectives by adding the same controls implemented on China in that rule to Macau. These changes are informed by BIS’s review of the October 7 advanced computing and semiconductor manufacturing equipment rule and the questions BIS has received since October 7, 2022. The comment period on the October 7 advanced computing and semiconductor manufacturing equipment rule, originally to close on December 12, 2022 but, in a rule published on December 7, 2022 (87 FR 74966) was extended to close on January 31, 2023. The public may submit comments on the controls in the October 7 advanced computing and semiconductor manufacturing equipment rule, which BIS is extending to Macau in this rule. BIS intends to publish a subsequent rule to respond to the comments, including additional updates to the controls in the October 7 advanced computing and semiconductor manufacturing equipment rule. The updates to the October 7 advanced computing and semiconductor manufacturing equipment rule in this rule are described under Section II below.

II. Addition of Macau to the Same Controls Implemented on China

A. Addition of Macau to RS Controls Implemented in the October 7 Advanced Computing and Semiconductor Manufacturing Equipment Rule

This rule adds the destination of Macau to the scope of the Regional Stability (RS) controls that were implemented specific to China in the October 7 advanced computing and semiconductor manufacturing

equipment rule. For purposes of the EAR, this rule does not change the status of Macau; it will continue to be treated as a separate destination from China. According to the U.S. Department of State's fact sheet, *U.S. Relations with Macau, Bilateral Relations Fact Sheet* of June 1, 2021 (see <https://www.state.gov/u-s-relations-with-macau/>), Macau has been a Special Administrative Region of China since 1999, when it was returned to Chinese sovereignty from Portuguese administration; therefore, its foreign relations and defense are the responsibility of China. China grants Macau limited autonomy in economic and commercial relations. U.S. policy toward Macau is grounded in the U.S. Macau Policy Act of 1999 and reflects U.S. support for Macau's autonomy under the "One Country, Two Systems" framework established in Macau's Basic Law.

Because of Macau's position as a Special Administrative Region of China, and the potential risk of diversion of items subject to the EAR from Macau to China, this rule adds Macau as a destination to which a license will be required to prevent the diversion to China of items determined to be critical to protecting U.S. national security and foreign policy interests. This rule implements this change by adding Macau to the RS control paragraph in the following seven Export Control Classification Numbers (ECCNs): 3A090, 3B090, 3D001, 3E001, 4A090, 4D090, and 4E001.

In parallel with the addition of Macau to the RS control paragraph of the ECCNs identified above, and as part of the RS control structure implemented in the October 7 advanced computing and semiconductor manufacturing equipment rule, this rule also adds Macau to the general restriction on the use of license exceptions for these RS-controlled ECCNs in § 740.2(a)(9). Additionally, in § 742.6, this rule adds Macau to paragraphs (a)(6) and (b)(10), as part of the RS control structure implemented in the October 7 advanced computing and semiconductor manufacturing equipment rule.

B. Addition of Macau to Advanced Computing and Supercomputer FDP Rules

In § 734.9, this rule adds Macau to the destination scope of the Advanced computing FDP rule under paragraph (h) and to the "Supercomputer" FDP rule under paragraph (i) by adding Macau to paragraphs (h)(2)(i) and (ii) and paragraphs (i)(2)(i) and (ii), respectively. BIS is adding Macau to these two FDP rules as part of the RS

control structure implemented in the October 7 advanced computing and semiconductor manufacturing equipment rule.

In supplement no. 1 to part 734—Model Certification for Purposes of Advanced Computing FDP rule, this rule makes a conforming change by adding Macau to the certification under paragraph (b)(2).

D. Addition of Macau to §§ 744.6 and 744.23

This rule adds Macau as an additional destination in the end-use controls under §§ 744.6 and 744.23. Because China has invested large amounts of capital to develop a special economic zone to develop semiconductors in Macau and the diversion concerns to China referenced above, there is a need to include Macau as an additional destination under §§ 744.6 and 744.23 at this time. This rule makes the following changes to add Macau to §§ 744.6 and 744.23.

In § 744.6, this rule adds Macau to the additional prohibitions on "U.S. persons" informed by BIS paragraphs (c)(2)(i) through (ix) and to the license review standards under paragraph (e)(3).

In § 744.23, this rule adds Macau to the end-use scope under paragraphs (a)(2)(i) through (v) and to the license review standards in paragraph (d).

E. Addition of Macau to the Temporary General License (TGL)

In supplement no. 1 to part 736—General Orders, this rule revises paragraph (d) (General Order No. 4), as a conforming change to the addition of Macau to the RS controls and FDP rules, as described above, to add Macau to the scope of the temporary general license (TGL).

Savings Clause

The savings clause for the advanced computing rule has already passed and is not being renewed or extended with the publication of this rule. This rule does include a savings clause which is specific and limited to the new controls for Macau.

Shipments of items removed from license exception eligibility or eligibility for export, reexport, or transfer (in-country) without a license to or within Macau as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on January 17, 2023, may continue to the destination under the previous license exception eligibility or without a license so long as they have been exported, reexported or transferred (in-country) before

February 16, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on February 16, 2023, require a license in accordance with this interim final rule.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (codified, as amended, at 50 U.S.C. Sections 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. To the extent it applies to certain activities that are the subject of this rule, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (codified, as amended, at 22 U.S.C. Sections 7201–7211) also serves as authority for this rule.

Rulemaking Requirements

1. This interim final rule is not a "significant regulatory action" because it "pertain[s]" to a "military or foreign affairs function of the United States" under sec. 3(d)(2) of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule involves the following OMB-approved collections of information subject to the PRA:

- 0694–0088, "Multi-Purpose Application," which carries a burden hour estimate of 29.4 minutes for a manual or electronic submission;
- 0694–0096 "Five Year Records Retention Period," which carries a burden hour estimate of less than 1 minute; and
- 0607–0152 "Automated Export System (AES) Program," which carries a burden hour estimate of 3 minutes per electronic submission.

BIS does not anticipate any changes in these estimates as a result of the changes include in today's rule. Additional information regarding these collections of information—including all background materials—can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. While section 1762 of ECRA provides sufficient authority for such an exemption, this action is also independently exempt from these APA requirements because it involves a military or foreign affairs function of the United States (5 U.S.C. 553(a)(1)).

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology.

15 CFR Parts 736 and 772

Exports.

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Reporting and recordkeeping requirements.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 734, 736, 740, 742, 744, 762, 772, and 774 of the Export Administration Regulations (15 CFR parts 730 through 774) are amended as follows:

PART 734—SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

■ 1. The authority citation for part 734 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 2. Section 734.9 is amended by revising paragraphs (h)(2)(i) and (ii) and (i)(2)(i) and (ii) to read as follows:

§ 734.9 Foreign-Direct Product (FDP) Rules.

* * * * *

(h) * * *
(2) * * *

(i) Destined to the PRC or Macau or will be incorporated into any “part,” “component,” “computer,” or “equipment” not designated EAR99 that is destined to the PRC or Macau; or
(ii) Technology developed by an entity headquartered in the PRC or Macau for the “production” of a mask or an integrated circuit wafer or die.

* * * * *

(i) * * *
(2) * * *

(i) Used in the design, “development,” “production,” operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, a “supercomputer” located in or destined to the PRC or Macau; or
(ii) Incorporated into, or used in the “development,” or “production,” of any “part,” “component,” or “equipment” that will be used in a “supercomputer” located in or destined to the PRC or Macau.

■ 3. Supplement No. 1 to part 734 is amended by revising paragraph (b)(2) to read as follows:

Supplement No. 1 to Part 734—Model Certification for Purposes of Advanced Computing FDP Rule

* * * * *

(b) * * *

(2) My organization is aware that the items, [INSERT A DESCRIPTION OF THE ITEMS], provided to this exporter, reexporter, or transferor, [INSERT NAME OF EXPORTER, REEXPORTER, OR TRANSFEROR], could be subject to the U.S. Export Administration Regulations (EAR) (15 CFR 730–774) if future transactions are within the destination scope of § 734.9(h)(2)(i) or (ii) and exported or reexported to or transferred within the People’s Republic of China (China) or Macau;

* * * * *

PART 736—GENERAL PROHIBITIONS

■ 4. The authority citation for part 736 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of May 9, 2022, 87 FR 28749 (May 10, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 5. Supplement No. 1 to part 736 is amended by revising paragraph (d) to read as follows:

Supplement No. 1 to Part 736—General Orders

* * * * *

(d) General Order No. 4: The purpose of this General Order is to avoid disruption of supply chains for items specified in paragraph (d)(1) of this supplement that are ultimately destined to customers outside of People’s Republic of China (China) or Macau.

(1) Temporary General License (TGL). BIS authorizes, from October 21, 2022, through April 7, 2023, exports, reexports, in-country transfers, and exports from abroad destined to or within China or Macau by companies not headquartered in Country Groups D:1 or D:5 or E (see supplement no. 1 to part 740 of the EAR) to continue or engage in integration, assembly (mounting), inspection, testing, quality assurance, and distribution of items covered by ECCN 3A090, 4A090, and associated software and technology in ECCN 3D001, 3E001, 4D090, or 4E001; or any item that is a computer, integrated circuit, “electronic assembly” or “component” and associated software and technology, specified elsewhere on Commerce Control List (supplement no. 1 to part 774 of the EAR), which meets or exceeds the performance parameters of ECCN 3A090 or 4A090. This does not authorize the export, reexport, in-country transfer, or export from abroad to “end-users” or “ultimate consignees” in China or Macau. This TGL does not overcome the license requirements of §§ 744.11 or 744.21 when an entity listed in supplements no. 4 or 7 to part 744 is a party to the transaction as described in § 748.5(c) through (f) of the EAR, or when there is knowledge of any other prohibited end use or end user. This TGL is only for companies that engage in the specific activities authorized under this TGL.

(2) Recordkeeping requirement. Prior to any export, reexport, or transfer (in-country) to China or Macau pursuant to this TGL, the exporter, reexporter, or transferor, must retain the name of the entity receiving the item and the complete physical address of where the item is destined in China or Macau and the location of that company’s headquarters.

* * * * *

PART 740—LICENSE EXCEPTIONS

■ 6. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 7. Section 740.2 is amended by revising the first sentence of paragraph (a)(9) introductory text to read as follows:

§ 740.2 Restrictions on all License Exceptions.

(a) * * *

(9) The item is identified in paragraphs (a)(9)(i) and (ii) of this section, being exported, reexported, or transferred (in-country) to or within the People's Republic of China (PRC) or Macau, and the license exception is other than: RPL (excluding 3B090, 3D001 (for 3B090), and 3E001 (for 3B090)), under the provisions of § 740.10, including § 740.10(a)(3)(v), which prohibits exports and reexports of replacement parts to countries in Country Group E:1 (see supplement no. 1 to this part); GOV, restricted to eligibility under the provisions of § 740.11(b)(2)(ii); or TSU (excluding 3B090, 3D001 (for 3B090), and 3E001 (for 3B090)), under the provisions of § 740.13(a) and (c). * * *

* * * * *

PART 742—CONTROL POLICY—CCL BASED CONTROLS

■ 8. The authority citation for part 742 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 9. Section 742.6 is amended by revising paragraphs (a)(6) and (b)(10) to read as follows:

§ 742.6 Regional stability.

(a) * * *

(6) *RS requirement that applies to the People's Republic of China (China) and Macau for advanced computing and semiconductor manufacturing items—(i) Exports, reexports, transfers (in-country).* A license is required for items

specified in ECCNs 3A090, 3B090, 4A090, 5A992 (that meet or exceed the performance parameters of ECCNs 3A090 or 4A090) and associated software and technology in 3D001 (for 3A090 or 3B090), 3E001 (for 3A090 or 3B090), 3B090, or 3D001 (for 3A090 or 3B090), 4D090, 4E001 (for 4A090 and 4D090), and 5D992 (that meet or exceed the performance parameters of ECCNs 3A090 or 4A090) being exported, reexported, or transferred (in-country) to or within China or Macau. A license is also required for the export from China or Macau to any destination worldwide of 3E001 (for 3A090) technology developed by an entity headquartered in China or Macau that is the direct product of software subject to the EAR and is for the “production” of commodities identified in ECCNs 3A090, 4A090, or identified elsewhere on the CCL that meet or exceed the performance parameters of ECCNs 3A090 or 4A090, consistent with § 734.9(h)(1)(i)(B)(1) and (h)(2)(ii) of the EAR.

(ii) *Deemed exports.* The license requirements in this paragraph (a)(6) do not apply to deemed exports or deemed reexports.

* * * * *

(b) * * *

(10) *Advanced computing and semiconductor manufacturing items when destined to China or Macau.* There is a presumption of denial for applications for items specified in paragraph (a)(6) of this section being exported, reexported, or transferred (in-country) to or within China or Macau. See § 744.11(a)(2)(ii) of the EAR for license requirements, license review policy, and license exceptions applicable to specific entities. License applications for semiconductor manufacturing items, such as semiconductor equipment, destined to end users in China or Macau that are headquartered in the United States or in a country in Country Group A:5 or A:6 will be considered on a case-by-case basis, taking into account factors including technology level, customers and compliance plans.

* * * * *

PART 744—END-USE AND END-USER CONTROLS

■ 10. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994

Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 11. Section 744.6 is amended by revising paragraphs (c)(2) and (e)(3) to read as follows:

§ 744.6 Restrictions on specific activities of “U.S. persons.”

* * * * *

(c) * * *

(2) Consistent with paragraph (c)(1) of this section, BIS is hereby informing “U.S. persons” that a license is required for the following activities, which could involve ‘support’ for the weapons of mass destruction-related end uses set forth in paragraph (b) of this section.

(i) Shipping, transmitting, or transferring (in-country) to or within the PRC or Macau any item not subject to the EAR that you know will be used in the “development” or “production” of integrated circuits at a semiconductor fabrication “facility” located in the PRC or Macau that fabricates integrated circuits meeting any of the following criteria:

(A) Logic integrated circuits using a non-planar architecture or with a “production” technology node of 16/14 nanometers or less;

(B) NOT–AND (NAND) memory integrated circuits with 128 layers or more; or

(C) Dynamic random-access memory (DRAM) integrated circuits using a “production” technology node of 18 nanometer half-pitch or less; or

(ii) Facilitating the shipment, transmission, or transfer (in-country) of any item not subject to the EAR that you know will be used in the “development” or “production” of integrated circuits at a semiconductor fabrication “facility” located in the PRC or Macau that fabricates integrated circuits that meet any of the criteria in paragraphs (c)(2)(i)(A) through (C) of this section;

(iii) Servicing any item not subject to the EAR that you know will be used in the “development” or “production” of integrated circuits at a semiconductor fabrication “facility” located in the PRC or Macau that fabricates integrated circuits that meet any of the criteria in paragraphs (c)(2)(i)(A) through (C) of this section;

(iv) Shipping, transmitting, or transferring (in-country) to or within the PRC or Macau any item not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D, or

E in Category 3 of the CCL that you know will be used in the “development” or “production” of integrated circuits at any semiconductor fabrication “facility” located in the PRC or Macau, but you do not know whether such semiconductor fabrication “facility” fabricates integrated circuits that meet any of the criteria in paragraphs (c)(2)(i)(A) through (C) of this section;

(v) Facilitating the shipment, transmission, or transfer (in-country) to or within the PRC or Macau of any item not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D, or E in Category 3 of the CCL that you know will be used in the “development” or “production,” of integrated circuits at any semiconductor fabrication “facility” located in the PRC or Macau, but you do not know whether such semiconductor fabrication “facility” fabricates integrated circuits that meet any of the criteria in paragraphs (c)(2)(i)(A) through (C) of this section;

(vi) Servicing any item not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D, or E in Category 3 of the CCL that you know will be used in the “development” or “production” of integrated circuits at any semiconductor fabrication “facility” located in the PRC or Macau, but you do not know whether such semiconductor fabrication “facility” fabricates integrated circuits that meet any of the criteria in paragraphs (c)(2)(i)(A) through (C) of this section;

(vii) Shipping, transmitting, or transferring (in-country) to or within the PRC or Macau any item not subject to the EAR and meeting the parameters of ECCN 3B090, 3D001 (for 3B090), or 3E001 (for 3B090) regardless of end use or end user;

(viii) Facilitating the shipment, transmission, or transfer (in-country) to or within the PRC or Macau of any item not subject to the EAR and meeting the parameters of ECCN 3B090, 3D001 (for 3B090), or 3E001 (for 3B090), regardless of end use or end user;

(ix) Servicing any item not subject to the EAR located in the PRC or Macau and meeting the parameters of ECCN 3B090, 3D001 (for 3B090), or 3E001 (for 3B090), regardless of end use or end user.

* * * * *

(e) * * *

(3) Applications for licenses submitted pursuant to the notice of a license requirement set forth in paragraph (c)(2) of this section will be reviewed with a presumption of denial,

except for end users in the PRC or Macau headquartered in the United States or a country in Country Group A:5 or A:6, which will be considered on a case-by-case basis taking into account factors including technology level, customers, and compliance plans.

■ 12. Section 744.23 is amended by revising paragraphs (a)(2) and (d) to read as follows:

§ 744.23 “Supercomputer” and semiconductor manufacturing end use.

(a) * * *

(2) *End-use scope.* The following activities meet the end-use scope of the prohibition in this section:

(i) The “development,” “production,” “use,” operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a “supercomputer” located in or destined to the PRC or Macau;

(ii) The incorporation into, or the “development” or “production” of any “component” or “equipment” that will be used in a “supercomputer” located in or destined to the PRC or Macau; or

(iii) The “development” or “production,” of integrated circuits at a semiconductor fabrication “facility” located in the PRC or Macau that fabricates integrated circuits meeting any of the following criteria:

(A) Logic integrated circuits using a non-planar transistor architecture or with a “production” technology node of 16/14 nanometers or less;

(B) NOT AND (NAND) memory integrated circuits with 128 layers or more; or

(C) Dynamic random-access memory (DRAM) integrated circuits using a “production” technology node of 18 nanometer half-pitch or less; or

(iv) The “development” or “production” of integrated circuits at any semiconductor fabrication “facility” located in the PRC or Macau, but you do not know whether such semiconductor fabrication “facility” fabricates integrated circuits that meet any of the criteria in paragraphs (a)(2)(iii)(A) through (C) of this section; or

(v) The “development” or “production” in the PRC or Macau of any “parts,” “components,” or “equipment” specified under ECCN 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992.

* * * * *

(d) *License review standards.* There is a presumption of denial for applications to export, reexport, or transfer (in-country) items described in paragraph (a)(1) of this section that are for end uses described in paragraph (a)(2) of this section, except for items controlled

under paragraph (a)(2)(iii) of this section for end users in China or Macau that are headquartered in the United States or in a Country Group A:5 or A:6 country, which will be considered on a case-by-case basis taking into account factors including technology level, customers and compliance plans.

PART 774—THE COMMERCE CONTROL LIST

■ 13. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 14. Supplement no. 1 to part 774 is amended by revising ECCNs 3A090, 3B090, 3D001, 3E001, 4A090, 4D090, and 4E001 to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

3A090 Integrated circuits as follows (see List of Items Controlled).

License Requirements

Reason for Control: RS, AT

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
RS applies to entire entry.	China and Macau (See § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: See ECCNs 3D001 and 3E001 for associated technology and software controls.

Related Definitions: N/A

Items:

a. Integrated circuits that have or are programmable to have an aggregate bidirectional transfer rate over all inputs and outputs of 600 Gbyte/s or more to or from integrated circuits other than volatile memories, and any of the following:

a.1. One or more digital processor units executing machine instructions having a bit length per operation multiplied by processing performance measured in TOPS, aggregated over all processor units, of 4800 or more;

a.2. One or more digital ‘primitive computational units,’ excluding those units contributing to the execution of machine instructions relevant to the calculation of TOPS for 3A090.a.1, having a bit length per

operation multiplied by processing performance measured in TOPS, aggregated over all computational units, of 4800 or more;

a.3. One or more analog, multi-value, or multi-level 'primitive computational units' having a processing performance measured in TOPS multiplied by 8, aggregated over all computational units, of 4800 or more; or

a.4. Any combination of digital processor units and 'primitive computational units' whose calculations according to 3A090.a.1, 3A090.a.2, and 3A090.a.3 sum to 4800 or more.

Note: Integrated circuits specified by 3A090.a include graphical processing units (GPUs), tensor processing units (TPUs), neural processors, in-memory processors, vision processors, text processors, co-processors/accelerators, adaptive processors, field-programmable logic devices (FPLDs), and application-specific integrated circuits (ASICs). Examples of integrated circuits are in the Note to 3A001.a.

Technical Notes:

1. A 'primitive computational unit' is defined as containing zero or more modifiable weights, receiving one or more inputs, and producing one or more outputs. A computational unit is said to perform 2N-1 operations whenever an output is updated based on N inputs, where each modifiable weight contained in the processing element counts as an input. Each input, weight, and output might be an analog signal level or a scalar digital value represented using one or more bits. Such units include:

- Artificial neurons
- Multiply accumulate (MAC) units
- Floating-point units (FPUs)
- Analog multiplier units
- Processing units using memristors, spintronics, or magnonics
- Processing units using photonics or non-linear optics
- Processing units using analog or multi-level nonvolatile weights
- Processing units using multi-level memory or analog memory
- Multi-value units
- Spiking units

2. Operations relevant to the calculation of TOPS for 3A090.a include both scalar operations and the scalar constituents of composite operations such as vector operations, matrix operations, and tensor operations. Scalar operations include integer operations, floating-point operations (often measured by FLOPS), fixed-point operations, bit-manipulation operations, and/or bitwise operations.

3. TOPS is Tera Operations Per Second or 10^{12} Operations per Second.

4. The rate of TOPS is to be calculated at its maximum value theoretically possible when all processing elements are operating simultaneously. The rate of TOPS and aggregate bidirectional transfer rate is assumed to be the highest value the manufacturer claims in a manual or brochure for the integrated circuit. For example, the threshold of 4800 bits \times TOPS can be met with 600 tera integer operations at 8 bits or 300 tera FLOPS at 16 bits. The bit length of an operation is equal to the highest bit length of any input or output of that operation.

Additionally, if an item specified by this entry is designed for operations that achieve different bits \times TOPS value, the highest bits \times TOPS value should be used for the purposes of 3A090.a.

5. For integrated circuits specified by 3A090.a that provide processing of both sparse and dense matrices, the TOPS values are the values for processing of dense matrices (e.g., without sparsity).

b. [Reserved]

* * * * *

3B090 Semiconductor manufacturing equipment, not controlled by 3B001, as follows (see List of Items Controlled) and "specially designed" "parts," "components," and "accessories" therefor.

License Requirements

Reason for Control: RS, AT

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
RS applies to entire entry.	China and Macau (see § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A

GBS: N/A

List of Items Controlled

Related Controls: N/A

Related Definitions: N/A

Items:

a. Semiconductor manufacturing deposition equipment, as follows:

a.1. Equipment for depositing cobalt through electroplating processes.

a.2. Chemical vapor deposition equipment capable of deposition of cobalt or tungsten fill metal having a void/seam having a largest dimension less than or equal to 3 nm in the fill metal using a bottom-up fill process.

a.3. Equipment capable of fabricating a metal contact within one processing chamber by:

a.3.a. Depositing a layer using an organometallic tungsten compound while maintaining the wafer substrate temperature between 100 °C and 500 °C; and

a.3.b. Conducting a plasma process where the chemistries include hydrogen, including H_2+N_2 and NH_3 .

a.4. Equipment capable of fabricating a metal contact in a vacuum environment by:

a.4.a. Using a surface treatment during a plasma process where the chemistries include hydrogen, including H_2 , H_2+N_2 , and NH_3 , while maintaining the wafer substrate temperature between 100 °C and 500 °C;

a.4.b. Using a surface treatment consisting of a plasma process where the chemistries include oxygen (including O_2 and O_3) while maintaining the wafer substrate temperature between 40 °C and 500 °C; and

a.4.c. Depositing a tungsten layer while maintaining the wafer substrate temperature between 100°C and 500°C.

a.5. Equipment capable of depositing a cobalt metal layer selectively in a vacuum

environment where the first step uses a remote plasma generator and an ion filter, and the second step is the deposition of the cobalt layer using an organometallic compound.

Note: *This control does not apply to equipment that is non-selective.*

a.6. Physical vapor deposition equipment capable of depositing a cobalt layer with a thickness of 10 nm or less on a top surface of a copper or cobalt metal interconnect.

a.7. Atomic layer deposition equipment capable of depositing a 'work function metal' for the purpose of adjusting transistor electrical parameters by delivering an organometallic aluminum compound and a titanium halide compound onto a wafer substrate.

Technical note: *'Work function metal' is a material that controls the threshold voltage of a transistor.*

a.8. Equipment capable of fabricating a metal contact in a vacuum environment by depositing all of the following:

a.8.a. A titanium nitride (TiN) or tungsten carbide (WC) layer using an organometallic compound while maintaining the wafer substrate temperature between 20 °C and 500 °C;

a.8.b. A cobalt layer using a physical sputter deposition technique where the process pressure is 1–100 mTorr while maintaining the wafer substrate temperature below 500 °C; and

a.8.c. A cobalt layer using an organometallic compound, where the process pressure is 1–100 Torr, and the wafer substrate temperature is maintained between 20 °C and 500 °C.

a.9. Equipment capable of fabricating copper metal interconnects in a vacuum environment that deposits all of the following:

a.9.a. A cobalt or ruthenium layer using organometallic compound where the process pressure is 1–100 Torr, and the wafer substrate temperature is maintained between 20 °C and 500 °C; and

a.9.b. A copper layer using a physical vapor deposition technique where the process pressure is 1–100m Torr and the wafer substrate temperature is maintained below 500 °C.

a.10. Equipment capable of area selective deposition of a barrier or liner using an organometallic compound.

Note: *3B090.a.10 includes equipment capable of area selective deposition of a barrier layer to enable fill metal contact to an underlying electrical conductor without a barrier layer at the fill metal via interface to an underlying electrical conductor.*

a.11. Atomic layer deposition equipment capable of producing a void/seam free fill of tungsten or cobalt in a structure having an aspect ratio greater than 5:1, with openings smaller than 40 nm, and at temperatures less than 500 °C.

* * * * *

3D001 "Software" "specially designed" for the "development" or "production" of commodities controlled by 3A001.b to 3A002.h, 3A090, or 3B (except 3B991 and 3B992).

License Requirements

Reason for Control: NS, RS, AT

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
NS applies to “software” for commodities controlled by 3A001.b to 3A001.h, 3A002, and 3B.	NS Column 1
RS applies to “software” for commodities controlled by 3A090 or 3B090.	China and Macau (see § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, Special Comprehensive Licenses, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

TSR: Yes, except for “software” “specially designed” for the “development” or “production” of Traveling Wave Tube Amplifiers described in 3A001.b.8 having operating frequencies exceeding 18 GHz.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit “software” “specially designed” for the “development” or “production” of equipment specified by 3A002.g.1 or 3B001.a.2 to any of the destinations listed in Country Group A:6 (See Supplement No.1 to part 740 of the EAR).

List of Items Controlled

Related Controls: N/A
Related Definitions: N/A
Items:

The list of items controlled is contained in the ECCN heading.

* * * * *

3E001 “Technology” according to the General Technology Note for the “development” or “production” of commodities controlled by 3A (except 3A980, 3A981, 3A991, 3A992, or 3A999), 3B (except 3B991 or 3B992) or 3C (except 3C992).

License Requirements

Reason for Control: NS, MT, NP, RS, AT

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
NS applies to “technology” for commodities controlled by 3A001, 3A002, 3A003, 3B001, 3B002, or 3C001 to 3C006.	NS Column 1
MT applies to “technology” for commodities controlled by 3A001 or 3A101 for MT reasons.	MT Column 1

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
NP applies to “technology” for commodities controlled by 3A001, 3A201, or 3A225 to 3A234 for NP reasons.	NP Column 1
RS applies to “technology” for commodities controlled by 3A090 or 3B090 or “software” specified by 3D001 (for 3A090 or 3B090 commodities).	China and Macau (See § 742.6(a)(6))
RS applies to “technology” for commodities controlled in 3A090, when exported from China or Macau.	Worldwide (See § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

License Requirements Note: See § 744.17 of the EAR for additional license requirements for microprocessors having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more, including those incorporating “information security” functionality, and associated “software” and “technology” for the “production” or “development” of such microprocessors.

Reporting Requirements
See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, Special Comprehensive Licenses, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

TSR: Yes, except N/A for MT, and “technology” for the “development” or “production” of: (a) vacuum electronic device amplifiers described in 3A001.b.8, having operating frequencies exceeding 19 GHz; (b) solar cells, coverglass-interconnect-cells or covered-interconnect-cells (CIC) “assemblies”, solar arrays and/or solar panels described in 3A001.e.4; (c) “Monolithic Microwave Integrated Circuit” (“MMIC”) amplifiers in 3A001.b.2; and (d) discrete microwave transistors in 3A001.b.3.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit “technology” according to the General Technology Note for the “development” or “production” of equipment specified by ECCNs 3A002.g.1 or 3B001.a.2 to any of the destinations listed in Country Group A:6 (See Supplement No. 1 to part 740 of the EAR). License Exception STA may not be used to ship or transmit “technology” according to the General Technology Note for the “development” or “production” of components specified by ECCN 3A001.b.2 or b.3 to any of the destinations listed in Country Group A:5 or A:6 (See Supplement No.1 to part 740 of the EAR).

List of Items Controlled

Related Controls: (1) “Technology” according to the General Technology Note for the “development” or “production” of certain “space-qualified” atomic frequency standards described in Category XV(e)(9), MMICs described in Category XV(e)(14), and oscillators described in Category XV(e)(15) of the USML are “subject to the ITAR” (see 22 CFR parts 120 through 130). See also 3E101, 3E201 and 9E515. (2) “Technology” for “development” or “production” of “Microwave Monolithic Integrated Circuits” (“MMIC”) amplifiers in 3A001.b.2 is controlled in this ECCN 3E001; 5E001.d refers only to that additional “technology” “required” for telecommunications.

Related Definition: N/A
Items:

The list of items controlled is contained in the ECCN heading.

Note 1: 3E001 does not control “technology” for equipment or “components” controlled by 3A003.

Note 2: 3E001 does not control “technology” for integrated circuits controlled by 3A001.a.3 to a.14, having all of the following:

- (a) Using “technology” at or above 0.130 μ; and
- (b) Incorporating multi-layer structures with three or fewer metal layers.

Note 3: 3E001 does not apply to ‘Process Design Kits’ (‘PDKs’) unless they include libraries implementing functions or technologies for items specified by 3A001.

Technical Note: A ‘Process Design Kit’ (‘PDK’) is a software tool provided by a semiconductor manufacturer to ensure that the required design practices and rules are taken into account in order to successfully produce a specific integrated circuit design in a specific semiconductor process, in accordance with technological and manufacturing constraints (each semiconductor manufacturing process has its particular ‘PDK’).

* * * * *

4A090 Computers as follows (see List of Items Controlled) and related equipment, “electronic assemblies,” and “components” therefor.

License Requirements

Reason for Control: RS, AT

<i>Control(s)</i>	<i>Country chart (see Supp. No. 1 to part 738)</i>
RS applies to entire entry.	China and Macau (see § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: For associated “software” for commodities in this ECCN, see 4D090 and for associated “technology” for commodities in this ECCN, see 4E001.

Related Definitions: N/A

Items:

a. Computers, “electronic assemblies,” and “components” containing integrated circuits, any of which exceeds the limit in 3A090.a.

Technical Note: Computers include “digital computers,” “hybrid computers,” and analog computers.

b. Reserved

* * * * *

4D090 “Software” “specially designed” or modified for the “development” or “production,” of computers and related equipment, “electronic assemblies,” and “components” therefor specified in ECCN 4A090.

License Requirements

Reason for Control: RS, AT

Control(s)	<i>Country chart (see Supp. No. 1 to part 738)</i>
RS applies to entire entry.	China and Macau (See § 742.6(a)(6))
AT applies to entire entry.	AT Column 1

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

TSR: N/A

List of Items Controlled

Related Controls: For associated “technology” for software in this ECCN, see 4E001.

Related Definitions: N/A

Items:

The list of items controlled is contained in the ECCN heading.

* * * * *

4E001 “Technology” as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, MT, RS, CC, AT

Control(s)	<i>Country chart (see Supp. No. 1 to part 738)</i>
NS applies to entire entry.	NS Column 1
MT applies to “technology” for items controlled by 4A001.a and 4A101 for MT reasons.	MT Column 1
RS applies to “technology” for commodities controlled by 4A090 or “software” specified by 4D090.	China and Macau (See § 742.6(a)(6))
CC applies to “software” for computerized finger-print equipment controlled by 4A003 for CC reasons.	CC Column 1
AT applies to entire entry.	AT Column 1

Reporting Requirements

See § 743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

TSR: Yes, except for the following:

(1) “Technology” for the “development” or “production” of commodities with an “Adjusted Peak Performance” (“APP”) exceeding 29 WT or for the “development” or “production” of commodities controlled by 4A005 or “software” controlled by 4D004; or

(2) “Technology” for the “development” of “intrusion software”.

APP: Yes to specific countries (see § 740.7 of the EAR for eligibility criteria).

ACE: Yes for 4E001.a (for the “development”, “production” or “use” of equipment or “software” specified in ECCN 4A005 or 4D004) and for 4E001.c, except to Country Group E:1 or E:2. See § 740.22 of the EAR for eligibility criteria.

Special Conditions for STA

STA: License Exception STA may not be used to ship or transmit “technology” according to the General Technology Note for the “development” or “production” of any of the following equipment or “software”: a. Equipment specified by ECCN 4A001.a.2; b. “Digital computers” having an ‘Adjusted Peak Performance’ (‘APP’) exceeding 29 Weighted TeraFLOPS (WT); or c. “software” specified in the License Exception STA paragraph found in the License Exception section of ECCN 4D001 to any of the destinations listed in Country Group A:6 (See Supplement No. 1 to part 740 of the EAR); and may not be used to ship or transmit “software” specified in 4E001.a (for the “development”, “production” or “use” of equipment or “software” specified in ECCN 4A005 or 4D004) and 4E001.c to any of the destinations listed in Country Group A:5 or A:6.

List of Items Controlled

Related Controls: N/A

Related Definitions: N/A

Items:

a. “Technology” according to the General Technology Note, for the “development”, “production”, or “use” of equipment or “software” controlled by 4A (except 4A980 or 4A994) or 4D (except 4D980, 4D993, 4D994).

b. “Technology” according to the General Technology Note, other than that controlled by 4E001.a, for the “development” or “production” of equipment as follows:

b.1. “Digital computers” having an “Adjusted Peak Performance” (“APP”) exceeding 15 Weighted TeraFLOPS (WT);

b.2. “Electronic assemblies” “specially designed” or modified for enhancing performance by aggregation of processors so that the “APP” of the aggregation exceeds the limit in 4E001.b.1.

c. “Technology” for the “development” of “intrusion software.”

Note 1: 4E001.a and 4E001.c do not apply to “vulnerability disclosure” or “cyber incident response”.

Note 2: Note 1 does not diminish national authorities’ rights to ascertain compliance with 4E001.a and 4E001.c.

* * * * *

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–00888 Filed 1–17–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2022–0987]

RIN 1625–AA00

Safety Zone; St. Clair Icy Bazaar Fireworks, St. Clair River, MI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 50-yard radius of a portion of the St. Clair River, St. Clair, MI. This zone is necessary to protect spectators and vessels from potential hazards associated with the St. Clair Icy Bazaar Fireworks.

DATES: This temporary final rule is effective from 6 p.m. on January 21, 2023 through 6:30 p.m. on January 22, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2022–0987 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313–568–9564, or email Tracy.M.Girard@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

- CFR Code of Federal Regulations
- COTP Captain of the Port Detroit
- DHS Department of Homeland Security
- FR Federal Register
- NPRM Notice of Proposed Rulemaking
- § Section
- U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b) (B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard did not receive the final details of this fireworks display in time to publish an NPRM. As such, it is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule. To provide such a comment period would prevent the Coast Guard from enforcing the safety zone at the time of the event, leaving the public in danger from the hazards associated with a firework display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Detroit (COTP) has determined that potential hazard associated with fireworks from 6 p.m. on January 21, 2023, through 6:30 p.m. on January 22, 2023 will be a safety concern to anyone within a 50-yard radius of the launch site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the fireworks are being displayed.

IV. Discussion of the Rule

This rule establishes a safety zone from 6 p.m. on January 21, 2023, through 6:30 p.m. on January 22, 2023. The safety zone will be enforced from 6 p.m. through 6:30 p.m. on January 21, 2023. In the case of predicted inclement weather on January 21, 2023, this safety zone will be enforced from 6 p.m. through 6:30 p.m. on January 22, 2023. The safety zone will encompass all U.S. navigable waters of the St. Clair River, St. Clair, MI, within a 50-yard radius of position 42°49.477' N, 082°29.107' W (NAD 83). No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of the St. Clair River from 6 p.m. through 6:30 p.m. on January 21, 2023 or January 22, 2023. Moreover, the Coast Guard will issue Broadcast Notice to Mariners (BNM) via VHF-FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121),

we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f) and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting less than one hour that will prohibit entry into a designated area. It is categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T09–0987 to read as follows:

§ 165.T09–0987 Safety Zone; St. Clair Icy Bazaar Fireworks, St. Clair River, MI.

(a) *Location.* A safety zone is established to include all U.S. navigable waters of the St. Clair River, St. Clair MI, within a 50-yard radius of position 42°49.477' N, 082°29.107' W (NAD 83).

(b) *Enforcement period.* The regulated area described in paragraph (a) will be enforced from 6 p.m. through 6:30 p.m. on January 21, 2023. In the case of inclement weather on January 21, 2023, this safety zone will be enforced from 8 p.m. through 8:30 p.m. on January 22, 2023.

(c) *Regulations.* (1) No vessel or person may enter, transit through, or anchor within the safety zone unless authorized by the Captain of the Port Detroit (COTP), or his on-scene representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or his on-scene representative.

(3) The “on-scene representative” of COTP is any Coast Guard commissioned, warrant or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port Detroit to act on his behalf.

(4) Vessel operators shall contact the COTP or his on-scene representative to obtain permission to enter or operate within the safety zone. The COTP or his on-scene representative may be contacted via VHF Channel 16 or at (313) 568–9464. Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the COTP or his on-scene representative.

Dated: January 10, 2023.

Brad W. Kelly,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. 2023–00705 Filed 1–17–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AQ91

Modifications of Approval Requirements for Courses Designed To Prepare Individuals for Licensure or Certifications

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations to implement the provisions of the Jeff

Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act of 2016. This final rule adopts without change a proposed rule, which adds new approval requirements as specified in the statutory provisions for accredited and nonaccredited programs designed to prepare an individual for licensure and certification in a State, implements VA’s new authority to waive the added approval requirements under certain circumstances and adjust the authority of a State approving agency to add new approval criteria, and adds a circumstance for disapproval of a program designed to prepare an individual for licensure and certification, as prescribed by the law we are implementing.

DATES: This rule is effective on February 17, 2023.

FOR FURTHER INFORMATION CONTACT:

Cheryl Amitay, Chief, Policy and Regulation Development Staff, (225C), Education Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9800. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On January 10, 2022, VA published a proposed rule in the **Federal Register**, 87 FR 1087, to amend its regulations to add new approval requirements for accredited and nonaccredited programs designed to prepare an individual for licensure and certification in a State and to allow VA to waive the added approval requirements under certain circumstances. VA provided a 60-day comment period, which ended on March 10, 2022. We received two comments on the proposed amendments. Both comments supported the rulemaking, but requested clarifying information, which we provide below.

One comment requested that VA clarify the “undefined terms in 38 U.S.C. 3676 (approval of nonaccredited courses),” listing as undefined: “Quality,” “Qualifications,” “Financially Sound,” “Substantial Misrepresentation,” “Good Reputation and Character,” “Licensure and Certification,” “Such Additional Criteria. . . ,” and “Administrative Support.” The commenter stated that the standards to protect student veterans and GI Bill funds in 38 U.S.C. 3676 have been undefined and rarely enforced resulting in the abuse of veteran benefits and taxpayer funds.

VA shares the concern for the protection of student veterans and their VA education benefits and wants to provide assurances that the standards in sec. 3676 are clearly defined and upheld. The regulatory amendments

implementing the provisions of the Jeff Miller and Richard Blumenthal Veterans Healthcare and Benefits Improvement Act of 2016 will provide safeguards against abuse of veterans and their VA educational benefits with regard to programs that are designed to prepare an individual for licensure or certification. The new approval requirements will ensure that courses designed to prepare an individual for licensure or certification meet all instructional curriculum licensure and certification requirements, and courses designed to prepare an individual for employment meet the standards developed by a board or agency. Likewise, for courses designed to prepare an individual for licensure to practice law, the new approval requirements will ensure that the courses are accredited by a specialized accrediting agency for programs of legal education, or an association recognized by the Department of Education. We believe our implementation in this rulemaking of the legal standards will ensure the protection of student Veterans and GI Bill funds, and further clarification is not necessary. Thus, we will not make any changes based on this comment.

Also, the State Approving Agency's (SAA) authority in new 38 CFR 21.4253(d) and 21.4254(c)(15) to impose additional approval criteria and the requirement in these provisions that SAAs consult with VA before imposing the new criteria to ensure that the criteria are necessary and equitable with regard to public, private, and proprietary educational institutions will provide protection against abuse of veterans benefits and taxpayer funds. In addition, the requirement in new 38 CFR 21.4259(e) to publicly disclose the conditions or requirements for obtaining the license, certification, or approval or face disapproval will protect veterans from being deceived about the skills they need for licensure or certification. Therefore, we do not think it is necessary to further define terms in sec. 3676 and will not make any additional changes based on these comments.

A second comment requested that VA collaborate with the Department of Education to determine common language and direction, where possible, when addressing institution responsibilities to manage student aid for postsecondary programs leading to a license or certification. VA is happy to consider the request to collaborate with the Department of Education when necessary to address an institution's responsibilities concerning managing student aid for programs that lead to licensure or certification to make any

processes less confusing for students; however, we will not make any changes to the rule based on this comment as it is beyond the scope of this rulemaking.

This comment also requested clarification on implementation of proposed 38 CFR 21.4253(d)(9)(i) with regard to how VA will advise the SAA and the institution seeking State program approval to address interstate programs provided by distance education that lead to a license or certification. For SAA approval, § 21.4253(d)(9)(i) requires that a course designed to prepare an individual for licensure or certification in a State meet all instructional curriculum licensure or certification requirements of such State. Such courses are required to meet the same instructional curriculum licensure or certification requirements established by their State whether the program is conducted via distance learning or in person. The comment referenced confusion with regard to jurisdiction for obtaining SAA approval of "interstate distance education." Section 21.4253(d)(9)(i) does not address SAA jurisdiction for purposes of approval of licensure or certifications courses, and therefore, we will not address the jurisdictional issue in this rulemaking. However, the general provisions in 38 CFR 21.4250, governing licensing and certification test approval and jurisdiction, remain applicable.

Additionally, this comment requested clarification concerning the specific additional requirements that must be part of the notifications that are intended by the requirement in proposed 38 CFR 21.4259(e) directing an SAA to disapprove a course leading to a license or certification when an institution fails to publicly disclose "any conditions or additional requirements, including training, experience, or examinations, required to obtain the license, certification, or approval for which the course of education is designed to provide preparation." The additional requirements that must be part of the notifications refer to any requirements set by a state licensing or certifying agency, such as training required for licensure, certification, or approval, any prior experience that is a prerequisite for obtaining the license, certification, or approval, or any examinations that must be taken before a student can obtain a license, certification, or approval. Because each state licensing or certifying agency establishes their own distinct requirements, we are unable to be more specific about the requirements in this rulemaking. If there are any requirements beyond training, prior experience, or examinations that a

student must meet to obtain a particular license, certification, or approval, an institution or training facility must disclose those requirements. Thus, we will not make any changes based on this comment.

For the reasons stated above, VA will adopt the proposed rule as final, without change.

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 final 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). VA has determined that, although there may be a number of educational training facilities and SAAs considered small entities which may be affected by this rule, they will not be significantly impacted by this rule.

Allowing waiver of the added approval requirements under certain circumstances, as well as requiring SAAs to present a written proposal to VA justifying the need for adding additional approval criteria for approving either accredited or nonaccredited programs, will likely have some impact on both educational training institutions and SAAs. However, the impact will be minimal. VA estimates that five educational facilities will request a waiver per year and that the estimated cost for any educational institution seeking a waiver will be less than \$300. Also, VA estimates that approximately eleven requests per year from SAAs will be received to add additional approval criteria and the estimated cost for SAAs making these requests will also be less

than \$300. Accordingly, the number of schools and SAAs affected will not be substantial and the impact on each will not be significant. Therefore, under 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.

The provisions requiring institutions to meet certain criteria to maintain eligibility for receipt of VA educational benefits could also entail costs to these institutions, such as the cost of making program changes to meet the new requirements or the loss of funding derived from VA benefit payments because of an inability to meet the new requirements or obtain a waiver. However, such provisions merely restate existing provisions of statute and thus will have no additional impact on such small entities. Therefore, under 5 U.S.C. 605(b), these provisions are exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

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.

Paperwork Reduction Act

This final rule includes provisions constituting two new collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval. OMB has reviewed and approved these new collections of information and assigned OMB Control Numbers 2900–0907, 2900–0908.

Congressional Review Act

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

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Claims, Colleges and universities, Education, Employment, Schools, Veteran

readiness, Veterans, Vocational education.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on December 30, 2022, 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 21 as set forth below:

PART 21—VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

■ 1. The authority citation for part 21, subpart D, continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

■ 2. Amend § 21.4253 by revising the last sentence of the introductory text of paragraph (d) and adding paragraphs (d)(9) and (10) to read as follows:

§ 21.4253 Accredited courses.

* * * * *

(d) * * * The State approving agency may approve the application of the school when the school and its accredited courses are found to have met the following criteria and additional reasonable criteria established by the State approving agency if the Secretary or designee, in consultation with the State approving agency, approves the additional criteria as necessary and equitable in its treatment of public, private, and proprietary for-profit educational institutions:

* * * * *

(9)(i) For a course designed to prepare an individual for licensure or certification in a State, the course meets all instructional curriculum licensure or certification requirements of such State.

(ii) For a course designed to prepare an individual for licensure to practice law in a State, the course is accredited by a specialized accrediting agency for programs of legal education or association recognized by the Secretary of Education under subpart 2 of part H of title IV of the Higher Education Act of 1965 (20 U.S.C. 1099b), from which recipients of law degrees from such

accredited programs are eligible to sit for a bar examination in any State.

(iii) For a course designed to prepare an individual for employment pursuant to standards developed by a board or agency of a State in an occupation that requires approval, licensure, or certification, the course meets such standards.

(iv) An educational institution may apply, through their State approving agency of jurisdiction, to the Secretary or designee for a waiver of the requirements of this paragraph (d)(9). The State approving agency will forward an application for waiver, together with its recommendation for granting or denying the application, to the Secretary or designee. The Secretary or designee may grant a waiver upon a finding that all of the following criteria have been met:

(A) The educational institution is not accredited by an agency or association recognized by the Department of Education.

(B) The course did not meet the requirements of this paragraph (d)(9) at any time during the 2-year period preceding the date of the waiver.

(C) The waiver furthers the purposes of the educational assistance programs administered by VA or would further the education interests of individuals eligible for assistance under such programs.

(D) The educational institution does not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except for the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

(10) Before requiring a school and its accredited courses to meet any additional criteria, the State approving agency must present a written proposal to the Secretary or designee justifying the need for the additional criteria and containing an attestation that the criteria will treat all schools equitably, regardless of whether they are public, private, or for-profit institutions. The Secretary or designee will determine whether the additional criteria are necessary and treat schools equitably based on the proposal and any additional information submitted. The Secretary or designee may change the determination at any time if, after implementation, it becomes apparent that the criteria are unnecessary or

schools are treated inequitably under the criteria.

(i) The written proposal must contain a description of the need for the additional criteria and an explanation of how the imposition of the additional criteria would remedy the problem. The proposal must also contain a statement concerning whether State or Federal laws, regulations, or policies require the imposition of the additional criteria and an explanation of the consideration of any alternative means to achieve the same goal as the additional criteria.

(ii) The Secretary or designee may request such additional information from the State approving agency as the Secretary or designee deems appropriate before determining whether the criteria are necessary and treat schools equitably.

(Authority: 38 U.S.C. 3675(b)(3), 3676(c), (f))

* * * * *

■ 3. Amend § 21.4254 by revising paragraph (c)(14) and adding paragraph (c)(15) to read as follows:

§ 21.4254 Nonaccredited courses.

* * * * *

(c) * * *

(14)(i) For a course designed to prepare an individual for licensure or certification in a State, the course meets all instructional curriculum licensure or certification requirements of such State.

(ii) For a course designed to prepare an individual for licensure to practice law in a State, the course is accredited by a specialized accrediting agency for programs of legal education or association recognized by the Secretary of Education under subpart 2 of part H of title IV of the Higher Education Act of 1965 (20 U.S.C. 1099b), from which recipients of law degrees from such accredited programs are eligible to sit for a bar examination in any State.

(iii) For a course designed to prepare an individual for employment pursuant to standards developed by a board or agency of a State in an occupation that requires approval, licensure, or certification, the course meets such standards.

(iv) An educational institution may apply, through their State approving agency of jurisdiction, to the Secretary or designee for a waiver of the requirements of this paragraph (c)(14). The State approving agency will forward an application for waiver, together with its recommendation for granting or denying the application, to the Secretary or designee. The Secretary or designee may grant a waiver upon a finding that all of the following criteria have been met:

(A) The educational institution is not accredited by an agency or association

recognized by the Department of Education.

(B) The course did not meet the requirements of this paragraph (c)(14) at any time during the 2-year period preceding the date of the waiver.

(C) The waiver furthers the purposes of the educational assistance programs administered by VA or would further the education interests of individuals eligible for assistance under such programs.

(D) The educational institution does not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except for the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

(15) Such additional reasonable criteria as may be deemed necessary by the State approving agency if the Secretary or designee, in consultation with the State approving agency, approves the additional criteria as necessary and equitable in its treatment of public, private, and proprietary for-profit educational institutions. The Secretary or designee will determine whether the additional criteria are necessary and treat schools equitably based on a proposal and any additional information submitted.

(i) Before requiring a school and its nonaccredited courses to meet any additional criteria, the State approving agency must present a written proposal to the Secretary or designee justifying the need for the additional criteria and containing an attestation that the criteria will treat all schools equitably, regardless of whether they are public, private or for-profit institutions. The written proposal must contain a description of the need for the additional criteria and an explanation of how the imposition of the additional criteria would remedy the problem. The proposal must also contain a statement concerning whether State or Federal laws, regulations, or policies require the imposition of the additional criteria and an explanation of the consideration of any alternative means to achieve the same goal as the additional criteria.

(ii) The Secretary or designee may request such additional information from the State approving agency as the Secretary or designee deems appropriate before determining whether the criteria are necessary and treat schools equitably.

(iii) The Secretary or designee may change the determination at any time if, after implementation, it becomes apparent that the criteria are unnecessary or schools are treated inequitably under the criteria.

(Authority: 38 U.S.C. 3676(c), (f))

* * * * *

■ 4. Amend § 21.4259 by adding paragraph (e) to read as follows:

§ 21.4259 Suspension or disapproval.

* * * * *

(e) The Secretary or the appropriate State approving agency will disapprove a licensing and certification program of education if the educational institution providing the program of education fails to publicly disclose in a prominent manner any conditions or additional requirements, including training, experience, or examinations required to obtain the license, certification, or approval for which the program of education is designed to provide preparation.

(1) The Secretary will determine whether a disclosure is sufficiently prominent; however, at a minimum, the educational institution must publish the conditions or requirements on a publicly facing website and in their catalog, and include them in any publication (regardless of medium) which explicitly mentions “educational assistance benefits for servicemembers (and their dependents) or veterans (and their dependents)” or which, in the view of the Secretary, is intended for VA educational assistance beneficiaries.

(2) Individuals continuously enrolled at the same educational institution pursuing a program of education subject to disapproval under paragraph (e) of this section may complete the program of education.

(Authority: 38 U.S.C. 3679(d))

* * * * *

[FR Doc. 2023-00556 Filed 1-17-23; 8:45 am]

BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2020-0730; EPA-R05-OAR-2020-0731; FRL-9746-02-R5]

Air Plan Approval; Michigan; Base Year Emissions Inventory and Emissions Statement Rule for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving, under the Clean Air Act (CAA), a request submitted by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) on December 18, 2020, to revise the Michigan State Implementation Plan (SIP). EGLE's submittal addresses the emissions inventory and statement requirements for the Allegan County, Berrien County, Detroit (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties) and Muskegon County nonattainment areas under the 2015 ozone National Ambient Air Quality Standard (NAAQS or standard). The CAA requires states to develop and submit, as SIP revisions, emission inventories for all ozone nonattainment areas. In this action, EPA is approving EGLE's emissions inventories for the Allegan County, Berrien County, and Muskegon County nonattainment areas under the 2015 ozone NAAQS and the removal of the repealed Act 348, Section 14a. EPA approved the portions of EGLE's December 18, 2020, submittal pertaining to the certification of EGLE's stationary annual emissions statement regulation and emissions inventories for the Detroit nonattainment area under the 2015 ozone NAAQS in a separate action on July 6, 2022.

DATES: This direct final rule is effective March 20, 2023, unless EPA receives adverse comments by February 17, 2023. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2020-0730 (regarding emissions statement) or EPA-R05-OAR-2020-0731 (regarding emissions inventory) at <https://www.regulations.gov> or via email to blakley.pamela@epa.gov. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located

outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Emily Crispell, Environmental Scientist, Control Strategies Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-8512, crispell.emily@epa.gov. The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID-19.

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

I. The 2015 Ozone NAAQS Emissions Inventory and Emissions Statement Rule Requirements

On December 28, 2015, EPA promulgated a revised 8-hour ozone NAAQS of 0.070 parts per million (ppm) (October 26, 2015, 80 FR 65292). The Allegan County (partial county), Berrien County, and Muskegon County (partial county) nonattainment areas were designated as marginal nonattainment areas for the 2015 ozone NAAQS (June 4, 2018, 83 FR 25776).

A. Emissions Inventories

CAA sections 172(c)(3) and 182(a)(1), 42 U.S.C. 7502(c)(3) and 7511a(a)(1), require states to develop and submit, as SIP revisions, emission inventories for all areas designated as nonattainment for any NAAQS, including the ozone NAAQS. An emissions inventory for ozone is an estimation of actual emissions of air pollutants that contribute to the formation of ozone in an area. Ozone is a gas that is formed by the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_x) in the atmosphere in the presence of sunlight (VOC and NO_x are referred to as ozone precursors). Therefore, an emissions inventory for ozone focuses on the emissions of VOC and NO_x. VOC is emitted by many types of pollution sources including power plants, industrial sources, on-road and off-road mobile sources, smaller stationary sources (collectively referred to as area sources), and biogenic

sources. NO_x is primarily emitted by combustion sources, both stationary and mobile.

Emissions inventories provide emissions data for a variety of air quality planning tasks including:

- establishing baseline emissions levels (anthropogenic [manmade] emissions associated with ozone standard violations),
- calculating emission reduction targets needed to attain the NAAQS and to achieve reasonable further progress (RFP) toward attainment of the ozone standard,
- determining emissions inputs for ozone air quality modeling analyses, and
- tracking emissions over time to determine progress toward achieving air quality and emissions reduction goals.

As stated above, the CAA requires the states to submit emission inventories for areas designated as nonattainment for ozone. For the 2015 ozone NAAQS, EPA specifies that states submit ozone season day emissions estimates for an inventory calendar year to be consistent with the baseline year for RFP plan as required by 40 CFR 51.1310(b). For the RFP baseline year for the 2015 ozone NAAQS under 40 CFR 51.1310(b), states may use a calendar year for the most recently available complete triennial (3-year cycle) emissions inventory (40 CFR 51, subpart A) preceding the year of the area's effective date of designation as a nonattainment area (December 6, 2018, 83 FR 62998).¹ States are required to submit estimates of VOC and NO_x emissions for four general classes of anthropogenic sources: stationary point sources; area sources; on-road mobile sources; and off-road mobile sources.

B. Emissions Statement Rules

Section 182(a)(3)(B) of the CAA requires states with ozone nonattainment areas to submit revisions to their SIP to require the owner or operator of each major stationary source of NO_x or VOC to provide the state with an annual statement documenting the actual emissions of NO_x and VOC from their source. Under section 182(a)(3)(B)(ii), a state may waive the emissions statement requirement for any class or category of stationary sources which emits less than 25 tons per year of VOC or NO_x if the state, in its base year emissions inventory, provides an inventory of emissions from such class or category of sources. States and EPA

¹ The RFP requirements specified in CAA section 182(b)(1) shall apply to all area's designated nonattainment for ozone classified Moderate or higher.

have generally interpreted this waiver provision to apply to sources (without specification of a specific source class or source category) emitting less than 25 tons per year of VOC or NO_x.

Many states have adopted these emissions statement rules for a prior ozone NAAQS that covers all the state's nonattainment areas and relevant classes and categories of sources. For these states, EPA is accepting certifications that their previously adopted emissions statement rules remain in place and are adequate to meet the emissions statement rule requirement under the 2015 ozone standard (December 6, 2018, 83 FR 62998).

II. Michigan's Emissions Inventory

On December 18, 2020, EGLE submitted a request to revise the Michigan SIP to address the emissions inventory requirement of CAA section 182(a)(1). EGLE provided documentation of a 2017 NO_x and VOC

base year emissions inventory to meet requirements for the Allegan County, Berrien County, Detroit and Muskegon County nonattainment areas. EPA approved emissions inventories for the Detroit nonattainment area under the 2015 ozone NAAQS in a separate action on July 6, 2022 (87 FR 40097). EGLE selected 2017 as the base year because this was the most recent comprehensive, accurate, and quality assured (QA) triennial emissions inventory in the National Emissions Inventory (NEI) database, available at the time the state began preparing the emissions inventory submittal for the Allegan County, Berrien County, and Muskegon County areas and is consistent with baseline year for the RFP plan as required by 40 CFR 51.1310(b). The baseline year for RFP would be the calendar year for the most recently available triennial emissions inventory at the time ROP/RFP plans are developed (e.g., 2017 for initial designations effective in 2018) (83 FR 62998). At the time that EGLE

prepared its inventory of 2017 emissions to address the requirements of section 182(a)(1), several improvements in data sources were not yet available. Specifically, EGLE relied upon a version of the 2017 NEI that did not include a revised point source inventory to correct airport emissions. Additionally, EGLE relied upon the 2016v1 modeling platform (which did not yet include improvements from the 2016v2 modeling platform) including updated information from the 2017 NEI, MOVES3, and revised inventory methodologies. EPA is not evaluating Michigan's 2017 emissions inventory against platforms or data sources that were not available at the time of submission. Table 1 shows the Allegan County, Berrien County, and Muskegon County areas' 2017 NO_x emissions in tons per ozone season day.² Table 2 shows the Allegan County, Berrien County, and Muskegon County areas' 2017 VOC emissions in tons per ozone season day.

TABLE 1—2017 OZONE SEASON DAY NO_x EMISSIONS

[Tons/day]

County/NAA	Event	Biogenics	Area	Non-road	On-road	Point	Total NO _x
Allegan	0.02	0.96	0.73	0.83	2.83	1.76	7.13
Berrien	0.02	1.42	1.11	1.35	6.70	2.09	12.69
Muskegon	0.02	0.49	1.01	0.79	2.91	0.19	5.41

TABLE 2—2017 OZONE SEASON DAY VOC EMISSIONS

[Tons/day]

County/NAA	Event	Biogenics	Area	Non-road	On-road	Point	Total VOC
Allegan	0.33	18.12	3.72	0.90	1.50	0.60	25.17
Berrien	0.41	19.69	6.47	2.03	3.49	0.95	33.04
Muskegon	0.30	19.97	3.79	1.40	2.04	0.49	27.99

EGLE estimated NO_x and VOC emissions for all source categories in the Allegan County, Berrien County, and Muskegon County ozone nonattainment areas. Emissions for these counties were totaled by source category for each ozone nonattainment area.

To develop emissions inventories for the year 2017, Michigan began with annual emissions data contained in the 2017 NEI for the point, nonpoint, on-road, nonroad, biogenic, and event categories. Ozone season day emissions were calculated by determining the representative typical ozone season month during the May 1–September 30 ozone season period by defining all days with ambient air monitor values at or above 70 parts per billion as “typical

ozone season” days. EGLE then assessed which months contained the most typical ozone season days or the days with the highest measured values or greatest impact on the design values. Using this methodology, EGLE selected July as the representative typical ozone season month. To convert annual emissions data to ozone season day values, EGLE extracted data from EPA's 2016v1 modeling platform and calculated a conversion factor for the point, nonpoint, on-road, nonroad, and biogenic data categories. EGLE determined the event category emissions were too low and too variable from year to year to benefit from applying a conversion factor. For partial

county nonattainment areas, a scaling factor was also applied before obtaining the emissions. EGLE also analyzed the impact of weekend day emissions on monitored design values. EGLE determined that weekend day emissions have a large impact on individual monitor design values and included weekend days in the calculation of typical ozone season day emission values.

For point sources, EGLE calculates and stores emissions data annually in the state's air emissions inventory database. Under the authority of Michigan Air Pollution Control Rule 2 (R 336.202) and AQD–013, EGLE requires any facility in the state that emits a pollutant above the thresholds

²The ozone season is the portion of the year in which high ozone concentrations may be expected in a given area.

specified to submit emissions inventory statements annually. These reports contain detailed source type-specific or annual source unit-specific and seasonal actual emissions for all source units in a facility. QA is performed when the data are submitted to the Emissions Inventory System Gateway.

For area source (sometimes referred to as non-point source) emissions, EGLE relied on a variety of state-specific data to estimate emissions based on EPA's procedures and guidance for the 2017 base emissions inventory. Area sources are spread over wide areas with no distinct discharge points or are comprised of a large number of small point sources that are difficult to describe separately and whose emissions are not well characterized (e.g., heating furnaces in individual homes, architectural surface coating, automobile refueling, dry cleaning, etc.). To develop an accurate and complete area source inventory, EGLE used annual emissions from the 2017 NEI and monthly emissions profiles from 2016v1 platform data. EGLE calculated 2017 emissions estimations by applying conversion factors to the July monthly emission profile to obtain daily emissions. A scaling factor was applied to the area source emissions for the partial county 2015 ozone NAAQS nonattainment areas.

On-road and non-road mobile source emissions were developed by EGLE using annual emissions from the 2017 NEI and monthly emissions profiles from 2016v1 platform data. On-road mobile sources include emissions from motorized vehicles that are normally operated on public roadways. This includes passenger cars, motorcycles, minivans, sport-utility vehicles, light-duty trucks, heavy duty trucks, and buses. Non-road mobile sources include emissions from locomotives, aircraft, marine, off-road vehicles and non-road equipment such as lawn and garden equipment.

For biogenics, which comprise of emissions that come from natural sources, EGLE utilized the annual emissions from the 2017 NEI and monthly emissions profiles from 2016v1 platform data. EGLE applied a conversion factor 2016v1 platform July emissions to obtain ozone season day emissions for the 2017 NEI annual values. For the event category, which is primarily comprised of wildfire emissions, EGLE relied on the 2017 NEI emissions in entirety.

III. Michigan's Emissions Statement Rule

Section 182(a)(3)(B) of the CAA requires states to include regulations in

the SIP to require sources (source facilities) to submit annual statements characterizing sources of NO_x and VOC emissions within the source facilities and to report actual NO_x and VOC emissions for these sources. EPA approved the majority of EGLE's December 18, 2020, submittal pertaining to the certification of EGLE's stationary annual emissions statement regulation under the 2015 ozone NAAQS in a separate EPA action on July 6, 2022 (87 FR 40097). The remaining request included in EGLE's December 18, 2020, submittal, which was not addressed in EPA's separate action, was the removal of Act 348, Section 14a from the SIP. Act 348, Section 14a was repealed in 1995 and required annual fee payment by certain sources to EGLE as part of the elements for the Michigan Title V Renewable Operating Permit Program.

IV. EPA's Evaluation

A. Emissions Inventory

EPA reviewed Michigan's December 18, 2020, submittal for consistency with sections 172(c)(3) CAA and 182(a)(1) of the CAA and with EPA's emissions inventory requirements. In particular, EPA reviewed the techniques used by EGLE to derive and quality assure the emissions estimates. EPA has also considered whether Michigan provided the public with the opportunity to review and comment on the development of the emissions estimates, whether Michigan confirmed that source facility emissions statements are required for the 2015 ozone standard, and whether the state addressed all public comments. EGLE documented the procedures used to estimate the emissions for each of the major source types. The documentation of the emissions estimation procedures is thorough and is adequate for EPA to determine that Michigan followed acceptable procedures to estimate the emissions. Accordingly, EPA concludes that Michigan has developed inventories of NO_x and VOC emissions that are comprehensive and complete.

B. Emissions Statement Rule

As mentioned earlier, EPA approved the portions of EGLE's December 18, 2020, submittal pertaining to the certification of EGLE's stationary annual emissions statement regulation under the 2015 ozone NAAQS in a separate EPA action on July 6, 2022 (87 FR 40097). EGLE requested the removal of Act 348, Section 14a from the SIP which was repealed in 1995 and required annual fee payment by certain sources to EGLE. Act 348, Section 14a does not address the requirements related to

attainment and maintenance of the NAAQS under Section 110 of the CAA. EPA has determined that Act 348, Section 14a was erroneously incorporated into the SIP. Instead, Act 348, Section 14a addresses the requirements under title V of the CAA for operating permit programs. EPA fully approved Michigan's title V Renewable Operating Permit Program on November 10, 2003 (68 FR 63735). Since Act 348, Section 14a has been repealed and does not address the requirements related to attainment and maintenance of the NAAQS under Section 110 of the CAA, EPA is approving EGLE's request to remove Act 348, Section 14a from the Michigan SIP.

V. Michigan's Public Notice and Comment

Title 40 of the Code of Federal Regulations, part 51, appendix V requires that the State provide sufficient notice and opportunity for public comment and hearing on all SIP submittals. On September 7, 2020, EGLE notified the public of the 30-day period for the opportunity to comment, with respect to the requested SIP revisions pertaining to the emission inventories for the 2015 ozone NAAQS nonattainment areas and updates to the statewide emission statement program. The notification was published on EGLE's website at: https://www.michigan.gov/documents/deq/deq-aqd-sip-pub_notice_Info_610029_7.pdf. EGLE did not receive any public comments or requests for a public hearing by the stated date in the public notice, therefore, EGLE canceled the public hearing.

VI. What action is EPA taking?

EPA is approving Michigan's SIP revision submitted on December 18, 2020, to address the ozone-related emissions inventory requirements for the Allegan County, Berrien County, and Muskegon County ozone nonattainment areas for the 2015 ozone NAAQS. The emissions inventories we are approving into the SIP are specified in Tables 1 and 2, above. We are approving the emissions inventories because they contain comprehensive, accurate, and current inventories of actual emissions for all relevant sources in accordance with CAA sections 172(c)(3) and 182(a), and because Michigan adopted the emissions inventories after providing for reasonable public notice and opportunity for a public hearing. We are also approving the removal of the repealed Act 348, Section 14a from the Michigan SIP, which does not address the requirements related to attainment

and maintenance of the NAAQS under Section 110 of the CAA, but rather addresses the requirements under title V of the CAA for operating permit programs. In addition, we are also correcting a typographical error contained in the codification of our own July 6, 2022 (87 FR 40097), action. In that action, on page 40009, we incorrectly identified that we were approving sections 324.5003, 324.5524 and 324.5525 of Act 451 of 1994, as amended, where the correct citations for the approved sections are 324.5503, 324.5524 and 324.5525.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective March 20, 2023 without further notice unless we receive relevant adverse written comments by February 17, 2023. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective March 20, 2023.

VII. Incorporation by Reference

In this document, EPA is amending regulatory text that includes incorporation by reference. As described in Section III of this preamble and set forth in the amendments to 40 CFR part 52 below, EPA is removing provisions of the EPA-Approved Michigan Regulations from the Michigan State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations.

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

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

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

This action is subject to the Congressional Review Act, and 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).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 20, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: January 5, 2023.

Debra Shore,

Regional Administrator, Region 5.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.1170:

■ a. In paragraph (c) amend the table by:

■ i. Removing the entry for "Act 348 of 1965, as amended" with an EPA approval date of 7/6/2022; and

■ ii. Revising the entry for "Act 451 of 1994, as amended".

■ b. In paragraph (e) amend the table under the sub-heading "Emissions Inventories" by adding a second entry for "2015 8-hour ozone 2017 base year" before the entry for "1997 annual PM_{2.5} 2005 base year".

The revision and addition read as follows:

§ 52.1170 Identification of plan. (c) * * *

* * * * *

EPA-APPROVED MICHIGAN REGULATIONS

Michigan citation	Title	State effective date	EPA approval date	Comments
* * * * *				
State Statues				
Act 451 of 1994, as amended	Natural Resources and Environmental Protection Act.	3/30/1995	7/6/2022, 87 FR 40097	Only sections 324.5503, 324.5524 and 324.5525.
* * * * *				

(e) * * *

EPA-APPROVED MICHIGAN NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
* * * * *				
Emission Inventories				
2015 8-hour ozone 2017 base year	Allegan County (part), Berrien County, and Muskegon County (part).	12/18/2020	1/18/2022, [INSERT FEDERAL REGISTER CITATION].	
* * * * *				

* * * * *
 [FR Doc. 2023-00369 Filed 1-17-23; 8:45 am]
 BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2021-0549; FRL-8856-02-R9]

Second 10-Year Maintenance Plan for the Indian Wells Valley PM₁₀ Planning Area; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve the “Indian Wells Valley Second 10-Year PM₁₀ Maintenance Plan” (“Indian Wells Second Maintenance Plan” or “Plan”) as a revision to the state implementation plan (SIP) for the State of California.

The Indian Wells Second Maintenance Plan includes, among other elements, a base year emissions inventory, a maintenance demonstration, contingency provisions, and motor vehicle emissions budgets for use in transportation conformity determinations. The EPA is finalizing these actions because the SIP revision meets the applicable statutory and regulatory requirements for such plans and motor vehicle emissions budgets.

DATES: This rule is effective February 17, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2021-0549. 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, such as copyrighted material, is not placed on

the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. **FOR FURTHER INFORMATION CONTACT:** Ashley Graham, Air Planning Office (ARD-2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972-3877, or by email at graham.ashleyr@epa.gov. **SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” refer to the EPA.

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- I. Summary of Proposed Rule
- II. Public Comments and EPA Responses

III. Air Quality Conditions Since Proposal
 IV. Final Action
 V. Statutory and Executive Order Reviews

I. Summary of Proposed Rule

On October 13, 2021, the EPA proposed to approve the Indian Wells Second Maintenance Plan submitted by the California Air Resources Board (CARB) on July 30, 2020, as a revision to the California SIP.¹ In doing so, we proposed to find that the Indian Wells Second Maintenance Plan adequately demonstrates that the Indian Wells Valley planning area will maintain the

1987 annual national ambient air quality standards (NAAQS or “standards”) for particulate matter of ten microns or less (PM₁₀) through the year 2025 (*i.e.*, for more than 10 years beyond the first 10-year maintenance period). We also proposed to find that the Plan includes sufficient contingency provisions to promptly correct any violation of the PM₁₀ standards that may occur. Lastly, we proposed to find the motor vehicle emissions budgets in the Plan for direct PM₁₀ for the years 2020 and 2025 adequate and to approve the budgets for transportation conformity

purposes because they meet all applicable criteria for such budgets including the adequacy criteria under 40 CFR 93.118(e).

The motor vehicle emissions budgets that the EPA proposed to find adequate and to approve are shown in Table 1. The EPA announced the availability of the Plan and related motor vehicle emissions budgets on the EPA’s transportation conformity website on October 13, 2021, and requested comments by November 12, 2021. We received no comments in response to the adequacy review posting.

TABLE 1—TRANSPORTATION CONFORMITY BUDGETS FOR THE INDIAN WELLS VALLEY PM₁₀ AREA
 [PM₁₀ tons per day, annual average]

Source category	2020	2025
Motor Vehicle Emissions Budget	0.40	0.50

Motor vehicle emissions budgets calculated are rounded up to the nearest tenth of a ton per day. Source: Indian Wells Second Maintenance Plan, Table 5.

II. Public Comments and EPA Responses

The EPA’s proposed action provided a 30-day public comment period that ended on November 12, 2021. We received one comment submission from a private citizen.² The comments are included in the docket for this action and the remainder of this section provides a summary of the comments and the EPA’s responses.

Comments Summary

The commenter raises two main concerns with the EPA’s proposed approval of the Indian Wells Second Maintenance Plan. The commenter’s first concern is that the Plan is “mostly informed by models that may have inadequate data supporting them.” The commenter acknowledges that “models can be helpful at providing insight into trends in data and helping to predict what will happen in the future” but expresses concern that the Plan “relies too heavily on them.” The commenter notes that there is only one monitoring station in the Indian Wells Valley planning area and recommends that additional monitoring stations throughout the planning area (including near one of the airports in the city of Ridgecrest) would provide greater insight into PM₁₀ emissions trends. The commenter also notes that emissions data were obtained from owners and operators of industrial point sources and states that these data may not be

accurate because they rely on the owners to track their emissions.

The commenter’s second main concern is “that the plan does not address how emissions would be limited.” The commenter asserts that “the plan shows projections for how the emissions in the area of concern are expected to change between now and 2025, [but that] they never specifically stated why there would be any increases in emissions or how they are hoping to combat these increases in emissions.” The commenter asserts that the maintenance plan would be more effective if it addressed off-road emissions from airplanes and questions the contribution of emissions from the Naval Air Weapons Station China Lake, asserting that the facility may contribute fugitive dust emissions to the Indian Wells Valley planning area.

Aside from these two concerns, the commenter states that “the plan is well laid out and should work quite well for the area once it is implemented.”

EPA Responses

As discussed in the EPA’s proposal, the EPA interprets, through guidance, CAA section 175A’s requirement that the state submit a revision to the SIP “to provide for the maintenance” of the NAAQS, to permit the state to do so using different methods.³ One method permits a state to demonstrate maintenance of the NAAQS in an area by showing that projected emissions of

a pollutant or its precursors in a future year will not exceed the actual levels of those same pollutants and precursors in the attainment inventory, *i.e.*, an inventory of actual emissions from one of the three years making up the design value during which the area was attaining the NAAQS. The Indian Wells Second Maintenance Plan relies on this approach and includes an emissions inventory representing actual emissions in 2013 (*i.e.*, 10 years after redesignation, or the final year of the first maintenance period). The Plan also provides an updated inventory of actual emissions in 2017 and projected emissions through 2025 (*i.e.*, 12 years beyond the expiration of the first 10-year maintenance period) for sources in the Indian Wells Valley planning area. We note that CAA section 175A requires only that the plan provide for maintenance for 20 years after an area is redesignated, but the State provided projections demonstrating maintenance for 22 years.

With regards to the commenter’s concern that the emissions inventories in the Plan rely too heavily on models, we note that the requirements for PM₁₀ emissions inventories are set forth in the Air Emissions Reporting Requirements (AERR) rule.⁴ The EPA has provided additional guidance to states for developing PM₁₀ emissions inventories in “PM₁₀ Emissions Inventory Requirements,” EPA-454/R-94-033 (September 1994) and “Emissions

¹ 86 FR 56848.

² Comment dated October 14, 2021, from Elaina Porter to Docket ID No. EPA-R09-OAR-2021-0549.

³ See 86 FR 56848, 56852, citing memorandum dated September 4, 1992, from John Calcagni, Director, EPA Air Quality Management Division, to Regional Office Air Division Directors, Subject:

“Procedures for Processing Requests to Redesignate Areas to Attainment”, 9–11.

⁴ Codified at 40 CFR part 51, subpart A.

Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations” (May 2017).

Under the AERR, states are required to report comprehensive emissions inventories to the EPA every three years.⁵ All states, including California, require facilities within their jurisdictions to report their emissions to the states. CARB estimates stationary point source emissions based on annual reports submitted by the local air districts, which reflect actual emissions from industrial point sources reported to local air districts by facility operators. The local air districts are responsible for working with facility operators to compile estimates, using source testing, direct measurement, or engineering calculations. Because area sources often occur over a large geographic area, emissions for these source categories are estimated using various models and methodologies. Similarly, emissions from on-road mobile sources are estimated using the latest EPA-approved version of CARB’s Emission FACTor model (EMFAC) based on activity data from the Kern Council of Governments, and off-road mobile source emissions are estimated using a suite of category-specific models. Projected inventories are derived by applying expected growth trends for each source category based on historical trends, current conditions, and economic and demographic forecasts. CARB provides website links to additional information on each of the methodologies and models used in the Plan and has established quality assurance and quality control processes to ensure the integrity and accuracy of the emissions inventories.⁶

As discussed in the EPA’s proposal, the EPA reviewed CARB’s emissions inventory development methodologies and the resulting emissions inventories in the Indian Wells Second Maintenance Plan and determined that the inventories were developed consistent with EPA regulations and guidance;⁷ that the projected inventories are based on reasonable methods, growth factors, and assumptions; and that the inventories are based on the most current

information available at the time the Plan was being developed. Projections of direct PM₁₀ emissions show that future emissions increases through 2025 are within 1.6 percent of emissions in 2017 and below emissions in 2013, both of which reflected attainment conditions in the Indian Wells Valley planning area.⁸ Therefore, we find that the emissions inventories in the Indian Wells Second Maintenance Plan rely on actual emissions information, where available, and that where the State relies on models and other methodologies to supplement actual emissions information, that reliance is appropriate. We also find that CARB has quality assurance and quality control procedures that are complete, adequate, and acceptable to ensure the accuracy of the model inputs and model results. Furthermore, to address potential uncertainties in the emissions inventories, the Eastern Kern Air Pollution Control District has committed to continue to review the inputs and assumptions used to develop the emissions inventories on an annual basis and to monitor ambient air quality to verify continued attainment.⁹

Regarding ambient air quality monitoring, the EPA disagrees with the commenter’s concerns about the need for additional monitors in the Indian Wells Valley area. Each year, CARB is required to submit an Annual Network Plan to establish that its monitoring network meets applicable statutory requirements and is consistent with applicable guidance. CARB’s most recent Annual Network Monitoring plan addressing the PM₁₀ NAAQS requirements in the Indian Wells Valley planning area is the “Annual Network Plan, Covering Monitoring Operations in 25 California Air Districts, July 2022” (“Annual Network Plan”), which contains additional information and analysis on the planning area’s monitoring sites and instrumentation.¹⁰ This Annual Network Plan reflects CARB’s approach to meeting the federal monitoring requirements for PM₁₀,¹¹ which are based on population and air quality conditions in each Metropolitan Statistical Area (MSA). The Indian Wells Valley is located within the Bakersfield, California MSA (“Bakersfield, CA MSA”). Based on population and air quality conditions in the Bakersfield, CA MSA, a minimum of four to eight monitoring sites are required.¹² There are a total of six PM₁₀

monitoring sites in the Bakersfield, CA MSA, including the Ridgecrest monitoring site located in the Indian Wells Valley planning area, and the minimum monitoring requirement for PM₁₀ is met. The Ridgecrest monitoring site is a “neighborhood scale” site within the Bakersfield, CA MSA.¹³ Neighborhood scale PM₁₀ sites “represent conditions throughout some reasonably homogeneous urban sub-region with dimensions of a few kilometers” . . . and these “PM₁₀ sites provide information about trends and compliance with standards because they often represent conditions in areas where people commonly live and work for extended periods.”¹⁴

In addition, CARB is required to submit to the EPA a network assessment every five years that includes a determination of whether the network meets monitoring objectives, such as compliance with ambient air quality standards and providing air pollution data to the public in a timely manner, and whether any new sites are needed to meet these objectives.¹⁵ This regular review by CARB evaluates whether the existing PM₁₀ monitoring network provides an adequate measure of PM₁₀ air quality in the Indian Wells Valley. CARB’s 2020 Monitoring Network Assessment stated that “the Eastern Kern Air Pollution Control District (EKAPCD) believes the existing monitoring network adequately captures population exposure, transport, and high concentrations and should be maintained in its current configuration.”¹⁶ CARB provides the public opportunities to comment on any proposed changes to the monitoring network in the Annual Network Plan before the plan is submitted to the EPA for formal approval of all network modifications. The EPA approved CARB’s Annual Network Plan on October 28, 2022.¹⁷

In response to the commenter’s concern that the Plan does not sufficiently address how emissions would be limited, we note that the Indian Wells Second Maintenance Plan discusses the development of rules controlling PM₁₀ emissions in section II.B (“Rule Development”) and lists the control measures that contributed to attainment of the PM₁₀ NAAQS in section III.B (“Factors that Contributed

⁵ 40 CFR 51.30(b).

⁶ Indian Wells Second Maintenance Plan, Appendix D.

⁷ Air Emissions Reporting Requirements, 40 CFR part 51, subpart A; “PM₁₀ Emissions Inventory Requirements,” EPA-454/R-94-033 (September 1994); and “Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations” (May 2017).

⁸ 86 FR 56848, 56853.

⁹ Id.

¹⁰ CARB, Annual Network Plan, July 2022.

¹¹ 40 CFR part 58, Appendix D, section 4.6.

¹² Annual Network Plan, 31.

¹³ Id. at Appendix A.

¹⁴ 40 CFR part 58, Appendix D, section 4.6(b)(3).

¹⁵ 40 CFR 58.10(d).

¹⁶ CARB, 2020 Monitoring Network Assessment, October 2020.

¹⁷ Letter dated October 28, 2022, from Gwen Yoshimura, Manager, Air Quality Analysis Office, EPA Region IX, to Sylvia Vanderspek, Chief, Air Quality Planning Branch, CARB.

to Attainment”). These control measures will continue to limit emissions in the Indian Wells Valley PM₁₀ planning area. The Plan describes the methods and assumptions CARB used to develop the emissions projections upon which the maintenance demonstration relies, including the growth forecasts for point, areawide, and mobile sources. Appendix C (“CEPAM Emission Projections by Summary Category”) presents detailed emissions information for the years 2017 through 2025 by source category, and Appendix D (“IWW Precursor Emission Inventories”) provides emissions inventory documentation. The Indian Wells Second Maintenance Plan discusses anticipated population and industry growth in the area in section IV (“IWW Growth”), noting that the area “. . . has not had any significant changes since 1990, and no significant changes are projected to occur during the second maintenance period.” As noted above, the EPA finds that these methods and assumptions are reasonable and that the inventories are based on the most current information available at the time the Plan was developed.

Regarding fugitive dust emissions from the Naval Air Weapons Station, China Lake, we note that the “Fugitive Dust Control Plan for the Naval Air Weapons Station, China Lake, California (September 1, 1994)” (“Fugitive Dust Control Plan”), prepared pursuant to District Rule 402 (“Fugitive Dust”),¹⁸ established controls to limit emissions from unpaved roads, disturbed vacant land, and open storage piles at Naval Air Weapons Station, China Lake. On May 7, 2003, as part of our action redesignating the Indian Wells Valley planning area to attainment, the EPA approved the Fugitive Dust Control Plan.¹⁹ We found that the plan meets the reasonably available control measures requirement of CAA section 189(a)(1)(C) and concluded that the measure was responsible, in part, for bringing the Indian Wells Valley planning area into attainment of the PM₁₀ NAAQS.²⁰ The Indian Wells Second Maintenance Plan references the Fugitive Dust Control Plan in section III.B (“Factors that Contributed to Attainment”).

Finally, in response to the commenter’s suggestion that the Plan would be more effective if it addressed emissions from aircraft, we note that of the 1.15 tons per day (tpd) of PM₁₀ emissions from aircraft in the Indian

Wells Valley, 80 percent (0.92 tpd) are from military aircraft at the Naval Air Weapons Station, China Lake.²¹ As discussed above, the fugitive dust sources that contribute to these emissions are subject to controls outlined in the Fugitive Dust Control Plan. Thus, a majority of off-road emissions from aircraft are addressed by the Plan. With regards to aviation, we note that the authority to establish emissions standards for aircraft lies with the EPA and that states are preempted from adopting any emissions standard for aircraft or aircraft engines that differs from any standards promulgated by the EPA.²² Given that the District does not have authority to control emissions from aircraft engines, including government aircraft from military flight operations at the Naval Air Weapons Station, China Lake, it focused its control strategy on the fugitive dust source categories.

III. Air Quality Conditions Since Proposal

As part of our proposal, we evaluated quality-assured, certified, and complete data available at the time (*i.e.*, through 2020).²³ These data indicated that there had been one exceedance of the PM₁₀ NAAQS in the Indian Wells Valley planning area in 2019 and one exceedance in 2020, resulting in an attaining three-year design value of 0.7.²⁴ In 2021, there were three additional exceedances of the PM₁₀ NAAQS in the area. These additional exceedances in 2021 caused the number of exceedances recorded at the air monitor averaged over three consecutive years (*i.e.*, 2019–2021) to be greater than 1.05. However, we do not think these data contradict the EPA’s finding that the State’s plan provides for maintenance of the PM₁₀ NAAQS under CAA section 175A(b). The District and CARB provided information to the EPA about the five exceedances that occurred in 2019–2021 that explained that the exceedances were not within the State’s control.²⁵ The information provided indicates that the 2019 exceedance was caused by wildfire smoke and wind gusts, the 2020 and two of the 2021

exceedances were caused by wildfire smoke, and the third 2021 exceedance was a result of fugitive dust transported by a high wind event. The EPA has reviewed the information provided by the State regarding the 2019–2021 exceedances, and we agree that this information does not call into question the EPA’s proposed approval of the Indian Wells Second Maintenance Plan as providing for maintenance of the PM₁₀ NAAQS. We note as well that the State’s analysis and the EPA’s evaluation are consistent with the proposed changes to the maintenance plan that the EPA is approving in this final action to evaluate data that may have been influenced by certain events in determining whether contingency provisions should be triggered.

As part of this final action, the EPA has also reviewed data available through June 2022, and so far, there has been one additional exceedance in the Indian Wells Valley planning area.²⁶ Given the EPA’s agreement that the 2021 exceedances do not call into question the EPA’s proposal to approve the Indian Wells Second Maintenance Plan as providing for maintenance of the NAAQS, the State is not required at this time to submit additional information and analyses for the 2022 exceedance, because such exceedance, without the 2021 exceedances, would not on its own cause a violation of the NAAQS. Upon the effective date of this final action, if additional exceedances occur in 2022 or a later year such that the number of exceedances averaged over three consecutive years is greater than 1.05, per section V of the Plan, the State will be required to submit information regarding those exceedances if it wishes to request that the exceedances be excluded from the contingency trigger calculation. The EPA will review such information and will notify the State whether or not the contingency provisions have been triggered per the schedule outlined in the Plan.

IV. Final Action

For the reasons discussed in our proposed action and herein, the EPA is taking final action to approve the Indian Wells Second Maintenance Plan, submitted by CARB on July 30, 2020, as a revision to the California SIP. We are approving the maintenance demonstration and contingency provisions as meeting all of the applicable requirements for maintenance plans and related contingency provisions in CAA section

²¹ Email dated March 7, 2022, from Jeremiah Cravens, EKAPCD, to Ashley Graham, EPA Region IX, Subject: “Question re fugitive dust emissions from aircraft.”

²² See 40 CFR part 87.

²³ 86 FR 56848, 56850.

²⁴ *Id.*

²⁵ See email dated September 2, 2022, from Sylvia Vanderspek, CARB, to Gwen Yoshimura, EPA Region IX, Subject: “Initial Notification Submittal—Eastern Kern Indian Wells PM₁₀ 2nd Maintenance Plan Contingency,” including attachments. See also memorandum dated September 8, 2022, from Ashley Graham, EPA Region IX, to Docket ID No. EPA–R09–OAR–2021–0549.

²⁶ EPA Air Quality System Design Value Report, AMP480, accessed November 17, 2022 (User ID: STSAL, Report Request ID: 2058650).

¹⁸ Indian Wells Second Maintenance Plan, Appendix E.

¹⁹ 68 FR 24368, 24368.

²⁰ *Id.*

175A. We are also finding the motor vehicle emissions budgets shown in Table 1 for 2020 and 2025 adequate and approving the budgets for transportation conformity purposes because we find they meet all applicable criteria for such budgets including the adequacy criteria under 40 CFR 93.118(e).

V. Statutory and Executive Order Reviews

Under the 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); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

The State did not evaluate environmental justice considerations as part of its SIP submittal. There is no information in the record inconsistent with the stated goals of E.O. 12898 of achieving environmental justice for

people of color, low-income populations, and indigenous peoples.

In addition, there are no areas of Indian country within the Indian Wells Valley planning area, and the state plan is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 20, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

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

Dated: December 22, 2022.

Martha Guzman Aceves,
Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

- 2. Section 52.220 is amended by adding paragraph (c)(594) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(594) The following plan was submitted on July 30, 2020, by the Governor's designee as an attachment to a letter dated July 23, 2020.

(i) [Reserved]

(ii) *Additional materials.* (A) Eastern Kern Air Pollution Control District.

(1) Indian Wells Valley Second 10-Year PM₁₀ Maintenance Plan, adopted on June 25, 2020.

(2) [Reserved]

(B) [Reserved]

* * * * *

[FR Doc. 2022-28307 Filed 1-17-23; 8:45 am]

BILLING CODE 6560-50-P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 301-10, 301-70

[FTR Case 2022-01; Docket Number GSA-FTR-2022-0010, Sequence 2]

RIN 3090-AK61

Federal Travel Regulation (FTR); Constructive Cost

AGENCY: Office of Government-wide Policy (OGP), General Services Administration.

ACTION: Final rule.

SUMMARY: GSA is issuing a final rule amending the Federal Travel Regulation (FTR) to clarify the calculation of "constructive cost" as it relates to temporary duty (TDY) travel. GSA is also making technical changes regarding what method of transportation agencies should compare privately owned vehicle costs to when preparing a constructive cost analysis. These clarifications are intended to produce

better estimates for agency decision makers.

DATES: Effective February 17, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Jill Denning, Office of Government-wide Policy, at 202-208-7642 or email at travelpolicy@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact The Regulatory Secretariat (M1V1CB), at 1800 F Street NW, Washington, DC 20405, 202-501-4755 or email at GSARegSec@gsa.gov. Please cite FTR case 2022-01.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule at 87 FR 32106 on May 27, 2022, to clarify the calculation of “constructive cost” as it relates to temporary duty (TDY) travel. This rule finalizes the proposed changes to section 301-10.309, regarding what method of transportation agencies should compare privately owned vehicle (POV) costs to when preparing a constructive cost analysis, and makes minor editorial adjustments in order to clarify intent.

When employees perform official business away from their official station, agencies must, in authorizing the TDY travel, select the transportation method most advantageous to the Government, when cost and other factors are considered. Travel must be by the most expeditious means of transportation practicable and commensurate with the nature and purpose of the duties. In addition, the agency must consider energy conservation, total cost to the Government (including costs of per diem, overtime, lost work time, and actual transportation cost), total distance traveled, number of points visited, and number of travelers. The most advantageous transportation method by order of precedence is common carrier, Government-furnished automobile, rental car, and POV.

Regardless of the method of transportation the agency selects in the travel authorization, Federal employees may choose to use a POV while on TDY. However, if the agency has selected a method of transportation other than POV for the employee’s use because it is more advantageous to the Government, the agency must perform a cost comparison, known as “constructive cost”, to determine how much the agency should reimburse the traveler when the traveler chooses a POV over the agency-selected method of transportation. If the constructive cost of the agency-selected method of transportation is less than the cost of traveling by POV, the employee only

receives that limited amount, regardless of how much it costs to use a POV. If the constructive cost shows that the POV cost is less than the agency-selected method, then the employee will receive the total POV-related costs (as listed in 41 CFR 301-10.304). (Agencies are reminded that the FTR does not authorize agencies to require that employees use their POV for TDY travel, even if the costs will be less for the Government.)

GSA is aware that agencies may mistakenly calculate TDY constructive costs by only comparing the selected transportation method with the POV mileage rates without also factoring in related travel costs, such as per diem expenses, parking, baggage fees, etc. Not factoring in these other costs leads to an incomplete calculation of the total constructive travel cost that employees may incur.

The Civilian Board of Contract Appeals (CBCA) and its predecessor, the General Services Board of Contract Appeals (GSCBA) have, in their decisions on TDY constructive costs, opined that when comparing the total allowable costs for travel by a method other than that most advantageous to the Government, with the constructive cost of traveling by the agency-selected method, agencies should think through the complete travel experience and include other potential costs. (*See In the Matter of Russell E. Yates*, GSCBA No. 15109-TRAV (Jan. 28, 2000); *In the Matter of Stephen M. England*, CBCA 3903-TRAV (Jan. 30, 2015)). For example, if the agency selected travel by air via common carrier but the employee chose to travel by POV, in calculating the constructive cost of air travel the agency should include potential costs such as the expected cost of lodging as well as meals, incidental expenses, airfare, baggage, use of a rental car, and transportation to and from the airport using a taxi or transportation network company (TNC), and perhaps others depending on the individual situation. Even though these costs may not actually be incurred when the employee uses the POV instead of flying via a common carrier, the relevant travel costs should be included in the agency’s constructive cost analysis to determine how much the agency-selected method would have cost the agency in total.

Additionally, GSA is clarifying the constructive cost methodology stated in § 301-10.309. GSA amended this section in 2015 to include the use of rental cars as a potential transportation option, in addition to the use of common carriers (80 FR 27259). However, when determining the constructive cost, the section currently

states that agencies should not exceed the total constructive cost of the “authorized method of common carrier transportation,” when it should read “authorized method of transportation” as is consistent with 41 CFR 301-70.105(a).

II. Discussion of the Final Rule

GSA did not receive any public comments related to the proposed rule and has not made any substantive changes to the regulatory language from the proposed to final rule.

While difficult to quantify, GSA expects some savings in travel costs as a result of this final rule; GSA anticipates that no additional travel costs will result from agencies performing more comprehensive constructive cost comparisons as agencies will better understand the impact of method of transportation decisions, and therefore should be better positioned to select the method of transportation most advantageous to the Government. Agencies also should be able to better limit TDY costs incurred by employees who choose to use their POV instead of the agency-selected transportation method. Common carrier, Government-furnished automobile, and rental car are presumed to be the most advantageous methods of transportation, and are often less expensive than travel by POV. Administrative savings from having a more comprehensive process should also lessen the time agencies and employees spend working through confusion or differences in interpretation, hopefully with fewer employees requesting CBCA review of claims for entitlement to travel expenses.

III. Executive Orders 12866 and 13563

Executive Orders (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 is not a significant regulatory action, and therefore, is not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

IV. Congressional Review Act

OIRA has determined that this rule is not a “major rule” as defined by 5 U.S.C. 804(2). Additionally, this rule is

excepted from Congressional Review Act reporting requirements prescribed under 5 U.S.C. 801 since it relates to agency management or personnel under 5 U.S.C. 804(3)(b).

V. 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 the changes are administrative in nature and only affect Government employees. Therefore, a Final Regulatory Flexibility Analysis has not been performed.

VI. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the Federal Travel Regulation do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects

41 CFR Parts 301–10, 301–70

Government employees, Travel and transportation expenses, common carriers.

Robin Carnahan

Administrator of General Services.

For the reasons set forth in the preamble GSA amends 41 CFR parts 301–10 and 301–70 as set forth below:

PART 301–10—TRANSPORTATION EXPENSES

■ 1. The authority citation for 41 CFR part 301–10 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; Office of Management and Budget Circular No. A–126, “Improving the Management and Use of Government Aircraft.” Revised May 22, 1992.

■ 2. Revise § 301–10.309 to read as follows:

§ 301–10.309 What will I be reimbursed if I am authorized to use common carrier transportation or a rental vehicle and I use a POV instead?

You will be reimbursed the applicable POV rate on a mileage basis, plus per diem and related travel expenses, not to exceed the total constructive cost of the authorized method of transportation. Your agency must determine the constructive cost in accordance with § 301–70.105(a).

PART 301–70—INTERNAL POLICY AND PROCEDURE REQUIREMENTS

■ 3. The authority citation for 41 CFR part 301–70 is revised to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701, note); OMB Circular No. A–126, revised May 22, 1992; OMB Circular A–123, Appendix B, revised August 27, 2019.

■ 4. Amend § 301–70.105 by revising paragraph (a) to read as follows:

§ 301–70.105 May we prohibit an employee from using a POV on official travel?

* * * * *

(a) Limit reimbursement to the constructive cost of the authorized method of transportation, which is the sum of travel and transportation expenses the employee would reasonably have incurred had the employee traveled by the method of transportation deemed to be most advantageous to the Government. The calculation will necessarily involve assumptions. Examples of related expenses that could be considered constructive costs include, but are not limited to, taxi and TNC fares, baggage fees, rental car costs, tolls, ferry fees, and parking charges; and

* * * * *

■ 5. Amend § 301–70.506 by revising paragraph (b) to read as follows:

§ 301–70.506 How do we define actual cost and constructive cost when an employee interrupts a travel assignment because of an incapacitating illness or injury?

* * * * *

(b) Constructive cost is the sum of travel and transportation expenses the employee would reasonably have incurred for round-trip travel between the official station and the alternate location plus per diem calculated for the appropriate en route travel time. The calculation will necessarily involve assumptions. Examples of related expenses that could be considered constructive costs include, but are not limited to, taxi and TNC fares, baggage fees, rental car costs, tolls, ferry fees, and parking charges.

[FR Doc. 2023–00733 Filed 1–17–23; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 88

[Docket No. CDC–2022–0052; NIOSH–347]

RIN 0920–AA82

World Trade Center (WTC) Health Program; Addition of Uterine Cancer to the List of WTC-Related Health Conditions

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: In accordance with the World Trade Center (WTC) Health Program’s regulations, which establish procedures for adding a new condition to the list of covered health conditions, this final rule adds malignant neoplasms of corpus uteri and uterus, part unspecified (uterine cancer) to the List of WTC-Related Health Conditions.

DATES: This rule is effective on January 18, 2023.

FOR FURTHER INFORMATION CONTACT: Rachel Weiss, Public Health Analyst, National Institute for Occupational Safety and Health, 1090 Tusculum Avenue, MS: C–46, Cincinnati, OH 45226; telephone: (404) 498–2500 (this is not a toll-free number); email: NIOSHregs@cdc.gov.

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I. Executive Summary

A. Purpose of Regulatory Action

In a notice of proposed rulemaking (NPRM) published in May 2022, the Administrator of the WTC Health Program (Administrator) and the Secretary of HHS proposed the addition of uterine cancer¹ to the List of WTC-Related Health Conditions (List) in 42 CFR 88.15.² In this final rule, the WTC Health Program summarizes and responds to both independent peer reviews and public comments on the NPRM and finalizes the addition of uterine cancer to the List.

B. Summary of Major Provisions

This final rule adds malignant neoplasms of corpus uteri and uterus, part unspecified (uterine cancer) to the List.

C. Costs and Benefits

The addition of uterine cancer to the List through this rulemaking is estimated to cost the WTC Health Program between \$1,706,454 and \$3,805,173 annually from 2023 through 2026. All of the costs to the WTC Health Program are transfers.³ Benefits to current and future WTC Health Program members⁴ are expected to include improved access to care and better treatment outcomes than members would have experienced in the absence of Program coverage.

The case numbers used to develop the cost estimates are, themselves, only estimates; the certification of individual

¹ For the purposes of this action, the WTC Health Program defines the term “uterine cancer” as ICD-10 code C54, including the following specific malignant neoplasms: isthmus uteri (C54.0), endometrium (C54.1), myometrium (C54.2), fundus uteri (C54.3), overlapping sites of corpus uteri (C54.8), and corpus uteri, unspecified (C54.9); and ICD-10 code C55, including only a single subcategory, malignant neoplasm of uterus, part unspecified.

² 87 FR 27961 (May 10, 2022).

³ Due to the implementation of the Patient Protection and Affordable Care Act in 2014, and as required under the authorizing statute for the WTC Health Program, all current and future Program members are assumed to have or have access to medical insurance coverage other than through the WTC Health Program; therefore, all projected treatment costs to be paid by the Program are considered transfers.

⁴ Although this rulemaking refers, at times, to uterine cancer in females, the WTC Health Program recognizes that some individuals who identify as male also may be at risk for uterine cancer.

cancer diagnoses will be conducted on a case-by-case basis, as required by the Zadroga Act. Interested parties should visit the WTC Health Program website for information about how to apply for enrollment in the Program⁵ and about health condition certification.⁶

II. Background

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010, as amended, revised the Public Health Service Act (PHS Act) to establish the WTC Health Program, which is administered by the National Institute for Occupational Safety and Health (NIOSH), within CDC, provides medical monitoring and treatment to eligible responders to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania, and to eligible survivors of the New York City attacks. In an NPRM published in May 2022,⁷ the Administrator of the WTC Health Program and the Secretary of HHS proposed the addition of uterine cancer⁸ to the List of WTC-Related Health Conditions in 42 CFR 88.15. In this final rule, the WTC Health Program summarizes and responds to both independent peer reviews and public comments on the NPRM and finalizes the addition of uterine cancer to the List in § 88.15(d).

A. WTC Health Program Statutory Authority

Title I of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347, as amended by Pub. L. 114–113 and Pub. L. 116–59), added Title XXXIII to the PHS Act⁹ establishing the WTC Health Program within HHS. The WTC Health Program provides medical monitoring and treatment benefits to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania (responders), and to eligible persons who were present in the dust or dust cloud on September 11, 2001, or who worked, resided, or attended school, childcare,

or adult daycare in the New York City disaster area (survivors).

All references to the Administrator in this document mean the Director of NIOSH, within CDC, or his or her designee. Section 3312(a)(6) of the PHS Act requires the Administrator to conduct rulemaking to propose the addition of a health condition to the List codified in 42 CFR 88.15.

B. Rulemaking History

In 2020, the Administrator received requests from WTC responders, survivors, and five of the WTC Health Program Clinical Centers of Excellence (CCEs) to add “uterine cancer” to the List. The letter from the CCEs raised important questions about the potential association between endocrine disrupting chemicals (EDCs) present at the WTC sites and uterine cancer, and noted that a previous WTC Health Program evaluation of the evidence regarding a causal association between endometrial cancer and 9/11 exposure did not address the potential role of EDCs. In response to the requests, the Administrator directed the WTC Health Program’s Science Team to assess the available scientific evidence for adding uterine cancer to the List pursuant to the *Policy and Procedures for Adding Types of Cancer to the List of WTC-Related Health Conditions (Policy and Procedures)*.¹⁰

The *Policy and Procedures* describes four methods for determining whether to add a type of cancer to the List, summarized below:

- *Method 1. Epidemiologic Studies of September 11, 2001, Exposed Populations:* A type of cancer may be added to the List if peer-reviewed, published, epidemiologic studies of cancers in the 9/11-exposed populations demonstrate a causal association between 9/11 exposures and that cancer.

- *Method 2. Established Causal Associations:* A type of cancer may be added to the List if there is well-established scientific support published in multiple peer-reviewed epidemiologic studies for a causal association between a health condition already on the List and that type of cancer.

- *Method 3. Review of Evaluations of Carcinogenicity in Humans:* A type of cancer may be added to the List if a 9/11 agent¹¹ included in the *Inventory of*

⁵ See WTC Health Program, *How to Apply* web page, <https://www.cdc.gov/wtc/apply.html>.

⁶ See WTC Health Program, “Certifications and Covered Conditions,” *Member Handbook*, <https://www.cdc.gov/wtc/handbook.html#certifications>.

⁷ See *supra* note 2.

⁸ See *supra* note 1.

⁹ Title XXXIII of the PHS Act is codified at 42 U.S.C. 300mm to 300mm–61. Those portions of the Zadroga Act found in Titles II and III of Public Law 111–347 do not pertain to the WTC Health Program and are codified elsewhere.

¹⁰ WTC Health Program [Nov 2021], *Policy and Procedures for Adding Types of Cancer Conditions to the List of WTC-Related Health Conditions*, https://www.cdc.gov/wtc/pdfs/policies/WTCHP_PP_Addn_Cancer_11182021-508.pdf.

¹¹ The WTC Health Program defines 9/11 agents to mean chemical, physical, biological, or other hazards reported in a published, peer-reviewed

9/11 Agents¹² has been determined by the National Toxicology Program (NTP) to be a *known human carcinogen* or *reasonably anticipated to be a human carcinogen* and the World Health Organization's International Agency for Research on Cancer (IARC) has determined there is *sufficient* or *limited* evidence in humans that the 9/11 agent causes that type of cancer.

• *Method 4. Review of Information by the WTC Health Program Scientific/Technical Advisory Committee (STAC):* A type of cancer may be added to the List if the STAC recommends the addition and provides a reasonable basis for the recommendation.

The Science Team evaluated the available evidence and presented its findings to the Administrator in a white paper (2021 White Paper)¹³ that was shared with the STAC and the public before the STAC's public meeting on September 28–29, 2021 (see discussion below). The 2021 White Paper concluded that insufficient evidence exists under Method 1 and Method 3 to support a decision to add uterine cancer to the List. The Science Team found that evidence considered under Method 2 supports the addition of uterine cancer to the List, but only for those WTC Health Program members who have a certified WTC-related estrogen-secreting tumor.¹⁴ Finally, the 2021 White Paper

exposure assessment study of responders, recovery workers, or survivors who were present in the New York City disaster area, or at the Pentagon site, or the Shanksville, Pennsylvania site, as those locations are defined in 42 CFR 88.1, as well as those hazards not identified in a published, peer-reviewed exposure assessment study, but which are reasonably assumed to have been present at any of the three sites. See the *Inventory of 9/11 Agents*, *infra* note 12.

¹²The *Inventory of 9/11 Agents* is composed of those agents identified in Tables 1–4 of the document, *Development of the Inventory of 9/11 Agents*, published July 17, 2018, https://www.cdc.gov/ResearchGateway/Content/pdfs/Development_of_the_Inventory_of_9-11_Agents_20180717.pdf.

¹³The WTC Health Program released a draft of the white paper, entitled *Scientific Considerations for Potential Addition of Uterine Cancer to the List of Covered Conditions by the World Trade Center Health Program: Preliminary Assessment for the World Trade Center Health Program Scientific/Technical Advisory Committee*, on August 20, 2021, followed by a revised draft on September 16, 2021. The September revision updated the August draft to include additional information concerning 9/11 exposures and reorganized one section for clarity but did not alter the findings or conclusions of the August draft. The September revision was shared with the STAC and public prior to the STAC meeting. All versions of the WTC Health Program Science Team's white paper referenced in this final rule are available at https://www.cdc.gov/wtc/stac_meeting.html and in the docket for this rulemaking.

¹⁴The most common type of estrogen-secreting tumor are granulosa cell tumors of the ovary. Another type of estrogen-secreting tumor is adrenocortical cancers. The findings in the 2021 White Paper related to estrogen-secreting tumors are

included additional information for the STAC to consider in its deliberations, conducted pursuant to Method 4 and discussed below, including: mechanisms of endometrial cancer development; other evidence from studies of uterine cancer from exposure to the 9/11 agents 2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD), polychlorinated biphenyls, cadmium, asbestos, and chloroethane; sex disparities in occupational cohort studies; and other cancers causally associated with EDCs.

Pursuant to Method 4 of the *Policy and Procedures*, the Administrator exercised his discretion to request a recommendation from the STAC regarding whether the available evidence provides a reasonable basis for adding uterine cancer to the List. The STAC held a public meeting on September 28 and 29, 2021, during which it heard public comments and deliberated on the evidence, including the evidence presented in the Science Team's 2021 White Paper, and created a workgroup to write a report describing the STAC's findings on uterine cancer. In a subsequent public STAC meeting on November 18, 2021, the full Committee voted unanimously to approve the workgroup report and recommend that the Administrator add uterine cancer to the List.

In a letter received by the Administrator on November 29, 2021,¹⁵ the STAC formally recommended the addition of “all types of uterine cancer” to the List. In its rationale, the STAC noted that the *Inventory of 9/11 Agents* includes certain 9/11 agents which are recognized as EDCs, and that EDC exposure-related imbalances in sex steroid hormones are a “plausible mechanism” for the development of uterine cancer among WTC responders and survivors. Moreover, the STAC argued that other hormone-related cancers thought to be caused by EDC exposure are on the List, including thyroid cancer, breast cancer, testicular and prostate cancers, and all other female reproductive organ cancers. Finally, the STAC commented on the likelihood that future epidemiologic studies in the extensively studied 9/11-exposed responder population may be

described in detail in the NPRM, see 87 FR 27961, 27964.

¹⁵Letter from Dr. Elizabeth Ward, Chair of the STAC, to the Administrator, regarding the STAC's resolution on the addition of uterine cancer to the List of WTC Covered Conditions, received November 29, 2021. The letter from Dr. Ward, including the STAC's recommendation, is available in the docket for this rulemaking and on the WTC Health Program website, at <https://www.cdc.gov/wtc/pdfs/stac/STAC.Recommendation.Received.29.November.2021.pdf>.

unable to accurately capture uterine cancer incidence because of the small number of female responders.

The Administrator reviewed the available body of evidence, including the evidence presented in the Science Team's 2021 White Paper and the STAC's comprehensive rationale and recommendation, and concluded that the totality of the available information provided a sufficient evidentiary basis to propose adding uterine cancer to the List. Subsequently, the Administrator and Secretary of HHS published an NPRM in May 2022 proposing the addition of uterine cancer to the List in 42 CFR 88.15.¹⁶ The NPRM described the methodology used by the Science Team to evaluate the scientific evidence and included a full discussion of the Science Team's 2021 White Paper, the STAC recommendation and rationale, and the Administrator's decision to propose the addition of uterine cancer to the List.

C. Public Participation

The NPRM was published on May 10, 2022. The Administrator provided a 45-day public comment period and invited interested persons and organizations to submit written views, opinions, recommendations, and data.¹⁷ The Administrator received 27 comments in the rulemaking docket from the public, including current WTC Health Program members and non-members who experienced 9/11 exposures who have or have had uterine cancer; unaffiliated individuals; and the WTC Health Program Survivors Steering Committee. Concurrently, as required by statute, the Administrator solicited an assessment of the WTC Health Program's evaluation of evidence supporting the proposal to add uterine cancer to the List by three independent peer reviewers.¹⁸

Comments received from the three peer reviewers were de-identified and compiled into one document which was published in the docket on June 9, 2022, 30 days after the NPRM publication. This permitted the public an additional 15 days to comment on the peer reviewers' assessment of the proposed rulemaking. The three peer reviewers were asked to respond to the following questions:

1. Are you aware of any other studies which should be considered? If so, please identify them.

¹⁶ See *supra* note 2.

¹⁷ Pursuant to the *Policy and Procedures*, *supra* note 10, the public comment period remained open for 45 days to allow the public an additional 15 days to comment after the independent peer reviews were posted to the docket.

¹⁸ See PHS Act, sec. 3312(a)(6)(F).

2. Have the requirements of this *Policy and Procedures*¹⁹ been fulfilled? If not, please explain which requirements are missing or deficient.

3. Is the interpretation of the available information appropriate, and does it support the conclusion to add the health condition, as described in the regulatory text, to the List? If not, please explain why.

The peer reviews and public comments are found in the docket for this rulemaking. Summaries of all peer reviews and public comments, as well as the Administrator's responses, are found below.

D. Issuance of Final Rule With Immediate Effective Date

The Administrative Procedure Act (APA) requires the publication of a rule "not less than 30 days before its effective date," unless the agency finds and publishes with the rule good cause for such exception.²⁰ In the context of the requirement for notice and comment on rulemakings, the APA specifies that such procedures may be avoided if an agency "for good cause finds" that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."²¹ To the extent that the same standard for establishing "good cause" applies to both excepting a rulemaking from notice and comment requirements and excepting a rulemaking from the 30-day post-publication effective date requirement, the "impracticable" and "contrary to the public interest" prongs of the good-cause exemption are particularly relevant to situations such as this, where the typical delayed effective date would defer the agency's ability to provide life-saving treatment and result in less favorable treatment outcomes and survival rates for covered individuals.

The purpose of the post-publication waiting period is to give affected parties time to adjust their behavior before the final rule takes effect. In this instance, however, the affected parties are current and prospective members of the WTC Health Program who need treatment for

uterine cancer. Currently enrolled WTC Health Program members who have already been diagnosed with uterine cancer do not require an additional 30 days to ready themselves for implementation of this rule; indeed, any delay in effective date could result in postponed medical care for such members or necessitate their paying out of pocket for care in the interim.

As discussed in the economic analysis in Section VI.A. of this rulemaking, the WTC Health Program estimates that over 200 enrolled members currently have uterine cancer; the Program anticipates these members will submit requests for certification of their uterine cancers as WTC-related as soon as the rule is issued. It is in these members' best interest that treatment for their cancer is made available as soon as possible. Neither these members nor the WTC Health Program require additional time to prepare for the implementation of this rule.²² Treatment of cancer at the earliest stages has been shown to result in the best outcomes and higher survival rates.²³ As such, there is no public interest served in further delaying the effective date of this rulemaking.

For the forgoing reasons, the Administrator and the Secretary of HHS find that good cause exists to make this rulemaking effective immediately on publication.

III. Summary of Public Comments and Independent Peer Reviews

The WTC Health Program has considered whether the public comments and the peer reviews of the evidence comprising the basis for the proposed rulemaking warrant any revision to the findings and determinations described in the NPRM. The public comments and the independent peer reviews are summarized below, followed by the WTC Health Program's response.

²² In anticipation of the potential addition of uterine cancer to the List of covered health conditions, the WTC Health Program has prepared internal procedures and has worked closely with the CCEs and Nationwide Provider Network, the contractors tasked with requesting cancer certifications for members where appropriate, to ensure all parties are ready to begin processing uterine cancer certification requests from Program physicians.

²³ The American Cancer Society reports a 96 percent 5-year relative survival rate for people diagnosed with uterine cancer that is still confined to the uterus (generally considered Stage I); the 5-year survival rate drops exponentially to 20 percent for people diagnosed with uterine cancer that has spread to distant parts of the body (*e.g.*, lungs, liver, or bones) (generally considered Stage IV). See <https://www.cancer.org/cancer/endometrial-cancer/detection-diagnosis-staging/survival-rates.html>.

A. Summary of Public Comments

Twenty-seven public commenters submitted comments to the docket for this rulemaking. Twenty-six expressed unequivocal agreement with the addition of uterine cancer to the List. One commenter expressed displeasure with the WTC Health Program's process for adding health conditions to the List; that comment is outside the scope of this rulemaking and is not further addressed.

Of the 26 supportive public comments, one asked that the Administrator also consider adding fibroid tumors, endometriosis, and infertility to the List. Another of the supportive comments described concerns with inequities in the WTC Health Program's research agenda, faulting the Program for "routinely pass[ing] over" research proposals to study survivor cohorts. These comments are also outside the scope of this rulemaking but are discussed further below.

No public commenter suggested additional references to scientific evidence regarding causes of uterine cancer, nor did any commenter indicate that there were any flaws in the WTC Health Program's evaluation of the available evidence or the Administrator's determination.

B. Summary of Independent Peer Reviews

The de-identified peer reviewers were labelled as Reviewer A, Reviewer B, and Reviewer C; their reviews of the content of the NPRM are summarized below.

Question 1: Are you aware of any other studies which should be considered? If so, please identify them.

Reviewer A suggested that a study by Curtis *et al.* [2019]²⁴ should be included in the evaluation.

Reviewer B was not aware of any "additional epidemiology studies that should have been considered using Method 1," nor any other studies using Method 2. Reviewer B described two concerns with the WTC Health Program's analysis of evidence pursuant to Method 3 of the *Policy and Procedures*. First, Reviewer B stated that the Science Team did not consider the Endocrine Society's definition of EDCs ("an exogenous chemical, or mixture of chemicals, that interferes with any aspect of hormone action") and noted that the list of EDCs found in the

²⁴ Curtis S.W., Cobb D.O., Kilaru V., Terrell M.L., Kennedy E.M., Marder M.E., Barr D.B., Marsit C.J., Marcus M., Conneely K.N., Smith A.K. [2019], *Exposure to Polybrominated Biphenyl (PBB) Associates with Genome-Wide DNA Methylation Differences in Peripheral Blood*, *Epigenetics* 14(1):52–66.

¹⁹ See *supra* note 10.

²⁰ 5 U.S.C. 553(d).

²¹ 5 U.S.C. 553(b)(B). Courts differ on whether the good cause standard for waiving notice and comment announced in sec. 553(b)(B) of the APA is the same standard that should be applied in waiving the 30-day publication rule in sec. 553(d). See Cole JP [Jan 2016], *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, Congressional Research Service, No. R44356 at 3–4 (noting that some courts have indicated that these are two distinct standards and that the test for good cause to waive notice and comment is more stringent than that used to waive the 30-day rule).

Inventory of 9/11 Agents “is almost certainly incomplete.” According to the reviewer, the WTC Health Program should have evaluated several other EDCs in the *Inventory*, including but not limited to benzo[a]pyrene, carbazole, chlordane, chromium, dibenzofuran, dieldrin, endosulfan, heptachlor, mirex, and oxychlordane. Second, Reviewer B found some of the references cited in the 2021 White Paper concerning U.S. Environmental Protection Agency (EPA) determinations of carcinogenicity to be too dated to be authoritative. Reviewer B ultimately found that the STAC’s conclusions, pursuant to its review under Method 4, are supported by a “large body of evidence.”

Finally, Reviewer C also indicated that the Method 3 review in the 2021 White Paper does not include EDCs that have “estrogenic activity,” but are not carcinogens, including: polyvinyl chloride, trichloroethylene, TCDD, and some pesticides. Reviewer C provided references to support that assertion and also asked that the WTC Health Program add a discussion of studies demonstrating the association between EDCs and uterine hyperplasia and other alterations to the uterine lining that may have a causal relationship with uterine cancer. The reviewer found the assertion in the 2021 White Paper that “[n]one of the 9/11 Agents identified as EDCs have been found by NTP, IARC, or EPA to be known to cause or be reasonably anticipated to cause uterine cancer” to be misleading because (1) the exposures studied by these organizations may not be comparable to the extensive exposures experienced by WTC responders and survivors; (2) the reviews conducted by NTP, IARC, and EPA are often outdated; and (3) many studies have been conducted in male mice, precluding examination of uterine cancer. Finally, Reviewer C indicated that “women’s health and women’s health related cancers have been under examined and grossly understudied,” and offered a reference²⁵ to demonstrate that breast and ovarian cancer are associated with EDCs and that the mechanisms of action through which EDCs can impair endocrine system function and cause those cancers are similar to the known causes of uterine cancer.

Question 2: Have the requirements of this Policy and Procedures been fulfilled? If not, please explain which requirements are missing or deficient.

All three peer reviewers found that the WTC Health Program’s scientific

evaluation and proposed rulemaking fulfilled the requirements in the *Policy and Procedures*.

Question 3: Is the interpretation of the available information appropriate, and does it support the conclusion to add the health condition, as described in the regulatory text, to the List? If not, please explain why.

Reviewer A agreed that it was appropriate for the Administrator “to use Method 4 of the Policy and Procedures to include uterine cancer.” Reviewer A argued, however, that the WTC Health Program should consider the addition of uterine cancer to the List pursuant to Method 2, based on the association of uterine cancer with estrogen-secreting tumors, which may themselves be associated with EDCs. Reviewer A also pointed to their own research on polybrominated biphenyl, a type of flame retardant, which is similar to a chemical found at the WTC site and shows “considerable overlap with endogenous estrogen.”

Reviewer B stated that they believed the rationale used by the Administrator to support the addition of uterine cancer to the List was sound.

Reviewer C agreed that the interpretation of the available information was appropriate but thought that “some important evidence of risk factors for developing uterine cancer were under identified.” Reviewer C suggested EDCs and other toxins contained in WTC dust may lead to risk factors that, in turn, may lead to uterine cancer.

C. WTC Health Program Response to Public Comments

The WTC Health Program finds that the comment regarding the addition of other female reproductive health conditions (*i.e.*, fibroid tumors, endometriosis, and infertility) to the List to be outside the scope of this rulemaking, which only contemplates the sufficiency of the scientific evidence for the addition of uterine cancer to the List.

Although the comment about purported inequities in the WTC Health Program research agenda is also outside the scope of the rulemaking, the Administrator notes that the Program continually evaluates its research priorities and is committed to funding research that includes all 9/11-exposed populations. The WTC Health Program manages and solicits research on a broad range of health conditions related to the 9/11-exposed population of workers and community members, including health conditions among women, members of minority groups, and persons exposed as children. With

input from researchers and community members, the WTC Health Program monitors the progress of each award cycle and adjusts solicitations as needed to promote an appropriate balance of health conditions and exposure cohorts.²⁶ All extramural research funded by grant or cooperative agreement is awarded under a competitive process following the widely accepted National Institutes of Health framework.²⁷ Each research proposal is rigorously reviewed by an independent panel of experts and is subsequently scored according to its merits, including aims that address health equity. The research portfolio has been and continues to be the product of the quantity and quality of the proposed research.²⁸

The public comments were overwhelmingly supportive of the proposal to add uterine cancer to the List. Moreover, public commenters did not suggest any additional references or identify concerns with the evaluation of evidence presented in the NPRM or the Administrator’s determination. Therefore, there are no changes to this rulemaking as a result of the public comments.

D. WTC Health Program Response to Independent Peer Reviews

The WTC Health Program has considered the independent peer reviews of the scientific and technical evidence presented in the NPRM. The peer reviewers favored the addition of uterine cancer to the List and offered supplemental evidence in support of the addition. Many of the reviewers’ suggestions for improving the Program’s evaluation of the evidence supporting the addition of uterine cancer to the List

²⁶ For example, a multi-year WTC survivor-only research solicitation was initiated in the most recent cycle in response to concerns raised by community members. See <https://grants.nih.gov/grants/guide/ffa-files/RFA-OH-22-004.html>.

²⁷ All WTC Health Program extramural research grant and cooperative agreement applications accepted for funding consideration: (1) are evaluated for scientific and technical merit by appropriate Scientific Review Group(s) convened by CDC/NIOSH in accordance with CDC peer review policy and procedures (www.cdc.gov/os/quality/support/peer-review.htm), the HHS Grant Policy Statement (www.hhs.gov/sites/default/files/grants/policies-regulations/hhsgrps107.pdf), and specific guidance contained in published research funding opportunity announcements (FOAs); (2) receive a second level of review for programmatic relevance and balance by a WTC Health Program Secondary Review Committee; and (3) compete for available funds with all other recommended applications submitted in response to an FOA. Additional information on the peer review process used can be found at <https://grants.nih.gov/grants/peer-review.htm>.

²⁸ For more information about the WTC Health Program’s research priorities, see <https://www.cdc.gov/ResearchGateway>.

²⁵ Rachoń D. [2015], *Endocrine Disrupting Chemicals (EDCs) and Female Cancer: Informing the Patients*, *Rev Endocr Metab Disord* 16:359–364.

were compelling. As a result, the Science Team has revised and finalized the White Paper (final White Paper) to address the peer reviewers' suggestions.²⁹ The final White Paper is included in the docket for this rulemaking. The WTC Health Program's evaluation of the supplemental evidence provided by the peer reviewers is discussed below.

Endocrine Disrupting 9/11 Agents

Upon careful evaluation of the information provided by all three reviewers in response to *Question 1*, the WTC Health Program has found that the scientific analysis described in the NPRM did not fully capture all of the 9/11 agents identified in the *Inventory of 9/11 Agents* that are known or potential endocrine disruptors. Accordingly, the Science Team has reevaluated whether the 9/11 agents that are included as known or potential EDCs in Table 3 of the 2021 White Paper³⁰ was comprehensive or if additional 9/11 agents may also be considered known and potential EDCs. Following the reevaluation, the Science Team concluded that 9/11 agents beyond those listed in the 2021 White Paper, might also exhibit endocrine disrupting properties. The Science Team's process and conclusion are described below.

In the absence of an internationally harmonized list of known and potential EDCs, the Science Team has evaluated 9/11 agents by comparing each 9/11

²⁹ Following review of public comments and peer reviews on the May 2022 NPRM, the WTC Health Program Science Team revised the 2021 White Paper twice. In an August 2022 revision of the white paper, the Science Team added the definition of EDC by the Endocrine Society and a reference to the Society's position statement on EDCs; revised Table 3 to include an additional 84 agents, mixtures, and categories of agents known and potential EDCs; and to exclude the EPA classifications of carcinogenicity found in the earlier drafts. In January 2023, the white paper was finalized and retitled *Scientific Considerations for Addition of Uterine Cancer to the List of Covered Conditions by the World Trade Center Health Program: Final Assessment and Follow-Up to November 18, 2021, Scientific/Technical Advisory Committee (STAC) Meeting*. In the final White Paper, the Science Team revised Table 3 to sort the 9/11 agents, mixtures, and categories in alphabetical order; revised the section named "WTC Health Program's Actions after Receipt of the STAC Recommendation" to clarify that the Administrator initiated this rulemaking to add uterine cancer to the List in response to the STAC recommendation; and added an appendix reflecting the discussion about mechanisms of endocrine disruption in the preamble of this rulemaking. Both the August 2022 revision and the January 2023 final White Paper are available at https://www.cdc.gov/wtc/stac_meeting.html and in the docket for this rulemaking.

³⁰ Table 3 includes a list of substances in the *Inventory of 9/11 Agents* that are known and potential endocrine disruptors and their reported carcinogenicity by authoritative bodies.

agent listed in the *Inventory* to publicly available lists of known and potential endocrine disruptors. Comparison lists included the following:

- The Endocrine Disruptor Lists published by the national authorities in six European Union (EU) member countries: *List of Substances Identified as Endocrine Disruptors at EU Level*, the *List of Substances Under Evaluation for Endocrine Disruption Under an EU Legislation*, and the *List of Substances Considered, by the Evaluating National Authority, to Have Endocrine Disrupting Properties*,³¹ which altogether identify 194 chemicals recognized as known or potential endocrine disruptors. The EU lists are updated at least bi-annually and were most recently updated in June 2022.
- The United Nations Environment Programme's *List of Identified Endocrine Disrupting Chemicals*,³² which identifies 45 chemical substances as endocrine disruptors and was last updated in July 2017.
- The Endocrine Disruption Exchange's *List of Potential Endocrine Disruptors*, a master list of 1,482 chemicals with at least one study demonstrating endocrine disrupting properties, last updated in September 2018.³³
- The SIN (Substitute It Now) List developed by the non-profit International Chemical Secretariat (ChemSec).³⁴ ChemSec recommends ceasing use of 32 EDCs on the SIN List, last updated in 2014, because of their threat to human health and the environment.

As a result of this reevaluation, the Science Team has concluded that additional 9/11 agents and categories of 9/11 agents should be added to the 9/11 agents and categories previously listed in Table 3 of the 2021 White Paper as known or potential EDCs. Accordingly, Table 3 of the final White Paper now includes 136 individual 9/11 agents, one mixture (diesel exhaust), and 10 categories of 9/11 agents that may be evaluated as a group.

³¹ The Endocrine Disruptor Lists are compiled by the national authorities of Belgium, Denmark, France, The Netherlands, Sweden, and Spain. See <https://edlists.org/>.

³² United Nations Environment Programme, International Panel on Chemical Pollution [2017], *Worldwide Initiatives to Identify Endocrine Disrupting Chemicals (EDCs) and Potential EDCs*, https://wedocs.unep.org/bitstream/handle/20.500.11822/25633/EDC_report1.pdf?sequence=1&isAllowed=y.

³³ The Endocrine Disruption Exchange (TEDX), <https://endocrinedisruption.org/interactive-tools/tedx-list-of-potential-endocrine-disruptors/search-the-tedx-list>.

³⁴ The International Chemical Secretariat, *Endocrine Disrupting Chemicals*, <https://sinlist.chemsec.org/endocrine-disruptors/>.

Of the 9/11 agents and categories of 9/11 agents that are now included in Table 3 and recognized by the WTC Health Program as known or potential EDCs, 78 have been evaluated by IARC for carcinogenicity. EDC 9/11 agents have been classified by IARC as follows:

- 12 EDC 9/11 agents and categories as *carcinogenic to humans* (Group 1),
- 8 EDC 9/11 agents and categories as *probably carcinogenic to humans* (Group 2A),
- 20 EDC 9/11 agents and categories as *possibly carcinogenic to humans* (Group 2B), and
- 38 EDC 9/11 agents and categories as not classifiable as to carcinogenicity to humans (Group 3).

The remainder—55 individual EDC 9/11 agents and three categories—have not been evaluated by IARC.³⁵ NTP classifies seven EDC 9/11 agents and categories as *known to be human carcinogens* and 23 EDC 9/11 agents and categories as *reasonably anticipated to be human carcinogens*;³⁶ the rest of the EDCs—101 individual 9/11 agents and 5 categories—have not been evaluated by NTP. For each cancer site, IARC identifies chemical, physical, and biological entities or exposure circumstances with *sufficient* or *limited* evidence of carcinogenicity in humans. IARC does not identify any EDC 9/11 agents, categories, or any other hazard included in the *Inventory of 9/11 Agents* as having sufficient or limited evidence in humans of causing cancer in the uterus.³⁷

The Science Team also has acknowledged Reviewer B's concerns that the EPA classifications of carcinogenicity are not always up to date and should not be relied upon for current scientific knowledge. Some EPA evaluations of the carcinogenicity of 9/11 agents in the *Inventory* were conducted decades ago (e.g., evaluations for phthalates such as benzyl butyl phthalates and dibutyl phthalate were last updated between 1987 and 1990) and some assessments are currently in development (e.g., chloroform, chromium, cobalt, formaldehyde, mercury, naphthalene,

³⁵ World Health Organization, International Agency for Research on Cancer (IARC), *List of Classifications; Agents Classified by the IARC Monographs, Volumes 1–132*, <https://monographs.iarc.who.int/list-of-classifications>. Last visited August 22, 2022.

³⁶ National Toxicology Program (NTP), HHS, 15th Report on Carcinogens, <https://ntp.niehs.nih.gov/go/roc15>. Last visited August 22, 2022.

³⁷ World Health Organization, International Agency for Research on Cancer (IARC), *List of Classifications by Cancer Sites with Sufficient or Limited Evidence in Humans, IARC Monographs, Volumes 1–132*, https://monographs.iarc.who.int/wp-content/uploads/2019/07/Classifications_by_cancer_site.pdf. Last visited September 15, 2022.

perfluorodecanoic acid, perfluorohexanesulfonic acid, polychlorinated biphenyls, uranium, and vanadium).³⁸ Additionally, the Science Team has found that use of EPA references may be confusing since they are not required for review under any of the methods in the *Policy and Procedures* discussed above. To address these concerns, the Science Team has decided to remove the EPA carcinogenicity classification column from Table 3 of the final White Paper.

Mechanisms of Endocrine Disruption

The Science Team also has evaluated the references provided by peer reviewers to supplement the STAC's discussion of some potential mechanisms of action³⁹ through which EDCs might cause uterine cancer in humans. Much of the available research on EDCs' mechanisms of action has focused on EDCs which are not also identified 9/11 agents in the *Inventory of 9/11 Agents*. Indeed, some of the specific chemicals and toxins identified as EDCs by the peer reviewers based on supplemental sources have not been identified by the WTC Health Program as 9/11 agents. The Science Team has recognized, however, that the list of 9/11 agents identified by the WTC Health Program in the *Inventory* may not be complete and that WTC-related uterine cancer may be associated with chemicals and toxins that exhibit estrogenic properties that may be identified as 9/11 agents in the future. Regardless of whether there are EDCs that may be associated with uterine cancer that may be added to the *Inventory* in the future, the Science Team has found it instructive to examine mechanisms of action for endocrine disruption even for those EDCs that have not been recognized as 9/11 agents. The supplemental references' descriptions of mechanisms of endocrine disruption illustrate the various ways in which exposure to EDCs could impact the female reproductive system and result in uterine cancer. The similar mechanisms of action for other EDCs help provide a complete picture of the possible causal relationship between the September 11, 2001, terrorist attacks, and uterine cancer among WTC responders and survivors.⁴⁰

³⁸ See U.S. Environmental Protection Agency (EPA), Integrated Risk Information System (IRIS) Assessments, https://iris.epa.gov/AtoZ/?list_type=erd.

³⁹ Mechanisms of action are the biochemical processes underlying the adverse response to exposure; these processes may lead to risk factors for or development of disease, such as cancer.

⁴⁰ The EDCs discussed in this section include:

Most endometrial tumors are hormonally driven through estrogen signaling via estrogen receptors α and β acting as an oncogenic signal. The main risk factors (*i.e.*, estrogen therapy without progestins, tamoxifen for the treatment of breast cancer, parity, oral contraceptive use, age at menarche) and some treatment options (*i.e.*, progestin therapies) for endometrial cancer patients underscore a key role for estrogen signaling in the disease.⁴¹ Estrogen-like chemicals have been shown to mimic the estrogen pathway and affect the normal function of female sex hormones. This mechanism is suspected to lead to carcinogenesis in women, including the development of endometrial cancer, breast and ovarian cancers, and prostate cancer in men.⁴² EDCs can interfere with the function and metabolism of estrogen; breast and ovarian cancers are associated with EDCs and their current known mechanisms of action are similar to those of uterine cancer.⁴³ For example, experimental studies in animals exposed to endocrine-disrupting alkylphenols such as nonylphenol and oxyphenol, as well as a case-control study, suggest an association between exposure to EDCs and endometrial cancer.⁴⁴ Experimental animal and *in vitro* studies have shown that exposure to the EDCs bisphenol A (BPA) and 2,4-dichlorodiphenyltrichloroethane (DDT) result in changes that could lead endometrial cells towards malignancy.⁴⁵

- 9/11 agents: 2,4-dichlorodiphenyltrichloroethane (DDT); polyvinyl chloride plastics (which contain phthalates); trichloroethylene (and its major metabolites); TCDD; chlordanes; dieldrin; endosulfan; hexachlorobenzene (HCB); lindane; heptachlor; metribuzin; mirex; cadmium; and WTC dust.

- Non-9/11 agents: alkylphenols (*e.g.*, nonylphenol and oxyphenol); bisphenol A (BPA); di(2-ethylhexyl)phthalate (DEHP); and polybrominated biphenyl (PBB).

⁴¹ Rodriguez AC, Blanchard Z, Maurer KA, Gertz J [2019]. *Estrogen Signaling in Endometrial Cancer: A Key Oncogenic Pathway with Several Open Questions*, *Horm Cancer* 10(2–3), 51–63.

⁴² Deroo BJ, Korach KS [2006]. *Estrogen Receptors and Human Disease*, *J Clin Invest* 116(3):561–570.

⁴³ See *supra* note 26.

⁴⁴ Zhang W, Yang J, Wang J, Xia P, Xu Y, Jia H, Chen Y [2007]. *Comparative Studies on the Increase of Uterine Weight and Related Mechanisms of Cadmium and p-Nonylphenol*, *Toxicology* 241(1–2):84–91; Kim J, Cha S, Lee MY, Hwang YJ, Yang E, Ryu C, Jung HI, Cheon YP [2018]. *Chronic Low-Dose Nonylphenol or Di-(2-ethylhexyl) Phthalate Has a Different Estrogen-Like Response in Mouse Uterus*, *Dev Reprod* 22(4):379–391; Wen HJ, Chang TC, Ding WH, Tsai SF, Hsiung CA, Wang SL [2020]. *Exposure to Endocrine Disruptor Alkylphenols and the Occurrence of Endometrial Cancer*, *Environ Pollut* 267:115475.

⁴⁵ Scsukova S, Rollerovab E, Mlynarcikova AB [2016]. *Impact of Endocrine Disrupting Chemicals on Onset and Development of Female Reproductive Disorders and Hormone-Related Cancer*, *Reprod Biol* 16:243–254.

Studies in animal models show that exposure to some EDCs can cause endometrial hyperplasia (a proliferation of endometrial glands) and other alterations to the uterine lining.⁴⁶ Endometrial hyperplasia with atypia is of clinical significance because it may progress to, or coexist with, endometrial carcinoma. However, no human studies that showed an association between EDCs and endometrial hyperplasia were identified. Nonetheless, experimental animal studies have identified some evidence that suggests the likelihood of occurrence in humans.

EDCs such as di(2-ethylhexyl)phthalate (DEHP) and cadmium have also been associated with uterine leiomyoma (a benign smooth muscle tumor, also known as a fibroid, that causes symptoms such as uterine bleeding and severe pelvic pain, which may result in infertility or major surgery). A meta-analysis of five studies showed that urinary DEHP metabolites were statistically significantly associated with an increased risk of uterine leiomyoma, although the mechanism is still not well understood.⁴⁷ Moreover, an *in vitro* study showed that fibroid cells subjected to cadmium exposure for two months show enhanced migration potential, augmented anchorage-independent growth, and increased

⁴⁶ Singh P, Bhartiya D [2022]. *Molecular Insights into Endometrial Cancer in Mice*, *Stem Cell Rev Rep* 18(5):1702–1717; Guerrero Schimpf M, Milesi MM, Zanardi MV, Varayoud J [2022]. *Disruption of Developmental Programming with Long-Term Consequences after Exposure to a Glyphosate-Based Herbicide in a Rat Model*, *Food Chem Toxicol* 159:112695; Neff AM, Blanco SC, Flaws JA, Bagchi IC, Bagchi MK [2019]. *Chronic Exposure of Mice to Bisphenol-A Alters Uterine Fibroblast Growth Factor Signaling and Leads to Aberrant Epithelial Proliferation*, *Endocrinology* 160(5):1234–1246; Nasiadek M, Danilewicz M, Sitarek K, Swiatkowska E, Daragó A, Stragierowicz J, Kilanowicz A [2018]. *The Effect of Repeated Cadmium Oral Exposure on the Level of Sex Hormones, Estrous Cyclicity, and Endometrium Morphometry in Female Rats*, *Environ Sci Pollut Res Int* 25(28):28025–28038; Padmanabhan R, Hendry IR, Knapp JR, Shuai Bin, Hendry WJ [2017]. *Altered MicroRNA Expression Patterns During the Initiation and Promotion Stages of Neonatal Diethylstilbestrol-Induced Dysplasia/Neoplasia in the Hamster (Mesocricetus auratus) Uterus*, *Cell Biol Toxicol* 33(5):483–500; Wikoff DS, Rager JE, Haws LC, Borghoff SJ [2016]. *A High Dose Mode of Action for Tetrabromobisphenol A-Induced Uterine Adenocarcinomas in Wistar Han Rats: A Critical Evaluation of Key Events in an Adverse Outcome Pathway Framework*, *Regul Toxicol Pharmacol* 77:143–159; Hendry WJ, Hariri HY, Alwis ID, Gunewardena SS, Hendry IR [2014]. *Altered Gene Expression Patterns During the Initiation and Promotion Stages of Neonatal Diethylstilbestrol-Induced Hyperplasia/Dysplasia/Neoplasia in the Hamster Uterus*, *Reprod Toxicol* 50:68–86.

⁴⁷ Fu, Z, Zhao F, Chen K, Xu J, Li P, Xia D, Wu Y [2017]. *Association Between Urinary Phthalate Metabolites and Risk of Breast Cancer and Uterine Leiomyoma*, *Reprod Toxicol* 74:134–142.

DNA synthesis, suggesting EDC-induced potential progression towards uterine cancer.⁴⁸

In addition to interacting with estrogen receptors α and β , EDCs are known to bind to and activate the estrogen-related receptor gamma (ERR γ). BPA has weak estrogenic activity due to its limited capacity to bind to nuclear estrogen receptors α and β . Nonetheless, ERR γ is activated by BPA and interacts with the ligand domain of estrogen receptors.⁴⁹ Multiple studies show that BPA may increase the risk of estrogen-related cancers.⁵⁰

EDCs are also known to play a role in endocrine disruption leading to epigenetic⁵¹ changes. An instructive example is a study among Michigan residents accidentally exposed to the EDC polybrominated biphenyl (PBB). The study's authors found differences in epigenetic marks (chemicals which turn genes "on" and "off") that suggest that PBB acts similarly to estrogen and is associated with dysregulated immune system pathways. The authors also found evidence that PBB could be acting like an estrogen, impacting gene expression.⁵² Furthermore, EDCs may increase uterine sensitivity to estrogens due to epigenetic alterations. Another example is a study in female mice in which BPA administered *in utero* increased the expression of the developmental homeobox gene *Hoxa10* that controls uterine organogenesis. Alterations in methylation of *Hoxa10* have been associated with several human cancers.⁵³

In addition, endocrine disruption caused by some 9/11 agents alters

reproductive and sexual development, and may lead to other health outcomes such as obesity and diabetes that affect the risk of uterine cancer development.⁵⁴ The following identified EDC 9/11 agents may pose such risks for the development of uterine cancer: polyvinyl chloride plastics, which contain phthalates;⁵⁵ trichloroethylene and its major metabolites;⁵⁶ TCDD, which is an EDC that has antiestrogenic properties;⁵⁷ and pesticides such as chlordane, DDT, dieldrin, endosulfan, hexachlorobenzene, lindane, heptachlor, metribuzin, and mirex.⁵⁸

Finally, the development of most endocrine cancers is likely to be the result of low-dose exposures to complex chemical mixtures in the environment throughout a person's life.⁵⁹ WTC dust is a complex mixture of EDCs and other environmental chemicals. Exposure to WTC dust, when added to the usual low-dose environmental chemical exposures experienced in a person's lifetime, may directly or indirectly influence the development of uterine cancer. Combined exposures have simultaneous effects on the endocrine system that could affect the development of uterine cancer and its risk factors.⁶⁰

⁵⁴ Eales J, Bethel A, Galloway T, Hopkinson P, Morrissey K, Short RE, Garside R [2022], *Human Health Impacts of Exposure to Phthalate Plasticizers: An Overview of Reviews*, Environ Int 158:106903.

⁵⁵ Ohashi A, Kotera H, Hori H, Hibiya M, Watanabe K, Murakami K, Hasegawa M, Tomita M, Hiki Y, Sugiyama S [2005], *Evaluation of Endocrine Disrupting Activity of Plasticizers in Polyvinyl Chloride Tubes by Estrogen Receptor Alpha Binding Assay*, J Artif Organs 8(4):252; Bang DY, Kyung M, Kim MJ, Jung BY, Cho MC, Choi SM, Kim YW, Lim SK, Lim DS, Won AJ, Kwack SJ, Lee Y, Kim HS, Lee BM [2012], *Human Risk Assessment of Endocrine-Disrupting Chemicals Derived from Plastic Food Containers*, Compr Rev Food Sci Food Saf 11:453–70; Yan Y, Zhu F, Zhu C, Chen Z, Liu S, Wang C, Gu C [2021], *Dibutyl Phthalate Release from Polyvinyl Chloride Microplastics: Influence of Plastic Properties and Environmental Factors*, Water Res 204:117597; Mariana M, Feiteiro J, Verde I, Cairrao E [2016], *The Effects of Phthalates in the Cardiovascular and Reproductive Systems: A Review*, Environ Int 94:758–776.

⁵⁶ Tachachartvanich P, Sangsuwan R, Ruiz HS, Sanchez SS, Durkin KA, Zhang L, Smith MT [2018], *Assessment of the Endocrine-Disrupting Effects of Trichloroethylene and its Metabolites Using In Vitro and In Silico Approaches*, Environ Sci Technol 52(3):1542–1550.

⁵⁷ Boverhof DR, Kwekel JC, Humes DG, Burgoon LD, Zacharewski TR [2006], *Dioxin Induces an Estrogen-Like, Estrogen Receptor-Dependent Gene Expression Response in the Murine Uterus*, Mol Pharmacol 69(5):1599–1606.

⁵⁸ Mnif W, Hassine AI, Bouaziz A, Bartegi A, Thomas O, Roig B [2011], *Effect of Endocrine Disruptor Pesticides: A Review*, Int J Environ Res Public Health 8(6):2265–303.

⁵⁹ Darbre PD [2022], Chapter 8: Exposure to Mixtures of EDCs and Long-Term Effects, in *Endocrine Disruption and Human Health* (Darbre PD, ed., Elsevier, 2nd ed.).

⁶⁰ See *supra* note 26.

E. WTC Health Program Science Team Conclusion

In response to the peer reviews, the Science Team has updated its analysis and issued the final White Paper⁶¹ including the Endocrine Society's definition of EDC and a reference to the Society's position statement on EDCs; the final White Paper recognizes 84 additional 9/11 agents in the *Inventory of 9/11 Agents* as known or potential EDCs in Table 3. The Science Team has also clarified in the final White Paper that among all 9/11 agents that are known or potential EDCs and that have been evaluated for their carcinogenicity by NTP and IARC, none are currently *known to cause or reasonably anticipated to cause* uterine cancer. Finally, the Science Team has modified the final White Paper to incorporate an appendix reflecting the discussion about mechanisms of endocrine disruption in this preamble.

The evidence provided by independent peer reviewers is compelling. However, the additional information does not alter the evaluations and conclusions found in the Science Team's final White Paper because the scope of the White Paper was limited to an assessment of the evidence for adding uterine cancer to the List based on Methods 1–3 of the *Policy and Procedures* described above. The peer reviewers did not suggest any epidemiologic studies of uterine cancer in the 9/11-exposed population; therefore, no further analysis was conducted under Method 1. No studies were suggested to demonstrate support for a causal association between a health condition already on the List and uterine cancer; therefore, no further analysis was conducted under Method 2. Finally, Method 3 relies on: (1) an NTP finding that the 9/11 agent is *known or reasonably anticipated to be a human carcinogen*, and (2) an IARC finding that there is *sufficient or limited* evidence in humans that the 9/11 agent causes that cancer. Although some of the 9/11 agents identified as known or potential EDCs that have been added to Table 3 of the final White Paper are considered by NTP to be *known human carcinogens or reasonably anticipated to be human carcinogens*, IARC has not determined that there is *sufficient or limited* evidence in humans that any 9/11 agent EDC or any other hazard in the *Inventory* causes uterine cancer. Therefore, the Science Team has continued to find that there is insufficient evidence available to

⁶¹ See *supra* note 30.

⁴⁸ Yan Y, Liu J, Lawrence A, Dykstra MJ, Fannin R, Gerrish K, Tucker CJ, Scappini E, Dixon D [2021], *Prolonged Cadmium Exposure Alters Benign Uterine Fibroid Cell Behavior, Extracellular Matrix Components, and TGF β Signaling*, FASEB J 35(8):e21738.

⁴⁹ Hwang KA, Choi KC [2015], Chapter One: Endocrine-Disrupting Chemicals with Estrogenicity Posing the Risk of Cancer Progression in Estrogen-Responsive Organs, in *Advances in Molecular Toxicology, Volume 9*, (Fishbein JC and Heilman JM, eds., Elsevier).

⁵⁰ Soto AM, Sonnenschein C [2010], *Environmental Causes of Cancer: Endocrine Disruptors as Carcinogens*, Nat Rev Endocrinol 6(7):363–370.

⁵¹ Changes in gene expression caused by environmental factors that do not involve alteration of the DNA sequence.

⁵² Curtis SW, Cobb DO, Kilaru V, Terrell ML, Kennedy EM, Marder ME, Barr DB, Marsit CJ, Marcus M, Conneely KN, Smith AK [2019], *Exposure to Polybrominated Biphenyl (PBB) Associates with Genome-Wide DNA Methylation Differences in Peripheral Blood*, Epigenetics 14(1):52–66.

⁵³ See Scsukova S, et al., *supra* note 46; Bromer JG, Zhou Y, Taylor MB, Doherty L, Taylor HS [2010], *Bisphenol-A Exposure in Utero Leads to Epigenetic Alterations in the Developmental Programming of Uterine Estrogen Response*, FASEB J 24:2273–2280.

support the addition of uterine cancer to the List pursuant to Method 3.

For the reasons discussed above, the Science Team's analysis and conclusion are unchanged: there continues to be no evidence to support the addition of uterine cancer to the List pursuant to Methods 1 or 3, but sufficient evidence supports the addition of uterine cancer to the List for qualified WTC Health Program members, pursuant to Method 2 (*i.e.*, only for those Program members who have a certified WTC-related estrogen-secreting tumor). However, the Science Team has found that the evaluations and supplemental information provided by the peer reviewers in response to the NPRM provide additional support for the STAC recommendation and rationale provided to the Administrator under Method 4.

IV. Administrator's Final Decision Regarding Uterine Cancer

The Administrator and Secretary of HHS proposed the addition of uterine cancer⁶² to the List after reviewing the available body of scientific evidence describing the causal relationship between 9/11 exposures and uterine cancer, including certain 9/11 agents which are known or potential EDCs, as well as evaluating the STAC's comprehensive rationale and recommendation. In accordance with the WTC Health Program's Policy and Procedures, the Administrator evaluated the available information under the four methods developed for determining whether to add a type of cancer to the List. The Administrator's evaluation was discussed in full in Section III.E. of the NPRM.⁶³ During the NPRM public comment period, 26 public commenters and three independent peer reviewers expressed unanimous support for the addition of uterine cancer to the List based on the STAC's recommendation. Peer reviewers found that the totality of evidence points to a causal association between 9/11 agents that are known or potential EDCs and uterine cancer in the 9/11-exposed population.

The Administrator considered the public comments and peer reviews as well as the Science Team's description and evaluation of the supplemental evidence regarding mechanisms by which EDCs could affect the development of uterine cancer and its risk factors. First, the Administrator assessed whether there was sufficient evidence in peer-reviewed, published, epidemiologic studies of 9/11-exposed populations to support adding uterine cancer to the List under Method 1. The

Administrator concurred with the Science Team's evaluation of the literature pursuant to Method 1 and found that the available literature did not provide sufficient support for the addition of uterine cancer to the List under Method 1. Because no peer-reviewed, published, epidemiologic studies of uterine cancer in 9/11-exposed populations were identified by peer reviewers or public commenters, the Administrator has determined that the evidence available under Method 1 is insufficient to support the addition of uterine cancer to the List.

Next, the Administrator reviewed whether multiple peer-reviewed epidemiologic studies establish a causal association between a condition already on the List and that type of cancer to permit an addition to the List under Method 2. In the NPRM, the Administrator agreed with the Science Team's finding that there is evidence of a causal association between estrogen-secreting tumors, which are considered rare cancers within the WTC Health Program, and uterine cancer. Thus, the Administrator found that uterine cancer may be proposed for addition to the List pursuant to Method 2, but such an addition would be limited to only those WTC Health Program members who have a certified WTC-related estrogen-secreting tumor. Neither peer reviewers nor public commenters provided studies refuting a causal association between estrogen-secreting tumors and uterine cancer. Therefore, the Administrator has determined that uterine cancer may be added to the List pursuant to Method 2, but only for those WTC Health Program members with a qualifying certified WTC-related estrogen-secreting tumor.

Pursuant to Method 3, the Administrator examined NTP and IARC evaluations of carcinogenicity of 9/11 agents. Method 3 permits an addition to the List if: (1) NTP has determined that a specific 9/11 agent is *known to be a human carcinogen* or *reasonably anticipated to be a human carcinogen*, and (2) IARC has determined that there is *sufficient* or *limited* evidence in humans that the 9/11 agent causes uterine cancer. As described in the NPRM, the Administrator concurred with the Science Team's conclusion that there was insufficient evidence to add uterine cancer to the List because IARC has not determined there is *sufficient* or even *limited* evidence in humans that any of the 9/11 agents in the *Inventory of 9/11 Agents* cause uterine cancer. Following publication of the NPRM, the Administrator also reviewed the 9/11 agents added to the list of EDCs in Table 3 of the final White Paper in response to the peer reviews. He agrees that 9/11

agents that are considered by NTP to be *known* or *reasonably anticipated human carcinogens* but that are not determined by IARC to have *sufficient* or *limited* evidence of uterine carcinogenicity in humans do not meet the requirements of Method 3. Because IARC has not identified any EDCs among the 136 EDC 9/11 agents and categories of EDC 9/11 agents now recognized in Table 3 of the final White Paper, nor any other hazard included in the *Inventory* as having sufficient or limited evidence in humans of uterine carcinogenicity, the Science Team's analysis and the Administrator's determination remains unchanged. Accordingly, the Administrator has determined that the evidence available under Method 3 is insufficient to support the addition of uterine cancer to the List but acknowledges that some 9/11 agents in the *Inventory* have never been evaluated for carcinogenicity by NTP or IARC.

The Administrator ultimately proposed adding uterine cancer to the List pursuant to Method 4, which permits an addition where the STAC recommends such an addition and provides a reasonable basis for the recommendation. As explained in the NPRM, the Administrator found that the STAC's recommendation provided a reasonable basis for the addition of uterine cancer under Method 4 and the recommendation was further supported by the supplemental information presented by the Science Team in the 2021 White Paper.

Specifically, the Administrator agreed with the STAC that mechanisms of initiation and progression of uterine cancer are similar to those for several other cancers on the List.⁶⁴ The Administrator agreed with the STAC's finding that the shared etiology and pathogenesis described in the scientific literature suggest it would be unlikely that uterine cancer would be the only cancer type not related to 9/11 exposures. The Administrator also agreed that an association between exposure to EDCs in WTC dust and uterine cancer risk is plausible.⁶⁵

Following publication of the NPRM and upon review of the public comments and peer reviews and the Science Team's response, including the final White Paper, the Administrator has found that the supplemental scientific evidence complements the evidence provided by the STAC by comprehensively demonstrating the variety of mechanisms of endocrine disruption and providing additional general support for the addition of

⁶² ICD-10 codes C54 and C55. See *supra* note 1.

⁶³ *Supra* note 2 at 27966.

⁶⁴ See *supra* note 2 at 27966 and *supra* note 15.

⁶⁵ See *supra* note 2 at 27967 and *supra* note 15.

uterine cancer to the List. Given the growing body of scientific evidence suggesting that exposure to EDCs may be a risk factor for female reproductive organ cancers, the Administrator has found that it is reasonable to assume that exposure to EDCs in WTC dust may contribute to uterine cancer risk, even in the absence of a robust body of evidence conclusively demonstrating EDC carcinogenic risks in occupational cohorts of women. The Administrator continues to recognize that the disproportionately low representation of women in the most studied cohorts of exposed responders makes it epidemiologically unlikely that a definitive association between 9/11 exposures and the occurrence of uterine cancer will be identified during the lifetime of even the most highly exposed WTC Health Program members.⁶⁶

After final review of the analyses by the STAC in its recommendation, the WTC Health Program Science Team's 2021 White Paper, public comments on the NPRM, the independent peer reviews of the scientific and technical evidence comprising the basis for the proposed rule, the Science Team's response to those comments, and the final White Paper, the Administrator has concluded that evidence continues to support the addition of uterine cancer to the List. For the reasons discussed above, the Administrator has determined that there is insufficient evidence to add uterine cancer to the List pursuant to Methods 1 and 3 of the *Policy and Procedures*. Sufficient evidence exists for the addition of uterine cancer pursuant to Method 2, restricted to those members who have a qualifying estrogen-secreting tumor. Finally, pursuant to Method 4, because the STAC provided a reasonable basis for an association between 9/11 agents listed in the *Inventory of 9/11 Agents* and uterine cancer, the Administrator has determined that there is sufficient evidence to add uterine cancer to the List for all eligible members.

With this rulemaking, the Administrator and the Secretary of HHS finalize the addition of uterine cancer to the List of WTC-Related Health Conditions. Adding uterine cancer to the List in a final rule with an immediate effective date allows the WTC Health Program to begin offering treatment services as soon as possible to members whose uterine cancers are certified as WTC-related.

V. Summary of Final Rule

For the reasons discussed above, the Administrator amends 42 CFR 88.15 by

adding a new paragraph (d)(15) to include "malignant neoplasms of corpus uteri and uterus, part unspecified"⁶⁷ on the List of WTC-Related Health Conditions. The existing paragraph (d)(15)—malignant neoplasm of the ovary—and the remainder of the cancer types identified in existing paragraphs (d)(16) through (24)—rare cancers—are renumbered paragraphs (d)(16) through (25), accordingly. Finally, in renumbered paragraphs (d)(24) and (d)(25), the terms "Childhood cancers" and "Rare cancers" are unitalicized but are otherwise unchanged.

In addition to the changes described above, the Authority citation for part 88 is revised to remove the Public Law citations, retaining only the U.S. Code citations.

VI. Required Regulatory Analyses

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

Executive Orders (E.O.) 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, reducing costs, harmonizing rules, and promoting flexibility.

This final rule has been determined not to be a significant regulatory action under section 3(f) of E.O. 12866, and therefore has not been reviewed by the Office of Management and Budget (OMB). The addition of uterine cancer finalized by this rulemaking is estimated to cost the WTC Health Program between \$1,706,454 and \$3,805,173 per annum for 2023 through 2026.⁶⁸ All costs to the WTC Health Program will be transfers due to the

⁶⁷ See *supra* note 1.

⁶⁸ As discussed in this section, NIOSH estimated lower- and upper-bound estimates to reflect the uncertainty in the Agency's ability to predict the expected number of cancer cases in the three years after this rulemaking. The lower-bound reflects the general U.S. population cancer rate and uses undiscounted costs for 2023 and costs for 2024–2026 discounted at the 7 percent discount rate. The upper-bound reflects the estimated rate of uterine cancer among existing WTC Health Program members and uses undiscounted rates for 2023 and costs for 2024–2026 discounted at the 3 percent discount rate. Although, if added to the List, uterine cancer would be considered a covered condition for the duration of the WTC Health Program (currently authorized through FY 2090). The dates 2023–2026 were chosen to provide a snapshot of uterine cancer costs in the coming years.

implementation of provisions of the Patient Protection and Affordable Care Act (Pub. L. 111–148) in 2014 and as required under the authorizing statute for the WTC Health Program.⁶⁹ The rule will not interfere with state, local, or tribal governments in the exercise of their governmental functions.

Population Estimates

The WTC Health Program estimates that approximately 84,000 WTC responders and approximately 34,000 survivors, or approximately 118,000 individuals in total, are current, living Program members. Of that total population, approximately 60,000 individuals were participants in previous WTC medical programs and were enrolled as "legacy" members in the WTC Health Program established by Title XXXIII of the PHS Act. For the purpose of calculating a baseline estimate of cancer prevalence only, the Administrator assumed that a steady rate of enrollment would continue, based on the trend in enrollees through September 2021.

According to WTC Health Program data, 12 percent of the current responder members (approximately 10,000 individuals) and 50 percent of survivor members (approximately 17,000 individuals) are female.⁷⁰ Finally, because there are no existing data on cancer cases related to 9/11 exposures at either the Pentagon or in Shanksville, Pennsylvania, the Administrator has used only data from studies of individuals who were responders or survivors in the New York City disaster area.

Cost of Uterine Cancer Treatment

The Administrator estimated the treatment costs associated with covering uterine cancer in this rulemaking in U.S. dollars. The costs of treatment are divided into three treatment phases: the first year of treatment following diagnosis; the intervening years or continuing treatment after the first year; and treatment during the last year of life. The first-year costs of cancer treatment are higher due to the initial need for aggressive medical (e.g., radiation or chemotherapy) and surgical care. The costs during the last year of life are often dominated by increased hospitalization costs.⁷¹ Therefore, three

⁶⁹ Because sec. 3331(c)(3) of the PHS Act requires WTC Health Program members to maintain minimum essential insurance coverage, all treatment costs to be paid by the WTC Health Program are considered transfers.

⁷⁰ See *supra* note 4.

⁷¹ Yabroff KR, Lamont EB, Mariotto A, Warren JL, Topor M, Meekins A, Brown ML [2008], *Cost of Care for Elderly Cancer Patients in the United States*, J Natl Cancer Inst 100(9):630–41.

⁶⁶ *Id.*

different treatment phase costs were used to provide a best estimate of treatment costs in conjunction with expected incidence and long-term survival rates for uterine cancer. Average 2022 treatment costs for uterine cancer, the last year for which complete data were available, are in Table A below.

TABLE A—AVERAGE COSTS OF TREATMENT FOR UTERINE CANCER, 2022 DOLLARS

Stage of treatment	Average cost (U.S. dollars)
Initial (first 12 months after diagnosis)	\$41,283
Continuing (annual)	2,152
Last year of life (last 12 months of life)	122,954

These cost figures were based on a study of cancer patients from the Surveillance, Epidemiology, and End Results (SEER) Program maintained by the National Cancer Institute and using Medicare files.⁷² The average costs of treatment described above are given in 2022 prices, adjusted using the Medical Consumer Price Index for all urban consumers.⁷³

Incident Cases of Cancer

For the purpose of illustrating a lower-bound incidence estimate, the Administrator used the same baseline analysis described in the NPRM, calculating the number of cases of uterine cancer expected to be observed in the cohort of approximately 27,000 female responders and survivors in the WTC Health Program, based on U.S. population cancer rates.⁷⁴ Demographic characteristics of the cohort were assigned since the actual data are not available for individuals in the responder and survivor populations who have not yet enrolled in the WTC Health Program. Sex and age (at the time of exposure) distributions for responders and survivors were assumed to be the same as current members in the WTC Health Program. Because uterine cancer occurs only in females,⁷⁵

⁷² National Cancer Institute, Surveillance, Epidemiology, and End Results (SEER) Program, SEER*Stat Database: Incidence—SEER Research Data, 9 Registries, Nov 2020 Submission (1975–2018), released Apr 2021, www.seer.cancer.gov. Although patients who are Medicare members are age 65 and older, cancer treatment costs are not expected to vary with age.

⁷³ Bureau of Labor Statistics, *Consumer Price Index*, <https://www.bls.gov/cpi/data.htm>. Accessed on November 10, 2022.

⁷⁴ See *supra* note 2 at 27968.

⁷⁵ See *supra* note 4.

all calculations only consider female WTC Health Program members.

The Administrator assumed race and ethnic origin distributions for responders and survivors, respectively, according to distributions in the WTC Health Registry cohort:⁷⁶ 57 percent non-Hispanic white, 15 percent non-Hispanic black, 20 percent Hispanic, and 8 percent other race/ethnicity for responders; 50 percent non-Hispanic white, 17 percent non-Hispanic black, 15 percent Hispanic, and 18 percent other race/ethnicity for survivors. Registry follow-up for cancer morbidity for each person began on January 1, 2002, or at age 15 years, whichever occurred later. Age 15 was used because the cancer incidence rate file did not include rates for persons of less than 15 years of age. Follow-up ended on December 31, 2016, or the estimated last year of life, whichever was earlier. The estimated last year of life was used since not all persons would be expected to remain alive at the end of 2016. The estimated last year of life was based on sex, race, age, and year-specific death rates from CDC WONDER.⁷⁷ A life-table analysis program, LTAS.NET, was used to estimate the expected number of incident cancers for uterine cancer.⁷⁸ The Administrator calculated cancer incidence rates using data through 2018 from the SEER Program and estimated uterine cancer incidence in the WTC Health Program for 2002–2026.⁷⁹ The resulting sex, race, age, and year-specific cancer incidence rates were applied to the estimated person-years at risk to estimate the expected number of cancer cases for uterine cancer starting from year 2002, the first full year following the September 11, 2001, terrorist attacks, to 2026.

For the purpose of illustrating an upper-bound incidence estimate, the

⁷⁶ Jordan H.T., Brackbill R.M., Cone J.E., Debchoudhury I., Farfel M.R., Greene C.M., Hadler J.L., Kennedy J., Li J., Liff J., Stayner L., Stellman SD [2011], *Mortality Among Survivors of the Sept 11, 2001, World Trade Center Disaster: Results from the World Trade Center Health Registry Cohort*, *Lancet* 378:879–887. Note: percentages may not sum to 100 percent due to rounding.

⁷⁷ Centers for Disease Control and Prevention, National Center for Health Statistics, Compressed Mortality File 1999–2016 on CDC WONDER Online Database, released June 2017. Data are from the Compressed Mortality File 1999–2016 Series 20 No. 2U, 2016, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. <http://wonder.cdc.gov/cmfi-icd10.html>. Accessed May 29, 2021.

⁷⁸ Schubauer-Berigan M.K., Hein M.J., Raudabaugh W.M., Ruder A.M., Silver S.R., Spaeth S., Steenland K., Petersen M.R., and Waters K.M. [2011], *Update of the NIOSH Life Table Analysis System: A Person-Years Analysis program for the Windows Computing Environment*, *Am J Ind Med* 54:915–924.

⁷⁹ See *supra* note 73.

Administrator reviewed WTC Health Program records and Program Data Center monitoring exam questionnaires to identify self-reported uterine cancer diagnoses among current members. The Administrator found 254 self-reports of uterine cancer among members who filled out monitoring exam questionnaires from January 2013 to November 2022; of those members, 11 are now deceased. The limitations associated with the review of WTC Health Program data are that some of the reported cases of uterine cancer may have been diagnosed prior to 2001 and some members may have mistakenly self-reported uterine cancer. The Administrator calculated a WTC Health Program uterine cancer incidence rate based on the January 2013–November 2022 WTC Health Program data and used that rate to estimate incidence of uterine cancer among Program members for 2023 through 2026.

These case numbers are offered as estimates only; the certification of individual cancer diagnoses will be conducted on a case-by-case basis, as required by the Zadroga Act.⁸⁰ Please see the WTC Health Program website for information about how to apply for enrollment in the Program⁸¹ and about health condition certification.⁸²

Prevalence of Cancer

To determine the potential number of persons in the responder and survivor populations with cancer, the Administrator conducted two different analyses for the purposes of illustrating lower- and upper-bound cost estimates.

As discussed above and in the NPRM, for the lower-bound, baseline analysis, the Administrator used the number of incident uterine cancer cases expected, based on U.S. population rates, for each year starting with 2002 and estimated the prevalence of uterine cancer using SEER survival rate statistics for *corpus uteri* through 2026.⁸³ Using the incident cases and survival rate statistics, the Administrator estimated the lower-bound prevalence (number of persons living with cancer) of cases during the 23-year period (2002–2026) since September 11, 2001. The resulting Table B summarizes those results for each year from 2023 through 2026, the number of new cases estimated to have occurred in that year (incidence), the number of persons surviving up to 23 years beyond their first diagnosis (prevalence), and

⁸⁰ See *supra* note 9.

⁸¹ See WTC Health Program, *How to Apply* web page, <https://www.cdc.gov/wtc/apply.html>.

⁸² See WTC Health Program, “Certifications and Covered Conditions,” *Member Handbook*, <https://www.cdc.gov/wtc/handbook.html#certifications>.

⁸³ See *supra* note 73.

the number of individuals who might be expected to have died from their cancer in that year.⁸⁴

For the upper-bound estimate, the Administrator used the incidence rate calculated based on a review of data from the WTC Health Program and the Program Data Centers of self-reported

uterine cancer diagnoses among current members, discussed above, and SEER survival rate statistics for *corpus uteri* to estimate uterine cancer prevalence during the 4-year period from 2023 through 2026.⁸⁵ The resulting Table C summarizes those results for each year from 2023 through 2026, including the

number of new cases estimated to have occurred in each year, the number of persons surviving beyond their first diagnosis, and the number of individuals who might be expected to have died from their cancer in each year.

TABLE B—ESTIMATED INCIDENCE AND PREVALENCE OF UTERINE CANCER; U.S. POPULATION CANCER RATES AMONG ~27,000 WTC HEALTH PROGRAM MEMBERS [2023–2026]

	2023	2024	2025	2026
Vital status:				
New cases	17.87	18.13	18.22	18.30
Live cases from previous years	85.50	87.58	89.50	91.08
Deaths	15.27	15.79	16.41	16.44
Total new and live cases	103.37	105.71	107.72	109.38

TABLE C—ESTIMATED INCIDENCE AND PREVALENCE OF UTERINE CANCER; WTC HEALTH PROGRAM RATES AMONG ~27,000 WTC HEALTH PROGRAM MEMBERS [2023–2026]

	2023	2024	2025	2026
Vital status:				
New cases	243	25.84	30.90	31.90
Live cases from previous years	n/a	266.54	296.09	326.52
Deaths	1.07	1.23	1.35	1.47
Total new and live cases	244.07	293.61	328.34	359.89

Cost Computation

To compute the lower-bound costs for uterine cancer, the Administrator assumed that the rate of uterine cancer in the WTC Health Program is equal to the rate of uterine cancer in the U.S. population. The treatment costs for the first year of treatment (Table A, year adjusted) were applied to the predicted newly incident (Year 1) cases for each year (see Table B). Likewise, the costs of treatment for the last year of life were applied in each year to the number of people predicted to die from their cancer in that year. The costs of continuing treatment from Table A were applied to the number of individuals who had survived their cancers beyond their year of diagnosis, for each year of survival (years two to four). Because some of the members estimated to be living with uterine cancer may not meet the WTC Health Program’s exposure⁸⁶ and latency⁸⁷ requirements as necessary for certification, the Administrator

assumed that 11 percent of uterine cancer certification requests will not be approved.⁸⁸ Costs for future years are discounted at both seven percent and three percent to reflect net present value.⁸⁹

To compute the upper-bound costs, the Administrator assumed that cases of uterine cancer in the WTC Health Program will continue to increase at the WTC Health Program incidence rate derived from self-reported uterine cancer diagnoses. He further assumed that 243 cases of uterine cancer in 2023 will be considered “new” and certified by the WTC Health Program for treatment and monitoring and that every new case in 2023 will incur first-year costs (see Table A) because no information is available about the stage of treatment for each Program member who has reported a uterine cancer diagnosis. For treatment costs in future years, the Administrator applied the same formula as above for the lower-

bound estimate and assumed that 11 percent of uterine cancer certification requests will not be granted.

The sum of the annual costs in the table for the years 2023 through 2026 represents the estimated treatment costs to the WTC Health Program for coverage of uterine cancer for the 12 percent of approximately 84,000 WTC responders who are female and the 50 percent of approximately 34,000 WTC survivors who are female.

Summary of Costs

Because HHS lacks data to account for recoupment from workers’ compensation insurance or primary payment by either private health insurance or Medicare/Medicaid payments specific to uterine cancer, the estimates offered here are reflective of estimated WTC Health Program costs only and assume the Program is the primary payer. This analysis offers assumptions about the number of

⁸⁴ The 23-year survival limit is imposed based on the analytic time horizon.

⁸⁵ See *supra* note 73.

⁸⁶ See WTC Health Program [Feb 2015], *Policy and Procedures for Certification of Physician Determinations for Aerodigestive and Cancer Health Conditions*, <https://www.cdc.gov/wtc/pdfs/>

policies/WTCHPPP CertPhysDetFINAL20Feb2015-508.pdf.

⁸⁷ The minimum latency requirement for all solid cancers, including uterine cancer, is 4 years after first 9/11 exposure. See WTC Health Program [Jan 2015], *Minimum Latency & Types or Categories of Cancer*, <https://www.cdc.gov/wtc/pdfs/policies/>

WTCHP-Minimum-Cancer-Latency-PP-01062015-508.pdf.

⁸⁸ The 89 percent certification approval rate is based on historic WTC Health Program data.

⁸⁹ See OMB Circular A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a94/a094.pdf>.

current and future WTC Health Program members who are and will likely be diagnosed with uterine cancer and have their certification requests granted, to provide a conservative estimate of treatment costs to the WTC Health Program. The U.S. population average uterine cancer rate is used to identify a baseline number of expected cases among WTC Health Program members for the lower bound; an upper-bound

estimate was based on a review of the number of WTC Health Program members who self-reported uterine cancer diagnoses in questionnaires completed from January 2013 to November 2022. This analysis does not include administrative costs associated with certifying additional WTC-related uterine cancers that might result from this action.

Since the implementation of provisions of the Patient Protection and Affordable Care Act on January 1, 2014, all members and future members are assumed to have or have access to medical insurance coverage other than through the WTC Health Program.⁹⁰ Therefore, all treatment costs to be paid by the WTC Health Program from 2023 through 2026 are considered transfers.

TABLE D—MEDICAL TREATMENT COSTS FOR CERTIFIED UTERINE CANCER CASES DURING 2023–2026, 2022 DOLLARS

	2023 Costs, undiscounted		2024–2026 Costs,* 7% discount rate	2024–2026 Costs, 3% discount rate
	Cancer rate		Cancer rate	
	U.S. average	WTCHP average	U.S. average	WTCHP average
Total	\$1,785,423	\$9,508,626	\$5,040,394	\$5,712,066

* Since this table summarizes the lowest and highest cost estimates for treatment of uterine cancer, values representing 2024–2026 costs at the 7% discount rate and at the increased cancer rate and 2024–2026 costs at the 3% discount rate and at the U.S. population average rate were not included.

The Administrator found the total cost estimate range—\$1,706,454 to \$3,805,173 annually—by adding the low estimate for 2023, \$1,785,423 (U.S. cancer rate average), and the low 2024–2026 estimate in Table D, \$5,040,394 (7 percent discount rate, U.S. cancer rate average, 89 percent certification rate), and dividing the sum by four to find the annual low-cost estimate (*i.e.*, \$1,706,454). The same calculation was done for the annual high-cost estimates, adding the high estimate for 2023, \$9,508,626.20 (WTC Health Program average uterine cancer rate), to the high 2024 through 2026 estimate, \$5,712,066 (3 percent discount rate, WTC Health Program average uterine cancer rate, 89 percent certification rate), and dividing the sum by four (*i.e.*, \$3,805,173).

Examination of Benefits (Health Impact)

This section qualitatively describes the potential benefits of this rulemaking to add uterine cancer to the List in terms of the expected improvements in the health and health-related quality of life of potential uterine cancer patients treated through the WTC Health Program, compared to not conducting the rulemaking.

The Administrator does not have information on the health of the population that may have experienced 9/11 exposures and is not currently enrolled in the WTC Health Program. In addition, the Administrator has only

limited information about health insurance and healthcare services available for cases of uterine cancer potentially caused by 9/11 exposures and suffered by any population of responders and survivors, among responders and survivors both currently enrolled in the WTC Health Program and those who are not enrolled. For the purposes of this analysis, the Administrator assumed that all unenrolled responders and survivors are now covered by health insurance due to access provided by the Patient Protection and Affordable Care Act and may be receiving treatment outside the WTC Health Program.

Although the Administrator cannot quantify the benefits associated with the WTC Health Program, members with certified WTC-related uterine cancer are expected to experience better treatment outcomes with WTC Health Program physicians as compared to receiving care outside of the WTC Health Program. A recent study found that “WTC-exposed responder cancer patients enrolled in the Fire Department of the city of New York Clinical Center of Excellence or in the General Responder Cohort had higher survival rates compared with those not so enrolled.”⁹¹ Moreover, under other insurance plans, patients would likely have deductibles and copays, which impact access to care and, particularly, its timeliness.⁹² WTC Health Program

members have first-dollar coverage and hence are likely to seek care sooner, when indicated, resulting in improved treatment outcomes.

Finally, during public meetings, WTC Health Program members have expressed that the lack of social and clinical support, and lack of recognition that their diagnosed uterine cancer is a WTC-related health condition, have had a significant negative impact on their morale and quality of life.

Limitations

The analysis presented here was limited by the dearth of verifiable data on the uterine cancer status of responders and survivors who have yet to apply for enrollment in the WTC Health Program. Because of the limited data, the Administrator is not able to estimate benefits in terms of averted healthcare costs; nor is the Administrator able to estimate administrative costs, or indirect costs, such as averted absenteeism, short- and long-term disability, and productivity losses averted due to premature mortality.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-

⁹⁰ Sec. 3331(c)(3) of the PHS Act requires WTC Health Program members to maintain minimum essential insurance coverage.

⁹¹ Goldfarb D.G., Zeig-Owens R., Kristjansson D., Li J., Brackbill R.M., Farfel M.R., Cone J.E., Kahn

A.R., Qiao B., Schymura M.J., Webber M.P., Dasaro C.R., Lucchini R.G., Todd A.C., Prezant D.J., Hall C.B., Boffetta P. [2021], *Cancer Survival among World Trade Center Rescue and Recovery Workers: A Collaborative Cohort Study*. *Am J Ind Med* 64(10):815–826.

⁹² Wharam J.F., Galbraith A.A., Kleinman K.P., Soumerai S.B., Ross-Degnan D., Landon B.E. [2008], *Cancer Screening before and after Switching to a High-Deductible Health Plan*, *Ann Intern Med* 148(9):647–655.

profit organizations. The Administrator certifies that this final rule has “no significant economic impact upon a substantial number of small entities” within the meaning of the RFA.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, requires an agency to invite public comment on, and to obtain OMB approval of, any regulation that requires 10 or more people to report information to the agency or to keep certain records. The Administrator has determined that this rulemaking does not contain any new information collection requirements or recordkeeping requirements; thus, the PRA does not apply to this rulemaking. Data collection and recordkeeping requirements for the WTC Health Program are approved by OMB under “World Trade Center Health Program Enrollment, Appeals & Reimbursement” (OMB Control No. 0920–0891, exp. September 30, 2025).

D. Small Business Regulatory Enforcement Fairness Act

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.*, HHS will report the promulgation of this rule to Congress prior to its effective date.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, directs agencies to 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.” For purposes of the Unfunded Mandates Reform Act, this final rule does not include any Federal mandate that may result in increased annual expenditures in excess of \$100 million in 1995 dollars by state, local, or tribal governments in the aggregate, or by the private sector.

F. Executive Order 12988 (Civil Justice)

This final rule has been drafted and reviewed in accordance with Executive Order 12988, “Civil Justice Reform,” and will not unduly burden the Federal court system. This rule has been reviewed carefully to eliminate drafting errors and ambiguities.

G. Executive Order 13132 (Federalism)

The Administrator has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have

“Federalism implications.” The rule does not “have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.”

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

In accordance with Executive Order 13045, the Administrator has evaluated the environmental health and safety effects of this final rule on children. The Administrator has determined that the rule will have no environmental health and safety effect on children.

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

In accordance with Executive Order 13211, the Administrator has evaluated the effects of this final rule on energy supply, distribution, or use, and has determined that the rule will not have a significant adverse effect.

J. Plain Writing Act of 2010

Under Public Law 111–274 (October 13, 2010), Executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal Government administers or enforces. The Administrator has attempted to use plain language in promulgating the final rule consistent with the Federal Plain Writing Act guidelines.

List of Subjects in 42 CFR Part 88

Aerodigestive disorders, Appeal procedures, Cancer, Healthcare, Mental health conditions, Musculoskeletal disorders, Respiratory and pulmonary diseases.

For the reasons discussed in the preamble, the Administrator and HHS Secretary amend 42 CFR part 88 as follows:

PART 88—WORLD TRADE CENTER HEALTH PROGRAM

■ 1. The authority citation for part 88 is revised to read as follows:

Authority: 42 U.S.C. 300mm to 300mm–61.

■ 2. Amend § 88.15 as follows:

■ a. Redesignate paragraphs (d)(15) through (24) as paragraphs (d)(16) through (25).

■ b. Add new paragraph (d)(15).

■ c. In newly redesignated paragraph (d)(24), remove “*Childhood cancers:*” and add “*Childhood cancers:*” in its place.

■ d. In newly redesignated paragraph (d)(25), remove “*Rare cancers:*” and add “*Rare cancers:*” in its place.

The addition reads as follows:

§ 88.15 List of WTC-Related Health Conditions.

* * * * *

(d) * * *

(15) Malignant neoplasms of corpus uteri and uterus, part unspecified.

* * * * *

John J. Howard,

Administrator, World Trade Center Health Program and Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–00645 Filed 1–17–23; 8:45 am]

BILLING CODE 4163–18–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 831

[Docket No.: NTSB–2023–0001]

RIN 3147–AA24

Civil Monetary Penalty Annual Inflation Adjustment

AGENCY: National Transportation Safety Board (NTSB).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, this final rule provides the 2023 adjustment to the civil penalties that the agency may assess for violations of certain NTSB statutes and regulations.

DATES: This final rule is effective on January 18, 2023.

ADDRESSES: A copy of this final rule, published in the **Federal Register** (FR), is available at <https://www.regulations.gov> (Docket ID Number NTSB–2023–0001).

FOR FURTHER INFORMATION CONTACT: Kathleen Silbaugh, General Counsel, (202) 314–6080 or rulemaking@ntsb.gov.
SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act) requires, in pertinent part, agencies to make an annual adjustment for inflation by January 15th every year. OMB, M–16–06, *Implementation of the Federal Civil Penalties Inflation Adjustment Act*

Improvements Act of 2015 (Feb. 24, 2016). The Office of Management and Budget (OMB) annually publishes guidance on the adjustment multiplier to assist agencies in calculating the mandatory annual adjustments for inflation.

The NTSB's most recent adjustment was for fiscal year (FY) 2022, allowing the agency to impose a civil penalty up to \$1,850, effective January 14, 2022 for violations involving 49 U.S.C. 1132 (Civil aircraft accident investigations), 1134(b) (Inspection, testing, preservation, and moving of aircraft and parts), 1134(f)(1) (Autopsies), or 1136(g) (Prohibited actions when providing assistance to families of passengers involved in aircraft accidents). Civil Monetary Penalty Annual Inflation Adjustment, 87 FR 2352 (Jan. 14, 2022).

OMB has since published updated guidance for FY 2023. OMB, M–23–05, *Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 15, 2022). Accordingly, this final rule reflects the NTSB's 2023 annual inflation adjustment and updates the maximum civil penalty from \$1,850 to \$1,993.

II. The 2023 Annual Adjustment

The 2023 annual adjustment is calculated by multiplying the applicable maximum civil penalty amount by the cost-of-living adjustment multiplier, which is based on the Consumer Price Index and rounding to the nearest dollar. OMB, M–23–05, *Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 15, 2022). For FY 2023, OMB's guidance states that the cost-of-living adjustment multiplier is 1.07745.

Accordingly, multiplying the current penalty of \$1,850 by 1.07745 equals \$1,993.2825, which rounded to the nearest dollar equals \$1,993. This updated maximum penalty for the upcoming fiscal year applies only to civil penalties assessed after the effective date of this final rule. The next civil penalty adjustment for inflation will be calculated by January 15, 2024.

III. Regulatory Analysis

The Office of Information and Regulatory Affairs has determined that agency regulations that exclusively implement the annual adjustment are consistent with OMB's annual guidance, and have an annual impact of less than \$100 million are generally not significant regulatory actions under Executive Order (E.O.) 12866. OMB, M–

23–05, *Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 15, 2022). An assessment of its potential costs and benefits under E.O. 12866, *Regulatory Planning and Review* and E.O. 13563, *Improving Regulation and Regulatory Review* is not required because this final rule is not a “significant regulatory action.” Likewise, this rule does not require analyses under the Unfunded Mandates Reform Act of 1995 because this final rule is not significant.

The Regulatory Flexibility Act (5 U.S.C. 801 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines a rule is not expected to have a significant economic impact on a substantial number of small entities. In accordance with 5 U.S.C. 605(b), the NTSB certifies that the final rule will not have a significant economic impact on a substantial number of small entities; only those entities that are determined to have violated Federal law and regulations would be affected by the increase in penalties made by this rule.

This final rule complies with all applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988 “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights”; and E.O. 13045, “Protection of Children from Environmental Health Risks and Safety Risks.”

The NTSB does not anticipate this rule will have a substantial direct effect on state government or will preempt state law. Accordingly, this rule does not have implications for federalism under E.O. 13132, *Federalism*.

The NTSB also evaluated this rule under E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. The agency has concluded that this final rule 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.

The Paperwork Reduction Act of 1995 is inapplicable because the final rule imposes no new information reporting or recordkeeping necessitating clearance by OMB.

The Regulatory Flexibility Act of 1980 does not apply because, as a final rule, this action is not subject to prior notice and comment. *See* 5 U.S.C. 604(a).

The NTSB has concluded that this final rule neither violates nor requires further consideration under the aforementioned Executive Orders and acts.

List of Subjects in 49 CFR Part 831

Aircraft accidents, Aircraft incidents, Aviation safety, Hazardous materials transportation, Highway safety, Investigations, Marine safety, Pipeline safety, Railroad safety.

Accordingly, for the reasons stated in the Preamble, the NTSB amends 49 CFR part 831, as follows:

PART 831—INVESTIGATION PROCEDURES

- 1. The authority citation for part 831 continues to read as follows:

Authority: 49 U.S.C. 1113(f).

Section 831.15 also issued under Pub. L. 101–410, 104 Stat. 890, amended by Pub. L. 114–74, sec. 701, 129 Stat. 584 (28 U.S.C. 2461 note).

§ 831.15 [Amended]

- 2. Amend § 831.15 by removing the dollar amount “\$1,850” and add in its place “\$1,993”.

Jennifer Homendy,
Chair.

[FR Doc. 2023–00881 Filed 1–17–23; 8:45 am]

BILLING CODE 7533–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No: 210325–0071; RTID 0648–XC678]

Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2023 Management Area 3 Possession Limit Adjustment

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

ACTION: Temporary rule; possession limit adjustment.

SUMMARY: NMFS is implementing a 2,000-lb (907.2-kg) possession limit for Atlantic herring for Management Area 3. This is required because NMFS projects that herring catch from Area 3 will reach 98 percent of the Area's sub-annual catch limit before the end of the fishing year. This action is intended to prevent overharvest of herring in Area 3, which would result in additional catch limit reductions in a subsequent year.

DATES: Effective 00:01 hr local time, January 13, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Maria Fenton, Fishery Management Specialist, (978) 281-9196.

SUPPLEMENTARY INFORMATION: The Regional Administrator of the Greater Atlantic Regional Office monitors herring fishery catch in each Management Area based on vessel and dealer reports, state data, and other available information. Regulations at 50 CFR 648.201(a)(1)(i)(B)(2) require that NMFS implement a 2,000-lb (907.2-kg) possession limit for herring for Area 3 beginning on the date that catch is projected to reach 98 percent of the sub-annual catch limit (ACL) for that area.

Based on vessel reports, dealer reports, and other available information, the Regional Administrator projects that the herring fleet will have caught 98 percent of the Area 3 sub-ACL by January 10, 2023. Therefore, effective 00:01 hr local time January 13, 2023, through December 31, 2023, a person may not attempt or do any of the following: Fish for; possess; transfer; purchase; receive; land; or sell more than 2,000 lb (907.2 kg) of herring per trip or more than once per calendar day in or from Area 3.

Vessels that enter port before 00:01 local time on January 13, 2023, may land and sell more than 2,000 lb (907.2 kg) of herring from Area 3 from that trip, provided that catch is landed in accordance with state management measures. Vessels may transit or land in Area 3 with more than 2,000 lb (907.2 kg) of herring on board, provided that: The herring were caught in an area not subject to a 2,000-lb (907.2-kg) limit; all fishing gear is stowed and not available for immediate use; and the vessel is issued a permit appropriate to the amount of herring on board and the area where the herring was harvested.

Also effective 00:01 hr local time, January 13, 2023, through 24:00 hr local time, December 31, federally permitted dealers may not attempt or do any of the following: Purchase; receive; possess; have custody or control of; sell; barter; trade; or transfer more than 2,000 lb (907.2 kg) of herring per trip or calendar day from Area 3, unless it is from a vessel that enters port before 00:01 local time on January 13, 2023 and catch is landed in accordance with state management measures.

This 2,000-lb possession limit bypasses the 40,000-lb (18,143.7-kg) possession limit that is required when NMFS projects that 90 percent of the sub-ACL will be caught. Regulations at § 648.201(a)(1)(i)(B)(1) require NMFS to

implement a 40,000-lb (18,143.7-kg) possession limit for herring for Area 3 beginning on the date that catch is projected to reach 90 percent of the herring sub-ACL for that area. Based on dealer reports, state data, and other available information, we estimate that 90 percent of the Area 3 sub-ACL was harvested by January 9, 2023. However, due to the low 2023 sub-ACLs, the high volume nature of this fishery, and the progress of catch this fishing year, we project that 98 percent of the sub-ACL in Area 3 will be harvested by January 10, 2023. Implementing the 40,000-lb limit before the 2,000-lb limit is impracticable due to the small amount of time between the 90-percent and 98 percent catch projection dates and substantially increases the risk of exceeding the sub-ACL due to the low amount of available catch remaining under the sub-ACL. The limited time for the two different notices is logistically difficult and could result in substantial confusion. The limited time between projected dates and the relatively low available catch could also encourage significantly increased fishing effort if we first implemented the 40,000-lb limit in Area 3. This increase could require a quicker implementation of the 2,000 lb limit than possible. To minimize the chance of a potential sub-ACL overage occurring and to avoid incentivizing potential changes in fishing behavior that could contribute to an overage, NMFS is bypassing the 40,000-lb (18,143.7-kg) possession limit and implementing the 2,000-lb (907.2-kg) possession limit in Area 3.

The projected catch is 98 percent of the current Area 3 sub-ACL. The current Area 3 sub-ACL is equal to the 2023 Area 3 sub-ACL that was previously implemented through Framework Adjustment 8 to the Atlantic Herring Fishery Management Plan (FMP), which will remain in place until it is revised through the specification process. NMFS is working on implementing updated 2023 specifications as soon as practicable consistent with the specifications process.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive prior notice and the opportunity for public comment because it is unnecessary, contrary to the public interest, and impracticable. Ample prior notice and opportunity for public comment on this action has been provided for the required implementation of this action. The requirement to implement this

possession limit was developed by the New England Fishery Management Council using public meetings that invited public comment on the measures when they were developed and considered along with alternatives. Further, the regulations requiring NMFS to implement this possession limit also were subject to public notice and opportunity to comment when they were first adopted in 2021. Herring fishing industry participants monitor catch closely and anticipate potential possession limit adjustments as catch totals approach Area sub-ACLs. The regulation provides NMFS with no discretion and is designed for implementation as quickly as possible to prevent catch from exceeding limits designed to prevent overfishing while allowing the fishery to achieve optimum yield.

The 2023 herring fishing year began on January 1, 2023. Data indicating that the herring fleet will have landed at least 98 percent of the 2023 sub-ACL allocated to Area 3 only recently became available. High-volume catch and landings in this fishery can increase total catch relative to the sub-ACL quickly, especially in this fishing year where annual catch limits are unusually low. If implementation of this possession limit adjustment is delayed to solicit prior public comment, the 2023 sub-ACL for Area 3 will likely be exceeded; thereby undermining the conservation objectives of the Herring FMP. If sub-ACLs are exceeded, the excess must be deducted from a future sub-ACL and would reduce future fishing opportunities. The public expects these actions to occur in a timely way consistent with the FMP's objectives. For the reasons stated above, NMFS also finds good cause to waive the 30-day delayed effectiveness in accordance with 5 U.S.C 553(d)(3).

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

Dated: January 11, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023-00798 Filed 1-12-23; 4:15 pm]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 220223-0054; RTID 0648-XC674]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Greater Than or Equal to 60 Feet Length Overall Using Pot Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher vessels greater than or equal to 60 feet (18.3 meters (m)) length overall (LOA) using pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season apportionment of the 2023 Pacific cod total allowable catch (TAC) allocated to catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI.

DATES: This inseason action is effective at 1200 hours, Alaska local time (A.l.t.), January 12, 2023, and remains in effect through 1200 hours, A.l.t., September 1, 2023.

FOR FURTHER INFORMATION CONTACT: Krista Milani, 907-581-2062.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season apportionment of the 2023 Pacific cod TAC allocated to catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI is 5,168 metric tons (mt) as established by the final 2022 and 2023 harvest specifications for groundfish in the BSAI (87 FR 11626, March 2, 2022) and inseason adjustment (87 FR 80090, December 29, 2022).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season apportionment of the 2023 Pacific cod TAC allocated as a directed fishing allowance to catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI.

While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would delay the closure of Pacific cod by catcher vessels greater than or equal to 60 feet (18.3 m) LOA using pot gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 10, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: January 11, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023-00746 Filed 1-11-23; 4:15 pm]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 88, No. 11

Wednesday, January 18, 2023

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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Doc. No.: AMS–SC–21–0054]

Amendments to the Marketing Order for Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes amendments to Marketing Order 905, which regulates the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. The proposed amendments reduce the size of the Citrus Administrative Committee (Committee) and lower quorum requirements, revise the nomination and selection processes, remove the requirement to allocate committee seats on the basis of volume from each district, and add a new section to provide the Committee authority to receive voluntary contributions for promotion and research projects. Conforming changes to align the marketing order with the proposed amendments are also proposed.

DATES: The referendum will be conducted from April 3 through May 1, 2023. The representative period for the referendum is August 1, 2021, through July 31, 2022.

ADDRESSES: Interested persons with questions and comments are invited to submit written questions and comments to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; or Telephone: (202) 720–2491.

FOR FURTHER INFORMATION CONTACT: Geronimo Quinones, Marketing Specialist, or Matthew Pavone, Chief, Rulemaking Services Branch, Market Development Division, Specialty Crops

Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Geronimo.Quinones@usda.gov* or *Matthew.Pavone@usda.gov*.

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

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposal is issued under Marketing Order No. 905, as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. Part 905 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and is comprised of citrus producers and shippers operating within the area of production, and a non-industry member.

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

In addition, this proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has

determined this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposal has also been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect. This proposed rule shall not be deemed to preclude, preempt, or supersede any State program covering oranges, grapefruit, tangerines, and pummelos grown in Florida.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608(15)(A)), any handler subject to an order may file with the United States of Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 Section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. AMS may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments proposed herein are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the Order.

The Committee unanimously recommended the amendments

following deliberations at a public meeting held on November 19, 2020. The proposals would reduce the size of the Committee and lower quorum requirements, revise the nomination and selection processes, eliminate the requirement to allocate Committee seats on the basis of volume from each district, and add a new section to provide the Committee authority to receive voluntary contributions for promotion/research projects. Other conforming changes to align the marketing order with the proposed amendments were also recommended.

A proposed rule soliciting comments on the proposed amendments was published in the **Federal Register** on June 30, 2022 (87 FR 39003). Seven comments were received in response to the proposed rule, all of which were in support of the proposal. Based on all the information available to AMS at this time, including the comments received in response to the proposed rule, no substantive changes will be made to the proposed amendments.

AMS will conduct a producer referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments, if they are favored by producers in the referendum.

Proposal 1—Reduce Committee Size

Section 905.19 currently provides that the Committee consists of at least eight but not more than nine grower members, and eight shipper members. A differentiation between grower and shipper members on the Committee is also provided in § 905.19.

This proposal would amend § 905.19 by reducing the size of the Committee from at least eight but not more than nine grower members, and eight shipper members, to 10 grower members. The Committee would be grower-based, consisting of 10 members and 10 alternate members, which would eliminate the designation of shipper members. The grower members would be producers who produce within the district for which they are nominated and selected to represent. The proposed revisions would allow grower members to also be shippers or employees of shippers, which is limited under the current regulations. However, the Committee may establish alternative qualifications for such grower members with approval of the Secretary. The option to increase the Committee by one non-industry member nominated by the Committee and selected by the Secretary would remain unchanged.

Section 905.14 currently provides that the Committee can redefine the districts, reapportion or change the grower

membership of districts, or both, provided that Committee membership consists of at least eight but not more than nine grower members.

This proposal would amend § 905.14 by revising the reference to total number of member seats from at least eight but not more than nine grower members, to 10 grower members. This change would align this section with the proposed new Committee size.

Section 905.20 provides that members and their alternates serve a 2-year term of office, but that has not included non-industry members due to the current § 905.150(d). This proposal would align the terms of office for all members by removing language from § 905.150(d), which created a 1-year term of office for non-industry members, and replacing it with language specifying a 2-year term of office for non-industry members.

Since promulgation of the Order in 1957, the Florida citrus industry has undergone consolidation and crop loss. Increasing labor costs, real estate pressures, and citrus greening have been contributing factors. Current industry structure shows there are few growers who are not affiliated with handlers, and most of the handlers are also growers. Total citrus acreage is about half of what it was at its peak production and has declined 22 percent from 2010 to 2020. Not distinguishing between grower and shipper members and decreasing the Committee's size to 10 members and 10 alternate members would make Committee membership more reflective of today's industry. The Committee would be able to fill all its member positions with less difficulty. Aligning the term of the public member to the same 2-year term as the rest of the Committee will also improve efficiency and the effectiveness of the position. A 2-year term will help ensure that the public member can contribute to the work of the Committee at a higher level.

Proposal 2—Revise Nomination and Selection Process

For grower members, § 905.22 currently provides that, on even numbered years, nominees for open grower member and alternate member positions shall be chosen by ballot. In support of this nomination process, § 905.22(a) further provides that the Committee will publicly announce and hold grower meetings no later than June 10 to make those nominations. The nominees chosen in this manner, along with the vote certification and any other information requested, will be submitted by the secretary and chairman of each grower-meeting to the Secretary of Agriculture (Secretary) on or before June 20. At least two of the

grower-nominees and their alternates will be affiliated with a bona fide cooperative marketing organization. Section 905.22(b) outlines the process for nominating shipper members and their alternates.

This proposal would amend § 905.22 by removing the designation of shipper members. Section 905.22(a)(1) would be revised by changing the deadline for Committee nominees from June 10 to April 10, and the deadline for presenting nominees for selection to the Secretary from June 20 to April 20. A revision to paragraph 905.22(a)(2) would add language to clarify that grower members are producers who may also be shippers or who are also employees of shippers. The requirement that at least two of the grower nominees and their alternates be affiliated with a bona fide cooperative marketing organization would be changed to one grower nominee and their alternate.

Section 905.23 currently provides that the Secretary will select members and alternate members from each district. The grower nominations will be made from qualified persons and at least two members and their alternates shall be affiliated with bona fide cooperative marketing organizations. Furthermore, the Secretary shall select at least two shipper members and their alternates to represent bona fide cooperative marketing organizations of handlers. The remaining shipper members and their alternates represent handlers who are not affiliated. Section 905.29 currently provides that when a member and that member's alternate are unable to attend a meeting, any alternate designated by the member or Committee to act in his or her stead for that meeting must represent the same affiliation as the member.

Section 905.23 would be amended by removing the allocation of Committee seats by district from the selection process and providing that only one nominee and their alternate be affiliated with a bona fide cooperative marketing organization. Proposed changes to § 905.29 would eliminate the requirement that any person designated to serve on the Committee in the absence of a member and his or her alternate represent the same group affiliation as the absent member and alternate. This would not apply to the public member.

Currently there are three districts. A nomination meeting is scheduled in each district for growers and shippers. Votes are cast by each respective district for each member type and the corresponding alternate. Growers participate in the nomination process for grower members and alternates,

while shippers participate in the nomination process for shippers and their alternates. Alternates must meet the same requirements of the member, which further complicates finding suitable candidates for nomination. Because handlers crisscross the state buying fruit, the differentiation of districts no longer serves a practical purpose since all but one shipper sources fruit from multiple districts. With the current shrinking of the industry and the number of growers and shippers working as both, eliminating the distinction between growers and shippers will make it easier to facilitate the nomination and selection process and better reflect the current industry.

Proposal 3—Revise Quorum Requirements

Currently, § 905.34 states that 10 members of the Committee shall constitute a quorum, and any action of the committee shall require at least 10 concurring votes. Five of those concurring votes must be grower votes. It also states that the Committee may provide for meeting by telephone, telegraph, or other means of communication.

This proposal would modify § 905.34 to allow seven members to constitute a quorum, with six concurring votes required to pass any motion or approve any Committee action. Finally, a small change would eliminate “telegraph” as a valid means of communication.

The Committee is experiencing difficulties obtaining a quorum at meetings to conduct business activities. Many industry members are fulfilling multiple roles. Reductions in staff due to rising operational costs has made it difficult for smaller growers and handlers to leave their businesses to participate in meetings. These factors are making it more difficult to fill the seats on the Committee. Adjusting the current requirements would enable the Committee to operate fully and reduce the risk of not establishing a quorum during scheduled meetings or not having the required votes to pass any action. These changes would help to increase the Committee’s effectiveness.

Proposal 4—Authority To Accept Voluntary Contributions From Domestic Sources

Section 905.54 of the Order authorizes the Committee, with the approval of the Secretary, to establish research, marketing, and promotional projects. This proposal would add a new § 905.43 to provide the Committee with authority to receive voluntary contributions from domestic sources to fund promotional and research projects. Any contributions

made to the Committee will be free from any encumbrances by the donor and the Committee will retain complete control of their use.

Presently, research and promotional activities are administered by the Florida Department of Citrus, which is a state agency. Such projects are generally funded by grower assessments through the Florida Department of Citrus and are administered by the Florida Citrus Commission. At the Committee’s request, research and promotional authority was added to the Order in 2009 (74 FR 46303) to ensure that a mechanism exists for the Committee to conduct those activities. Such activities are paid by assessments authorized by the Order. Consequently, increases to the assessment rate may be needed if the Committee desires to increase its research or promotional activities. Furthermore, while it is expected that the state agency will continue to exist and offer these services, should the agency close, the Committee could ensure that fresh citrus research continues. The Committee believes that the ability to receive voluntary contributions toward such projects may eliminate the need to use or increase the assessment rate, thereby minimizing financial pressure on producers. Contributions would be used for more research and promotional activities that would benefit the entire industry.

The following concurring changes would also be made to align the Order with the above amendments:

Section 905.114 would be revised to create a single district, down from the current number of three. Florida Citrus acreage has declined from approximately 900,000 acres to approximately 435,000 acres. As previously discussed in Proposal 1, because of the effects of citrus greening, handlers must access fruit from statewide sources. Currently, only one handler packs fruit exclusively from its own district, while all other handlers access fruit from all districts and production areas. The changes to § 905.114 would create one statewide district, better reflecting current industry structure and practices.

Section 905.120 would be revised to eliminate any reference to handlers as a distinct class for purposes of nominations, since such designations will no longer be relevant to the process. The volume vote for shipper nominations and shipper designations would also be eliminated from § 905.120. By eliminating the volume vote, the Committee expects this would provide small growers greater

opportunity and representation moving forward.

Finally, changes to § 905.150 would revise the current 1-year term of office for the public member to a 2-year term. This would align the public member with all members and their alternates, which serve a 2-year term of office.

Initial Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened.

There are approximately 15 handlers of Florida citrus who are subject to regulation under the Order and approximately 500 citrus producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration as those having annual receipts of no more than \$30,000,000, and small agricultural producers of orange groves are defined as those having annual receipts of no more than \$3,500,000 (13 CFR 121.201).

According to data from the National Agricultural Statistics Service (NASS) and the Citrus Administrative Committee, the weighted average packing house door equivalent price for fresh Florida citrus for the 2020–21 season was approximately \$6.52 per carton with total shipments of around 6,022,426 cartons. Based on this information, the majority of handlers have average annual receipts of significantly less than \$30,000,000 (\$6.52 times 6,022,426 cartons equals \$39,266,217.52, divided by 15 handlers equals \$2,617,747.83 per handler).

In addition, based on the NASS data, the weighted average grower price for the 2020–21 season was estimated at \$4.95 per carton of fresh citrus. Based on grower price, shipment data, and the total number of Florida citrus growers, the average annual grower revenue is well below \$3,500,000 (\$4.95 times 6,022,426 million cartons equals \$29,811,008.70, divided by 500 growers equals \$59,622.02 per grower). Thus, the majority of Florida citrus handlers and growers may be classified as small entities.

AMS has determined that the proposed amendments would not have a significant impact on a substantial number of small businesses. Rather, large and small entities alike would be expected to benefit from the

Committee's improved ability to address important issues of interest to all on a timely basis. The proposed reduction in the number of seats on the Committee, and the reduced quorum and lowered voting requirements, would not require any significant changes in producer or handler business operations, and no significant industry educational effort would be needed. Producers and handlers, large and small alike, would incur no additional costs. No small businesses would be unduly or disproportionately burdened as a result of this proposal going into effect.

The Committee unanimously recommended the proposed amendments at a public meeting on November 19, 2020. If these proposals are approved in a referendum, there would be no direct financial effects on producers or handlers.

The Florida citrus industry has undergone consolidation and crop reduction. Because of this fact, it has become difficult to fill the member seats on the Committee and to obtain a quorum to conduct business activities. Decreasing the Committee's size would make it more reflective of today's industry and easier to fulfill the quorum requirement. The current districts are not relevant because handlers routinely source fruit from across the state, therefore the differentiation of districts no longer serves a practical purpose. Authority to accept voluntary contributions from domestic sources would allow the Committee to collaborate with other organizations for research/promotional activities. No economic impact is expected if the proposed amendments are approved because they would not establish any new regulatory requirements on handlers, nor would they have any assessment or funding implications. There would be no change in financial costs, reporting, or recordkeeping requirements if this proposal is approved.

As an alternative to this proposal, the Committee considered making no revisions to the Order at this time. However, due to changes in the industry, the Committee believes the proposals are justified and necessary to ensure its ability to locally administer the program. AMS concurs with that conclusion.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0189, Fruit Crops. No changes in those

requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large Florida citrus handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public-sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

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

The November 19, 2020, Committee meeting was widely publicized throughout the production area. Meetings are held virtually or in a hybrid style. Participants both large and small, have a choice whether to attend in person or virtually and can participate in the Committee's deliberations on all issues.

A proposed rule concerning this action was published in the **Federal Register** on June 30, 2022 (87 FR 39003). A copy of the rule was sent via email to the Committee Manager for disposal to all Committee members and Florida citrus handlers. Finally, the proposed rule was made available by USDA through the internet and the Office of the Federal Register. A 60-day comment period ending August 29, 2022, was provided to allow interested persons to respond to the proposals. Seven comments were received during the comment period, all of which were in support of the proposed amendments. Based on all the information available to AMS at this time, including the comments received in response to the proposed rule, no substantive changes will be made to the amendments as proposed.

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

Findings and Conclusions

AMS has determined that the findings and conclusions, and general findings and determinations included in the

proposed rule set forth in the June 30, 2022, issue of the **Federal Register** (87 FR 39003) are appropriate and necessary and are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered that this entire proposed rule be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400 through 407) to determine whether the annexed order amending the Order regulating the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida is approved by growers, as defined under the terms of the Order, who during the representative period were engaged in the production of oranges, grapefruit, tangerines, and pummelos in the production area. The representative period for the conduct of such referendum is hereby determined to be August 1, 2021, through July 31, 2022.

The agents designated by the Secretary to conduct the referendum are Dolores Lowenstine, Christian Nissen, and Jennie Varela, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or Email:

Dolores.Lowenstine@usda.gov,
Christian.Nissen@usda.gov, and
Jennie.Varela@usda.gov, respectively.

Order Amending the Order Regulating the Handling of Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida¹

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of Marketing Order 905; and all said previous findings and determinations are hereby ratified and affirmed, except

¹ This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. Marketing Order 905 as hereby proposed to be amended and all the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. Marketing Order 905 as hereby proposed to be amended regulates the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 905, as hereby proposed to be amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several marketing orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. Marketing Order 905, as hereby proposed to be amended, prescribes insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of oranges, grapefruit, tangerines, and pummelos produced or packed in the production area; and

5. All handling of oranges, grapefruit, tangerines, and pummelos produced or packed in the production area as defined in marketing order 905 is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of oranges, grapefruit, tangerines, and pummelos grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the Order contained in the proposed rule issued by the Administrator and published in the **Federal Register** (87 FR 39003) on June 30, 2022, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Pummelos, Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 905 as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND PUMMELOS GROWN IN FLORIDA

■ 1. The authority citation for part 905 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 905.14 by revising paragraph (a) introductory text to read as follows:

§ 905.14 Redistricting.

(a) The Committee may, with the approval of the Secretary, redefine the districts into which the production area is divided or reapportion or otherwise change the grower membership of districts, or both: Provided, that the membership shall consist of 10 grower members, and any such change shall be based, insofar as practicable, upon the respective averages for the immediately preceding three fiscal periods of:

* * * * *

■ 3. Amend § 905.19 by revising paragraph (a) to read as follows:

§ 905.19 Establishment and membership.

(a) There is hereby established a Citrus Administrative Committee consisting of 10 grower members. Grower members shall be producers who produce within the district for which they are nominated and selected to represent. Grower members may be persons who, in addition to being producers, are shippers or employees of shippers: Provided, that the committee, with the approval of the Secretary, may establish alternative qualifications for such grower members. The committee may be increased by one non-industry member nominated by the committee and selected by the Secretary. The committee, with approval of the Secretary, shall prescribe qualifications, term of office, and the procedure for nominating the non-industry member.

* * * * *

■ 4. Revise § 905.22 to read as follows:

§ 905.22 Nominations.

(a) The Committee shall give public notice of a meeting of producers in each district, to be held not later than April 10th of even-numbered years, for the purpose of making nominations for grower members and alternate grower members. The Committee, with the approval of the Secretary, shall prescribe uniform rules to govern such meetings and the balloting thereat. The chairman of each meeting shall publicly announce at such meeting the names of

the persons nominated, and the chairman and secretary of each such meeting shall transmit to the Secretary their certification as to the number of votes so cast, the names of the persons nominated, and such other information as the Secretary may request. All nominations shall be submitted to the Secretary on or before the 20th day of April.

(b) Each nominee shall be a producer in the district from which he or she is nominated. In voting for nominees, each producer shall be entitled to cast one vote for each nominee in each of the districts in which he or she is a producer. At least one of the nominees and their alternates so nominated shall be affiliated with a bona fide cooperative marketing organization.

(c) Notwithstanding the provisions of paragraph (a) of this section, nomination and election of members and alternate members to the Committee may be conducted by mail, electronic mail, or other means according to rules and regulations recommended by the Committee and approved by the Secretary.

■ 5. Revise § 905.23 to read as follows:

§ 905.23 Selection.

(a) From the nominations made pursuant to § 905.22(a) or from other qualified persons, the Secretary shall select 10 members and 10 alternates. At least one such member and their alternate shall be affiliated with a bona fide cooperative marketing organization.

■ 6. Amend § 905.29 by revising paragraph (b) to read as follows:

§ 905.29 Inability of members to serve.

* * * * *

(b) If both a member and his or her respective alternate are unable to attend a committee meeting, such member may designate another alternate to act in his or her place in order to obtain a quorum. If the member is unable to designate such an alternate, the committee members present may designate such alternate.

* * * * *

■ 7. Amend § 905.34 by revising paragraphs (a) through (c) to read as follows:

§ 905.34 Procedure of committees.

(a) Seven members of the committee shall constitute a quorum.

(b) For any decision or recommendation of the Committee to be valid, six concurring votes shall be necessary: Provided, that the Committee may recommend a regulation restricting the shipment of grapefruit grown in Regulation Area I or Regulation Area II which meets the requirements of the

Improved No. 2 grade or the Improved No. 2 Bright grade only upon the affirmative vote of a majority of its members present from the regulation area in which such restriction would apply; and whenever a meeting to consider a recommendation for release of such grade is requested by a majority of the members from the affected area, the committee shall hold a meeting within a reasonable length of time for the purpose of considering such a recommendation. If after such consideration the requesting area majority present continues to favor such release for their area, the request shall be considered a valid recommendation and transmitted to the Secretary. The votes of each member cast for or against any recommendation made pursuant to this subpart shall be duly recorded. Whenever an assembled meeting is held each member must vote in person.

(c) The committee may provide for meeting by telephone, or other means of communication, and any vote cast at such a meeting shall be promptly confirmed in writing: Provided, that if any assembled meeting is held, all votes shall be cast in person.

* * * * *

■ 8. Add § 905.43 to read as follows:

§ 905.43 Contributions.

The Committee may accept voluntary contributions. Such contributions shall be free from any encumbrances by the donor and the Committee shall retain complete control of their use.

■ 9. Revise § 905.80 to read as follows:

§ 905.80 Fruit not subject to regulation.

(a) Except as otherwise provided in this section, any person may, without regard to the provisions of §§ 905.52 and 905.53 and the regulations issued thereunder, ship any variety for the following purposes:

(1) To a charitable institution for consumption by such institution;

(2) To a relief agency for distribution by such agency;

(3) To a commercial processor for conversion by such processor into canned or frozen products or into a beverage base;

(4) By U.S. Mail or private courier; or

(5) In such minimum quantities, types of shipments, or for such purposes as the committee with the approval of the Secretary may specify.

(b) No assessment shall be levied on fruit so shipped. The committee shall, with the approval of the Secretary, prescribe such rules, regulations, or safeguards as it may deem necessary to prevent varieties handled under the provisions of this section from entering channels of trade for other than the

purposes authorized by this section. Such rules, regulations, and safeguards may include the requirements that handlers shall file applications with the committee for authorization to handle a variety pursuant to this section, and that such applications be accompanied by a certification by the intended purchaser or receiver that the variety will not be used for any purpose not authorized by this section.

■ 10. Revise § 905.114 to read as follows:

§ 905.114 Redistricting of citrus districts and reapportionment of grower members.

Pursuant to § 905.14, the citrus districts and membership allotted each district shall be as follows:

(a) Citrus District One shall include that portion of the State of Florida, which is bounded by the Suwannee River, the Georgia border, the Atlantic Ocean, and the Gulf of Mexico. This district shall have 10 members and 10 alternates.

(b) Reserved.

■ 11. Amend § 905.120 by revising paragraphs (d) and (e) and removing paragraphs (f) and (g) to read as follows.

§ 905.120 Nomination procedure.

* * * * *

(d) At each meeting each eligible person may cast one vote for each of the persons to be nominated to represent the district or group, as the case may be.

(e) Voting may be by written ballot. If written ballots are used, all ballots shall be delivered by the chairman or the secretary of the meeting to the agent of the Secretary. If written ballots are not used, the committee's representative shall deliver to the Secretary's agent a listing of each person nominated and a count of the number of votes cast for each nominee for grower member and alternate. Said representative shall also provide the agent the register of eligible voters present at each meeting, a listing of each person nominated, and the number of votes cast.

■ 12. Amend § 905.150 by revising paragraph (d) as follows:

§ 905.150 Eligibility requirements for public member and alternate member.

* * * * *

(d) The public member should be nominated by the Citrus Administrative Committee and should serve a 2-year term which coincides with the term of office of grower members of the Committee.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023-00856 Filed 1-17-23; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2023-0077; Airspace Docket No. 23-AGL-6]

RIN 2120-AA66

Proposed Amendment of Class E Airspace; St. James, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace at St. James, MI. The FAA is proposing this action due to an airspace review conducted as part of the decommissioning of the Pellston very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program. The geographic coordinates of the airport would also be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before March 6, 2023.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366-9826, or (800) 647-5527. You must identify FAA Docket No. FAA-2023-0077/Airspace Docket No. 23-AGL-6 at the beginning of your comments. You may also submit comments through the internet at www.regulations.gov. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222-5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Beaver Island Airport, Beaver Island, MI (currently St. James, MI), to support instrument flight rule operations at this airport.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2023-0077/Airspace Docket No. 23-AGL-6." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. 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 www.regulations.gov. Recently published rulemaking

documents can also be accessed through the FAA's web page at www.faa.gov/air-traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the 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 Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by amending the Class E airspace extending upward from 700 feet above the surface to within a 7-mile (increased from a 6.2-mile) radius of Beaver Island Airport, Beaver Island, MI; removing the extension to the east as it is no longer required; updating the header from "St. James, MI" to "Beaver Island, MI" to coincide with the FAA's aeronautical database; and updating the geographic coordinates to coincide with the FAA's aeronautical database.

This action is the result of an airspace review conducted as part of the decommissioning of the Pellston VOR, which provided navigational information to this airport, as part of the VOR MON Program.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would 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

Accordingly, pursuant to the authority delegated to me, 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 14 CFR 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 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL MI E5 Beaver Island, MI [Amended]
Beaver Island Airport, MI

(Lat. 45°41'32" N, long. 85°34'00" W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of the Beaver Island Airport.

Issued in Fort Worth, Texas, on January 12, 2023.

Martin A. Skinner,

*Acting Manager, Operations Support Group,
ATO Central Service Center.*

[FR Doc. 2023-00820 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2023-0038; Airspace
Docket No. 23-ASW-2]

RIN 2120-AA66

Proposed Amendment of Class E Airspace; Antlers, OK

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This action proposes to amend the Class E airspace at Antlers, OK. The FAA is proposing this action due to an airspace review conducted as part of the decommissioning of the Paris very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program. The geographic coordinates of the airport would also be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before March 6, 2023.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366-9826, or (800) 647-5527. You must identify FAA Docket No. FAA-2023-0038/Airspace Docket No. 23-ASW-2 at the beginning of your comments. You may also submit comments through the internet at www.regulations.gov. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy

Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222-5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Antlers Municipal Airport, Antlers, OK, to support instrument flight rule operations at this airport.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2023-0038/Airspace Docket No. 23-ASW-2." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed

in light of the comments received. 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 www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the 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 Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by amending the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (increased from a 6.3-mile) radius of Antlers Municipal Airport, Antlers, OK; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review conducted as part of the decommissioning of the Paris VOR, which provided navigation information to the instrument procedures to this airport, as part of the VOR MON Program.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace

designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would 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

Accordingly, pursuant to the authority delegated to me, 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 14 CFR 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 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

ASW OK E5 Antlers, OK [Amended]

Antlers Municipal Airport, OK
(Lat. 34°11'33" N, long. 95°39'00" W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Antlers Municipal Airport.

Issued in Fort Worth, Texas, on January 12, 2023.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2023–00822 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0036; Airspace Docket No. 23–AGL–5]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Rantoul, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class E airspace at Rantoul, IL. The FAA is proposing this action due to an airspace review conducted as part of the decommissioning of the Danville very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program. The name of the airport would also be updated to coincide with the FAA’s aeronautical database.

DATES: Comments must be received on or before March 6, 2023.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2023–0036/Airspace Docket No. 23–AGL–5 at the beginning of your comments. You may also submit comments through the internet at www.regulations.gov. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Rantoul National Aviation Center-Frank Elliot Field, Rantoul, IL, to support instrument flight rule operations at this airport.

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 and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: “Comments to Docket No. FAA–2023–0036/Airspace Docket No. 23–AGL–5.” The postcard

will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. 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 www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the 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 Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by amending the Class E airspace extending upward from 700 feet above the surface to within a 6.8-mile (increased from a 6.7-mile) radius of Rantoul National Aviation Center-Frank Elliott Field, Rantoul, IL; removing the exclusion areas from the airspace legal description as they are not required; and updating the name (previously Rantoul National Aviation Center Airport) of the airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review conducted as part of the

decommissioning of the Danville VOR, which provided navigational information to this airport, as part of the VOR MON Program.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would 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

Accordingly, pursuant to the authority delegated to me, 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 14 CFR 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 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL IL E5 Rantoul, IL [Amended]

Rantoul National Aviation Center-Frank Elliott Field, IL
(Lat. 40°17'35" N, long. 88°08'18" W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Rantoul National Aviation Center-Frank Elliott Field.

Issued in Fort Worth, Texas, on January 12, 2023.

Martin A. Skinner,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2023–00821 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Bureau of Engraving and Printing

31 CFR Part 601

Distinctive Paper and Distinctive Counterfeit Deterrents for United States Federal Reserve Notes

AGENCY: Bureau of Engraving and Printing, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking would update the description of the distinctive paper and distinctive counterfeit deterrents used to guard against counterfeit and fraudulently altered United States (U.S.) Federal Reserve notes in accordance with the U.S. Code. The Department of the Treasury, Bureau of Engraving and Printing (BEP) is amending its distinctive paper and distinctive counterfeit deterrents regulation to remove obsolete language to align the regulation to the current state-of-art and emerging technologies generated as a result of BEP's research and development initiatives; clarify the agency's authority for adopting distinctive paper and distinctive counterfeit deterrents; and announce the adoption of new distinctive paper and counterfeit deterrents by the Secretary of the Treasury.

DATES: Comments must be received no later than March 20, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. BEP encourages the early submission of comments. Comments may be submitted through one of these methods:

- *Electronic Submission:* Please submit comments electronically through the Federal eRulemaking Portal: <https://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables BEP to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be viewed by other commenters and interested members of the public. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. You should submit only information that you wish to make available publicly.

- *Postal Mail Submission:* Comments may be sent to the Office of the Chief Counsel, United States Department of the Treasury, Bureau of Engraving and Printing, 14th and C Streets SW, Washington, DC 20228, Room 419–A, Attention: Leslie J. Rivera Pagán, Amendments to 31 CFR part 601. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically.

FOR FURTHER INFORMATION CONTACT:

Leslie J. Rivera Pagán, Attorney-Advisor, Office of Chief Counsel, U.S. Department of the Treasury, Bureau of Engraving and Printing, Room 419A, 14th & C Streets SW, Washington, DC 20028, phone at (202) 874–2500 or fax (202) 874–2951.

SUPPLEMENTARY INFORMATION:

I. Background

The BEP regulation appearing at 31 CFR part 601 relates to the distinctive paper and distinctive counterfeit deterrents used to guard against counterfeit and fraudulently altered U.S. Federal Reserve notes. The last amendment to 31 CFR part 601 was on March 18, 1996. Since then, BEP has engaged in research and development resulting in modification of its distinctive paper and distinctive counterfeit deterrents, thus necessitating revision of the entire regulation.

The U.S. Congress, which has power under the U.S. Constitution to coin money and regulate the value thereof, has delegated to the Secretary of the Treasury (“Secretary”) exclusive authority to determine the form and tenor of U.S. Federal Reserve notes. Accordingly, the Secretary may adopt and examine plates, dies, bed pieces, and other materials used to print U.S. Federal Reserve notes and issue regulations relating to such examination. The Secretary may also prescribe regulations that the Secretary considers best calculated to promote the public convenience and security, and to protect the U.S. Government and individuals from fraud and loss that apply to anyone who may receive on behalf of the U.S. Government, Treasury notes, United States notes, or other Government securities. Additionally, the Secretary has the authority to adopt any distinctive paper and distinctive counterfeit deterrents for U.S. Federal Reserve notes in the best manner to guard against counterfeits and fraudulent alterations.

The BEP mission is to develop and manufacture U.S. Federal Reserve notes that are trusted worldwide. The Secretary has delegated specific authority and responsibilities related to the production of U.S. Federal Reserve notes to the Director of BEP only. (Treasury Order 101–07, Delegation to the Director, Bureau of Engraving and Printing, for the Production of Currency Notes to Meet the Demands of the Federal Reserve Banks, January 4, 2021.) BEP’s Director may redelegate the authority and responsibility to a BEP Associate Director only.

This proposed rule would update BEP’s 1996 (61 FR 10895) regulation concerning the distinctive paper and distinctive counterfeit deterrents BEP intends to use to produce the next generations of U.S. Federal Reserve notes to guard against counterfeits and fraudulent alterations. The proposed revision would clarify the description of the distinctive paper and distinctive counterfeit deterrents separately for U.S. Federal Reserve notes, remove obsolete language, align the regulation to the current state-of-art and emerging technologies generated as a result of BEP’s research and development initiatives, clarify the agency’s authority for adopting distinctive paper and distinctive counterfeits deterrents, and announce the adoption of new distinctive paper and counterfeit deterrents by the Secretary.

II. Procedural Analyses

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires agencies to prepare an initial regulatory flexibility analysis (IRFA) to determine the economic impact of the rule on small entities. A small entity is defined as either a small business, a small organization, or a small governmental jurisdiction; an individual is not a small entity. Section 605(b) of the RFA allows an agency to prepare a certification instead of an IRFA if the rule does not have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 605(b), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The proposed rule is limited to updating the description of the distinctive paper and distinctive counterfeit deterrents used to guard against counterfeit and fraudulently altered United States (“U.S.”) Federal Reserve notes and other obligations and securities in accordance with the U.S. Code. Accordingly, if finalized, this proposed rule will have no direct impact on small entities. Notwithstanding this certification, BEP invites comments on this proposed rule’s impact, if any, on small entities.

B. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Orders 13563 and 12866 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, reducing costs, harmonizing rules, and promoting flexibility. BEP has determined this proposed rule relates to the agency organization and management, and therefore, Executive Orders 13563 and 12866 do not apply to this proposed rule. This proposed rule is not a “significant regulatory action” under Executive Order 12866.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a rule that includes any federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in

the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. BEP certifies that no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. Furthermore, these proposed regulations will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and they will not significantly or uniquely affect small governments.

D. Federalism

Executive Order 13132 (titled Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule has been reviewed under Executive Order 13132 and would not have federalism implications and or impose substantial direct effects on States, on the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the Executive Order. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Paperwork Reduction Act (PRA) Notices

The Paperwork Reduction Act does not apply because this proposed rule would not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 31 CFR Part 601

Currency, Securities, Printing.

For the reasons stated in the preamble, BEP proposes to revise 31 CFR part 601 as follows:

PART 601—DISTINCTIVE PAPER AND DISTINCTIVE COUNTERFEIT DETERRENTS FOR UNITED STATES FEDERAL RESERVE NOTES

Sec.

- 601.1 Notice and scope.
- 601.2 Distinctiveness requirement.
- 601.3 Distinctive paper.
- 601.4 Distinctive counterfeit deterrents.
- 601.5 Penalty for unauthorized control or possession.

Authority: 5 U.S.C. 301; 12 U.S.C. 418, 421; 18 U.S.C. 474A; 31 U.S.C. 321.

§ 601.1 Notice and scope.

The regulation in this part governs the distinctive paper and distinctive counterfeit deterrents adopted by the Secretary of the Treasury for United States Federal Reserve notes, which are subject to 18 U.S.C. 474A. The Director of Bureau of Engraving and Printing, by delegated authority, hereby gives notice of the distinctive paper and distinctive counterfeit deterrents adopted by the Secretary of the Treasury.

§ 601.2 Distinctiveness requirement.

(a) The Secretary of the Treasury has adopted distinctive paper and distinctive counterfeit deterrents:

- (1) In which the United States has an exclusive property interest; or
- (2) That are not otherwise in commercial use or the public domain and are necessary for preventing the counterfeiting of United States Federal Reserve notes.

(b) The distinctive paper and counterfeit deterrents are used in United States Federal Reserve notes.

§ 601.3 Distinctive paper.

The distinctive paper is a cream-white currency note paper with fibers, colored red and blue, evenly distributed throughout the currency note paper. The distinctive paper shall contain distinctive counterfeit deterrents in the currency note paper denominations prescribed by the Secretary of the Treasury.

§ 601.4 Distinctive counterfeit deterrents.

The distinctive counterfeit deterrents that may be used in the denominations of United States Federal Reserve notes as prescribed by the Secretary of the Treasury are:

- (a) Security threads containing graphics consisting of the designation “USA” and the denomination of the currency note, expressed in alphabetic or numeric characters.
- (b) Optically variable inks with material characteristics.
- (c) Non-visual characteristic inks with material characteristics.
- (d) Optically variable thread (three-dimensional (3-D) security ribbon and micro-optic stripe) visible in front or back of the currency note.
- (e) Non-visual characteristic features with material characteristics.

§ 601.5 Penalty for Unauthorized Control or Possession.

(a) Control or possession of distinctive paper and/or distinctive counterfeit deterrents adopted in §§ 601.3 and 601.4 require authorization by the Secretary of the Treasury.

(b) The penalty for unauthorized control and/or possession of distinctive paper and/or distinctive counterfeit deterrents adopted in §§ 601.3 and 601.4 is found at 18 U.S.C. 474A.

Leonard R. Olijar,

Director.

[FR Doc. 2023-00854 Filed 1-17-23; 8:45 am]

BILLING CODE 4840-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2022-0721, FRL-10452-01-R10]

Air Plan Approval; AK; Adoption and Permitting Rule Updates

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Alaska State Implementation Plan submitted on May 16, 2022, and August 11, 2022. The revisions proposed for approval update Alaska’s adoption by reference date for Federal regulations relied upon for implementation of the air program, including permitting requirements and air pollution test methods. The revisions also add procedures for electronic submission of documents for air permits and other authorizations, update air permitting and emission fees, add additional clarifying language to the fee provisions, and specify emissions inventory reporting requirements. The EPA is proposing to approve the submitted revisions as consistent with Clean Air Act requirements.

DATES: Comments must be received on or before February 17, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R10-OAR-2022-0721, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [regulations.gov](https://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not

consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

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

SUPPLEMENTARY INFORMATION: Throughout this document, “we” and “our” mean “the EPA”.

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I. Background

Each state has a State Implementation Plan (SIP) containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS) established by the EPA for the criteria pollutants (carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, sulfur dioxide). The SIP is governed by section 110 of the Clean Air Act, and contains such elements as air pollution control regulations, emission inventories, monitoring network, attainment demonstrations, and enforcement mechanisms. The SIP is a living compilation of these elements and is revised and updated by the state to address changing air quality conditions in the state.

Alaska establishes state air pollution regulations in Alaska Administrative Code Title 18 Environmental Conservation, Chapter 50 Air Quality Control (18 AAC 50). The state then submits these provisions for EPA approval. The EPA makes the provisions federally enforceable by approving the provisions into the Alaska SIP in the Code of Federal Regulations (CFR) at 40 CFR part 52, subpart C. Important air pollution control measures in the SIP are the Alaska permitting programs designed to limit emissions from new construction and modification of industrial facilities, called stationary sources under the Federal Clean Air Act. To ensure the permitting programs

remain consistent with Federal requirements, the state adopts specific parts of EPA air regulations by reference as of a certain date and regularly submits the adoption updates to the EPA for approval. Alaska also makes periodic changes to state permitting programs to improve implementation and to address changing air quality conditions.

II. Evaluation of Submission

A. Updates to Adoption by Reference

On May 16, 2022, Alaska submitted revisions to the SIP that update the adoption by reference of certain Federal regulations. Alaska’s May 16, 2022, submittal also included revisions regarding ice fog and sulfur dioxide special protection areas, which are outside the scope of this action and will be addressed in a separate, future proposed rulemaking.

With respect to the adoption by reference of certain Federal regulations, Alaska updated 18 AAC 50.035(b) which includes the adoption by reference of Federal test procedures and methods for determining compliance with the NAAQS contained in 40 CFR part 50, Appendices A, C, D, F, G, J, K, L, N, P, Q, R, S and T, as well as the recommended test methods for SIPs contained in 40 CFR part 51, Appendix M. Alaska made no substantive changes to 18 AAC 50.035(b) since the EPA’s last approval on February 10, 2022 (87 FR 7722) other than updating the adoption by reference date from July 1, 2019 to March 23, 2021. No other revisions to 18 AAC 50.035 were submitted for approval. Therefore, we will continue to exclude 18 AAC 50.035 subsections (a)(6), (a)(9), and (b)(4) which were not submitted for approval, consistent with the current SIP.

Alaska also updated the adoption by reference date for Federal regulations relied upon in 18 AAC 50.040(h) and (i) to implement permitting programs designed to limit emissions from new and modified stationary sources. In AAC 50.040(h), Alaska adopts by reference specific provisions of 40 CFR 51.166 and 40 CFR part 52 related to the Prevention of Significant Deterioration (PSD) permitting program which regulates the construction or modification of major stationary sources in areas designated by the EPA as having criteria pollutant concentrations meeting the NAAQS, often called attainment or unclassifiable/attainment areas. In AAC 50.040(i), Alaska adopts by reference certain Federal permitting requirements contained in 40 CFR 51.165 related to the construction or modification of major stationary sources

in areas that the EPA has designated as having criteria pollutant concentrations above NAAQS, called nonattainment areas.¹ Alaska made no substantive changes to AAC 50.040(h) and (i) since the EPA’s February 2022 approval other than updating the adoption by reference date from July 1, 2019, to November 24, 2020. Consistent with the current SIP, Alaska did not submit subsections (a), (b), (c), (d), (e), (g), (j) and (k) for EPA approval.

We have evaluated the submitted adoption updates and propose to approve them because these routine updates are designed keep state requirements current with requirements for SIPs. Additional details on the adoption updates may be found in the submission which is placed in the docket for this action.

B. Fees

By state statute, the Alaska Department of Environmental Conservation (ADEC) is required to evaluate permit administration fees, compliance fees, and air quality emission fees every four years and provide the results in a report. On August 8, 2022, Alaska revised 18 AAC 50.400(d) through (h) to update the fee provisions consistent with the results of ADEC’s 2021 Fee Study Report and submitted these changes as an update to the SIP on August 11, 2022. A redline/strikeout comparison of the updates to 18 AAC 50.400(d) through (h) is included in the docket for this action (comparison.docx). In addition to updating the fees, ADEC added clarifying language and added additional language to address certain source categories such as asphalt plants, rock crushers, and portable oil and gas operations.

We have evaluated the submitted fee revisions and propose to approve them because these routine updates are an important component of administering an effective air permitting program. This includes, where applicable, the Clean Air Act section 110(a)(2)(L) requirements related to the construction or modification of major stationary sources. Clean Air Act section 110(a)(2)(L) requires that the owner or operator of a new or modified major stationary source pay the permitting authority the reasonable costs of reviewing and acting upon any application for such permit and the reasonable costs of implementing and enforcing the terms and conditions of the permit.

¹ For more information, please see “technical support documents Alaska Part D NSR 165 IBR memo” included in the docket for this action.

C. Electronic Permit Application and Reporting Procedures

As discussed in the state's October 20, 2021, public notice included in the docket for this action, ADEC added a new section 18 AAC 50.270 that established requirements and procedures for electronic submission of documents for air permits, reporting, and other authorizations. Specifically, under 18 AAC 50.270(a), if an electronic form is available within ADEC's permittee portal for records or information required by the department, a person shall submit that information electronically using the designated form. Importantly, under 18 AAC 50.270(b), if a person does not have reasonable access to equipment necessary to access the permittee portal, the department may approve submission by alternative methods, including by letter, form, or electronic mail. Under 18 AAC 50.270(c), ADEC established a one-year deadline (September 7, 2023) for submission of existing forms using the permitting portal, and the provisions of 18 AAC 50.270(d) though (g) outline the procedures, timelines, notification, public participation, and electronic test environment for new forms added to the permitting portal. We have reviewed 18 AAC 50.270 and are proposing to approve this new section as consistent with the Clean Air Act. We also note that pursuant to the Cross-Media Electronic Reporting Rule (CROMERR) the EPA already approved Alaska's request to revise its EPA-authorized programs to allow electronic reporting under 40 CFR parts 51, 52, 60 through 63, and 70 via the Air Online Service System (AOS) for electronic reporting.² The permittee portal is a part of AOS.

D. Emissions Inventory

ADEC also added a new section 18 AAC 50.275 that requires sources to use consistent pollutant-specific emissions factors and calculation methods for all reporting requirements under 18 AAC 50. Specifically, subsection (a) requires all stationary sources operating in the state to report actual emissions, either upon request or to meet individual permit requirements, so that the state can meet Federal reporting requirements under 40 CFR part 51, subpart A. Subsection (b) requires that for the purposes of reporting potential, actual, or assessable emissions under any requirement of 18 AAC 50, stationary sources shall use consistent pollutant-specific emissions factors and calculation methods for all reporting

requirements. In its April 18, 2022, response to comments included in the docket for this action, ADEC explained the purpose of the new section was, "for a stationary source that reports emissions under one set of regulatory requirements (e.g., annual emission fees) and again under a second regulatory requirement (e.g., annual compliance certification) that the stationary source will use the same emission factor in both calculations, and not 'cherry pick' which emission factor works best for a given situation. The Department is finding multiple reports that often do not align and yet purport to report the same input value (actual emissions), because different emission factors were used trying to achieve some leverage on reported values." The response to comments further explained that the new section 18 AAC 50.275 will simplify reporting requirements for the regulated community and data validation for ADEC. We have reviewed 18 AAC 50.275 and are proposing to approve this new section as consistent with the Clean Air Act.

III. Proposed Action

The EPA is proposing to approve, and incorporate by reference, certain regulatory revisions to the Alaska SIP submitted on May 16, 2022, and August 11, 2022, as described in section II of this preamble. We are proposing to determine that these revisions are consistent with Clean Air Act (CAA) section 110, as well as CAA part C and D requirements for the permitting of major stationary sources. Upon final approval, the Alaska SIP will include the following regulations:

- 18 AAC 50.035 Documents, Procedures and Methods Adopted by Reference, except (a)(6), (a)(9), and (b)(4), state effective April 16, 2022, which adopts by reference certain Federal test procedures and methods for determining compliance with the NAAQS;
- 18 AAC 50.040 Federal Standards Adopted by Reference, except (a), (b), (c), (d), (e), (g), (j) and (k), state effective April 16, 2022, which adopts by reference certain Federal regulations for the permitting of new or modified major stationary sources;
- 18 AAC 50.270 Electronic Submission Requirements, state effective September 7, 2022, which establishes requirements and procedures for the electronic submission of permitting forms and other documents;
- 18 AAC 50.275 Consistency of Reporting Methodologies, state effective September 7, 2022, requiring consistent methodology in reporting air emissions;

- 18 AAC 50.400 Permit Administration Fees, except (a), (b), (c), and (i), state effective September 7, 2022, which establishes permit administration fees, compliance fees, and air quality emission fees.

IV. Incorporation by Reference

In this document, the EPA is proposing to include in a final rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the provisions described in sections II and III of this preamble. The EPA has made, and will continue to make, these documents generally available through <https://www.regulations.gov> and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

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

² See 80 FR 48531 (August 13, 2015).

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of the requirements would be inconsistent with the CAA; and

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

In addition, this proposed rulemaking would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rulemaking does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

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

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

Dated: January 11, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

[FR Doc. 2023–00817 Filed 1–17–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0730; EPA–R05–OAR–2020–0731; FRL–9746–01–R5]

Air Plan Approval; Michigan; Base Year Emissions Inventory and Emissions Statement Rule for the 2015 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve, under the Clean Air Act (CAA), a request submitted by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) on December 18, 2020, to revise the Michigan State Implementation Plan (SIP). EGLE's submittal addresses the emissions inventory and emissions statement requirements for the Allegan County, Berrien County, Detroit (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties) and Muskegon County nonattainment areas under the 2015 ozone National Ambient Air Quality Standard (NAAQS or standard). The CAA requires states to develop and submit, as SIP revisions, emission inventories for all ozone nonattainment areas. In this action, EPA is proposing to approve EGLE's emissions inventories for the Allegan County, Berrien County, and Muskegon County nonattainment areas under the 2015 ozone NAAQS and the removal of the repealed Act 348, Section 14a. EPA approved the portions of EGLE's December 18, 2020, submittal pertaining to the certification of EGLE's stationary annual emissions statement regulation and emissions inventories for the Detroit nonattainment area under the 2015 ozone NAAQS in a separate action on July 6, 2022.

DATES: Comments must be received on or before February 17, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2020–0730 (regarding emissions statement) or EPA–R05–OAR–2020–0731 (regarding emissions inventory) at <https://www.regulations.gov> or via email to blakley.pamela@epa.gov. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider

comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Emily Crispell, Environmental Scientist, Control Strategies Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8512, crispell.emily@epa.gov. The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

SUPPLEMENTARY INFORMATION:

In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives such comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: January 5, 2023.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2023–00368 Filed 1–17–23; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 88, No. 11

Wednesday, January 18, 2023

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2022–0055]

Notice of Intent To Prepare an Environmental Impact Statement for Highly Pathogenic Avian Influenza Control in the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: We are announcing to the public that the Animal and Plant Health Inspection Service (APHIS) intends to prepare an environmental impact statement (EIS) to examine the potential environmental effects of the Agency's response activities to highly pathogenic avian influenza outbreaks in commercial and backyard poultry operations in the United States. APHIS is requesting public comment to further define the scope of the EIS, identify reasonable alternatives and potential issues, as well as relevant information, studies, and/or analyses that APHIS should consider in the EIS.

DATES: We will consider all comments that we receive on or before February 17, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2022–0055 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2022–0055, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Comments received, including attachments and other supporting

materials, are part of the public record and subject to public disclosure. Commenters should not include any information in their comments or supporting materials that they consider confidential or inappropriate for public disclosure.

Supporting documents and any comments we receive on this docket may be viewed at www.regulations.gov or in our reading room, located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC 20250. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For questions related to the HPAI response activities, contact Ms. Chelsea Bare, Chief of Staff, Veterinary Services, APHIS, USDA, 1400 Independence Avenue SW, Whitten Building Room 318–E, Washington, DC 20250; (515) 337–6128; email: chelsea.j.bare@usda.gov. For questions related to the EIS, contact Ms. Samantha Bates, Environmental Protection Specialist, Environmental and Risk Analysis Services, PPD, APHIS, 4700 River Road Unit 149, Riverdale, MD 20737; (301) 851–3053; email: Samantha.Bates@usda.gov.

SUPPLEMENTARY INFORMATION:

Purpose and Need for the Proposed Action

Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture is authorized to protect the health of livestock, poultry, and aquaculture populations in the United States by preventing the introduction and interstate spread of serious diseases and pests of livestock, poultry, and aquaculture, and for eradicating such diseases within the United States when feasible. This authority has been delegated to the U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS), Veterinary Services (VS).

Highly pathogenic avian influenza (HPAI) is an extremely infectious disease and mostly fatal to poultry.¹

¹ Domestic poultry that can be affected include chickens; turkeys; ring-necked pheasants; ducks; geese; common, Japanese, or bobwhite quail; Indian peafowl; chukar or grey partridge; pigeons; ostrich; and guinea fowl.

HPAI can rapidly spread within and between domestic poultry flocks and wild bird (especially waterfowl) populations. In February 2004, the first outbreak of HPAI in the United States in 20 years occurred in Texas. From December 2014 until June 2015, there were more than 200 outbreaks of HPAI, affecting commercial and backyard flocks in the central and northwestern United States. Additional outbreaks occurred in Indiana beginning in January 2016, in Tennessee in March 2017, and in South Carolina in April 2020. In February 2022, HPAI was detected in a commercial turkey flock in Indiana. Within 9 months, the virus was confirmed in 266 commercial and 360 backyard flocks in 46 States.

VS works closely with States and the poultry industry to prevent HPAI from becoming established in the U.S. poultry population. Keeping the nation's poultry free from HPAI helps protect the poultry industry, farmers' livelihoods, the availability of poultry for U.S. consumers, international trade, the health of wild birds, and the health of people who are in close, regular contact with birds (note that the risk of HPAI infections in humans is low).

APHIS is planning to prepare an environmental impact statement (EIS) to examine the potential environmental effects of its HPAI outbreak response activities in commercial and backyard poultry operations in the United States. The EIS findings will be used in VS planning and decision making, as well as to inform the public about the potential environmental effects of VS' HPAI outbreak response activities. When HPAI outbreak response activities are implemented at specific locations, site-specific environmental documents may be required. If such documents are needed, APHIS may refer to information presented in the EIS in order to promptly fulfill its environmental compliance obligations during an emergency.

We are requesting public comment to help us identify reasonable alternatives, potential environmental effects, and any other issues APHIS could examine in the EIS. The EIS will be prepared in accordance with: (1) the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*), (2) the Council on Environmental Quality's NEPA-implementing regulations (40 CFR parts 1500–1508) in

effect as of the date of this notice, (3) USDA's NEPA-implementing regulations (7 CFR part 1b), and (4) APHIS' NEPA-Implementing Procedures (7 CFR part 372).

On February 9, 2016, APHIS published a notice in the **Federal Register** (81 FR 6828, Docket No. APHIS-2015-0058)² announcing the availability of a December 2015 final environmental assessment (EA) titled "High Pathogenicity Avian Influenza Control in Commercial Poultry Operations—A National Approach" and a finding of no significant impact (FONSI). APHIS withdrew the EA and FONSI on July 28, 2021 (86 FR 40444-40445, Docket No. APHIS-2015-0058). In that withdrawal, we indicated that further evaluation of the approach was warranted in light of then-changing circumstances related to HPAI in the United States. APHIS published a draft EA in April 2022 to allow VS to carry out emergency HPAI outbreak response activities as a result of HPAI outbreaks in seven States at the start of 2022. A final environmental assessment for an Emergency Response for HPAI Outbreaks in Seven States and FONSI were published in September 2022.³ As the current HPAI outbreak continues, VS is drafting a supplemental NEPA document to cover response activities in the other impacted States.

Proposed Action and Alternatives the EIS Will Consider

We have identified the following alternatives for further examination in the EIS:

No action alternative. Under the no action alternative, VS would conduct nationwide surveillance of commercial and backyard flocks to monitor for HPAI, determine whether outbreaks have occurred, monitor sites where HPAI has been detected and eradicated, and provide technical guidance upon request by an impacted State. VS would also provide indemnity (monetary payment made to a livestock owner for animal and animal products taken or destroyed to control or eradicate a disease) and financial compensation for costs incurred from disposal, cleanup, and disinfection under this alternative, as applicable. However, States, local authorities, and private partners, not VS, would be responsible for conducting and managing HPAI outbreak response activities, such as

depopulating infected poultry flocks and carcass management.⁴

Standard procedures alternative. Under the standard procedures alternative, VS would conduct all activities as outlined under the no action alternative (surveillance, monitoring, guidance, and indemnity and compensation). In addition, upon request from a State, APHIS VS' assistance could include conducting and managing the following: Depopulation of infected poultry flocks (e.g., using water-based foam, carbon dioxide (CO₂) and other approved gasses, ventilation shutdown plus (VSD+) heat or CO₂, cervical dislocation, decapitation, captive bolt, injectable euthanasia agents, and gunshot); carcass management, including transportation, disposal (e.g., composting, burial, landfill disposal compliant with the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), rendering, incineration, open-air burning, alkaline hydrolysis, and/or anaerobic digestion); and cleaning and disinfection of equipment and infected premises. HPAI outbreak response methods would be used either singly or in combination.

Adaptive management alternative. Under the adaptive management alternative, the proposed action, VS could use all available HPAI outbreak response methods from the standard procedures alternative, plus any new HPAI outbreak response methods or other existing methods not previously listed that become more useful due to changes in technology or in outbreak scenarios, as long as the technology is analyzed prior to use within a separate risk assessment and considered and discussed within a site-specific environmental assessment. If the risk assessment indicates that the risks to human health and the environment from the proposed outbreak response method are equal to, or less than, the risks associated with the outbreak response methods in the no action or standard procedures alternatives, the proposed nonstandard HPAI outbreak response method may be used. HPAI outbreak response methods could be used either singly or in combination.

VS recognizes that the use of a nonstandard HPAI outbreak response method would be rare, if at all. However, it is impossible to consider all

nonstandard technologies that currently exist or will exist in the future. The technologies for these nonstandard outbreak response methods have several logistical issues to overcome before VS could consider their use. For example, some nonstandard HPAI outbreak response methods may not be applied in the management of large numbers of animals or carcasses, either because the technologies have low capacity or low availability. However, should there be a change in the efficiency, number, or geographic range of nonstandard technologies, it is imperative that decisionmakers have the ability to quickly identify these options, analyze resulting risks, and implement the chosen course of action for their use, as applicable.

Summary of Potential Impacts

We have identified the following potential environmental impacts for examination in the EIS. We are requesting that the public comment on these potential impacts during the scoping period. They are impacts on: Soil, air, and water quality; humans (including effects on health and safety; agricultural lands; industries and the economy; public perception; cultural and historic resources; equity and environmental justice; children's health; and Tribes); and wildlife and plant populations, especially birds of conservation concern, eagles, and threatened and endangered species. Additionally, we request comment on the potential impacts of climate change on HPAI outbreak response activities, as well as possible impacts of the HPAI outbreak response activities on climate change.

Comments that identify other alternatives or issues that could be considered for examination in the EIS would be especially helpful. All comments received during the scoping period will be carefully considered in developing the final scope of the EIS.

Anticipated Permits and Authorizations

Various Federal, State, and local authorizations, permits, and consultations may be required for the proposed alternative. Anticipated permits, authorizations, and consultations may include, but are not limited to, the following: USDA permits/authorization for movement of materials into or out of control areas, including USDA permits for transportation of HPAI-infected poultry carcasses or products off-site; State permits for various depopulation, disposal, and clean-up options; Tribal consultations; Endangered Species Act section 7 consultation; and, if necessary,

² To view the notice and supporting documents as well as subsequent related notices and their supporting documents, go to www.regulations.gov and enter APHIS-2015-0058 in the Search field.

³ To view the draft EA, final EA, comments, and the FONSI, go to www.regulations.gov and enter APHIS-2022-0031 in the Search field.

⁴ Carcass management encompasses the transportation and disposal of carcasses, body parts, and eggs, and the cleanup and disinfection of equipment and premises after the carcasses are removed from the site. Associated materials such as unconsumed feed, bedding, manure, and other potentially contaminated debris/materials may be included.

consultation under the National Historic Preservation Act.

Schedule for the Decision-Making Process

APHIS will consider comments submitted in response to this notice of intent (NOI) when analyzing the potential impacts of the proposed alternatives for development of the draft EIS. Following completion of the draft EIS, APHIS will publish a notice of availability and request for public comments. APHIS expects to make the draft EIS available for public review and comment by November 2023. After the 45-day public review and comment period, APHIS will revise the draft EIS, as appropriate, and complete the final EIS. APHIS anticipates that the final EIS will be made available to the public by October 30, 2024. A record of decision will be issued no sooner than 30 days after the final EIS is released in accordance with 40 CFR 1506.11, but no later than December 1, 2024.

Public Scoping Process

This NOI initiates the public scoping process and will help guide the analysis. APHIS seeks public comment on this NOI to help identify potential alternatives or other issues that could be considered and any relevant information, studies or analyses that APHIS should consider in evaluating the potential impacts of the proposed alternatives on the quality of the human environment. To promote informed NEPA analysis and decision making, comments should be as specific as possible and explain why the issues raised are important for consideration in the EIS.

Comments should include, where possible, references and data sources supporting the information provided in the comment. We encourage the submission of scientific data, studies, or research to support your comments and an explanation of why the scientific data, study, or research is relevant and important.

Authority:

7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 11th day of January 2023.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–00884 Filed 1–17–23; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Guam Advisory Committee; Cancellation

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of virtual business meeting.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** concerning a virtual business meeting of the Guam Advisory Committee. The meeting scheduled for Tuesday, January 17, 2023, at 9:00 a.m. (ChST) is cancelled. The notice is in the **Federal Register** of Monday, December 19, 2022, in FR Doc. 2022–27440 in the first, second, and third columns of page 77549.

FOR FURTHER INFORMATION CONTACT: Liliana Schiller, *lschiller@uscrr.gov*, (202) 770–1856.

Dated: January 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–00740 Filed 1–17–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Indiana Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Indiana Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold planning meetings. The purpose of these meetings is to plan, discuss, and vote, as needed, on matters related to the Committee's civil rights project.

DATES: Wednesday, January 18, 2023, at 3:00 p.m. (ET); Wednesday, February 15, 2023, at 3:00 p.m. (ET); Wednesday, March 15, 2023, at 3:00 p.m. (ET); Wednesday, April 19, 2023, at 3:00 p.m. (ET); Wednesday, May 17, 2023, at 3:00 p.m. (ET).

ADDRESSES: Meetings will be held via Zoom.

Meeting Link (Audio/Visual): <https://tinyurl.com/2thaw2fj>

Join by Phone (Audio Only): 833–435–1820; Meeting ID: 161 128 3214#

FOR FURTHER INFORMATION CONTACT: Email Ivy Davis, Designated Federal Officer, at *ero@uscrr.gov*, or call Sarah

Villanueva, Support Specialist, at 206–800–4892.

SUPPLEMENTARY INFORMATION: Members of the public can listen to these discussions. Committee meetings are available to the public through the above call-in number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over landline connections to the toll-free telephone number. Individuals who are deaf, blind, and hard of hearing may follow the proceedings by first calling the Federal Relay Service at 800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed. The email subject line transmitting the written comments should state: Atten: IN and sent to this email address: *ero@uscrr.gov*. Persons who desire additional information may email Ivy Davis at *ero@uscrr.gov*, or call Sarah Villanueva, at 206–800–4892.

By appointment, records generated from this meeting may be inspected and reproduced at the Eastern Regional Programs as they become available, both before and after the meeting. Please contact staff by email or phone, as noted above. Records of the meeting will be available via www.facadatabase.gov under the Commission on Civil Rights, Indiana Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.uscrr.gov>, or may contact the Eastern Regional Office at the above email address or phone number.

Agenda

- I. Meeting Announcement & Roll Call
- II. Welcome
- III. Project Planning
- IV. Other Business
- V. Next Meeting
- VI. Public Comments
- VII. Adjourn

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given fewer than 15 calendar days prior to the meeting because of the exigent circumstances.

Dated: January 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-00797 Filed 1-17-23; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2138]

Approval for Production Authority; Foreign-Trade Zone 26, OFS Fitel, LLC (Optical Fiber Products), Carrollton, Georgia

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Georgia Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 26, has requested production authority on behalf of OFS Fitel, LLC (OFS), within FTZ 26 in Carrollton, Georgia (B-2-2022, docketed January 20, 2022);

Whereas, notice inviting public comment has been given in the **Federal Register** (87 FR 4195-4196, January 27, 2022) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if subject to the restriction listed below;

Now, therefore, the Board hereby orders:

The application for production authority under zone procedures within FTZ 26 on behalf of OFS, as described in the application and **Federal Register** notice, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to the following restriction: the authority shall remain in effect for a period of five years from the date of approval by the Board, subject to extension upon review.

Dated: January 11, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2023-00815 Filed 1-17-23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC655]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Replacement of Pier 3 at Naval Station Norfolk in Norfolk, Virginia

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

ACTION: Notice; modification of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued a modified incidental harassment authorization (IHA) to the U.S. Navy to incidentally harass, by Level A and Level B harassment, marine mammals during construction activities associated with the replacement of Pier 3 at Naval Station Norfolk at Norfolk, Virginia. **DATES:** This Authorization is effective from the date of issuance through March 31, 2023.

FOR FURTHER INFORMATION CONTACT: Kim Corcoran, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), 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 such 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 such takings are set forth.

History of Request

On March 15, 2022, NMFS issued an incidental harassment authorization (IHA) to the Navy to incidentally harass, by Level A and Level B harassment only, marine mammals during construction activities associated with the Pier 3 Replacement Project at Naval Station (NAVFAC) Norfolk in Norfolk, Virginia (87 FR 15945; March 21, 2022). Species authorized for take included humpback whale (*Megaptera novaeangliae*), bottlenose dolphin (*Tursiops truncatus*), harbor porpoise (*Phocoena phocoena*), harbor seal (*Phoca vitulina*), and gray seal (*Halichoerus grypus*). The effective dates of this IHA are April 1, 2022 through March 31, 2023.

On July 29, 2022, NMFS received a request from the Navy for a modification to the Pier 3 Replacement project IHA due to a change in the construction contractor's plan to include concurrent pile driving and drilling activities. During consultation for the initial IHA, the Navy did not anticipate the need for concurrent activities in the first year of work. This IHA covers 1 year of a larger project for which the Navy has submitted a request for a Letter of Authorization (LOA) (87 FR 60998; October 7, 2022) for additional work occurring from April 1, 2023 through March 31, 2028. However, the construction contractor has since determined that in order to meet the

scope requirements and dates to complete the pier, concurrent activities will be necessary within the first year of construction. Therefore, the Navy is requesting, and NMFS is modifying the 2022 IHA to include concurrent pile driving and drilling activities. This change may increase both Level A and Level B harassment isopleths and result in an increased estimate of exposures by Level B harassment for bottlenose dolphin and by Level A harassment for harbor seal. NMFS has determined that the changes also necessitate revised shutdown mitigation provisions for concurrent pile driving scenarios for all species. The monitoring and reporting measures remain the same as prescribed in the initial IHA, and no additional take is requested nor authorized for other species.

Description of the Activity and Anticipated Impacts

The modified IHA will include the same construction activities (*i.e.*, impact

pile driving, vibratory pile driving and removal, and drilling) in the same locations that were described in the initial IHA. The monitoring and reporting measures remain the same as prescribed in the initial IHA, while revisions to the required mitigation measures have been made. NMFS refers the reader to relevant documents related to issuance of the initial IHA, including the Navy’s application, the notice of proposed IHA and request for comments (87 FR 3976; January 26, 2022), and notice of issued IHA (87 FR 15945; March 21, 2022) (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-replacement-pier-3-naval-station-norfolk-norfolk-virginia>) for more detailed description of the project activities.

Detailed Description of the Action

A detailed description of the construction activities is found in the aforementioned documents associated

with issuance of the initial IHA. The location, time of year, and nature of the activities, including the types of piles and methods of installation and removal are identical to those described in the previous documents. However, as noted in the History of Request section, the Navy anticipates that concurrent pile driving will be necessary to complete year one activities on time. Potential concurrent activity scenarios for year one can be found in Table 1. For individual pile driving activities, the Level A and Level B harassment zones remain unchanged (see initial IHA (87 FR 3976; January 26, 2022)), however for concurrent pile driving scenarios harassment zones increased. Therefore, the larger harassment zone for each scenario was used to calculate exposure estimates as well as to determine appropriate shutdown zones.

TABLE 1—POTENTIAL CONCURRENT ACTIVITY SCENARIOS

Scenario locations	Concurrent scenarios	Total equipment quantity	Equipment (quantity)	Number of days
Pier 3T and Pier 4	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T and vibratory extract 14-inch timber piles at Pier 4.	2	Vibratory Hammer (2)	16
Pier 3T and Pier 4	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T and impact install 24-inch concrete piles.	3	Vibratory Hammer (2), Impact Hammer (1).	41
Pier 3T and Pier 4	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T and rotary drill 24-inch concrete piles.	3	Vibratory Hammer (2), Rotary Drill (1).	30
Pier 3T, CEP–176, and CEP–102.	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T, vibratory or impact install 42-inch pipe piles at CEP–176 and CEP–102.	3	Vibratory Hammer (2), Impact Hammer (1).	34
Pier 3T and CEP–176	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T, vibratory or impact install 42-inch pipe piles at CEP–176, and vibratory or impact install 28-inch sheet pile at CEP–176.	3	Vibratory Hammer (2), Impact Hammer (1).	67
Pier 3T and Pier 3	Vibratory extract 14-inch timber and or 18-inch concrete piles at Pier 3T and impact hammer 24-inch concrete.	2	Vibratory Hammer (1), Impact Hammer (1).	13
Pier 3T and Pier 3	Vibratory extract 14-inch timber or 18-inch concrete piles at Pier 3T and rotary drill 24-inch concrete.	2	Vibratory Hammer (1), Rotary Drill (1).	33

Comments and Responses

A notice of NMFS’s proposal to modify the Navy’s IHA was published in the **Federal Register** on December 9, 2022 (87 FR 75600). That notice described, in detail, the Navy’s activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 15-day public comment period, NMFS received no comments. There have been no changes from the proposed to final modified IHA.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this modified IHA as well. In addition, NMFS has reviewed the 2021 Stock Assessment Reports (Hayes *et al.*, 2022), information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA. (Note that the Potential Biological Removal of the gray seal Western North Atlantic stock

increased from 1,389 to 1,458, and annual mortality and serious injury of the harbor porpoise Gulf of Maine/Bay of Fundy stock decreased from 217 to 164).

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the initial IHA, which remains applicable to the issuance of this modified IHA.

NMFS is not aware of new information regarding potential effects.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take for the specified activity are found in the notice of issuance of the initial Pier 3 Replacement IHA (87 FR 15945; March 21, 2022). The types and sizes of piles, installation methods, and marine mammal stocks taken remain unchanged from the initial IHA. The modification includes concurrent pile driving activities which could result in increased SPLs and harassment zone sizes given the proximity of the component driving sites and the physical rules of decibel addition. The Navy anticipates that concurrent use of up to three hammers producing continuous noise could occur on 70 days. Given that the use of more than

one hammer for pile installation and removal on the same day (whether simultaneous or not) will increase the number of piles installed per day, this would be anticipated to result in a reduction in total number of days of pile installation. Table 1 shows potential scenarios for concurrent pile driving. However, as described further below, the Navy has conservatively calculated take for both individual and concurrent pile driving scenarios and requested authorization of take for the most conservative scenario.

NMFS (2018b) analyzes 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 Down-the-Hole (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 harassment zones.

When two continuous noise sources, such as vibratory hammers and drills, 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 2.

TABLE 2—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 zones.
Impact, Impact	Any	Use zones for each pile size and number of strikes.	Use zone for each pile size.
Vibratory, Vibratory or Vibratory, Drilling	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 the rules for combining sound source levels, decibel addition calculations were carried out for each possible concurrent pile driving scenario. The source levels included in

Table 3 are used to estimate the Level A harassment zones and Level B harassment zones. No addition is warranted for impact pile driving in combination with vibratory.

TABLE 3—REVISED PROXY VALUES FOR SIMULTANEOUS USE OF NON-IMPULSIVE SOURCES

Scenario location	Activity and proxy	Revised proxy
Pier 3T and Pier 4	Vibratory Extract 14-inch timber at Pier 3T—162 dB RMS	165 dB RMS.
	Vibratory extract 14-inch timber Pier 4—162 dB RMS	165 dB RMS.
	Vibratory Extract 18-inch concrete piles at Pier 3T—162 dB RMS	165 dB RMS.
	Vibratory Extract 14-inch timber piles at Pier 4—162 dB RMS	166 dB RMS.
	Vibratory extract 14-inch timber piles at Pier 3T—162 dB RMS	166 dB RMS.
Pier 3T, CEP-176, and CEP-102.	Vibratory extract 18-inch concrete Piles at Pier 3T—162 dB RMS	169 dB RMS.
	Rotary drill 24-inch concrete piles at Pier 4—154 dB RMS	169 dB RMS.
	Vibratory extract 14-inch timber at Pier 3T—162 dB RMS	169 dB RMS.
	Vibratory install 42-inch pipe at CEP-176 or CEP-102—168 dB RMS	169 dB RMS.
Pier 3T and Pier 3	Vibratory extract 18-inch concrete at Pier 3T—162 dB RMS	163 dB RMS.
	Vibratory install 42-inch pipe at CEP-176 or CEP-102—168 dB RMS	163 dB RMS.
	Vibratory extract 14-inch timber at Pier 3T—162 dB RMS	163 dB RMS.
	Rotary drill 24-inch concrete piles at Pier 4—154 dB RMS	163 dB RMS.

The size of the Level A harassment zones and Level B harassment zones

using the source levels in Table 3 result in larger isopleths (see Table 4 for

isopleth distances) compared to individual activities.

TABLE 4—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR CONCURRENT PILE DRIVING SCENARIOS

Activity	Pile location	Scenario	Source level	Level A (m)				Level B (m/km2)
				LF	MF	HF	Phocids	
Vibratory Pile Extraction	Pier 3T and pier 4	Remove two 14-inch timber piles ...	165	51	5	75	31	10,000
Vibratory Pile Extraction	Pier 3T and pier 4	Remove 18-inch concrete and 14-inch timber piles.	165	51	5	75	31	10,000
Vibratory Pile Extraction and Drilling.	Pier 3T and pier 4	Remove 14-inch timber and 18-inch concrete piles at Pier 3T and rotary drill for 24-inch concrete piles at Pier 4.	166	59	5	87	36	11,659
Vibratory Pile Extraction and Drilling.	Pier 3T, CEP-176, and CEP-102.	Remove 14-inch timber at Pier 3T and install 42-inch pipe at either CEP-176 or CEP-102.	169	194	17	287	118	18,479
Vibratory Pile Extraction and Drilling.	Pier 3T, CEP-176, and CEP-102.	Remove 18-inch concrete at Pier 3T and install 42-inch pipe at either CEP-176 or CEP-102.	169	194	17	287	118	18,479
Vibratory Pile Extraction and Drilling.	Pier 3T and Pier 3	Remove 14-inch timber piles at Pier 3T and rotary drill for 24-inch concrete piles at new Pier 3.	163	43	4	64	26	7,356
Vibratory Pile Extraction and Drilling.	Pier 3T and Pier 3	Remove 18-inch concrete piles at Pier 3T and rotary drill for 24-inch concrete piles at new Pier 3.	163	43	4	64	26	7,356

With the exception of bottlenose dolphins, which is the only species where densities and harassment isopleths are used to determine take estimates as opposed to local occurrence data, the total taking by Level B harassment of all species is predicted to be the same or lower with concurrent activity scenarios due to a decrease in number of construction days (see Table 5 for calculated take estimate comparison), therefore the authorized take for these species remains unchanged from the initial IHA to account for the most conservative scenario. As stated in the initial Pier 3 IHA (87 FR 15945; March 21, 2022), the total take number for all species, except bottlenose dolphin, were estimated using local occurrence data, therefore take estimates were determined by multiplying the number of pile driving days by assumed daily occurrence for each species. As the number of pile driving days under concurrent scenarios is lower than the number of days anticipated for individual activities, the calculated takes were lower than what was originally authorized through the initial IHA. Please see the notice of issuance for the initial Pier 3 IHA (87 FR 15945; March 21, 2022) for a detailed explanation of how take estimates were calculated for individual pile driving activities for these species.

The total take number for bottlenose dolphin was estimated using inshore seasonal densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent areas near Virginia Beach, Virginia from August 2012 through August 2015. This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and

is the most representative density for the project area. NMFS multiplied the density of 1.38 dolphins per square kilometer by the Level B harassment zone area for each activity for the project, and then by the number of days associated with that activity (see Table 1). The Level B harassment zones increased as a result of concurrent pile driving activities; therefore, calculated Level B harassment exposure estimates also increased as a result. As described in the notice of the initial proposed and issued IHA, there is insufficient information on relative abundance to apportion the takes precisely to each of the three stocks in the area. Therefore, the same approach as used in previous projects (e.g., Hampton Roads Bridge Tunnel project (86 FR 17458; April 2, 2021), and the U.S. Navy Norfolk Maintenance Rule (86 FR 24340; May 6, 2021)) was used to estimate the appointment of takes to each of the three bottlenose dolphin stocks that may be present in the area. Given that most of the Northern North Carolina Estuarine Stock (NNCES) are found in the Pamlico Sound Estuary, over 160 kilometers from Norfolk, we conservatively estimated that no more than 200 of the requested takes will be from this stock. Since members of the northern migratory coastal and southern migratory coastal stocks are thought to occur in or near the Bay in greater numbers, we conservatively assume that no more than half of the remaining takes will accrue to either of these stocks. Additionally, a subset of these takes will likely be comprised of the Chesapeake Bay resident dolphins, although the size of that population is unknown.

With the exception of harbor seals, the total taking by Level A harassment of all species is predicted to be the same

or lower with the concurrent activity scenario given the decreased number of pile driving days anticipated and therefore the authorized take by Level A harassment remains unchanged from the initial IHA to be conservative. To remain consistent with the calculations used to determine take by Level A harassment for harbor seals in the proposed rulemaking for years two through five of the Navy's Pier 3 Replacement project (87 FR 60998; October 7, 2022), the Navy has requested to increase the number of takes by Level A harassment for harbor seals to reflect the potential of one seal per day (of 13.6 seals per day occurrence), or 20 percent of the total taking, to remain within the Level A harassment area and within the shutdown zone for sufficient prior to detection that Level A harassment will actually occur. Similar methodologies were applied for gray seal which resulted in no estimated change in the number of takes by Level A harassment.

The total numbers of incidental takes by Level A harassment and Level B harassment, including updated Level A harassment numbers for harbor seal and Level B harassment numbers for bottlenose dolphin, are shown in Table 5. The total number of takes (Level A harassment and Level B harassment combined) has not changed for harbor seal because the additional takes by Level A harassment are assumed to occur to animals that would have previously been counted as taken by Level B harassment. Therefore, NMFS is proposing to reduce the authorized Level B harassment take of harbor seal by the same amount that the Level A harassment estimate is increased.

TABLE 5—TOTAL NUMBERS OF AUTHORIZED TAKES BY LEVEL A AND LEVEL B HARASSMENT AND AS A PERCENTAGE OF THE STOCK

Species	Stock	Level A harassment	Level B harassment	Total taking	Percent of stock
Humpback whale	Gulf of Maine ^a	0	12	12	0.9
Bottlenose dolphin ^{b c d}	WNA Coastal, Northern Migratory	0	14,841	14,841	223.5
	WNA Coastal, Southern Migratory	0	14,841	14,841	395.7
	Northern NC Estuarine	0	200	200	24.3
Harbor porpoise	Gulf of Maine/Bay of Fundy	10	12	22	0.0
Harbor seal	WNA ^e	152	1,092	1,244	2.0
Gray seal	WNA	1	2	3	0.0

^a West Indies DPS. Please see the Description of Marine Mammals in the Area of Specified Activities section in the initial IHA for further discussion.

^b Takes estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present will follow the same probability of presence in the project area. Please see the Small Numbers section for additional information.

^c Assumes multiple repeated takes of the same individuals from a small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see the Small Numbers section for additional information.

^d Total authorized takes by Level B harassment increased from 14,989 in the initial IHA to 29,882.

^e Total authorized takes by Level A harassment increased from 16 in the initial IHA to 152, however the total take (1244) has not increased.

Description of Mitigation, Monitoring and Reporting Measures

With the exception of the revised shutdown provisions for concurrent pile driving scenarios discussed below, the monitoring and reporting measures described here are identical to those included in the initial Pier 3 IHA (87 FR 15945; March 21, 2022).

In addition to the measures described later in this section, the Navy will employ the following mitigation measures:

- Avoid direct physical interactions with marine mammals during construction activity. If a marine mammal comes within 10 meters of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction;

- The Navy will conduct trainings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all activities subject to this IHA and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures; and

- 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.

The following monitoring measures apply to the Navy’s in water construction activities:

- *Protected Species Observers (PSOs)*—The placement of PSOs during all pile driving, removal, and drilling activities will ensure that the entire

shutdown zone is visible. Should environmental conditions deteriorate such that the entire shutdown zone will not be visible (e.g., fog, heavy rain), pile driving, removal, and drilling must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected;

- *Monitoring for Level A and Level B Harassment*—The Navy will monitor the Level B harassment zones to the extent practicable, and all of the Level A harassment zones. The Navy will monitor at least a portion of the Level B harassment zone on all pile driving, removal, or drilling days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of activity should the animal enter the shutdown zone;

- *Pre-activity Monitoring*—Prior to the start of daily in water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30 minute period. If a marine mammal is observe within the shutdown zones listed in Table 6, pile driving, removal, and drilling activities must be delayed or halted. If pile driving, removal, and/or drilling 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 zones or 15 minutes have

passed without re-detection of the animal. When a marine mammal for which Level A harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence. A determination that the shutdown zone is clear must be made during a period of good visibility (i.e., the entire shutdown zone and surrounding waters must be visible to the naked eye);

- *Soft Start*—Soft start procedures are used to provide additional protection to marine mammals by providing and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy strike sets. Soft start will 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;

- *Reporting*—PSOs must record specific information as described in the **Federal Register** notice of the issuance of the initial IHA (87 FR 15945; March 21, 2022). Within 90 days after completion of pile driving and removal activities, the Navy must provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed. If no comments are received by NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be

submitted within 30 days after receipt of comments; and

- *Establishment of Shutdown Zones*—The Navy will establish shutdown zones for all pile driving, removing, and drilling activities. The purpose of a shutdown zone is generally to define an area within which

shutdown of the activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 6). For every pile driving activity, shutdown is

mandatory whenever an animal is within 10 m of a pile driving location. In such instances, in-water pile driving operations may only continue after 15 minutes have passed or the animal is seen heading away from the 10 m shutdown zone.

TABLE 6—SHUTDOWN ZONES (m) DURING CONCURRENT PILE DRIVING SCENARIOS
 [Shutdown zones for individual pile driving activities remain unchanged from the initial IHA]

Activity	Shutdown zones		
	Humpback whale*	Harbor porpoise	Dolphins and seals
Vibratory Remove two 14-inch timber piles	55	55	35
Vibratory Remove 18-inch concrete and 14-inch timber piles	55	55	35
Vibratory Remove 14-inch timber and 18-inch concrete piles at Pier 3T and rotary drill for 24-inch concrete piles at Pier 4	60	60	35
Vibratory Remove 14-inch timber at Pier 3T and Vibratory install 42-inch pipe at either CEP-176 or CEP-102	200	200	50
Vibratory Remove 18-inch concrete at Pier 3T and Vibratory install 42-inch pipe at either CEP-176 or CEP-102	200	200	50
Vibratory Remove 14-inch timber piles at Pier 3T and rotary drill for 24-inch concrete piles at new Pier 3	45	45	30
Vibratory Remove 18-inch concrete piles at Pier 3T and rotary drill for 24-inch concrete piles at new Pier 3	45	45	30

* Shutting down to the maximum distance to the Level A harassment threshold. No takes by Level A harassment are expected to occur or are authorized.

Based on our evaluation of the applicant’s measures in consideration of the increased estimated take for bottlenose dolphin, as well as the modified shutdown provisions for concurrent pile driving scenarios, NMFS has re-affirmed the determination that the required mitigation measures, as modified here, provide the means of effecting the least practicable impact on the affected species and their habitat.

Determinations

With the exception of the revised take numbers and shutdown procedures, the Navy’s in water construction activities as well as monitoring and reporting requirements are unchanged from those in the initial IHA. The effects of the activity on the affected species and stocks, taking into consideration the modified mitigation and related monitoring measures, remain unchanged, notwithstanding the increase to the authorized amount of harbor seal take by Level A harassment, and to the authorized amount of bottlenose dolphin take by Level B harassment.

The takes from Level A and Level B harassment will be due to potential behavioral disturbance, temporary threshold shift (TTS), and potentially but unlikely, permanent threshold shift (PTS). No serious injury or mortality is anticipated given the nature of the activity and measures designed to

minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Description of Mitigation, Monitoring and Reporting Measures section).

The Level A harassment zones identified in Table 4 are based upon an animal exposed to pile driving or drilling multiple concurrent piles per day. Considering the short duration to drive each pile and breaks between pile installations (to reset equipment and move pile into place), means an animal will have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. With the addition of concurrent pile driving, the Navy anticipates fewer construction days than with individual pile driving which will ultimately reduce exposure time for all species. Additionally, no Level A harassment is anticipated for humpback whales due to the required mitigation measures to shutdown to the full extent of the Level A harassment zone, which we expect the Navy will be able to effectively implement given the reasonable Level A harassment zone sizes and high visibility of humpback whales. If an animal was exposed to accumulated sound energy, the resulting PTS will likely be small (e.g., PTS onset) at lower frequencies where pile driving

energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The Navy’s pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take will occur within a limited, confined area (immediately surrounding NAVSTA Norfolk in the Chesapeake Bay area) of the stock’s range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Furthermore, the amount of take authorized is extremely small when compared to stock abundance.

There are three bottlenose dolphin stocks that could occur in the project area. Therefore, the estimated 29,882 incidents of dolphin take by Level B harassment will likely be split among the western North Atlantic northern migratory coastal stock, the western North Atlantic southern migratory coastal stock, and the northern North Carolina Estuarine stock (NNCES), and is expected to involve repeated takes of a limited subset of individuals of these stocks. Based on the stocks’ respective occurrence in the area, NMFS estimates that there will be no more than 200 takes from the NNCES stock, representing 24 percent of that population, with the remaining takes split evenly between the northern and southern migratory coastal stocks. Based

on the consideration of various factors as described below, we have determined the number of individuals taken will comprise less than one-third of the best available population abundance estimate of either coastal migratory stocks. Detailed descriptions of the stocks' ranges have been provided in the Description of Marine Mammals in the Area of Specified Activities section of the initial IHA.

Both the northern migratory coastal and southern migratory coastal stocks have expansive ranges and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these two stocks it is unlikely that large segments of either stock will approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The northern migratory coastal stock is found during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold water months, dolphins may be found in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia border. During January–March, the southern Migratory coastal stock appears to move as far south as northern Florida. From April–June, the stock moves back north to North Carolina. During the warm water months of July–August, the stock is presumed to occupy the coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of the mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~2 months) animals might remain at these boundaries, it is reasonable to

assume that takes are likely to occur only within some small portion of either of the migratory coastal stocks.

Many of the dolphin observations in the Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (Mann, Personal Communication). Similarly, using available photo-identification data, Engelhaupt *et al.* (2016) determined that specified individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 kilometers from the initial sighting location. Multiple sightings of the same individual will considerably reduce the number of individual animals that are taken by harassment. Furthermore, the existence of a resident dolphin population in the Bay will increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

The increase in Level A harassment for harbor seal take corresponds to a commensurate decrease in the predicted number of Level B harassment, and the total number of takes remains unchanged. Therefore, in consideration of this, the harbor seal stock abundance information discussed in the initial IHA and in the Estimated Take section above, we re-affirm that small numbers of harbor seals will be taken relative to the population size of the stock. Even in consideration of the increased numbers of take by Level A harassment, the impacts of these exposures may result in moderate injury to a limited number of harbor seals.

In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) The Navy's activities will not have an unmitigable adverse impact on taking for subsistence

purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included..

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under Section 7 of the ESA is not required for this action.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our action (*i.e.*, the issuance of an IHA) with respect to potential impacts on the human environment.

This action remains 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 will preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the modified IHA continues to qualify to be categorically excluded from further NEPA review.

Authorization

NMFS has issued a modified IHA to the Navy for the potential harassment of small numbers of five marine mammal species incidental to the Pier 3 Replacement project at Naval Station Norfolk at Norfolk, Virginia, that includes the previously explained mitigation, monitoring, and reporting requirements.

Dated: January 11, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2023-00801 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; NOAA Space-Based Data Collection System (DCS) Agreements

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 20, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at NOAA.PRA@noaa.gov. Please reference OMB Control Number 0648-0157 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Letecia Reeves, GOES DCS Customer Service Manager, Office of Satellite and Product Operations, 1315 East-West Hwy., Silver Spring, MD 20746, 240-528-8891, Letecia.Reeves@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of an existing information collection.

The National Oceanic and Atmospheric Administration (NOAA) operates two space-based data collection

systems (DCS) per 15 CFR part 911: the Geostationary Operational Environmental Satellite (GOES) DCS and the Polar-Orbiting Operational Environmental Satellite (POES) DCS, also known as the Argos system. Both the GOES DCS and the Argos DCS are operated to support environmental applications, e.g., meteorology, oceanography, hydrology, ecology, and remote sensing of Earth resources. In addition, the Argos DCS currently supports applications related to protection of the environment, e.g., hazardous material tracking, fishing vessel tracking for treaty enforcement, and animal tracking. Presently, the majority of users of these systems are government agencies and researchers and much of the data collected by both the GOES DCS and the Argos DCS are provided to the World Meteorological Organization via the Global Telecommunication System for inclusion in the World Weather Watch Program.

Current loading on both of the systems does not use the entire capacity of that system, so NOAA is able to make its excess capacity available to other users who meet certain criteria. Applications are made in response to the requirements in 15 CFR 911 (under the authority of 15 U.S.C. 313, Duties of the Secretary of Commerce and others), using system use agreement (SUA) forms. The application information received is used to determine if the applicant meets the criteria for use of the system. The system use agreements contain the following information: (1) the period of time the agreement is valid and procedures for its termination, (2) the authorized use(s) of the DCS, and its priorities for use, (3) the extent of the availability of commercial services which met the user's requirements and the reasons for choosing the government system, (4) any applicable government interest in the data, (5) required equipment standards, (6) standards of operation, (7) conformance with applicable International Telecommunication Union (ITU) and Federal Communications Commission (FCC) agreements and regulations, (8) reporting time and frequencies, (9) data formats, (10) data delivery systems and schedules and (11) user-borne costs.

Accepted applicants use the NOAA DCS to collect environmental data and in limited cases, non-environmental data via the Argos DCS, to support other governmental and non-governmental research or operational requirements, such as for law enforcement purposes. The applicants must submit information to ensure that they meet these criteria. NOAA does not approve agreements

where there is a commercial service available to fulfill the user requirements (per 15 CFR part 911).

II. Method of Collection

Method of submittal is electronically (via internet).

III. Data

OMB Control Number: 0648-0157.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Not-for-profit institutions; Federal government; state, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 225.

Estimated Time per Response: Thirty minutes per response.

Estimated Total Annual Burden Hours: 113.

Estimated Total Annual Cost to Public: \$0 in recordkeeping/reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 15 CFR 911, Policies and Procedures Concerning Use of the NOAA Space-Based Data Collection Systems.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2023-00778 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-HR-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC663]

North Pacific Albacore United States Stakeholder Meeting; Meeting Announcement

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

ACTION: Notice of public meeting.

SUMMARY: NMFS announces a U.S. stakeholder meeting open to the public to discuss North Pacific albacore (NPALB) management. This meeting is intended to prepare for potential discussions at the 2023 annual meetings of the Inter-American Tropical Tuna Commission (IATTC) and Western and Central Pacific Fisheries Commission Northern Committee (WCPFC NC) on a harvest strategy for NPALB fisheries. The meeting topics are described under the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The virtual meeting will be held on February 15, 2023, from 11 a.m. to 2 p.m. Hawaii Standard Time (or until business is concluded). You must complete the registration process by February 8, 2023, if you plan to attend the meeting (see **ADDRESSES**). Members of the public may submit written comments on meeting topics or materials to Valerie Post at valerie.post@noaa.gov by February 8, 2023, and may also provide oral comments during the virtual meeting.

ADDRESSES: If you plan to attend the meeting, which will be held by webinar, please register at <https://forms.gle/HnauFTcdHQQz1MHLs8>. Instructions for attending the meeting will be emailed to meeting participants before the meeting occurs. This meeting may be audio recorded for the purposes of generating notes of the meeting. As public comments will be made publicly available, participants and public commenters are urged not to provide personally identifiable information (PII) at this meeting. Participation in the meeting, in person,

by web conference, or by telephone constitutes consent to the audio recording.

FOR FURTHER INFORMATION CONTACT: Valerie Post, Pacific Islands Regional Office at valerie.post@noaa.gov.

SUPPLEMENTARY INFORMATION: In 2021, the International Scientific Committee on Tuna and Tuna-like Species in the North Pacific Ocean (ISC) completed a management strategy evaluation (MSE) on NPALB,¹ and the ISC Albacore Working Group hosted a meeting among U.S. and Canadian stakeholders from March 22–25, 2021, to review the results of the MSE. As a follow-up to the ISC meeting in March 2021, NMFS hosted virtual meetings on June 1, 2021 and April 5, 2022, for U.S. stakeholders to express their priorities and consider future management of NPALB. Additionally, in 2022, the Inter-American Tropical Tuna Commission (IATTC) and Western and Central Pacific Fishery Commission (WCPFC) adopted a harvest strategy for NPALB that indicated certain components (*e.g.*, harvest control rules) would be addressed in 2023.² The forthcoming February 15 meeting, is intended to follow up on the June 2021 and April 2022 webinars, as well as to prepare for anticipated discussions at the IATTC and WCPFC Northern Committee (NC).

NPALB U.S. Stakeholder Meeting Topics

The agenda will be distributed to participants in advance of the meeting. The meeting agenda will include a discussion on a harvest strategy for NPALB that may include, but is not limited to, harvest control rules, management procedures and exceptional circumstances.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be indicated when registering for the meeting (see **ADDRESSES**) by February 8, 2023.

Authority: 16 U.S.C. 951 *et seq.*; 16 U.S.C. 1801 *et seq.*; and 16 U.S.C. 6901 *et seq.*

Dated: January 11, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023-00789 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-22-P

¹ http://isc.fra.go.jp/working_groups/albacore.html.

² https://iattc.org/GetAttachment/9d1676e8-b2af-4f40-88c1-5c3f0f8594ea/C-22-04_North-Albacore-Harvest-Strategy.pdf and harvest strategies recently adopted by the WCPFC are expected to be available here: <https://www.wcpfc.int/harvest-strategy>.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC682]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Marine Planning Committee (MPC) will hold an online public meeting.

DATES: The online meeting will be held Thursday, February 2, 2023, from 10 a.m. to 4 p.m., Pacific Standard Time or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including a proposed agenda and directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Staff Officer, Pacific Council; telephone: (503) 820-2409.

SUPPLEMENTARY INFORMATION: The purpose of this online meeting is for the MPC to consider current offshore wind energy and aquaculture issues and to provide information and advice to the Pacific Council for consideration at its March 2023 meeting. Potential topics may include:

1. Update on suitability modeling being conducted by the National Centers for Coastal Ocean Science and the Bureau of Ocean Energy Management to support identification of offshore Wind Energy Areas for two Call Areas off the Oregon Coast;

2. Update on the Draft NOAA Aquaculture Opportunity Areas Programmatic Environmental Impact Statement; and

3. Summarizing the December 2022 lease auction for five offshore Wind Energy Areas off Central and Northern California.

Other relevant topics may be addressed as appropriate.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: January 12, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-00855 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC679]

Endangered and Threatened Species; Take of Abalone

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

ACTION: Notice of receipt of application; to renew one scientific research and enhancement permit.

SUMMARY: Notice is hereby given that NMFS has received a request to renew an existing scientific research and enhancement permit for white abalone. The proposed work is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and to help guide management, conservation, and recovery efforts. The application may be viewed online at: https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.

DATES: Comments or requests for a public hearing on the application must be received at the provided email address (see **ADDRESSES**) on or before February 17, 2023.

ADDRESSES: All written comments on the applications should be submitted by

email to nmfs.wcr-apps@noaa.gov. Please include the permit number (14344-3R) in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Susan Wang, Long Beach, CA (email: Susan.Wang@noaa.gov). Permit application instructions are available from the address above, or online at <https://apps.nmfs.noaa.gov>.

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Endangered white abalone (*Haliotis sorenseni*).

Authority

Scientific research and enhancement permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*) and regulations governing listed fish and wildlife permits (50 CFR parts 222-226). NMFS issues permits based on findings that such permits: (1) are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on the application listed in this notice should set out the specific reasons why a hearing on the application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Applications Received

Permit 14344-3R

The University of California, Davis' Bodega Marine Laboratory (BML) has requested to renew a research and enhancement permit that currently authorizes a captive breeding program for white abalone. The permit allows BML and approved facilities to hold, breed, grow-out, and conduct lab studies on captive white abalone. The permit also allows BML and co-investigators to collect wild white abalone from the ocean and bring them in to captivity to serve as broodstock for the captive breeding program. The requested permit renewal would allow these activities to continue for an additional 5 years.

The purpose of the research and enhancement permit is to: (1) investigate and overcome key barriers to captive propagation of endangered white abalone in captivity; (2) identify

limitations on reproduction in wild white abalone; (3) understand disease processes and how to mitigate them; and (4) seek the most successful means of restoring white abalone in the wild.

Activities would include collection from the wild, captive holding, breeding, rearing, grow-out, lab experiments, genetic sampling, tagging, observation, and transport of white abalone. Both wild-collected and captive-bred white abalone are currently held at BML and several captive facilities throughout the coast. Additional wild white abalone may be collected to increase the numbers and genetic integrity of the captive broodstock. We expect and intend that the captive breeding program will benefit white abalone by supporting critical lab studies to inform recovery and providing healthy abalone for outplanting to restore wild populations.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted to determine whether the application meets the requirements of section 10(a) of the ESA and Federal regulations. The final permit decision will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: January 11, 2023.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023-00803 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC666]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Naval Base Point Loma Fuel Pier Inboard Pile Removal Project

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

ACTION: Notice; issuance of Renewal incidental harassment authorization (IHA).

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a renewal

incidental harassment authorization (IHA) to the United States Navy (Navy) to incidentally harass marine mammals incidental to Fuel Pier Inboard Pile Removal Project at Naval Base Point Loma in San Diego Bay, CA.

DATES: This renewal IHA is valid from January 15, 2023 through January 14, 2024.

FOR FURTHER INFORMATION CONTACT: Kate Fleming, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), 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 Marine Mammal Protection Act (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 proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is 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 such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA

(16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1 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, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the initial IHA issuance, provided all of the following conditions are met:

(1) 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 1 year from expiration of the initial IHA);

(2) The request for renewal must include the following:

- 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);

- 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; and

(3) 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.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at: www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.

History of Request

On August 26, 2021, NMFS issued an IHA to the Navy to take marine mammals incidental to the Fuel Pier Inboard Pile Removal Project at Naval Base Point Loma in San Diego Bay (86 FR 48986; September 01, 2021), effective from January 15, 2022 through January 14, 2023. On November 16, 2022, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but will not be completed prior to its expiration. At the time of submittal of the renewal request, no activities had been conducted (though the applicant indicated its intention to conduct some activities prior to the expiration of the initial IHA). Therefore, a renewal is appropriate, and no monitoring data are available for review. The notice of the proposed renewal incidental harassment authorization was published on December 22, 2022 (87 FR 78655).

Description of the Specified Activities and Anticipated Impacts

The initial IHA authorized take incidental to the removal of 409 piles from the Fuel Pier at Naval base Point Loma by a variety of techniques (*i.e.*, one to two pile clippers, an underwater chainsaw, a diamond wire saw, or a vibratory hammer, possibly with the assistance of a diver, to allow for continued Naval Fleet readiness activities). At the time of the request, the Navy has not done any work under the initial IHA. The activities that will occur under the renewal IHA consist of activities that are covered by the current authorization but will not be completed prior to its expiration (if any work is undertaken prior to expiration of the initial IHA). As the Navy has not done any work under the initial IHA at the time of their request, we assume here that the activities to be conducted under the renewal IHA are identical to those evaluated for the initial IHA.

Level B harassment (disruption of behavioral patterns and TTS for

individual marine mammals resulting from exposure to the sounds produced from the underwater acoustic sources) is authorized under the initial IHA and authorized through this renewal for six species of marine mammal that could be present in the project area: California sea lion (*Zalophus californianus*), the northern elephant seal (*Mirounga angustirostris*), the harbor seal (*Phoca vitulina*), the bottlenose dolphin (*Tursiops truncatus*), the Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and the common dolphin (*Delphinus delphis*). Based on the nature of the activity and the anticipated effectiveness of the mitigation measures Level A harassment is neither anticipated nor authorized.

The following documents are referenced in this notice and include important supporting information:

- Initial 2022 proposed renewal IHA (87 FR 78655, December 22, 2022);
- Initial 2021 final IHA (86 FR 48986; September 01, 2021);
- Initial 2021 proposed IHA (86 FR 38274; July 20, 2021); and
- Initial IHA application, references cited, marine mammal monitoring plan, and San Diego Bay Acoustic Compendium (available at www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-fuel-pier-removal-naval-base-san-diego-california).

Detailed Description of the Activity

A detailed description of the pile removal activities for which take is authorized here may be found in the notices of the proposed and final IHAs for the initial authorization. The location and nature of the activities, including the methods and types of equipment planned for use, are identical to those described in the previous notices. The Navy intends to complete work by March 31, 2023, under the terms of a previously developed Memorandum of Understanding (MOU) between the Navy and the U.S. Fish and Wildlife Service (USFWS). According to this MOU, the Navy would only be performing in-water activities during a 196-day period from September 16 to March 31 to not interfere with the California least tern (*Sterna antillarum browni*) nesting season. However, the renewal will be effective for a period extending to one year from the date of expiration of the initial IHA.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is provided, including information on abundance, status, distribution, and hearing, may be found in the notices of the proposed and final IHAs for the initial authorization. NMFS has reviewed the most recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA. This includes cases where stock abundances have changed. In all cases, stock abundance estimates are either the same (*i.e.*, bottlenose dolphin, California sea lion, harbor seal), or have increased (common dolphin, Pacific white-sided dolphin, and northern elephant seal, with the exception of the long-beaked common dolphin, which has decreased. In all cases, our negligible impact determination has not changed.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is authorized here may be found in the **Federal Register** notices of the Proposed IHA for the initial authorization. NMFS has reviewed the most recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, other scientific literature, and the public comments, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed and final IHAs for the initial authorization. Specifically, the source levels, days of operation, and marine mammal density/occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA.

TABLE 1—LEVEL B HARASSMENT TAKE ESTIMATES FOR THE NBPL OLD FUEL PIER PILE REMOVAL PROJECT

Common name	Level B take requested
California sea lion	1,260
Harbor seal	84
Northern elephant seal	7
Common dolphin	756
Pacific white-sided dolphin	84
Bottlenose dolphin	84

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document and the notice of the proposed IHA remains accurate. The same measures are proposed for this renewal and are summarized here:

- The use of trained and qualified Protected Species Observers (PSOs);
- The implementation of a 20 m shutdown zone that is larger than the predicted Level A harassment isopleths;
- Delay or halting of activities in the event that visibility decreases where the shutdown zone cannot be appropriately monitored;
- Pile removal during daylight hours only;
- A minimum of one to four PSO's are allowed, depending on the visibility of the 400 meter Level B harassment zone, the visibility of the entire shutdown zone, and the location of pile removal activities for concurrent pile clippers;
- PSO's will need to record all observations of marine mammals, regardless of the distance from the pile being removed;
- Draft and final monitoring reports will be submitted to NMFS;
- The Navy will submit all PSO datasheets and/or raw sighting data with the draft report; and
- Reporting of injured or dead marine mammals is required.

TABLE 2—SHUTDOWN AND HARASSMENT ZONES (METERS) FOR EACH METHOD

Pile information	Removal method	Harassment zone	Shutdown zone
13-inch polycarbonate pile	One pile clipper	423	20
14-inch, 16-inch concrete piles	One pile clipper	250	
14-inch, 16-inch concrete piles	Two pile clippers	250	
14-inch, 16-inch concrete piles	Underwater chainsaw	229	
14-inch, 16-inch concrete piles	Diamond wire saw	575	
14-inch, 16-inch concrete piles	Vibratory hammer	311	

Comments and Responses

A notice of NMFS’ proposal to issue a renewal IHA to the Navy was published in the **Federal Register** on December 22, 2022 (87 FR 78655). That notice either described, or referenced descriptions of, the Navy’s activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, estimated amount and manner of take, and proposed mitigation, monitoring and reporting measures. NMFS received no public comments.

Determinations

The renewal request consists of activities identical to those that are covered by the initial authorization. The methods of determining estimated take, potential effects, and required mitigation, monitoring and reporting have not changed.

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). We found that the activities authorized under the initial IHA would have a negligible impact and that the taking would be small relative to the population size.

NMFS has concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of the estimated abundance of common dolphin, Pacific white-sided dolphin, and northern elephant seal stocks increasing slightly and the population estimate for long-beaked common dolphin decreasing slightly. As such, our negligible impact determination has not changed. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal

species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) The Navy’s activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

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 renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

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 consults internally

whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Renewal

NMFS has issued a renewal IHA to the Navy for the take of marine mammals incidental to conducting the Fuel Pier Inboard Pile Removal Project at Naval Base Point Loma in San Diego Bay, California from January 15, 2023 to January 14, 2024.

Dated: January 11, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–00800 Filed 1–17–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2022–0001]

Extension of, and New Combined Petition Option for Participation in, the Expanded Collaborative Search Pilot Program

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

ACTION: Notice.

SUMMARY: To speed up patent examination and give applicants more comprehensive prior art by combining the search expertise of United States Patent and Trademark Office (USPTO), Japan Patent Office (JPO), and Korean Intellectual Property Office (KIPO) examiners before issuing a first Office action, the USPTO, in partnership with the JPO and the KIPO, is extending the Expanded Collaborative Search Pilot (CSP) program for an additional two years, through October 31, 2024. Requests to participate in the Expanded CSP program that were filed between

October 31, 2022, and January 18, 2023, will be considered.

In addition, the partner intellectual property (IP) offices have collaborated on a new petition option for participation in the Expanded CSP program. The new petition option, which has several enhancements compared to the current petition form and process, permits an applicant to file a combined petition in either the USPTO or one of the partner IP offices rather than separate petitions in each office. Enhancements include a more user-friendly layout, the addition of multilingual text, and a foundation for data collection that both satisfies the petition requirements and streamlines the process for partaking in the Expanded CSP program.

DATES: Pilot duration: The Expanded CSP program will continue until October 31, 2024. Each partner IP office will continue to grant no more than 400 requests per year per partner office for the duration of the pilot.

New petition option applicability date: The combined petition option and the related process will take effect on January 18, 2023.

FOR FURTHER INFORMATION CONTACT: You may direct inquiries regarding any specific application participating in the pilot to Jessica Patterson; Senior Advisor and Director; International Worksharing, Planning, and Implementation; Office of International Patent Cooperation; at 571-272-8828 or Jessica.Patterson@uspto.gov. You may email any inquiry regarding this pilot program and the petition process to msp@uspto.gov. You may direct inquiries concerning this notice to Michael Arguello; Management and Program Analyst; International Worksharing, Planning, and Implementation; Office of International Patent Cooperation; at 571-270-7876 or Michael.Arguello@uspto.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The USPTO continually looks for ways to improve its worksharing pilot programs, including the Expanded CSP program. The Expanded CSP program provides applicants who cross-file with the USPTO and the JPO or the KIPO with search results from each partner IP office early in the examination process. It is designed to accelerate examination and provide the applicant with more comprehensive prior art by combining the search expertise of the USPTO and the JPO or the KIPO examiners before issuing a first Office action. For additional details about this program, see Expanded Collaborative Search Pilot

Program Extension, 86 FR 8183 (February 4, 2021) (Expanded CSP extension notice). Feedback from applicants based in the United States, Korea, and Japan has cited the petition process as an area for improvement, specifically the requirement to petition each partner IP office separately. As a result, the USPTO collaborated with its partner IP offices, the JPO and the KIPO, to develop combined petition forms (PTO/437-JP for the USPTO/JPO pilot program and PTO/437-KR for the USPTO/KIPO pilot program). Submitting a completed combined petition form to either the USPTO or the partner IP office (the JPO or the KIPO) will result in receipt of the form at both offices in the corresponding pilot program and placement in the application files of both counterpart applications.

The current petition option and process, in which an applicant files a separate petition or a request with each partner IP office (original petition option), remains available. Under the original petition option, an applicant must submit petition form PTO/SB/437 (without the JP or KR designation) to the USPTO to request CSP participation for the U.S. application and must make a separate submission to the partner IP office in the desired pilot to request CSP participation for a counterpart application.

II. Overview of the Combined Petition Option

Applicants need only submit one combined petition form to the USPTO or the partner IP office (the JPO or the KIPO). There are separate agreements between the USPTO and the JPO and the USPTO and the KIPO. Therefore, to request participation in the corresponding pilot program between the USPTO and the JPO using this combined petition option, applicants must file the combined petition form PTO/437-JP with either the USPTO or the JPO. Likewise, to request participation in the corresponding pilot program between the USPTO and the KIPO using this combined petition option, applicants must file the combined petition form PTO/437-KR with either the USPTO or the KIPO. However, if an application corresponds to more than one application in a partner IP office, the combined petition option cannot be used. In this situation, an applicant must use the original petition option (form PTO/SB/437, without the JP or KR designation) to request participation in the Expanded CSP program.

Under the combined petition option, use of the proper combined petition

form will assist applicants in complying with the pilot program's requirements and will assist the USPTO in quickly identifying participating applications and their corresponding partner IP office. The combined petition forms for the USPTO/JPO pilot program and the USPTO/KIPO pilot program are multilingual. Both combined petition forms provide links to the requirements (with exceptions noted in section VI below) and conditions for entry into the respective pilot program for each partner IP office. As each partner IP office's conditions for entry may differ, applicants should review the requirements of the relevant partner IP offices to ensure compliance.

Forms PTO/437-JP and PTO/437-KR are available as Portable Document Format (PDF) fillable forms at the USPTO's CSP website at www.uspto.gov/CollaborativeSearch. The forms can also be accessed at the USPTO website at www.uspto.gov/PatentForms. The Office of Management and Budget (OMB) has reviewed and approved the collection of information involved in this pilot program, under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), as part of a collection identified by OMB control number 0651-0079. Collection 0651-0079 is available at OMB's Information Collection Review website, www.reginfo.gov/public/do/PRAMain. No fee for the combined petition to make special under 37 CFR 1.102 is required for participation in the Expanded CSP program.

III. Filing a Combined Petition Form

If opting to use a combined petition form, applicants must file a completed combined petition form (PTO/437-JP or PTO/437-KR) for each pilot program in which the applicant wishes to participate.

Combined petition form PTO/437-JP must either be directly filed in the U.S. application or directly with the JPO for the USPTO/JPO pilot program, and combined petition form PTO/437-KR must either be directly filed in the U.S. application or directly with the KIPO for the USPTO/KIPO pilot program. If the combined petition form is directly filed in the U.S. application, the applicant must file it using either USPTO filing system(s) or Patent Center. If the applicant directly files the combined petition form with the partner IP office, the combined petition form must be accompanied by supporting documents (e.g., an English translation of the claims of the application filed in the partner IP office; a machine translation of the claims is acceptable). The corresponding partner IP office will

then transmit the combined petition form and supporting documents to the USPTO. The applicant should not file the combined petition form directly with both the USPTO and the corresponding partner IP office.

Based on the agreements between the USPTO and the partner IP offices, if the applicant directly files the combined petition form with the USPTO, then the USPTO must transmit the completed form and any accompanying supporting documents, along with the date of receipt, to the corresponding partner IP office. Additionally, if the applicant files the combined petition form directly with the JPO or the KIPO, then the partner IP office that receives the filing must transmit the form and the accompanying supporting documents, along with its date of receipt, to the USPTO. The USPTO will then place the combined petition form and the accompanying supporting documents in the file of the U.S. application. Incomplete combined petition forms will not be forwarded to the corresponding partner IP office and will be dismissed in accordance with the Memorandums of Cooperation between the USPTO and the respective partner IP offices.

Under the combined petition option, the partner IP offices have agreed to transmit the combined petition form to the corresponding partner IP office within 15 days of receipt from the applicant. This reduces the risk of the counterpart application being acted upon by an examiner in the partner IP office before that application enters the pilot program, which would result in both applications being denied entry into the Expanded CSP program. The request for participation in the Expanded CSP program must be granted by both the IP office in which the request is directly filed and the partner IP office prior to any examination of the counterpart applications in either office.

To the extent that the combined petition form forwarded to the USPTO from a partner IP office does not comply with the requirements of 37 CFR 1.4(d)(2) and (d)(3), and 1.6(a), these requirements are waived for certain elements. Specifically, with respect to 37 CFR 1.4(d)(2), a forwarded combined petition form containing an S-signature will not be required to be filed by facsimile transmission, via the USPTO patent electronic filing system (*i.e.*, USPTO filing system(s) or Patent Center), or on paper. With respect to 37 CFR 1.4(d)(3), a forwarded combined petition form containing a graphic representation of a handwritten signature or an S-signature will not be required to be filed via the USPTO

patent electronic filing system. With respect to 37 CFR 1.6(a), a forwarded combined petition form will be accorded a receipt date even though it was not received at the USPTO by mail, filed via the USPTO patent electronic filing system, or hand-delivered to the USPTO. The U.S. receipt date of the combined petition form will either be the actual date that the combined petition form is received at the USPTO via the USPTO patent electronic filing system or the date the combined petition form is transmitted to the USPTO from the partner IP office, which may not be the same as the receipt date in the partner IP office.

IV. Requirements for Participation in the Expanded CSP

To be accepted into the Expanded CSP program, applicants who use the combined petition option must meet all the requirements of the pilot program that are set forth in section III of the Expanded CSP extension notice, except with the following modifications.

Under the combined petition option, the combined petition form PTO/437-JP or PTO/437-KR must be used instead of form PTO/SB/437, and the combined petition form, as discussed above, must be submitted to either the USPTO or the partner IP office (the JPO or the KIPO). Separate petitions are not required to be filed in both the USPTO and the partner IP office. The combined petition form PTO/437-JP or PTO/437-KR also includes an express written consent under 35 U.S.C. 122(c) for the USPTO to receive the combined petition form (if filed directly with the corresponding partner IP office) and to accept and consider prior art references and comments from the designated partner IP office during the examination of the U.S. application. In addition, the combined petition form includes written authorization for the USPTO to forward the form (if filed directly with the USPTO) to the corresponding partner IP office and to provide to the designated partner IP office, before a first Office action on the merits, access to the participating U.S. application's bibliographic data and search results, in accordance with 35 U.S.C. 122(a) and 37 CFR 1.14(c). No other consents are required.

V. Treatment of a Combined Petition Form

The combined petition form filed directly or indirectly in the U.S. application will be treated in the manner set forth in section IV of the Expanded CSP extension notice.

VI. Requirement for Restriction

The requirement for restriction set forth in section V of the Expanded CSP extension notice remains the same for the combined petition option.

VII. First Action on the Merits

Under the Expanded CSP program, the USPTO examiner will consider all exchanged search results. However, search results that are not received by the USPTO within four months from the date the USPTO granted the petition may not be included in the first action on the merits (FAOM). The examiner will prepare and issue an Office action and notify the applicant if any designated partner IP office did not provide search results prior to the issuance of the Office action. Once an FAOM issues, the application will no longer be treated as special under the Expanded CSP program.

The USPTO will continue to cooperate with applicants, IP stakeholders, and partner IP offices to improve the CSP process. More information on the CSP is available at www.uspto.gov/CollaborativeSearch.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023-00799 Filed 1-17-23; 8:45 am]

BILLING CODE 3510-16-P

COMMODITY FUTURES TRADING COMMISSION

Global Markets Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC) announces that on February 13, 2023, from approximately 9:30 a.m. to 3 p.m. (Eastern Standard Time, or EST), the Global Markets Advisory Committee (GMAC or Committee) will hold an in-person public meeting at the CFTC's Washington, DC headquarters with options for the public to attend virtually. At this meeting, the GMAC will discuss the Committee's structure; formation of subcommittees; and potential topics for the GMAC to prioritize in making policy recommendations to the CFTC on issues that affect the integrity and competitiveness of U.S. markets and U.S. firms engaged in global business, including the regulatory challenges of global markets that reflect the increasing interconnectedness of markets and the

multinational nature of business, and international standards for regulating futures, swaps, options, and derivatives markets, as well as intermediaries.

DATES: The meeting will be held on February 13, 2023, from approximately 9:30 a.m. to 3 p.m. EST. Please note that the meeting may end early if the GMAC has completed its business. Members of the public who wish to submit written statements in connection with the meeting should submit them by February 20, 2023.

ADDRESSES: The meeting will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581 subject to CFTC facility health protocols in place at that time. You may submit public comments, identified by "Global Markets Advisory Committee," through the CFTC website at <https://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the website. If you are unable to submit comments online, contact Gates S. Hurand, Designated Federal Officer, or Meghan Tente, Alternate Designated Federal Officer, via the contact information listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, to discuss alternate means of submitting your comments. Any statements submitted in connection with the committee meeting will be made available to the public, including publication on the CFTC website, <https://www.cftc.gov>.

FOR FURTHER INFORMATION CONTACT: Gates S. Hurand, GMAC Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; (202) 418-5000; or Meghan Tente, GMAC Alternate Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC; (202) 418-5000.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Seating for the public may be limited due to the CDC's COVID-19 Community Level, which may require facilitating physical distancing to avoid overcrowding and additional restrictions. Members of the public may listen to the meeting by telephone by calling a domestic or international number to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation.

Domestic Numbers: +1 669 254 5252, +1 646 828 7666, +1 669 216 1590, +1 551 285 1373, 833 568 8864 (Toll Free), or 833 435 1820 (Toll Free).

International Numbers: Will be posted on the CFTC's website, <https://www.cftc.gov>, on the page for the meeting, under Related Links.

Webinar ID: 161 214 0349.

Pass Code/Pin Code: 777139.

The meeting will also be open to the public via webcast on the <https://www.cftc.gov> website. The meeting agenda may change to accommodate other GMAC priorities. For agenda updates, please visit the GMAC committee site at: <https://www.cftc.gov/About/AdvisoryCommittees/GMAC>.

All written submissions provided to the CFTC in any form will also be published on the CFTC's website. Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person above.

(Authority: 5 U.S.C. app. 2 section 10(a)(2).)

Dated: January 12, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023-00841 Filed 1-17-23; 8:45 am]

BILLING CODE 6351-01-P

DELAWARE RIVER BASIN COMMISSION

Notice of Public Hearing and Business Meeting; February 8 and March 8, 2023

Notice is hereby given that the Delaware River Basin Commission will hold a public hearing on Wednesday, February 8, 2023. A business meeting will be held the following month on Wednesday, March 8, 2023. Both the hearing and the business meeting are open to the public. Both will be conducted remotely. Details about the remote platforms for the two events will be posted on the Commission's website, www.drbc.gov, at least ten days prior to the respective meeting dates.

Public Hearing. The Commission will conduct the public hearing virtually on February 8, 2023, commencing at 1:30 p.m. Hearing items will include draft dockets for withdrawals, discharges, and other projects that could have a substantial effect on the basin's water resources. A list of the projects scheduled for hearing, including project descriptions, will be posted on the Commission's website, www.drbc.gov, in a long form of this notice at least ten days before the hearing date.

Written comments on matters scheduled for hearing on February 8, 2023 will be accepted through 5:00 p.m. on Monday, February 13, 2023.

The public is advised to check the Commission's website periodically during the ten days prior to the hearing

date, as items scheduled for hearing may be postponed if additional time is needed to complete the Commission's review. Items also may be added up to ten days prior to the hearing date. In reviewing docket descriptions, the public is asked to be aware that the details of projects may change during the Commission's review, which is ongoing.

Public Meeting. The public business meeting on March 8, 2023 will begin at 10:30 a.m. and will include: adoption of the Minutes of the Commission's December 7, 2022 business meeting; announcements of upcoming meetings and events; a report on hydrologic conditions; reports by the Executive Director and the Commission's General Counsel; and consideration of any items for which a hearing has been completed or is not required. The agenda is expected to include consideration of the draft dockets for withdrawals, discharges, and other projects that were subjects of the public hearing on February 8, 2023.

After all scheduled business has been completed and as time allows, the business meeting will be followed by up to one hour of Open Public Comment, an opportunity to address the Commission on any topic concerning management of the Basin's water resources outside the context of a duly noticed, on-the-record public hearing.

There will be no opportunity for additional public comment for the record at the March 8, 2023 business meeting on items for which a hearing was completed on February 8, 2023 or a previous date. Commission consideration on March 8, 2023 of items for which the public hearing is closed may result in approval of the item (by docket or resolution) as proposed, approval with changes, denial, or deferral. When the Commissioners defer an action, they may announce an additional period for written comment on the item, with or without an additional hearing date, or they may take additional time to consider the input they have already received without requesting further public input. Any deferred items will be considered for action at a public meeting of the Commission on a future date.

Advance Registration and Sign-Up for Oral Comment. Links for registering to attend the public hearing and the business meeting will be posted at www.drbc.gov at least ten days before each meeting date. Registrants who wish to comment on the record during the public hearing on February 8, 2023 or to address the Commissioners informally during the Open Public Comment portion of the meeting on March 8, 2023

as time allows, will be asked to so indicate when registering. The Commission's hearing and business meeting will also be livestreamed on YouTube at https://www.youtube.com/@DRBC_1961. For assistance, please contact Ms. Patricia Hausler of the Commission staff, at patricia.hausler@drbc.gov.

Addresses for Written Comment. Written comment on items scheduled for hearing may be made through the Commission's web-based comment system, a link to which is provided at www.drbc.gov. Use of the web-based system ensures that all submissions are captured in a single location and their receipt is acknowledged. Exceptions to the use of this system are available based on need, by writing to the attention of the Commission Secretary, DRBC, P.O. Box 7360, 25 Cooney Road, West Trenton, NJ 08628-0360. For assistance, please contact Patricia Hausler at patricia.hausler@drbc.gov.

Accommodations for Special Needs. Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the meeting or hearing should contact the Commission Secretary directly at 609-883-9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how we can accommodate your needs.

Additional Information, Contacts. Additional public records relating to hearing items may be examined at the Commission's offices by appointment by contacting Denise McHugh, 609-883-9500, ext. 240. For other questions concerning hearing items, please contact David Kovach, Project Review Section Manager at 609-883-9500, ext. 264.

Authority. Delaware River Basin Compact, Public Law 87-328, Approved September 27, 1961, 75 Statutes at Large, 688, sec. 14.4.

Dated: January 10, 2023.

Pamela M. Bush,

Commission Secretary and Assistant General Counsel.

[FR Doc. 2023-00849 Filed 1-17-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2022-SCC-0129]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Accrediting Agencies Reporting Activities for Institutions and Programs—Database of Accredited Postsecondary Institution and Programs (DAPIP)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 17, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then check the "Only Show ICR for Public Comment" checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the "View Information Collection (IC) List" link. Supporting statements and other supporting documentation may be found by clicking on the "View Supporting Statement and Other Documents" link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Herman Bounds, (202) 453-6128.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note

that written comments received in response to this notice will be considered public records.

Title of Collection: Accrediting Agencies Reporting Activities for Institutions and Programs—Database of Accredited Postsecondary Institution and Programs (DAPIP).

OMB Control Number: 1840-0838.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: Private sector.

Total Estimated Number of Annual Responses: 9,014.

Total Estimated Number of Annual Burden Hours: 751.

Abstract: Sections 496(a)(7), (a)(8), (c)(7), and (c)(8) of the Higher Education Act (HEA), and Federal regulations at 34 CFR 34 CFR 602.26 and 602.27 contain certain requirements for reporting by recognized accrediting agencies to the Department on the institutions and programs the agencies accredit. This collection specifies the required and requested reporting. It also discusses the channel for reporting this information, and reporting information the accrediting agency may wish to submit voluntarily to ensure that the Department's Database of Accredited Postsecondary Institutions and Programs is accurate and comprehensive.

Dated: January 11, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023-00744 Filed 1-17-23; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

[Docket ID ED-2021-IES-0046]

Privacy Act of 1974; System of Records—National Center for Education Statistics (NCES) Longitudinal, Cross-Sectional, and International Studies

AGENCY: National Center for Education Statistics, Institute of Education Sciences, Department of Education.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), the U.S. Department of Education (Department) publishes this notice of a modified system of records entitled "National Center for Education Statistics (NCES) Longitudinal, Cross-sectional, and International Studies,"

formerly known as “National Center for Education Statistics (NCES) Longitudinal and Cross-sectional Studies,” (18–13–01). This system is used to fulfill NCES’s legislative mandate to collect, report, analyze, and disseminate statistical data on the condition and progress of education in the United States and other nations at the early childhood, preschool, elementary, secondary, postsecondary, and adult levels, including data on the critical influences, contexts, and transitions of: students in elementary, secondary, postsecondary, and graduate education, and into employment and adult experiences; children at early childhood stage; homeschooled students; the general adult population; and participants in career training.

DATES: The Department seeks comment on the modified system of records described in this notice in accordance with the requirements of the Privacy Act. We must receive your comments on or before February 17, 2023.

This modified system of records will become applicable upon publication in the **Federal Register** on January 18, 2023, with the exception of the modified routine uses outlined in the section entitled “ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES,” unless the modified system of records notice needs to be changed as a result of public comment. Modified routine uses (1) and (2) in the section entitled “ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES” will become applicable upon the expiration of the 30-day period of public comment on February 17, 2023, unless any of the modified routine uses in the system of records notice need to be changed as a result of public comment. The Department will publish any significant changes to the modified system of records notice resulting from public comment.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

• **Federal eRulemaking Portal:** Go to www.regulations.gov to submit your comments electronically. Information on using *Regulations.gov*, including

instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the “Help” tab.

• **Postal Mail, Commercial Delivery, or Hand Delivery:** If you mail or deliver your comments about this modified system of records, address them to: Commissioner, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, Potomac Center Plaza (PCP), 550 12th Street SW, 4th floor, Washington, DC 20202–4160.

Privacy Note: The Department’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will supply an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Carrie Clarady, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, PCP, 550 12th Street SW, 4th floor, Washington, DC 20202–4160. Telephone: (202) 245–6347. Email: NCES.Information.Collections@ed.gov.

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), you may call the Federal Relay Service (FRS) toll free at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: This system of records is used to fulfill NCES’s legislative mandate set forth at 20 U.S.C. 9543(a) to collect, report, analyze, and disseminate statistical data on the condition and progress of education in the United States and other nations at the early childhood, preschool, elementary, secondary, postsecondary, and adult levels. NCES must collect, analyze, and report on such data in a manner that is objective, secular, neutral, and non-ideological; free of political influence and bias; and relevant and useful to practitioners, researchers, policymakers, and the public. 20 U.S.C. 9541(b).

The Department published the “National Center for Education Statistics (NCES) Longitudinal and Cross-sectional Studies” (18–13–01) system of records notice in the **Federal Register** on November 14, 2018 (83 FR 56831). The Department is modifying this system of records notice as follows:

(a) The Department is modifying the section entitled “SYSTEM NAME AND NUMBER” to “National Center for Education Statistics (NCES) Longitudinal, Cross-sectional, and International Studies (18–13–01)” in order to include reference to the international studies covered by the system and thereby provide greater clarity to the public that this system of records notice covers these studies;

(b) The Department is modifying the section entitled “SYSTEM LOCATION” to update additional system locations, as set forth in the Appendix;

(c) The Department is modifying the section entitled “CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM” to include a new example study reference in the national quick response studies paragraph;

(d) The Department is modifying the section entitled “RECORD SOURCE CATEGORIES” to indicate that information in this system of records may be obtained from other persons or entities from which information is obtained under a routine use;

(e) The Department is modifying the section entitled “ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES” to modify routine use (1), currently entitled “Contract Disclosure,” both to permit the disclosure of records from the system to another government agency or its contractor, or both, pursuant to interagency agreements for the collection of statistics, consistent with 20 U.S.C. 9544(b)(3)(A), and to change the name of the routine use to “Contract or Interagency Agreement Disclosure;” routine use (2), entitled “Research Disclosure,” both to, in certain circumstances, permit the disclosure of directly personally identifiable respondent information from the system to researchers and to add that researchers who obtain data under this routine use will be required as part of a restricted-use data licensing agreement to agree, among other items listed in this routine use, to the submission of their work products to NCES for disclosure review prior to sharing the work products with anyone not named in the restricted-use data licensing agreement; and, both routine uses (1) and (2) to

replace references to the Commissioner of Education Statistics with NCES;

(f) The Department is modifying the section entitled “POLICIES AND PRACTICES FOR STORAGE OF RECORDS” to explain that researchers who access records from the system are required to execute Institute of Education Sciences Restricted-Use Data Security Plans and follow the data access, storage, and security protocols set forth therein; and

(g) The Department is modifying the section entitled “ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS” both to clarify that each contractor and subcontractor who accesses records from the system must have received Department approval to hold Public Trust positions and to explain how researchers with access to records from the system are required to secure the records.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document 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.

Mark Schneider,

Director, Institute of Education Sciences.

For the reasons discussed in the preamble, the National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, publishes a notice of a modified system of records to read as follows:

SYSTEM NAME AND NUMBER:

National Center for Education Statistics (NCES) Longitudinal, Cross-sectional, and International Studies (18–13–01).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

National Center for Education Statistics (NCES), Institute of Education Sciences (IES), U.S. Department of Education (Department or ED), Potomac Center Plaza (PCP), 550 12th Street SW, 4th floor, Washington, DC 20202–4160. See the Appendix at the end of this system notice for additional system locations.

SYSTEM MANAGER(S):

Commissioner, National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, PCP, 550 12th Street SW, 4th floor, Washington, DC 20202.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The data collections being administered and their maintenance are authorized under the Education Sciences Reform Act of 2002 (ESRA) (20 U.S.C. 9541–9547 and 9571–9576).

PURPOSE(S) OF THE SYSTEM:

This system is used to fulfill NCES’s legislative mandate to collect, report, analyze, and disseminate statistical data on the condition and progress of education in the United States and other nations at the early childhood, preschool, elementary, secondary, postsecondary, and adult levels. NCES must collect, analyze, and report on such data in a manner that is objective, secular, neutral, and non-ideological; free of political influence and bias; and relevant and useful to practitioners, researchers, policymakers, and the public.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains records about individuals randomly selected from their respective populations of particular subgroups of children and adults (pre-Kindergarten children, Kindergarten through graduate school students, parents or legal guardians, teachers, administrators, service providers, and general population adults) who voluntarily agree to participate (with implicit or explicit parental or legal guardian consent to participate for minors, depending on school or school district requirements and on the Department’s Protection of Human Subjects regulations (34 CFR part 97)) in one of the NCES studies

categorized below (with example studies provided for each category):

1. National household studies [e.g., National Household Education Survey (NHES) including the current Early Childhood Education/Program Participation (ECPP) and Parent and Family Involvement in Education (PFI), and with past PFI-Enrolled and PFI-Homeschooled modules, the Adult Training and Education Survey (ATES) studies, and the past Adult Education (AE), Adult Education for Work-Related Reasons (AEWR), Adult Education and Lifelong Learning (AELL), Before- and After-School Programs and Activities (ASPA), School Readiness (SR), Civic Engagement (CE), School Safety and Discipline (SS&D), and Household and Library Use (HHL)];
2. National and international K–12 school and staff studies [e.g., Schools and Staffing Survey (SASS) and its follow-ups Teacher Follow-Up Survey (TFS), Principal Follow-Up Survey (PFS), and Beginning Teacher Longitudinal Study (BTLS); redesigned SASS—National Teacher and Principal Surveys (NTPS); and studies not related to SASS, such as Teacher Compensation Survey (TCS), Teacher Pilot Study (TPS), School Survey of Crime and Safety (SSOCS), Teaching and Learning International Survey (TALIS) and its associated Video Studies, and ED School Climate Surveys (EDSCLS)];
3. National early childhood longitudinal studies [e.g., Early Childhood Longitudinal Study, Birth Cohort (ECLS–B); and Early Childhood Longitudinal Study, Kindergarten Class studies (ECLS–K)];
4. International K–12 assessments studies [e.g., International Early Learning Study (IELS); Progress in International Reading Literacy Study (PIRLS); Civic Education Study (CivEd); Program for International Student Assessment (PISA); Program for International Student Assessment (PISA) Young Adult Follow-up (YAF) Study; Trends in International Mathematics and Science Study (TIMSS) and its associated Video Studies; and International Computer and Information Literacy Study (ICILS)];
5. National middle grades longitudinal studies [e.g., Middle Grades Longitudinal Study (MGLS)];
6. National high school longitudinal studies [e.g., National Longitudinal Study of the High School Class of 1972 (NLS); National Education Longitudinal Study of 1988 (NELS); Education Longitudinal Study of 2002 (ELS); High School Longitudinal Study of 2009 (HSLS); and High School and Beyond Longitudinal studies (HS&B)];

7. National postsecondary studies [e.g., Recent College Graduates (RCG); National Postsecondary Student Aid Study (NPSAS) and its follow-ups Beginning Postsecondary Students Longitudinal Study (BPS) and Baccalaureate and Beyond Longitudinal Study (B&B); National Postsecondary Student Aid Study, Administrative Collection (NPSAS-AC); National Postsecondary Education Cooperative—Sample Surveys (NPEC-S); National Study of Postsecondary Faculty (NSOPF); and National Center for Education Research NCER—NPSAS Grant Studies];

8. National and international adult assessment studies [e.g., International Adult Literacy Survey (IALS); Adult Literacy and Lifeskills Survey (ALL); National Assessment of Adult Literacy (NAAL); and Program for the International Assessment of Adult Competencies (PIAAC)];

9. National quick response studies [e.g., the School Pulse Panel study and the Quick Response Information System (QRIS) made up of pre-postsecondary Fast Response Survey System (FRSS) and Postsecondary Education Quick Information System (PEQIS)]; and

10. NCES national and international developmental studies [e.g., cognitive interviews, focus groups, feasibility studies, usability tests, pilot tests, web tests, etc., utilized to develop new or to improve current data collection methodologies and instruments for particular existing or multiple current and future data collection programs].

CATEGORIES OF RECORDS IN THE SYSTEM:

This system consists of responses from students, their parents or legal guardians, teachers, administrators, service providers, and other adults to data collection instruments including information such as background and demographic data, functional measures (reports of children's functioning in cognitive, social, emotional, and physical domains), family characteristics, education and/or employment experiences, finances, aspirations, plans, and attitudes. Cognitive assessment scores, administrative and financial aid records, and high school and college transcripts are also appended to the records. The appended administrative records contain data such as attendance, program participation, and other information.

The records for service providers, schools/institutions, and local educational agencies contain information on numbers and characteristics of students, teaching staff, and administrators; data on

facilities, programs, services, and finances; and information related to student enrollment, persistence, completion, and performance. The records related to teachers and administrators contain, in addition to the above, data on certifications, training, experience, staff evaluations, salary, benefits, and attitudes and opinions related to various aspects of education and operations.

RECORD SOURCE CATEGORIES:

Information in the records comes from responses to survey and assessment instruments and from administrative records maintained by K–12 schools and school districts, postsecondary institutions, the Department, and third-parties, including State and Federal agencies, as well as vendors, such as the National Student Clearinghouse. Information in this system also may be obtained from other persons or entities from which data is obtained under routine uses set forth below.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purpose for which the record was collected. Any disclosure of individually identifiable information from a record in this system must also comply with the requirements of Section 183 of the ESRA (20 U.S.C. 9573) and its confidentiality standards that apply to all collection, reporting, and publication of data by NCES. Any disclosure of personally identifiable information (PII) from students' education records that was obtained from schools, school districts, postsecondary institutions, and other covered sources must also comply with the requirements of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1417(c); 34 CFR 300.610–300.611, 300.613–300.623, and 300.625–300.627) and the Family Educational Rights and Privacy Act (20 U.S.C. 1232g; 34 CFR part 99), which protect the privacy of student education records and the PII contained therein.

(1) *Contract or Interagency Agreement Disclosure.* When NCES contracts with a private firm, or enters into an agreement with another government agency or its contractor or both, for the purpose of collecting, collating, analyzing, aggregating, maintaining, appending, or otherwise refining records in this system, NCES may

release relevant records to the NCES contractor or to the other government agency or its contractor, consistent with NCES's authority for the for the collection of statistics at 20 U.S.C. 9544(b)(3)(A). The NCES contractor or other government agency or its contractor must agree to safeguards to protect the security and confidentiality of the records disclosed from this system, consistent with Section 183 of the ESRA (20 U.S.C. 9573).

(2) *Research Disclosure.* Where NCES determines that an individual or organization is qualified to carry out specific research, NCES may disclose information from the system of records to that researcher solely for the purpose of carrying out that research. NCES will only disclose directly personally identifiable respondent information to a researcher, upon the researcher's direct request, when such disclosure is relevant to the research, as determined by NCES. The researcher must agree to safeguards to protect the security and confidentiality of the records disclosed from this system, consistent with Section 183 of the ESRA (20 U.S.C. 9573). Furthermore, the researcher must agree to a restricted-use data licensing agreement that (among other things) requires: that the disclosed information be used only for statistical purposes; that the disclosed data cannot be redisclosed in identifiable form; that all work products that use the disclosed data must be submitted to NCES for disclosure review prior to sharing the work products with anyone not named in the data licensing agreement; and that NCES may periodically inspect the workspace approved in the restricted-use data licensing agreement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in a database on NCES's or its contractors' or subcontractors' secure servers and in other secure electronic storage media. Directly personally identifiable respondent information, such as name and contact information, is stored separately from the rest of the data collected in this system. Principal Project Officers, Senior Officials from the Principal Researchers' institution or organization, and System Security Officers must execute IES Restricted-Use Data Security Plans (Security Plans) and follow the data access, storage, and security protocols set forth therein.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records in the location file are indexed by a unique number assigned to each individual, which can be cross-

referenced when needed with the separately stored direct personal identifiers. Records are retrieved by title of survey and the unique number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The Department shall submit a retention and disposition schedule that covers the records contained in this system to the National Archives and Records Administration (NARA) for review. The records will not be destroyed until such time as NARA approves said schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Contractors and subcontractors: Access to the records is limited to authorized personnel who are briefed regarding confidentiality of the data, are required to sign a written statement attesting to their understanding of the significance of the confidentiality requirement and penalties for non-compliance, and have received Department approval to hold a Public Trust position.

All physical access to the NCES, contractor, and subcontractor sites where this system of records is maintained, is controlled and monitored by security personnel who check each individual entering the buildings for his or her employee or visitor badge.

The computer systems employed offer a high degree of resistance to tampering and circumvention. Security systems limit data access to contract staff on a "need to know" basis, and control each individual user's ability to access and alter records within the system.

The NCES, contractor, and subcontractor employees who "maintain" (including collect, maintain, use, or disseminate) data in this system of records must comply with the requirements of the confidentiality standards under Section 183 of the ESRA (20 U.S.C. 9573).

Researchers: The Principal Project Officer(s) on a NCES-restricted-use data license and a Senior Official from the Principal Project Officer(s)' institution or organization must sign a legally binding agreement that transfers the responsibilities and penalties under Section 183 of the ESRA (20 U.S.C. 9573) to the researcher(s) and their institution or organization for a fixed period of time. The Principal Project Officer(s), Senior Official from the Principal Project Officer(s)' institution or organization, and a System Security Officer all must sign a Security Plan that identifies the location where the data will be stored and processed, security arrangements, and authorized data users

(if any) beyond the Principal Project Officer(s). Researchers, including all authorized data users besides the Principal Project Officer(s) on each license, must complete training on the confidential nature of the data, and are each required to sign a notarized written statement attesting to their understanding of the significance of the confidentiality requirement and penalties for non-compliance. At the end of the license period, the Principal Project Officer(s) must either return the data to NCES or destroy the data and complete and submit a witnessed certificate of destruction.

RECORD ACCESS PROCEDURES:

If you wish to gain access to a record that exists regarding you in this system of records, contact the system manager at the address listed above. You must provide necessary particulars such as the study in question, your name, current address, the date and place of your birth, and any other identifying information requested by the Department, while processing the request, to distinguish between individuals with the same name. Your request must meet the requirements in 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURES:

If you wish to contest content of a record regarding you in this system of records, contact the system manager. Your request must meet the requirements in 34 CFR 5b.7.

NOTIFICATION PROCEDURES:

If you wish to determine whether a record exists regarding you in this system of records, contact the system manager at the address listed above. You must provide necessary particulars such as the study in question, your name, current address, the date and place of your birth, and any other identifying information requested by the Department, while processing the request, to distinguish between individuals with the same name. Your request must meet the requirements in 34 CFR 5b.5, including proof of identity.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

The system of records previously entitled "National Center for Education Statistics (NCES) Longitudinal and Cross-sectional Studies" (18-13-01) was last published in full in the **Federal Register** at 83 FR 56831 (November 14, 2018).

Appendix to 18-13-01

Additional System Locations:

- ABT Associates, 4550 Montgomery Ave., Suite 800, North, Bethesda, MD 20815-3343.
- Activate Research, 1001 Connecticut Ave. NW, #515, Washington, DC 20036.
- American Institutes for Research (AIR), 1000 and 1025 Thomas Jefferson St. NW, Washington, DC 20007.
- Branch Associates, 1628 John F. Kennedy Blvd., #800, Philadelphia, PA 19103.
- Child Trends, 7315 Wisconsin Ave., #1200w, Bethesda, MD 20814.
- Coleridge Initiative, 4445 Willard Ave., Suite 600, Chevy Chase, MD 20815.
- Educational Testing Service (ETS), 660 Rosedale Rd., Princeton, NJ 08541.
- EurekaFacts, 51 Monroe St., Plaza East 10, Rockville, MD 20850.
- Fors Marsh Group, 1010 N Glebe Rd., #510, Arlington, VA 22201.
- Hager Sharp, 1030 15th St. NW, Suite 600E, Washington, DC 20005.
- Mathematica Policy Research, 1100 First St., #1200, NE, Washington, DC 20002.
- Medicare and Medicaid Resource Information Center (MedRIC), 500 Airport Blvd., Suite 365, Burlingame, CA 94010.
- National Opinion Research Center (NORC), 1155 E 60th St., Chicago, IL 60637; 55 E Monroe, Suite 3000, Chicago, IL 60603; 4350 East-West Hwy., 8th Fl., Bethesda, MD 20814.
- Pearson Inc., 2510 N Dodge St., Iowa City, IA 52245.
- Research Support Services, 906 Ridge Ave., Evanston, IL 60202.
- RTI International, 3040 E Cornwallis Rd., Research Triangle Park, NC 27709-2194.
- Sanamatrix, 1120 20th St., South Tower, Suite 200 NW, Washington, DC 20036; 506 Wonderwood Dr., Charlotte, NC 28211; 24574 Spriggs Ct., Hollywood, MD 20636.
- Shugoll Research, 7475 Wisconsin Ave., #200, Bethesda, MD 20814; 1800 Diagonal Rd., #300, Alexandria, VA 22314.
- SRI International, 1100 Wilson Blvd., #2800, Arlington, VA 22209.
- Strategic Analytics Inc., 6503 Shipyard Pl., Falls Church, VA 22043.
- Synergy Enterprises, 8757 Georgia Ave., Silver Spring, MD 20910.
- U.S. Census Bureau, 4600 Silver Hill Rd., Suitland, MD 20746; 1201 E 10th St., Jeffersonville, IN 47190.
- WESTAT, 1600 Research Blvd., Rockville, MD 20850.

[FR Doc. 2023-00768 Filed 1-17-23; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant Programs; 2023–24 Award Year Deadline Dates

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces the 2023–24 award year deadline dates for the submission of requests and documents from postsecondary institutions for the Federal Perkins Loan (Perkins Loan) Program, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) programs (collectively, the “Campus-Based programs”), Assistance Listing Numbers 84.038, 84.033, and 84.007.

DATES: The deadline dates for each program are specified in the chart in the Deadline Dates section of this notice.

FOR FURTHER INFORMATION CONTACT: Shannon Mahan, Division Chief, Grants

& Campus-Based Partner Division, U.S. Department of Education, Federal Student Aid, 830 First Street NE, Union Center Plaza, Room 64C4, Washington, DC 20202–5453. Telephone: (202) 377–3019. Email: *shannon.mahan@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The authority to award new Federal Perkins Loans to students has expired. Institutions that continue to service their Perkins Loans (or contract with a third-party servicer for servicing) are required to report all Perkins Loan activity on the institution’s Fiscal Operations Report and Application to Participate (FISAP).

The FWS program encourages the part-time employment of undergraduate and graduate students with need to help pay for their education and to involve the students in community service activities.

The FSEOG program encourages institutions to provide grants to

exceptionally needy undergraduate students to help pay for their education.

The Perkins Loan, FWS, and FSEOG programs are authorized by parts E and C, and part A, subpart 3, respectively, of title IV of the Higher Education Act of 1965, as amended.

Throughout the year, in its “Electronic Announcements,” the Department will continue to provide additional information for the individual deadline dates listed in the table under the Deadline Dates section of this notice. You will also find the information on the Department’s Knowledge Center website at: <https://fsapartners.ed.gov/knowledge-center>.

Deadline Dates: The following table provides the 2023–24 award year deadline dates for the submission of applications, reports, waiver requests, and other documents for the Campus-Based programs. Institutions must meet the established deadline dates to ensure consideration for funding or waiver, as appropriate.

2023–24 AWARD YEAR DEADLINE DATES

What does an institution submit?	How is it submitted?	What is the deadline for submission?
1. The Campus-Based Reallocation Form designated for the return of 2022–23 funds and the request for supplemental FWS funds for the 2023–24 award year.	The form must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov .	Monday, August 14, 2023.
2. The 2024–25 FISAP (reporting 2022–23 expenditure data and requesting funds for 2024–25).	The FISAP must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov . The FISAP signature page must be signed by the institution’s chief executive officer with an original signature and mailed to: FISAP Administrator, U.S. Department of Education, P.O. Box 1130, Fairfax, VA 22038. For overnight delivery, mail to: FISAP Administrator, U.S. Department of Education, 4050 Legato Road, #1100, Fairfax, VA 22033.	Friday, September 29, 2023.
3. The Work Colleges Program Report of 2022–23 award year expenditures.	The report must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov . The signature page must be signed by the institution’s chief executive officer with an original signature and mailed to: FISAP Administrator, U.S. Department of Education, P.O. Box 1130, Fairfax, VA 22038. For overnight delivery, mail to: FISAP Administrator, U.S. Department of Education 4050 Legato Road, #1100, Fairfax, VA 22033.	Friday, September 29, 2023.
4. The 2022–23 Financial Assistance for Students with Intellectual Disabilities (Comprehensive Transition Program) Expenditure Report.	The report must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov . The signature page must be signed by the institution’s chief executive officer with an original signature and mailed to: FISAP Administrator, U.S. Department of Education, P.O. Box 1130, Fairfax, VA 22038. For overnight delivery, mail to: FISAP Administrator, U.S. Department of Education, 4050 Legato Road, #1100, Fairfax, VA 22033.	Friday, September 29, 2023.
5. The Institutional Application and Agreement for Participation in the Work Colleges Program for the 2024–25 award year— <i>NEW applicants only</i> .	The application and agreement must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov . The signature page must be signed by the institution’s chief executive officer with an original signature and sent in the mail to: U.S. Department of Education, P.O. Box 1130, Fairfax, VA 22038. For overnight delivery, mail to: FISAP Administrator, U.S. Department of Education 4050 Legato Road, #1100, Fairfax, VA 22033. All supporting application documents should be scanned and emailed to alanna.nelson@ed.gov .	Wednesday, November 1, 2023.

2023–24 AWARD YEAR DEADLINE DATES—Continued

What does an institution submit?	How is it submitted?	What is the deadline for submission?
6. 2024–25 FISAP Edit Corrections	The corrections must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov .	Friday, December 15, 2023.
7. The 2024–25 FISAP Perkins Cash on Hand Update as of October 31, 2023.	The update must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov .	Friday, December 15, 2023.
8. Request for a waiver of the 2024–25 award year penalty for the underuse of 2022–23 award year funds.	The request for a waiver of the penalty and the justification must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov .	Monday, February 5, 2024.
9. The Institutional Application and Agreement for Participation in the Work Colleges Program for the 2024–25 award year— <i>RE-TURNING applicants only</i> .	The application and agreement must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov . The signature page must be signed by the institution's chief executive officer with an original signature and mailed to: FISAP Administrator, U.S. Department of Education, P.O. Box 1130, Fairfax, VA 22038. For overnight delivery, mail to: FISAP Administrator, U.S. Department of Education 4050 Legato Road, #1100, Fairfax, VA 22033.	Monday, March 4, 2024.
10. Request for a waiver of the FWS Community Service Expenditure Requirement for the 2024–25 award year.	The request for a waiver must be submitted electronically through the Common Origination and Disbursement website at https://cod.ed.gov .	Monday, April 22, 2024.

Notes:

- The deadline for electronic submissions is 11:59:00 p.m. (Eastern Time) on the applicable deadline date. Transmissions must be completed and accepted by 11:59:00 p.m. to meet the deadline.
- Paper documents that are sent through the U.S. Postal Service must be postmarked or you must have a mail receipt stamped by the applicable deadline date.
- The Secretary may consider on a case-by-case basis the effect that a major disaster, as defined in section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)), or another unusual circumstance has on an institution in meeting the deadlines.

Proof of Mailing of Paper Documents

If you submit paper documents when permitted by mail, we accept as proof one of the following:

- (1) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.
- (2) A legibly dated U.S. Postal Service postmark.
- (3) A dated shipping label, invoice, or receipt from a commercial courier (FedEx, UPS, etc.).
- (4) Any other proof of mailing acceptable to the Secretary.

If you mail your paper documents 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, you should check with your local post office.

All institutions are encouraged to use certified or at least first-class mail. Hand-delivery of paper documents is not accepted.

Sources for Detailed Information on These Requests

A more detailed discussion of each request for funds or waiver is provided in specific "Electronic Announcements," which are posted on the Department's Knowledge Center

website (<https://fsapartners.ed.gov/knowledge-center>) at least 30 days before the established deadline date for the specific request. Information on these items also is found in the Federal Student Aid Handbook, which is posted on the Department's Knowledge Center website.

Applicable Regulations: The following regulations apply to these programs:

- (1) Student Assistance General Provisions, 34 CFR part 668.
- (2) General Provisions for the Federal Perkins Loan Program, Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grant Program, 34 CFR part 673.
- (3) Federal Perkins Loan Program, 34 CFR part 674.
- (4) Federal Work-Study Program, 34 CFR part 675.
- (5) Federal Supplemental Educational Opportunity Grant Program, 34 CFR part 676.
- (6) Institutional Eligibility Under the Higher Education Act of 1965, as amended, 34 CFR part 600.
- (7) New restrictions on Lobbying, 34 CFR part 82.
- (8) Governmentwide Requirements for Drug-Free Workplace (Financial Assistance), 34 CFR part 84.
- (9) 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 in 2 CFR part 3485.

(10) Drug and Alcohol Abuse Prevention, 34 CFR part 86.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document 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.

Program Authority: 20 U.S.C. 1070b *et seq.* and 1087aa *et seq.*; 42 U.S.C. 2751 *et seq.*

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2023-00818 Filed 1-17-23; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

[Docket No. 22-166-LNG]

Southern LNG Company, L.L.C.; Application for Blanket Authorization To Export Previously Imported Liquefied Natural Gas to Non-Free Trade Agreement Countries on a Short-Term Basis

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy and Carbon Management (FECM) (formerly the Office of Fossil Energy) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed on December 16, 2022, by Southern LNG Company, L.L.C. (Southern LNG). Southern LNG requests blanket authorization to export liquefied natural gas (LNG) previously imported into the United States by vessel from foreign sources in a volume equivalent to 182.5 billion cubic feet (Bcf) of natural gas on a cumulative basis over a two-year period. Southern LNG filed the Application under the Natural Gas Act (NGA).

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed electronically as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, February 17, 2023.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, DOE 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 Office of Resource Sustainability staff at (202) 586-4749 or (202) 586-7893 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.

FOR FURTHER INFORMATION CONTACT:

Jennifer Wade or Peri Ulrey, U.S.

Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-4749 or (202) 586-7893, jennifer.wade@hq.doe.gov or peri.ulrey@hq.doe.gov
Cassandra Bernstein, U.S. Department of Energy (GC-76), Office of the Assistant General Counsel for Energy Delivery and Resilience, Forrestal Building, Room 6D-033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-9793, cassandra.bernstein@hq.doe.gov

SUPPLEMENTARY INFORMATION: Southern LNG requests a short-term blanket authorization to export LNG that has been previously imported into the United States from foreign sources for a two-year period commencing on April 1, 2023. Southern LNG seeks to export the LNG from its existing LNG import terminal known as the Elba Island Terminal (or SLNG Terminal), located in Chatham County, Georgia, to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy. This includes both countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries) and all other countries (non-FTA countries). This Notice applies only to the portion of the Application requesting authority to export the previously imported LNG to non-FTA countries pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a). Southern LNG states that its existing blanket re-export authorization, set forth in DOE/FE Order No. 4687 (Docket No. 20-99-LNG), is scheduled to expire on March 31, 2023. Southern LNG is not seeking authorization to export domestically produced natural gas or LNG.

Southern LNG requests this authorization on its own behalf and as agent for other parties that hold title to the LNG at the point of export. Additional details can be found in Southern LNG's Application, posted on the DOE website at: [https://](https://www.energy.gov/sites/default/files/2022-12/22-166-LNG.pdf)

www.energy.gov/sites/default/files/2022-12/22-166-LNG.pdf.

DOE Evaluation

In reviewing Southern LNG's Application, DOE will consider any issues required by law or policy. DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this Application should comment in their responses on these issues.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Interested parties will be provided 30 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590, including the service requirements.

As noted, DOE is only accepting electronic submissions at this time. Please email the filing to fergas@hq.doe.gov. All filings must include a reference to "Docket No. 22-166-LNG" or "Southern LNG Company, L.L.C. Application" in the title line.

Please Note: Please include all related documents and attachments (*e.g.*, exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE

must follow these guidelines to ensure that all documents are filed in a timely manner.

The Application and any filed protests, motions to intervene, notices of interventions, and comments will also be available electronically by going to the following DOE Web address: www.energy.gov/fecm/regulation.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

Signed in Washington, DC, on January 11, 2023.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.

[FR Doc. 2023-00850 Filed 1-17-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23-354-000.
Applicants: NEXUS Gas Transmission, LLC.

Description: § 4(d) Rate Filing: FOSA Signature Block Update to be effective 2/10/2023.

Filed Date: 1/10/23.

Accession Number: 20230110-5107.

Comment Date: 5 p.m. ET 1/23/23.

Docket Numbers: RP23-355-000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Amended Negotiated Rate Agreement—1/10/2023 to be effective 1/10/2023.

Filed Date: 1/11/23.

Accession Number: 20230111-5000.

Comment Date: 5 p.m. ET 1/23/23.

Docket Numbers: RP23-356-000.

Applicants: RH energytrans, LLC.

Description: Request for Waiver of Requirement to File FL&U Percentage Adjustment of RH energytrans, LLC.

Filed Date: 1/11/23.

Accession Number: 20230111-5019.

Comment Date: 5 p.m. ET 1/23/23.

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 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-00843 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ23-6-000]

City of Riverside, California; Notice of Filing

Take notice that on December 29, 2022, City of Riverside, California submits tariff filing: City of Riverside 2023 Transmission Revenue Balancing Account Adjustment/Existing Transmission Contracts Update, to be effective January 1, 2023.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal**

Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5 p.m. Eastern Time on January 23, 2023.

Dated: January 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-00847 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR23-21-000.
Applicants: Columbia Gas of Maryland, Inc.

Description: § 284.123 Rate Filing: CMD Rates effective 12-9-2022 to be effective 12/9/2022.

Filed Date: 1/9/23.

Accession Number: 20230109-5088.

Comment Date: 5 p.m. ET 1/30/23.

Docket Numbers: RP23-353-000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Non-conforming Agreement—Venture Global K911779 eff 1–1–23 to be effective 1/1/2023.

Filed Date: 1/9/23.

Accession Number: 20230109–5087.

Comment Date: 5 p.m. ET 1/23/23.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP22–1033–002.

Applicants: Northern Natural Gas Company.

Description: Compliance filing: 20221222 Motion Adjusted Base Case Rates to be effective 1/1/2023.

Filed Date: 12/22/22.

Accession Number: 20221222–5127.

Comment Date: 5 p.m. ET 1/17/23.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date. The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number. eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–00838 Filed 1–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ23–7–000]

City of Azusa, California; Notice of Filing

Take notice that on December 29, 2022, City of Azusa, California submits tariff filing: City of Azusa 2023 Transmission Revenue Balancing Account adjustment/Existing

Transmission Contracts Update, to be effective January 1, 2023.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5 p.m. Eastern Time on January 23, 2023.

Dated: January 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–00846 Filed 1–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ23–5–000]

City of Colton, California; Notice of Filing

Take notice that on December 29, 2022, City of Colton, California submits tariff filing: City of Colton 2023 Transmission Revenue Balancing Account Adjustment/Existing Transmission Contracts Update, to be effective January 1, 2023.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225

Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5 p.m. Eastern Time on January 23, 2023.

Dated: January 11, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-00848 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meetings

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94-409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

TIME AND DATE: January 19, 2023, 10:00 a.m.

PLACE: Room 2C, 888 First Street NE, Washington, DC 20426.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: Agenda.
* Note—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502-8400.

For a recorded message listing items stricken from or added to the meeting, call (202) 502-8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission’s website at <https://elibrary.ferc.gov/eLibrary/search> using the eLibrary link.

1097TH—MEETING

[Open Meeting; January 19, 2023, 10:00 a.m.]

Item No.	Docket No.	Company
Administrative		
A-1	AD23-1-000	Agency Administrative Matters.
A-2	AD23-2-000	Customer Matters, Reliability, Security and Market Operations.
Electric		
E-1	RM22-3-000	Internal Network Security Monitoring for High and Medium Impact Bulk Electric System Cyber Systems.
E-2	OMITTED.	
E-3	OMITTED.	
E-4	ER22-2970-001	AEP Generation Resources Inc.
	ER22-2983-001	Ohio Power Company.
	ER22-2971-001	Ohio Valley Electric Corporation.
E-5	ER22-93-001	Tatanka Ridge Wind, LLC.
E-6	ER23-479-000; TS23-1-000	Bellflower Solar 1, LLC.
E-7	OMITTED.	
E-8	ER23-404-000	Shullsburg Wind Farm LLC, Grant County Solar, LLC, and Red Barn Energy, LLC.
E-9	ER22-379-003; ER22-379-004	Southwest Power Pool, Inc.
E-10	ER18-2358-006	Southwest Power Pool, Inc.
	ER19-1357-004; ER20-1313-001 (con-	GridLiance High Plains LLC.
	solidated).	
E-11	ER22-2462-000; EL22-27-000	Alabama Power Company, Georgia Power Company, and Mississippi Power Company.
E-12	EL22-54-001	Southwest Power Pool, Inc.
E-13	EL22-15-001	New York Power Authority.
	ER22-1014-002	New York Independent System Operator, Inc. and New York Power Authority.
Gas		
G-1	RP23-198-000	Tampa Electric Company and Peoples Gas System.
Hydro		
H-1	P-4451-024	Green Mountain Power Corporation and City of Somersworth, New Hampshire.
H-2	P-199-205	South Carolina Public Service Authority.
Certificates		
C-1	CP21-44-001	LA Storage, LLC.
C-2	CP16-454-005	Rio Grande LNG, LLC.
C-3	CP22-474-000; CP22-475-000; CP22-476-000.	West Texas Gas, Inc. and West Texas Gas Utility, LLC.

A free webcast of this event is available through the Commission’s website. Anyone with internet access who desires to view this event can do

so by navigating to www.ferc.gov’s Calendar of Events and locating this event in the Calendar. The Federal Energy Regulatory Commission provides

technical support for the free webcasts. Please call (202) 502-8680 or email customer@ferc.gov if you have any questions.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters but will not be telecast.

Issued: January 12, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-00954 Filed 1-13-23; 4:15 pm]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ23-4-000]

City of Banning, California; Notice of Filing

Take notice that on December 23, 2022, City of Banning, California submits tariff filing: City of Banning 2023 Transmission Revenue Balancing Account Adjustment/Existing Transmission Contracts Update, to be effective January 1, 2023.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel

Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5 p.m. Eastern Time on January 23, 2023.

Dated: January 11, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-00845 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RC11-6-016]

North American Electric Reliability Corporation; Notice of Filing

Take notice that on November 29, 2022, the North American Electric Reliability Corporation submitted an annual report on the Find, Fix, Track and Compliance Exception programs, in accordance with the Federal Energy Regulatory Commission's (Commission) Orders.¹

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the

¹ See *N. Am. Elec. Reliability Corp.*, 138 FERC ¶ 61,193 (2012); *N. Am. Elec. Reliability Corp.*, 143 FERC ¶ 61,253 (2013); *N. Am. Elec. Reliability Corp.*, 148 FERC ¶ 61,214 (2014); *N. Am. Elec. Reliability Corp.*, Docket No. RC11-6-004 (Nov. 13, 2015) (delegated letter order).

comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on January 24, 2023.

Dated: January 10, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-00772 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23-51-000.
Applicants: Phoenix Energy Group, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Phoenix Energy Group, LLC.

Filed Date: 1/9/23.
Accession Number: 20230109-5198.
Comment Date: 5 p.m. ET 1/30/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–57–000.

Applicants: Cavalry Energy Center, LLC.

Description: Cavalry Energy Center, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/10/23.

Accession Number: 20230110–5136.

Comment Date: 5 p.m. ET 1/31/23.

Docket Numbers: EG23–58–000.

Applicants: Dunns Bridge Energy Storage, LLC.

Description: Dunns Bridge Energy Storage, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 1/10/23.

Accession Number: 20230110–5144.

Comment Date: 5 p.m. ET 1/31/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–22–000.

Applicants: Missouri Joint Municipal Electric Utility Commission d/b/a the Missouri Electric Commission.

Description: Missouri Joint Municipal Electric Utility Commission d/b/a the Missouri Electric Commission submits Request for Partial Waiver of Public Utility Regulatory Policies Act Obligations of Electric Utilities to Purchase and Sell Energy et al.

Filed Date: 1/6/23.

Accession Number: 20230106–5159.

Comment Date: 5 p.m. ET 1/27/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–2380–000.

Applicants: EDF Trading North America, LLC.

Description: Refund Report: Refund report to 76 to be effective N/A.

Filed Date: 1/10/23.

Accession Number: 20230110–5073.

Comment Date: 5 p.m. ET 1/31/23.

Docket Numbers: ER21–2455–004.

Applicants: California Independent System Operator Corporation.

Description: Compliance filing: 2023–01–10 FERC Order No. 2222 Errata Filing of Corrections to be effective 6/16/2022.

Filed Date: 1/10/23.

Accession Number: 20230110–5148.

Comment Date: 5 p.m. ET 1/31/23.

Docket Numbers: ER23–799–000.

Applicants: Pivot Point Energy Group, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Tariff Application to be effective 1/10/2023.

Filed Date: 1/9/23.

Accession Number: 20230109–5156.

Comment Date: 5 p.m. ET 1/30/23.

Docket Numbers: ER23–800–000.

Applicants: The Dayton Power and Light Company.

Description: § 205(d) Rate Filing: Filing of Union Facilities Agreement to be effective 3/11/2023.

Filed Date: 1/9/23.

Accession Number: 20230109–5164.

Comment Date: 5 p.m. ET 1/30/23.

Docket Numbers: ER23–801–000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company

Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): CED Timberland Solar 2 LGIA Filing to be effective 1/4/2023.

Filed Date: 1/10/23.

Accession Number: 20230110–5081.

Comment Date: 5 p.m. ET 1/31/23.

Docket Numbers: ER23–802–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of ISA & ICSA, SA Nos. 5246 & 5247; Queue No. Z2–107 to be effective 2/19/2023.

Filed Date: 1/10/23.

Accession Number: 20230110–5111.

Comment Date: 5 p.m. ET 1/31/23.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF23–360–000.

Applicants: B.C. Organics LLC.

Description: Form 556 of B.C. Organics LLC.

Filed Date: 1/9/23.

Accession Number: 20230109–5188.

Comment Date: 5 p.m. ET 1/30/23.

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 10, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–00771 Filed 1–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–55–026.

Applicants: Homer City Generation, L.P.

Description: Triennial Market Power Analysis for Northeast Region of Homer City Generation, L.P.

Filed Date: 12/30/22.

Accession Number: 20221230–5391.

Comment Date: 5 p.m. ET 3/13/23.

Docket Numbers: ER17–1217–001.

Applicants: Total Gas & Power North America, Inc.

Description: Supplement to October 28, 2022, Notice of Non-Material Change in Status of TotalEnergies Gas & Power North America, Inc., et al.

Filed Date: 1/10/23.

Accession Number: 20230110–5180.

Comment Date: 5 p.m. ET 1/31/23.

Docket Numbers: ER22–1165–001.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Order No. 676–J Compliance Revisions to be effective 6/2/2022.

Filed Date: 10/27/22.

Accession Number: 20221027–5144.

Comment Date: 5 p.m. ET 2/1/23.

Docket Numbers: ER23–277–002.

Applicants: Westlake US 2 LLC.

Description: Tariff Amendment: Amendment to Region Status Update in Docket ER23–277 to be effective 1/1/2023.

Filed Date: 1/11/23.

Accession Number: 20230111–5051.

Comment Date: 5 p.m. ET 1/23/23.

Docket Numbers: ER23–425–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Request to Defer Action on Amendment to WMPA, SA No. 6062 to be effective 12/31/9998.

Filed Date: 1/11/23.

Accession Number: 20230111–5037.

Comment Date: 5 p.m. ET 2/1/23.

Docket Numbers: ER23–481–000.

Applicants: TotalEnergies Gas & Power North America, Inc.

Description: Supplement and Clarification of Request for Waiver of

Prior Notice to November 22, 2022
TotalEnergies Gas & Power North America, Inc. submits tariff filing Updated Market Based Rate Tariff submitted on 11/22/2022.
Filed Date: 1/10/23.
Accession Number: 20230110–5177.
Comment Date: 5 p.m. ET 1/31/23.
Docket Numbers: ER23–803–000.
Applicants: Invenergy Solar Project Development LLC.
Description: Invenergy Solar Project Development LLC Requests a Prospective Waiver of Section 25.6.2.3.1 of Attachment S of the New York Independent System Operator, Inc. OATT.
Filed Date: 1/10/23.
Accession Number: 20230110–5179.
Comment Date: 5 p.m. ET 1/20/23.
Docket Numbers: ER23–804–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 6761; Queue No. AF1–021 to be effective 12/13/2022.
Filed Date: 1/11/23.
Accession Number: 20230111–5013.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–805–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Tariff Clean-Up Filing Effective 20211001 to be effective 10/1/2021.
Filed Date: 1/11/23.
Accession Number: 20230111–5043.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–806–000.
Applicants: Wolverine Power Supply Cooperative, Inc.
Description: § 205(d) Rate Filing: Second Amended and Restated Transmission Interconnection Facilities Agreement to be effective 3/13/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5047.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–807–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: GIA & DSA, BCE Los Alamitos 2 1st Amend (WDT1583–SA Nos. 1141–1142) to be effective 3/13/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5052.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–808–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Revisions to GDEMA with MDU Related to WEIS Integration to be effective 4/1/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5053.

Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–809–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Revisions to GDEMA with BHW Related to WEIS Integration to be effective 4/1/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5062.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–810–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Revisions to GDEMA with BHCOE Related to WEIS Integration to be effective 4/1/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5064.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–811–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Revisions to GDEMA with Gillette Related to WEIS Integration to be effective 4/1/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5066.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–812–000.
Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Revisions to GDEMA with CLFP Related to WEIS Integration to be effective 4/1/2023.
Filed Date: 1/11/23.
Accession Number: 20230111–5070.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–813–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6740; Queue No. AC1–194 & Cancellation of IISA, SA No. 6156 to be effective 12/15/2022.
Filed Date: 1/11/23.
Accession Number: 20230111–5077.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–814–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6756; Queue No. AF1–105 to be effective 12/16/2022.
Filed Date: 1/11/23.
Accession Number: 20230111–5081.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–815–000.
Applicants: Dominion Energy South Carolina, Inc.
Description: § 205(d) Rate Filing: Attachment H Clean Up Filing to be effective 9/1/2021.
Filed Date: 1/11/23.
Accession Number: 20230111–5082.
Comment Date: 5 p.m. ET 2/1/23.
Docket Numbers: ER23–816–000.
Applicants: System Energy Resources, Inc.

Description: § 205(d) Rate Filing: SERI Compliance Report and Limited Extension Request (EL18–152) to be effective 12/31/9998.
Filed Date: 1/11/23.
Accession Number: 20230111–5117.
Comment Date: 5 p.m. ET 2/1/23.

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 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–00844 Filed 1–17–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–799–000]

Pivot Point Energy Group, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of PGR 2022 Lessee 2, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 30, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Dated: January 10, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-00769 Filed 1-17-23; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2022-0337; FRL-10497-02-OCSPJ]

Pesticides; Evaluating the Efficacy of Antimicrobial Test Substances on Porous Surfaces in Non-Residential Settings; Interim Guidance and Methods; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: In the **Federal Register** of December 21, 2022, EPA announced the availability of and solicited public comment on interim guidance and methods for adding efficacy claims to antimicrobial products for use on porous materials, including fabrics, textiles, and upholstered items in non-residential settings. This document extends the comment period for 30 days from January 20, 2023, to February 19, 2023.

DATES: The comment period for the notice that published on December 21, 2022, at 87 FR 78105, is extended. Comments must be received on or before February 19, 2023.

ADDRESSES: Submit your comments, identified by ID number EPA-HQ-OPP-2022-0337, through the Federal eRulemaking Portal at <https://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 <https://www.epa.gov/dockets/epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Marc Carpenter, Microbiology Laboratory Branch (7503M), Biological and Economic Analysis Division, Office of Pesticide Programs, Environmental Protection Agency, Environmental Science Center, 701 Mapes Road, Ft. Meade, MD 20755-5350; telephone number: (410) 305-2927; email address: carpenter.marc@epa.gov.

SUPPLEMENTARY INFORMATION: This document extends the public comment period established in the **Federal Register** document of December 21, 2022 (87 FR 78105) (FRL-10497-01-OCSPJ) for 30 days, from January 20, 2023, to February 19, 2023. In that document, EPA announced the

availability of and solicited public comment on interim guidance and methods for adding efficacy claims to antimicrobial products for use on porous materials, including fabrics, textiles, and upholstered items in non-residential settings. More information on EPA's interim guidance and solicitation of comment can be found in the **Federal Register** of December 21, 2022.

[Optional, include a statement about why we are extending the comments. For example:

EPA received requests to extend the comment period and believes it is appropriate to do so in order to give stakeholders additional time to review the interim guidance and methods, and prepare comments.

To submit comments, or access the materials in the docket, please follow the detailed instructions provided under **ADDRESSES**. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: January 11, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023-00851 Filed 1-17-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OLEM-2022-0973; FRL-10528-01-OLEM]

Hazardous Waste Electronic Manifest System ("e-Manifest") Advisory Board; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Public notice.

SUMMARY: The Environmental Protection Agency (EPA) will convene the Hazardous Waste Electronic System ("e-Manifest") Advisory Board for a three (3) day virtual public meeting. The purpose of the meeting is for EPA to seek the Board's consultation and recommendations regarding the e-Manifest system (Meeting Theme: "Meeting the Needs of the User Community: e-Manifest Program Priorities and User Fees for FY 2024 and 2025").

DATES: The meeting will be held on February 28-March 2, 2023, from approximately 10:00 a.m. to 5:00 p.m. EST on each day.

ADDRESSES: This public meeting will be conducted virtually. Registration is required to attend and/or participate (as public commenter) in this public

meeting. Please refer to the e-Manifest Advisory Board website at <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board> for information on how to register either as a public audience attendee or as an oral public commenter.

Comments. To make oral comments during the public meeting and be included on the meeting agenda, please register by noon on February 21, 2023. Registration instructions will be posted on the e-Manifest Advisory Board website at <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board>. Any written comments submitted for the e-Manifest Advisory Board meeting on or before February 21, 2023, should be submitted in the public docket under Docket number EPA–HQ–OLEM–2022–0973 at <http://www.regulations.gov>. Written comments submitted to the public docket on or before February 21, 2023, will be provided to the e-Manifest Advisory Board for their consideration before the meeting. Anyone who wishes to submit comments after February 21, 2023, must send their written public comments or their oral comment requests directly to the Designated Federal Officer (DFO) listed under **FOR FURTHER INFORMATION CONTACT**. For additional instructions, see section I.B. under **SUPPLEMENTARY INFORMATION**.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least ten (10) days prior to the meeting to give the EPA as much time as possible to process your request.

FOR FURTHER INFORMATION CONTACT: Fred Jenkins, Designated Federal Officer (DFO), U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, email: jenkins.fred@epa.gov; phone: 202–566–0344.

SUPPLEMENTARY INFORMATION: This meeting will be open to the public. The full agenda and meeting materials will be available in the docket for the meeting and at the e-Manifest Advisory Board website at <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board>. This public meeting will be conducted virtually. Registration is required to attend and/or participate in this public meeting. Registration instructions will be posted on the e-Manifest Advisory Board website at <https://www.epa.gov/e-manifest/>

[hazardous-waste-electronic-manifest-system-e-manifest-advisory-board](https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board). In the event the Agency needs to make subsequent changes to this meeting, the Agency will post future notices to its e-Manifest Board meeting website (<https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board>). The Agency strongly encourages the public to refer to the e-Manifest website for the latest meeting information, as sudden changes may be necessary.

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may be of particular interest to persons who are or may be subject to the Hazardous Waste Electronic Manifest Establishment (e-Manifest) Act.

B. How may I participate in this meeting?

You may participate in this meeting by providing public comments via the instructions in this document. To ensure proper receipt of your public comments by the EPA, it is imperative that you submit your comments, identified by docket ID number EPA–HQ–OLEM–2022–0973, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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 (e.g., 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>.

1. **Written comments.** The Agency encourages written comments be submitted electronically via <http://www.regulations.gov>, into docket ID number EPA–HQ–OLEM–2022–0973 on or before February 21, 2023, to provide the e-Manifest Advisory Board the time necessary to consider and review the

written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after February 21, 2023, should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

2. **Oral comments.** The Agency encourages each individual or group wishing to make brief oral comments to the e-Manifest Advisory Board to please register as an oral commenter for the meeting at the e-Manifest Advisory Board website, <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board>, by noon on February 21, 2023, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting. Registration is required to attend and/or participate as an oral public commenter in this public meeting. Please refer to the e-Manifest Advisory Board website at <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board> for information on how to register either as an oral public commenter or public audience attendee. Anyone submitting oral public comments request after February 21, 2023, should also contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**. To the extent that time permits, the Chair of the e-Manifest Advisory Board may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) that the individual represents, and any requirements for audiovisual presentation support. Oral comments before the e-Manifest Advisory Board are limited to approximately five (5) minutes unless prior arrangements have been made. In addition, each speaker should provide a copy of his or her comments and presentation to the DFO so that they can be distributed to the e-Manifest Advisory Board at the meeting.

C. Purpose of the e-Manifest Advisory Board

The Hazardous Waste Electronic Manifest System Advisory Board is established in accordance with the provisions of the Hazardous Waste Electronic Manifest Establishment Act, 42 U.S.C. 6939g, and the Federal Advisory Committee Act (FACA), 5 U.S.C. app.2. The e-Manifest Advisory Board is in the public interest and supports the EPA in performing its duties and responsibilities. The Board shall meet annually to discuss, evaluate the effectiveness of, and provide

recommendations about the system to the EPA Administrator.

The sole duty of the Advisory Board is to provide advice and recommendations to the EPA Administrator. As required by the e-Manifest Act, the e-Manifest Advisory Board is composed of nine (9) members. One (1) member is the EPA Administrator (or a designee), who serves as Chairperson of the Advisory Board. The rest of the committee is composed of:

- At least two (2) members who have expertise in information technology;
- At least three (3) members who have experience in using or represent users of the manifest system to track the transportation of hazardous waste under the e-Manifest Act;

- At least three (3) members who are state representatives responsible for processing manifests.

All members of the e-Manifest Advisory Board, except for the EPA Administrator, are appointed as Expert members or Representative members.

D. Public Meeting

EPA launched the e-Manifest system on June 30, 2018. e-Manifest provides those persons required to use a Resource Conservation and Recovery Act (RCRA) manifest under either federal or state law the option of using electronic manifests to track shipments of hazardous waste and to meet certain RCRA requirements. By enabling the transition from a paper-intensive process to an electronic system, EPA estimates e-Manifest will ultimately save state and industry users more than \$50 million annually, once electronic manifests are widely adopted.

Under the Hazardous Waste Electronic Manifest Establishment Act (e-Manifest Act) of 2012, EPA must collect user fees to offset the costs of developing and operating the e-Manifest system. In January 2018, EPA published regulations establishing the methodology which the Agency uses to set and collect user fees for the e-Manifest system. Under the final rule, EPA charges a fee to receiving facilities for each manifest submitted to EPA's e-Manifest system. User fees are tailored to the method used to submit manifests to EPA, e.g., different fees apply for electronic manifests than for paper manifests uploaded to the system. In addition, EPA is required to publish revised user fee schedules at two-year intervals.

EPA will convene its next public meeting of the e-Manifest System Advisory Board February 28–March 2, 2023. The purpose of this meeting is for the Board to advise the Agency on its

proposed program priorities and user fees for the FY2024/FY2025 cycle.

E. e-Manifest Advisory Board Documents and Meeting Minutes

The meeting background paper, related supporting materials, charge/questions to the Advisory Board, the Advisory Board membership roster (i.e., members attending this meeting), and the meeting agenda will be available by approximately early-February 2023. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available at <http://www.regulations.gov> via the docket ID number EPA–HQ–OLEM–2022–0973 and at the e-Manifest Advisory Board website at: <https://www.epa.gov/e-manifest/hazardous-waste-electronic-manifest-system-e-manifest-advisory-board>.

The e-Manifest Advisory Board will prepare meeting minutes summarizing its recommendations to the Agency approximately ninety (90) days after the meeting. The meeting minutes will be posted on the e-Manifest Advisory Board website, or they may be obtained from the public docket at <http://www.regulations.gov> via the docket ID number EPA–HQ–OLEM–2022–0973.

Dated: January 11, 2023.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2023–00870 Filed 1–17–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2022–0132; FRL–9411–12–OCSPJ]

Certain New Chemicals; Receipt and Status Information for December 2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, to make information publicly available and to publish information in the **Federal Register** pertaining to submissions under TSCA section 5, including notice of receipt of a Premanufacture notice (PMN), Significant New Use Notice (SNUN) or Microbial Commercial Activity Notice (MCAN), including an amended notice or test information; an exemption

application (Biotech exemption); an application for a test marketing exemption (TME), both pending and/or concluded; a notice of commencement (NOC) of manufacture (including import) for new chemical substances; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review. This document covers the period from 12/1/2022 to 12/31/2022.

DATES: Comments identified by the specific case number provided in this document must be received on or before February 17, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2022–0132, through the *Federal eRulemaking Portal* at <https://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 and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Jim Rahai, Project Management and Operations Division (MC 7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8593; email address: rahai.jim@epa.gov.

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

This document provides the receipt and status reports for the period from 12/01/2022 to 12/31/2022. The Agency is providing notice of receipt of PMNs, SNUNs, and MCANs (including amended notices and test information); an exemption application under 40 CFR part 725 (Biotech exemption); TMEs, both pending and/or concluded; NOCs to manufacture a new chemical substance; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review.

EPA is also providing information on its website about cases reviewed under

the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tasca/status-pre-manufacture-notices>. This information is updated on a weekly basis.

B. What is the Agency's authority for taking this action?

Under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, a chemical substance may be either an "existing" chemical substance or a "new" chemical substance. Any chemical substance that is not on EPA's TSCA Inventory of Chemical Substances (TSCA Inventory) is classified as a "new chemical substance," while a chemical substance that is listed on the TSCA Inventory is classified as an "existing chemical substance." (See TSCA section 3(11).) For more information about the TSCA Inventory please go to: <https://www.epa.gov/tsca-inventory>.

Any person who intends to manufacture (including import) a new chemical substance for a non-exempt commercial purpose, or to manufacture or process a chemical substance in a non-exempt manner for a use that EPA has determined is a significant new use, is required by TSCA section 5 to provide EPA with a PMN, MCAN, or SNUN, as appropriate, before initiating the activity. EPA will review the notice, make a risk determination on the chemical substance or significant new use, and take appropriate action as described in TSCA section 5(a)(3).

TSCA section 5(h)(1) authorizes EPA to allow persons, upon application and under appropriate restrictions, to manufacture or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a)(2), for "test marketing" purposes, upon a showing that the manufacture, processing, distribution in commerce, use, and disposal of the chemical will not present an unreasonable risk of injury to health or the environment. This is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: <https://www.epa.gov/chemicals-under-tsca>.

Under TSCA sections 5 and 8 and EPA regulations, EPA is required to publish in the **Federal Register** certain

information, including notice of receipt of a PMN/SNUN/MCAN (including amended notices and test information); an exemption application under 40 CFR part 725 (biotech exemption); an application for a TME, both pending and concluded; NOCs to manufacture a new chemical substance; and a periodic status report on the new chemical substances that are currently under EPA review or have recently concluded review.

C. Does this action apply to me?

This action provides information that is directed to the public in general.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

E. What should I consider as I prepare my comments for EPA?

1. *Submitting confidential business information (CBI).* Do not submit this information to EPA through [regulations.gov](https://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. Status Reports

In the past, EPA has published individual notices reflecting the status of TSCA section 5 filings received, pending or concluded. In 1995, the Agency modified its approach and streamlined the information published in the **Federal Register** after providing notice of such changes to the public and an opportunity to comment (see the **Federal Register** of May 12, 1995 (60 FR 25798) (FRL-4942-7)). Since the passage of the Lautenberg amendments to TSCA in 2016, public interest in information on the status of section 5 cases under EPA review and, in

particular, the final determination of such cases, has increased. In an effort to be responsive to the regulated community, the users of this information, and the general public, to comply with the requirements of TSCA, to conserve EPA resources and to streamline the process and make it more timely, EPA is providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tasca/status-pre-manufacture-notices>. This information is updated on a weekly basis.

III. Receipt Reports

For the PMN/SNUN/MCANs that have passed an initial screening by EPA during this period, Table I provides the following information (to the extent that such information is not subject to a CBI claim) on the notices screened by EPA during this period: The EPA case number assigned to the notice that indicates whether the submission is an initial submission, or an amendment, a notation of which version was received, the date the notice was received by EPA, the submitting manufacturer (*i.e.*, domestic producer or importer), the potential uses identified by the manufacturer in the notice, and the chemical substance identity.

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that this information in the table is generic information because the specific information provided by the submitter was claimed as CBI. Submissions which are initial submissions will not have a letter following the case number. Submissions which are amendments to previous submissions will have a case number followed by the letter "A" (*e.g.*, P-18-1234A). The version column designates submissions in sequence as "1", "2", "3", etc. Note that in some cases, an initial submission is not numbered as version 1; this is because earlier version(s) were rejected as incomplete or invalid submissions. Note also that future version of the following tables may adjust slightly as the Agency works to automate population of the data in the tables.

TABLE I—PMN/SNUN/MCANS APPROVED * FROM 12/1/2022 TO 12/31/2022

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P-18-0146A	4	12/19/2022	CBI	(G) Primer paint binders for open non-dispersive uses.	(G) Modified fat amines, polymers with bisphenol A, alkanolamines, epichlorohydrin, alkylamine and substituted isocyanato [isocyanatoalkylcarbomonocyle].
P-22-0002A	4	12/01/2022	Materion Advanced Chemicals	(G) This product is used for the manufacturing of electronic devices.	(G) Metal Oxide Chloride.
P-22-0095A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0096A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0097A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0098A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0099A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0100A	2	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0101A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P-22-0102A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates, salts.
P-22-0103A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates, salts.
P-22-0104A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates, salts.
P-22-0105A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates, salts.
P-22-0106A	3	12/05/2022	Locus Fermentation Solutions	(G) Surfactant for consumer, industrial, commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates, salts.
P-22-0119A	3	12/12/2022	CBI	(G) Resin for packaging and Binding agent.	(G) Polyhydroxyalkanoate.
P-22-0120A	3	12/12/2022	CBI	(G) Resin for packaging, Binder materials.	(G) Polyhydroxyalkanoate.
P-23-0009A	2	12/19/2022	CBI	(G) Fragrance ingredient for use in laundry applications..	(G) Cysteine, cyclic alkyl, ethyl ester.
P-23-0014A	5	12/12/2022	CBI	(S) Intermediate in production of fragrance.	(G) [Polyalkyl-methylenepolyhydro-polycyclic]alkyl acetate.
P-23-0028	3	12/13/2022	CBI	(S) Encapsulating Shell Polymer for Fragrance Encapsulates for Industrial or Household Consumer Products such as Detergents and Fabric Softeners.	(G) gelatin and maltodextrin crosslinked with linear and cyclic aliphatic polyisocyanates.
P-23-0029A	2	12/07/2022	CBI	(G) Battery Cathode Manufacturing ..	(G) Cobalt metal nickel oxide.
P-23-0035	2	12/13/2022	CBI	(G) Isolated intermediate	(G) Aryl alkoxy ether.
P-23-0036	1	11/30/2022	Elantas PDG, Inc	(S) MF8044 Resin is an unsaturated polyester resin used in an electrical insulation coating. The coating is used to insulate electrical components in automobiles.	(S) Castor oil, polymer with dicyclopentadiene, maleic anhydride, 2-methyl-1,3-propanediol, 3a,4,7,7a-tetrahydro-2-(2-hydroxyethyl)-1H-isindole-1,3(2H)-dione and triethylene glycol.
P-23-0037	1	12/01/2022	CBI	(G) Photoacid generator (PAG) for use in electronics industry.	(G) Monoaromatic cyclic alkylene sulfonium fluoroalkyl sulfonic acid salt.
P-23-0038	2	12/07/2022	Allnex, USA Inc	(S) Crosslinker (hardener) for various water dilutable backbone binders (e.g., polyester resins, epoxy resins or acrylic resins) in order to obtain high chemical resistant protective layers for heat curing metal application.	(G) Formaldehyde, polymer with phenol, carboxyalkyl ethers, alkali salts, compds. with (dialkylamino)alkanol.
P-23-0039	2	12/19/2022	Evonik Corporation	(S) Surfactant in manual/hand dish detergent, surface cleaner, laundry detergent.	(G) Rhamnolipids, modified pseudomonas-fermented, from dextrose, salts.
P-23-0040	2	12/19/2022	Evonik Corporation	(S) Surfactant in manual/hand dish detergent, surface cleaner, laundry detergent.	(G) Rhamnolipids, modified pseudomonas-fermented, from dextrose, salts.

TABLE I—PMN/SNUN/MCANS APPROVED * FROM 12/1/2022 TO 12/31/2022—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P-23-0041	1	12/09/2022	CHT USA Inc	(G) Additive into consumer cleaning products, Industrial & Institutional Cleaners.	(G) Siloxane & Silicone, alkyl amino polymer.
P-23-0042	1	12/12/2022	Clariant Corporation	(S) Intermediate for use in producing polymers.	(G) Oxirane, alkyl-, polymer with oxirane, monoethers with polyethylene glycol alkenyl ether.
P-23-0043	1	12/12/2022	Clariant Corporation	(S) Intermediate for use in producing polymers.	(G) Oxirane, alkyl-, polymer with oxirane, sulfate, ethers with polyethylene glycol alkenyl ether, salt.
P-23-0044	1	12/13/2022	CBI	(G) Photoacid generator (PAG) for use in electronics industry.	(G) Monoaromatic cyclic alkylene sulfonium fluoroalkyl sulfonic acid salt.
P-23-0046	1	12/16/2022	CBI	(G) Process aid for the fabrication of molded articles.	(G) Siloxanes and Silicones, di-alkyl, hydroxy-terminated, polymers with substituted alkane and substituted silane.
P-23-0047	1	12/16/2022	CBI	(G) Additive in plating baths	(G) Heteromonocyclic, dialkyl amide, substituted alkyl salt.
P-23-0048	2	12/19/2022	Dynax Corporation	(G) Additive used in industrial and commercial applications.	(G) Alkenoic acid, reaction products with polyalkenimine, polymer with mercapto alkanolester and C6-fluoro haloalkane, compds. with alkanolamine.
P-23-0049	1	12/21/2022	CBI	(G) Photolithography	(G) Sulfonium, tricarboxylic-, 2-aryl-polyfluoropolyhydro-alkano-heteropolycycle-alkanesulfonate (1:1), polymer with heteroatom substituted aryl and carbomonocyclic 2-alkyl-2-alkanoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated.
P-23-0050	1	12/23/2022	SHIN-ETSU Microsi	(G) Contained use for microlithography for electronic device manufacturing.	(G) Substitutedheterocyclic onium compound, salt with heteropolysubstitutedalkyl substitutedtricycloalkanecarboxylate (1:1), polymer with 3-ethenylphenol and heterosubstitutedaromaticalkyl 2-methyl-2-propenoate, di-Me 2,2-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated.

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs that have passed an initial screening by EPA during this period: The EPA case number assigned

to the NOC including whether the submission was an initial or amended submission, the date the NOC was received by EPA, the date of commencement provided by the submitter in the NOC, a notation of the

type of amendment (e.g., amendment to generic name, specific name, technical contact information, etc.) and chemical substance identity.

TABLE II—NOCs APPROVED * FROM 12/1/2022 TO 12/31/2022

Case No.	Received date	Commencement date	If amendment, type of amendment	Chemical substance
P-11-0224A	12/06/2022	08/29/2022	Amended generic chemical name	(G) Propane, fluoro-substituted-3-(1,1,2,2-tetrafluoroethoxy)-.
P-21-0019	11/30/2022	11/28/2022	N	(G) Ethyl 4-alkyl-2-oxocycloalkanecarboxylate.

* The term 'Approved' indicates that a submission has passed a quick initial screen ensuring all required information and documents have been provided with the submission.

In Table III of this unit, EPA provides the following information (to the extent such information is not subject to a CBI claim) on the test information that has

been received during this time period: The EPA case number assigned to the test information; the date the test information was received by EPA, the

type of test information submitted, and chemical substance identity.

TABLE III—TEST INFORMATION RECEIVED FROM 12/1/2022 TO 12/31/2022

Case No.	Received date	Type of test information	Chemical substance
P-13-0021	12/05/2022	Revised Test Data Validation Study	(G) Perfluoroacrylate polymer.
P-14-0712	11/30/2022	Polychlorinated Dibenzodioxins and Polychlorinated dibenzofurans Testing.	(G) Plastics, wastes, pyrolyzed, bulk pyrolysate.
P-14-0712	12/19/2022	Testing Notice	(G) Plastics, wastes, pyrolyzed, bulk pyrolysate.

TABLE III—TEST INFORMATION RECEIVED FROM 12/1/2022 TO 12/31/2022—Continued

Case No.	Received date	Type of test information	Chemical substance
P-15-0443	12/21/2022	90-Day Inhalation Toxicity Testing (OECD Test Guideline 413).	(G) Rare earth doped zirconium oxide.
P-22-0129	12/14/2022	Water Solubility: Column Elution Method; Shake Flask Method (OECD Test Guideline 105).	(G) Substituted heterocyclic onium compound, salt with heteropolysubstitutedalkyl substitutedtricycloalkane carboxylate (1:1), polymer with 1-alkenyl-4-[(alkylcycloalkyl)oxy]carbomonocycle, 5-ethyloctahydro-4,7-methano-1h-inden-5-yl 2-methyl-2-propenoate, hexahydro-5-oxo-2,6-methanofuro[3,2-b]furan-3-yl 2-methyl-2-propenoate and 4-hydroxyphenyl 2-methyl-2-propenoate.
P-23-0030	12/06/2022	Bacterial Reverse Mutation Test (OECD Test Guideline 471)	(G) Phenol, polyalkylcarbo bis-, polymer with 2-carbomonocyclichaloheteromonocycle, bis[(alkenylcarbomonocyclic alkyl) ether.

If you are interested in information that is not included in these tables, you may contact EPA’s technical information contact or general information contact as described under **FOR FURTHER INFORMATION CONTACT** to access additional non-CBI information that may be available.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: January 12, 2023.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023-00859 Filed 1-17-23; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board’s Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than February 17, 2023.

A. *Federal Reserve Bank of Atlanta* (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309 or electronically to Applications.Comments@atl.frb.org:
 1. *TIAA FSB Holdings, Inc.*; to become a bank holding company upon the conversion of its subsidiary, TIAA, FBS, both of Jacksonville, Florida, into a national bank.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-00857 Filed 1-17-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project “Supporting and Evaluating the Dissemination and Implementation of PCOR to Improve Non-Surgical Treatment of Urinary Incontinence Among Women in Primary Care.” This proposed information collection was previously published in the **Federal Register** on October 28, 2022 and allowed 60 days for public comment. AHRQ received no substantive comments. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by February 17, 2023.

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.

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT: 88 FR 863.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, January 10, 2023 at 10:00 a.m. and its continuation at the conclusion of the open meeting on January 12, 2023.

CHANGES IN THE MEETING: The meeting began at 10:30 a.m. on January 10, 2023.

The meeting also discussed:

Matters relating to internal personnel decisions, or internal rules and practices.

* * * * *

FOR MORE INFORMATION CONTACT: Judith Ingram, Press Officer, Telephone: (202) 694-1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2023-00905 Filed 1-13-23; 11:15 am]

BILLING CODE 6715-01-P

FOR FURTHER INFORMATION CONTACT:
Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427-1477, or by email at doris.lefkowitz@AHRQ.hhs.gov.

SUPPLEMENTARY INFORMATION:

Proposed Project

Supporting and Evaluating the Dissemination and Implementation of PCOR To Improve Non-Surgical Treatment of Urinary Incontinence Among Women in Primary Care

AHRQ's Improve Non-surgical Treatment of Urinary Incontinence Among Women in Primary Care (INTUIT-PC) initiative, now named the Managing Urinary Incontinence (MUI) initiative, addresses important gaps in urinary incontinence (UI) care for women in the primary care setting. As part of the MUI initiative, AHRQ is funding five cooperative agreement (U18) grantees to develop primary care extension services to disseminate and implement improved nonsurgical treatment of UI for women—including screening, diagnosis, management, and specialty referral—within primary care practices in separate regions of the United States.

AHRQ is also conducting a project to support the MUI cooperative agreements and evaluate the initiative, which includes:

- Support of the five U18 MUI cooperative agreements in the form of a learning community, technical assistance, and other resources to assist grantees to disseminate and implement patient centered outcomes research (PCOR) for nonsurgical treatment of urinary incontinence for women in primary care.

- A rigorous mixed methods process and outcome evaluation of the grantees' dissemination and implementation strategies.

This evaluation is being conducted by AHRQ through its contractor, RAND, pursuant to AHRQ's authority to carry out the PCOR dissemination activities described in section 937 of the Public Health Service Act. 42 U.S.C. 299b-37.

Method of Collection

To achieve the goals of this multisite evaluation, AHRQ is requesting OMB approval for three years of data collection by the evaluator. The evaluator's primary data collection is requested to achieve the goals of the multisite evaluation and includes the following data collection activities:

- (1) Focus groups with practice facilitators who are employed by the MUI U18 grantees to provide direct technical assistance to primary care practices.
- (2) Semi-structured interviews with leaders and staff of primary care practices participating in the MUI U18 studies.

Practice facilitator focus groups. Practice facilitators (also known as practice coaches) perform a critical role in enabling primary care practices to implement evidence-based improvements. The purpose of the annual focus groups with practice facilitators is to gather their insights on challenges assisting various types of primary care practices, the resources needed to promote improvement in primary care practices, and the effectiveness of different dissemination and implementation strategies used by

the MUI U18 studies. The evaluator aims to conduct a virtual focus group with 8–10 practice facilitators for each of the five U18 studies, for an expected total of 45 focus group participants per year.

Practice leader/staff semi-structured interviews. The goal of the MUI U18 studies is to disseminate and implement evidence-based UI treatment for women within primary care practices. The purpose of the semi-structured interviews with leaders and staff of primary care practices is to collect data from the practices' perspective on the barriers and facilitators to implementing evidence-based UI treatment for women in primary care, as well as on the utility of the technical assistance and resources provided to practices by the grant studies. The evaluator aims to conduct 4–8 in-person individual interviews in one practice per each U18 study (average of 1 interviews × on average 6 participants × 1 practice × 5 grants = 30 interviews), and 1 telephone interview with 1–2 participants per interview for two additional practices per each grant study (1 interview × on average 1.5 participants × 2 practices × 5 grants = 15 interviews), for an expected total of 45 interview participants per year.

Estimated Annual Respondent Burden

Exhibit A.1a shows the estimated annualized burden hours for the respondents' time to complete the Practice Facilitator Focus Groups and Practice Leader/Staff Semi-Structured Interviews. For the three-year clearance period, the estimated annualized burden hours for the interviews are \$2,190.50.

EXHIBIT A.1a—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Practice Facilitator Focus Groups	45	1	1	45
Practice Leader/Staff Semi-Structured Interviews	45	1	1	45
Total	90	N/A	N/A	90

EXHIBIT A.1b—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents	Total burden hours	Average hourly wage rate ^a	Total cost burden
Practice Facilitator Focus Groups	45	45	^a \$28.01	1,260.45
Practice Leader/Staff Semi-Structured Interviews	45	45	^a 28.01	1,260.45
Total	90	90	24.34	2,520.90

^{*} Mean hourly wage for All Occupations (00-0000).

^a Occupational Employment Statistics, May 2021 National Occupational Employment and Wage Estimates United States, U.S. Department of Labor, Bureau of Labor Statistics.

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: January 11, 2023.

Marquita Cullom,

Associate Director.

[FR Doc. 2023–00796 Filed 1–17–23; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[30Day–23–0041]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Agency for Toxic Substances and Disease Registry (ATSDR) has submitted the information collection request titled the “National Amyotrophic Lateral Sclerosis (ALS) Registry” to the Office of Management and Budget (OMB) for review and approval. ATSDR previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on September 30, 2022, to obtain comments from the public and affected agencies. ATSDR received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

ATSDR will accept all comments for this proposed information collection project. The Office of Management and

Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

National Amyotrophic Lateral Sclerosis (ALS) Registry (OMB Control No. 0923–0041, Exp. 1/31/2023)—Revision—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The Agency for Toxic Substances and Disease Registry (ATSDR) is requesting a three-year Paperwork Reduction Act (PRA) clearance for a revision information collection request (ICR) titled the “National Amyotrophic Lateral Sclerosis (ALS) Registry” (OMB Control No. 0923–0041, Exp. Date 01/31/2023).

In 2008, Public Law 110–373 (the ALS Registry Act) amended the Public Health Service Act for ATSDR to: (1)

develop a system to collect data ALS and other motor neuron disorders that can be confused with ALS, misdiagnosed as ALS, or progress to ALS; and (2) establish a national registry for the collection and storage of such data to develop a population-based registry of cases. Under these two mandates, ATSDR established the National ALS Registry.

The primary operational goal of the Registry is to obtain reliable information on the incidence and prevalence of ALS, and to better describe the demographic characteristics (age, race, sex, and geographic location) of persons with ALS. The secondary operational goal of the surveillance system/registry is to collect additional information on potential risk factors for ALS, including, but not limited to, family history of ALS, smoking history, military service, residential history, lifetime occupational exposure, home pesticide use, hobbies, participation in sports, hormonal and reproductive history (women only), caffeine use, trauma, health insurance, open-ended supplemental questions, and clinical signs and symptoms.

With those goals in mind, persons with ALS first joined the Registry in 2010. Those interested in taking part answered a series of validation questions. If determined to be eligible, they created an online account to enroll in the Registry. Next, they were asked to complete up to 17 one-time voluntary survey modules, each taking up to five minutes. New registrants were also asked to complete a longitudinal disease progression survey (modified from the ALS Functional Rating Scale—Revised [ALSFRS–R]) at regular intervals over their first three years in the Registry.

A biorepository component was added in 2016. At the time of enrollment, interested registrants can request additional information about the biorepository and provide additional contact information. ATSDR selects a geographically representative sample from among the interested registrants to collect specimens. There are two types of specimen collections, in-home and postmortem. The in-home collection includes blood, urine, hair, nails, and saliva. The postmortem collection includes the brain, spinal cord, cerebral spinal fluid (CSF), bone, muscle, and skin. Researchers can now request access to registrants' specimens, data, or both through an ATSDR research application process. Once approved for scientific merit, validity, and human subjects protections, ATSDR makes the requested data and/or specimens available to the requester. ATSDR also collaborates with ALS service

organizations to conduct outreach activities through their local chapters and districts as well as on a national level. The service organizations provide ATSDR with monthly reports on their outreach efforts in support of the Registry.

Under this Revision ICR, the respondent types still include persons with ALS, researchers, and ALS service organizations. In summary, three main revisions to the ICR are proposed. First, based on feedback from patients, caregivers, researchers as well as the National Center for Health Statistics (NCHS) Collaborating Center for Questionnaire Design and Evaluation Research, ATSDR proposes to restructure the original five-minute survey modules to make them more user-friendly and easier to navigate for patients. These changes are designed to increase completion rates for all surveys. Therefore, ATSDR requests to restructure the layouts of the 17 one-time ALS survey modules. The previously approved questions in the 17 modules are reorganized into the Essential Questionnaire and one of the four Follow-up Question modules: (1) Demographics; (2) Lifestyle Information; (3) Environmental Factors; and (4) ALS-associated Clinical Factors. Questions determined to be critical in capturing the information about Registry

participant at the time of enrollment are grouped in the Essential Questionnaire. The remaining questions from one-time survey were evaluated for proper classification in the new format.

The five-minute disease progression survey requirements remain unchanged. In Year 1, new registrants are asked to complete the disease progression survey at 0 (baseline), three, and six months. The disease progression survey at 0 (baseline) months will be administered after completion of the Essential Questionnaire. In Year 2 and Year 3, they are asked to repeat the disease progression survey on their anniversary date and at six months. Therefore over three years, new registrants are requested to complete the survey seven times. For time burden estimation, the number of responses is rounded up to three times per year.

As a second revision, ATSDR proposes to release state level data as four-year rolling averages for ALS incidence, prevalence, and mortality. Case counts for the four-year moving average will only be released for states with more than 16 ALS cases and is consistent with United States Cancer Statistics practices where cases or deaths are small and tend to have poor reliability.

In addition to identifying cases through Registry enrollment, ATSDR

currently identifies additional cases from three large national administrative databases (Medicare, Veterans Health Administration, and Veterans Benefits Administration). As a third revision, ATSDR aims to achieve more complete ALS case ascertainment by adding new data sources (totaling less than nine), including state ALS registries and non-profit ALS organizations.

There are no costs to the respondents other than their time. There is a change to the total time burden requested for persons with ALS due to reformatting and restructuring the one-time survey questions. This reformatting has reduced the time burden per year to 1,757 hours, which is a decrease of 188 from the previously approved 1,945 hours. The annual number of responses requested is 11,549, which is an increase of 3,000 over the previously approved 8,549 responses. This increase is due to the more accurate presentation of each online survey module in a separate row in the burden table. Previously, the 17 online survey modules were aggregated in a single row in the burden table. Participation in this information collection is completely voluntary for persons with ALS and for researchers. ALS service organizations report their outreach information under contract with ATSDR.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Persons with ALS	ALS Case Validation Questions	1,670	1	2/60
	ALS Case Registration Form	1,500	1	10/60
	Essential Questionnaire	750	1	6/60
	Disease Progression Survey	750	3	5/60
	Follow-up Questions—Demography	750	1	2/60
	Follow-up Questions—Lifestyle Information	750	1	32/60
	Follow-up Questions—Environmental Factors	750	1	23/60
	Follow-up Questions—ALS-associated and Clinical Factors.	750	1	7/60
	ALS Biorepository Specimen Processing Form and In-Home Collection.	325	1	30/60
	ALS Biorepository Saliva Collection	350	1	10/60
Researchers	ALS Registry Research Application Form	36	1	30/60
	Annual Update	24	1	15/60
ALS Service Organizations	Chapter/District Outreach Reporting Form	135	12	5/60
	National Office Outreach Reporting Form	2	12	20/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023-00806 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-70-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day—23–23CA; Docket No. CDC–2023–0002]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Vector Surveillance and Control Assessment: Post-Zika Response and Tick Capacities. This study is designed to determine the vector control capabilities of local jurisdictions within the District of Columbia, territories, and 50 states that responded to Zika virus (ZIKV) outbreaks.

DATES: CDC must receive written comments on or before March 20, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0002 by either of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to www.regulations.gov.

Please note: Submit all comments through the Federal eRulemaking portal

(www.regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Vector Surveillance and Control Assessment: Post-Zika Response and Tick Capacities—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Vector borne diseases (VBD) like West Nile Virus (WNV) and Zika virus infection (ZIKV), as well as Lyme disease, have become a public health concern in the United States. CDC expects that the number of vector-borne disease cases in the United States will likely increase and that the pathogens have the potential to spread locally, particularly if vector control measures are not taken. Currently, there is limited information available regarding the abilities of local vector control organizations to prepare for and respond to VBDs. To provide these organizations with the most useful and beneficial information and resources, the National Association of County and City Health Officials (NACCHO) and CDC must first determine what gaps and limitations still exist specific to these vector control capabilities.

CDC and NACCHO have developed a Mosquito Control Program Questionnaire with additional tick inquiries to collect information about the capabilities of local vector control organizations. The information collected during this study will provide jurisdictions with their current status (ranging from ‘needs improvement’ to ‘fully capable’) related to various vector control activities. This will enable respondents to focus future efforts and initiatives on observed areas for improvement. This study will utilize an electronic assessment that will be distributed to 1,664 local vector control departments and districts. Information collected in this study will be self-reported. The data will be analyzed using descriptive statistics and subgroup analyses.

CDC requests OMB approval for an estimated 250 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Environmental Science and Protection Technicians, including Health.	Vector Control Program Questionnaire.	1664	1	9/60	250

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Total	250

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–00809 Filed 1–17–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 1009(d) of 5 U.S.C. 10, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 117–286. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—RFA–TS–23–001: Identify and Evaluate Potential Risk Factors for Amyotrophic Lateral Sclerosis (ALS).

Date: March 21, 2023.

Time: 8:30 a.m.–5:30 p.m., EDT.

Place: Videoconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Carlisha Gentles, PharmD, BCPS, CDCES, Scientific Review Officer, National Center for Injury Prevention and Control, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341; Telephone: (770) 488–1504; Email: CGentles@cdc.gov.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been

delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–00783 Filed 1–17–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–23–23BX; Docket No. CDC–2022–0144]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies to take this opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a new proposed information collection project titled Pre-Shift Lighting Interventions to Improve Miner Safety and Well-Being. The purpose of this information collection is to examine the effect of human centric lighting (HCL) interventions on circadian disruption (CD) and well-being in underground mineworkers.

DATES: Written comments must be received on or before March 20, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2022–0144 by any of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.

- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to www.regulations.gov.

Please note: Submit all comments through the Federal eRulemaking portal (www.regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7118; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected;

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Pre-shift Lighting Interventions to Improve Miner Safety and Well-being—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Institute for Occupational Safety and Health (NIOSH) seeks a two-year approval from the Office of Management and Budget (OMB) to collect information needed to develop strategies and guidance to improve the safety, health, and well-being of underground shift workers in the U.S. mining industry. Light has both visual and non-visual impacts on the human body, enabling us to visually perceive the world and non-visually experience circadian entrainment and acute effects that include alertness, concentration, and performance on cognitive tasks. Hence, light drives our fundamental physiological functioning.

It is not surprising that underground miners have significant reductions in exposure to daylight—especially those miners working shifts. This lack of exposure to daylight can lead to fatigue and circadian disruption (CD) that can result in sleep loss and reduced alertness. These factors can increase risk of accidents and lead to health problems that include obesity, diabetes, and cancer.

This study will evaluate the impacts of blue and red-light treatment at the beginning of the work shift on reaction time task performance, sleepiness and alertness, subjective well-being, sleep efficiency and circadian rhythms in underground mine workers.

A 2 x 2 randomized crossover, mixed design will be used to test the efficacy and acceptability a human centric

lighting (HCL) intervention using light-emitting eyewear delivered to shift workers at multiple mines within a two-year study period. A cross-over design has a significant advantage because the subjects serve as their own control, which serves to minimize variations caused by circadian phase differences, sleep patterns, etc. of the individual participants. The other advantages include greater sample size efficiency with randomization of treatment order and all subjects receive all the treatments. Participants will be underground miners who regularly work the 1st, 2nd or 3rd shifts.

NIOSH researchers will obtain informed consent from volunteer mineworkers to conduct an intervention study and administer both electronic and paper and pencil surveys. Before beginning the study, the respondents will provide their informed consent to participate, be given an overview of the demographic information that will be collected and will be instructed how to properly wear the lighted eyewear, how to use the actigraphy device, and how to use a wearable temperature sensor device. During the course of the study, participants will be asked to complete eight short surveys: (1) demographic information; (2) the Checklist of Individual Strengths; (3) the Karolinska Sleepiness Scale (KSS); (4) PROMIS Sleep Related Impairment Questionnaire (PSRIQ); (5) PROMIS Sleep Disturbance Questionnaire (PSDQ); (6) Shiftwork Disorder Screening Questionnaire; (7F) the Lighted Eyeglasses Intervention Acceptability survey; and (8) Morning-Eveningness Questionnaire. They will also be asked to take the NASA Psychomotor Vigilance Test (PVT), log caffeine intake and sleep, wear an actigraphy wristband, and on certain occasions wear a temperature sensing device.

Intervention lighting doses will be administered via commercially available lightweight, light-emitting glasses during the nonworking periods or pre-shift. Each participant will experience two lighting interventions: Treatment A is dim red light (10 lx, 3000 K, the placebo control), and Treatment B is blue-enriched, polychromatic lighting (the treatment intervention). For each study group, half of the subjects will first experience the blue-light exposure,

and half will first experience the red-light exposure during a three-week experimental phase. After a two-week washout period designed to minimize carryover or residual learning effects from the prior treatments, subjects will experience the lighting treatment condition they did not yet experience for another three-week period. While wearing lighted eyewear the participants will evaluate comfort, glare and acceptability of the eyewear, while the KSS, the PSRIQ, PSDQ, and the NASA PVT will be re-administered at various intervals throughout the course of the study. The total number of responses for each data collection instrument are indicated in the estimated annualized burden hours table below.

Survey data will be collected during pre-shift periods and at home on working days and at home on non-working days. Time for data collection at the beginning of the shift will be no more than 25 minutes. NIOSH researchers will collect data at participating sites in above ground facilities on working days. Participants will also complete brief caffeine and sleep logs and wear an actigraphy wristband that records activity and sleep patterns and light/dark exposure while at home. At various intervals of the study, participants will wear a temperature sensor device to derive core body temperature. It is estimated that at-home data collection time will be no more than eight minutes per instance per participant.

This data collection will occur within a two-year period beginning after OMB approval and is designed to gather information not previously available. Potential impacts of this project include improvement of the health, safety, and well-being of underground mineworkers by reducing fatigue and CD through new recommendations and HCL-interventions. This project will also answer several research questions that will help establish the efficacy of the new HCL interventions so that they could be commercialized by mine lighting companies and used by underground mining companies.

CDC requests OMB approval for an estimated 1,007 annualized burden hours. There are no costs to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Underground Mineworkers	Informed consent	90	1	30/60	45
Underground Mineworkers	Participant Training	90	1	30/60	45
Underground Mineworkers	Demographics	90	1	1/60	2
Underground Mineworkers	Checklist of Individual Strengths	90	1	2/60	3
Underground Mineworkers	Karolinska Sleepiness Scale	90	36	1/60	54
Underground Mineworkers	Lighted Eyewear	90	2	2/60	6
Underground Mineworkers	Lighted Eyeglasses Intervention Acceptability Survey.	90	2	1/60	3
Underground Mineworkers	PROMIS Sleep Related Impairment Questionnaire.	90	4	10/60	60
Underground Mineworkers	PROMIS Sleep Disturbance Questionnaire.	90	4	5/60	30
Underground Mineworkers	Psychomotor Vigilance Test	90	36	6/60	324
Underground Mineworkers	Shiftwork Disorder Screening	90	1	8/60	12
Underground Mineworkers	Actigraphy Don and Remove	90	49	3/60	221
Underground Mineworkers	Caffeine log	90	49	1/60	74
Underground Mineworkers	Temperature Sensor Device (on and remove).	90	12	3/60	54
Underground Mineworkers	Sleep Log	90	49	1/60	74
Total .....	.....	.....	.....	.....	1,007

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Scientific Integrity, Office of Science,
Centers for Disease Control and Prevention.

[FR Doc. 2023-00808 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2023-0005; NIOSH 248-J]

World Trade Center Health Program Scientific/Technical Advisory Committee (WTCHP-STAC)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with provisions of Title 5 U.S.C. 10, the Centers for Disease Control and Prevention (CDC) announces the following meeting for the World Trade Center Health Program Scientific/Technical Advisory Committee (WTCHP-STAC). This virtual meeting is open to the public. Time will be available for public comment.

DATES: The meeting will be held on February 9, 2023, from 11:00 a.m. to 4:30 p.m., EST. Written public comments must be received by February 9, 2023. Written comments received

prior to the meeting will be part of the official record of the meeting. Members of the public who wish to address the WTCHP-STAC during the oral public comment session must sign up to speak by February 3, 2023, at the email address provided in the Procedure for Oral Public Comment section below.

ADDRESSES: This is a virtual meeting conducted via Zoom. The public is welcome to follow the proceedings via live webcast at the following link: <https://www.ustream.tv/channel/QyXBRzYjVCS>. No registration is required. For additional information, please visit the World Trade Center Health Program website at https://www.cdc.gov/wtc/stac_meeting.html.

You may submit comments, identified by Docket No. CDC-2023-0005; NIOSH 248-J by either of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.

- **Mail:** Ms. Sherri Diana, NIOSH Docket Office, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1090 Tusculum Avenue, Mailstop C-34, Cincinnati, Ohio 45226. Attn: Docket No. CDC-2023-0005; NIOSH 248-J.

Instructions: All submissions received must include the Agency name and Docket Number (CDC-2023-0005; NIOSH 248-J). The docket will close on February 9, 2023. All relevant comments, including any personal information provided, will be posted without change to <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Tania Carreón-Valencia, Ph.D., M.S., Designated Federal Officer, World Trade Center Health Program Scientific/Technical Advisory Committee, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop R-12, Atlanta, Georgia 30329-4027; Telephone: (513) 841-4515; Email: wtc-stac@cdc.gov.

SUPPLEMENTARY INFORMATION:

Background: The World Trade Center (WTC) Health Program, including the World Trade Center Health Program Scientific/Technical Advisory Committee (WTCHP-STAC), was established by Title I of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347 (January 2, 2011), as amended by Public Law 114-113 (December 18, 2015) and Public Law 116-59 (September 27, 2019), adding Title XXXIII to the Public Health Service (PHS) Act (codified at 42 U.S.C. 300mm to 300mm-61). All references to the Administrator in this document mean the Director of the National Institute for Occupational Safety and Health (NIOSH), within the Centers for Disease Control and Prevention (CDC), or his or her designee.

Purpose: The purpose of the WTCHP-STAC is to review scientific and medical evidence and to make recommendations to the Administrator of the WTC Health Program regarding additional WTC Health Program eligibility criteria, potential additions to the List of WTC-Related Health

Conditions (List), and research regarding certain health conditions related to the September 11, 2001, terrorist attacks.

Title XXXIII of the PHS Act established the WTC Health Program within the Department of Health and Human Services. The WTC Health Program provides medical monitoring and treatment benefits to eligible firefighters and related personnel, law enforcement officers, and rescue, recovery, and cleanup workers who responded to the September 11, 2001, terrorist attacks in New York City, at the Pentagon, and in Shanksville, Pennsylvania (responders), and to eligible persons who were present in the dust or dust cloud on September 11, 2001, or who worked, resided, or attended school, childcare, or adult daycare in the New York City disaster area (survivors).

The Administrator is responsible for the administration of the WTCHP–STAC. CDC and NIOSH provide funding, staffing, and administrative support services for the WTCHP–STAC. The WTCHP–STAC’s charter was reissued on May 12, 2021, and will expire on May 12, 2023. In accordance with 42 U.S.C. 300mm–22(a)(6)(G)(i)(II), the Administrator must ask the WTCHP–STAC to review and evaluate any substantive amendment to any existing WTC Health Program policy or procedure.

Matters To Be Considered: The agenda will include presentations on the state of the WTC Health Program, the Program’s research activities, and uterine cancer coverage. There will be a presentation and discussion about substantive amendments to the existing *Policy and Procedures for Adding Non-Cancer Health Conditions to the List of WTC-Related Health Conditions*. The amendments are intended to clarify the evaluation criteria used to assess the likelihood of a causal association between 9/11-related exposures and a health condition in the 9/11-exposed population. The revision also clarifies the nature of the rationale that provides the basis for the WTCHP–STAC recommendations.

The amended draft *Policy and Procedures for Adding Non-Cancer Health Conditions to the List of WTC-Related Health Conditions* as well as the agenda for this meeting are available on the WTC Health Program website at https://www.cdc.gov/wtc/stac_meeting.html. Agenda items are subject to change as priorities dictate.

Public Participation

Interested parties may participate by submitting written views, opinions,

recommendations, and data. You may submit comments on any topic related to the matters to be discussed by the Committee. 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. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comments by email.

Oral Public Comment: The public is welcome to participate, via Zoom, during the public comment period on February 9, 2023, from 1:30 p.m. to 2:00 p.m. Each commenter will be provided up to five minutes for comment. A limited number of time slots are available and will be assigned on a first-come-first-served basis.

Procedure for Oral Public Comment: Members of the public who wish to address the WTCHP–STAC during the oral public comment session at the February 9, 2023, WTCHP–STAC meeting must sign up to speak by providing their name to Ms. Mia Wallace, Committee Management Specialist, via email at MWallace@cdc.gov, by February 3, 2023. Zoom instructions and participation details will follow.

Written Public Comment: Written comments will also be accepted per the instructions provided in the Addresses section above. Written public comments received prior to the meeting will be part of the official record of the meeting. The docket will close on February 9, 2023.

Policy on Redaction of Committee Meeting Transcripts (Public Comment): Transcripts will be prepared and posted to <https://www.regulations.gov> within 60 days after the meeting. If individuals making a comment give their name, no attempt will be made to redact the name. NIOSH will take reasonable steps to ensure that individuals making public comments are aware that their comments (including their names, if provided) will appear in a transcript of the meeting posted on a public website.

Such reasonable steps include a statement read at the start of the meeting stating that transcripts will be posted, and names of speakers will not be redacted. If individuals in making a statement reveal personal information (e.g., medical information) about themselves, that information will not usually be redacted. The CDC Freedom of Information Act coordinator will, however, review such revelations in accordance with the Freedom of Information Act and, if deemed appropriate, will redact such information. Disclosures of information concerning third party medical information will be redacted.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–00784 Filed 1–17–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2021–0053]

The Systematic Review Report for Diagnosis and Treatment of Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS); Notice of Availability

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the availability of the final systematic review report titled “Diagnosis and Treatment of Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS).” The report is accompanied by a summary of public comments.

DATES: The final document is available January 18, 2023.

ADDRESSES: The document may be found in the docket at www.regulations.gov, Docket No. CDC-2021-0053 in the Supporting Materials tab and at <https://www.cdc.gov/me-cfs/programs/evidence-review.html>.

FOR FURTHER INFORMATION CONTACT: Anindita Issa, MD, National Center for Emerging and Zoonotic Infectious Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24-12, Atlanta, Georgia 30329; Telephone: 404-718-3959; Email: cfs@cdc.gov.

SUPPLEMENTARY INFORMATION: In 2022, the systematic review titled “Diagnosis and Treatment of Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS)” conducted by the Pacific Northwest Evidence-Based Practice Center at Oregon Health and Science University, concluded that there is limited evidence on effective treatments for ME/CFS. The review updates a 2014 Agency for Healthcare Research and Quality (AHRQ)-funded review and its 2016 addendum. It also expands upon the prior AHRQ review by including children as well as adults, evaluating harms as well as benefits of diagnosis, and evaluating effects of treatment on depression, anxiety, sleep quality, pain, and other symptoms associated with ME/CFS in addition to fatigue, function, and quality of life. The report evaluates the quality of the scientific literature and does not make recommendations or guidelines. While improving clinical care remains a critical issue, the lack of sufficient evidence from the review resulted in the decision for CDC not to proceed with developing clinical management guidelines.

On May 17, 2021, CDC published a notice in the **Federal Register** (87 FR 26733) requesting public comment on the draft report of the systematic review for ME/CFS. One hundred and thirty-five commenters provided feedback including those from academia, professional organizations, advocacy groups, and the public. Some of the comments received were from organizations that represented patient advocacy groups. CDC highly values insights gained from these public comments and especially thanks patients living with ME/CFS, who shared their personal experiences in this public forum.

Comments were centered around several themes. All comments were carefully reviewed and considered by CDC. Themes from the comments included (1) concerns with cognitive behavioral therapy and graded exercise therapy; (2) personal testimonials; (3)

inclusion of studies with high risk of bias; (4) exclusion of certain studies on harms evidence; (5) concerns with case definitions and impact on the systematic review; (6) interpretation of results; (7) CDC programmatic concerns and recommendations; and (8) recommended references.

Comments: Concerns with cognitive behavioral therapy (CBT) and graded exercise therapy (GET): Commenters expressed concern with inclusion of the CBT and GET in the systematic review, including personal testimony of harms experienced after attempting treatment with CBT or GET, and critiques of the proposed mechanism (or lack of) of CBT or GET.

Response: CDC acknowledges the concerns that commenters have about the inclusion of CBT and GET in this systematic review. The authors of this systematic review report were aware of the criticisms of CBT and GET as treatments for ME/CFS. The studies for CBT and GET were included in the report because they met the inclusion and exclusion criteria of this systematic review protocol, and the limitations of the evidence on these therapies were described in the report as well. The purpose of this systematic review was to provide a summary of available published literature, including limitations. This systematic review does not make treatment recommendations, and therefore, does not recommend GET or CBT.

Comments: Personal testimonials: These testimonials spoke to the sincere frustration and desperation experienced by many patients with ME/CFS, including difficulty finding providers familiar with ME/CFS, struggles during and after attempted treatment with GET or CBT, and the impact of ME/CFS on their daily lives.

Response: CDC appreciates the patients living with ME/CFS to share their stories and acknowledges the struggles that they face on a daily basis. CDC highly values insights gained from these public comments. Some patients felt that this systematic review was recommending treatment with GET or CBT. However, the purpose of this systematic review was to provide a summary of available published literature, including limitations. This systematic review does not make treatment recommendations, and therefore, does not recommend GET or CBT.

Comments: Inclusion of studies with high risk of bias: Commenters expressing concern that unblinded trials and studies reporting participant-reported outcomes should have been rated high risk of bias or should be

downgraded unless there were other methodological limitations.

Response: CDC recognizes commenters’ concerns about such studies. For interventions where blinding is not possible, we followed the standard approach used in many other systematic evidence reviews and downgraded for open-label design, but did not necessarily downgrade to high risk of bias unless there were other methodological limitations.

Comments: Exclusion of certain studies on harms evidence: Commenters suggest that the review missed potentially relevant evidence on harms by excluding observational studies and patient surveys.

Response: CDC understands commenters’ concern about exclusion of these studies. We will take them into consideration for future systematic reviews. This review focused on randomized controlled trials (RCT) for evaluation of benefits and harms of treatments because observational studies and non-RCTs are susceptible to bias and confounding, particularly for more subjective outcomes like those evaluated in this report.

Comments: Concerns with case definitions and impact on the systematic review: Some commenters suggested the removal of studies that used older case definitions for the inclusion of this review.

Response: CDC respects the reasons for commenters’ concerns with the case definitions used in the report, as many case definitions have emerged over the past several decades. To address the issue of the multitude of case definitions, regrouped analyses were performed for various case definitions.

Comments: Interpretation of results: Commenters questioned the use and interpretation of meta-analysis in the systematic review, due to high heterogeneity, low strength of evidence, and high risk of bias studies.

Response: CDC appreciates commenters’ concerns with meta-analysis methodology. In the revision we incorporated some of these comments and added more details to address these concerns. Essentially, the meta-analysis results were restructured for visualization and to facilitate the interpretation of results, thus overcoming this challenge and allowing for useful information to be reviewed.

Comments: CDC programmatic concerns and recommendations: Commenters included requests or recommendations to the CDC ME/CFS program regarding future research and/or guidelines.

Response: CDC appreciates the comments for improving the CDC ME/

CFS program and will address them with leadership during program planning activities.

Comments: Recommended references: Commenters suggested additional information available on websites and in scientific publications.

Response: CDC recognizes the importance of reviewing these suggested references. Each suggested reference was assessed for this current review with pre-established inclusion/exclusion criteria. For future systematic reviews CDC may consider different criteria, which may allow for taking the suggested references into further consideration.

Based on public comments, CDC revised the final report to include (1) information about the decision not to proceed with developing clinical management guidelines; (2) regrouping of plots for the meta-analysis by case definition to facilitate the interpretation of results by various case definitions; (3) regrouping limitations into two major categories (study and clinical trial limitations and limitation in methods used to conduct the review); and (4) adding a description about the importance of collecting common data elements via standardized instruments or other assessment tools. The final report and a thematic summary of responses to public comments can be found in the Supporting Materials tab of the docket and at <https://www.cdc.gov/me-cfs/programs/evidence-review.html>. Although ultimately, at this time, CDC did not find sufficient evidence from the review to proceed with the development of clinical management guidelines for ME/CFS, the review was instrumental in spotlighting the research gaps in the currently available literature, and consequently, possible improvements for future clinical trial design and ways to leverage funding resources for clinical trials.

Dated: January 11, 2023.

Tiffany Brown,

Acting Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2023-00813 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-23-221J]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for

Disease Control and Prevention (CDC) has submitted the information collection request titled "Evaluation of safe spaces in CDC-directly funded community-based organizations (CBOs)" to the Office of Management and Budget (OMB) for review and approval. CDC previously published a "Proposed Data Collection Submitted for Public Comment and Recommendations" notice on August 30, 2022, to obtain comments from the public and affected agencies. CDC received one non-substantive comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570.

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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

Evaluation of Safe Spaces in CDC-directly funded Community-based Organizations (CBOs)—New—National Centers for HIV, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC-funded HIV prevention program for young men of Color who have sex with men (YMSM) and young transgender persons (YTG) of Color employs an innovative strategy to address the social determinants of health (e.g., housing, employment) that contribute to health inequities and impact HIV outcomes: safe spaces. Safe spaces are culturally, linguistically, and age-appropriate physical spaces for engaging people who are at increased risk for HIV and providing HIV prevention and care activities. Under this program, funded community-based organizations (CBOs) must address at least two social determinants of health within their safe spaces. CBOs will employ a community-driven approach and work with people who are at increased risk for HIV to select social determinants of health with the most potential to reduce barriers to accessing HIV prevention and care services and promote health equity.

The purpose of this data collection is to assess the implementation of safe spaces, participant perceptions about the role of space spaces in addressing social determinants of health and promoting HIV prevention and care, and the association between safe space implementation and HIV process and outcome indicators. The primary objectives of this data collection are to obtain data to: (a) describe the implementation of safe spaces; (b) to describe the impact on participants served; and (c) identify successful models for safe spaces to inform other CBOs and CDC.

By describing safe spaces and their impact on HIV-related outcomes, this data collection provides an important data source for evaluating a public health strategy aimed at reducing new infections, increasing HIV testing, and prioritizing populations at high risk for acquiring HIV.

CDC requests approval for a two-year information collection. Data are collected through surveys with participants of the safe spaces and phone-based interviews conducted with safe space staff. Persons attending the safe spaces are young men who have sex with men and young transgender persons of Color over the age of 18. A

brief eligibility screener will be used to determine eligibility for participation in the participant survey. All persons surveyed will also be offered a token of appreciation in the amount of \$25. No other federal agency systematically collects this type of information from persons attending safe spaces. These

data may inform prevention program development and monitoring at both the local and national levels.

CDC estimates that this data collection will involve, eligibility screening for 1,250 persons, and a participant survey for 1,000 eligible respondents at 10 CBOs, annually. At

each CBO, two staff members will be interviewed about their perceptions of safe spaces, totaling 20 staff interviews. CDC requests OMB approval for an estimated 384 annual burden hours. Participation of respondents is voluntary and there is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Persons Screened	Eligibility Screener	1,250	1	5/60
Eligible Participants	Participant survey	1,000	1	15/60
Community-based organization staff	Staff interview	20	1	90/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023-00804 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-23-1380; Docket No. CDC-2023-0006]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Requirements for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery from COVID-19 for all Airline or Other Aircraft Passengers Traveling to the United States from the People’s Republic of China (PRC). This data collection is created to protect the U.S. population from potential importation, transmission, and spread of new COVID-19 variants into the United States from the PRC.

DATES: CDC must receive written comments on or before March 20, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC-2023-0006 by any of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21-8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to www.regulations.gov.

Please note: Submit all comments through the Federal eRulemaking portal (www.regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21-8, Atlanta, Georgia 30329; Telephone: 404-639-7570; Email: omb@cdc.gov.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information

collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Requirements for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery from COVID-19 for all Airline or Other Aircraft Passengers Traveling to the United States from the People’s Republic of China (OMB Control No. 0920-1380, Exp. 6/30/2023)—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

COVID-19 is surging in the People’s Republic of China (PRC) because of

recent decisions to remove mitigation measures. The population in the PRC has not had extensive exposure to the virus that causes COVID-19 and, therefore, has not developed immune protection through prior infection. The recent surge in COVID-19 transmission, particularly in a large population such as the PRC, increases the potential for new variants to emerge that could be introduced to the United States.

Considering the potential danger to public health posed by emerging new variants in the PRC, CDC has determined that proactive, preventative measures must be implemented now to protect the U.S. population from potential importation, transmission, and spread of new COVID-19 variants into the United States.

Pursuant to 42 CFR 71.20 and 71.31(b) and as set forth in greater detail below, this Notice and associated CDC Order will prohibit the boarding of any passenger two years of age or older on an itinerary that includes the United States, on:

- any aircraft departing from the PRC, or
- any aircraft departing from a Designated Airport if the passenger within the ten (10) days prior to their departure for the United States has been in the PRC, unless the passenger presents paper or digital documentation of one of the following requirements or meets a limited exception:

1. A negative pre-departure viral test result for SARS-CoV-2 conducted on a specimen collected no more than two (2) calendar days before the flight's departure from the PRC (Qualifying Test)

OR

2. Documentation of having recovered from COVID-19 in the past 90 days in the form of one of the following (*i.e.*, Documentation of Recovery):

- a. A positive viral test result for SARS-CoV-2 conducted on a specimen collected more than 10 calendar days but fewer than 91 calendar days before the flight's departure; OR

b. A positive viral test result for SARS-CoV-2 conducted on a specimen collected 10 or fewer calendar days before the flight's departure AND a signed letter from a licensed healthcare provider or public health official stating that the passenger's COVID-19 symptoms began more than 10 calendar days before the flight's departure.

CDC may grant a humanitarian exception in very limited circumstances only when an individual must travel to the United States to preserve health (*e.g.*, emergency medical evacuations, life-saving medical treatment) or safety (*e.g.*, violence) and pre-departure testing cannot be accessed or completed before travel because of exigent circumstances. Air passengers will also be required to provide an attestation, attesting that the information they present is true.

CDC requests OMB approval for an estimated 5,208,373 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Air Passenger	<i>Attestation—Proof of Negative COVID-19 Test Result or Documentation of Recovery for Air Passengers from the People's Republic of China.</i>	2,500,000	1	2	5,000,000
Airline Desk Agent	<i>Attestation—Proof of Negative COVID-19 Test Result or Documentation of Recovery for Air Passengers from the People's Republic of China.</i>	2,500,000	1	8/60	208,333
Air Passenger	Request Humanitarian Exception—(No form).	20	1	2	40
Total .....	.....	.....	.....	.....	5,208,373

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023-00810 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-23-1282]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for

Disease Control and Prevention (CDC) has submitted the information collection request titled "The Performance Measures Project: Improving Performance Measurement and Monitoring by CDC Programs" to the Office of Management and Budget (OMB) for review and approval. CDC previously published a "Proposed Data Collection Submitted for Public Comment and Recommendations" notice on July 25, 2022 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project.

The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

The Performance Measures Project: Improving Performance Measurement and Monitoring by CDC Programs (OMB Control No. 0920-1282, Exp. 1/31/2023)—Revision—Office of the Director for Policy and Strategy (OADPS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Each year, approximately 75% of the CDC’s congressionally appropriated funding goes to extramural organizations, including state and local partners, via contracts, grants, and, most commonly, cooperative agreements. The availability of funding for grants and cooperative agreements is announced through a Notice of Funding Opportunity (NOFO). CDC awards up to 100 new, non-research NOFOs each year (each funded for one to five years). These awards may have only a few funded recipients or more than 50, such as when a CDC program provides funding to all states and territories. Monitoring and reporting of program performance is required of any non-federal entity receiving federal funds under 45 CFR 75.342; “The non-federal entity must monitor its activities under federal awards to assure compliance with applicable federal requirements and performance expectations are being achieved”.

CDC’s Program Performance and Evaluation Office (PPEO) provides technical assistance to CDC programs and funding recipients with the immediate goal of monitoring progress and the long-term goals of improving performance and maximizing public health impact. Greater public health impact can be achieved by the development of performance measures and monitoring plans that are customized to the goals outlined in each NOFO. PPEO therefore provides consultations for the development of NOFO-specific performance measures and the development of each NOFO’s logic model (*i.e.*, a graphic depiction of the relationship between the funded activities and the intended effects or outcomes of those activities in the short, medium, and/or long term).

PPEO has also developed templates that can be further customized by CDC/ATSDR programs participating in the Performance Measures Project (PMP). These templates include a sample “Performance Measure Technical Specification Instrument” and a sample “Performance Measure Reporting Instrument.” After the templates are finalized by PPEO and the CDC/ATSDR program, the templates are completed by the recipients of CDC/ATSDR funding.

CDC requests OMB approval to continue information collection for the PMP, with changes. Individual collection requests submitted under this Generic approval will continue to include the tailored forms and a supplementary template that provides a description of program purpose and the estimated burden of information collection. CDC proposes minor changes to the template that clarify: (i) the calendar year(s) in which each program will collect information; (ii) the frequency of information collection (annual, semi-annual, quarterly, or other); and (iii) total burden requested for up to three years of approval. These clarifications are needed because the majority of awards are for multi-year projects, and the frequency of reporting may vary according to program-specific factors.

In addition, a number of changes to the PMP Generic Clearance reflect expanded technical assistance that PPEO provides to CDC programs. The CDC program eligibility to participate in PMP will be expanded as follows:

(1) Given the recent increase in grants and other funding mechanisms used at CDC to enhance programmatic flexibility, PMP eligibility will expand

to include all available funding mechanisms for eligible programs (*i.e.*, activities funded through grants, cooperative agreements, or contracts).

(2) PPEO is providing increasing technical assistance to international programs. Eligibility will expand to include both domestic and international programs.

(3) Many CDC programs are operating under the HHS COVID-19 Emergency PRA waiver. This Emergency Waiver is expected to be discontinued. PMP will prioritize transitioning CDC program performance measure data collection from the Emergency Waiver to PMP.

(4) Some CDC programs are developing common performance metrics across multiple public health initiatives. PMP will prioritize cross-NOFO collaboration with these programs to increase efficiency.

(5) As CDC/ATSDR programs transition back to normal function after the COVID-19 pandemic, there has been increased interest in PMP. The revision will increase the estimated number of new programs that may participate from 25 programs to 40 programs.

(6) CDC proposes changes to the GenIC Request Template that clarify the calendar years in which each program’s customized templates will be administered, and total burden hours for the entire period of information collection. The template will adopt the standard burden table format utilized throughout CDC/ATSDR which provides greater clarity with respect to the frequency of information collection (annual, semi-annual, quarterly, or other). These changes will improve recordkeeping for the 0920-1282 generic and improve CDC/PPEO’s ability to monitor capacity and usage of the generic, while also providing increased flexibility for CDC/ATSDR programs to describe their data collection plans.

Finally, in addition to requesting increased PMP capacity (respondents and burden hours) to cover expanded eligibility and anticipated increases in PMP utilization, CDC is also requesting additional capacity to ensure seamless continuation of GenIC data collections that were previously approved but have not been completed.

The requested total estimated annualized burden will increase from 35,000 hours to 97,049 hours. OMB approval is requested for three years. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of responses	Number of responses per respondent	Average burden per response (in hours)
CDC Award Recipients (new GENICs)	Performance Measures Project Information Collection Tool.	1,750	1	40
CDC Award Recipients (continuation of previously approved GENICs).	Performance Measures Project Information Collection Tool.	2,192	1	740/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023-00807 Filed 1-17-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-1572]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS’ intention to collect information from the public. 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 or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency’s functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by February 17, 2023.

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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term “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 publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Home Health Agency Survey and Deficiencies Report; *Use:* This is a request to revise form CMS-1572 by adding fillable text or check blocks to each data field, thus

converting it to a fillable .pdf format. A previous version of the CMS-1572 form had been in a fillable format. However, when it was revised in the past, it was placed into a non-fillable format. We also added a new selection to item #7. The CMS-1572 form is used by State Survey Agencies (SAs) when surveying Home Health Agencies (HHAs) and to collect information about an HHA. These regulations were created by CMS under the authority of sections 1861(o) and 1891 of the Social Security Act (“the Act”).

In the Medicare and Medicaid programs, CMS is responsible for developing Conditions of Participation (CoPs) that facilities must meet to become eligible to receive Medicare payments. State survey agencies (SAs) conduct on-site surveys of Home Health Agencies (HHAs) to ensure that HHA facilities are in compliance with these requirements.

Surveys of HHA providers are intended to ensure and strengthen patient health and safety, to enhance quality of care by emphasizing outcomes rather than process, to implement the Omnibus Reconciliation Act of 1987 (OBRA 87), and to achieve more effective compliance with Federal requirements. The CMS-1572 HHA survey form reflects this fundamental change and directs surveyors to observe and monitor the provision of care in the home setting. HHA surveyors use the CMS-1572 form to assist and direct them in evaluating important information relating to the quality of services provided HHAs in the home setting. Moreover, the CMS-1572 form represents a deficiency-based approach to evaluating and reporting compliance. *Form Number:* CMS-1572 (OMB control number: 0938-0355); *Frequency:* Yearly; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 3,833; *Total Annual Responses:* 3,833; *Total Annual Hours:* 1,917. (For policy questions regarding this collection contact Caroline Gallaher at 410-786-8705.)

Dated: January 12, 2023.
William N. Parham, III,
 Director, Paperwork Reduction Staff, Office
 of Strategic Operations and Regulatory
 Affairs.
 [FR Doc. 2023-00879 Filed 1-17-23; 8:45 am]
BILLING CODE 4120-01-P

**DEPARTMENT OF HEALTH AND
 HUMAN SERVICES**

**Centers for Medicare & Medicaid
 Services**

[CMS-9896-N2]

**Virtual Meeting of the Ground
 Ambulance and Patient Billing
 Advisory Committee; Cancellation**

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

ACTION: Notice.

SUMMARY: The Centers for Medicare &
 Medicaid Services is cancelling the
 virtual public meeting of the Ground
 Ambulance and Patient Billing, which
 was scheduled for January 17 and 18,
 2023.

FOR FURTHER INFORMATION CONTACT:
 Shaheen Halim, CMS, by phone (410)
 786-0641 or via email at
 gapbadvisorycommittee@cms.hhs.gov.
 Press inquiries may be submitted by
 phone (202) 690-6145 or via email at
 press@cms.hhs.gov.

SUPPLEMENTARY INFORMATION: This
 notice announces the cancellation of the
 January 17 and 18, 2023 virtual public
 meeting of the Ground Ambulance and
 Patient Billing (GAPB) that was
 announced in the December 16, 2022
Federal Register (87 FR 77122 through
 77123). The January 17 and 18, 2023
 public meeting would have been the
 initial plenary meeting of the GAPB
 Advisory Committee. CMS will publish
 a notice in the **Federal Register**
 announcing the future, rescheduled
 dates on which the initial meeting of the
 GAPB Advisory Committee will take
 place no less than 15 calendar days

before the meeting date. The meeting
 will be open to the public in accordance
 with the Federal Advisory Committee
 Act.

The GAPB Advisory Committee will
 make recommendations with respect to
 disclosure of charges and fees for
 ground ambulance services and
 insurance coverage, consumer
 protection and enforcement authorities
 of the Departments of Labor, Health and
 Human Services, and the Treasury (the
 Departments) and relevant States, and
 the prevention of balance billing to
 consumers. The recommendations shall
 address options, best practices, and
 identified standards to prevent
 instances of balance billing; steps that
 can be taken by State legislatures, State
 insurance regulators, State attorneys
 general, and other State officials as
 appropriate, consistent with current
 legal authorities regarding consumer
 protection; and legislative options for
 Congress to prevent balance billing.

The Administrator of CMS, Chiquita
 Brooks-LaSure, having reviewed and
 approved this document, authorizes
 Lynette Wilson, who is the Federal
 Register Liaison, to electronically sign
 this document for purposes of
 publication in the **Federal Register**.

Dated: January 12, 2023.
Lynette Wilson,
 Federal Register Liaison, Centers for Medicare
 & Medicaid Services.
 [FR Doc. 2023-00903 Filed 1-13-23; 4:15 pm]
BILLING CODE 4120-01-P

**DEPARTMENT OF HEALTH AND
 HUMAN SERVICES**

**Administration for Children and
 Families**

**Proposed Information Collection
 Activity; State Plan Child Support
 Collection and Establishment of
 Paternity Title IV-D of the Social
 Security Act**

AGENCY: Office of Child Support
 Enforcement, Administration for

Children and Families, U.S. Department
 of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Office of Child Support
 Enforcement (OCSE), Administration for
 Children and Families (ACF), U.S.
 Department of Health and Human
 Services (HHS), is requesting a 3-year
 extension of the forms OCSE-21-U4:
 Transmittal and Notice of Approval of
 State Plan Material for: Title IV-D of the
 Social Security Act, and OCSE-100:
 State Plan (Office of Management and
 Budget (OMB) # 0970-0017, expiration
 July 31, 2023). No changes are proposed.

DATES: *Comments due within 60 days of
 publication.* In compliance with the
 requirements of the Paperwork
 Reduction Act of 1995, ACF is soliciting
 public comment on the specific aspects
 of the information collection described
 above.

ADDRESSES: You can obtain copies of the
 proposed collection of information and
 submit comments by emailing
 infocollection@acf.hhs.gov. Identify all
 requests by the title of the information
 collection.

SUPPLEMENTARY INFORMATION:

Description: OCSE has approved an
 IV-D state plan for each state. Federal
 regulations require states to amend their
 state plans only when necessary to
 reflect new or revised federal statutes or
 regulations or material change in any
 state laws, regulations, policies, or IV-
 D agency procedures. The requirement
 for submission of a state plan and plan
 amendments for the Child Support
 Enforcement program is found in
 sections 452, 454, and 466 of the Social
 Security Act.

Respondents: State IV-D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
State Plan (OCSE-100)	54	12	.5	324
State Plan Transmittal (OCSE-21-U4)	54	12	.25	162

*Estimated Total Annual Burden
 Hours:* 486.

Comments: The Department
 specifically requests comments on (a)
 whether the proposed collection of

information is necessary for the proper
 performance of the functions of the
 agency, including whether the

information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C 652, 654, and 666.

John M. Sweet, Jr.,
ACF/OPRE Certifying Officer.

[FR Doc. 2023-00764 Filed 1-17-23; 8:45 am]

BILLING CODE 4184-41-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-D-2827]

Optimizing the Dosage of Human Prescription Drugs and Biological Products for the Treatment of Oncologic Diseases; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled "Optimizing the Dosage of Human Prescription Drugs and Biological Products for the Treatment of Oncologic Diseases." This guidance is intended to assist sponsors in identifying the optimal dosage(s) for human prescription drugs or biological products for the treatment of oncologic diseases during clinical development prior to submitting an application for approval for a new indication and usage. This guidance does not address selection of the starting dosage for first-in-human trials nor does it address dosage optimization for radiopharmaceuticals, cellular and gene therapy products, microbiota, or cancer vaccines.

DATES: Submit either electronic or written comments on the draft guidance by March 20, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

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-2022-D-2827 for "Optimizing the Dosage of Human Prescription Drugs and Biological Products for the Treatment of Oncologic Diseases." Received comments 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Mirat Shah, Center for Drug Evaluation and Research (HFD-150), Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993-0002, 301-796-8547; or Stephen Ripley, Center of Biologics Evaluation

and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Optimizing the Dosage of Human Prescription Drugs and Biological Products for the Treatment of Oncologic Diseases.” Dose-finding trials (*i.e.*, trials that include dose-escalation and dose-expansion portions with the primary objective of selecting the recommended phase II dose) for oncology drugs have historically been designed to determine the maximum tolerated dose (MTD). This paradigm was developed for cytotoxic chemotherapy drugs based on their observed steep dose-response, their limited drug target specificity, and the willingness of patients and providers to accept substantial toxicity to treat a serious, life-threatening disease. Most modern oncology drugs, such as kinase inhibitors and monoclonal antibodies, are designed to interact with a molecular pathway unique to an oncologic disease(s) (*i.e.*, targeted therapies). These targeted therapies demonstrate different dose-response relationships compared to cytotoxic chemotherapy, such that doses below the MTD may have similar efficacy to the MTD but with fewer toxicities.

This draft guidance is intended to assist sponsors in identifying the optimal dosage(s) for human prescription drugs or biological products for the treatment of oncologic diseases during clinical development prior to submitting an application for approval for a new indication and usage and does not address selection of the starting dosage for first-in-human trials nor does it address dosage optimization for radiopharmaceuticals, cellular and gene therapy products, microbiota, or cancer vaccines. This guidance should be considered along with the International Conference on Harmonisation (ICH) E4 guidance entitled “Dose-Response Information to Support Drug Registration” when identifying the optimal dosage(s).

This draft guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on “Optimizing the Dosage of Human Prescription Drugs and Biological Products for the Treatment of Oncologic Diseases.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an

alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910-0130; the collections of information in 21 CFR part 314 have been approved under OMB control number 0910-0001; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910-0014; and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910-0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: January 12, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-00837 Filed 1-17-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-N-3299]

Understanding the Use of Negative Controls To Assess the Validity of Non-Interventional Studies of Treatment Using Real-World Evidence; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the following public

workshop entitled “Understanding the Use of Negative Controls to Assess the Validity of Non-Interventional Studies of Treatment Using Real-World Evidence.” Convened by the Duke-Margolis Center for Health Policy and supported by a cooperative agreement between FDA and Duke-Margolis, the purpose of this public workshop is to discuss existing negative control methodologies for studies based on real-world data and to outline advantages and disadvantages of the use of negative controls for evaluating the safety and effectiveness of regulated medical products. Additionally, the Center for Drug Evaluation and Research and the Center for Biologics Evaluation and Research will propose projects to develop negative control methods and implement new tools for use in the Sentinel System, Biologics Effectiveness and Safety (BEST) System, and with Federal Partners.

DATES: The public workshop will be virtually convened on March 8, 2023, from 10 a.m. to 3 p.m., Eastern Standard Time. Either electronic or written comments on this public workshop must be submitted by May 8, 2023. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held virtually using the Zoom Platform. The link for the public workshop can be accessed at the following web page: <https://duke.is/cy9w4>.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of May 8, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received 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-2022-N-3299 for “Understanding the Use of Negative Controls to Assess the Validity of Non-Interventional Studies of Treatment Using Real-World Evidence.” Received comments, those filed in a timely manner, 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. 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:

Jamila Mwidau, Food and Drug Administration, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Bldg. 22, Rm. 4481, Silver Spring, MD 20993, 301-796-4989, Jamila.Mwidau@fda.hhs.gov; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

In connection with the seventh iteration of the Prescription Drug User Fee Amendments (PDUFA VII), incorporated as part of the FDA User Fee Reauthorization Act of 2022, FDA has committed to enhancing and modernizing the FDA drug safety system, including improving the utility of existing tools and adopting new scientific approaches. This commitment includes optimizing the capabilities of the Sentinel Initiative to address questions of product safety and advance the understanding of how Real-World Evidence can be used for studying effectiveness.

Under PDUFA VII, FDA agreed to conduct a public workshop by September 30, 2023, on the use of negative controls for assessing the validity of non-interventional studies of treatment. This public workshop, scheduled for March 8, 2023, will satisfy the PDUFA VII commitment. One purpose of the public workshop is to discuss current negative control methods in studies based on real-world data and discuss future implications for their use to evaluate the safety of regulated medical products. Another

purpose of the public workshop is to present the proposed methods development projects that may support a tool for use in the Sentinel System and BEST.

II. Topics for Discussion at the Public Workshop

Some topics FDA plans to discuss at the public workshop include but may not be limited to the following:

1. What are the strengths and limitations of current negative control methods used in studies based on real-world data?
2. What are known and potential benefits and challenges in using negative controls in evaluating regulated product safety and effectiveness?
3. What additional information is needed about negative control methods to provide confidence regarding their use in regulatory decision-making?

III. Participating in the Public Workshop

Registration: To register for the public workshop, please visit the following website to register: <https://duke.is/cy9w4>. Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free and open until the public workshop is completed. Persons interested in attending this public workshop can register until 2:59 p.m. Eastern Standard Time on March 8, 2023.

If you need special accommodations due to a disability, please contact margolisevents@duke.edu no later than February 22, 2023.

Dated: January 12, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-00840 Filed 1-17-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-P-1982]

Determination That OFIRMEV (Acetaminophen) Injection, 1,000 Milligrams/100 Milliliters (10 Milligrams/Milliliter), Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we)

has determined that OFIRMEV (acetaminophen) injection, 1,000 milligrams (mg)/100 milliliters (mL) (10 mg/mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for acetaminophen injection, 1,000 mg/100 mL (10 mg/mL), if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT:

Kaetochi Okemgbo, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6224, Silver Spring, MD 20993-0002, 301-796-1546, Kaetochi.Okemgbo@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the “Approved Drug Products With Therapeutic Equivalence Evaluations,” which is known generally as the “Orange Book.” Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug’s NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), is the

subject of NDA 022450, held by Mallinckrodt Hospital Products IP Ltd. (Mallinckrodt), and initially approved on November 2, 2010. OFIRMEV is indicated for management of mild to moderate pain in adult and pediatric patients 2 years and older, management of moderate to severe pain with adjunctive opioid analgesics in adult and pediatric patients 2 years and older, and reduction of fever in adult and pediatric patients.

In a letter dated June 24, 2021, Mallinckrodt notified FDA that OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), was being discontinued, and FDA moved the drug product to the “Discontinued Drug Product List” section of the Orange Book.

Nines Consult Pharma, LLC, submitted a citizen petition dated August 22, 2022 (Docket No. FDA-2022-P-1982), under 21 CFR 10.30, requesting that the Agency determine whether OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that this drug product was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that this drug product was not withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), in the “Discontinued Drug Product List” section of the Orange Book. The “Discontinued Drug Product List” delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to OFIRMEV (acetaminophen) injection, 1,000 mg/100 mL (10 mg/mL), may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling

for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: January 10, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-00792 Filed 1-17-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-N-1600]

Gabriel J. Letizia, Jr.: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debaring Gabriel J. Letizia, Jr. from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Letizia was convicted of a felony under Federal law for conduct that relates to the regulation of a drug product under the FD&C Act. Mr. Letizia was given notice of the proposed permanent debarment and was given an opportunity to request a hearing to show why he should not be debarred within the timeframe prescribed by regulation. Mr. Letizia has not responded to the notice. Mr. Letizia’s failure to respond and request a hearing within the prescribed timeframe constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable January 18, 2023.

ADDRESSES: Submit applications for special termination of debarment to the Dockets Management Staff, Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500, or at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240-402-8743, or at debarments@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires

debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On May 18, 2022, Mr. Letizia was convicted in the U.S. District Court for the Southern District of New York, of one felony count of conspiracy to commit wire fraud in violation of 18 U.S.C. 371, and two misdemeanor counts of misbranding in violation of 21 U.S.C. 331(a) and 333(a)(1). FDA's finding that debarment is appropriate is based on the felony conviction referenced herein.

The factual basis for this conviction is as follows: As contained in the Superseding Information in Mr. Letizia's case, filed May 4, 2021, and from the transcript of his guilty plea hearing, filed on May 26, 2021, Mr. Letizia was the owner and executive director of AMA Laboratories (AMA), a consumer product testing company in Rockland County, New York. Mr. Letizia began operating AMA in the early 1980s and became its sole owner in approximately 2003. Mr. Letizia falsely used the title "Dr." in correspondence, falsely representing to customers that he held a Ph.D. AMA purported to test the safety and efficacy of cosmetics, sunscreens, and other products on specified numbers of volunteer panelists for consumer products companies. AMA's customers would use the test results to support their claims that their products were safe, effective, hypoallergenic, or provided a certain sun protection factor (SPF), including after exposure to water. AMA customers that manufactured sunscreens used the test results to comply with FDA regulations requiring sunscreen manufacturers to have their products tested and to maintain the test results for possible review by the FDA.

From 1987 to April 2017, Mr. Letizia and AMA personnel operating at Mr. Letizia's direction, defrauded AMA's customers of more than \$46 million by testing products on materially lower numbers of panelists than the numbers specified and paid for by AMA's customers. At Mr. Letizia's direction, AMA personnel rarely tested products on the number of panelists requested by AMA's customers and for which they had paid. AMA's fees for tests were based, in part, on the number of panelists that were to participate in the study. However, at Mr. Letizia's direction AMA sent its customers fraudulent test results, via interstate email and facsimile communications, in which AMA personnel included fictitious data for "phantom" panelists

who had not actually participated in the tests. At Mr. Letizia's direction, AMA employees had panelists who agreed to partake in studies at AMA fill out consent forms and other paperwork as if they would be participating in all of the studies that were being performed at AMA at that time. These panelists were then used as "phantom" panelists in other studies, and their consent forms for those studies would falsely make it appear to those who might audit AMA's files, including FDA investigators and AMA's customers, that the panelists had participated in studies when, in fact, they had not. In addition, AMA customers who paid for AMA to test their sunscreen products relied on the reliability of AMA's test results for purposes of accurately and lawfully labeling the SPF level of the sunscreen products those customers intended to sell. Mr. Letizia knowingly caused AMA employees to send false reports to AMA's customers in that testing had not been performed on the whole panel as requested and paid for by AMA's customers. In so doing, Mr. Letizia knowingly caused AMA's customers to market and sell to consumers in the United States and elsewhere, sunscreen, with labels that failed to reveal material facts in that the labels on these products stated that the SPF level of the sunscreen was 50 with no indication on that label that the laboratory testing of the panel paid for by AMA customers had not been performed.

In addition, at Mr. Letizia's direction, AMA personnel routinely falsified test results relating to AMA's customers' products, which included suppressing reports of adverse reactions and deviating from testing protocols. AMA personnel reported adverse reactions to customers only in extreme cases and often offered to retest the product and, in some cases, change the test procedure with the hope of reducing the number of reported negative reactions. AMA personnel also falsified data to accord with prior results from smaller "screener" study results or customer expectations.

Based on this conviction, FDA sent Mr. Letizia by certified mail on September 12, 2022, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Letizia was convicted, as set forth in section 306(l)(1) of the FD&C Act, of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. The proposal also offered Mr. Letizia an

opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to file a timely request for a hearing would constitute an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Letizia received the proposal on September 16, 2022. He did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Letizia has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Letizia is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(B) and (c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses in any capacity the services of Mr. Letizia during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Letizia provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Mr. Letizia during his period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of sections 306 and 307 of the FD&C Act, a "drug product" is defined as a "drug subject to regulation under section 505, 512, or 802 of this Act [(21 U.S.C. 355, 360b, 382)] or under section 351 of the Public Health Service Act [(42 U.S.C. 262)]" (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Any application by Mr. Letizia for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA-2022-N-1600 and sent to the Dockets Management Staff (see

ADDRESSES). The public availability of information in these submissions is governed by 21 CFR 10.20.

Publicly available submissions will be placed in the docket and will be viewable at <https://www.regulations.gov> or at the Dockets Management Staff (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: January 11, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–00791 Filed 1–17–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–3071]

Joint Meeting of the Drug Safety and Risk Management Advisory Committee and the Dermatologic and Ophthalmic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Drug Safety and Risk Management Advisory Committee and the Dermatologic and Ophthalmic Drugs Advisory Committee. The general function of the committees is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held virtually on March 28 and 29, 2023, from 10 a.m. to 4 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2022–N–3071. Please note that late, untimely filed comments will not be considered. The docket will close on March 27, 2023. The <https://www.regulations.gov>

electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 27, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Comments received on or before March 14, 2023, will be provided to the committees. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

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–

2022–N–3071 for “Joint Meeting of the Drug Safety and Risk Management Advisory Committee and the Dermatologic and Ophthalmic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.” 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.” FDA 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 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 the 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: Philip Bautista, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417,

Silver Spring, MD 20993-0002, 240-762-8729, email: DSaRM@fda.hhs.gov, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. The committees will discuss proposed changes to the iPLEDGE Risk Evaluation and Mitigation Strategy requirements to minimize burden on patients, pharmacies, and prescribers while maintaining safe use of isotretinoin oral capsules for patients.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference meeting room will be available at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before March 14, 2023, will be provided to the committees. Oral presentations from the public will be scheduled between approximately 10:30 a.m. and 12 p.m. Eastern Time on March 29, 2023. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of

proposed participants, and an indication of the approximate time requested to make their presentation on or before March 6, 2023. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by March 7, 2023.

For press inquiries, please contact the Office of Media Affairs at fdaoma@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Philip Bautista (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 11, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-00795 Filed 1-17-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; The National Health Service Corps Loan Repayment Programs

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB.

OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this Information Collection Request must be received no later than February 17, 2023.

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 Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email paperwork@hrsa.gov or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at 301-594-4394.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: The National Health Service Corps Loan Repayment Programs OMB No. 0915-0127—Revision.

Abstract: The National Health Service Corps (NHSC) Loan Repayment Program (LRP) was established to assure an adequate supply of trained primary care health professionals to provide services in Health Professional Shortage Areas (HPSAs) of the United States with the greatest need. The NHSC Substance Use Disorder Workforce LRP and the NHSC Rural Community LRP were established to recruit and retain a health professional workforce with specific training and credentials to provide evidence-based substance use disorder treatment in HPSAs. Under these programs, the Department of Health and Human Services agrees to repay the qualifying educational loans of selected primary care health professionals. In return, the health professionals agree to serve for a specified period of time in an NHSC-approved site located in a federally-designated HPSA approved by the Secretary of Health and Human Services for LRP participants.

The forms used by each LRP include the following: (1) the NHSC LRP Application, (2) the Authorization for Disclosure of Loan Information Form, (3) the Privacy Act Release Authorization Form, and, if applicable, (4) the Verification of Disadvantaged Background Form, and (5) the Private Practice Option Form. The first four of the aforementioned NHSC LRP Forms collect information that is needed for

selecting participants and repaying qualifying educational loans. The last referenced form, the Private Practice Option Form, is needed to collect information for all participants who have applied for that service option.

NHSC-approved sites are health care facilities that provide comprehensive outpatient, ambulatory, primary health care services to populations residing in HPSAs. Related in-patient services may be provided by NHSC-approved Critical Access Hospitals and Indian Health Service hospitals. In order to become an NHSC-approved site, new sites must submit a Site Application for review and approval. Existing NHSC-approved sites are required to complete a Site Recertification Application every 3 years in order to maintain their NHSC-approved status. Both the NHSC Site Application and Site Recertification Application request information on the clinical service site, sponsoring agency, recruitment contact, staffing levels, service users, charges for services, employment policies, and fiscal management capabilities. Assistance in completing these applications may be obtained through the appropriate State Primary Care Offices and the NHSC. The information collected on the applications is used for determining the eligibility of sites for the assignment of NHSC health professionals and to verify the need for NHSC clinicians. NHSC service site approval is valid for 3 years.

A 60-day notice was published in the **Federal Register** on October 31, 2022, vol. 87, No. 209; pp. 65598–00. There were no public comments.

Need and Proposed Use of the Information: The need and proposed use of this information collection is to assess an LRP applicant’s eligibility and qualifications for the LRP, and to obtain

information for NHSC site applicants. The NHSC LRP application asks for personal, professional, and financial/loan information.

The proposed revisions in this ICR include asking applicants to provide their educational information on the completion of postgraduate training. The NHSC will use this information to identify graduates or completers of the following HRSA-funded programs: the Primary Care Training and Enhancement: Training Primary Care Champions Program, the Addiction Medicine Fellowship Program, the Teaching Health Center Graduate Medical Education Program, the Advanced Nursing Education Nurse Practitioner Residency Program, and the Advanced Nursing Education Nurse Practitioner Residency Integration Program. To identify the graduates or completers of these HRSA-funded programs, the NHSC will require applicants to respond to the following additional questions:

- (1) Have you completed a postgraduate training?
- (2) Applicants who selected “yes” to the question above are required to submit the National Practitioner Identifier number.
- (3) Further, if applicable, applicants are asked to enter the residency identification number and their residency completion certificate, if available.

NHSC policy requires behavioral health providers to practice in a community-based setting that provides access to comprehensive behavioral health services. Accordingly, for those sites seeking to be assigned behavioral health NHSC participants, additional site information will be collected from an NHSC Comprehensive Behavioral

Health Services Checklist. NHSC sites that do not directly offer all required behavioral health services must demonstrate a formal affiliation with a comprehensive, community-based primary behavioral health setting or facility to provide these services.

Likely Respondents: Likely respondents include (1) licensed primary care medical, dental, and behavioral health providers who are employed or seeking employment, and are interested in serving underserved populations; (2) health care facilities interested in participating in the NHSC and becoming an NHSC-approved service site; and (3) NHSC sites providing behavioral health care services directly, or through a formal affiliation with a comprehensive community-based primary behavioral health setting or facility providing comprehensive behavioral health services.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
NHSC LRP Application	9,020	1	9,020	1.00	9,020
Authorization for Disclosure of Loan Information Form	7,150	1	7,150	.10	715
Privacy Act Release Authorization Form	303	1	303	.10	30
Verification of					
Disadvantaged Background Form	660	1	660	.50	330
Private Practice Option Form	330	1	330	.10	33
NHSC Comprehensive Behavioral Health Services Checklist	4,400	1	4,400	.13	572
NHSC Site Application					
(including recertification)	4,070	1	4,070	.5	2,035
Total	25,933	.....	25,933	.....	12,735

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023-00819 Filed 1-17-23; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Purchased/Referred Care Delivery Area Redesignation for the Hoh Tribe in the State of Washington

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: This Notice advises the public that the Indian Health Service (IHS) proposes to expand the geographic boundaries of the Purchased/Referred Care Delivery Area (PRCDA) for the Hoh Tribe in the State of Washington to include the county of Clallam in the State of Washington. The current PRCDA for the Hoh Tribe includes the Washington county of Jefferson. Hoh Tribe members residing outside of the PRCDA are eligible for direct care services, however, they are not eligible for Purchased/Referred Care (PRC) services. The sole purpose of this expansion would be to authorize additional Hoh Tribe members and beneficiaries to receive PRC services.

DATES: Comments must be submitted February 17, 2023.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a Comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Carl Mitchell, Director, Division of Regulatory and Policy Coordination Indian Health Service, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, Maryland 20857.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the above address.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the address above.

If you intend to deliver your comments to the Rockville address, please call telephone number (301) 443-

1116 in advance to schedule your arrival with a staff member.

FOR FURTHER INFORMATION CONTACT:

CAPT John Rael, Director, Office of Resource Access and Partnerships, Indian Health Service, 5600 Fishers Lane, Mail Stop: 10E85C, Rockville, Maryland 20857. Telephone (301) 443-0969 (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment.

Background: The IHS provides services under regulations in effect as of September 15, 1987, and republished at 42 CFR part 136, subparts A-C. Subpart C defines a Contract Health Service Delivery Area (CHSDA), now referred to as a PRCDA, as the geographic area within which PRC will be made available by the IHS to members of an identified Indian community who reside in the PRCDA. Residence within a PRCDA by a person who is within the scope of the Indian health program, as set forth in 42 CFR 136.12, creates no legal entitlement to PRC but only potential eligibility for services. Services needed, but not available at an IHS/Tribal facility, are provided under the PRC program depending on the availability of funds, the person's relative medical priority, and the actual availability and accessibility of alternate resources in accordance with the regulations.

The regulations at 42 CFR part 136, subpart C provide that, unless otherwise designated, a PRCDA shall consist of a county which includes all or part of a reservation and any county or counties which have a common boundary with the reservation. 42 CFR 136.22(a)(6). The regulations also provide that after consultation with the Tribal governing body or bodies on those reservations included within the PRCDA, the Secretary may from time to time, redesignate areas within the United States for inclusion in or exclusion from a PRCDA. The regulations require that certain criteria must be considered before any redesignation is made. The criteria are as follows:

(1) The number of Indians residing in the area proposed to be so included or excluded;

(2) Whether the Tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the Tribe;

(3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and

(4) The level of funding which would be available for the provision of PRC.

Additionally, the regulations require that any redesignation of a PRCDA must be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553). In compliance with this requirement, IHS is publishing this Notice and requesting public comments.

The Hoh Indian Tribe (Tribe) is located in the upper Northwest Peninsula of Washington State. The Tribe is located on a small reservation of just over 470 acres in Jefferson County which is the only county in their established PRCDA. The Tribal offices, as well as a large portion of the Tribal members, live in the nearest town of Forks, WA which is in Clallam County. The Tribe has expressed the desire to add Clallam County to ensure a large portion of their members can be PRC eligible, which is important because the Tribe does not currently operate any primary care services. Clallam County is not currently part of the Hoh Tribe's designated PRCDA. Accordingly, IHS proposes to expand the Hoh Tribe's PRCDA to include the Washington county of Clallam.

Under 42 CFR 136.23, those otherwise eligible Indians who do not reside on a reservation, but reside within a PRCDA, must be either members of the Tribe or other IHS beneficiaries who maintain close economic and social ties with the Tribe. In this case, applying the aforementioned PRCDA redesignation criteria required by operative regulations codified at 42 CFR part 136, subpart C, the following findings are made:

1. By expanding, the Hoh Tribe estimates the current eligible population will be increased by 41 for a total eligible population of 73.

2. IHS is construing the letter from the Tribe, dated July 28, 2021, to mean that the tribal members within the new PRCDA are socially and economically affiliated with the Hoh Tribe.

3. The expanded area including Clallam County in the State of Washington maintains a common boundary with the current PRCDA consisting of Jefferson County in the State of Washington.

4. The Portland Area IHS administers the PRC program for the Hoh Tribe and will use its existing Federal allocation for PRC funds to provide services to the expanded population. No additional financial resources will be allocated by IHS to the Portland Area IHS to provide services to Hoh Tribe members residing

in Clallam County in the State of Washington.

This Notice does not contain reporting or recordkeeping requirements subject to prior approval by the Office

of Management and Budget under the Paperwork Reduction Act of 1980.

Tribe/reservation	County/state
Ak Chin Indian Community	Pinal, AZ.
Alabama-Coushatta Tribes of Texas	Polk, TX. ¹
Alaska	Entire State. ²
Arapahoe Tribe of the Wind River Reservation, Wyoming	Hot Springs, WY, Fremont, WY, Sublette, WY.
Aroostook Band of Micmacs	Aroostook, ME. ³
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana	Daniels, MT, McCone, MT, Richland, MT, Roosevelt, MT, Sheridan, MT, Valley, MT.
Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin	Ashland, WI, Iron, WI.
Bay Mills Indian Community, Michigan	Chippewa, MI.
Blackfeet Tribe of the Blackfeet Indian Reservation of Montana	Glacier, MT, Pondera, MT.
Brigham City Intermountain School Health Center, Utah	Permanently closed on May 17, 1984. ⁴
Burns Paiute Tribe	Harney, OR.
California	Entire State, except for the counties listed in the footnote. ⁵
Catawba Indian Nation (AKA Catawba Tribe of South Carolina)	All Counties in SC, ⁶ Cabarrus, NC, Cleveland, NC, Gaston, NC, Mecklenburg, NC, Rutherford, NC, Union, NC.
Cayuga Nation	Alleghany, NY, ⁷ Cattaraugus, NY, Chautauqua, NY, Erie, NY, Warren, PA.
Chickahominy Indian Tribe	New Kent, VA, James City, VA, Charles City, VA, Henrico, VA. ⁸
Chickahominy Indian Tribe—Eastern Division	New Kent, VA, James City, VA, Charles City, VA, Henrico, VA. ⁹
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota	Corson, SD, Dewey, SD, Haakon, SD, Meade, SD, Perkins, SD, Potter, SD, Stanley, SD, Sully, SD, Walworth, SD, Ziebach, SD.
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana	Chouteau, MT, Hill, MT, Liberty, MT.
Chitimacha Tribe of Louisiana	St. Mary Parish, LA.
Cocopah Tribe of Arizona	Yuma, AZ, Imperial, CA.
Coeur D'Alene Tribe	Benewah, ID, Kootenai, ID, Latah, ID, Spokane, WA, Whitman, WA.
Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California	La Paz, AZ, Riverside, CA, San Bernardino, CA, Yuma, AZ.
Confederated Salish and Kootenai Tribes of the Flathead Reservation	Flathead, MT, Lake, MT, Missoula, MT, Sanders, MT.
Confederated Tribes and Bands of the Yakama Nation	Klickitat, WA, Lewis, WA, Skamania, WA, ¹⁰ Yakima, WA.
Confederated Tribes of Siletz Indians of Oregon	Benton, OR, ¹¹ Clackamas, OR, Lane, OR, Lincoln, OR, Linn, OR, Marion, OR, Multnomah, OR, Polk, OR, Tillamook, OR, Washington, OR, Yamhill, OR.
Confederated Tribes of the Chehalis Reservation	Grays Harbor, WA, Lewis, WA, Thurston, WA.
Confederated Tribes of the Colville Reservation	Chelan, WA, ¹² Douglas, WA, Ferry, WA, Grant, WA, Lincoln, WA, Okanogan, WA, Stevens, WA.
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians	Coos, OR, ¹³ Curry, OR, Douglas, OR, Lane, OR, Lincoln, OR.
Confederated Tribes of the Goshute Reservation, Nevada and Utah	The entire State of Nevada, Juab, UT, Toole, UT.
Confederated Tribes of the Grand Ronde Community of Oregon	Marion, OR, Multnomah, OR, Polk, OR, ¹⁴ Tillamook, OR, Washington, OR, Yamhill, OR.
Confederated Tribes of the Umatilla Indian Reservation	Umatilla, OR, Union, OR.
Confederated Tribes of the Warm Springs Reservation of Oregon	Clackamas, OR, Jefferson, OR, Linn, OR, Marion, OR, Wasco, OR.
Coquille Indian Tribe	Coos, OR, Curry, OR, Douglas, OR, Jackson, OR, Lane, OR.
Coushatta Tribe of Louisiana	Allen Parish, LA, the city limits of Elton, LA. ¹⁵
Cow Creek Band of Umpqua Tribe of Indians	Coos, OR, ¹⁶ Deshutes, OR, Douglas, OR, Jackson, OR, Josephine, OR, Klamath, OR, Lane, OR.
Cowlitz Indian Tribe	Clark, WA, Cowlitz, WA, King, WA, Lewis, WA, Peirce, WA, Skamania, WA, Thurston, WA, Columbia, OR, ¹⁷ Kittitas, WA, Wahkiakum, WA.
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota	Brule, SD, Buffalo, SD, Hand, SD, Hughes, SD, Hyde, SD, Lyman, SD, Stanley, SD.
Crow Tribe of Montana	Big Horn, MT, Carbon, MT, Treasure, MT, ¹⁸ Yellowstone, MT, Big Horn, WY, Sheridan, WY.
Eastern Band of Cherokee Indians	Cherokee, NC, Graham, NC, Haywood, NC, Jackson, NC, Swain, NC.
Eastern Shoshone Tribe of the Wind River Reservation, Wyoming	Hot Springs, WY, Fremont, WY, Sublette, WY.
Flandreau Santee Sioux Tribe of South Dakota	Moody, SD.
Forest County Potawatomi Community, Wisconsin	Forest, WI, Marinette, WI, Oconto, WI.
Fort Belknap Indian Community of the Fort Belknap Reservation of Montana	Blaine, MT, Phillips, MT.
Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon	The entire State of Nevada, Malheur, OR.
Fort McDowell Yavapai Nation, Arizona	Maricopa, AZ.
Fort Mojave Indian Tribe of Arizona, California and Nevada	The entire State of Nevada, Mohave, AZ, San Bernardino, CA.
Gila River Indian Community of the Gila River Indian Reservation, Arizona	Maricopa, AZ, Pinal, AZ.
Grand Traverse Band of Ottawa and Chippewa Indians, Michigan	Antrim, MI, ¹⁹ Benzie, MI, Charlevoix, MI, Grand Traverse, MI, Leelanau, MI, Manistee, MI.
Hannahville Indian Community, Michigan	Delta, MI, Menominee, MI.
Haskell Indian Health Center	Douglas, KS. ²⁰
Havasupai Tribe of the Havasupai Reservation, Arizona	Coconino, AZ, Mohave, AZ. ²¹
Ho-Chunk Nation of Wisconsin	Adams, WI, ²² Clark, WI, Columbia, WI, Crawford, WI, Dane, WI, Eau Claire, WI, Houston, MN, Jackson, WI, Juneau, WI, La Crosse, WI, Marathon, WI, Monroe, WI, Sauk, WI, Shawano, WI, Vernon, WI, Wood, WI.
Hoh Indian Tribe	Jefferson, WA.
Hopi Tribe of Arizona	Apache, AZ, Coconino, AZ, Navajo, AZ.
Houlton Band of Maliseet Indians	Aroostook, ME. ²³
Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona	Coconino, AZ, Mohave, AZ, Yavapai, AZ.
Iowa Tribe of Kansas and Nebraska	Brown, KS, Doniphan, KS, Richardson, NE.
Jamestown S'Klallam Tribe	Clallam, WA, Jefferson, WA.
Jena Band of Choctaw Indians	Grand Parish, LA, ²⁴ LaSalle Parish, LA, Rapides, LA.
Jicarilla Apache Nation, New Mexico	Archuleta, CO, Rio Arriba, NM, Sandoval, NM.
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona	Coconino, AZ, Mohave, AZ, Kane, UT.
Kalispel Indian Community of the Kalispel Reservation	Pend Oreille, WA, Spokane, WA.
Kewa Pueblo, New Mexico (previously listed as the Pueblo of Santo Domingo)	Sandoval, NM, Santa Fe, NM.

Tribe/reservation	County/state
Keweenaw Bay Indian Community, Michigan	Baraga, MI, Houghton, MI, Ontonagon, MI.
Kickapoo Traditional Tribe of Texas	Maverick, TX. ²⁵
Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas	Brown, KS, Jackson, KS.
Klamath Tribes	Klamath, OR. ²⁶
Koi Nation of Northern California (formerly known as Lower Lake Rancheria, California).	Lake, CA, Sonoma, CA. ²⁷
Kootenai Tribe of Idaho	Boundary, ID.
Lac Courte Oreilles Band of Superior Chippewa Indians of Wisconsin	Sawyer, WI.
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin.	Iron, WI, Oneida, WI, Vilas, WI.
Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan	Gogebic, MI.
Little River Band of Ottawa Indians, Michigan	Kent, MI, ²⁸ Muskegon, MI, Newaygo, MI, Oceana, MI, Ottawa, MI, Manistee, MI, Mason, MI, Wexford, MI, Lake, MI.
Little Shell Tribe of Chippewa Indians of Montana	Blaine, MT, Cascade, MT, Glacier, MT, Hill, MT. ²⁹
Little Traverse Bay Bands of Odawa Indians, Michigan	Alcona, MI, ³⁰ Alger, MI, Alpena, MI, Antrim, MI, Benzie, MI, Charlevoix, MI, Cheboygan, MI, Chippewa, MI, Crawford, MI, Delta, MI, Emmet, MI, Grand Traverse, MI, Iosco, MI, Kalkaska, MI, Leelanau, MI, Luce, MI, Mackinac, MI, Manistee, MI, Missaukee, MI, Montmorency, MI, Ogemaw, MI, Oscoda, MI, Otsego, MI, Presque Isle, MI, Schoolcraft, MI, Roscommon, MI, Wexford, MI.
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota	Brule, SD, Buffalo, SD, Hughes, SD, Lyman, SD, Stanley, SD.
Lower Elwha Tribal Community	Clallam, WA.
Lower Sioux Indian Community in the State of Minnesota	Redwood, MN, Renville, MN.
Lummi Tribe of the Lummi Reservation	Whatcom, WA.
Makah Indian Tribe of the Makah Indian Reservation	Clallam, WA.
Mashantucket Pequot Indian Tribe	New London, CT. ³¹
Mashpee Wampanoag Tribe	Barnstable, MA, Bristol, MA, Norfolk, MA, Plymouth, MA, Suffolk, MA. ³²
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan	Allegan, MI, ³³ Barry, MI, Kalamazoo, MI, Kent, MI, Ottawa, MI.
Menominee Indian Tribe of Wisconsin	Langlade, WI, Menominee, WI, Oconto, WI, Shawano, WI.
Mescalero Apache Tribe of the Mescalero Reservation, New Mexico	Chaves, NM, Lincoln, NM, Otero, NM.
Miccosukee Tribe of Indians	Broward, FL, Collier, FL, Miami-Dade, FL, Hendry, FL.
Minnesota Chippewa Tribe, Minnesota, Bois Forte Band (Nett Lake)	Itasca, MN, Koochiching, MN, St. Louis, MN.
Minnesota Chippewa Tribe, Minnesota, Fond du Lac Band	Carlton, MN, St. Louis, MN.
Minnesota Chippewa Tribe, Minnesota, Grand Portage Band	Cook, MN.
Minnesota Chippewa Tribe, Minnesota, Leech Lake Band	Beltrami, MN, Cass, MN, Hubbard, MN, Itasca, MN.
Minnesota Chippewa Tribe, Minnesota, Mille Lacs Band	Aitkin, MN, Crow Wing, MN, ³⁴ Kanebec, MN, Mille Lacs, MN, Morrison, MN, ³⁵ Pine, MN.
Minnesota Chippewa Tribe, Minnesota, White Earth Band	Becker, MN, Clearwater, MN, Mahnomon, MN, Norman, MN, Polk, MN.
Mississippi Band of Choctaw Indians	Attala, MS, Jasper, MS, ³⁶ Jones, MS, Kemper, MS, Leake, MS, Neshoba, MS, Newton, MS, Noxubee, MS, ³⁷ Scott, MS, ³⁸ Winston, MS.
Mohegan Tribe of Indians of Connecticut	Fairfield, CT, Hartford, CT, Litchfield, CT, Middlesex, CT, New Haven, CT, New London, CT, Tolland, CT, Windham, CT.
Monacan Indian Nation	Amherst, VA, Nelson, VA, Albemarle, VA, Buckingham, VA, Appomattox, VA, Campbell, VA, Bedford, VA, Botetourt, VA, Rockbridge, VA, Augusta, VA, and the independent cities of Lynchburg, VA, Lexington, VA, Buena Vista, VA, Staunton, VA, Waynesboro, VA, and Charlottesville, VA. ³⁹
Muckleshoot Indian Tribe	King, WA, Pierce, WA.
Nansemond Indian Tribe	The independent cities of Chesapeake, VA, Hampton, VA, Newport News, VA, Norfolk, VA, Portsmouth, VA, Suffolk, VA, and Virginia Beach, VA. ⁴⁰
Narragansett Indian Tribe	Washington, RI. ⁴¹
Navajo Nation, Arizona, New Mexico, & Utah	Apache, AZ, Bernalillo, NM, Cibola, NM, Coconino, AZ, Kane, UT, McKinley, NM, Montezuma, CO, Navajo, AZ, Rio Arriba, NM, Sandoval, NM, San Juan, NM, San Juan, UT, Socorro, NM, Valencia, NM.
Nevada	Entire State. ⁴²
Nez Perce Tribe	Clearwater, ID, Idaho, ID, Latah, ID, Lewis, ID, Nez Perce, ID.
Nisqually Indian Tribe	Pierce, WA, Thurston, WA.
Nooksack Indian Tribe	Whatcom, WA.
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana	Big Horn, MT, Carter, MT, ⁴³ Rosebud, MT.
Northwestern Band of Shoshone Nation	Box Elder, UT, ⁴⁴ Davis, UT, Salt Lake, UT, Weber, UT. ⁴⁵
Nottawaseppi Huron Band of the Pottawatomi, Michigan	Allegan, MI, ⁴⁶ Barry, MI, Branch, MI, Calhoun, MI, Kalamazoo, MI, Kent, MI, Otsego, MI.
Oglala Sioux Tribe	Bennett, SD, Cherry, NE, Custer, SD, Dawes, NE, Fall River, SD, Jackson, SD, ⁴⁷ Mellette, SD, Pennington, SD, Shannon, SD, Sheridan, NE, Todd, SD.
Ohkay Owingeh, New Mexico	Rio Arriba, NM.
Oklahoma	Entire State. ⁴⁸
Omaha Tribe of Nebraska	Burt, NE, Cuming, NE, Monona, IA, Thurston, NE, Wayne, NE.
Oneida Nation (previously listed as the Oneida Tribe of Indians of Wisconsin)	Brown, WI, Outagamie, WI.
Oneida Indian Nation (previously listed as the Oneida Nation of New York)	Chenango, NY, Cortland, NY, Herkimer, NY, Madison, NY, Oneida, NY, Onondaga, NY.
Onondaga Nation	Onondaga, NY.
Paiute Indian Tribe of Utah	Iron, UT, ⁴⁹ Millard, UT, Sevier, UT, Washington, UT.
Pamunkey Indian Tribe	Caroline, VA, Hanover, VA, Henrico, VA, King William, VA, King and Queen, VA, New Kent, VA, and the independent city of Richmond, VA. ⁵⁰
Pascua Yaqui Tribe of Arizona	Pima, AZ. ⁵¹
Passamaquoddy Tribe	Aroostook, ME, ⁵² ⁵³ Hancock, ME, ⁵⁴ Washington, ME.
Penobscot Nation	Aroostook, ME, ⁵⁵ Penobscot, ME.
Poarch Band of Creeks	Baldwin, AL, ⁵⁶ Elmore, AL, Escambia, AL, Mobile, AL, Monroe, AL, Escambia, FL
Pokagon Band of Pottawatomi Indians, Michigan and Indiana	Allegan, MI, ⁵⁷ Berrien, MI, Cass, MI, Elkhart, IN, Kosciusko, IN, La Porte, IN, Marshall, IN, St. Joseph, IN, Starke, IN, Van Buren, MI.
Ponca Tribe of Nebraska	Boyd, NE, ⁵⁸ Burt, NE, Charles Mix, SD, Douglas, NE, Hall, NE, Holt, NE, Knox, NE, Lancaster, NE, Madison, NE, Platte, NE, Pottawatomie, IA, Sarpy, NE, Stanton, NE, Wayne, NE, Woodbury, IA.
Port Gamble S'Klallam Tribe	Kitsap, WA.
Prairie Band of Pottawatomi Nation	Jackson, KS.

Tribe/reservation	County/state
Prairie Island Indian Community in the State of Minnesota	Goodhue, MN.
Pueblo of Acoma, New Mexico	Cibola, NM.
Pueblo of Cochiti, New Mexico	Sandoval, NM, Santa Fe, NM.
Pueblo of Isleta, New Mexico	Bernalillo, NM, Torrance, NM, Valencia, NM.
Pueblo of Jemez, New Mexico	Sandoval, NM.
Pueblo of Laguna, New Mexico	Bernalillo, NM, Cibola, NM, Sandoval, NM, Valencia, NM.
Pueblo of Nambe, New Mexico	Santa Fe, NM.
Pueblo of Picuris, New Mexico	Taos, NM.
Pueblo of Pojoaque, New Mexico	Rio Arriba, NM, Santa Fe, NM.
Pueblo of San Felipe, New Mexico	Sandoval, NM.
Pueblo of San Ildefonso, New Mexico	Los Alamos, NM, Rio Arriba, NM, Sandoval, NM, Santa Fe, NM.
Pueblo of Sandia, New Mexico	Bernalillo, NM, Sandoval, NM.
Pueblo of Santa Ana, New Mexico	Sandoval, NM.
Pueblo of Santa Clara, New Mexico	Los Alamos, NM, Sandoval, NM, Santa Fe, NM.
Pueblo of Taos, New Mexico	Colfax, NM, Taos, NM.
Pueblo of Tesuque, Mexico	Santa Fe, NM.
Pueblo of Zia, New Mexico	Sandoval, NM.
Puyallup Tribe of the Puyallup Reservation	King, WA, Pierce, WA, Thurston, WA.
Quechan Tribe of the Fort Yuma Indian Reservation, Arizona and California	Yuma, AZ, Imperial, CA.
Quileute Tribe of the Quileute Reservation	Clallam, WA, Jefferson, WA.
Quinault Indian Nation	Grays Harbor, WA, Jefferson, WA.
Rapid City, South Dakota	Pennington, SD. ⁵⁹
Rappahannock Tribe, Inc	King and Queen County, VA, Caroline County, VA, Essex County, VA, King William County, VA. ⁶⁰
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin	Bayfield, WI.
Red Lake Band of Chippewa Indians, Minnesota	Beltrami, MN, Clearwater, MN, Koochiching, MN, Lake of the Woods, MN, Marshall, MN, Pennington, MN, Polk, MN, Roseau, MN.
Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota	Bennett, SD, Cherry, NE, Gregory, SD, Lyman, SD, Mellette, SD, Todd, SD, Tripp, SD.
Sac & Fox Nation of Missouri in Kansas and Nebraska	Brown, KS, Richardson, NE.
Sac & Fox Tribe of the Mississippi in Iowa	Tama, IA.
Saginaw Chippewa Indian Tribe of Michigan	Arenac, MI, ⁶¹ Clare, MI, Isabella, MI, Midland, MI, Missaukee, MI.
Saint Regis Mohawk Tribe	Franklin, NY, St. Lawrence, NY.
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona.	Maricopa, AZ.
Samish Indian Nation	Clallam, WA, ⁶² Island, WA, Jefferson, WA, King, WA, Kitsap, WA, Pierce, WA, San Juan, WA, Skagit, WA, Snohomish, WA, Whatcom, WA.
San Carlos Apache Tribe of the San Carlos Reservation, Arizona	Apache, AZ, Cochise, AZ, Gila, AZ, Graham, AZ, Greenlee, AZ, Pinal, AZ.
San Juan Southern Paiute Tribe of Arizona	Coconino, AZ, San Juan, UT.
Santee Sioux Nation, Nebraska	Bon Homme, SD, Knox, NE.
Sauk-Suiattle Indian Tribe	Snohomish, WA, Skagit, WA.
Sault Ste. Marie Tribe of Chippewa Indians, Michigan	Alger, MI, ⁶³ Chippewa, MI, Delta, MI, Luce, MI, Mackinac, MI, Marquette, MI, Schoolcraft, MI.
Seminole Tribe of Florida	Broward, FL, Collier, FL, Miami-Dade, FL, Glades, FL, Hendry, FL.
Seneca Nation of Indians	Alleghany, NY, Cattaraugus, NY, Chautauqua, NY, Erie, NY, Warren, PA.
Shakopee Mdewakanton Sioux Community of Minnesota	Scott, MN.
Shinnecock Indian Nation	Nassau, NY, ⁶⁴ Suffolk, NY.
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation	Pacific, WA.
Shoshone-Bannock Tribes of the Fort Hall Reservation	Bannock, ID, Bingham, ID, Caribou, ID, Lemhi, ID, ⁶⁵ Power, ID.
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada	The entire state of Nevada, Owyhee, ID.
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota	Codington, SD, Day, SD, Grant, SD, Marshall, SD, Richland, ND, Roberts, SD, Sargent, ND, Traverse, MN.
Skokomish Indian Tribe	Mason, WA.
Skull Valley Band of Goshute Indians of Utah	Tooele, UT.
Snoqualmie Indian Tribe	King, WA, ⁶⁶ Snohomish, WA, Pierce, WA, Island, WA, Mason, WA.
Sokaogon Chippewa Community, Wisconsin	Forest, WI.
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado	Archuleta, CO, La Plata, CO, Montezuma, CO, Rio Arriba, NM, San Juan, NM.
Spirit Lake Tribe, North Dakota	Benson, ND, Eddy, ND, Nelson, ND, Ramsey, ND.
Spokane Tribe of the Spokane Reservation	Ferry, WA, Lincoln, WA, Stevens, WA.
Squaxin Island Tribe of the Squaxin Island Reservation	Mason, WA.
St. Croix Chippewa Indians of Wisconsin	Barron, WI, Burnett, WI, Pine, MN, Polk, WI, Washburn, WI.
Standing Rock Sioux Tribe of North & South Dakota	Adams, ND, Campbell, SD, Corson, SD, Dewey, SD, Emmons, ND, Grant, ND, Morton, ND, Perkins, SD, Sioux, ND, Walworth, SD, Ziebach, SD.
Stillaguamish Tribe of Indians of Washington	Snohomish, WA.
Stockbridge Munsee Community, Wisconsin	Menominee, WI, Shawano, WI.
Suquamish Indian Tribe of the Port Madison Reservation	Kitsap, WA.
Swinomish Indian Tribal Community	Skagit, WA.
Tejon Indian Tribe	The State of California including Kern, CA. ⁶⁷
Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota	Dunn, ND, Mercer, ND, McKenzie, ND, McLean, ND, Mountrail, ND, Ward, ND.
Tohono O'odham Nation of Arizona	Maricopa, AZ, Pima, AZ, Pinal, AZ.
Tolowa Dee-ni' Nation (formerly known as Smith River Rancheria of California)	California, Curry, OR. ⁶⁸
Tonawanda Band of Seneca	Genesee, NY, Erie, NY, Niagara, NY.
Tonto Apache Tribe of Arizona	Gila, AZ.
Trenton Service Unit, North Dakota and Montana	Divide, ND, ⁶⁹ McKenzie, ND, Williams, ND, Richland, MT, Roosevelt, MT, Sheridan, MT.
Tulalip Tribes of Washington	Snohomish, WA.
Tunica-Biloxi Indian Tribe	Avoyelles, LA, Rapides, LA. ⁷⁰
Turtle Mountain Band of Chippewa Indians of North Dakota	Rolette, ND.
Tuscarora Nation	Niagara, NY.
Upper Mattaponi Tribe	Caroline, VA, Charles City, VA, Essex, VA, Hanover, VA, Henrico, VA, James City, VA, King and Queen, VA, King William, VA, Middlesex, VA, New Kent, VA, Richmond, VA and the independent city of Richmond, VA. ⁷¹
Upper Sioux Community, Minnesota	Chippewa, MN, Yellow Medicine, MN.

Tribe/reservation	County/state
Upper Skagit Indian Tribe	Skagit, WA.
Ute Indian Tribe of the Uintah & Ouray Reservation, Utah	Carbon, UT, Daggett, UT, Duchesne, UT, Emery, UT, Grand, UT, Rio Blanco, CO, Summit, UT, Uintah, UT, Utah, UT, Wasatch, UT.
Ute Mountain Ute Tribe	Apache, AZ, La Plata, CO, Montezuma, CO, San Juan, NM, San Juan, UT.
Wampanoag Tribe of Gay Head (Aquinnah)	Dukes, MA, ⁷² Barnstable, MA, Bristol, MA, Norfolk, MA, Plymouth, MA, Suffolk, MA. ⁷³
Washoe Tribe of Nevada & California	The State of Nevada, The State of California except for the counties listed in footnote.
White Mountain Apache Tribe of the Fort Apache Reservation, Arizona	Apache, AZ, Coconino, AZ, Gila, AZ, Graham, AZ, Greenlee, AZ, Navajo, AZ.
Wilton Rancheria, California	The State of California including Sacramento, CA. ⁷⁴
Winnebago Tribe of Nebraska	Dakota, NE, Dixon, NE, Monona, IA, Thurston, NE, Wayne, NE, Woodbury, IA.
Yankton Sioux Tribe of South Dakota	Bon Homme, SD, Boyd, NE, Charles Mix, SD, Douglas, SD, Gregory, SD, Hutchinson, SD, Knox, NE.
Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona	Yavapai, AZ.
Yavapai-Prescott Indian Tribe	Yavapai, AZ.
Ysleta Del Sur Pueblo of Texas	El Paso, TX. ⁷⁵
Zuni Tribe of the Zuni Reservation, New Mexico	Apache, AZ, Cibola, NM, McKinley, NM, Valencia, NM.

¹ Public Law 100–89, Restoration Act for Ysleta Del Sur and Alabama and Coushatta Tribes of Texas establishes service areas for “members of the Tribe” by sections 101(3) and 105(a) for the Pueblo and sections 201(3) and 206(a) respectively.

² Entire State of Alaska is included as a CHSDA by regulation (42 CFR 136.22(a)(1)).

³ Aroostook Band of Micmacs was recognized by Congress on November 26, 1991, through the Aroostook Band of Micmac Settlement Act. Aroostook County, ME, was defined as the SDA.

⁴ Special programs have been established by Congress irrespective of the eligibility regulations. Eligibility for services at these facilities is based on the legislative history of the appropriation of funds for the particular facility rather than the eligibility regulations. Historically services have been provided at Brigham City Intermountain School Health Center, Utah (Pub. L. 88–358).

⁵ Entire State of California, excluding the counties of Alameda, Contra Costa, Los Angeles, Marin, Orange, Sacramento, San Francisco, San Mateo, Santa Clara, Kern, Merced, Monterey, Napa, San Benito, San Joaquin, San Luis Obispo, Santa Cruz, Solano, Stanislaus, and Ventura, is designated a CHSDA (25 U.S.C. 1680).

⁶ The counties were recognized after the January 1984 CHSDA FRN was published, in accordance with Public Law 103–116, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, dated October 27, 1993.

⁷ There is no reservation for the Cayuga Nation; the service delivery area consists of those counties identified by the Cayuga Nation.

⁸ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Chickahominy Indian Tribe as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe’s PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

⁹ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Chickahominy Indian Tribe—Eastern Division as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe’s PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

¹⁰ Skamania County, WA, has historically been a part of the Yakama Service Unit population since 1979.

¹¹ In order to carry out the Congressional intent of the Siletz Restoration Act, Public Law 95–195, as expressed in H. Report No. 95–623, at page 4, members of the Confederated Tribes of Siletz Indians of Oregon residing in these counties are eligible for contract health services.

¹² Chelan County, WA, has historically been a part of the Colville Service Unit population since 1970.

¹³ Pursuant to Public Law 98–481 (H. Rept. No. 98–904), Coos, Lower Umpqua and Siuslaw Restoration Act, members of the Tribe residing in these counties were specified as eligible for Federal services and benefits without regard to the existence of a Federal Indian reservation.

¹⁴ The Confederated Tribes of Grand Ronde Community of Oregon were recognized by Public Law 98–165 which was signed into law on November 22, 1983, and provides for eligibility in these six counties without regard to the existence of a reservation.

¹⁵ The CHSDA for the Coushatta Tribe of Louisiana was expanded administratively by the Director, IHS, through regulation (42 CFR 136.22(b)) to include city limits of Elton, LA.

¹⁶ Cow Creek Band of Umpqua Tribe of Indians recognized by Public Law 97–391, signed into law on December 29, 1983. House Rept. No. 97–862 designates Douglas, Jackson, and Josephine Counties as a service area without regard to the existence of a reservation. The IHS later administratively expanded the CHSDA to include the counties of Coos, OR, Deschutes, OR, Klamath, OR, and Lane, OR.

¹⁷ The Cowlitz Indian Tribe was recognized in July 2002 as documented at 67 FR 46329, July 12, 2002. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638. The CHSDA was administratively expanded to include Columbia County, OR, Kittitas, WA, and Wahkiakum County, WA, as published at 67884 FR December 21, 2009.

¹⁸ Treasure County, MT, has historically been a part of the Crow Service Unit population.

¹⁹ The counties listed have historically been a part of the Grand Traverse Service Unit population since 1980.

²⁰ Haskell Indian Health Center has historically been a part of Kansas Service Unit since 1979. Special programs have been established by Congress irrespective of the eligibility regulations. Eligibility for services at these facilities is based on the legislative history of the appropriation of funds for the particular facility rather than the eligibility regulations. Historically services have been provided at Haskell Indian Health Center (H. Rept. No. 95–392).

²¹ The PRCDA for the Havasupai Tribe of Arizona was expanded administratively by the Director, IHS, through regulation (42 CFR 136.22(b)) to include Mohave County in the State of Arizona.

²² CHSDA counties for the Ho-Chunk Nation of Wisconsin were designated by regulation (42 CFR 136.22(a)(5)). Dane County, WI, was added to the reservation by the Bureau of Indian Affairs in 1986.

²³ Public Law 97–428 provides that any member of the Houlton Band of Maliseet Indians in or around the Town of Houlton shall be eligible without regard to existence of a reservation.

²⁴ The Jena Band of Choctaw Indian was Federally acknowledged as documented at 60 FR 28480, May 31, 1995. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

²⁵ Kickapoo Traditional Tribe of Texas, formerly known as the Texas Band of Kickapoo, was recognized by Public Law 97–429, signed into law on January 8, 1983. The Act provides for eligibility for Kickapoo Tribal members residing in Maverick County without regard to the existence of a reservation.

²⁶ The Klamath Indian Tribe Restoration Act (Pub. L. 99–398, Sec. 2(2)) states that for the purpose of Federal services and benefits “members of the tribe residing in Klamath County shall be deemed to be residing in or near a reservation”.

²⁷ The Koi Nation of Northern California, formerly known as the Lower Lake Rancheria, was reaffirmed by the Secretary of the Bureau of Indian Affairs on December 29, 2000. The counties listed were designated administratively as the SDA, to function as a PRCDA, for the purposes of operating a PRC program pursuant to the ISDEAA, Public Law 93–638.

²⁸ The Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act recognized the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians. Pursuant to Public Law 103–324, Sec.4(b) the counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

²⁹ In Public Law 116–92, that became law on December 20, 2019, Congress federally recognized the Little Shell Tribe of Chippewa Indians of Montana. Consistent with Public Law 116–92, the IHS designated the counties as the PRCDA for the Little Shell Tribe of Chippewa Indians of Montana

³⁰ The Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act recognized the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians. Pursuant to Public Law 103–324, Sec.4(b) the counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

³¹ Mashantucket Pequot Indian Claims Settlement Act, Public Law 98–134, signed into law on October 18, 1983, provides a reservation for the Mashantucket Pequot Indian Tribe in New London County, CT.

³² The Mashpee Wampanoag Tribe was recognized in February 2007, as documented at 72 FR 8007, February 22, 2007. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

³³ The Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan was recognized in October 1998, as documented at 63 FR 56936, October 23, 1998. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

³⁴ The PRCDA for the Mille Lacs Band of Ojibwe was expanded administratively by the Director, IHS, through regulation (42 CFR 136.22(b)) to include the counties of Crow Wing and Morrison in the State of Minnesota.

³⁵ The PRCDA for the Mille Lacs Band of Ojibwe was expanded administratively by the Director, IHS, through regulation (42 CFR 136.22(b)) to include the counties of Crow Wing and Morrison in the State of Minnesota.

³⁶ Members of the Mississippi Band of Choctaw Indians residing in Jasper and Noxubee Counties, MS, are eligible for contract health services; these two counties were inadvertently omitted from 42 CFR 136.22.

³⁷ Members of the Mississippi Band of Choctaw Indians residing in Jasper and Noxubee Counties, MS, are eligible for contract health services; these two counties were inadvertently omitted from 42 CFR 136.22.

³⁸ Scott County, MS, has historically been a part of the Choctaw Service Unit population since 1970.

³⁹ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Monacan Indian Nation as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe's PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

⁴⁰ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Nansemond Indian Tribe as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe's PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

⁴¹ The Narragansett Indian Tribe was recognized by Public Law 95–395, signed into law September 30, 1978. Lands in Washington County, RI, are now Federally restricted and the Bureau of Indian Affairs considers them as the Narragansett Indian Reservation.

⁴² Entire State of Nevada is included as a CHSDA by regulation (42 CFR 136.22(a)(2)).

⁴³ Carter County, MT, has historically been a part of the Northern Cheyenne Service Unit population since 1979.

⁴⁴ Land of Box Elder County, Utah, was taken into trust for the Northwestern Band of Shoshone Nation in 1986.

⁴⁵ The PRCDA for the Northwestern Band of Shoshone Nation was expanded administratively by the Director, IHS, through regulation (42 CFR 136.22(b)) to include the counties of Davis, Salt Lake, and Weber, in the State of Utah.

⁴⁶ The Nottawaseppi Huron Band of the Potawatomi, Michigan, formerly known as the Huron Band of Potawatomi, Inc., was recognized in December 1995, as documented at 60 FR 66315, December 21, 1995. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

⁴⁷ Washabaugh County, SD, merged and became part of Jackson County, SD, in 1983; both were/are CHSDA counties for the Oglala Sioux Tribe.

⁴⁸ Entire State of Oklahoma is included as a CHSDA by regulation (42 CFR 136.22(a)(3)).

⁴⁹ Paiute Indian Tribe of Utah Restoration Act, Public Law 96–227, provides for the extension of services for the Paiute Indian Tribe of Utah to these four counties without regard to the existence of a reservation.

⁵⁰ In the **Federal Register** on July 8, 2015 (80 FR 39144), the Pamunkey Indian Tribe was officially recognized as an Indian Tribe within the meaning of Federal law. The counties listed were designated administratively as the PRCDA, for the purposes of operating a PRC program.

⁵¹ Legislative history (H.R. Report No. 95–1021) to Public Law 95–375, Extension of Federal Benefits to Pascua Yaqui Indians, Arizona, expresses congressional intent that lands conveyed to the Pascua Yaqui Tribe of Arizona pursuant to Act of October 8, 1964. (Pub. L. 88–350) shall be deemed a Federal Indian Reservation.

⁵² The Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420; H. Rept. 96–1353) includes the intent of Congress to fund and provide contract health services to the Passamaquoddy Tribe and the Penobscot Nation.

⁵³ The Passamaquoddy Tribe has two reservations: Indian Township and Pleasant Point. The PRCDA for the Passamaquoddy Tribe at Indian Township, ME, is Aroostook County, ME, Washington County, ME, and Hancock County, ME. The PRCDA for the Passamaquoddy Tribe at Pleasant Point, ME, is Washington County, ME, south of State Route 9, and Aroostook County, ME.

⁵⁴ The Passamaquoddy Tribe's counties listed are designated administratively as the SDA, to function as a PRCDA, for the purposes of operating a PRC program pursuant to the ISDEAA, Public Law 93–638.

⁵⁵ The Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420; H. Rept. 96–1353) includes the intent of Congress to fund and provide PRC to the Passamaquoddy Tribe and the Penobscot Nation.

⁵⁶ Counties in the Service Unit designated by Congress for the Poarch Band of Creek Indians (see H. Rept. 98–886, June 29, 1984; Cong. Record, October 10, 1984, Pg. H11929).

⁵⁷ Public Law 103–323 restored Federal recognition to the Pokagon Band of Potawatomi Indians, Michigan and Indiana, in 1994 and identified counties to serve as the SDA.

⁵⁸ The Ponca Restoration Act, Public Law 101–484, recognized members of the Ponca Tribe of Nebraska in Boyd, Douglas, Knox, Madison or Lancaster counties of Nebraska or Charles Mix county of South Dakota as residing on or near a reservation. Public Law 104–109 made technical corrections to laws relating to Native Americans and added Burt, Hall, Holt, Platte, Sarpy, Stanton, and Wayne counties of Nebraska and Pottawatomie and Woodbury counties of Iowa to the Ponca Tribe of Nebraska SDA.

⁵⁹ Special programs have been established by Congress irrespective of the eligibility regulations. Eligibility for services at these facilities is based on the legislative history of the appropriation of funds for the particular facility, rather than the eligibility regulations. Historically services have been provided at Rapid City (S. Rept. No. 1154, FY 1967 Interior Approp. 89th Cong. 2d Sess.).

⁶⁰ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Rappahannock Tribe, Inc. as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe's PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

⁶¹ Historically part of Isabella Reservation Area for the Saginaw Chippewa Indian Tribe of Michigan and the Eastern Michigan Service Unit population since 1979.

⁶² The Samish Indian Tribe Nation was Federally acknowledged in April 1996 as documented at 61 FR 15825, April 9, 1996. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

⁶³ CHSDA counties for the Sault Ste. Marie Tribe of Chippewa Indians, Michigan, were designated by regulation (42 CFR 136.22(a)(4)).

⁶⁴ The Shinnecock Indian Nation was Federally acknowledged in June 2010 as documented at 75 FR 34760, June 18, 2010. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

⁶⁵ Lemhi County, ID, has historically been a part of the Fort Hall Service Unit population since 1979.

⁶⁶ The Snoqualmie Indian Tribe was Federally acknowledged in August 1997 as documented at 62 FR 45864, August 29, 1997. The counties listed were designated administratively as the SDA, to function as a CHSDA, for the purposes of operating a CHS program pursuant to the ISDEAA, Public Law 93–638.

⁶⁷ On December 30, 2011 the Office of Assistant Secretary-Indian Affairs reaffirmed the Federal recognition of the Tejon Indian Tribe. Kern County, CA, was designated administratively as part of the Tribe's CHSDA in addition to the CHSDA established by Congress for the State of California. Kern County was not covered when Congress originally established the State of California as a CHSDA excluding certain counties including Sacramento County (25 U.S.C. 1680).

⁶⁸ The counties listed are designated administratively as the SDA, to function as a PRC SDA, for the purposes of operating a PRC program pursuant to the ISDEAA, Public Law 93–638.

⁶⁹ The Secretary acting through the Service is directed to provide contract health services to Turtle Mountain Band of Chippewa Indians that reside in Trenton Service Unit, North Dakota and Montana, in Divide, Mackenzie, and Williams counties in the state of North Dakota and the adjoining counties of Richland, Roosevelt, and Sheridan in the state of Montana (Sec. 815, Pub. L. 94–437).

⁷⁰ Rapides County, LA, has historically been a part of the Tunica Biloxi Service Unit population since 1982.

⁷¹ The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Public Law 115–121, officially recognized the Upper Mattaponi Tribe as an Indian Tribe within the meaning of Federal law, and specified an area for the delivery of Federal services. The IHS administratively designated the Tribe's PRCDA, for the purposes of operating a PRC program, consistent with the Congressional intent expressed in the Recognition Act.

⁷² According to Public Law 100–95, Sec. 12, members of the Wampanoag Tribe of Gay Head (Aquinnah) residing on Martha's Vineyard are deemed to be living on or near an Indian reservation for the purposes of eligibility for Federal services.

⁷³ The counties listed are designated administratively as the SDA, to function as a PRCDA, for the purposes of operating a PRC program pursuant to the ISDEAA, Public Law 93–638.

⁷⁴ The Wilton Rancheria, California had Federal recognition restored in July 2009 as documented at 74 FR 33468, July 13, 2009. Sacramento County, CA, was designated administratively as part of the Rancheria's CHSDA in addition to the CHSDA established by Congress for the State of California. Sacramento County was not covered when Congress originally established the State of California as a CHSDA excluding certain counties including Sacramento County (25 U.S.C. 1680).

⁷⁵ Public Law 100–89, Restoration Act for Ysleta Del Sur and Alabama and Coushatta Tribes of Texas establishes service areas for "members of the Tribe" by sections 101(3) and 105(a) for the Pueblo and sections 201(3) and 206(a) respectively.

Chris B. Buchanan,

Deputy Director for Field Operations, Indian Health Service.

[FR Doc. 2023–00864 Filed 1–17–23; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2020–1 Phase II: Sequence-Based Assays to Quantify the Replication-Competent HIV Reservoir (Topic 78)/PHS 2023–1 Phase I: Point-of-Care HIV Viral Load, Drug Resistance, and Adherence Assays (Topic 114).

Date: February 9, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane Room 3E71, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Samita Sarkar Andreansky, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E71, Rockville, MD 20852, 240–669–2915, samita.andreansky@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00760 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; National Institute of Allergy and Infectious Diseases (NIAID) Clinical Data and Safety Management Center (CDSMC) (U01 Clinical Trial Not Allowed).

Date: February 1, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Kelly L. Hudspeth, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20852, 240–669–5067, kelly.hudspeth@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00767 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Center for Scientific Review; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Pain and Itch Study Section.

Date: February 15–16, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Anne-Sophie Marie Lucie Wattiez, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–4642, anne-sophie.wattiez@nih.gov.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Biology Development and Disease Study Section.

Date: February 15–16, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City, 2399 Jefferson Davis Hwy., Arlington, VA 22202.

Contact Person: Aruna K. Behera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, (301) 435–6809, beheraak@csr.nih.gov.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Drug and Biologic Therapeutic Delivery Study Section (DBTD).

Date: February 15–16, 2023.

Time: 9:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Janice Duy, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–3139, janice.duy@nih.gov.

Name of Committee: Emerging Technologies and Training Neurosciences Integrated Review Group; Bioengineering of Neuroscience, Vision and Low Vision Technologies Study Section.

Date: February 15–16, 2023.

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: Tina Tze-Tsang Tang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Suite 3030, Bethesda, MD 20817, (301) 435-4436, tangt@mail.nih.gov.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function B Study Section.

Date: February 15–16, 2023.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alexei A. Yeliseev, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301-443-0552, yeliseeva@mail.nih.gov.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.

Date: February 15–16, 2023.

Time: 10:00 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: Guoqin Yu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435-1276, guoqin.yu@nih.gov.

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group; Cellular and Molecular Technologies Study Section.

Date: February 15–16, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Tatiana V. Cohen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301-455-2364, tatiana.cohen@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 12, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00872 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS-NIH-CDC-SBIR PHS 2023-1 Phase I/II: Modular Sample Preparation for In-Field Viral Discovery (Topic 120).

Date: February 7, 2023.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 903 South 4th Street, Hamilton, MT 59840 (Virtual Meeting).

Contact Person: Dylan P. Flather, Ph.D., Scientific Review Officer, Scientific Review Program Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 903 South 4th Street, Hamilton, MT 59840, (406) 802-6209, dylan.flather@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00762 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS-NIH-CDC-SBIR PHS 2023-1 Phase I and Phase II: Adjuvant Discovery for Vaccines for Infectious and Immune-Mediated Diseases (Topic 116).

Date: February 9–10, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G22, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Michael M. Opata, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G22, Rockville, MD 20852, 240-627-3319, michael.opata@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00758 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Arthritis and Musculoskeletal and Skin Diseases Initial Review Group; Arthritis and Musculoskeletal and Skin Diseases Special Grants Study Section.

Date: March 2–3, 2023.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Helen Lin, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 800, Bethesda, MD 20892, 301–594–4952, linh1@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00741 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Mentored Career and Research Development Awards (Ks).

Date: February 23–24, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIMHD, DEM II, Suite 800, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Deborah Ismond, Ph.D., Scientific Review Officer, Office of Extramural Research Administration, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–2704, ismondrr@mail.nih.gov.

Name of Committee: National Institute on Minority Health and Health Disparities, Special Emphasis Panel; Misinformation among Populations that Experience Health Disparities (R01—Clinical Trials Optional).

Date: March 16, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIMHD, DEM II, Suite 800, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Karen Nieves-Lugo, M.P.H., Ph.D., Scientific Review Officer, Office of Extramural Research Activities, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 480–4727, karen.nieveslugo@nih.gov.

Name of Committee: National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIH Support for Conferences and Scientific Meetings (R13).

Date: March 17, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIMHD, DEM II, Suite 800, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan K. Navarro, Ph.D., Scientific Review Officer, Office of Extramural Research Administration, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, 301–827–2061, ivan.navarro@nih.gov.

Dated: January 12, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00874 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Communication Disorders Review Committee.

Date: February 9–10, 2023.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Orlando at Seaworld Orlando, FL.

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other, Communication Disorders, National Institute of Health, 6001 Executive Blvd. Rockville, MD 20850, 301–402–3587, rayk@nidcd.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 11, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00752 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; 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 Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below. The open session can be accessed from the Fogarty International Center website <https://www.fic.nih.gov/About/Advisory/Pages/default.aspx>. Members of the public are encouraged to attend virtually as space is limited. Individuals who plan to attend as well as those who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Fogarty International Center Advisory Board.

Date: February 6–7, 2023.

Closed: February 6, 2023, 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate the second level of grant applications.

Place: Fogarty International Center, National Institutes of Health, Lawton Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892.

Open: February 7, 2023, 9:00 a.m. to 3:00 p.m.

Agenda: Update and discussion of current and planned Fogarty International Center activities.

Place: Fogarty International Center, National Institutes of Health, Lawton Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892 (Virtual Meeting).

Meeting Access: <https://www.fic.nih.gov/About/Advisory/Pages/default.aspx>.

Contact Person: Kristen Weymouth, Executive Secretary, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, 301–496–1415, kristen.weymouth@nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at <https://www.nih.gov/about-nih/visitor-information/campus-access-security> for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Additional Health and Safety Guidance: Before attending a meeting at an NIH facility, it is important that visitors review the NIH COVID–19

Safety Plan at <https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/Pages/default.aspx> for information about requirements and procedures for entering NIH facilities, especially when COVID–19 community levels are medium or high. In addition, the Safer Federal Workforce website has FAQs for visitors at <https://www.saferfederalworkforce.gov/faq/visitors/>. Please note that if an individual has a COVID–19 diagnosis within 10 days of the meeting, that person must attend virtually. (For more information please read NIH's Requirements for Persons after Exposure at <https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/persons-after-exposure.aspx> and What Happens When Someone Tests Positive at <https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/test-positive.aspx>.) Anyone from the public can attend the open portion of the meeting virtually via the NIH Videocasting website (<http://videocast.nih.gov>). Please continue checking these websites, in addition to the committee website listed below, for the most up to date guidance as the meeting date approaches.

Information is also available on the Institute's/Center's home page: <http://www.fic.nih.gov/About/Advisory/Pages/default.aspx>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00765 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS Mechanistic Ancillary Studies Review Meeting.

Date: February 27, 2023.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kan Ma, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 814, Bethesda, MD 20892, 301–451–4838, mak2@mail.nih.gov.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS AMS Member Conflict Review Meeting.

Date: February 27, 2023.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bernard Joseph Dardzinski, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard., Room 824, Plaza One, Bethesda, MD 20817, 301–435–1146, bernard.dardzinski@nih.gov.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS AMSC Member Conflict Review Meeting.

Date: March 8, 2023.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Helen Lin, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 800, Bethesda, MD 20892, 301–594–4952, linh1@mail.nih.gov.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS P30 Rheumatic Diseases Research Resource-Based Centers Review Meeting.

Date: March 9–10, 2023.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yasuko Furumoto, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Suite 820, Bethesda, MD 20892, 301–827–7835, yasuko.furumoto@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00743 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Allergy and Asthma Statistical and Clinical Coordinating Center (AA–SCCC) (U01 Clinical Trial Not Allowed)

Date: February 13, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G72, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Lindsey M. Pujanandez, Ph.D., Scientific Review Officer, Scientific

Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G72, Rockville, MD 20852, (240) 627–3206, lindsey.pujanandez@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS).

Dated: January 12, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00866 Filed 1–17–23; 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: Cardiovascular and Respiratory Sciences Integrated Review Group; Integrative Myocardial Physiology/Pathophysiology B Study Section.

Date: February 14–15, 2023.

Time: 8:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Alexandria Old Town, 1900 Diagonal Road, Alexandria, VA 22314.

Contact Person: Kirk E. Dineley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 806E, Bethesda, MD 20892, (301) 867–5309, dineleyke@csr.nih.gov.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Viral Pathogenesis and Immunity Study Section.

Date: February 14–15, 2023.

Time: 9:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Neerja Kaushik-Basu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301)435–1742, kaushikbasun@csr.nih.gov.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.

Date: February 14–15, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jacek Topczewski, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1002A1, Bethesda, MD 20892, (301) 594–7574, topczewskij2@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Skeletal Muscle and Exercise Physiology

Date: February 14, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carmen Bertoni, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 805B Bethesda, MD 20892 (301) 867–5309 bertonic2@csr.nih.gov.

Name of Committee: Cell Biology Integrated Review Group; Development—1 Study Section.

Date: February 14, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Zubaida Saifudeen, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, (301) 827–3029, zubaida.saifudeen@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 11, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00754 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting of the National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Brain Initiative RFA EB-22-001 Review.

Date: February 16, 2023.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Songtao Liu, MD, Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Suite 920, Bethesda, MD 20817, (301) 827-3025, songtao@nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Career Development (Ks) and Conference support (R13) Review.

Date: February 28, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Dem II, Suite 920, 6707 Democracy Blvd. Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Tianhong Wang, Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Blvd. Bethesda, MD 20892, (301) 435-1189, wangt3@mail.nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; POCTRN Centers Review.

Date: March 13-14, 2023.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Dem II, Suite 920 6707 Democracy Blvd, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: John K. Hayes, Scientific Review Officer, 6707 Democracy Blvd, Suite

959, Bethesda, MD 20892, (301) 451-3398 hayesj@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health.)

Dated: January 11, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00753 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Neurological Disorders and Stroke Special Emphasis Panel, which was published in the **Federal Register** on December 15, 2022, FR Doc. 2022-27290, 87 FR 77130.

This notice is being amended to change the format of this meeting from In-person to a Virtual Meeting. The previous meeting, NIH-ZNS1 SRB-P 09 was located at the Canopy by Hilton Washington DC Bethesda North, 940 Rose Avenue, North Bethesda, MD 20852. The meeting date and time remain the same. The meeting is closed to the public.

Dated: January 12, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00867 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning

individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Partnerships for the Development of Novel Therapeutics to Combat Select Antibiotic Resistant Bacteria and Fungi (R01 Clinical Trial Not Allowed).

Date: February 9-10, 2023.

Time: 9:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E71A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Patricia A. Gonzales Hurtado, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E71A, Rockville, MD 20852, 240-627-3556, Patricia.Gonzales@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00761 Filed 1-17-23; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; NIGMS Pathway to Independence (K99/R00) Special Emphasis Panel.

Date: March 27-28, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: John J. Laffan, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18J, Bethesda, MD 20892, 301-594-2773, laffanjo@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 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00751 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Transplantation Statistical and Clinical Coordinating Center (T-SCCC) (U01 Clinical Trial Not Allowed).

Date: February 13, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Tara Capece, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities,

National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20852, 240-191-4281, capecet2@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 12, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00868 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Biospecimen Science and Use of PLCO Biospecimens.

Date: February 14, 2023.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Susan Lynn Spence, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850, 240-620-0819, susan.spence@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Immune Monitoring and Analysis Centers Review (U24).

Date: February 15, 2023.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240-276-5122, hasan.siddiqui@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Translational Research Centers for Early Detection of Liver Cancer.

Date: February 23, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240-276-6371, decluej@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP-5: NCI Clinical and Translational Cancer Research.

Date: February 27-28, 2023.

Time: 9:30 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240-276-5122, hasan.siddiqui@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP-6: SBIR Contract Review.

Date: March 7, 2023.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Shakeel Ahmad, Ph.D., Branch Chief, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850, 240-276-6442, ahmads@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; R13 Conference Grant Review.

Date: March 7, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W542, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Biman Chandra Paria, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W542, Rockville, Maryland 20850, 240-858-3814, pariab@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Clinical Sites for the HIV/Cervical Cancer Prevention 'CASCADE' Clinical Trials Network.

Date: March 9, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240-672-6175, singhshr@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Informatics Method for Cancer Research.

Date: March 9-10, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Susan Lynn Spence, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Rockville, Maryland 20850, 240-620-0819, susan.spence@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Prevention-Interception Targeted Agent Discovery Program (CAP-IT) Centers (U54).

Date: March 14, 2023.

Time: 11:00 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240-276-5122, hasan.siddiqui@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP-4: SBIR Contract Review Meeting.

Date: March 17, 2023.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240-276-6371, decluej@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; EBV Infections and Cancer Health Disparities.

Date: March 23, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850, 240-276-5856, nadeem.khan@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Metastasis Research Network (U01).

Date: March 24, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624 Rockville, Maryland 20850, 240-276-6132, tushar.deb@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP-7: NCI Clinical and Translational Cancer Research.

Date: March 29-30, 2023.

Time: 9:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Robert F. Gahl, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W260, Rockville, Maryland 20850, 240-276-7869, robert.gahl@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Advanced Development of Informatics Technologies for Cancer Research.

Date: March 31, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room

7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240-276-6371, decluej@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP-6: NCI Clinical and Translational Cancer Research.

Date: April 7, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W120 Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850, 240-276-6457, mh101v@nih.gov,

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 12, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00873 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be held as a virtual meeting and is open to the public, as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (<http://videocast.nih.gov/>).

A portion of the meeting will be closed to the public in accordance with

the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The intramural programs and projects as well as the grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with intramural programs and projects as well as the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Drug Abuse.

Date: February 8, 2023.

Closed: 11:00 a.m. to 12:15 p.m.

Agenda: To review and evaluate grant applications.

Closed: 12:15 p.m. to 12:45 p.m.

Agenda: Report to Council from the NIDA Board of Scientific Counselors (BSC).

Open: 1:15 p.m. to 5:00 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Susan R.B. Weiss, Ph.D., Director, Division of Extramural Research, Office of the Director, National Institute on Drug Abuse, NIH, Three White Flint North, RM 09D08, 11601 Landsdown Street, Bethesda, MD 20852, 301-443-6480, sweiss@nida.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to Gillian Acca at gillian.acca@nih.gov. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: www.drugabuse.gov/NACDA/NACDAHome.html, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00757 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; NINDS BRAIN Review (R01 & U01) Meeting.

Date: February 9–10, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Mir Ahamed Hossain, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892, 301-496-9223, mirahamed.hossain@nih.gov.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; F99, K99 & K01 Review.

Date: February 13–14, 2023.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications

Place: The Melrose Georgetown Hotel, 2430 Pennsylvania Avenue NW, Washington, DC 20037.

Contact Person: Lataisia Cherie Jones, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892, 301-496-9223, lataisia.jones@nih.gov.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; HEAL Initiative: Biomarker review meeting.

Date: February 13, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Abhignya Subedi, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892, 301-480-6938, abhi.subedi@nih.gov.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; HEAL Initiative: Planning Studies for Initial Analgesic Development [Small Molecules and Biologics] (R61 Clinical Trial Not Allowed).

Date: February 14, 2023.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Bo-Shiun Chen, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892, 301-496-9223, bo-shiun.chen@nih.gov.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Initial Translation Efforts for Non-addictive Analgesic Therapeutics Development (HEAL U19).

Date: February 15, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Abhignya Subedi, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892-9529, 301-480-6938, abhi.subedi@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00766 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the

provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Allergy, Immunology, and Transplantation Research Committee Allergy, Immunology, and Transplantation Research Committee (AITC).

Date: February 9–10, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Bethesda, MD 20892, 240–507–9685, thomas.conway@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00763 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Chemosensory Fellowship Review.

Date: February 8, 2023.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Shiguang Yang, DVM, Ph.D. Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301–496–8683, yangshi@nidcd.nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Fellowships.

Date: February 10, 2023.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Orlando at Seaworld Orlando, FL.

Contact Person: Katherine Shim, Ph.D. Scientific Review Officer, Division of Extramural Activities, NIH/NIDCD, 6001 Executive Blvd., Room 8351 Bethesda, MD 20892, 301–496–8683, katherine.shim@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Applications for Research Opportunities for New Investigators to Promote Workforce Diversity.

Date: February 23, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, kellya2@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Voice, Speech, Language Fellowship Review.

Date: February 28, 2023.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, kellya2@nih.gov.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Voice,

Speech, and Language Applications for Research Opportunities for New Investigators to Promote Workforce Diversity.

Date: February 28, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351 Bethesda, MD 20892, (301) 451–6339, kellya2@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 11, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00759 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; REDI–R25.

Date: February 24, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan Tadeu Rebestuni, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–2879, Ivan.rebestuni@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00749 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Interventions that Address Structural Racism to Reduce Kidney Health Disparities Consortium.

Date: February 21, 2023.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Diabetes and Digestive and Kidney Diseases, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892-2542, (301) 594-8898, barnardm@extra.niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00755 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 HEAL (Helping to End Addiction Long-Term) Multi-Disciplinary Working Group.

The meeting will be held virtually and open to the public as indicated below. Individuals who plan to participate and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The program documents and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the program documents, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: HEAL Multi-Disciplinary Working Group.

Date/Time: February 6, 2023, 11:00 a.m. to 4:00 p.m. Eastern Standard Time (EST) and February 15-16, 2023, 11:00 a.m. to 3:00 p.m. Eastern Standard Time (EST).

Agenda: To review and evaluate Helping to End Addiction Long-Term (HEAL) Initiative projects and obtain expertise from MDWG relevant to the NIH HEAL Initiative and to specific HEAL projects.

Open: February 6, 2023, 11:00 a.m. to 12:30 p.m. EST.

Closed: February 6, 2023, 12:30 p.m. to 4:00 p.m. EST.

Open: February 15, 2023, 11:00 a.m. to 3:00 p.m. EST.

Open: February 16, 2023, 11:00 a.m. to 3:00 p.m. EST.

Place: National Institutes of Health, Building 1, Wilson Hall, 1 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rebecca G. Baker, Ph.D., Office of the Director, National Institutes of Health, 1 Center Drive, Room 103A, Bethesda, MD 20892, (301) 402-1994, Rebecca.baker@nih.gov.

The meeting agenda will be available on the HEAL Initiative website: <https://heal.nih.gov/news>. Individuals are encouraged to access the meeting web page to stay abreast of the most current information regarding the meeting.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 11, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00756 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; REDI-K01.

Date: February 13, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan Tadeu Rebestini, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496-2879, Ivan.rebestini@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-00750 Filed 1-17-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Arthritis and Musculoskeletal and Skin Diseases Initial Review Group; Arthritis and Musculoskeletal and Skin Diseases Clinical Trials Study Section.

Date: February 16–17, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis Musculoskeletal and Skin Diseases, 6701 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bernard Joseph Dardzinski, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard., Room 824, Plaza One, Bethesda, MD 20817, 301–435–1146, bernard.dardzinski@nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00742 Filed 1–17–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds of Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase from the previous quarter. For the calendar quarter beginning January 1, 2023, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of January 1, 2023.

FOR FURTHER INFORMATION CONTACT:

Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621

provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2022–23, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2023, and ending on March 31, 2023. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties are increased from the previous quarter. These interest rates are subject to change for the calendar quarter beginning April 1, 2023, and ending on June 30, 2023.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	.....
070175	013176	9	9	.....
020176	013178	7	7	.....
020178	013180	6	6	.....
020180	013182	12	12	.....
020182	123182	20	20	.....
010183	063083	16	16	.....
070183	123184	11	11	.....
010185	063085	13	13	.....
070185	123185	11	11	.....
010186	063086	10	10	.....

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1-1-99) (percent)
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2
040122	063022	4	4	3
070122	093022	5	5	4
100122	123122	6	6	5
010123	033123	7	7	6

Dated: January 11, 2023.

Jeffrey Caine,

Chief Financial Officer, U.S. Customs and Border Protection.

[FR Doc. 2023-00836 Filed 1-17-23; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2008-0010]

Board of Visitors for the National Fire Academy

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice of open federal advisory committee meeting.

SUMMARY: The Board of Visitors for the National Fire Academy (Board) will meet virtually on Wednesday, March 8, 2023, to discuss and support the academic stature of the National Fire Academy. The meeting will be open to the public.

DATES: The meeting will take place on Wednesday, March 8, 2023, 2 p.m. to 4 p.m. Eastern Standard Time. Please note that the meeting may close early if the Board has completed its business.

ADDRESSES: Members of the public who wish to participate in the virtual conference should contact Deborah

Gartrell-Kemp as listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business on February 28, 2023, to obtain the call-in number and access code for the virtual meeting on March 8, 2023. For more information on services for individuals with disabilities or to request special assistance, contact Deborah Gartrell-Kemp as soon as possible. The Board is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Deborah Gartrell-Kemp as listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Board as listed in the **SUPPLEMENTARY INFORMATION** section. Participants seeking to have their comments considered during the meeting should submit them in advance or during the public comment segment. Comments submitted up to 30 days after the meeting will be included in the public record and may be considered at the next meeting. Comments submitted in advance must be identified by Docket ID FEMA-2008-0010 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Electronic Delivery:* Email Deborah Gartrell-Kemp at Deborah.Gartrell-Kemp@fema.dhs.gov no later than February 28, 2023, for consideration at the March 8, 2023, meeting.

Instructions: All submissions received must include the words “Federal Emergency Management Agency” and the Docket ID for this action. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may wish to view the Privacy and Security Notice via a link on the homepage of www.regulations.gov.

Docket: For access to the docket and to read background documents or comments received by the National Fire Academy Board of Visitors, go to <http://www.regulations.gov>, click on “Advanced Search,” then enter “FEMA-2008-0010” in the “By Docket ID” box, then select “FEMA” under “By Agency,” and then click “Search.”

FOR FURTHER INFORMATION CONTACT:

Designated Federal Officer: Eriks Gabliks, (301) 447-1117, Eriks.Gabliks@fema.dhs.gov.

Logistical Information: Deborah Gartrell-Kemp, (301) 447-7230, Deborah.Gartrell-Kemp@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: The Board will meet virtually on Wednesday, March 8, 2023. The meeting will be open to the public. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. Appendix.

Purpose of the Board

The purpose of the Board is to review annually the programs of the National Fire Academy (Academy) and advise the Administrator of the Federal Emergency Management Agency (FEMA), through the United States Fire Administrator, on the operation of the Academy and any improvements therein that the Board deems appropriate. In carrying out its responsibilities, the Board examines Academy programs to determine whether these programs further the basic missions approved by the FEMA Administrator, examines the physical plant of the Academy to determine the adequacy of Academy facilities, and examines funding levels for Academy programs. Annually, the Board submits a written report through the United States Fire Administrator to the FEMA Administrator. The report provides detailed comments and recommendations regarding Academy operations.

Agenda

On Wednesday, March 8, 2023, there will be four sessions, with deliberations and voting at the end of each session as necessary:

1. The Board will discuss United States Fire Administration Data, Research, Prevention and Response.
2. The Board will discuss deferred maintenance and capital improvements on the National Emergency Training Center campus and Fiscal Year 2023 and beyond Budget Request/Budget Planning.
3. The Board will deliberate and vote on recommendations on Academy program activities to include developments, deliveries, staffing, admissions, and strategic plan.
4. There will also be an update on the Board of Visitors Subcommittee Groups for the Professional Development Initiative Update and the National Fire Incident Report System.

There will be a 10-minute comment period after each agenda item and each speaker will be given no more than 2 minutes to speak. Please note the public comment period at the meeting may end before the time indicated following the last call for comments. Contact Deborah Gartrell-Kemp to register as a speaker.

Meeting materials will be posted by March 1, 2023, at <https://www.usfa.fema.gov/training/nfa/about/bov.html>.

Eriks J. Gabliks,

Superintendent, National Fire Academy, United States Fire Administration, Federal Emergency Management Agency.

[FR Doc. 2023-00875 Filed 1-17-23; 8:45 am]

BILLING CODE 9111-74-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR-7070-N-02]

30-Day Notice of Proposed Information Collection: Housing Choice Voucher Program and Tribal HUD-VASH, OMB Control No.: 2577-0169

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 17, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to OIRA_submission@omb.eop.gov or 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:

Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette.Pollard@hud.gov or telephone 202-402-3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Copies of available

documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 26, 2022 at 87 FR 64711.

A. Overview of Information Collection

Title of Information Collection: Housing Choice Voucher (HCV) Program, Project-based Voucher (PBV) Program and Tribal HUD-VASH.

OMB Approval Number: 2577-0169.

Type of Request: Reinstatement, with change of previously approved collection for which approval has expired.

Form Numbers: HUD-50164, HUD-52515, HUD-52517, HUD-52530A Part 1, HUD-52530A Part 2, HUD-52530B Part 1, HUD-52530B Part 2, HUD-52530C, HUD-52531A, HUD-52531B, HUD-52578B, HUD-52580, HUD-52580A, HUD-52641, HUD-52641A, HUD-52642, HUD-52646, HUD-52649, HUD-52665, HUD-52667, HUD-5980.

Description of the need for the information and proposed use:

Public housing agencies (PHAs) assist very low-income families to lease housing on the private rental market. PHAs maintain records on participant eligibility, unit acceptability, housing assistance payments, and budget and payment documentation. PHAs may also project-base a portion of their vouchers or use their vouchers under the Homeownership option.

When new funding is available, PHAs provide information on their qualifications and experience to administer additional vouchers or provide specific funded services and HUD scores applications based on the information required in the funding notice. The PHAs must establish a utility allowance schedule for all utilities and other services. Units must be inspected using HUD-prescribed forms to determine if the units meet the Housing Quality Standards (HQS) of the HCV program. After the PHA provides a briefing and information packet to the family, the PHA issues the family a voucher to search for a unit. When the family finds a unit, they submit a Request for Tenancy Approval when it finds a unit which is suitable for its needs. With approval from the PHA, the family may move to another unit with continued assistance using the same forms and process already described. If the family exercises their right to port

out of the PHA's jurisdiction, the initial PHA will use a standardized form to submit portability information to the receiving PHA who will also use the form for monthly portability billing. PHAs and owners will enter into housing assistance payments (HAP) contract that provides information on rents, payments, certifications, notifications, and other HCV requirements. A Tenancy Addendum for the HCV program is included in the HAP contract as well as incorporated in the lease between the owner and the family. Families that participate in the Homeownership option will execute a statement regarding their responsibilities and execute contracts of sale including an additional contract of sale for new construction units.

PHAs participating in the PBV program will enter into Agreements with owners for developing projects, HAP contracts with owners of existing housing and New Construction/ Rehabilitation projects, and a Statement of Family Responsibilities with the family. A lease addendum is executed between the family and the owner of a PBV project.

This information collection also includes the Tribal HUD-VA Supportive Housing Program (Tribal HUD-VASH), which provides rental assistance and supportive services to Native American veterans who are Homeless or At Risk of Homelessness living on or near a reservation or other Indian areas. Housing assistance under this program is made available by grants to tribes and Tribally Designated Housing Entities (TDHEs) that are eligible to receive Indian Housing Block Grant (IHBG) funding under the Native American Housing Assistance and Self-Determination Act (25 U.S.C. 4101) (NAHASDA). Tribes request Tenant-Based and/or Project-Based Rental Assistance by the number of bedrooms in a rental unit. Grants and renewal funds are awarded based on the number rental units (Tenant-Based and Project-Based Rental Assistance) approved by HUD. Grants include an additional amount for administrative costs and eligible Homeless veterans receive case management services through the Department of Veterans Affairs. Information collection requirements for this demonstration program are based on the **Federal Register** Notice, "Implementation of the Tribal HUD-VA Supportive Housing Program" (FR 6091-N-01) and renewal funding criteria established in PIH Notice 2018-10, "Procedural Guidance for Tribal HUD-VA Supportive Housing Renewal Grant Applications."

The following changes were made to comply with current laws and to fix typos:

(1) HUD-52641 Housing Assistance Payment (HAP) Contract and the HUD-52641A Tenancy Addendum were updated to reflect requirements in the Permanently Protecting Tenants at Foreclosure Act of 2017 (Pub. L. 115-174).

(2) HUD-52649 Statement of Homeownership Obligations was updated to reflect the requirement in *Housing Counseling: New Certification Requirements* (81 FR 90632 (Dec 14, 2016)).

(3) HUD-52531A Part 1: PBV Agreement to Enter into HAP Contract for New Construction and Rehabilitation was updated to fix a typo.

(4) HUD-52530A Part 1 and HUD-52530B Part 1 were updated to reflect changes made in the *Implementation of the Fostering Stable Housing Opportunities Amendments* (87 FR 3570 (Jan. 24, 2022)). The term "designated" was changed to "contracted" per PIH Notice 2017-21 Implementation Guidance: Housing Opportunity Through Modernization Act 2016 (HOTMA)—Housing Choice Voucher (HCV) and Project-Based Voucher (PBV) Provisions, Attachment E. A few typos were also corrected.

(5) When referring to discrimination based on sex, added "including sexual orientation and gender identity" in parentheses to clarify that protections are provided under the Fair Housing Act. This change was made to the following forms: HUD-52641 HAP Contract, HUD-52641A Tenancy Addendum, HUD-52642 Manufactured Home Space Rental HAP Contract, HUD-52530A PBV HAP Contract New Construction Part 2, HUD-52530B PBV HAP Contract Existing Housing Part 2, HUD-52530C PBV Tenancy Addendum, HUD-52531B Agreement to Enter in a HAP Contract Part 1, HUD-52578B PBV Statement of Family Responsibilities.

(6) Reformatted the HUD-52646 Voucher and the HUD-5980 Tribal HUD-VASH Leasing Performance Report to ensure the forms are 508 compliant.

(7) Updated PRA Burden Statements and the Privacy Act Statements to ensure inclusion of required components.

(8) Added language near the signature line on several forms to notify those signing the forms of the penalty for providing false information.

(9) Added required language related to the Violence Against Women Act to the HUD-52642 Manufactured Home Space Rental HAP Contract.

Respondents: State and Local Governments, Tribes and TDHEs, owners of rental housing.

Estimated Number of Respondents: 2,244 PHAs and Tribal HUD-VASH grantees.

Estimated Number of Responses: 5,762,595.
Frequency of Response: Varies by form.

Description	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hours
Application (HUD-52515)	300.00	1.00	300.00	5.00	1,500.00
Application for Federal Assistance (SF-424) ¹	300.00	1.00	300.00	0.75	225.00
Applicant/Recipient Disclosure/Update Report (HUD-2880) ²	300.00	1.00	300.00	0.08	24.00
Acknowledgement of Application Receipt (HUD-2993) ³	300.00	1.00	300.00	0.08	24.00
Certification of Consistency with the Consolidated Plan (HUD-2991) ⁴	300.00	1.00	300.00	0.08	24.00
Disclosure of Lobbying Activities (SF-LLL)	300.00	1.00	300.00	0.08	24.00
Tenant-Furnished Utilities (HUD-52667)	2,192.00	350.00	767,200.00	0.25	191,800.00
Inspection Checklist (HUD-52580 and 52580-A)	2,192.00	950.00	2,082,400.00	0.50	1,041,200.00
Inspection Form (HUD-52580A)	2,192.00	950.00	2,082,400.00	0.25	520,600.00
Request for Tenancy Approval (HUD-52517)	2,192.00	55.00	120,560.00	0.50	60,280.00
Notice of Unit Approval/Denial	2,192.00	55.00	120,560.00	0.50	60,280.00
Voucher (HUD-52646)	2,192.00	60.00	131,520.00	0.05	6,576.00
Information Packet	2,192.00	55.00	120,560.00	1.00	120,560.00
PHA Information to Owner about tenant	2,192.00	55.00	120,560.00	0.50	60,280.00
Portability Information (HUD-52665)	2,192.00	10.00	21,920.00	0.50	10,960.00
PHA Notification to Field Office of Insufficient Funds for portability moves	400.00	1.00	400.00	0.50	200.00
HAP Contracts (HUD-52641, 52641-A, 52642, 52642)	2,192.00	65.00	142,480.00	0.50	71,240.00
Statement of Homeowner Obligation (HUD-52649)	100.00	10.00	1,000.00	0.25	250.00
Homeownership: Required Contract of Sale Provisions	100.00	10.00	1,000.00	0.25	250.00
PHA PBV Public Notice of RFP	200.00	1.00	200.00	1.00	200.00
PHA PBV Notice of Owner Selection	200.00	1.00	200.00	0.50	100.00
PBV Agreement to enter into a HAP Contract (HUD-52531A and B)	100.00	1.00	100.00	0.50	50.00
PBV NC/R HAP Contract (HUD-52530A, Part 1 & 2)	100.00	1.00	100.00	2.00	200.00
PBV Existing HAP Contract (HUD-52530B, Part 1 & 2)	100.00	1.00	100.00	2.00	200.00
PBV Tenancy Addendum (HUD-52530C)	650.00	33.00	21,450.00	0.25	5,362.50
PBV Statement of Family Responsibilities (HUD-52578B)	650.00	33.00	21,450.00	0.25	5,362.50
PHA Notice of Intent to Project-Base Vouchers to FO	218.00	1.00	218.00	1.00	218.00
Owner Request to HUD FO for Approval to Terminate PBV HAP Contract	20.00	1.00	20.00	1.00	20.00
Owner Notice to FO and tenants to Terminate PBV HAP Contract	20.00	30.00	600.00	0.25	150.00
Legal Opinion that PHA's unit/project is no longer PHA-owned	350.00	1.00	350.00	1.00	350.00
Notification to Field Office of change in ownership if project becomes PHA-owned.	500.00	1.00	500.00	1.00	500.00
Joint PHA/Independent entity certification regarding no legal, financial, other ties.	90.00	1.00	90.00	0.50	45.00
Certification regarding previously approved independent entity	800.00	1.00	800.00	0.50	400.00
Notice of Rent reasonableness determinations completed by independent entity	150.00	3.00	450.00	2.00	900.00
Notice of Review of PBV selection process by independent entity	90.00	2.00	180.00	3.00	540.00
Waikoloa Maneuver Area public notice (HUD-50164)	100.00	1.00	100.00	0.30	30.00
FUP Statement of Need	300.00	1.00	300.00	2.00	600.00
FUP Memorandum of Understanding	300.00	1.00	300.00	5.00	1,500.00
FUP Evidence of a self-sufficiency program	175.00	1.00	175.00	0.50	88.00
HUD-VASH VAMC letter of support	50.00	1.00	50.00	5.00	250.00
HUD-VASH signed formal agreement	50.00	1.00	50.00	6.00	300.00
HUD-VASH boundary description	50.00	1.00	50.00	0.50	25.00
New Inspection Protocol	350.00	1.00	350.00	0.50	175.00
Tribal HUD-VASH application materials	26.00	1.00	26.00	8.00	208.00
Tribal HUD-VASH Leasing Performance Report (HUD-5980)	26.00	1.00	26.00	1.00	26.00
Totals	2,244	1,853.00	5,762,595.00	57.17	2,164,096.50

¹ This form is included in another PRA (OMB 2501-0032). The additional burden hours for the voucher program are included in this application (4040-0004).
² This form is included in another PRA (OMB 2501-0032). The additional burden hours for the voucher program are included in this application (2510-0011).
³ This form is included in another PRA (OMB 2501-0032). The additional burden hours for the voucher program are included in this application (2577-0259).
⁴ This form is included in another PRA (OMB 2501-0032). The additional burden hours for the voucher program are included in this application (2506-0112).

Average Hours per Response: 1.24.

Total Estimated Burdens Hours: 2,164,096.50.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) 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 those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(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.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer,
Office of Policy Development and Research,
Chief Data Officer.

[FR Doc. 2023-00805 Filed 1-17-23; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2022-0154;
FXIA16710900000-223-FF09A30000]

Marine Mammal Protection Act; Receipt of Permit Application

AGENCY: Fish and Wildlife Service,
Interior.

ACTION: Notice of receipt of permit
application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on species for which the Service has jurisdiction under the Marine Mammal Protection Act (MMPA). With some exceptions, the MMPA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The MMPA also requires that we invite public comment before issuing a permit for any activity otherwise prohibited with respect to any species.

DATES: We must receive comments by February 17, 2023.

ADDRESSES:

Obtaining Documents: The application, application supporting material, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS-HQ-IA-2022-0154.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet:* <https://www.regulations.gov>.

Search for and submit comments on Docket No. FWS-HQ-IA-2022-0154.

- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS-HQ-IA-2022-0154; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041-3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT:

Brenda Tapia, by phone at 703-358-2185 or via email at DMAFR@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on applications. Before issuing permits, we take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or fax, or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold

this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 104(c) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the MMPA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Service regulations regarding permits for any activity otherwise prohibited by the MMPA with respect to any foreign or native marine mammal species are available in 50 CFR part 18. Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the marine mammal application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

III. Permit Application

We invite comments on the following application.

Marine Mammal Protection Act

Applicant: USGS Alaska Science Center, Anchorage, AK; Permit No. 33776D

The applicant requests a reissuance and amendment of their permit to conduct tagging, biopsy sampling, collection of salvaged and beach cast samples, boat surveys, and unmanned aerial systems surveys, and to export/re-export collected samples from wild walrus (*Odobenus rosmarus*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make a decision regarding permit issuance. If we issue a permit to the applicant in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to <https://www.regulations.gov>

regulations.gov and search for "12345A".

V. Authority

We issue this notice under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023-00882 Filed 1-17-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2023-0010; FXIA1671090000-234-FF09A30000]

Foreign Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by February 17, 2023.

ADDRESSES:

Obtaining Documents: The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS-HQ-IA-2023-0010.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet:* <https://www.regulations.gov>. Search for and submit comments on Docket No. FWS-HQ-IA-2023-0010.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS-HQ-IA-2023-0010; U.S. Fish and Wildlife

Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041-3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT:

Brenda Tapia, by phone at 703-358-2185 or via email at DMAFR@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are (1) those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted

on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Applications

We invite comments on the following applications.

Applicant: Henson Robinson Zoo, Springfield, IL; Permit No. PER0056231

The applicant requests an interstate commerce permit to transfer four male and two female African black footed penguins (*Spheniscus demersus*) from Tanganyika Wildlife Park, Sedgewick, Kansas, for the purpose of enhancing the propagation or survival of the species. This notification is for a single activity.

Applicant: USFWS Texas Coastal Ecological Services Field Office, Corpus Christi, TX; Permit No. PER0321671

The applicant requests a permit to import one juvenile Kemp's ridley sea turtle (*Lepidochelys kempii*) from The Anglesey Sea Zoo, Isle of Anglesey, United Kingdom, for the purpose of enhancing the propagation or survival of the species. This notification is for a single import.

Applicant: International Center for the Preservation of Wild Animals dba The Wilds, Cumberland, OH; Permit No. PER0051886

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to add southern white rhinoceros (*Ceratotherium simum simum*) to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 1-year period.

Multiple Trophy Applicants

The following applicants request permits to import sport-hunted trophies of male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancing the propagation or survival of the species.

- Loyd D. Keith, Jr., Madison, TN; Permit No. 60450D
- Browder Lee Graves, Uvalde, TX; Permit No. PER0326840

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to [regulations.gov](https://www.regulations.gov) and search for "12345A".

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023-00880 Filed 1-17-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2022-0175; FXIA16710900000-234-FF09A30000]

Foreign Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by February 17, 2023.

ADDRESSES:

Obtaining Documents: The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS-HQ-IA-2022-0175.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet:* <https://www.regulations.gov>. Search for and submit comments on Docket No. FWS-HQ-IA-2022-0175.
- *U.S. Mail:* Public Comments Processing, Attn: Docket No. FWS-HQ-IA-2022-0175; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041-3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Brenda Tapia, by phone at 703-358-2185 or via email at DMAFR@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will

take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities.

Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Applications

We invite comments on the following applications.

Applicant: International Center for The Preservation of Wild Animals dba The Wilds, Cumberland, OH; Permit No. PER0092994

The applicant requests a permit to export four captive-bred male cheetahs (*Acinonyx jubatus*) from the Wilds, Cumberland, Ohio, to Greater Vancouver Zoo, Aldergrove, Canada, for the purpose of enhancing the propagation or survival of the species. This notification is for a single export.

Applicant: Tanganyika Wildlife Foundation, Goddard, KS; Permit No. 83605D

On April 11, 2022, we published a **Federal Register** notice inviting the public to comment on an application for a permit to conduct certain activities with endangered species (87 FR 21131). We are now reopening the comment period to allow the public the opportunity to review additional information submitted for the potential issuance of a permit to import three individual captive-bred lar gibbons (*Hylobates lar*) (one male, one female, and one juvenile) from Nature Resource Network, S.R.O., (společnost s ručením omezeným), Czech Republic, for the purpose of enhancing the propagation or survival of the species. This notification is for a single import.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to [regulations.gov](https://www.regulations.gov) and search for "12345A".

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023-00883 Filed 1-17-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/AOA501010.999900]

Rate Adjustments for Indian Irrigation Projects

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Indian Affairs (BIA) owns or has an interest in irrigation projects located on or associated with various Indian reservations throughout the United States. We are required to establish irrigation assessment rates to recover the costs to administer, operate, maintain, and rehabilitate these projects. We request your comments on the proposed rate adjustments.

DATES: Interested parties may submit comments on the proposed rate adjustments on or before March 20, 2023.

ADDRESSES: All comments on the proposed rate adjustments must be in writing. You may send comments via email to comments@bia.gov. Please reference "Rate Adjustments for Indian Irrigation Projects" in the subject line. Or you may submit comments to the Program Specialist, Division of Water and Power, Office of Trust Services, 2021 4th Avenue North, Billings, Montana 59101.

FOR FURTHER INFORMATION CONTACT: Leslie Underwood, Program Specialist, Division of Water and Power, Office of Trust Services, (406) 657-5985. For details about a particular irrigation project, please use the table in the **SUPPLEMENTARY INFORMATION** section to contact the BIA regional or local office where the project is located.

SUPPLEMENTARY INFORMATION: The first table in this notice provides contact information for individuals who can give further information about the irrigation projects covered by this notice. The second table provides the

proposed rates for calendar year (CY) 2024 for all irrigation projects.

What is the meaning of the key terms used in this notice?

In this notice:

Administrative costs mean all costs we incur to administer our irrigation projects at the local project level and are a cost factor included in calculating your operation and maintenance assessment. Costs incurred at the local project level do not normally include agency, region, or central office costs unless we state otherwise in writing.

Assessable acre means lands designated by us to be served by one of our irrigation projects, for which we collect assessments in order to recover costs for the provision of irrigation service. (*See total assessable acres.*)

BIA means the Bureau of Indian Affairs.

Bill means our statement to you of the assessment charges and/or fees you owe the United States for administration, operation, maintenance, and/or rehabilitation. The date we mail or hand-deliver your bill will be stated on it.

Costs means the costs we incur for administration, operation, maintenance, and rehabilitation to provide direct support or benefit to an irrigation facility. (*See administrative costs, operation costs, maintenance costs, and rehabilitation costs.*)

Customer means any person or entity to whom or to which we provide irrigation service.

Due date is the date on which your bill is due and payable. This date will be stated on your bill.

I, me, my, you and your mean all persons or entities that are affected by this notice.

Irrigation project means a facility or portion thereof for the delivery, diversion, and storage of irrigation water that we own or have an interest in, including all appurtenant works. The term "irrigation project" is used interchangeably with irrigation facility, irrigation system, and irrigation area.

Irrigation service means the full range of services we provide customers of our irrigation projects. This includes our activities to administer, operate, maintain, and rehabilitate our projects in order to deliver water.

Maintenance costs means costs we incur to maintain and repair our irrigation projects and associated equipment and is a cost factor included in calculating your operation and maintenance assessment.

Operation and maintenance (O&M) assessment means the periodic charge you must pay us to reimburse costs of

administering, operating, maintaining, and rehabilitating irrigation projects consistent with this notice and our supporting policies, manuals, and handbooks.

Operation or operating costs means costs we incur to operate our irrigation projects and equipment and is a cost factor included in calculating your O&M assessment.

Past due bill means a bill that has not been paid by the close of business on the 30th day after the due date as stated on the bill. Beginning on the 31st day after the due date, we begin assessing additional charges accruing from the due date.

Rehabilitation costs means costs we incur to restore our irrigation projects or features to original operating condition or to the nearest state which can be achieved using current technology and is a cost factor included in calculating your O&M assessment.

Responsible party means an individual or entity that owns or leases land within the assessable acreage of one of our irrigation projects and is responsible for providing accurate information to our billing office and paying a bill for an annual irrigation rate assessment.

Total assessable acres mean the total acres served by one of our irrigation projects.

Water delivery is an activity that is part of the irrigation service we provide our customers when water is available.

We, us, and our mean the United States Government, the Secretary of the Interior, the BIA, and all who are authorized to represent us in matters covered under this notice.

Does this notice affect me?

This notice affects you if you own or lease land within the assessable acreage of one of our irrigation projects or if you have a carriage agreement with one of our irrigation projects.

Where can I get information on the regulatory and legal citations in this notice?

You can contact the appropriate office(s) for the irrigation project that serves you. Please use the table in the **SUPPLEMENTARY INFORMATION** section to contact the regional or local office where the project is located.

Why are you publishing this notice?

We are publishing this notice to inform you that we propose to adjust our irrigation assessment rates. This notice is published in accordance with the BIA's regulations governing its operation and maintenance of irrigation projects, found at 25 CFR part 171. This

regulation provides for the establishment and publication of the proposed rates for annual irrigation assessments as well as related information about our irrigation projects.

What authorizes you to issue this notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has in turn delegated this authority to the Assistant Secretary—Indian Affairs under part 209, chapter 8.1A, of the Department of the Interior's Departmental Manual.

When will you put the rate adjustments into effect?

We will put the rate adjustments into effect for CY 2024.

How do you calculate irrigation rates?

We calculate annual irrigation assessment rates in accordance with 25 CFR part 171.500 by estimating the annual costs of operation and maintenance at each of our irrigation projects and then dividing by the total assessable acres for that particular irrigation project. The result of this calculation for each project is stated in the rate table in this notice.

What kinds of expenses do you consider in determining the estimated annual costs of operation and maintenance?

Consistent with 25 CFR part 171.500, these expenses include the following:

- (a) Personnel salary and benefits for the project engineer/manager and project employees under the project engineer/manager's management or control;
- (b) Materials and supplies;
- (c) Vehicle and equipment repairs;
- (d) Equipment costs, including lease fees;
- (e) Depreciation;
- (f) Acquisition costs;
- (g) Maintenance of a reserve fund available for contingencies or emergency costs needed for the reliable operation of the irrigation facility infrastructure;
- (h) Maintenance of a vehicle and heavy equipment replacement fund;
- (i) Systematic rehabilitation and replacement of project facilities;
- (j) Contingencies for unknown costs and omitted budget items; and
- (k) Other expenses we determine necessary to properly perform the activities and functions characteristic of an irrigation project.

When should I pay my irrigation assessment?

We will mail or hand deliver your bill notifying you (a) the amount you owe to the United States and (b) when such amount is due. If we mail your bill, we will consider it as being delivered no later than five business days after the day we mail it. You should pay your bill by the due date stated on the bill.

What information must I provide for billing purposes?

All responsible parties are required to provide the following information to the billing office associated with the irrigation project where you own or lease land within the project's assessable acreage or to the billing office associated with the irrigation project with which you have a carriage agreement:

- (1) The full legal name of the person or entity responsible for paying the bill;
- (2) An adequate and correct address for mailing or hand delivering our bill; and
- (3) The taxpayer identification number or social security number of the person or entity responsible for paying the bill.

Why are you collecting my taxpayer identification number or social security number?

Public Law 104–134, the Debt Collection Improvement Act of 1996, requires that we collect the taxpayer identification number or social security number before billing a responsible party and as a condition to servicing the account.

What happens if I am a responsible party but I fail to furnish the information required to the billing office responsible for the irrigation project within which I own or lease assessable land or for which I have a carriage agreement?

If you are late paying your bill because of your failure to furnish the required information listed above, you will be assessed interest and penalties as provided below, and your failure to provide the required information will not provide grounds for you to appeal your bill or any penalties assessed.

What can happen if I do not provide the information required for billing purposes?

We can refuse to provide you irrigation service.

If I allow my bill to become past due, could this affect my water delivery?

Yes. 25 CFR 171.545(a) states: "We will not provide you irrigation service

until: (1) Your bill is paid; or (2) You make arrangement for payment pursuant to § 171.550 of this part.” If we do not receive your payment before the close of business on the 30th day after the due date stated on your bill, we will send you a past due notice. This past due notice will have additional information concerning your rights. We will consider your past due notice as delivered no later than five business days after the day we mail it. We follow the procedures provided in 31 CFR 901.2, “Demand for Payment,” when demanding payment of your past due bill.

Are there any additional charges if I am late paying my bill?

Yes. We are required to assess interest, penalties, and administrative costs on past due bills in accordance with 31 U.S.C. 3717 and 31 CFR 901.9. The rate of interest is established annually by the Secretary of the United States Treasury (Treasury) and accrues from the date your bill is past due. If your bill becomes more than 90 days past due, you will be assessed a penalty charge of no more than six percent per year, which accrues from the date your bill became past due. Each time we try to collect your past due bill, you will be

charged an administrative fee of \$12.50 for processing and handling.

What else will happen to my past due bill?

If you do not pay your bill or make payment arrangements to which we agree, we are required to transfer your past due bill to Treasury for further action. Pursuant to 31 CFR 285.12, bills that are 120 days past due will be transferred to Treasury.

Who can I contact for further information?

The contact table below contains the regional and project/agency contacts for our irrigation facilities.

Northwest Region Contacts

Bryan Mercier, Regional Director, Bureau of Indian Affairs, Northwest Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4169. Telephone: (503) 231–6702.

Flathead Indian Irrigation Project	Larry Nelson, Acting Irrigation Project Manager, 220 Project Drive, St. Ignatius, MT 59865. Telephone: (406) 745–2661.
Fort Hall Irrigation Project	David Bollinger, Irrigation Project Manager, 36 Bannock Avenue, Fort Hall, ID 83203–0220. Telephone: (208) 238–1992.
Wapato Irrigation Project	Pete Plant, Project Administrator, 413 South Camas Avenue, Wapato, WA 98951–0220. Telephone: (509) 877–3155.

Rocky Mountain Region Contacts

Susan Messerly, Regional Director, Bureau of Indian Affairs, Rocky Mountain Regional Office, 2021 4th Avenue North, Billings, MT 59101. Telephone: (406) 247–7943.

Blackfeet Irrigation Project	Kenneth Bird, Superintendent, Greg Tatsey, Irrigation Project Manager, P.O. Box 880, Browning, MT 59417. Telephones: Superintendent (406) 338–7544; Irrigation Project Manager (406) 338–7519.
Crow Irrigation Project	Clifford Serawop, Superintendent, Jim Gappa, Acting Irrigation Project Manager (BIA), (Project O&M performed by Water Users Association), P.O. Box 69, Crow Agency, MT 59022. Telephones: Superintendent (406) 638–2672; Acting Irrigation Project Manager (406) 247–7998.
Fort Belknap Irrigation Project	Mark Azure, Superintendent, Jim Gappa, Acting Irrigation Project Manager (BIA), (Project O&M contracted to Tribes under PL 93–638), 158 Tribal Way, Suite B, Harlem, MT 59526. Telephones: Superintendent (406) 353–2901; Irrigation Project Manager, Tribal Office (406) 353–8454.
Fort Peck Irrigation Project	Anna Eder, Superintendent, Jim Gappa, Acting Irrigation Project Manager (BIA), (Project O&M performed by Fort Peck Water Users Association), P.O. Box 637, Poplar, MT 59255. Telephones: Superintendent (406) 768–5312; Acting Irrigation Project Manager (406) 247–7998.
Wind River Irrigation Project	Leslie Shakespeare, Superintendent, Jim Gappa, Acting Irrigation Project Manager (BIA), (Project O&M for Little Wind, Johnstown, and Lefthand Units contracted to Tribes under PL 93–638; Little Wind-Ray and Upper Wind Units O&M performed by Ray Canal, A Canal, and Crowheart Water Users Associations), P.O. Box 158, Fort Washakie, WY 82514. Telephones: Superintendent (307) 332–7810; Acting Irrigation Project Manager (406) 247–7998.

Southwest Region Contacts

Patricia L. Mattingly, Regional Director, Bureau of Indian Affairs, Southwest Regional Office, 1001 Indian School Road NW, Albuquerque, NM 87104. Telephone: (505) 563–3100.

Pine River Irrigation Project	Priscilla Bancroft, Superintendent, Vickie Begay, Irrigation Project Manager, P.O. Box 315, Ignacio, CO 81137–0315. Telephones: Superintendent (970) 563–4511; Irrigation Project Manager (970) 563–9484.
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Western Region Contacts

Jessie Durham, Acting Regional Director, Bureau of Indian Affairs, Western Regional Office, 2600 North Central Avenue, 4th Floor Mailroom, Phoenix, AZ 85004. Telephone: (602) 379–6600.

Colorado River Irrigation Project	Davetta Ameelyenah, Superintendent, Gary Colvin, Irrigation Project Manager, 12124 1st Avenue, Parker, AZ 85344. Telephones: Superintendent (928) 669–7111; (928) 662–4392 Irrigation Project Manager.
Duck Valley Irrigation Project	Joseph McDade, Superintendent, (Project O&M compacted to Shoshone-Paiute Tribes under PL 93–638), 2719 Argent Avenue, Suite 4, Gateway Plaza, Elko, NV 89801. Telephones: Superintendent (775) 738–5165; Tribal Office (208) 759–3100.
Yuma Project, Indian Unit	Denni Shields, Superintendent, (Bureau of Reclamation (BOR) owns the Project and is responsible for O&M), 256 South Second Avenue, Suite D, Yuma, AZ 85364. Telephones: Superintendent (928) 782–1202; BOR Area Office Manager (928) 343–8100.

San Carlos Irrigation Project (Indian Works and Joint Works).	Ferris Begay, Project Manager (BIA), Clarence Begay, Supervisory Civil Engineer (BIA), (Portions of Indian Works O&M compacted to Gila River Indian Community under PL 93-638), 13805 North Arizona Boulevard, Coolidge, AZ 85128. Telephones: Project Manager (520) 723-6225; Supervisory Civil Engineer (520) 723-6203; Gila River Indian Irrigation & Drainage District (520) 562-6720.
Uintah Irrigation Project	Antonio Pingree, Superintendent, Ken Asay, Irrigation System Manager (BIA), (Project O&M performed by Uintah Indian Irrigation Project Operation and Maintenance Company), P.O. Box 130, Fort Duchesne, UT 84026. Telephones: Superintendent (435) 722-4300; Irrigation System Manager (435) 722-4344; Uintah Indian Irrigation Operation and Maintenance Company (435) 724-5200.
Walker River Irrigation Project	Thomas Hemstreet, Acting Superintendent, 311 East Washington Street, Carson City, NV 89701. Telephone: (775) 887-3501.

What irrigation assessments or charges are proposed for adjustment by this notice?

The rate table below contains final CY 2023 rates for irrigation projects where

we recover costs of administering, operating, maintaining, and rehabilitating them. The table also contains proposed CY 2024 rates for all irrigation projects. An asterisk

immediately following the rate category notes irrigation projects where rates are proposed for adjustment.

Project name	Rate category	Final 2023 rate	Proposed 2024 rate
Northwest Region Rate Table			
Flathead Irrigation Project	Basic per acre—A *	\$35.50	\$39.00
	Basic per acre—B *	17.75	19.50
	Minimum Charge per tract	75.00	75.00
Fort Hall Irrigation Project	Basic per acre *	64.50	65.50
	Minimum Charge per tract	41.00	41.00
Fort Hall Irrigation Project—Minor Units	Basic per acre	45.00	45.00
	Minimum Charge per tract	41.00	41.00
Fort Hall Irrigation Project—Michaud Unit	Basic per acre *	73.50	75.00
	Pressure per acre *	114.00	116.50
	Minimum Charge per tract	41.00	41.00
	Minimum Charge per bill *	25.00	28.00
Wapato Irrigation Project—Toppenish/Simcoe Units ...	Basic per acre *	25.00	28.00
Wapato Irrigation Project—Ahtanum Units	Minimum Charge per bill *	30.00	35.00
	Basic per acre *	30.00	35.00
Wapato Irrigation Project—Satus Unit	Minimum Charge per bill *	79.00	100.00
	“A” Basic per acre *	79.00	86.00
	“B” Basic per acre *	85.00	92.00
Wapato Irrigation Project—Additional Works	Minimum Charge per bill *	80.00	100.00
	Basic per acre *	80.00	87.00
Wapato Irrigation Project—Water Rental	Minimum Charge per bill *	90.00	100.00
	Basic per acre *	90.00	100.00
Rocky Mountain Region Rate Table			
Blackfeet Irrigation Project	Basic-per acre *	20.50	21.50
Crow Irrigation Project—Willow Creek O&M (includes Agency, Lodge Grass #1, Lodge Grass #2, Reno, Upper Little Horn, and Forty Mile Units).	Basic-per acre *	29.00	30.00
	Basic-per acre *	29.00	30.00
Crow Irrigation Project—All Others (includes Bighorn, Soap Creek, and Pryor Units).	Basic-per acre *	29.00	30.00
Crow Irrigation Project—Two Leggins Unit	Basic-per acre *	14.00	15.00
Crow Irrigation Two Leggins Drainage District	Basic-per acre *	2.00	3.00
Fort Belknap Irrigation Project	Basic-per acre *	19.00	20.00
Fort Peck Irrigation Project	Basic-per acre *	28.00	29.00
Wind River Irrigation Project—Units 2, 3 and 4	Basic-per acre *	25.00	26.00
Wind River Irrigation Project—Unit 6	Basic-per acre *	22.00	23.00
Wind River Irrigation Project—LeClair District (See Note #1).	Basic-per acre	47.00	47.00
Wind River Irrigation Project—Crow Heart Unit	Basic-per acre	16.50	16.50
Wind River Irrigation Project—A Canal Unit	Basic-per acre	16.50	16.50
Wind River Irrigation Project—Riverton Valley Irrigation District (See Note #1).	Basic-per acre	30.65	30.65
Southwest Region Rate Table			
Pine River Irrigation Project	Minimum Charge per tract	75.00	75.00
	Basic-per acre *	23.00	23.50
Western Region Rate Table			
Colorado River Irrigation Project	Basic per acre up to 5.75 acre-feet	64.00	64.00
	Excess Water per acre-foot over 5.75 acre-feet	18.00	18.00

Project name	Rate category	Final 2023 rate	Proposed 2024 rate
Duck Valley Irrigation Project	Basic per acre	5.30	5.30
Yuma Project, Indian Unit (See Note #2)	Basic per acre up to 5.0 acre-feet	161.00	(+)
	Excess Water per acre-foot over 5.0 acre-feet	30.00	(+)
	Basic per acre up to 5.0 acre-feet (Ranch 5)	161.00	(+)

Project name	Rate category	Final 2023 rate	Proposed 2024 rate
San Carlos Irrigation Project (Joint Works) (See Note #3)	Basic per acre	\$26.00	\$26.00.

Proposed 2024 Construction Water Rate Schedule:			
	Off Project Construction.	On Project Construction—Gravity Water.	On Project Construction—Pump Water.
Administrative Fee.	\$300.00	\$300.00	\$300.00.
Usage Fee	\$250.00 per month.	No Fee	\$100.00 per acre foot.
Excess Water Rate †.	\$5.00 per 1,000 gal.	No Charge	No Charge.

Project name	Rate category	Final 2023 rate	Proposed 2024 rate
San Carlos Irrigation Project (Indian Works) (See Note #4).	Basic per acre *	\$90.50	\$99.62
Uintah Irrigation Project	Basic per acre	23.00	23.00
	Minimum Bill	25.00	25.00
Walker River Irrigation Project	Basic per acre	31.00	31.00

* Notes irrigation projects where rates are adjusted.

+ These rates have not yet been determined.

† The excess water rate applies to all water used in excess of 50,000 gallons in any one month.

Note #1: O&M rates for LeClair and Riverton Valley Irrigation Districts apply to Trust lands that are serviced by each irrigation district. The annual O&M rates are based on budgets submitted by LeClair and Riverton Valley Irrigation Districts, respectively.

Note #2: The O&M rate for the Yuma Project, Indian Unit has two components. The first component of the O&M rate is established by the Bureau of Reclamation (BOR), the owner and operator of the Project. BOR's rate, which is based upon the annual budget submitted by BOR is \$157.00 for 2023 but has not been established for 2024. The second component of the O&M rate is established by BIA to cover administrative costs, which includes billing and collections for the Project. The final 2023 BIA rate component is \$4.00 per acre. The proposed 2024 BIA rate component is \$4.00 per acre.

Note #3: The Construction Water Rate Schedule identifies fees assessed for use of irrigation water for non-irrigation purposes.

Note #4: The O&M rate for the San Carlos Irrigation Project—Indian Works has three components. The first component is established by BIA San Carlos Irrigation Project—Indian Works, the owner and operator of the Project; the final 2023 rate is \$56.50 per acre, and proposed 2024 rate is \$55.85 per acre. The second component is established by BIA San Carlos Irrigation Project—Joint Works; the final 2023 rate is \$26.00 per acre, and proposed 2024 rate is \$26.00 per acre. The third component is established by the San Carlos Irrigation Project Joint Control Board (comprised of representatives from the Gila River Indian Community and the San Carlos Irrigation and Drainage District); the 2023 rate is \$8.00 per acre (revised from \$16.94 per acre), and 2024 rate is \$17.77 per acre.

Consultation and Coordination With Tribal Governments (Executive Order 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this notice under the Department's consultation policy and under the criteria of Executive Order 13175 and have determined there to be substantial direct effects on federally recognized Tribes because the irrigation projects are located on or associated with Indian reservations. To fulfill its consultation responsibility to Tribes and Tribal organizations, BIA communicates, coordinates, and

consults on a continuing basis with these entities on issues of water delivery, water availability, and costs of administration, operation, maintenance, and rehabilitation of projects that concern them. This is accomplished at the individual irrigation project by project, agency, and regional representatives, as appropriate, in accordance with local protocol and procedures. This notice is one component of our overall coordination and consultation process to provide notice to, and request comments from, these entities when we adjust irrigation assessment rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

The proposed rate adjustments are not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

Regulatory Planning and Review (Executive Order 12866)

These proposed rate adjustments are not a significant regulatory action and do not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

These proposed rate adjustments are not a rule for the purposes of the Regulatory Flexibility Act because they

establish “a rule of particular applicability relating to rates.”

5 U.S.C. 601(2).

Unfunded Mandates Reform Act of 1995

These proposed rate adjustments do not impose an unfunded mandate on state, local, or Tribal governments in the aggregate, or on the private sector, of more than \$130 million per year. They do not have a significant or unique effect on State, local, or Tribal governments or the private sector. Therefore, the Department is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Takings (Executive Order 12630)

These proposed rate adjustments do not effect a taking of private property or otherwise have “takings” implications under Executive Order 12630. The proposed rate adjustments do not deprive the public, State, or local governments of rights or property.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, these proposed rate adjustments do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because they will not affect the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. A federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This notice complies with the requirements of Executive Order 12988. Specifically, in issuing this notice, the Department has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct as required by section 3 of Executive Order 12988.

Paperwork Reduction Act of 1995

These proposed rate adjustments do not affect the collections of information which have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires January 31, 2023.

National Environmental Policy Act

The Department has determined that these proposed rate adjustments do not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370(d), pursuant to 43 CFR 46.210(i). In addition, the proposed rate adjustments do not present any of the 12 extraordinary circumstances listed at 43 CFR 46.215.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–00863 Filed 1–17–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

[234D0102DM/DS62400000/DLSN00000/000000/DX62401]

FY 2020 Service Contract Inventory

AGENCY: Office of Acquisition and Property Management, Interior.

ACTION: Notice of public availability.

SUMMARY: The Department of the Interior is publishing this notice to advise the public of the availability of the Fiscal Year (FY) 2020 Service Contract Inventory, in accordance with section 743 of Division C of the Consolidated Appropriations Act of 2010.

ADDRESSES: *Obtaining Documents:* The Office of Federal Procurement Policy (OFPP) guidance is available online.

The Department of the Interior has posted its FY 2020 Service Contract Inventory on the Office of Acquisition and Property Management portion of the Department of the Interior website.

FOR FURTHER INFORMATION CONTACT: Valerie Green, Acquisition Analyst, Policy Branch, Office of Acquisition and Property Management (PAM), Department of the Interior. Phone number: 202–513–0797, Email: Valerie_green@ios.doi.gov.

SUPPLEMENTARY INFORMATION:

Introduction

Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117) requires civilian agencies to prepare an annual inventory of their service contracts. The analyses help inform agency managers whether contractors are being used appropriately or if rebalancing the workforce may be required.

In addition to the agency analyses, the process includes extracting contract data from the Federal Procurement Data

System (FPDS) and the System for Award Management (SAM) and the consolidated output file is posted for public use.

The Inventory provides information on service contract actions over \$25,000 that the Department made in FY 2020. The information is organized by function to show how contracted resources are distributed throughout the Department. The Department’s analysis of its Service Contract Inventory is summarized in the FY 2020 Service Contract Inventory Report. The 2020 Report was developed in accordance with guidance issued on December 19, 2011, and November 5, 2010, by the Office of Management and Budget’s Office of Federal Procurement Policy.

Authority

The authority for this action is the Consolidated Appropriations Act of 2010 (Pub. L. 111–117).

Megan Olsen,

Director, Office of Acquisition and Property Management.

[FR Doc. 2023–00787 Filed 1–17–23; 8:45 am]

BILLING CODE 4334–63–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1575 and 731–TA–1577 (Final)]

Emulsion Styrene-Butadiene Rubber From Czechia and Russia; Corrected Determinations

AGENCY: U.S. International Trade Commission.

ACTION: Notice; correction.

SUMMARY: Correction is made to the date determinations in these investigations were completed and filed.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of January 9, 2023 (88 FR 1292) in FR Doc. 2023–00145, on page 1292, in the second column, in the *Background* section, the date the determinations were completed and filed should be January 3, 2023.

Issued: January 11, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–00860 Filed 1–17–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-1587 (Final)]

Certain Preserved Mushrooms From France Determination

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that an industry in the United States is materially injured by reason of imports of certain preserved mushrooms from France, provided for in subheading 2003.10.01 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (“Commerce”) to be sold in the United States at less than fair value (“LTFV”).²

Background

The Commission instituted this investigation effective March 31, 2022, following receipt of petitions filed with the Commission and Commerce by Giorgio Foods, Inc., Blandon, Pennsylvania. The Commission scheduled the final phase of the investigation following notification of a preliminary determination by Commerce that imports of certain preserved mushrooms from France were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission’s investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of September 21, 2022 (87 FR 57717). The Commission conducted its hearing on November 17, 2022. All persons who requested the opportunity were permitted to participate.

The Commission made this determination pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determination in this investigation on January 12, 2023. The views of the Commission are contained in USITC Publication 5393 (January 2023), entitled *Certain Preserved Mushrooms from France: Investigation No. 731-TA-1587 (Final)*.

By order of the Commission.

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

² 87 FR 72963 (November 28, 2022).

Issued: January 12, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023-00862 Filed 1-17-23; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[USITC SE-23-004]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 20, 2023 at 9:30 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 701-TA-562 and 731-TA-1329 (Review)(Ammonium Sulfate from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on February 8, 2023.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Tyrell Burch, Management Analyst, 202-205-2595.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: January 13, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023-00935 Filed 1-13-23; 11:15 am]

BILLING CODE 7020-02-P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Proposed Renewal of the Approval of Information Collection Requirements; Comment Request

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to

reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). The program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Office of Federal Contract Compliance Programs (OFCCP) is soliciting comments concerning its proposal to obtain approval from the Office of Management and Budget (OMB) for renewal of the information collection for its complaint program. OFCCP is requesting OMB approval for two information collection instruments: revisions to the existing “Form CC-4, Complaint Involving Employment Discrimination by a Federal Contractor or Subcontractor” (Form CC-4) and a new instrument, “Form CC-390 Pre-Complaint Inquiry for Employment Discrimination Involving a Federal Contractor or Subcontractor” (Form CC-390). The current OMB approval for Form CC-4 expires on May 31, 2023. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice or by accessing it at www.regulations.gov.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before March 20, 2023.

ADDRESSES: You may submit comments by any of the following methods:

Electronic comments: The federal eRulemaking portal at www.regulations.gov. Follow the instructions found on that website for submitting comments.

Mail, Hand Delivery, Courier:

Addressed to Tina T. Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. For faster submission, we encourage commenters to transmit their comment electronically via the www.regulations.gov website.

Comments that are mailed to the address provided above must be postmarked before the close of the comment period. All submissions must

include OFCCP's name for identification. Comments submitted in response to the notice, including any personal information provided, become a matter of public record and will be posted on www.regulations.gov. Comments will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Tina T. Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: (202) 693-0103 or toll free at 1-800-397-6251. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services. Copies of this notice may be obtained in alternative formats (large print, braille, audio recording) upon request by calling the numbers listed above.

SUPPLEMENTARY INFORMATION:

I. *Background:* OFCCP administers and enforces the three equal employment opportunity authorities listed below.

- Executive Order 11246, as amended (E.O. 11246)
- Section 503 of the Rehabilitation Act of 1973, as amended (section 503)
- Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA)

These authorities prohibit employment discrimination by Federal contractors and subcontractors and require them to take affirmative action to ensure that equal employment opportunities are available regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, Federal contractors and subcontractors are prohibited from discriminating against applicants and employees for asking about, discussing, or sharing information about their pay or, in certain circumstances, the pay of their co-workers. Federal contractors and subcontractors are further prohibited from harassing, intimidating, threatening, coercing, or discriminating against individuals who file a complaint, assist or participate in any OFCCP investigation, oppose any discriminatory act or practice, or otherwise exercise their rights protected by OFCCP's laws.

No private right of action exists under the authorities that are enforced by OFCCP, *i.e.*, a private individual may not bring a lawsuit against an employer

(or prospective employer) for noncompliance with its contractual obligations enforced by OFCCP. However, any employee of, or applicant for employment with, a federal contractor or subcontractor may file a complaint with OFCCP alleging discrimination or failure to comply with other OFCCP contractor obligations. Currently, OFCCP encourages such employees and applicants to file their complaints by completing its complaint form ("Form CC-4"). OFCCP investigates certain complaints and refers others to agencies that may have jurisdiction. For example, if a complaint is filed under E.O. 11246 or section 503, OFCCP may refer it to the U.S. Equal Employment Opportunity Commission (EEOC).¹ OFCCP retains all complaints filed under VEVRAA.

Where OFCCP investigates a complaint and finds one or more violations of equal opportunity requirements, the agency engages in conciliation with the contractor to resolve the matter. Where that is not successful, OFCCP determines whether to bring an enforcement action through an administrative or judicial proceeding.

OFCCP is proposing to modify its complaint intake procedures to adopt a two-step complaint intake process. EEOC has long utilized a two-step intake process.² OFCCP proposes that as a first step, applicants and employees of contractors, their authorized representatives, or third parties would submit to OFCCP a pre-complaint inquiry providing basic information on their allegation(s) and contact information (Form CC-390). When OFCCP receives a pre-complaint inquiry, OFCCP will assess (1) whether the allegations are timely; (2) whether the inquiry falls under OFCCP's jurisdiction; and (3) whether the inquiry should be investigated, closed or referred to another agency. If OFCCP determines it would likely investigate the matter, OFCCP will provide the inquiry submitter ("submitter") with information on filing a complaint (Form CC-4), including information on the anti-retaliation protections under the authorities OFCCP enforces. If OFCCP determines that OFCCP would refer the matter to another agency, it will provide the submitter with information on the referral and send a copy of the pre-complaint inquiry to the other agency for review. If OFCCP determines that the

allegations provided in the inquiry are untimely or are not within OFCCP's authority, OFCCP will contact the submitter to explain why OFCCP would likely not investigate the matter if a complaint were filed. The decision to file a complaint with OFCCP lies with the submitter. Once OFCCP receives a completed complaint form, OFCCP will assign the matter for investigation, and OFCCP will notify the employer (contractor) of the complaint and investigation. By implementing this new process, OFCCP will improve the efficiency of its complaint intake process.

OFCCP is requesting approval of Form CC-390, which applicants and employees of contractors, their authorized representatives, or third parties will use to submit a pre-complaint inquiry. Additionally, OFCCP is requesting approval for changes to the existing Form CC-4, including formatting changes for consistency with the proposed pre-complaint inquiry form and clarifying revisions to portions of the form to improve useability.

Under E.O. 11246, section 206(b) provides the authority for collection of complaint information. The implementing regulations that specify the content of this information collection are found at 41 CFR 60-1.23. Under VEVRAA, the authority for collecting complaint information is at 38 U.S.C. 4212(b) and the implementing regulations that specify the content of VEVRAA complaints, are found at 41 CFR 60-300.61(b). The statutory authority for collecting complaint information under section 503 is at 29 U.S.C. 793(b), and the implementing regulations that specify the content of section 503 complaints are found at 41 CFR 60-741.61(c). This information collection request covers the recordkeeping and reporting requirements for Form CC-4 and Form CC-390.

II. *Review Focus:* OFCCP is particularly interested in comments that:

- Evaluate the proposed pre-complaint inquiry form and the proposed changes to the complaint form;
- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

¹ See 41 CFR 60-1.24(a) and 41 CFR 60-742.5.

² See EEOC, *How to File a Charge of Employment Discrimination*, <https://www.eeoc.gov/how-file-charge-employment-discrimination> (last accessed Dec. 9, 2022) (describing EEOC's pre-charge inquiry and charge filing process).

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

III. *Current Actions:* OFCCP seeks the approval of these information collection instruments in order to carry out its responsibility to enforce the affirmative action and nondiscrimination provisions of the three authorities it administers.

Type of Review: Renewal.

Agency: Office of Federal Contract Compliance Programs.

Title: Complaint Involving Employment Discrimination by a Federal Contractor or Subcontractor.

OMB Number: 1250–0002.

Agency Number: None.

Affected Public: Business or other for profit; individuals.

Total Respondents: 1,618 respondents for the pre-complaint inquiry; 100 respondents for the formal complaint.

Total Annual Responses: 1,618 respondents for the pre-complaint inquiry; 100 respondents for the formal complaint.

Average Time per Response: .25 hour for the pre-complaint inquiry; 1 hour for the formal complaint.

Estimated Total Burden Hours: 505 hours.

Frequency: On occasion.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintenance): \$1,648.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Christopher S. Seely,

Deputy Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. 2023–00811 Filed 1–17–23; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2022–0002]

National Advisory Committee on Occupational Safety and Health (NACOSH); Notice of Membership Appointments

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of NACOSH membership appointments.

SUMMARY: On January 16, 2023, the Secretary of Labor appointed four members to serve on the National Advisory Committee on Occupational Safety and Health (NACOSH).

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Francis Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone (202) 693–1999, (TTY (877) 889–5627); email meilinger.francis2@dol.gov.

For general information: Ms. Lisa Long, Acting Deputy Director, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2049; email long.lisa@dol.gov.

*For copies of this **Federal Register Notice:*** Electronic copies of this **Federal Register** notice are available at <http://www.regulations.gov>. This notice, as well as news releases and other relevant information, are also available at OSHA's web page at www.osha.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656) established NACOSH to advise, consult with and make recommendations to the Secretary of Labor and the Secretary of Health and Human Services (HHS) on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory committee of indefinite duration.

NACOSH operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), its implementing regulations (41 CFR part 102–3), and OSHA's regulations on advisory committees and NACOSH (29 CFR parts 1912 and 1912a).

NACOSH is comprised of 12 members: four public representatives, two management representatives, two occupational safety professional representatives, and two occupational health professional representatives (29 CFR 1912a.2). The

Secretary of Labor appoints all of these members. However, the Secretary of HHS designates four of the representatives: two of the four public representatives and the two occupational health professional representatives. NACOSH members serve staggered two-year terms, unless the member becomes unable to serve, resigns, ceases to be qualified to serve, or is removed by the Secretary.

On August 1, 2022, OSHA published a request for nominations for four NACOSH positions that would expire on January 14, 2023 (87 FR 47013). Specifically, OSHA requested nominations for:

- One (1) public representative;
- One (1) management representative;
- One (1) labor representative; and
- One (1) occupational safety professional representative.

OSHA handled the nominations consistent with the process identified in the FRN. The Secretary of Labor proceeded with the appointment of individuals to four positions on January 16, 2023.

II. Appointment of Committee Members

OSHA received nominations of highly qualified individuals in response to the agency's request for nominations (87 FR 47013, August 1, 2022). The Secretary appointed NACOSH members on the basis of their experience and competence in the field of occupational safety and health (29 CFR 1912a.2). The NACOSH members that the Secretary appointed on January 16, 2023 are:

Public Representative

- Nancy Daraiseh, University of Cincinnati (Term expires January 16, 2025)

Management Representative

- John A. Dony, National Safety Council (Term expires January 16, 2025)

Labor Representative

- Rebecca Reindel, AFL–CIO (Term expires January 16, 2025)

Occupational Safety Representative

- Kathleen Dobson, Alberici Constructors, Inc. (Term expires January 16, 2026)

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by 29 U.S.C. 655 (b)(1) and 656(b), 5 U.S.C. App. 2, and 29 CFR parts 1912 and 1912a.

Signed at Washington, DC, on January 9, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023-00812 Filed 1-17-23; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities

Arts and Artifacts Indemnity Panel Advisory Committee

AGENCY: Federal Council on the Arts and the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts Domestic Indemnity Panel.

DATES: The meeting will be held on Thursday, February 16, 2023, from 12:00 p.m. until adjourned.

ADDRESSES: The meeting will be held by videoconference originating at the National Endowment for the Arts, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506, (202) 606-8322; evoyatzis@neh.gov.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is for panel review, discussion, evaluation, and recommendation on applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities, for exhibitions beginning on or after April 1, 2023. Because the meeting will consider proprietary financial and commercial data provided in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified and the methods of transportation and security measures confidential, I have determined that that the meeting will be closed to the public pursuant to subsection (c)(4) of section 552b of Title 5, United States Code. I have made this determination under the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated April 15, 2016.

Dated: January 11, 2023.

Jessica Graves,

Legal Administrative Specialist, National Endowment for the Humanities.

[FR Doc. 2023-00747 Filed 1-17-23; 8:45 am]

BILLING CODE 7536-01-P

PENSION BENEFIT GUARANTY CORPORATION

Pendency for Request for Approval of Special Withdrawal Liability Rules: Motion Picture Laboratory Technicians and Film Editors Local 780 Pension Fund

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of pendency of request.

SUMMARY: This notice advises interested persons that the Pension Benefit Guaranty Corporation (PBGC) has received a request from the Motion Picture Laboratory Technicians and Film Editors Local 780 Pension Fund (the "Plan") for approval of a plan amendment providing for special withdrawal liability rules. Under PBGC's regulation on Extension of Special Withdrawal Liability Rules, a multiemployer pension plan may, with PBGC approval, be amended to provide for special withdrawal liability rules similar to those that apply to the construction and entertainment industries. Such approval is granted only if PBGC determines that the rules apply to an industry with characteristics that make use of the special rules appropriate and that the rules will not pose a significant risk to the pension insurance system. Before granting an approval, PBGC's regulations require PBGC to give interested persons an opportunity to comment on the request. The purpose of this notice is to advise interested persons of the request and to solicit their views on it.

DATES: Comments must be submitted on or before March 6, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.
- **Email:** reg.comments@pbgc.gov. Refer to the Motion Picture Local 780 Plan in the subject line.
- **Mail or Hand Delivery:** Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101.

Commenters are strongly encouraged to submit public comments electronically. PBGC expects to have

limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable.

All submissions must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to the Motion Picture Local 780 Plan. Comments received will be posted without change to PBGC's website, www.pbgc.gov, including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101 or calling 202-326-4040 during normal business hours. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Daniel Liebman, Deputy General Counsel, Program Law and Policy Department (liebman.daniel@pbgc.gov; 202-229-6510), Benjamin Kelly, Deputy Assistant General Counsel, Multiemployer Law Division (kelly.benjamin@pbgc.gov; 202-229-4097), Office of the General Counsel, 445 12th Street SW, Washington, DC 20024-2101. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Background

Section 4203(a) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (ERISA), provides that a complete withdrawal from a multiemployer plan generally occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. Under section 4205 of ERISA, a partial withdrawal generally occurs when an employer: (1) Reduces its contribution base units by seventy percent in each of three consecutive years; or (2) permanently ceases to have an obligation under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan, while continuing to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously

required or transfers such work to another location or to an entity or entities owned or controlled by the employer; or (3) permanently ceases to have an obligation to contribute under the plan for work performed at one or more but fewer than all of its facilities, while continuing to perform work at the facility of the type for which the obligation to contribute ceased.

Although the general rules on complete and partial withdrawal identify events that normally result in a diminution of the plan's contribution base, Congress recognized that, in certain industries and under certain circumstances, a complete or partial cessation of the obligation to contribute normally does not weaken the plan's contribution base. For that reason, Congress established special withdrawal rules for the construction and entertainment industries. For construction industry plans and employers, section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan and the employer either continues to perform previously covered work in the jurisdiction of the collective bargaining agreement or resumes such work within 5 five years without renewing the obligation to contribute at the time of resumption. In the case of a plan terminated by mass withdrawal (within the meaning of section 4041(A)(2) of ERISA), section 4203(b)(3) provides that the 5-year restriction on an employer's resuming covered work is reduced to 3 years. Section 4203(c)(1) of ERISA applies the same special definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. In contrast, the general definition of complete withdrawal in section 4203(a) of ERISA includes the permanent cessation of the obligation to contribute regardless of the continued activities of the withdrawn employer.

Congress also established special partial withdrawal liability rules for the construction and entertainment industries. Under section 4208(d)(1) of ERISA, "[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required." Under section 4208(d)(2) of ERISA, "[a]n employer to whom section

4203(c) (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by the [PBGC] by regulation."

Section 4203(f)(1) of ERISA provides that PBGC may prescribe regulations under which plans in other industries may be amended to provide for special withdrawal liability rules similar to the rules prescribed in section 4203(b) and (c) of ERISA. Section 4203(f)(2) of ERISA provides that such regulations shall permit the use of special withdrawal liability rules only in industries (or portions thereof) in which PBGC determines that the characteristics that would make use of such rules appropriate are clearly shown, and that the use of such rules will not pose a significant risk to the insurance system under title IV of ERISA. Section 4208(e)(3) of ERISA provides that PBGC shall prescribe by regulation a procedure by which plans may be amended to adopt special partial withdrawal liability rules upon a finding by PBGC that the adoption of such rules is consistent with the purposes of title IV of ERISA.

PBGC's regulations on Extension of Special Withdrawal Liability Rules (29 CFR part 4203) prescribe procedures for a multiemployer plan to ask PBGC to approve a plan amendment that establishes special complete or partial withdrawal liability rules. Section 4203.5(b) of the regulation requires PBGC to publish a notice of the pendency of a request for approval of special withdrawal liability rules in the **Federal Register**, and to provide interested parties with an opportunity to comment on the request.

The Request

PBGC received a request from the Plan, dated November 30, 2021, for approval of a plan amendment providing for special withdrawal liability rules. On May 26, 2022, the Plan provided supplemental information in response to a request from PBGC. PBGC's summary of the actuarial reports provided by the Plan may be accessed on PBGC's website (<https://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html>). A copy of the Plan's submission can be requested from the PBGC Disclosure Officer. The fax number is 202-229-4042. It may also be obtained by writing to the Disclosure Officer, PBGC, 445 12th Street SW, Washington, DC 20024.

The Plan is a multiemployer pension plan jointly maintained by Local Union No. 780 of the International Alliance of Theatrical Stage Employees (the

"Union") and employers that are signatory to collective bargaining agreements with the Union. The Plan covers approximately 2,000 participants. Most of the employers that contribute to the Plan have been awarded contracts or subcontracts to provide non-military support services at military bases and other federal facilities.

The proposed amendment would create special withdrawal liability rules for employers ("Federal Contractor Employers") that have an obligation to contribute to the Plan for work performed under a contract or subcontract to provide services to a federal government agency (a "Federal Contract"). The Proposed Amendment would create special withdrawal liability rules for a Federal Contractor Employer that loses one or more Federal Contracts to an unrelated employer (a "Successor Employer"). The Plan asserts that Federal Contracts are periodically re-bid, and that "the employees and the facility generally remain the same" after a Federal Contractor Employer loses a Federal Contract to a Successor Employer.

The Plan asserts that the industry covered by the Plan is "[n]ot unlike the construction industry" in that Federal Contractor Employees use the same "pool" of workers at the facility regardless of which Employer currently is awarded the contract. Contributions supporting future benefit accruals and satisfying any unfunded past liabilities are made on behalf of the same pool of employees and the same number of [CBUs]. Consequently, the change in the signatory Employer under a new contract has little or no effect on the funded position of the Pension Fund.

The Plan asserts that the proposed amendment may induce new Federal Employer Contractors to bid on covered work. That, in turn, will "continue the improvement in the health of the Pension Fund and reduce the potential risk and exposure to the PBGC."

The Plan's request includes the actuarial data on which the Plan relies to support its contention that the amendment will not pose a significant risk to the insurance system under title IV of ERISA.

Special Withdrawal Liability Rules

The proposed amendment would be effective for (i) complete withdrawals under section 4203(a) of ERISA on or after January 1, 2021; (ii) partial withdrawals under section 4205(a)(1) of ERISA during any three-year testing period beginning on or after January 1, 2019; and (iii) partial withdrawals

under section 4205(a)(2) of ERISA on or after January 1, 2021.

Complete Withdrawals

A complete withdrawal under section 4203(a) of ERISA will not occur if a Federal Contractor Employer ceases to have an obligation to contribute to the Plan because it loses all Federal Contracts that required contributions to the Plan to a Successor Employer, and is performing no other work under a collective bargaining agreement that requires contributions to the Plan, provided that:

(1) Substantially all the employees for whom the Federal Contractor Employer was obligated to contribute to the Plan continue to perform work under one or more Federal Contracts with a Successor Employer (including any Successor Employer subsequent to the initial Successor Employer); and

(2) For the five Plan Years following the Plan Year in which the Federal Contractor Employer lost all of its Federal Contracts to a Successor Employer, the Successor Employer has an obligation to contribute to the Plan for work performed under the Federal Contractor Employer's Federal Contract:

(a) At the same or a higher contribution rate as the highest contribution rate of the Federal Contractor Employer; and

(b) For substantially the same number of contribution base units as those for which the Federal Contractor Employer had an obligation to contribute in the final Plan Year preceding the Plan Year in which the Federal contractor lost all of its Federal Contracts.

Notwithstanding these rules, the Federal Contractor Employer will experience a complete withdrawal as of the date it ceased to have an obligation to contribute to the Plan or ceased all covered operations under the Plan if, within the five Plan Years following the Plan Year in which the Federal Contractor Employer lost all of its Federal Contracts, either:

(1) The Federal Contract of the Successor Employer is terminated, and no subsequent Successor Employer is obligated to contribute to the Plan under the conditions described in paragraphs 2(a) and (b); or

(2) The Successor Employer ceases contributions to the Plan or fails to contribute to the Plan under the conditions described in paragraphs 2(a) and (b).

Partial Withdrawals

If a Federal Contractor Employer loses one or more, but less than all, of its Federal Contracts to a Successor Employer, or if the Federal Contractor

Employer loses all of its Federal Contracts to a Successor Employer but continues to have an obligation to contribute to the Plan for other operations pursuant to a collective bargaining agreement, the following rules shall apply.

The contribution base units attributable to the work performed under the Federal Contract shall be excluded in determining whether the Federal Contractor has experienced a partial withdrawal under section 4205(a)(1) of ERISA, and the loss of the Contract shall not be considered a facility closing, provided that:

(1) For the five Plan Years following the Plan Year in which the Federal Contractor Employer lost the applicable Federal Contract to a Successor Employer, the Successor Employer has an obligation to contribute to the Plan for work performed under the Federal Contractor Employer's Federal Contract:

(a) At the same or a higher contribution rate as the highest contribution rate of the Federal Contractor Employer; and

(b) For substantially the same number of contribution base units as those for which the Federal Contractor Employer had an obligation to contribute in the final Plan Year preceding the Plan Year in which the Federal contractor lost the Federal Contract.

Notwithstanding these rules, the Federal Contractor Employer will experience a partial withdrawal if:

(1) Within the 5 Plan Years following the Plan Year in which the Federal Contractor Employer lost one or more but less than all of its Federal Contracts, the Successor Employer's Federal Contract is terminated, and no subsequent Successor Employer is obligated to contribute to the Plan under the conditions described in paragraphs 1(a) and (b);

(2) Within the 5 Plan Years following the Plan Year in which then Federal Contractor Employer lost one or more but less than all of its Federal Contracts, the Successor Employer ceases contributions to the Plan or fails to contribute to the Plan under the conditions described in paragraphs 1(a) and (b); or

(3) The Federal Contractor Employer either loses a Federal Contract to a Successor Employer or bargains out of a Federal Contract and there is not any Successor Employer with an obligation to contribute to the Plan under the conditions described in paragraphs 1(a) and (b).

The date of a partial withdrawal assessed under these rules shall be:

(1) In the event of a 70 percent contribution decline under section

4205(a)(1) of ERISA, the last day of the third year in the applicable three-year testing period beginning on or after January 1, 2019; and

(2) In the event of a partial cessation of such Federal Contractor Employer's contribution obligation under section 4205(a)(2) of ERISA, the year in which the facility closed or the Federal Employer Contractor bargained out of the Federal Contract.

Bona Fide Sale of Assets

If the Federal Contractor Employer engages in a bona fide, arm's-length sale of assets to an unrelated purchaser ("Buyer"), the Buyer will be treated as a Successor Employer.

Comments

All interested persons are invited to submit written comments on the pending exemption request. All comments will be made part of the administrative record.

Issued in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2023-00876 Filed 1-17-23; 8:45 am]

BILLING CODE 7709-02-P

POSTAL REGULATORY COMMISSION

[Docket No. ACR2022; Order No. 6407]

Postal Service Performance Report and Performance Plan

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: On December 29, 2022, the Postal Service filed the FY 2022 Performance Report and FY 2023 Performance Plan with its FY 2022 Annual Compliance Report. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* March 15, 2023. *Reply Comments are due:* March 29, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Request for Comments
- III. Ordering Paragraphs

I. Introduction

Each year the Postal Service must submit to the Commission its most recent annual performance plan and annual performance report. 39 U.S.C. 3652(g). On December 29, 2022, the Postal Service filed its FY 2022 Annual Report to Congress in Docket No. ACR2022.¹ The *FY 2022 Annual Report* includes the Postal Service's FY 2022 annual performance report (FY 2022 Report) and FY 2023 annual performance plan (FY 2023 Plan). *FY 2022 Annual Report* at 32–53.

The FY 2023 Plan reviews the Postal Service's plans for FY 2023. The FY 2022 Report discusses the Postal Service's progress during FY 2022 toward its four performance goals:

- High-Quality Service
- Excellent Customer Experience
- Safe Workplace and Engaged Workforce
- Financial Health

Each year, the Commission must evaluate whether the Postal Service met the performance goals established in the annual performance plan and annual performance report. 39 U.S.C. 3653(d). The Commission may also “provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in” Title 39. *Id.*

Since Docket No. ACR2013, the Commission has evaluated whether the Postal Service met its performance goals in reports separate from the Annual Compliance Determination.² The

¹ United States Postal Service Fiscal Year 2022 Annual Report to Congress, Library Reference USPS–FY22–17, December 29, 2022, folder “USPS–FY22–17,” folder “FY22.17.Annual.Report,” file “FY 2022 Annual Report to Congress.pdf” (*FY 2022 Annual Report*).

² See Docket No. ACR2013, Postal Regulatory Commission, Review of Postal Service FY 2013 Performance Report and FY 2014 Performance Plan, July 7, 2014; Docket No. ACR2014, Postal Regulatory Commission, Analysis of the Postal Service's FY 2014 Program Performance Report and FY 2015 Performance Plan, July 7, 2015; Docket No. ACR2015, Postal Regulatory Commission, Analysis of the Postal Service's FY 2015 Annual Performance Report and FY 2016 Performance Plan, May 4, 2016; Docket No. ACR2016, Postal Regulatory Commission, Analysis of the Postal Service's FY 2016 Annual Performance Report and FY 2017 Performance Plan, April 27, 2017; Docket No. ACR2017, Postal Regulatory Commission, Analysis of the Postal Service's FY 2017 Annual Performance Report and FY 2018 Performance Plan, April 26, 2018; Docket No. ACR2018, Postal Regulatory Commission, Analysis of the Postal Service's FY 2018 Annual Performance Report and FY 2019 Performance Plan, May 13, 2019; Docket No. ACR2019, Postal Regulatory Commission, Analysis of the Postal Service's FY 2019 Annual Performance

Commission continues this current practice to provide a more in-depth analysis of the Postal Service's progress toward meeting its performance goals and plans to improve performance in future years. To facilitate this review, the Commission invites public comment on the following issues:

- Did the Postal Service meet its performance goals in FY 2022?
- Do the FY 2022 Report and the FY 2023 Plan meet applicable statutory requirements, including 39 U.S.C. 2803 and 2804?
- What recommendations should the Commission provide to the Postal Service that relate to protecting or promoting public policy objectives in Title 39?
- For the Excellent Customer Experience performance goal, are there any customer experience (CX) metrics the Postal Service should add to measure CX?³
- What recommendations or observations should the Commission make concerning the Postal Service's strategic initiatives?⁴
- What other matters are relevant to the Commission's analysis of the FY 2022 Report and the FY 2023 Plan under 39 U.S.C. 3653(d)?

II. Request for Comments

Comments by interested persons are due no later than March 15, 2023. Reply comments are due no later than March 29, 2023. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as Public Representative to represent the interests of the general public in this proceeding with respect to issues related to the Commission's analysis of the FY 2022 Report and the FY 2023 Plan.

III. Ordering Paragraphs

It is ordered:

1. The Commission invites public comment on the Postal Service's FY 2022 Report and FY 2023 Plan.
2. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth R. Moeller to serve as Public Representative to represent the interests of the general public in this proceeding

Report and FY 2022 Performance Plan, June 1, 2022; Docket No. ACR2020, Postal Regulatory Commission, Analysis of the Postal Service's FY 2020 Annual Performance Report and FY 2021 Performance Plan, June 2, 2021; Docket No. ACR2021, Postal Regulatory Commission, Analysis of the Postal Service's FY 2021 Annual Performance Report and FY 2022 Performance Plan, June 30, 2022.

³ In FY 2022, the Postal Service measured CX based on surveys of residential, small/medium business, and large business customers. See Docket No. ACR2022, Library Reference USPS–FY22–38, December 29, 2022.

⁴ See *FY 2022 Annual Report* at 52–53.

with respect to issues related to the Commission's analysis of the FY 2022 Report and the FY 2023 Plan.

3. Comments are due no later than March 15, 2023.

4. Reply comments are due no later than March 29, 2023.

5. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Erica A. Barker,
Secretary.

[FR Doc. 2023–00785 Filed 1–17–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96639; File No. SR–LTSE–2022–06]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Continuing Education Requirements

January 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 30, 2022, Long-Term Stock Exchange, Inc. (“LTSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to adopt new LTSE Rule 2.153 and amend LTSE Rules 2.154 and 2.160. The proposed rule changes are based on changes made by the Financial Industry Regulatory Authority, Inc. (“FINRA”) to its Continuing Education Program³ (the “CE Program” or the “CE Transformation Initiative”).

The text of the proposed rule change is available at the Exchange's website at <https://longtermstockexchange.com/>, at

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Rel. No. 93097 (September 21, 2021), 86 FR 53358 (September 27, 2021) (Order Approving File No. SR–FINRA–2021–015 regarding the CE Transformation Initiative) (the “Approval Order”).

the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement on the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change incorporates the elements of the FINRA CE Transformation Initiative that are scheduled to take effect on January 1, 2023.⁴ Specifically, those changes (i) require registered persons to complete CE Regulatory Element⁵ annually for each representative or principal registration category that they hold; and (ii) expressly allow firms to consider other required training toward satisfying an individual's annual CE Firm Element and extend the Firm Element requirement to all registered persons.

The Exchange sets forth certain continuing education requirements for persons associated with a Member which are based on certain FINRA rules.⁶ The proposed rule change seeks to amend certain LTSE rules to more closely mirror the corresponding FINRA rules, as amended as part of the CE Transformation Initiative. The proposed rule change does not make any substantive changes to LTSE rules other than those to incorporate changes previously made by FINRA.

First, the proposed rule change would (i) adopt as new LTSE Rule 2.153, the exact provisions previously provided in LTSE Rule 2.160(m) regarding associated persons of a Member that are not required to register with the

Exchange. The Exchange believes that relocating these provisions into a standalone rule would more closely align the structure of LTSE's Rule Book with FINRA's, which has the standalone FINRA Rule 1230 (Associated Persons Exempt from Registration).

Second, the proposed rule change would amend LTSE Rule 2.154 to incorporate all of FINRA Rule 1240, not just the provisions that became effective on March 15, 2022.⁷ Additionally, as part of the broader incorporation, LTSE has added language to note that references to FINRA Rules 1210 and 1220 are to be construed to reference the applicable corresponding provisions of LTSE Rule 2.160. The proposed rule language also clarifies that such references to FINRA Rules 1210 and 1210 will not result in expansion of or changes to LTSE's registration categories as currently provided for in Rule 2.160. The proposed rule change also would eliminate the sentence in LTSE Rule 2.154 that states "References to FINRA Rule 1240(a)(2) shall refer to the LTSE Rule 2.160(p)(1) (Regulatory Element)" because it is no longer applicable.

Third, the proposed rule change would delete paragraphs (m) and (p) from LTSE Rule 2.160. As discussed above, paragraph (m) is being replaced by new LTSE Rule 2.153, and paragraph (p) is being replaced by proposed LTSE Rule 2.154.⁸

Fourth, the proposed rule change would add paragraph (o) back to LTSE Rule 2.160. The removal of this paragraph in the Exchange's prior filing related to the CE Transformation Initiative⁹ was in error. Reinstating paragraph (o) (Lapse of Registration and Expiration of SIE) to LTSE Rule 2.160 aligns the Exchange's rules to FINRA Rule 1210 Supplementary Material .08 (Lapse of Registration and Expiration of SIE), which covers substantially similar matters. The reinstated Rule 2.160 is also being proposed to include cross references to proposed LTSE Rule 2.154 as discussed above, in keeping with FINRA Rule 1210 Supplementary Material .08's references to FINRA Rule 1240. The Exchange believes these cross reference updates to account for references to FINRA Rule 1240 further aligns the Exchange's rules with the relevant FINRA rules.

Fifth, the proposed rule change updates internal LTSE rule references to reflect changes in LTSE's rules pursuant to the proposed rule change. Specifically, references to Rule 2.160(p) in paragraphs (e) and (g) of Rule 2.160 and Rule 9.218(a) are being updated as references to the proposed Rule 2.154.

FINRA's CE Transformation Initiative is being implemented in phases. The first phase was implemented on March 15, 2022 and provides eligible individuals who terminate any of their representative or principal registration categories the option of maintaining their qualification for any terminated registration categories by completing annual continuing education through a new program, the Maintaining Qualifications Program ("MQP"). The first phase also provides that, as of March 15, 2022, LTSE will not accept any new initial designations for individuals under its Financial Services Affiliate Waiver Program ("FSAWP").¹⁰

The second phase, which is being addressed the proposed rule change, would (i) require registered persons to complete continuing education Regulatory Element annually for each representative or principal registration category that they hold; and (ii) expressly allow firms to consider other required training toward satisfying an individual's annual continuing education Firm Element and extend the Firm Element requirement to all registered persons. The proposed rule change, consistent with this phase of FINRA's CE Transformation Initiative, will be implemented January 1, 2023. These changes, as further discussed below, are part of a larger initiative in which LTSE is aligning the structure of its registration, continuing education and supervision rules with those of FINRA.¹¹

(i) Transition to an Annual Regulatory Element for Each Registration Category

FINRA amended FINRA Rule 1240 under the CE Transformation Initiative to require registered persons to complete the Regulatory Element training of the CE Program annually by December 31. Firms, however, would have the flexibility to require their registered persons to complete the Regulatory Element training sooner than December 31, which would allow firms to coordinate the timing of the Regulatory Element with other training requirements, including the Firm Element.¹² FINRA Rule 1240 preserves FINRA's ability to extend the time by

⁴ See Securities Exchange Act Rel. No. 94515 (March 24, 2022), 87 FR 18419 (March 30, 2022) (Order approving SR-LTSE-2022-02 whereby LTSE adopted those elements of the FINRA CE Transformation Initiative that were implemented on March 15, 2022).

⁵ The terms CE Regulatory Element and CE Firm Element shall have the same meaning as in FINRA Rule 1240.

⁶ See *supra* note 4.

⁷ *Id.*

⁸ See FINRA Rules 1210 and 1240. In FINRA Regulatory Notice 21-41 (November 17, 2021), FINRA announced the amendment of Rules 1210 and 1240, noting implementation dates, March 15, 2022 (with respect to paragraph (c) of Rule 1240 and Supplementary Material .09 to Rule 1210); January 1, 2023 (all other rule changes).

⁹ See *supra* note 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² See *supra* note 3, at 53358.

which a registered person must complete the Regulatory Element for good cause shown if requested in writing and with supporting documentation.¹³ Consistent with prior requirements, individuals who fail to complete their Regulatory Element within the prescribed period would be automatically designated as “CE inactive”¹⁴ in FINRA’s Central Registration Depository (“CRD”) system¹⁵ until the requirements of the Regulatory Element have been satisfied.¹⁶

As amended under the CE Transformation Initiative, FINRA Rule 1240 also tailors the content of the Regulatory Element to each registration category. Thus, registered persons would be required to complete content specifically designed for each representative or principal registration category that they hold.¹⁷ FINRA Rule 1240 includes five additional elements such that: (1) Individuals who are designated as CE inactive would be required to complete all of their pending and upcoming annual Regulatory Element, including any annual Regulatory Element that becomes due during their CE inactive period, to return to active status;¹⁸ (2) the two-year CE inactive period would be calculated from the date individuals become CE inactive, and would continue to run regardless of whether individuals terminate their registrations;¹⁹ (3) individuals who become subject to a significant disciplinary action may be required to complete assigned continuing education content as prescribed by FINRA;²⁰ (4) individuals who have not completed any Regulatory Element content for a registration category in the calendar year(s) prior to reregistering would not be approved for registration for that category until they complete that Regulatory Element content, pass an examination for that registration category, or obtain an unconditional examination waiver for that registration category, whichever is applicable;²¹ and (5) the Regulatory Element requirements would apply to individuals who are

registered, or are in the process of registering as a representative or principal.²²

(ii) Recognition of Other Training Requirements for Firm Element and Extension of Firm Element to All Registered Persons

FINRA Rule 1240(b) requires a firm to develop and administer an annual Firm Element training program for its covered registered persons.²³ The Firm Element must, at a minimum, include training in ethics and professional responsibility, as well as training in the following items concerning securities products, services, and strategies offered by the member: (1) General investment features and associated risk factors; (2) suitability and sales practice considerations; and (3) applicable regulatory requirements.²⁴ Firms are required to conduct an annual needs analysis to, at minimum, determine the appropriate Firm Element training for covered registered persons at the firm based on the specific business of the member, and then provide the Firm Element training annually.²⁵

As amended under the CE Transformation Initiative, FINRA Rule 1240(b) allows for recognition of the successful completion of existing firm training programs relating to the anti-money laundering compliance program and the annual compliance meeting toward satisfying an individual’s annual Firm Element requirement.²⁶ FINRA also amended the rule to extend the Firm Element requirement to all registered persons, including individuals who maintain solely a permissive registration consistent with FINRA Rule 1210.02, thereby further aligning the Firm Element requirement with other broadly-based training requirements.²⁷ FINRA also updated the minimum training criteria under FINRA Rule 1240(b) to provide that Firm Element training must cover topics related to the role, activities, or responsibilities of the registered person, as well as professional responsibility.²⁸

To align with the changes discussed in subsections (i) and (ii) above, proposed new LTSE Rule 2.154 states that LTSE Members and associated persons of a Member shall comply with FINRA Rule 1240, as if such Rule were part of the Exchange’s rules.

2. Statutory Basis

LTSE believes that its proposal is consistent with Section 6(b) of the Act²⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁰ in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

As noted above, the proposed rule change seeks to align the Exchange’s Rules with certain changes to FINRA rules which have been approved by the Commission.³¹ The Exchange believes the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,³² which requires, among other things, that Exchange Rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 6(c)(3) of the Act,³³ which authorizes the Exchange to prescribe standards of training, experience and competence for persons associated with the Exchange. The proposed changes are based on the changes approved by the Commission in the Approval Order,³⁴ and the Exchange is proposing to adopt such changes substantially in the same form proposed by FINRA with respect to the continuing education program. The Exchange believes the proposal is consistent with the Act for the reasons described above and for those reasons cited in the Approval Order.³⁵

The Exchange believes that enhancements to FINRA’s CE program, including the shift to an annual Regulatory Element should lead to consistent, updated training, enhance a firm’s regulatory compliance and reduce a firm’s overall regulatory risk because of the increased timeliness and relevance of the more tailored content provided through an annual training, thus facilitating overall investor protection.

¹³ See FINRA Rule 1240(a)(2).

¹⁴ *Id.*

¹⁵ See <https://www.finra.org/registration-exams-classic-crd>. As stated on its website, FINRA integrated the registration filing functionality that supports the CRD Program into FINRA Gateway, available at <https://www.finra.org/filing-reporting/finra-gateway>. The standalone CRD features were retired August 21, 2021.

¹⁶ See *supra* note 3, at 53359.

¹⁷ See FINRA Rules 1240(a)(1) and (a)(4).

¹⁸ See *supra* note 3 at 53359.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See FINRA Rule 1240(b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See FINRA Rule 1240(b)(2)(D).

²⁷ See FINRA Rule 1240(b)(1).

²⁸ See FINRA Rule 1240(b)(2)(B).

²⁹ 15 U.S.C. 78f.

³⁰ 15 U.S.C. 78f(b)(6).

³¹ See Approval Order, *supra* note 3.

³² 15 U.S.C. 78f(b)(5).

³³ 15 U.S.C. 78f(c)(3).

³⁴ See Approval Order, *supra* note 3.

³⁵ *Id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change, which harmonizes its rules with rule changes adopted by FINRA, will reduce the regulatory burden placed on market participants engaged in trading activities across different markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative 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 and Rule 19b-4(f)(6) thereunder.³⁶

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that this proposed rule change may become operative immediately upon filing. In addition, Rule 19b-4(f)(6)(iii)³⁷ requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

Waiver of the 30-day operative delay will allow the Exchange to implement the proposed changes to its continuing education and registration rules without delay, thereby eliminating the material differences between FINRA and Exchange continuing education rules, providing more uniform standards

across the securities industry, and helping to avoid ongoing confusion for Exchange Members that are also FINRA members. For this reason, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.³⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-LTSE-2022-06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549. All submissions should refer to File Number SR-LTSE-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

³⁸ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 LTSE and on its internet website at <https://longtermstockexchange.com/>.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-LTSE-2022-06 and should be submitted on or before February 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-00777 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34803; File No. 812-15307]

Fidelity Private Credit Fund., et al.

January 11, 2023.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order ("Order") under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: Fidelity Private Credit Fund, Fidelity Multi-Strategy Credit Fund, Fidelity Diversifying Solutions

³⁹ 17 CFR 200.30-3(a)(12).

³⁶ 17 CFR 240.19b-4(f)(6).

³⁷ 17 CFR 240.19b-4(f)(6)(iii).

LLC, Fidelity Management & Research Company LLC, Fidelity Distressed Opportunities Master Fund I, LP, FIAM LLC, Fidelity Direct Lending Fund, LP, Fidelity Direct Lending Institutional Fund, LP, Fidelity Real Estate Debt Opportunities Fund I, LP, Fidelity REDOF I REIT, LLC, Fidelity Real Estate Opportunistic Income Fund, LP.

FILING DATES: The application was filed on February 2, 2022 and amended on June 13, 2022, November 30, 2022 and December 28, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at Secretarys-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below.

Hearing requests should be received by the Commission by 5:30 p.m. on February 7, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at Secretarys-Office@sec.gov.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicants: Cynthia Lo Bessette, Esq., cynthia.lo.bessette@fmr.com.

FOR FURTHER INFORMATION CONTACT: Asen Parachkevov, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' second amended and restated application, dated December 28, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at, at <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-00788 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34802; 812-15390]

Elevation Series Trust and Paralel Advisors LLC

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 15(a) of the Act, and rule 18f-2 under the Act, as well as from certain disclosure requirements in rule 20a-1 under the Act, Item 19(a)(3) of Form N-1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and Sections 6-07(2)(a), (b), and (c) of Regulation S-X ("Disclosure Requirements").

SUMMARY OF APPLICATION: The requested exemption would permit Applicants to enter into and materially amend subadvisory agreements with certain subadvisors without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the subadvisors.

APPLICANTS: Elevation Series Trust and Paralel Advisors LLC.

FILING DATES: The application was filed on September 30, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at Secretarys-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on February 6, 2023, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability

of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicants: JoAnn M. Strasser, JoAnn.Strasser@thompsonhine.com and Christopher Moore, Elevation Series Trust c/o Paralel Advisors LLC, 1700 Broadway, Suite 1230, Denver, CO 80290.

FOR FURTHER INFORMATION CONTACT: Laura L. Solomon, Senior Counsel, or Kyle R. Ahlgren, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated September 30, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system. The SEC's EDGAR system may be searched at <https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: January 11, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-00786 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-501, OMB Control No. 3235-0559]

Proposed Collection; Comment Request; Extension: Rule 203A-2(e)

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) ("PRA"), the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 203A-2(e),¹ which is entitled “internet investment advisers,” exempts from the prohibition on Commission registration an internet investment adviser who provides investment advice to all of its clients exclusively through computer software-based models or applications, termed under the rule as “interactive websites.”² These advisers generally would not meet the statutory thresholds currently set out in section 203A of the Advisers Act³ because they do not manage \$25 million or more in assets and do not advise registered investment companies, or they manage between \$25 million and \$100 million in assets, do not advise registered investment companies or business development companies, and are required to be registered as investment advisers with the states in which they maintain their principal offices and places of business and are subject to examination as an adviser by such states.⁴ Eligibility under rule 203A-2(e) is conditioned on an adviser maintaining in an easily accessible place, for a period of not less than five years from the filing of Form ADV,⁵ a record demonstrating that the adviser’s advisory business has been conducted through an interactive website in accordance with the rule.⁶

This record maintenance requirement is a “collection of information” for PRA purposes. The Commission believes that approximately 231 advisers are registered with the Commission under rule 203A-2(e), which involves a recordkeeping requirement of approximately four burden hours per year per adviser and results in an estimated 924 of total burden hours (4 × 231) for all advisers.

This collection of information is mandatory, as it is used by Commission staff in its examination and oversight program in order to determine continued Commission registration eligibility for advisers registered under this rule. Responses generally are kept confidential pursuant to section 210(b)

of the Advisers Act.⁷ Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) The accuracy of the Commission’s estimate of the burden of the collection of information; (c) Ways to enhance the quality, utility, and clarity of the information collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by March 20, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: January 11, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-00779 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

⁷ 15 U.S.C. 80b-10(a).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-181, OMB Control No. 3235-0184]

Proposed Collection; Comment Request; Extension: Form S-6

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the “Commission”) is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

The title for the collection of information is “Form S-6 (17 CFR 239.16), for Registration under the Securities Act of 1933 of Securities of Unit Investment Trusts Registered on Form N-8B-2 (17 CFR 274.13).” Form S-6 is a form used for registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (“Securities Act”) of securities of any unit investment trust (“UIT”) registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) (“Investment Company Act”) on Form N-8B-2. Section 5 of the Securities Act (15 U.S.C. 77e) requires the filing of a registration statement prior to the offer of securities to the public and that the statement be effective before any securities are sold. Section 5(b) of the Securities Act requires that investors be provided with a prospectus containing the information required in a registration statement prior to the sale or at the time of confirmation or delivery of the securities.

Section 10(a)(3) of the Securities Act (15 U.S.C. 77j(a)(3)) provides that when a prospectus is used more than nine months after the effective date of the registration statement, the information therein shall be as of a date not more than sixteen months prior to such use. As a result, most UITs update their registration statements under the Securities Act on an annual basis in order that their sponsors may continue to maintain a secondary market in the units. UITs that are registered under the Investment Company Act on Form N-8B-2 file post-effective amendments to their registration statements on Form S-6 in order to update their prospectuses.

The purpose of Form S-6 is to meet the filing and disclosure requirements of

¹ 17 CFR 275.203A-2(e).

² Included in rule 203A-2(e) is a limited exception to the interactive website requirement which allows these advisers to provide investment advice to fewer than 15 clients through other means on an annual basis. 17 CFR 275.203A-2(e)(1)(i). The rule also precludes advisers in a control relationship with an SEC-registered internet adviser from registering with the Commission under the common control exemption provided by rule 203A-2(b) (17 CFR 275.203A-2(b)). 17 CFR 275.203A-2(e)(1)(iii).

³ 15 U.S.C. 80b-3a(a).

⁴ *Id.*

⁵ The five-year record retention period is a similar recordkeeping retention period as imposed on all advisers under rule 204-2 of the Advisers Act. See rule 204-2 (17 CFR 275.204-2).

⁶ 17 CFR 275.203A-2(e)(1)(ii).

the Securities Act and to enable filers to provide investors with information necessary to evaluate an investment in the security. This information collection differs significantly from many other federal information collections, which are primarily for the use and benefit of the collecting agency. The information required to be filed with the Commission permits verification of compliance with securities law requirements and assures the public availability and dissemination of the information.

The Commission estimates that there are approximately 1,019 initial registration statements filed on Form S-6 annually and approximately 607 annual post-effective amendments to previously effective registration statements filed on Form S-6. The Commission estimates that the hour burden for preparing and filing an initial registration statement on Form S-6 is 45 hours and for preparing and filing a post-effective amendment to a previously effective registration statement filed on Form S-6 is 40 hours. Therefore, we estimate that the total hour burden of preparing and filing registration statements on Form S-6 for all affected UITs is 68,365 hours. We estimate that the cost burden of preparing and filing an initial registration statement on Form S-6 is \$38,825 and for preparing and filing a post-effective amendment is \$23,434. Therefore, we estimate that the total cost burden of preparing and filing registration statements on Form S-6 for all affected UITs is \$53,787,113.

Estimates of average burden hours and costs are made solely for purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. Compliance with the information collection requirements of Form S-6 is mandatory. Responses to the collection of information will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including

through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by March 20, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: PRA_Mailbox@sec.gov.

Dated: January 11, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-00773 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96638; File No. SR-Phlx-2023-02]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 7, Section 4

January 11, 2023.

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 3, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx's Pricing Schedule at Options 7, Section 4.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Phlx proposes to amend its Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY and broad-based index options symbols listed within Options 7, Section 5.A).” Specifically, Phlx proposes an increase to its Qualified Contingent Cross (“QCC”) rebates that are paid by the Exchange in a given month.

Today, the Exchange assesses a \$0.20 per contract QCC Transaction Fee for a Lead Market Maker,³ Market Maker,⁴

³ The term “Lead Market Maker” applies to transactions for the account of a Lead Market Maker (as defined in Options 2, Section 12(a)). A Lead Market Maker is an Exchange member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a). An options Lead Market Maker includes a Remote Lead Market Maker which is defined as an options Lead Market Maker in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Options 2, Section 11. See Options 7, Section 1(c). The term “Floor Lead Market Maker” is a member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a) and has a physical presence on the Exchange's trading floor. See Options 8, Section 2(a)(3).

⁴ The term “Market Maker” is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers. See Options 7, Section 1(c). The term “Floor Market Maker” is a Market Maker who is neither an SQT or an RSQT. A Floor Market Maker may provide a quote in open outcry. See Options 8, Section 2(a)(4).

Firm⁵ and Broker-Dealer.⁶ Customers⁷ and Professionals⁸ are not assessed a QCC Transaction Fee. QCC Transaction Fees apply to electronic QCC Orders⁹ and Floor QCC Orders.¹⁰ Rebates are paid on all qualifying executed electronic QCC Orders and Floor QCC Orders based on the following two tier rebate schedule:¹¹

QCC REBATE SCHEDULE

Tier	Threshold	Rebate per contract
Tier 1	0 to 999,999 contracts in a month.	\$0.09
Tier 2	1,000,000 contracts or more in a month.	0.17

The Exchange does not pay a QCC Rebate where the transaction is either: (i) Customer-to-Customer; (ii) Customer-to-Professional; (iii) Professional-to-Professional; or (iv) a dividend, merger, short stock interest or reversal or conversion strategy execution (as defined in Options 7, Section 4).

At this time, the Exchange proposes to increase the Tier 2 QCC Rebate from \$0.17 to \$0.20 per contract. The Tier 2 QCC Rebate requires market participants to transact 1,000,000 QCC contracts or more in a month.¹² The Exchange believes that increasing this Tier 2 QCC Rebate will permit Phlx to compete

⁵ The term "Firm" applies to any transaction that is identified by a member or member organization for clearing in the Firm range at The Options Clearing Corporation. See Options 7, Section 1(c).

⁶ The term "Broker-Dealer" applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(c).

⁷ The term "Customer" applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of a broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(b)(45)). See Options 7, Section 1(c).

⁸ The term "Professional" applies to transactions for the accounts of Professionals, as defined in Options 1, Section 1(b)(45) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Options 7, Section 1(c).

⁹ Electronic QCC Orders are described in Options 3, Section 12.

¹⁰ Floor QCC Orders are described in Options 8, Section 30(e).

¹¹ Volume resulting from all executed electronic QCC Orders and Floor QCC Orders, including Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional transactions and excluding dividend, merger, short stock interest or reversal or conversion strategy executions, is aggregated in determining the applicable volume tier.

¹² Tier 1 of the QCC Rebate Schedule requires market participants to transact from 0 to 999,999 QCC contracts in a month.

more effectively with other options exchanges for QCC Orders by incentivizing market participants to transact a greater amount of QCC Orders on Phlx in order to receive a greater rebate in a given month.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁴ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, 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."¹⁵

Likewise, in *NetCoalition v. Securities and Exchange Commission*¹⁶ ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁷ As the court emphasized, the Commission "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost."¹⁸

Further, "[n]o one disputes that competition for order flow is 'fiercer.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted'

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

¹⁵ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

¹⁶ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

¹⁷ See *NetCoalition*, at 534–535.

¹⁸ *Id.* at 537.

because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ." ¹⁹ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that it is reasonable to increase the Tier 2 QCC Rebate from \$0.17 to \$0.20 per contract.²⁰ The Exchange believes that increasing this QCC Rebate will permit Phlx to compete more effectively with other options exchange for QCC Orders by incentivizing market participants to transact a greater amount of QCC Orders on Phlx in order to receive a greater rebate in a given month.

The Exchange believes that it is equitable and not unfairly discriminatory to increase the Tier 2 QCC Rebate from \$0.17 to \$0.20 per contract. All market participants are eligible to transact QCC Orders, either electronically or on the Trading Floor, and would, therefore, be eligible to receive QCC Rebates for all qualifying executed QCC Orders, without limitation.

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.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact QCC orders. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the

¹⁹ *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

²⁰ The Tier 2 QCC Rebate requires market participants to transact 1,000,000 QCC contracts or more in a month.

degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-Market Competition

The proposed amendments do not impose an undue burden on intra-market competition. The Exchange believes that increasing the Tier 2 QCC Rebate from \$0.17 to \$0.20 per contract does not impose an undue burden on competition because all market participants are eligible to transact QCC Orders, either electronically or on the Trading Floor, and would, therefore, be eligible to receive QCC Rebates for all qualifying executed QCC Orders, without limitation.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²¹

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 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-Phlx-2023-02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2023-02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2023-02, and should be submitted on or before February 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-00776 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96636; File No. SR-NYSE-2023-02]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List

January 11, 2023.

Pursuant to section 19(b)(1) ¹ of the Securities Exchange Act of 1934

(“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on January 3, 2023, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, 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 its Price List (the “Price List”) with respect to certain regulatory fees related to the Central Registration Depository (“CRD” or “CRD system”), which are collected by the Financial Industry Regulatory Authority, Inc. (“FINRA”). The Exchange proposes to implement the fee change on January 3, 2023. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Price List with respect to certain regulatory fees collected by FINRA for use of CRD.⁴ The Exchange proposes to

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ CRD is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to do so by submitting a single form, fingerprint card, and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment, and

²¹ 15 U.S.C. 78s(b)(3)(A)(ii).

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

implement the fee changes effective January 3, 2023.

FINRA collects and retains certain regulatory fees via CRD for the registration of associated persons of Exchange member organizations that are not FINRA members (“Non-FINRA Member Organizations”).⁵ CRD fees are user-based, and there is no distinction in the cost incurred by FINRA if the user is a FINRA member or a Non-FINRA Member Organization.

FINRA recently amended two of the fees assessed for use of the CRD system.⁶ Accordingly, the Exchange proposes to amend the Price List to mirror the fees assessed by FINRA, which will be implemented concurrently with the amended FINRA fee as of January 2023.⁷ Specifically, the Exchange proposes to amend the Price List to modify the fee charged to Non-FINRA Member Organizations for additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings from \$110 to \$155⁸ and the fee for processing and posting to the CRD system each set of fingerprints submitted electronically to FINRA, plus any other charge that may be imposed by the U.S. Department of Justice for processing each set of fingerprints, from \$15 to \$20.⁹

The Exchange notes that the proposed change is not otherwise intended to address any other issues surrounding regulatory fees, and the Exchange is not aware of any problems that member

organizations would have in complying with the proposed change.

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 section 6(b)(4)¹¹ of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with section 6(b)(5) of the Act,¹² in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed fee change is reasonable because the fee will be identical to that adopted by FINRA as of January 2023 for use of the CRD system to submit an initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings and the posting to CRD each set of fingerprints submitted electronically to FINRA. The costs of operating and improving the CRD system are similarly borne by FINRA when a Non-FINRA Member Organization uses the CRD system; accordingly, the fees collected for such use should, as proposed by the Exchange, mirror the fees assessed to FINRA members. In addition, as FINRA noted in amending its fees, it believes that its proposed pricing structure is reasonable and correlates fees with the components that drive its regulatory costs to the extent feasible. The Exchange further believes that the change is reasonable because it will provide greater specificity regarding the CRD system fees that are applicable to Non-FINRA Member Organizations. All similarly situated member organizations are subject to the same fee structure, and every member organization must use the CRD system for registration and disclosure. Accordingly, the Exchange believes that the fees collected for such use should likewise increase in lockstep

with the fees assessed to FINRA members, as is proposed by the Exchange.

The Exchange further believes that the proposed fee change provides for the equitable allocation of reasonable fees and other charges, and does not unfairly discriminate between customers, issuers, brokers, and dealers. The fee applies equally to all individuals and firms required to report information the CRD system, and the proposed change will result in the same regulatory fees being charged to all member organizations required to report information to CRD and for services performed by FINRA regardless of whether such member organizations are FINRA members. Accordingly, the Exchange believes that the fee collected for such use should increase in lockstep with the fee adopted by FINRA as of January 2023, as is proposed by the Exchange.

B. Self-Regulatory Organization’s Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act,¹³ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the proposed change will reflect fees that will be assessed by FINRA as of January 2023 and will thus result in the same regulatory fees being charged to all member organizations required to report information to the CRD system and for services performed by FINRA, regardless of whether or not such member organizations are FINRA members.

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 has become effective upon filing pursuant to section 19(b)(3)(A)¹⁴ of the Act and paragraph (f) 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

disciplinary histories of registered associated persons of broker-dealers.

⁵ The Exchange originally adopted fees for use of the CRD system in 2001 and amended those fees in 2013 and 2022. See Securities Exchange Act Release Nos. 45112 (November 28, 2001), 66 FR 63086 (December 4, 2001) (SR-NYSE-2001-47); 68587 (January 4, 2013), 78 FR 2467 (January 11, 2013) (SR-NYSE-2012-77); Securities Exchange Act Release Nos. 93904 (January 5, 2022), 87 FR 1463 (January 11, 2022) (SR-NYSE-2021-77). While the Exchange lists these fees in its Price List, it does not collect or retain these fees.

⁶ See Securities Exchange Act Release No. 90176 (October 14, 2020), 85 FR 66592 (October 20, 2020) (SR-FINRA-2020-032).

⁷ The Exchange notes that it has only adopted the CRD system fees charged by FINRA to Non-FINRA Member Organizations when such fees are applicable. In this regard, certain FINRA CRD system fees and requirements are specific to FINRA members, but do not apply to NYSE-only member organizations. Non-FINRA Member Organizations have been charged CRD system fees since 2001. See note 5, *supra*. Member organizations that are also FINRA members are charged CRD system fees according to Section 4 of Schedule A to the FINRA By-Laws.

⁸ See section 4(b)(3) of Schedule A to the FINRA By-Laws.

⁹ See section 4(b)(4) of Schedule A to the FINRA By-Laws.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(5).

¹³ See 15 U.S.C. 78f(b)(8).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

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-NYSE-2023-02 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-2023-02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2023-02 and should be submitted on or before February 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-00775 Filed 1-17-23; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires Federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before March 20, 2023.

ADDRESSES: Send all comments to Office of Innovation & Technology, Small Business Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Elden Hawkes, Jr., Office, Innovation & Technology, technology@sba.gov, or Curtis B. Rich, Agency Clearance Officer, 202-205-7030, curtis.rich@sba.gov.

SUPPLEMENTARY INFORMATION: The Federal and State Technology Partnership (FAST) Program is a competitive grants program designed to strengthen the technological competitiveness of small businesses seeking funding from the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. Congress established the FAST Program under the Consolidated Appropriations Act of 2001, codified at 15 U.S.C. 657d(c). The program expired on September 30, 2005, and was reestablished under the Consolidated Appropriations Act of 2010.

FAST provides funding to organizations to execute state/regional programs that increase the number of SBIR/STTR proposals (through outreach and financial support); increase the number of SBIR/STTR awards (through technical assistance and mentoring);

and better prepare SBIR/STTR awardees for commercialization success (through technical assistance and mentoring).

The FAST Quarterly Reporting Form will collect data from FAST award recipients which will be used to improve program performance. The Quarterly Reports will collect ongoing performance and outcome data from FAST awardees on a required, quarterly basis. As well as improving program management, the data collected will inform the Annual Reports to the Senate Committee on Small Business & Entrepreneurship; the Senate Committee on Commerce, Science, and Transportation; the House Committee on Science, Space, and Technology; and the House Committee on Small Business, as required in the Small Business Act 34(c)(1)(2).

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

OMB Control Number: 3245-0405.

Title: FAST Program Quarterly Reporting Form.

Description of Respondents: FAST award recipients, including Small Business and Technology Development Centers (SBTDCs), State and local economic development agencies, and other FAST award recipients.

Form Number: N/A.

Total Estimated Annual Responses: 200.

Total Estimated Annual Hour Burden: 400.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023-00853 Filed 1-17-23; 8:45 am]

BILLING CODE 8026-09-P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: 30-Day notice.

SUMMARY: The Small Business Administration (SBA) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In

¹⁵ 17 CFR 200.30-3(a)(12).

accordance with the Paperwork Reduction Act and OMB procedures, SBA is publishing this notice to allow all interested member of the public an additional 30 days to provide comments on the proposed collection of information.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: Written comments and recommendations for this information collection request should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection request by selecting "Small Business Administration"; "Currently Under Review," then select the "Only Show ICR for Public Comment" checkbox. This information collection can be identified by title and/or OMB Control Number.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the information collection and supporting documents from the Agency Clearance Office at Curtis.Rich@sba.gov; (202) 205-7030, or from www.reginfo.gov/public/do/PRAMain.

SUPPLEMENTARY INFORMATION: Small Business Administration (SBA) regulations require that we determine that a participating Certified Development Company's Non-Bank Lender Institutions or Microlender's management, ownership, etc. is of "good character". To do so requires the information requested on the Form 1081. This form also provides data used to determine the qualifications and capabilities of the lenders key personnel.

Solicitation of Public Comments

Comments may be submitted on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

OMB Control 3245-0080

Title: Statement of Personal History.

Description of Respondents: Small Business Lending Companies.

SBA Form: 1081.

Estimated Number of Respondents: 150.

Estimated Annual Responses: 150.

Estimated Annual Hour Burden: 75.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023-00829 Filed 1-17-23; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Bridge in City of Corvallis, Benton County, Oregon

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final. The actions relate to a proposed highway project, OR 34: Van Buren Bridge Project, over the Willamette River, in City of Corvallis, Benton County, Oregon. Those actions grant approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 20, 2023. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Thomas Parker, Environmental Program Manager, FHWA Oregon Division Office, 530 Center St. NE, Salem, OR 97301, Office Hours: 7:00 a.m. to 4:30 p.m., Office Phone: 503-316-2547, Email: thomas.w.parker@dot.gov. You may also contact Christine Hildebrant, Senior Project Manager, ODOT Region 2 Area 4, 3700 SW Philomath Boulevard SW, Corvallis, OR 97333, Office Phone: 503-971-2044, Office Hours: 8:00 a.m.-5:00 p.m., Email: Christine.D.Hildebrant@odot.state.or.us.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency action subject to 23 U.S.C. 139(l)(1) by issuing approvals for the following bridge project in the State of Oregon. The OR34: Van Buren Bridge Project proposes to construct a new bridge crossing of the Willamette River in Corvallis, Oregon, along with associated surface street improvements. The purpose of the proposed project is to provide a seismically resilient Van Buren Avenue bridge across the Willamette River that meets modern design standards, safety requirements,

and ADA standards, while providing access for emergency, commercial, freight, and river traffic, and multi-modal transportation, but not limiting future options associated with the North Bypass concept developed in the 1980's to improve capacity and congestion in downtown Corvallis. [Federal ID No. S210(022)]. The actions by the agencies, and the laws under which such actions were taken, are described in the Categorical Exclusion (CE), approved on December 2, 2022. The OR 34: Van Buren Bridge Project and other project records are available by contacting FHWA or Oregon DOT at the addresses provided above. The CE and can be viewed and downloaded from the project website at <https://www.oregon.gov/odot/projects/pages/project-details.aspx?project=20688> or obtained from any contact listed above. This notice applies to all Federal agency decisions that are final as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321-4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
2. *Air:* Clean Air Act [42 U.S.C. 7401-7671q].
3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303; 23 U.S.C. 138]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531-1544 and Section 1536]; Marine Mammal Protection Act [16 U.S.C. 1361-1423h]; Fish and Wildlife Coordination Act [16 U.S.C. 661-667d]; Migratory Bird Treaty Act [16 U.S.C. 703-712].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 306108]; Archeological Resources Protection Act of 1977 [54 U.S.C. 312501-312508]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001-3013].
6. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 306108]; Archeological Resources Protection Act of 1977 [54 U.S.C. 312501-312508]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001-3013].
7. *Social and Economic:* American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201-4209].
8. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section

401, Section 319) [33 U.S.C. 1251–1387]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300f–300j–26]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act, [16 U.S.C. 3901, 3921]; Wetlands Mitigation [23 U.S.C. 119(g) and 133(b)(14)]; Flood Disaster Protection Act, 42 U.S.C. 4012a, 4106].

9. *Executive Orders*: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

(Authority: 23 U.S.C. 139(l)(1))

Keith Lynch,

Division Administrator, Salem, Oregon.

[FR Doc. 2023–00816 Filed 1–17–23; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0004]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: TORTUGA (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the

requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0004 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD–2023–0004 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0004, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–459, Washington, DC 20590. Telephone 202–366–5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *Tortuga* is:

—*Intended Commercial Use of Vessel:*

“The vessel is intended to be used as a research platform for ecological studies regarding marine mammals and fisheries as well as an UPV for eco-tours, sportfishing and sightseeing around Anacapa Island (Channel Island National Park).”

—*Geographic Region Including Base of Operations:* “California.” (Base of Operations: Oxnard, CA.)

—*Vessel Length and Type:* 34' Motor.

The complete application is available for review identified in the DOT docket

as MARAD 2023–0004 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD–2023–0004 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible,

please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00833 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD-2023-0006]

Coastwise Endorsement Eligibility Determination for a Foreign-built Vessel: OCEAN PEARL (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.
ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number

MARAD-2023-0006 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0006 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0006, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *Ocean Pearl* is:

—*Intended Commercial Use of Vessel:*

“Kelp forest research and film production.”

—*Geographic Region Including Base of Operations:* “California.” (Base of Operations: Monterey, CA.)

—*Vessel Length and Type:* 47.9' Motor.

The complete application is available for review identified in the DOT docket as MARAD 2023-0006 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or

a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0006 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00834 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration**

[Docket No. MARAD-2023-0001]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: APOLLO (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD-2023-0001 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0001 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0001,

1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *Apollo* is:—*Intended Commercial Use of Vessel:* “Dinner cruises.”—*Geographic Region Including Base of Operations:* “Texas.” (Base of Operations: Galveston, TX)—*Vessel Length and Type:* 41’ Motor.

The complete application is available for review identified in the DOT docket as MARAD 2023-0001 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the

instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0001 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.
Gabriel Chavez,
 Secretary, Maritime Administration.
 [FR Doc. 2023-00826 Filed 1-17-23; 8:45 am]
 BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD-2023-0002]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: DOUBLE DOWN (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.
ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD-2023-0002 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0002 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0002, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and

specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *Double Down* is:

—*Intended Commercial Use of Vessel:* “Vessel to be offered for charter to guests.”

—*Geographic Region Including Base of Operations:* “North Carolina.” (Base of Operations: Wilmington, NC)

—*Vessel Length and Type:* 72.8' Motor

The complete application is available for review identified in the DOT docket as MARAD 2023-0002 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0002 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.
Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00831 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration****[Docket No. MARAD-2023-0009]****Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: COOKIE TOO (Sail); Invitation for Public Comments****AGENCY:** Maritime Administration, DOT.
ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD-2023-0009 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0009 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0009, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in

nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *Cookie Too* is:

—*Intended Commercial Use of Vessel:* “Vessel is intended to be used for ad hoc coastwise 6-pack (UPV) day-chartering in New England, primarily on Long Island Sound, with possible occasional winter charter use in Florida. Activities would fall under coastwise time charter as an uninspected vessel.”

—*Geographic Region Including Base of Operations:* “Florida, Connecticut, Rhode Island, Massachusetts, New Hampshire, and New York (excluding New York Harbor).” (Base of Operations: Amangasset, NY)

—*Vessel Length and Type:* 41.3' Sail (Catamaran).

The complete application is available for review identified in the DOT docket as MARAD 2023-0009xxxx at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary.

There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0009 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). Recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00828 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration****[Docket No. MARAD-2023-0008]****Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: THE GARLIC (Motor); Invitation for Public Comments****AGENCY:** Maritime Administration, DOT.
ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD-2023-0008 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0008 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0008, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in

nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *The Garlic* is:

—*Intended Commercial Use of Vessel:* “Short day cruise on the intracoastal waterway in New Smyrna Beach, Florida.”

—*Geographic Region Including Base of Operations:* “Florida.” (Base of Operations: New Smyrna Beach, FL)

—*Vessel Length and Type:* 71.3' Motor.

The complete application is available for review identified in the DOT docket as MARAD 2023-0008 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation*How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0008 or visit the Docket Management Facility (see **ADDRESSES** for

hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00830 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION**Maritime Administration****[Docket No. MARAD-2023-0005]****Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: TEMPLAR (Sail); Invitation for Public Comments****AGENCY:** Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD-2023-0005 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0005 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0005, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As described in the application, the

intended service of the vessel *Templar* is:

—*Intended Commercial Use of Vessel:* “Snorkeling, island hopping, sunset cruises.”

—*Geographic Region Including Base of Operations:* “Florida.” (Base of Operations: Marathon, FL)

—*Vessel Length and Type:* 28’ Sail (Catamaran)

The complete application is available for review identified in the DOT docket as MARAD 2023-0005 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD’s regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel’s coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter’s interest in the application, and address the eligibility criteria given in section 388.4 of MARAD’s regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0005 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department’s FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT’s compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00825 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD-2023-0007]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: LUCERO (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this

notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 17, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD-2023-0007 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2023-0007 and follow the instructions for submitting comments.

- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2023-0007, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT:

James Mead, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-459, Washington, DC 20590. Telephone 202-366-5723, Email James.Mead@dot.gov.

SUPPLEMENTARY INFORMATION: As

described in the application, the intended service of the vessel *Lucero* is:

—*Intended Commercial Use of Vessel:*

“Uninspected passenger vessel for tourism in the near islands and beaches of Puerto Rico.”

—*Geographic Region Including Base of Operations:* “Puerto Rico.” (Base of Operations: Fajardo, PR)

—*Vessel Length and Type:* 48.4' Sail (Catamaran).

The complete application is available for review identified in the DOT docket as MARAD 2023-0007 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2023-0007 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to SmallVessels@dot.gov. Include in the email subject heading “Contains Confidential Commercial Information” or “Contains CCI” and state in your submission, with specificity, the basis for any such

confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can 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.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2023-00827 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-81-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2023-0002]

Pipeline Safety: Request for Special Permit; Colorado Interstate Gas Company, LLC

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to solicit public comments on a request for special permit received from the Colorado Interstate Gas Company, LLC (CIG). The special permit request is seeking relief from compliance with certain requirements in the federal pipeline safety regulations. At the conclusion of the 30-day comment period, PHMSA will review the comments received from this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by February 17, 2023.

ADDRESSES: Comments should reference the docket number for this special

permit request and may be submitted in the following ways:

- *E-Gov Website:* <http://www.Regulations.gov>. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1-202-493-2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Docket Management System: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two (2) copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at <http://www.Regulations.gov>.

Note: There is a privacy statement published on <http://www.Regulations.gov>. Comments, including any personal

information provided, are posted without changes or edits to <http://www.Regulations.gov>.

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 Code of Federal Regulations (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 Kay McIver, DOT, PHMSA–PHP–80, 1200 New Jersey Avenue SE, 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:

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: PHMSA received a special permit request from CIG, a subsidiary of Kinder Morgan, Inc., on December 29, 2022, seeking a waiver from the requirements of 49 CFR 192.611(a) and (d): Change in class location: Confirmation or revision of maximum allowable operating pressure and 49 CFR 192.619(a): Maximum allowable operating pressure: Steel or plastic pipelines.

This special permit is being requested in lieu of pipe replacement, pressure reduction, or new pressure tests for a Class 1 to 3 location change on one (1) gas transmission special permit segment totaling 1,022.62 feet (approximately 0.194 miles). This pipeline segment, which has changed from a Class 1 to Class 3 location, is as follows:

Special permit segment No.	County, state	Outside diameter (inches)	Line name	Length (feet)	Year installed	Maximum allowable operating pressure (psig)
1 (KM 725)	Douglas, Colorado	20	0009–A Pueblo-Watkins Mainline	1,022.62	1966	820

The special permit request, proposed special permit with conditions, and draft environmental assessment (DEA) for the above listed CIG pipeline segment is available for review and public comments in Docket Number PHMSA–2023–0002. PHMSA invites interested persons to review and submit comments on the special permit request and DEA in the docket. Please submit comments on any potential safety, environmental, and other relevant considerations implicated by the special permit request. Comments may include relevant data.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received on or before the comments closing date. Comments received after the closing date will be evaluated, if it is possible to do so without incurring additional expense or delay. PHMSA will consider

each relevant comment it receives in making its decision to grant or deny this special permit request.

Issued in Washington, DC, on January 9, 2023, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,
Associate Administrator for Pipeline Safety.
[FR Doc. 2023–00839 Filed 1–17–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

[Docket Number RITA–2008–0002]

Agency Information Collection Activity; Notice To Continue To Collect: Confidential Close Call Transit Data for the Washington Metropolitan Area Transit Authority (WMATA)

AGENCY: Bureau of Transportation Statistics (BTS), Office of the Assistant Secretary for Research and Technology (OST–R), U.S. Department of Transportation.

ACTION: Notice to continue to collect confidential close call transit data.

SUMMARY: In accordance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, this notice announces the intention of the Bureau of Transportation Statistics

(BTS) to request the Office of Management and Budget (OMB) to use the approved OMB Number 2138–0044, and continue to collect the following information: Confidential Close Call Transit Data for the Washington Metropolitan Area Transit Authority (WMATA or the Authority), which includes but is not limited to the collection of data from Rail, Bus, Information Technology, and Command Center personnel. This data collection effort supports a multi-year program focused on improving the Authority in its entirety, by collecting and analyzing data and information on close calls and other unsafe occurrences within WMATA. The program is co-sponsored by WMATA and labor leadership including: the President/Business Agent of the Amalgamated Transit Union (ATU) Local 689, the International Brotherhood of Teamsters (IBT) Local 922 and Office & Professional Employees International Union (OPEIU) Local 2. The Close Call program is designed to identify safety issues and propose preventive actions based on voluntary reports of a close call submitted confidentially to BTS, an Agency within the U.S. Department of Transportation. This information collection is necessary for systematically analyzing data to identify root causes of potentially unsafe events.

DATES: Written comments should be submitted by March 20, 2023.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments by only one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically. Docket Number: DOT–OST–2017–0043.

- *Mail:* Docket Services, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

- *Hand Delivery:* Deliver to mail address above between 9 a.m. and 5 p.m. EST, Monday through Friday, except Federal holidays.

- *Fax:* (202) 493–2251.

Identify all transmissions with “Docket Number RITA–2008–0002” at the beginning of each page of the document.

Instructions: All comments must include the agency name and docket number for this notice. Paper comments should be submitted in duplicate. The Docket Management Facility is open for examination and copying, at the above address from 9 a.m. to 5 p.m. EST, 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 Docket Number RITA–2008–0002.” The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that all comments received, including any personal information, will be posted and will be publicly viewable, without change, at www.regulations.gov. You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may review the Privacy Act Statement at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Demetra V. Collia, Bureau of Transportation Statistics, Office of the Assistant Secretary for Research and Technology, U.S. Department of Transportation, Office of Safety Data and Analysis, RTS–31, E36–302, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; Phone No. (202) 366–1610; Fax No. (202) 366–3383; email: demetra.collia@dot.gov. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

Data Confidentiality Provisions:

Under this data collection, the confidentiality of the information submitted to BTS is protected under the BTS confidentiality statute (49 U.S.C. 6307) and the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018 (Pub. L. 115–435 Foundations for Evidence-Based Policymaking Act of 2018, title III). In accordance with these confidentiality statutes, only statistical (aggregated) and non-identifying data will be made publicly available by BTS through its reports. BTS will not release to WMATA or any other public or private entity any information that might reveal the identity of individuals who have submitted a report.

SUPPLEMENTARY INFORMATION:

I. The Data Collection

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35; as amended) and 5 CFR part 1320 require each Federal agency to obtain OMB approval to initiate an information collection activity. BTS is seeking OMB approval to continue the following BTS information collection activity:

Title: Confidential Close Call Transit Data.

OMB Control Number: 2138–0044.

Type of Review: Continue to collect.

Respondents: WMATA employees.

Number of Potential Responses: 150 (per annum).

Estimated Time per Response: 60 minutes.

Frequency: Intermittent for 3 years. Reports are submitted when there is a qualifying event.

Total Annual Burden: 150 hours.

Abstract: Collecting safety data on the nation’s transportation system is an important component of BTS’s mission and responsibility to the transportation community and is authorized in BTS statute (49 U.S.C. 6302). BTS and WMATA share a common interest in promoting safety based on accurate information. To that end, WMATA and the Amalgamated Transit Union (ATU) Local 689, the International Brotherhood of Teamsters (IBT) Local 922 and Office & Professional Employees International Union (OPEIU) Local 2 have supported the Confidential Close Call Program at WMATA as a means of fostering an environment of ongoing advancements in their safety culture.

A close call is a situation or circumstance that had the potential for safety consequences, but did not result in an adverse safety event. Knowledge of a close call presents an opportunity to address unsafe work conditions and encourage a culture of safety in the workplace. It is estimated that the time to complete a close call report and participate in a brief confidential interview will be no than 60 minutes for a maximum total burden of 150 hours (150 reports*60 minutes/60 = 150 hours). Reports are submitted when there is a qualifying event, *i.e.*, when a close call occurs within any office of the Authority.

II. Background

WMATA deployed the Close Call program in April 2013, and in May 2016 the program expanded to include bus employees. The Confidential Close Call Program is a Cooperative Agreement between BTS, WMATA management, the Amalgamated Transit Union (ATU) Local 689, the International Brotherhood of Teamsters (IBT) Local 922 and Office & Professional Employees International Union (OPEIU) Local 2. This program provides a confidential platform to facilitate the voluntary reporting of close call events without fear of discipline. Collecting data on the nation’s transportation system is an important component of BTS’ mission and responsibility to the transportation community as stated in its authorizing statute (49 U.S.C. 6302). BTS and WMATA/ATU, IBT Local 922 and OPEIU Local 2, share a common interest in promoting rail transit and bus safety using timely, accurate, and relevant data. WMATA/ATU, IBT Local

922 and OPEIU Local 2, is sponsoring the Confidential Close Call Program for Transit Rail and Bus System to improve transit rail and bus safety by studying the effectiveness of its own systems through the data and information collected from reported close call events.

Any situation or circumstance that has the potential for safety consequences, but did not result in an adverse safety event is defined as a close call. Knowledge about a close call presents an opportunity to address unsafe work conditions and practices, prevent accidents, contribute to policy making decisions and improve overall safety in the workplace.

BTS collects close call reports submitted by WMATA employees, conducts employee interviews, develop and maintain an analytical database containing reported data and other pertinent information, provides statistical analysis to WMATA, and protects the confidentiality of these data through its own statute (49 U.S.C. 6302) and CIPSEA. Only statistical and non-sensitive information will be made available through publications and reports.

Voluntary reporting of close calls to a confidential system provides a tool to identify and correct weaknesses within WMATA and prevents accidents. Close Call reporting fosters a voluntary, cooperative, non-punitive environment to communicate safety concerns for the greater good. Through the analysis of the data that is reported, WMATA receives information about factors that contribute to unsafe events, which becomes the catalyst to develop new training programs and identify root causes of adverse events. The database also provides researchers with valuable information regarding precursors to safety risks and contributes to research and development of intervention programs aimed at averting accidents and fatalities.

Employees involved in reporting a close call incident are asked to fill out a report and participate in a brief, confidential interview. Employees submit the report electronically to BTS. Participants will be asked to provide information such as: (1) name and contact information; (2) time and location of the event; (3) a short description of the event; (4) contributing factors to the close call; and (5) any other information that might be useful in determining a root cause for such events.

III. Request for Public Comment

BTS requests comments on any aspects of this information collection

request, including: (1) the accuracy of the estimated burden of 150 hours detailed in section I; (2) ways to enhance the quality, usefulness, and clarity of the collected information; and (3) ways to minimize the collection burden without reducing the quality of the information collected, including additional use of automated collection techniques or other forms of information technology.

Demetra V. Collia,

Director, Office of Safety Data and Analysis, Bureau of Transportation Statistics (BTS), Office of the Assistant Secretary for Research and Technology, U.S. Department of Transportation.

[FR Doc. 2023-00852 Filed 1-17-23; 8:45 am]

BILLING CODE 4910-HY-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Securities Offering Disclosure Rules

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 comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). An agency 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 is soliciting comment concerning the renewal of an information collection titled "Securities Offering Disclosure Rules."

DATES: Comments must be submitted on or before March 20, 2023.

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: 1557-0120, 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-

0120" 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" drop down menu and click on "Information Collection Review." 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 "1557-0120" or "Securities Offering Disclosure Rules." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482-7340.

FOR FURTHER INFORMATION CONTACT:

Shaquita Merritt, OCC Clearance Officer, (202) 649-5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor.

"Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, and/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 this collection of information.

Title: Securities Offering Disclosure Rules.

OMB Control No.: 1557-0120.

Type of Review: Regular.

Description: Twelve CFR part 16 governs the offer and sale of securities by national banks and Federal savings associations. The requirements in part 16 enable the OCC to perform its responsibility to ensure that the investing public has information about the condition of the institution, the reasons for raising new capital, and the terms of the offering. Part 16 requires that securities offering disclosures of national banks and Federal savings associations be generally consistent with similar Securities and Exchange Commission (SEC) disclosure requirements.

The principal collections of information in part 16 are as follows:

Section 16.3 Registration Statement and Prospectus Requirements

A registration statement for a security and a prospectus must be filed with the OCC. Securities of a national bank or Federal savings association may be offered through the use of a preliminary prospectus before a registration statement and prospectus if among other things, a registration statement including preliminary prospectus has been filed with the OCC; the preliminary prospectus includes the information required by 12 CFR 16.15 with certain exceptions; a copy of the preliminary prospectus is furnished to each purchaser prior to or simultaneously with the sale of the security; and delivery of a prospectus by dealers is subject to SEC rule 174 (17 CFR 230.174) setting forth certain exemptions that apply to transactions by dealers in national bank and Federal savings association issued securities.

Section 16.6 Sales of Non-Convertible Debt

Non-convertible debt, if issued in certificate form, must be legended to provide that it cannot be exchanged for notes or debentures of the national bank or Federal savings association in denominations smaller than \$ 250,000. Each purchaser of the debt receives an

offering document and that the offering document and any amendments thereto are filed with the OCC. A federal branch or agency need not comply with certain requirements of § 16.6 if it provides the OCC the information specified in SEC Rule 12g3-2(b) (17 CFR 240.12g3-2(b)) and provides purchasers the information specified in SEC Rule 144A(d)(4)(i) (17 CFR 230.144A(d)(4)(i)). A federal branch or agency that provides the OCC with the information specified in SEC Rule 12g3-2(b) need not incorporate that information by reference into the offering document. However, the federal branch or agency must make that information available to the potential purchasers upon request.

Section 16.7 Nonpublic Offerings

Offers and sales of national bank or Federal savings association issued securities that meet certain requirements will be exempt from the registration and prospectus requirements of part 16 if, among other things, the securities are offered and sold in a transaction that satisfies the requirements of SEC Regulation D (17 CFR part 230, Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933) and all subsequent sales of national bank or Federal savings association issued securities subject to the limitations on resale of SEC Regulation D (17 CFR part 230, Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933) must be made pursuant to SEC Rule 144 (17 CFR 230.144), SEC Rule 144A (17 CFR 230.144A), another exemption from registration under the Securities Act referenced in § 16.5, or in accordance with the registration and prospectus requirements of § 16.3.

Section 16.15 Form and Content

Any registration statement filed pursuant to part 16 must be on the form for registration (17 CFR part 239) that the national bank or Federal savings association would be eligible to use were it required to register the securities under the Securities Act and must meet the requirements of the SEC regulations referred to in the applicable form for registration. Any registration statement or amendment filed pursuant to part 16 must comply with the requirements of SEC Regulation C (17 CFR part 230, Regulation C—Registration), except to the extent those requirements conflict with specific requirements of part 16. Any registration statement or

amendment filed pursuant to part 16 must comply with the requirements of SEC Regulation C (17 CFR part 230, Regulation C—Registration), except to the extent those requirements conflict with specific requirements of part 16. The registration statement for securities issued by a national bank or Federal savings association that is not in compliance with the regulatory capital requirements set forth in 12 CFR part 3, as applicable, must be on the Form S-1 (17 CFR part 239) registration statement under the Securities Act. A national bank or Federal savings association in organization pursuant to 12 CFR 5.20 is not required to include audited financial statements as part of its registration statement for the offer and sale of its securities, or as part of its offering statement for the offer and sale of its securities pursuant to 12 CFR 16.8, unless the OCC determines that factors particular to the proposal indicate that inclusion of such statements would be in the interest of investors or would further the safe and sound operation of a national bank or Federal savings association.

Section 16.17 Filing Requirements and Inspection of Documents

Where part 16 refers to a section of the Securities Act or the Exchange Act or an SEC rule that requires the filing of a notice or other document with the SEC, that notice or other document must be filed with the OCC. Any filing of amendments or revisions under part 16 must include two copies, one of which must be marked to indicate clearly and precisely, by underlining or in some other appropriate manner, the changes made.

Affected Public: Businesses or other for-profit.

Burden Estimates:

Estimated Number of Respondents: 16.

Estimated Number of Responses: 32.

Estimated Annual Burden: 544 hours.

Frequency of Response: On occasion.

Comments: Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will 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.*

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Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Part 120

Revised Definition of "Waters of the United States"; Final Rule

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 328****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 120**

[EPA-HQ-OW-2021-0602; FRL-6027.4-01-OW]

RIN 2040-AG19

Revised Definition of “Waters of the United States”

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are finalizing a rule defining the scope of waters protected under the Clean Water Act. In developing this rule, the agencies considered the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.”

This final rule advances the objective of the Clean Water Act and ensures critical protections for the nation’s vital water resources, which support public health, environmental protection, agricultural activity, and economic growth across the United States.

DATES: This action is effective on March 20, 2023.

ADDRESSES: The agencies have established a docket for this action under Docket ID No. EPA-HQ-OW-2021-0602. 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., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Whitney Beck, Oceans, Wetlands and Communities Division, Office of Water (4504-T), Environmental Protection

Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: CWAwtus@epa.gov, and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 459-6026; email address: usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil.

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I. Executive Summary

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (Clean Water Act or Act) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). In doing so, Congress performed a “total restructuring” and “complete rewriting” of the then-existing statutory framework, designed to “establish an all-encompassing program of water pollution regulation.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–18 (1981) (citation omitted). Congress thus intended the 1972 Act to be a bold step forward in providing protections for the nation’s waters.

Central to the framework and protections provided by the Clean Water Act is the term “navigable waters,”¹ defined broadly in the Act as “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). This term is relevant to the scope of

¹ To avoid confusion between the term “navigable waters” as defined in the Clean Water Act and its implementing regulations, 33 U.S.C. 1362(7); 33 CFR 328.3 (2014), and the use of the term “navigable waters” to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 CFR 328.3(a)(1) (2014), this preamble will refer to the latter as “traditional navigable waters” or waters that are “navigable-in-fact.”

most Federal programs to protect water quality under the Clean Water Act—for example, water quality standards, permitting to address discharges of pollutants, including discharges of dredged or fill material, processes to address impaired waters, oil spill prevention, preparedness and response programs, and Tribal and State water quality certification programs—because the Clean Water Act uses the term “navigable waters” in establishing such programs.

As a unanimous Supreme Court concluded decades ago, Congress delegated a “breadth of federal regulatory authority” in the Clean Water Act and expected the Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) to tackle the “inherent difficulties of defining precise bounds to regulable waters.” *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985) (“*Riverside Bayview*”). The Supreme Court noted that “[f]aced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.” *Id.* at 132. The Court went on to state that “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for [w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” *Id.* at 132–33 (citations omitted). The Supreme Court has twice more addressed the complex issue of Clean Water Act jurisdiction over “waters of the United States.” *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”); *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”).

This rule takes up that multi-faceted challenge. In developing this rule, the agencies considered the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.” The agencies’ experience includes more than a decade of implementing those regulations consistent with the Supreme Court’s decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*. The agencies also considered the extensive public comments on the proposed rule.

This rule establishes limits that appropriately draw the boundary of waters subject to Federal protection. When upstream waters significantly

affect the integrity of waters for which the Federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters—this rule ensures that Clean Water Act programs apply to protect those paragraph (a)(1) waters by including such upstream waters within the scope of the “waters of the United States.” Where waters do not significantly affect the integrity of waters for which the Federal interest is indisputable, this rule leaves regulation exclusively to the Tribes and States.² Additionally, it is important to note that the fact that a water is one of the “waters of the United States” does not mean that no activity can occur in that water; rather, it means that activities must comply with the Clean Water Act’s permitting programs, and those programs include numerous statutory exemptions and regulatory exclusions.

EPA and the Corps have separate regulations defining the statutory term “waters of the United States,” but their interpretations were substantially similar and remained largely unchanged between 1977 and 2015. *See, e.g.*, 42 FR 37122, 37144 (July 19, 1977); 44 FR 32854, 32901 (June 7, 1979). This rule is founded on that familiar pre-2015 definition that has bounded the Clean Water Act’s protections for decades, has been codified multiple times, and has been implemented by every administration in the last 45 years.³ The

² As explained in section IV.A.3.a.ii of this preamble, the agencies find it appropriate to assert Federal jurisdiction over waters meeting the relatively permanent standard in addition to waters meeting the significant nexus standard because—though the relatively permanent standard identifies only a subset of the “waters of the United States”—it provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters; *i.e.*, those waters for which the Federal interest is indisputable. By promulgating a rule interpreting the Clean Water Act to cover waters that meet the relatively permanent standard or the significant nexus standard, the agencies have appropriately construed the Act to protect those waters necessary to protect the integrity of traditional navigable waters, the territorial seas, and interstate waters, while leaving regulatory authority over all the waters that do not have the requisite connection to paragraph (a)(1) waters exclusively to the Tribes and States.

³ The Corps’ 1977 regulations (42 FR 37122, 37144 (July 19, 1977)), though organized differently than their 1986 regulations, contained many of the same categories as those later regulations, and its definition of “adjacent” was identical to the definition promulgated in 1986. EPA’s 1979 regulations (44 FR 32854, 32901 (June 7, 1979)) were substantially similar to the Corps’ 1977 regulations and added for the first time an exclusion for waste treatment systems. In 1986 and 1988, the Corps and EPA, respectively, promulgated nearly identical definitions of “waters of the United States.” 51 FR 41206, 41217 (November 13, 1986); 53 FR 20764, 20765 (June 6, 1988). Besides the addition of an exclusion for prior converted

pre-2015 regulations are commonly referred to as “the 1986 regulations,” and this preamble will refer to them as such, but the agencies note that “the 1986 regulations” have largely been in place since 1977 and were also amended in 1993 to add an exclusion.⁴

Since 2015, the agencies have finalized three rules revising the definition of “waters of the United States.” *See* 80 FR 37054 (June 29, 2015); 84 FR 56626 (October 22, 2019); 85 FR 22250 (April 21, 2020). The most recent rule, the 2020 “Navigable Waters Protection Rule” (“2020 NWPR”), substantially departed from prior rules defining “waters of the United States.” On January 20, 2021, President Biden signed Executive Order 13990, entitled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” directing all executive departments and agencies to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions that conflict with national policies of science-based decision making in order to improve public health, protect our environment, and ensure access to clean air and water. 86 FR 7037 (published January 25, 2021, signed January 20, 2021). After completing a review of and reconsidering the record for the 2020 NWPR, on June 9, 2021, the agencies announced their intention to revise or replace the rule. The 2020 NWPR was subsequently vacated by two district courts, as discussed further below.

In this rule, consistent with the general framework of the 1986 regulations, the agencies interpret the term “waters of the United States” to include:

- traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters”);
- impoundments of “waters of the United States” (“paragraph (a)(2) impoundments”);
- tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2)

cropland in 1993 (58 FR 45008, 45031 (August 25, 1993)), the agencies’ regulations defining “waters of the United States” remained unchanged until the agencies finalized the 2015 Clean Water Rule (80 FR 37054, 37104 (June 29, 2015)). In 2019, the agencies repromulgated their pre-2015 regulations (84 FR 56626, 56667 (October 22, 2019)).

⁴ For convenience, in this preamble the agencies will generally cite the Corps’ longstanding regulations and will refer to them as “the 1986 regulations,” “the pre-2015 regulations,” or “the regulations in place until 2015.” These references are inclusive of EPA’s comparable regulations that were recodified in 1988 and of the exclusion for prior converted cropland, which both agencies added in 1993.

impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”);

- wetlands adjacent to paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”); and

- intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard (“paragraph (a)(5) waters”).

The “relatively permanent standard” refers to the test to identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. The “significant nexus standard” refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters—*i.e.*, the paragraph (a)(1) waters. The regulatory text defines “significantly affect” in order to increase the clarity and consistency of implementation of the significant nexus standard.

With respect to “adjacent wetlands,” the concept of adjacency and the significant nexus standard create separate, additive limitations that work together to ensure that such wetlands are covered (*i.e.*, jurisdictional under the Act) when they have the necessary relationship to other covered waters. The adjacency limitation focuses on the relationship between the wetland and the covered water to which it is adjacent. Consistent with the plain meaning of the term and the agencies’ 45-year-old definition of “adjacent,” the rule requires that an “adjacent wetland” be “bordering, contiguous, or neighboring” to another covered water.⁵ Where a wetland is adjacent to a traditional navigable water, the

territorial seas, or an interstate water, consistent with longstanding regulations and practice, no further inquiry is required, and the wetland is jurisdictional. But where a wetland is adjacent to a covered water that is *not* a traditional navigable water, the territorial seas, or an interstate water, such as a tributary, this rule requires an additional showing for that adjacent wetland to be covered: the wetland must satisfy either the relatively permanent standard or the significant nexus standard. And that inquiry, under either standard, fundamentally concerns the adjacent wetland’s relationship to the relevant paragraph (a)(1) water rather than the relationship between the adjacent wetland and the covered water to which it is adjacent. In other words, the adjacent wetland must have a continuous surface connection to a relatively permanent, standing or continuously flowing water connected to a paragraph (a)(1) water *or* must either alone or in combination with similarly situated waters significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water.

In addition, this rule codifies several exclusions from the definition of “waters of the United States,” including longstanding exclusions for prior converted cropland and waste treatment systems, and for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime.⁶

This rule advances the Clean Water Act’s statutory objective as it is informed by the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, as well as intrastate lakes and ponds, streams, and wetlands that do not fall within the other jurisdictional categories to restore and maintain the water quality of traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, the paragraph (a)(1) waters). A comprehensive report prepared by EPA’s Office of Research and Development entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*⁷ (hereinafter, “Science Report”) in 2015 synthesized the peer-reviewed science. Since the

⁶ The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

⁷ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F (2015), available at <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

release of the Science Report, additional published peer-reviewed scientific literature has strengthened and supplemented the report’s conclusions. The *Technical Support Document for the Final Rule: Revised Definition of “Waters of the United States”* (hereinafter, “Technical Support Document”) provides additional scientific and technical information about issues raised in this rule.^{8,9}

The agencies’ interpretation also reflects consideration of the statute as a whole, including both its objective in section 101(a) and its policies, such as that of section 101(b), which states in part that “it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. 1251(b). The agencies find that the scope of Clean Water Act jurisdiction established in this final rule enhances States’ ability to protect waters within their borders, such as by participating in the section 401 certification process and by providing input during the permitting process for out-of-state section 402 and 404 permits that may affect their waters. *See* 33 U.S.C. 1341, 1342(b), 1344(h)(1)(E). Indeed, in implementing and participating in the Clean Water Act’s regulatory requirements and framework, States can have more powerful and holistic tools for addressing water quality than they would have in implementing state-only laws and regulations.

Further, this rule is based on the agencies’ conclusion that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act. The agencies have also determined that the relatively permanent standard is appropriate to include in this rule because, while it

⁸ Appendix A of the Technical Support Document contains a glossary of terms used in the document. Appendix B of the Technical Support Document contains the references cited in the document. Appendix C of the Technical Support Document is a list of citations that have been published since the Science Report and that contain findings relevant to the report’s conclusions.

⁹ Throughout this preamble, when the agencies refer to “science,” that means foundational principles related to chemical, physical, and biological integrity, including biology, hydrology, geology, chemistry, and soil science; the Science Report; and the Technical Support Document for this rule.

⁵ The agencies have a longstanding, specific definition of “adjacent,” and section IV.C.6 of this preamble provides additional clarity by articulating the criteria the agencies have long used to interpret and implement that definition.

identifies only a subset of the “waters of the United States,” it also provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters. In addition, because this rule is founded upon a longstanding regulatory framework and reflects the agencies’ experience and expertise, as well as updates in implementation tools and resources, it is generally familiar to the public and implementable. The clarifications in this rule, including the addition of exclusions that codify longstanding practice, and review of the advancements in implementation resources, tools, and scientific support (see section IV.G of this preamble) address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act.

By contrast, the agencies conclude that the 2020 NWPR, which substantially departed from prior rules defining “waters of the United States,” is incompatible with the objective of the Clean Water Act and inconsistent with the text of relevant provisions of the statute, the statute as a whole, relevant case law, and the best available science. The 2020 NWPR found jurisdiction primarily under the relatively permanent standard. The agencies have concluded that while the relatively permanent standard is administratively useful by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters, it is insufficient as the sole test for Clean Water Act jurisdiction. Sole reliance on the relatively permanent standard’s extremely limited approach has no grounding in the Clean Water Act’s text, structure, or history. Limiting determinations to that standard alone upends an understanding of the Clean Water Act’s coverage that has prevailed for nearly half a century. The relatively permanent standard as the exclusive jurisdictional test would seriously compromise the Clean Water Act’s comprehensive scheme by denying any protection to tributaries that are not relatively permanent and adjacent wetlands that do not have a continuous surface connection to other jurisdictional waters. The exclusion of these waters runs counter to the science demonstrating how such waters can affect the integrity of larger downstream waters, including traditional navigable waters, the territorial seas, and interstate waters. The agencies have concluded that the relatively permanent standard

should still be included in the rule in conjunction with the significant nexus standard because the subset of waters that meet the relatively permanent standard will virtually always have the requisite connection¹⁰ to traditional navigable waters, the territorial seas, or interstate waters to properly fall within the Clean Water Act’s scope. The relatively permanent standard is also administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters.

Following a Federal district court decision vacating the 2020 NWPR on August 30, 2021, the agencies halted implementation of the 2020 NWPR and began interpreting “waters of the United States” consistent with the pre-2015 regulatory regime.¹¹ For the reasons discussed more fully below, the agencies have decided that replacement of the 2020 NWPR is vital.

Through the rulemaking process, the agencies have considered all timely public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. The regulations established in this rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect the record before the agencies, including consideration of the best available science, as well as the agencies’ expertise and experience implementing the pre-2015 regulatory regime. In addition, this final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance

¹⁰ Throughout this preamble, the agencies’ reference to a “connection” to traditional navigable waters, the territorial seas, or interstate waters (when used without qualification such as “continuous surface connection” or an “unbroken surface or shallow subsurface connection”) includes all the types of connections relevant to either the relatively permanent standard or the significant nexus standard: physical (including hydrological), chemical, biological, or functional relationships (including where the water retains floodwaters or pollutants that would otherwise flow to the traditional navigable water, the territorial seas, or an interstate water). See Technical Support Document section III. A “requisite” connection is one that satisfies either the relatively permanent or significant nexus standard.

¹¹ See *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021); U.S. EPA, *Current Implementation of Waters of the United States*, <https://www.epa.gov/wotus/current-implementation-waters-united-states>; U.S. Army Corps of Engineers, *Navigable Waters Protection Rule Vacatur* (published January 5, 2022), <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>.

informed by sound science, implementation tools including modern assessment tools, and other resources.

II. General Information

A. What action are the agencies taking?

In this action, the agencies are publishing a final rule defining “waters of the United States” in 33 CFR 328.3 and 40 CFR 120.2.

B. What is the agencies’ authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 301, 304, 311, 401, 402, 404, and 501.

C. What are the incremental costs and benefits of this action?

The agencies prepared the Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule (hereinafter, “Economic Analysis for the Final Rule”), available in the rulemaking docket, for informational purposes to analyze the potential costs and benefits associated with this final action. This rule establishing the definition of “waters of the United States” does not by itself impose costs or benefits. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of “waters of the United States” (*i.e.*, sections 303, 311, 401, 402, and 404). The agencies analyze the potential costs and benefits against two baselines: the current status quo and the vacated 2020 NWPR. The findings of this analysis for the primary baseline of the current status quo conclude that there are *de minimis* costs and benefits associated with this rulemaking. The findings of this analysis for the secondary baseline of the 2020 NWPR conclude that within the ranges of indirect costs and benefits considered, benefits consistently outweigh the costs. The analysis is summarized in section V.A of this preamble.

III. Background

A. Legal Background

1. The Clean Water Act

Before passage of the Clean Water Act, the nation’s waters were in “serious trouble, thanks to years of neglect, ignorance, and public indifference.” H.R. Rep. No. 911, 92d Cong., 2d Sess. at 66 (1972). Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.*, with the objective “to restore and maintain the chemical, physical and biological integrity of the

Nation's waters." 33 U.S.C. 1251(a). The Clean Water Act was intended to address longstanding concerns regarding the quality of the nation's waters and the Federal Government's ability to respond to those concerns under existing law. A centerpiece of that comprehensive framework is the term "navigable waters," which the Clean Water Act broadly defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Waters satisfying that definition are often called "covered" or "jurisdictional" waters because the term "navigable waters" appears in most of the Clean Water Act's key programs, including those for water quality standards, oil-spill prevention, and permits regulating the discharge of pollutants.

a. History of the Clean Water Act

Prior to 1972, the Federal Government's authority to control and redress pollution in the nation's waters largely fell to the U.S. Army Corps of Engineers (Corps) under the Rivers and Harbors Act of 1899. While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the statute made it unlawful to discharge refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. 407. In 1948, Congress enacted the Federal Water Pollution Control Act of 1948, Public Law 80-845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956, 1961, and 1965.¹² These early versions of the statute that eventually became known as the Clean Water Act encouraged the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal Government to bring enforcement actions to abate water

pollution. However, Congress subsequently concluded these authorities proved inadequate to address the decline in the quality of the nation's waters. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981) (citing S. Rep. No. 92-414, p. 7 (1971)).

As a result, in 1972, Congress performed "a 'total restructuring' and 'complete rewriting' of the existing" statutory framework. *Id.* at 317 (quoting legislative history of 1972 amendments). The Clean Water Act, which was passed as an amendment to the Federal Water Pollution Control Act, was described by its supporters as the first truly comprehensive Federal water pollution legislation. The "major purpose" of the Clean Water Act was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1511 (1971) (emphasis added). "No Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature." *City of Milwaukee*, 451 U.S. at 318. In passing the 1972 Act, Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987).

One of the Clean Water Act's principal tools to protect the integrity of the nation's waters is section 301(a), which generally prohibits "the discharge of any pollutant by any person" without a permit or other authorization under the Act. The terms "discharge of a pollutant" and "discharge of pollutants" are defined broadly to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). And "navigable waters" has a broad, specialized definition: "the waters of the United States, including the territorial seas." *Id.* at 1362(7). Although Congress opted to carry over the term "navigable waters" from prior versions of the Federal Water Pollution Control Act, Congress broadened the definition of "navigable waters" to encompass all the "waters of the United States." *Id.* The relevant House bill would have defined "navigable waters" as the "navigable waters of the United States,

including the territorial seas." H.R. Rep. No. 911, 92d Cong., 2d Sess. 356 (1972) (emphasis omitted). But in conference the word "navigable" was deleted from that definition, and the conference report urged that the term "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Further, the Senate Report stated that "navigable waters" means "the navigable waters of the United States, portions thereof, *tributaries thereof*, and includes the Territorial Seas and the Great Lakes." S. Rep. No. 92-414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43 (emphasis added). The Senate Report accompanying the 1972 Act also explained that "[w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." *Id.*

In 1977, Congress substantially amended the Clean Water Act while leaving unchanged the 1972 definition of "navigable waters." *See* Clean Water Act of 1977 (1977 Act), Public Law 95-217, 91 Stat. 1566. In the run-up to those amendments, Congress considered proposals to amend section 404, which requires a permit for discharges of dredged or fill material into "waters of the United States," and debate on those proposals "centered largely on the issue of wetlands preservation." *SWANCC*, 531 U.S. at 170 (citation omitted). The legislative proposal followed the Corps' 1975 rulemaking, which defined the scope of "waters of the United States" to cover all of the following waters, but phased Corps' regulation of discharges of dredged or fill material into these waters in three phases: first, into "coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto;" second, into "primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes;" and third, "into intrastate lakes, rivers and streams landward to their ordinary high water mark". 40 FR 31320, 31324, 31326 (July 25, 1975); *see* section III.A.2 of this preamble *infra* for further discussion of the phased rulemaking through which the Corps established a definition of "waters of the United States" and the dates when the Corps began regulating activities under that definition. The House passed a bill that would have limited the waters and adjacent wetlands to which section 404 applies. H.R. 3199, 95th Cong., section 16 (1977). Many legislators objected, with one characterizing the proposed limitation as an "open invitation" to pollute other

¹²The 1948 Act was enacted "in connection with the exercise of jurisdiction over the waterways of the Nation" and focused specifically on the protection of water quality in interstate waters and tributaries of interstate waters. *See* Public Law 80-845, 62 Stat. 1155 (1948). Congress's 1956 amendments to the Act strengthened measures for controlling pollution of interstate waters and their tributaries. Public Law 84-660, 70 Stat. 498 (1956). In 1961, Congress amended the Act to substitute the term "interstate or navigable waters" for "interstate waters." *See* Public Law 87-88, 75 Stat. 208 (1961). Accordingly, beginning in 1961, the Act's provisions applied to all interstate waters and navigable waters and to the tributaries of each. *See* 33 U.S.C. 466a, 466g(a) (1964). The 1965 amendments established the requirement that states develop water quality standards for interstate waters. Public Law 89-234, 79 Stat. 903, 908, 909 (1965).

wetlands. 123 Cong. Rec. 26,725 (1977) (statement of Sen. Hart); *see id.* at 26,714–26,716. The Senate ultimately rejected the proposal. *Id.* at 26,728; *cf.* S. Rep. No. 370, 95th Cong., 1st Sess. 10 (1977).

Congress instead modified the Clean Water Act in other respects. Rather than alter the geographic reach of section 404 in 1977, Congress amended the statute by exempting certain activities—for example, certain agricultural and silvicultural activities—from the permit requirements of section 404. *See* 33 U.S.C. 1344(f). The amendments also authorized the use of “general permits” to streamline the permitting process.¹³ *See id.* at 1344(e). Finally, the 1977 Act established for the first time a mechanism by which a State, rather than the Corps, could assume responsibility to administer the section 404 permitting program. *Id.* at 1344(g)(1). In so doing, however, Congress limited States’ potential jurisdiction to waters “other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto.” *Id.* The Corps retains jurisdiction to issue permits in those waters. *See* section IV.A.2.b for additional analysis of the Corps’ regulations, the text of the 1977 amendments, and their legislative history for purposes of construing the scope of “waters of the United States.”

b. Clean Water Act Programs

The term “navigable waters” is used in most of the key programs established by the Clean Water Act, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program; the section 404 permit program for dredged or fill material; the section 311 oil spill prevention, preparedness, and response program;¹⁴

¹³ Whereas individual permits are issued directly to an individual discharger, a “general permit” may provide coverage for multiple dischargers. *See also* preamble section III.A.1.b for additional discussion of general permits.

¹⁴ While Clean Water Act section 311 uses the phrase “navigable waters of the United States,” EPA has interpreted it to have the same breadth as the phrase “navigable waters” used elsewhere in section 311, and in other sections of the Clean Water Act. *See United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, EPA revised its regulations defining “waters of the United States” in 40 CFR part 112 to ensure that the rule’s

the water quality standards, impaired waters, and total maximum daily load programs under section 303; and the section 401 Tribal and State water quality certification process. While there is only one definition of “waters of the United States” for purposes of the Clean Water Act, there may be other statutory factors that define the reach of a particular Clean Water Act program or provision.¹⁵

EPA administers the Clean Water Act except as otherwise explicitly provided. 33 U.S.C. 1251(d). The United States Attorney General long ago determined that the “ultimate administrative authority to determine the reach of the term ‘navigable waters’ for purposes of § 404” resides with EPA. 43 Op. Att’y Gen. 197 (1979). The Act provides for the Federal Government to implement some Clean Water Act programs, and it gives direct grants of authority to authorized Tribes as well as States for implementation and enforcement of others. In some cases, the Act provides authorized Tribes and States the option to take on certain Clean Water Act programs.¹⁶ Eligible Tribes or States

language was consistent with the regulatory language used in other Clean Water Act programs. Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 FR 47042 (July 17, 2002). A district court vacated the rule for failure to comply with the Administrative Procedure Act and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008). However, EPA interprets “navigable waters of the United States” in Clean Water Act section 311(b), in both the pre-2002 regulations and the 2002 rule, to have the same meaning as “navigable waters” in Clean Water Act section 502(7).

¹⁵ For example, the Clean Water Act section 402 permit program regulates discharges of pollutants from “point sources” to “navigable waters” whether the pollutants reach jurisdictional waters directly or indirectly. *See Rapanos*, 547 U.S. at 743 (plurality); *see also County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (holding that the statute also requires a permit “when there is the functional equivalent of a direct discharge”). Section 402 also regulates “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” *See* 33 U.S.C. 1362(12). As another example, section 311 applies to “discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 *et seq.*], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 *et seq.*]).” 33 U.S.C. 1321(b)(1).

¹⁶ The Clean Water Act defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3). Clean Water Act section 518(e), which is part of the 1987 amendments to the

implement the section 401 program and may request approval by EPA to administer a Clean Water Act section 402 or 404 program.¹⁷ ¹⁸ Moreover, consistent with the Clean Water Act, Tribes and States retain authority to implement their own programs to protect the waters in their jurisdiction more broadly and more stringently than the Federal Government. Section 510 of the Clean Water Act provides that, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any Tribe or State to establish more protective standards or limits than the Clean Water Act.¹⁹ For example, many Tribes and States regulate groundwater, and some others protect vital wetlands that may be outside the scope of the Clean Water Act.

In addition to section 301(a) which regulates discharges of pollutants to jurisdictional waters, many other provisions of the Clean Water Act operate based on the definition of “waters of the United States.” For example, under section 303, water quality standards and total maximum daily loads are not required under the Clean Water Act for waters that are not “waters of the United States,” and Tribes and States have no authority to provide certifications under section 401

Act, authorizes EPA to treat eligible federally recognized Tribes in a similar manner as a State for implementing and managing certain environmental programs. 33 U.S.C. 1377(e).

¹⁷ All States and 79 Tribes have authority to implement section 401 water quality certification programs. Currently 47 States and one territory have authority to administer all or portions of the section 402 NPDES program for “waters of the United States.” All States and 47 Tribes have established water quality standards pursuant to section 303 of the Clean Water Act, which form a legal basis for limitations on discharges of pollutants to “waters of the United States.” Three States are authorized to administer a section 404 program for certain waters in their boundaries.

¹⁸ As noted in section III.A.1.a of this preamble, when a Tribe or State assumes a section 404 program, the Corps retains permitting authority over certain waters. The scope of Clean Water Act jurisdiction as defined by “waters of the United States” is distinct from the scope of waters over which the Corps retains authority following Tribal or State assumption of the section 404 program. Corps-retained waters are identified during approval of a Tribal or State section 404 program, and any modifications are approved through a formal EPA process. 40 CFR 233.36. This rule does not address the scope of Corps-retained waters, and nothing in this rule should affect the process for determining the scope of Corps-retained waters.

¹⁹ Congress has provided for eligible Tribes to administer Clean Water Act programs over their reservations and expressed a preference for Tribal regulation of surface water quality on reservations to ensure compliance with the goals of the statute. *See* 33 U.S.C. 1377; 56 FR 64876, 64878–79 (December 12, 1991). In addition, Tribes may establish more protective standards or limits under Tribal law that may be more stringent than the Federal Clean Water Act. Where appropriate, references to States in this preamble may also include eligible Tribes.

with water quality conditions for a permit or license issued by a Federal agency for an activity that does not result in a discharge to “waters of the United States.”

Under section 402 of the Clean Water Act, an NPDES permit is required where a point source discharges a pollutant to “waters of the United States.”²⁰ Clean Water Act section 404 requires a permit before dredged or fill material may be discharged to “waters of the United States,” with regulatory exemptions for certain farming, ranching, and forestry activities. No section 404 permits are required for discharging dredged or fill material into waters or features that are not “waters of the United States.”

Section 303(c) of the Clean Water Act requires States to establish water quality standards for “waters of the United States.” States must periodically review their water quality standards and modify or adopt standards as required by the Clean Water Act or as otherwise appropriate. States must submit new or revised standards for EPA review. Water quality standards are the foundation for a wide range of programs under the Clean Water Act. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits beyond the technology-based levels of treatment required by the Clean Water Act. Water quality standards also serve as a target for Clean Water Act restoration goals such as total maximum daily loads.

Under Clean Water Act section 303(d) and EPA’s implementing regulations, States are required to assemble and evaluate all existing and readily available water quality-related data and information and to submit to EPA every two years a list of impaired waters that require total maximum daily loads. For waters identified on a 303(d) list, States establish total maximum daily loads for all pollutants preventing or expected to prevent attainment of water quality standards. Section 303(d) applies to “waters of the United States.” Non-jurisdictional waterbodies are not required to be assessed or otherwise identified as impaired. Total maximum daily load restoration plans likewise

²⁰ The term “point source” is defined in Clean Water Act section 502(14) and 40 CFR 122.2 to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” This definition specifically excludes return flows from irrigated agriculture and agricultural stormwater runoff. *See also supra* note 15 (discussing discharges of pollutants subject to the section 402 program).

apply only to “waters of the United States.”

Clean Water Act section 311 and the Oil Pollution Act (OPA) of 1990 authorize the Oil Spill Liability Trust Fund (OSLTF) to pay for or reimburse costs of assessing and responding to oil spills to “waters of the United States” or adjoining shorelines or the Exclusive Economic Zone.²¹ The OSLTF allows an immediate response to a spill, including containment, countermeasures, cleanup, and disposal activities. The OSLTF can only reimburse Tribes or States for cleanup costs and damages to businesses and citizens (e.g., lost wages and damages) for spills affecting waters subject to Clean Water Act jurisdiction. EPA also lacks authority under the Clean Water Act to take enforcement actions based on spills solely affecting waters not subject to Clean Water Act jurisdiction under section 311(b). Moreover, section 311’s requirements for oil spill and prevention plans only apply to those facilities where there is a reasonable expectation that an oil discharge could reach a jurisdictional water or adjoining shoreline or the Exclusive Economic Zone.

The scope of facilities required to prepare oil spill prevention and response plans is also affected by the definition of “waters of the United States.” EPA-regulated oil storage facilities with storage capacities greater than 1,320 gallons (except farms) that have a reasonable expectation of an oil discharge to “waters of the United States” or adjoining shorelines²² are required to prepare and implement spill prevention plans. High-risk oil storage facilities that meet certain higher storage thresholds and related harm factors are required to prepare and submit oil spill preparedness plans to EPA for review. The U.S. Coast Guard and Department of Transportation also require oil spill response plans under their respective authorities. However, section 311 spill prevention and preparedness plan requirements do not apply to a facility if there is no reasonable expectation that an oil discharge from that facility could reach a jurisdictional water or adjoining shoreline or the Exclusive Economic Zone.

Clean Water Act section 401 provides authorized Tribes and States an opportunity to address the proposed aquatic resource impacts of federally issued permits and licenses. The definition of “waters of the United States” affects where Federal permits and licenses are required and thus

²¹ *See* 33 U.S.C. 1321(b) for the full jurisdictional scope of Clean Water Act section 311.

²² *See supra* note 14.

where section 401 certification applies. Section 401 prohibits Federal agencies from issuing permits or licenses for activities that may result in a discharge to “waters of the United States” until after the State or authorized Tribe where the discharge would originate has granted or waived water quality certification.

The fact that a resource meets the definition of “waters of the United States” does not mean that activities such as farming, construction, infrastructure development, or resource extraction cannot occur in or near the resource at hand. For example, the Clean Water Act exempts a number of activities from permitting or from the definition of “point source,” including agricultural storm water and irrigation return flows. *See* 33 U.S.C. 1342(l)(2), 1362(14). As discussed above, since 1977 the Clean Water Act in section 404(f) has exempted activities such as many “normal farming, silviculture, and ranching activities” from the section 404 permitting requirement, including seeding, harvesting, cultivating, planting, and soil and water conservation practices. *Id.* at 1344(f)(1). This rule does not affect these statutory exemptions.

In addition, permits are routinely issued under Clean Water Act sections 402 and 404 to authorize certain discharges to “waters of the United States.” Further, under both permitting programs, the agencies have established general permits for a wide variety of activities that have minimal impacts to waters. General permits provide dischargers with knowledge about applicable requirements before dischargers may obtain coverage under them. Furthermore, obtaining coverage under a general permit is typically quicker than obtaining coverage under an individual permit, with coverage under a general permit often occurring immediately (depending on how the permit is written) or after a short waiting period. The permitting authority²³ generally works with permit applicants to ensure that activities can occur without harming the integrity of the nation’s waters. Thus, the permitting programs allow for discharges to “waters of the United States” to occur while also ensuring that those discharges meet statutory and regulatory requirements designed to protect water quality.

²³ Generally, the permitting authority is either EPA or an authorized State for the NPDES program and either the Corps or an authorized State for the section 404 program. No eligible Tribes have authority to administer a Clean Water Act section 402 or section 404 program at this time.

In issuing section 404 permits, the Corps or authorized State works with the applicant to avoid, minimize, and compensate for any unavoidable impacts to “waters of the United States.” For most discharges that “will cause only minimal adverse environmental effects,” a general permit (e.g., a “nationwide” permit) may be suitable. 33 U.S.C. 1344(e)(1). General permits are issued on a nationwide, regional, or State basis for particular categories of activities. While some general permits require the applicant to submit a pre-construction notification to the Corps or the State, others allow the applicant to proceed with no formal notification. The general permit process allows certain activities to proceed with little or no delay, provided the general or specific conditions for the general permit are met. For example, minor road construction activities, utility line backfill, and minor discharges for maintenance can be considered for a general permit, where the activity meets the threshold limits and only results in minimal impacts, individually and cumulatively. Tribes and States can also have a role in Corps section 404 permit decisions, through State Programmatic General Permits (SPGPs), Regional General Permits (RGPs), and water quality certification.

Property owners may obtain a jurisdictional determination from the Corps.²⁴ A jurisdictional determination is a written Corps document indicating whether a water is subject to regulatory jurisdiction under section 404 of the Clean Water Act (33 U.S.C. 1344) or under section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Jurisdictional determinations are identified as either preliminary or approved. An approved jurisdictional determination (AJD) is “a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel.” 33 CFR 331.2. An approved jurisdictional determination is administratively appealable and is a final agency action subject to judicial review. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590 (2016). A preliminary jurisdictional determination (PJD) is a non-binding “written indication that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the

United States on a parcel.” 3 CFR 331.2. An applicant can elect to use a PJD to voluntarily waive or set aside questions regarding Clean Water Act jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination. The Corps does not charge a fee for these jurisdictional determinations. See 33 CFR 325.1 (omitting mention of fees for jurisdictional determinations); Regulatory Guidance Letter 16–01 (2016) (stating that such determinations are issued as a “public service”).

2. The 1986 Regulations Defining “Waters of the United States”

In 1973, EPA published regulations defining “navigable waters” to include traditional navigable waters; tributaries of traditional navigable waters; interstate waters; and intrastate lakes, rivers, and streams used in interstate commerce. 38 FR 13528, 13528–29 (May 22, 1973). The Corps published regulations in 1974 defining the term “navigable waters” for purposes of section 404 to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 39 FR 12115, 12119 (April 3, 1974); 33 CFR 209.120(d)(1) (1974); see also 33 CFR 209.260(e)(1) (1974) (explaining that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor”).²⁵

Around the same time, several Federal courts found that limiting “waters of the United States” to those that are navigable-in-fact is an unduly restrictive reading of the Act. See, e.g., *United States v. Holland*, 373 F. Supp. 665, 670–676 (M.D. Fla. 1974) (“*Holland*”); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (“*Callaway*”). EPA and the House Committee on Government Operations agreed with the decision in *Holland*.²⁶ In *Callaway*, the

court held that in the Clean Water Act, Congress had “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Federal] Water [Pollution Control] Act, the term [‘navigable waters’] is not limited to the traditional tests of navigability.” The court ordered the Corps to publish new regulations “clearly recognizing the full regulatory mandate of the [Federal] Water [Pollution Control] Act.” *Callaway*, 392 F. Supp. at 686.

In response to the district court’s order in *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its section 404 jurisdiction. 40 FR 31320 (July 25, 1975); see 33 CFR 209.120(d)(2), (e)(2) (1976). The court required that the Corps put forth a new definition within a short timeframe. The regulatory phased-in approach was to ensure enough time for the Corps to build up their resources to implement the expanded jurisdiction and workload. Thus, the phases did not mean all of the waters in the final regulation were not “waters of the United States,” but rather established when the Corps would begin regulating activities within each type of jurisdictional water.²⁷ The interim regulations revised the definition of “waters of the United States” to include waters not covered by the other regulatory provisions. 33 CFR 209.120(d)(2)(i) (1976).²⁸ On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of

Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). Shortly thereafter, the House Committee on Government Operations discussed the disagreement between the two agencies (as reflected in EPA’s June 19 letter) and concluded that the Corps should adopt the broader view of the term “waters of the United States” taken by EPA and by the court in *Holland*. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23–27 (1974). The Committee urged the Corps to adopt a new definition that “complies with the congressional mandate that this term be given the broadest possible constitutional interpretation.” *Id.* at 27 (internal quotation marks omitted).

²⁷ See Wood, *supra* note 25.

²⁸ Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 FR 31321, 31324, 31326 (July 25, 1975). Phase II, which took effect after July 1, 1976, extended the Corps’ jurisdiction to lakes and certain tributaries of Phase I waters, as well as wetlands adjacent to the lakes and certain tributaries. *Id.* Phase III, which took effect after July 1, 1977, extended the Corps’ jurisdiction to all remaining areas encompassed by the regulations, including “intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters.” *Id.* at 31325; see also 42 FR 37124 (July 19, 1977) (describing the three phases).

²⁴ When a Tribe, State, or territory is approved to administer the Clean Water Act section 404 program for certain waters, it is responsible for decisions on whether or not a section 404 permit is required.

²⁵ See Lance Wood, Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 *Envtl. L. Rptr.* (Envtl. L. Inst.) 10,187 (2004) (explaining history and limitations of the 1974 Corps regulation as an interpretation of the scope of the Clean Water Act).

²⁶ EPA expressed the view that “the *Holland* decision provides a necessary step for the preservation of our limited wetland resources,” and that “the [*Holland*] court properly interpreted the jurisdiction granted under the [Clean Water Act] and Congressional power to make such a grant.” See section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works, 94th Cong., 2d Sess. 349 (1976) (letter dated June 19, 1974, from

the definitional terms for purposes of section 404. 42 FR 37122 (July 19, 1977). The 1977 final regulations defined the term “waters of the United States” to include, *inter alia*, “isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.” 33 CFR 323.2(a)(5) (1978); *see also* 40 CFR 122.3 (1979).²⁹

In 1986, the Corps consolidated and recodified its regulatory provisions defining “waters of the United States” for purposes of implementing the section 404 program. *See* 51 FR 41206, 41216–17 (November 13, 1986). These regulations reflected the interpretation of both agencies. While EPA and the Corps also have separate regulations defining the statutory term “waters of the United States,” their interpretations, reflected in the 1986 regulations, were identical and remained largely unchanged from 1977 to 2015. *See* 42 FR 37122, 37124, 37127 (July 19, 1977).³⁰ EPA’s comparable regulations were recodified in 1988 (53 FR 20764 (June 6, 1988)), and both agencies added an exclusion for prior converted cropland in 1993 (58 FR 45008, 45031 (August 25, 1993)). For convenience, the agencies in this preamble will generally cite the Corps’ longstanding regulations and will refer to “the 1986 regulations” as including EPA’s comparable regulations and the 1993 addition of the exclusion for prior converted cropland.

The 1986 regulations define “waters of the United States” as follows (33 CFR 328.3 (2014)):³¹

(a) The term “waters of the United States” means:

1. All waters which are currently used, were used in the past, or may be

susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

iii. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

6. The territorial seas; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of Clean Water Act (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

See section I.B of the Economic Analysis for the Final Rule for a comparison of regulatory categories between the pre-2015 regulatory regime, the 2020 NWPR, and this rule.

3. U.S. Supreme Court Decisions

The U.S. Supreme Court first addressed the scope of “waters of the United States” protected by the Clean Water Act in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (“*Riverside Bayview*”), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court reversed the Sixth Circuit Court of Appeals and held that court had erred when it

imposed a limitation requiring inundation or “frequent flooding” of wetlands by the adjacent body of water for the wetlands to be jurisdictional when such a limitation was required by neither the regulation nor the Clean Water Act. *Id.* at 129, 134. The Supreme Court then deferred to the Corps’ judgment that adjacent wetlands “that form the border of or are in reasonable proximity to” other “waters of the United States” are “inseparably bound up with the ‘waters’ of the United States,” thus concluding that “adjacent wetlands may be defined as waters under the Act.” *Riverside Bayview*, 474 U.S. at 134. The Court observed that the objective of the Clean Water Act to restore the integrity of the nation’s waters “incorporated a broad, systemic view of the goal of maintaining and improving water quality Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’” *Id.* at 132–33 (citing S. Rep. 92–414 (1972)). The Court then stated: “In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into ‘navigable waters,’ *see* CWA [sections] 301(a), 404(a), 502(12), 33 U.S.C. [sections] 1311(a), 1344(a), 1362(12), the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.” *Id.* at 133.

The Court also recognized that “[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.” *Id.* at 132. The Court then deferred to the agencies’ interpretation: “In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent

²⁹ An explanatory footnote published in the Code of Federal Regulations stated that this paragraph “incorporates all other waters of the United States that could be regulated under the Federal government’s Constitutional powers to regulate and protect interstate commerce.” 33 CFR 323.2(a)(5), at 616 n.2 (1978).

³⁰ Multiple provisions in the Code of Federal Regulations contained the definition of the phrases “waters of the United States” and “navigable waters” for purposes of implementing the Clean Water Act, 33 U.S.C. 1362(7), and other water pollution protection statutes such as the Oil Pollution Act, 33 U.S.C. 2701(21). Some EPA definitions were added after 1986, but each conformed to the 1986 regulations except for variations in the waste treatment system exclusion. *See, e.g.*, 55 FR 8666 (March 8, 1990); 73 FR 71941 (November 26, 2008).

³¹ There are some variations in the waste treatment system exclusion across EPA’s regulations defining “waters of the United States.” The placement of the waste treatment system and prior converted cropland exclusions also varies in EPA’s regulations.

wetlands may be defined as waters under the Act.” *Id.* at 134. The Court further stated, “[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” *Id.* at 135 n.9. The Court expressly reserved the question of whether the Clean Water Act applies to “wetlands that are not adjacent to open waters.” *Id.* at 131 n.8.

The Supreme Court again addressed the issue of Clean Water Act jurisdiction over “waters of the United States” in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”). A 5–4 Court in *SWANCC* held that the use of “nonnavigable, isolated, intrastate waters” by migratory birds was not by itself a sufficient basis for the exercise of Federal authority under the Clean Water Act. *SWANCC*, 531 U.S. at 172. The Court noted that in *Riverside Bayview*, it had “found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably bound up with the ‘waters’ of the United States’” and that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed [the Court’s] reading of the Clean Water Act” in that case. *Id.* at 167.

While recognizing that *Riverside Bayview* had found the term “navigable” to be of limited import, the Court in *SWANCC* noted that the term “navigable” could not be read entirely out of the Act. *Id.* at 172 (“We said in *Riverside Bayview Homes* that the word ‘navigable’ in the statute was of ‘limited import’ and went on to hold that [section] 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” (citations omitted)).

The Corps asserted authority in this instance based on an interpretation of the regulations (known as the “Migratory Bird Rule”) that waters used as habitat for migratory birds were jurisdictional. The Court found that the exercise of Clean Water Act regulatory authority over discharges into the ponds based on their use by migratory birds raised “significant constitutional questions.” *Id.* at 173. The Court explained that “[w]here an administrative interpretation of a statute

invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *Id.* at 172. This is particularly true “where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The Court concluded that “the ‘Migratory Bird Rule’ is not fairly supported by the CWA.” *Id.* at 167.

Five years after *SWANCC*, the Court again addressed the Clean Water Act term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”). *Rapanos* involved two consolidated cases in which the Clean Water Act had been applied to wetlands adjacent to tributaries, that are not themselves navigable-in-fact, of traditional navigable waters. Although the Court remanded the Court of Appeals’ finding of Clean Water Act jurisdiction, the plurality opinion and Justice Kennedy’s concurrence disagreed on the proper test to apply. Despite this disagreement, all nine members of the Court agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. *Id.* at 731 (Scalia, J., plurality opinion) (“We have twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675, 148 L. Ed. 2d 576; *Riverside Bayview*, 474 U.S. at 133, 106 S. Ct. 455, 88 L. Ed. 2d 419.”).

A four-Justice plurality in *Rapanos* interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water,” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a “continuous surface connection” to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5 (emphasis in original).

Justice Kennedy’s concurring opinion took a different approach, concluding that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759 (citing *SWANCC*, 531 U.S. at 167, 172); see also *id.* at 774 (“As *Riverside*

Bayview recognizes, the Corps’ adjacency standard is reasonable in some of its applications. Indeed, the Corps’ view draws support from the structure of the Act.”). He concluded that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. Justice Kennedy’s opinion noted that to be jurisdictional, such a relationship with traditional navigable waters must be more than “speculative or insubstantial.” *Id.*

The four dissenting Justices in *Rapanos*, who would have affirmed the Court of Appeals’ application of the agencies’ regulation to find jurisdiction over the waters at issue, also concluded that the term “waters of the United States” encompasses, *inter alia*, all tributaries and wetlands that satisfy “either the plurality’s or Justice Kennedy’s test” and that in “future cases the United States may elect to prove jurisdiction under either test.” *Id.* at 810 & n.14 (Stevens, J., dissenting). The four dissenting Justices stated: “The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation’s waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps’ resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.” *Id.* at 788 (citation omitted).

In addition to joining the plurality opinion, Chief Justice Roberts issued his own concurring opinion noting that the agencies “are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer,” and the agencies thus have “plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority” under the Clean Water Act. *Id.* at 758 (emphasis in original). The Chief Justice observed that the Court’s division over the proper standard “could have been avoided” had the agencies conducted rulemaking more clearly defining “its authority to regulate wetlands.” *Id.*

4. Post-*Rapanos* Appellate Court Decisions

The earliest post-*Rapanos* decisions by the United States Courts of Appeals focused on which standard to apply in interpreting the scope of “waters of the United States”—the plurality’s or Justice Kennedy’s. Chief Justice Roberts anticipated this question and cited *Marks v. United States*, 430 U.S. 188 (1977) in his concurring opinion to *Rapanos* as applicable precedent. *Marks v. United States* provides that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The dissenting Justices in *Rapanos* also spoke to future application of the divided decision. While Justice Stevens stated that he assumed Justice Kennedy’s significant nexus standard would apply in most instances, the dissenting Justices noted that they would find the Clean Water Act extended to waters meeting either the relatively permanent standard articulated by Justice Scalia or the significant nexus standard described by Justice Kennedy. *Rapanos*, 547 U.S. at 810 & n.14 (Stevens, J., dissenting).

Since *Rapanos*, every Court of Appeals to have considered the question has determined that the government may exercise Clean Water Act jurisdiction over at least those waters that satisfy the significant nexus standard set forth in Justice Kennedy’s concurrence. None has held that the plurality’s relatively permanent standard is the sole basis that may be used to establish jurisdiction. *Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011); see also *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (superseding the original opinion published at 457 F.3d 1023 (9th Cir. 2006)); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006). Some Courts of Appeals have held that the government may establish jurisdiction under either standard. See, e.g., *United States v. Johnson*, 467 F.3d 56, 62–64 (1st Cir. 2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Eleventh Circuit has held that only Justice

Kennedy’s significant nexus standard applies. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

5. Post-*Rapanos* Implementation of the 1986 Regulations

For nearly a decade after *Rapanos*, the agencies did not revise their regulations but instead determined jurisdiction under the 1986 regulations consistent with the two standards established in *Rapanos*—the plurality’s relatively permanent standard and Justice Kennedy’s significant nexus standard— informed by guidance issued jointly by the agencies. See U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), superseded December 2, 2008 (the “*Rapanos* Guidance”).

In the *Rapanos* Guidance,³² the agencies concluded that Clean Water Act jurisdiction exists if a water meets either the relatively permanent standard or the significant nexus standard. The agencies’ assertion of jurisdiction over traditional navigable waters and their adjacent wetlands remained unchanged by *Rapanos*. Under the relatively permanent standard, the guidance stated that the agencies would assert jurisdiction over: non-navigable tributaries of traditional navigable waters that typically flow year-round or have continuous flow at least seasonally; and wetlands that directly abut such tributaries. *Rapanos* Guidance at 4–7. The guidance stated that the agencies would determine jurisdiction under the significant nexus standard for the following waters: non-navigable tributaries that are not relatively permanent; wetlands adjacent to non-navigable tributaries that are not relatively permanent; and wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary. *Id.* at 8–12. Under the guidance, the agencies generally did not assert jurisdiction over swales or erosional features (e.g., gullies and small washes characterized by low volume or infrequent or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that did not carry a relatively permanent flow of water. *Id.* at 11–12.

B. The Agencies’ Post-*Rapanos* Rules

Since 2015, EPA and the Army have finalized three rules revising the

definition of “waters of the United States.”

1. The 2015 Clean Water Rule

On June 29, 2015, EPA and the Army published the “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 FR 37054 (June 29, 2015) (the “2015 Clean Water Rule”). The 2015 Clean Water Rule’s definition of “waters of the United States” established three categories: (A) waters that are categorically “jurisdictional by rule” (without the need for additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (C) waters that are categorically excluded from jurisdiction. *Id.* at 37054. Waters considered “jurisdictional by rule” included: (1) traditional navigable waters; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of “jurisdictional by rule” waters; and (6) waters adjacent to a water identified in the first five categories of “jurisdictional by rule” waters, including “wetlands, ponds, lakes, oxbows, impoundments, and similar waters.” Finally, all exclusions from the definition of “waters of the United States” in the pre-2015 regulations were retained, and several exclusions reflecting agency practice or based on public comment were added to the regulation for the first time. The rule excluded the following (unless they were traditional navigable waters, the territorial seas, or interstate waters): certain ditches; artificially irrigated areas that would revert to dry land should application of water to that area cease; artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; artificial reflecting pools or swimming pools created in dry land; small ornamental waters created in dry land; water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; puddles; groundwater, including groundwater drained through subsurface drainage systems; stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and wastewater

³² The agencies note that the guidance “does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances.” *Rapanos* Guidance at 4 n.17.

recycling structures constructed in dry land.

2. The 2019 Repeal Rule

On February 28, 2017, Executive Order 13778 “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule,” directed EPA and the Army to review the 2015 Clean Water Rule for consistency with the policy outlined in section 1 of the order and to issue a proposed rule rescinding or revising the 2015 Clean Water Rule as appropriate and consistent with law. 82 FR 12497 (March 3, 2017). The Executive Order also directed the agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with” Justice Scalia’s opinion in *Rapanos*. *Id.*

Consistent with this directive, after notice and comment rulemaking, on October 22, 2019, the agencies published a final rule repealing the 2015 Clean Water Rule and recodifying the 1986 regulations without any changes to the regulatory text. 84 FR 56626 (October 22, 2019). The final rule provided that the agencies would implement the definition “consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience”; *i.e.*, consistent with the pre-2015 regulatory regime. *Id.* at 56626.

3. The 2020 Navigable Waters Protection Rule

Three months later, on January 23, 2020, the agencies signed another final rule—the “Navigable Waters Protection Rule: Definition of ‘Waters of the United States’” (“2020 NWPR”)—that for the first time defined “waters of the United States” based primarily on Justice Scalia’s plurality test from *Rapanos*. The 2020 NWPR was published on April 21, 2020, and went into effect on June 22, 2020.³³ 85 FR 22250 (April 21, 2020). The 2020 NWPR interpreted the term “the waters” within “the waters of the United States” to “encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water

connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.” *Id.* at 22273. Specifically, the rule established four categories of jurisdictional waters: (1) the territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands). *Id.*

The 2020 NWPR further defined the scope of each of these four categories. The territorial seas and traditional navigable waters were defined consistent with the agencies’ longstanding interpretations of those terms. A “tributary” was defined as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary was required to be perennial or intermittent in a typical year. The term “tributary” included a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch is perennial or intermittent and contributes surface water flow to a traditional navigable water or the territorial seas in a typical year. *Id.* at 22251. The definition did not include ephemeral features, which were defined as surface waters that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools. *Id.*

The 2020 NWPR defined “lakes and ponds, and impoundments of jurisdictional waters” as “standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland.” *Id.* A lake, pond, or impoundment of a jurisdictional water was jurisdictional under the 2020 NWPR if it contributed surface water flow to a downstream jurisdictional water in a typical year through certain artificial or natural features. A lake, pond, or impoundment of a jurisdictional water inundated by flooding from a jurisdictional water in a typical year was also jurisdictional. *Id.*

As for wetlands, the 2020 NWPR interpreted “adjacent wetlands” to be those wetlands that abut jurisdictional waters and those non-abutting wetlands that are (1) “inundated by flooding”

from a jurisdictional water in a typical year, (2) physically separated from a jurisdictional water only by certain natural features (*e.g.*, a berm, bank, or dune), or (3) physically separated from a jurisdictional water by an artificial structure that “allows for a direct hydrologic surface connection” between the wetland and the jurisdictional water in a typical year. *Id.* at 22251. Wetlands that do not have these types of connections to other waters were not jurisdictional.

The 2020 NWPR expressly provided that waters that do not fall into one of these jurisdictional categories were not considered “waters of the United States.” *Id.* For the first time, interstate waters were not included in the definition of “waters of the United States.” The rule also excluded groundwater, including groundwater drained through subsurface drainage systems; ephemeral features, including ephemeral streams, swales, gullies, rills, and pools; diffuse stormwater run-off and directional sheet flow over upland; ditches that are not traditional navigable waters, the territorial seas, or tributaries as defined in the rule; and those portions of ditches constructed in adjacent wetlands as defined in the rule that do not satisfy the conditions of an adjacent wetland under the rule; prior converted cropland; artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease; artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the rule’s definition of lakes and ponds, and impoundments of jurisdictional waters; water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity; pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff; groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and waste treatment systems. While many of these exclusions were based on the exclusions

³³ The 2020 NWPR went into effect on June 22, 2020, in all jurisdictions except Colorado, where the rule was subject to a preliminary injunction issued by the U.S. District Court for the District of Colorado. *Colorado v. EPA*, 445 F. Supp. 3d 1295 (D. Colo. 2020). After the Tenth Circuit reversed the Colorado district court’s order on appeal, the 2020 NWPR went into effect in Colorado on April 26, 2021. *Colorado v. EPA*, 989 F.3d 874 (6th Cir. 2021); *Colorado v. EPA*, No. 20–1238, ECF No. 010110512604 (Doc. 10825032) (10th Cir. Apr. 26, 2021).

in the 2015 Clean Water Rule, new exclusions were added and some were substantially broadened in a number of ways. For example, for the first time, all ephemeral streams were excluded. Moreover, waters within the 2020 NWPR's jurisdictional categories, including traditional navigable waters and the territorial seas, were not "waters of the United States" if they also fit within the 2020 NWPR's exclusions. See *id.* at 22325 ("If the water meets any of the [] exclusions, the water is excluded even if the water satisfies one or more conditions to be a [jurisdictional] water.").³⁴ In addition, the rule expanded the longstanding exclusion for prior converted cropland. Generally speaking, the 2020 NWPR's approach to prior converted cropland substantially reduced the likelihood that prior converted cropland would ever lose its excluded status. The 2020 NWPR definition extended prior converted cropland status beyond those areas the U.S. Department of Agriculture (USDA) defines as prior converted cropland for purposes of the Food Security Act.

4. Legal Challenges to the Rules

The agencies' rulemakings to revise the definition of "waters of the United States" have been subject to a series of legal challenges.³⁵

Multiple parties sought judicial review of the 2015 Clean Water Rule in various district and circuit courts. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that rules defining the scope of "waters of the United States" are subject to direct review in the district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). Several of those district court

cases remain pending in district court or on appeal.³⁶ While the 2015 Clean Water Rule went into effect in some parts of the country in August 2015, it was never implemented nationwide due to multiple injunctions and later rulemakings. The day before the 2015 Clean Water Rule's August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the rule in the 13 States challenging the rule in that court at the time. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); Order, *North Dakota v. EPA*, No. 3:15-cv-59, Dkt. No. 79 (D.N.D. Sept. 4, 2015) (limiting scope of preliminary injunction to the parties before the court). Shortly thereafter, on October 9, 2015, the Sixth Circuit issued an order staying the 2015 Clean Water Rule nationwide and directing the agencies to resume implementing the "familiar, if imperfect" pre-2015 regulatory regime. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 806, 808 (6th Cir. 2015). In 2018, two other district courts issued geographically limited preliminary injunctions against the 2015 Clean Water Rule. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. June 6, 2018) (barring implementation of the 2015 Clean Water Rule in 11 States); *Texas v. EPA*, No. 3:15-cv-162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018) (same as to three States). In 2019, prior to issuance of the 2019 Repeal Rule, two courts remanded the 2015 Clean Water Rule to the agencies, but neither court vacated the rule. See *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). As such, the 2015 Clean Water Rule remained in effect in some parts of the country until the effective date of the 2019 Repeal Rule.³⁷

The 2019 Repeal Rule went into effect on December 23, 2019, and though it has been the subject of legal challenges, no court has issued an adverse ruling with respect to it. The 2019 Repeal Rule was thus in effect until the effective date of the 2020 NWPR.

Multiple parties subsequently sought judicial review of the 2020 NWPR, which went into effect on June 22, 2020, in all jurisdictions except Colorado, where the rule was subject to a preliminary injunction issued by the U.S. District Court for the District of Colorado. *Colorado v. EPA*, 445 F. Supp. 3d 1295 (D. Colo. 2020). The Tenth Circuit later reversed the Colorado district court's order on appeal; as a result, the 2020 NWPR went into effect in Colorado on April 26, 2021. *Colorado v. EPA*, 989 F.3d 874 (6th Cir. 2021); *Colorado v. EPA*, No. 20-1238, ECF No. 010110512604 (Doc. 10825032) (10th Cir. Apr. 26, 2021).

On August 30, 2021, the U.S. District Court for the District of Arizona remanded the 2020 NWPR and vacated the rule. *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). The court found that "[t]he seriousness of the Agencies' errors in enacting the NWPR, the likelihood that the Agencies will alter the NWPR's definition of 'waters of the United States,' and the possibility of serious environmental harm if the NWPR remains in place upon remand, all weigh in favor of remand with vacatur." *Id.* at 956. On September 27, 2021, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the 2020 NWPR. *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021). In vacating the rule, the court agreed with the reasoning of the *Pascua Yaqui* court that the 2020 NWPR suffers from "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States.'" *Id.* at 1168. In six additional cases, courts remanded the 2020 NWPR without vacatur or without addressing vacatur.³⁸

At this time, 14 cases challenging the 2015 Clean Water Rule, 2019 Repeal Rule, and/or the 2020 NWPR remain.³⁹

³⁴ The 2020 NWPR's exclusion for ditches, however, explicitly did not encompass ditches that are traditional navigable waters or jurisdictional tributaries. 33 CFR 328.3(b)(5) (2022).

³⁵ The agencies note that a Clean Water Act case currently pending before the Supreme Court is not a direct challenge to any of the rules defining "waters of the United States," but instead presents the question of the Act's jurisdictional standard for adjacent wetlands in the context of a challenge to an EPA administrative compliance order for the unauthorized discharge of a pollutant into "waters of the United States." *Sackett v. EPA*, No. 21-454. Petitioners—who operated a commercial construction and excavation business—dumped approximately 1,700 cubic yards of gravel and sand to fill wetlands adjacent to "waters of the United States," and EPA issued an administrative order in light of the unauthorized discharge. The district court and the Court of Appeals determined that, under Ninth Circuit precedent, the Clean Water Act covers at least those adjacent wetlands that satisfy the significant nexus standard. The lower courts held that the administrative record supports EPA's conclusion that the wetlands on petitioners' property are adjacent to a jurisdictional tributary and that, together with other similarly situated adjacent wetlands, the adjacent wetlands have a significant nexus to Priest Lake, a traditional navigable water.

³⁶ See, e.g., *North Dakota v. EPA*, No. 15-00059 (D.N.D.); *Ohio v. EPA*, No. 15-02467 (S.D. Ohio) (dismissed as moot), No. 22-3292 (6th Cir.) (appeal stayed); *Southeastern Legal Found. v. EPA*, No. 15-02488 (N.D. Ga.).

³⁷ In February 2018, the agencies issued a rule that added an applicability date of February 6, 2020, to the 2015 Clean Water Rule. 83 FR 5200 (February 6, 2018) ("Applicability Date Rule"). The Applicability Date Rule was challenged in several district court actions, and on August 16, 2018, the rule was vacated and enjoined nationwide. See *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); see also Order, *Puget Soundkeeper All. v. Wheeler*, No. 15-01342 (W.D. Wash. Nov. 26, 2018) (vacating the Applicability Date Rule nationwide).

³⁸ Order, *Pueblo of Laguna v. Regan*, No. 1:21-cv-277, Dkt. No. 40 (D.N.M. Sept. 21, 2021) (declining to reach issue of vacatur in light of the *Pascua* decision); Order, *California v. Wheeler*, No. 3:20-cv-3005, Dkt. No. 271 (N.D. Cal. Sept. 16, 2021) (same); Order, *Waterkeeper All. v. Regan*, No. 3:18-cv-3521, Dkt. No. 125 (N.D. Cal. Sept. 16, 2021) (same); Order, *Conservation Law Found. v. EPA*, No. 1:20-cv-10820, Dkt. No. 122 (D. Mass. Sept. 1, 2021) (same); Order, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-1687, Dkt. No. 147 (D.S.C. July 15, 2021) (remanding without vacating); Order, *Murray v. Wheeler*, No. 1:19-cv-1498, Dkt. No. 46 (N.D.N.Y. Sept. 7, 2021) (same).

³⁹ *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-266 (D. Ariz.); *Colorado v. EPA*, No. 1:20-cv-1461 (D. Colo.); *Am. Exploration & Mining Ass'n v. EPA*, No. 1:16-cv-1279 (D.D.C.); *Envntl. Integrity Project v. Regan*, No. 1:20-cv-1734 (D.D.C.); *Se. Stormwater Ass'n v. EPA*, No. 4:15-cv-579 (N.D. Fla.); *Se. Legal Found. v. EPA*, No. 1:15-cv-2488 (N.D. Ga.); *Chesapeake Bay Found. v. Regan*, Nos. 1:20-cv-

All of these cases are administratively closed, inactive, or being held in abeyance as of the date this final rule was signed. See “History of the Effects of Litigation over Recent Definitions of ‘Waters of the United States’” in the docket for this rule for more information on how litigation has impacted the status of the definition of “waters of the United States” in effect at different times across the country.

5. 2021 Executive Order and Review of the Navigable Waters Protection Rule

On January 20, 2021, President Biden signed Executive Order 13990, entitled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” It provides that “[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” 86 FR 7037, section 1 (published January 25, 2021, signed January 20, 2021). The order “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *Id.* The order specified that “[f]or any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.” *Id.* at section 2(a). The order also revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United

States” Rule), which had initiated development of the 2020 NWPR. *Id.* at section 7(a).

In conformance with Executive Order 13990, the agencies reviewed the 2020 NWPR to determine its alignment with three principles laid out in the Executive Order: science, climate change, and environmental justice.

Science: Science plays a critical role in understanding how to protect the integrity of our nation’s waters. As discussed in detail below, see section IV.B.3 of this preamble, the 2020 NWPR did not properly consider the extensive scientific evidence demonstrating the interconnectedness of waters and their downstream effects, thereby undermining Congress’s objective to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The 2020 NWPR’s definition of “waters of the United States” does not adequately consider the way pollution moves through waters or the way filling in a wetland affects downstream water resources.

Climate: Science has established that human and natural systems have been and continue to be extensively impacted by climate change. Climate change can have a variety of impacts on water resources in particular. See section II.C of the Technical Support Document. For instance, a warming climate is already increasing precipitation in many areas (e.g., the Northeast and Midwest), while decreasing precipitation in other areas (e.g., the Southwest). Other areas are experiencing more extreme cycles of flood and drought (e.g., the Northern Great Plains). Climate change can increase the intensity of precipitation events. Runoff from more intense storms can impair water quality as pollutants deposited on land wash into waterbodies. Changes in streamflow, snowmelt timing, snowpack accumulation, and the size and frequency of heavy precipitation events can also cause river floods to become larger or more frequent than they used to be in some places. In addition, climate change affects streamflow characteristics, such as the magnitude and timing of flows, in part due to changes in snowpack magnitude and seasonality. Many historically dry areas are experiencing less precipitation and an increased risk of drought associated with more frequent and intense heatwaves, which cause streams and wetlands to become drier, negatively affecting water supplies and water quality. Heatwaves, associated drought, and the loss of surface and soil moisture associated with longer dry seasons, lower streamflow, and lower groundwater levels also affect the

frequency, size, and duration of wildfires, which alter water quality and impact wetlands and their functions. A changing climate can also result in higher and more variable temperatures in streams, killing fish and harming other aquatic species that can live only in colder water. Finally, rising sea levels associated with climate change are inundating low-lying streams and wetlands and further contributing to coastal flooding and erosion.

Although water resources are vulnerable to climate change, when their interconnectedness and extent are maintained, streams and wetlands perform a variety of functions that contribute to climate resiliency by mitigating negative effects on traditional navigable waters, the territorial seas, and interstate waters. For instance, wetlands inside and outside of floodplains store large volumes of floodwaters, thereby reducing flood peaks and protecting downstream watersheds. As natural filters, wetlands help purify and protect the quality of other waterbodies, including drinking water supplies—a function which is more important than ever as intense precipitation events spurred on by a changing climate mobilize sediment, nutrients, and other pollutants. Coastal wetlands help buffer storm surges, which may increase in frequency or severity with sea-level rise and the increasing size and intensity of coastal storms. Additionally, small streams are particularly effective at retaining and attenuating floodwaters. Biological communities and geomorphic processes in small streams and wetlands break down leaves and other organic matter, sequestering a portion of that carbon that could otherwise be released into the atmosphere and continue to negatively affect water resources.

The 2020 NWPR did not appropriately acknowledge or take account of the effects of a changing climate on the chemical, physical, and biological integrity of the nation’s waters. For example, its rolling thirty-year approach to determining a “typical year” did not allow the agencies flexibility to account for the effects of a rapidly changing climate, including upward trending temperatures, increasing storm events, and extended droughts (see section IV.B.3.c of this preamble). The 2020 NWPR also categorically excluded ephemeral streams and their adjacent wetlands from the definition of “waters of the United States.” These exclusions, if in effect, would disproportionately impact the arid West. Aquatic systems comprised largely of ephemeral streams are increasingly critical to protecting

1063 & 1:20-cv-1064 (D. Md.); *Navajo Nation v. Regan*, No. 2:20-cv-602 (D.N.M.); *N.M. Cattle Growers’ Ass’n v. EPA*, No. 1:19-cv-988 (D.N.M.); *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio) (dismissed as moot), No. 22-3292 (6th Cir.) (appeal stayed); *Or. Cattlemen’s Ass’n v. EPA*, No. 3:19-cv-564 (D. Or.); *Puget Soundkeeper All. v. EPA*, No. 2:20-cv-950 (W.D. Wash.); *Wash. Cattlemen’s Ass’n v. EPA*, No. 2:19-cv-569 (W.D. Wash.).

and maintaining the integrity of paragraph (a)(1) waters, for example by contributing streamflow and organic matter to those larger waters. This is especially true in the Southwestern United States, where climate change is expanding the spatial extent of arid conditions and increasing the risks of more extreme drought. Some portions of the arid West are experiencing altered monsoon seasons that have fewer but more intense storms that contribute to so-called “flashy” stream hydrology (*i.e.*, higher runoff volume, leading to more rapidly rising and falling streamflow over shorter periods of time).

Environmental Justice: While impacts on communities with environmental justice concerns are not a basis for determining the scope of the definition of “waters of the United States,” the agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns (*e.g.*, minority (Indigenous peoples and/or people of color) and low-income populations, as specified in Executive Order 12898). Numerous groups have raised concerns that the 2020 NWPR had disproportionate impacts on Tribes and Indigenous communities.⁴⁰ The 2020 NWPR decreased the scope of Clean Water Act jurisdiction across the country, including in geographic regions where regulation of waters beyond those covered by the Act is not authorized under current Tribal or State law (*see* section IV.B.3.d of this preamble). If the 2020 NWPR were in effect, without regulations governing discharges of pollutants into previously jurisdictional waters, communities with

environmental justice concerns where these waters are located could experience increased water pollution and impacts from associated increases in health risk.

Further, the 2020 NWPR’s categorical exclusion of ephemeral streams from jurisdiction (and any wetlands adjacent to those streams) disproportionately impacted Tribes and communities with environmental justice concerns in the arid West. Many Tribes lack the authority and resources to regulate waters within their boundaries, and they may also be affected by pollution from adjacent jurisdictions.⁴¹ In addition, under the 2020 NWPR, increased water pollution due to the elimination of Federal protection over ephemeral streams and their adjacent wetlands could lead to health impacts and the reduction of clean water needed for traditional agricultural, cultural, and subsistence uses for communities with environmental justice concerns.⁴² Therefore, if in effect, the 2020 NWPR could disproportionately expose Tribes to increased pollution and health risks.

After completing the review and reconsidering the record for the 2020 NWPR, on June 9, 2021, the agencies announced their intention to revise or replace the rule. The factors the agencies found most relevant in making this decision were the text, structure, and history of the Clean Water Act; relevant Supreme Court case law; the current and future harms to the chemical, physical, and biological integrity of the nation’s waters due to implementation of the 2020 NWPR; concerns raised by co-regulators and stakeholders about the 2020 NWPR, including implementation-related

issues; the principles outlined in the Executive Order; and issues raised in ongoing litigation challenging the 2020 NWPR. EPA and the Army concluded that the 2020 NWPR did not appropriately consider the effect of the revised definition of “waters of the United States” on the integrity of the nation’s waters, and that it threatened the loss or degradation of waters critical to the protection of traditional navigable waters, the territorial seas, and interstate waters, among other concerns.

C. Summary of Co-Regulator Engagement and Stakeholder Outreach

EPA and the Army held a series of stakeholder meetings during the agencies’ review of the 2020 NWPR, including specific meetings in May 2021 with industry, environmental organizations, agricultural organizations, and State associations. On July 30, 2021, the agencies signed a **Federal Register** document that announced a schedule for initial public meetings to hear from interested stakeholders on their perspectives on defining “waters of the United States” and implementing the definition. 86 FR 41911 (August 4, 2021). The agencies also announced their intent to accept written pre-proposal recommendations from members of the public for a 30-day period from August 4, 2021, to September 3, 2021. The agencies received over 32,000 recommendation letters from the public, which can be found in the pre-proposal docket (Docket ID No. EPA-HQ-OW-2021-0328). Consistent with the August 4, 2021, **Federal Register** publication, the agencies held six public meeting webinars on August 18, August 23, August 25 (specifically for small entities), August 26, August 31, and September 2, 2021.

The agencies also engaged State and local governments over a 60-day federalism consultation period during development of the proposed rule, beginning with an initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. A total of thirty-eight letters were submitted to the agencies as part of the federalism consultation process from State and local government agencies, intergovernmental associations, and State-level associations. On September 29, October 6, and October 20, 2021, the agencies hosted virtual meetings with States focused on implementation of prior “waters of the United States” regulatory regimes. Additional information about the federalism consultation can be found in section V.E of this preamble and the Summary

⁴⁰ *See, e.g.*, Tribal Consultation Comment Letter from President Jonathan Nez and Vice President Myron Lizer, Navajo Nation, October 4, 2021 (“The Navajo Nation relies greatly on all its surface waters, including ephemeral, intermittent, and perennial surface waters. The Navajo Nation currently lacks the resources to implement CWA permitting and other programs necessary to maintain and protect water quality and relies on the Agencies to fill that need. Therefore, any new [“waters of the United States”] rule must not reduce the scope of the waters that the Agencies can protect, or it will have ‘disproportionately high and adverse human health or environmental effects’ on the Navajo Nation.”), and Tribal Consultation Comment Letter from Clarice Madalena, Interim Director, Natural Resources Department, Pueblo of Jemez, October 4, 2021 (stating that desert “hydrology and the geographic location of Native communities—means that the Navigable Waters Rule had the effect of disparately stripping Clean Water Act protections from areas with higher Native populations. This means that the Rule disproportionately harmed Native American communities. This discriminatory impact violates the principles of environmental justice”) (citations omitted). *See also* section IV.B.3.d of this preamble and Technical Support Document section II.B.D.

⁴¹ *See supra* note 40.

⁴² *See, e.g.*, comments submitted by Navajo Nation at 3 (February 7, 2022) (Docket ID No. EPA-HQ-OW-2021-0602-0581), <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0581> (“Nor did the NWPR consider environmental justice concerns, including that tribes, among other environmental justice communities, ‘may experience increased water pollution and impacts from associated increases in health risk.’” (citation omitted)); comments submitted by Amigos Bravos et al. at 2 (February 7, 2022) (Docket ID No. EPA-HQ-OW-2021-0602-0600), <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0600> (“Many New Mexican farmers of color depend upon clean water flowing from the ephemeral drainages in headwater systems to water their crops and livestock. New Mexico acequias (community irrigation ditches) help to convey and distribute surface water to tens of thousands of New Mexican acequia families and over 100,000 acres of irrigable lands, primarily for traditional agricultural and cultural uses. New Mexico’s surface waters are the lifeblood of numerous acequias, sustaining and enriching centuries-old acequias and farming and ranching traditions which depend upon clean water. Protecting clean water in New Mexico is intricately tied to environmental justice.”).

Report of Federalism Consultation, available in the docket for this rule.

The agencies initiated a Tribal consultation and coordination process during development of the proposed rule which was conducted over a 66-day period from July 30, 2021, until October 4, 2021, including two consultation kick-off webinars. The agencies received consultation comment letters from 27 Tribes and three Tribal organizations and held three leader-to-leader consultation meetings and four staff-level meetings with Tribes at their request. On October 7, 13, 27, and 28, 2021, the agencies hosted virtual dialogues with Tribes focused on implementation of prior “waters of the United States” regulatory regimes. Additional information about Tribal consultation and engagement can be found in section V.F of this preamble and the Summary of Tribal Consultation and Coordination, which is available in the docket for this rule.

The agencies signed a proposed rule defining “waters of the United States” on November 18, 2021. On December 7, 2021, the agencies published the proposed rulemaking in the **Federal Register**, 86 FR 69372, which initiated a 60-day public comment period that lasted through February 7, 2022. EPA and Army held three virtual public hearings on January 11, 13, and 18, 2022. The Office of Advocacy of the U.S. Small Business Administration hosted EPA and Army staff in January 2022 to discuss the proposed rule with small entities at its Small Business Environmental Roundtables. The agencies met with small agricultural interests and their representatives for a roundtable on January 7, 2022, and met with other small entities on January 10, 2022. The agencies also engaged with State and local governments during the public comment period, including through two virtual roundtables on January 24 and 27, 2022. The agencies continued to engage with Tribes during the public comment period. On January 20, 2022, the agencies hosted a Tribal virtual roundtable.

In developing this rule, the agencies reviewed and considered approximately 114,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including: the legal basis for the proposed rule; the agencies’ proposed treatment of categories of jurisdictional waters and those features that would not be jurisdictional; the Economic Analysis and Technical Support Document for the proposed rule; and the need for a clear and implementable rule that is

easy for the public to understand. The agencies discuss comments received and their responses in the applicable sections of the preamble to this rule. A complete response to comments document is available in the docket for this rule (Docket ID No. EPA–HQ–OW–2021–0602).

The agencies also engaged with EPA’s Science Advisory Board (SAB) on several occasions during the development of this rule. The SAB was established in 1978 by the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), to provide independent scientific and technical advice to the EPA Administrator on the technical basis for agency positions and regulations.

On January 28, 2022, during the public comment period, the agencies met with the SAB Work Group for Review of Science Supporting EPA Decisions to explain the proposed rule, including its basis, and to address the SAB Work Group’s initial questions. On February 7, 2022, the SAB Work Group signed a memorandum recommending that the Chartered SAB should review the adequacy of the science supporting the proposed rule. SAB Memorandum: Recommendations of the SAB Work Group for Review of Science Supporting EPA Decisions Regarding Two Planned EPA Regulatory Actions (February 7, 2022). On March 7, 2022, during the public meeting of the Chartered SAB, the Chartered SAB unanimously voted to review the scientific and technical basis of the proposed rule. The SAB formed a Work Group of its chartered members which issued a draft review on May 9, 2022, and the Chartered SAB held public meetings on the matter on May 31 and June 2, 2022. The SAB issued their final review on July 5, 2022 (EPA–SAB–22–005, hereinafter, “2022 SAB Review”). All materials related to the SAB’s review are available in the docket for this rule and on the SAB’s website.

The SAB’s review of the proposed rule was overall supportive of the science underpinning the proposed rule, including the Technical Support Document, and the discussion of shallow subsurface flow. The SAB made some recommendations on the discussion of climate change. The SAB’s review was also generally favorable towards the approaches taken in the Economic Analysis supporting the proposed rule. The SAB made recommendations for improvement of the Economic Analysis, particularly regarding the environmental federalism approach and the continued non-monetization of certain benefits. The

SAB indicated that the agencies’ plans for expanding the environmental justice analysis for this rule were appropriate and provided recommendations for improving and clarifying the analysis. A memorandum summarizing the agencies’ interactions with the SAB and the SAB’s review of the proposed rule is available in the docket for this rule.

IV. Revised Definition of “Waters of the United States”

A. Basis for This Rule

In this rule, the agencies are exercising their authority to interpret “waters of the United States” to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies’ determination of the statutory limits on the scope of the “waters of the United States” informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.”⁴³ The agencies construe the term “waters of the United States” to mean: (1) traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters”); (2) impoundments of “waters of the United States” (“paragraph (a)(2) impoundments”); (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”);

⁴³ For brevity, the agencies may refer to the considerations that formed the basis of the agencies’ interpretation of “waters of the United States” in the final rule as “the law, the science, and agency expertise.” References to the agencies’ consideration of “the law, the science, and agency expertise” throughout this preamble are intended to encompass the agencies’ consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court decisions, and the agencies’ experience and technical expertise implementing the pre-2015 regulatory regime.

and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard (“paragraph (a)(5) waters”). This rule also contains, at paragraph (b), the longstanding exclusions in the 1986 regulations, as well as additional exclusions based on well-established practice, from the definition of “waters of the United States” and, at paragraph (c), definitions for terms used in this rule.

This rule advances the Clean Water Act’s statutory objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” section 101(a), as it is informed by the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and paragraph (a)(5) waters to restore and maintain the water quality of paragraph (a)(1) waters. In developing the rule, the agencies also considered the text of the relevant statutory provisions of the Clean Water Act and the statute as a whole, relevant Supreme Court case law, and the agencies’ experience and technical expertise after more than 45 years of implementing the 1986 regulations defining “waters of the United States,” including more than a decade of experience implementing those regulations consistent with the decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* collectively.

This construction also reflects consideration of provisions of the Clean Water Act referencing the role of the States. Section 101(b) provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” The provisions in this rule reflect consideration of the comprehensive nature and objective of the Clean Water Act and also avoid assertions of jurisdiction that raise federalism concerns. Determining where to draw the boundaries of Federal jurisdiction to ensure that the agencies advance Congress’s objective while preserving and protecting the responsibilities and rights of the States is assigned by Congress to the agencies. This rule’s relatively permanent and significant nexus limitations appropriately draw this boundary by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, the territorial seas, and interstate waters, Clean Water Act programs will apply to

ensure that those downstream waters have a baseline of protection established by Federal law. Where they do not, Tribes and States have authority. These limitations are based on the agencies’ conclusion that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act, and that, while the relatively permanent standard, standing alone, identifies only a subset of the “waters of the United States,” including this standard in the final rule facilitates ease of implementation. In addition, this rule reflects consideration of the agencies’ experience and expertise, as well as updates in implementation tools and resources, and its terms are generally familiar and implementable.

For all these reasons, this rule will achieve the agencies’ goals of effectively and durably protecting the quality of the nation’s waters. The effectiveness of this rule is based, in part, on the familiarity of the regulatory framework to the agencies and stakeholders, with an array of readily available tools and resources. This rule also is durable because it is founded on the familiar framework of the longstanding 1986 regulations, amended to reflect the agencies’ interpretation of appropriate limitations on the geographic scope of the Clean Water Act in light of the law, the science, and agency expertise. This rule also reflects the agencies’ consideration of the extensive public comments. This rule protects the quality of the nation’s waters by restoring the important protections for jurisdictional waters provided by the Clean Water Act, including not only protections provided by the Act’s permitting programs, but also protections provided by programs ranging from water quality standards and total maximum daily loads to oil spill prevention, preparedness, and response programs, to the Tribal and State water quality certification programs.

1. The Agencies Are Exercising the Authority Granted by Congress To Define “Waters of the United States” Under the Clean Water Act

The agencies are exercising the authority granted to them by Congress in the Clean Water Act to construe the key term “navigable waters,” which Congress broadly defined to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7) (Clean Water Act section 502(7)). As explained herein, the text of the statute, including in particular sections 501 and

502(7), and congressional intent provide that delegation of authority. And the Supreme Court has affirmed the conclusion that the agencies have the authority to define the bounds of “waters of the United States.” In this rule, the agencies are using the traditional tools of statutory construction to exercise their delegated authority. Further, the rule is founded upon the longstanding 1986 regulations, familiar to Congress and the Court, while incorporating important limitations based on the text of the statute. Finally, it is well established that agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation.

Congress’s intent to delegate authority to the agencies to construe the term “navigable waters” and its definition in section 502(7), “the waters of the United States, including the territorial seas,” is clear from this text in the Clean Water Act. First, Congress established a broad definition of a term foundational to advancing the Act’s clear objective that requires additional interpretation to implement that term by the expert agencies charged with administering the statute. Second, Congress explicitly delegated such authority to EPA: “The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.” 33 U.S.C. 1361 (Clean Water Act section 501). Clearly, interpreting this key term through regulation is necessary to carry out the functions of the Act.

Congressional intent affirms this delegation. The breadth of the definition of “navigable waters” reflects a deliberate choice by Congress to both enact a statute with a broad scope of waters protected by Federal law and to delegate the authority to interpret the specialized term and its definition to the expert agencies. The relevant House bill would have defined “navigable waters” as the “navigable waters of the United States, including the territorial seas.” H.R. Rep. No. 911, 92d Cong., 2d Sess. 356 (1972) (emphasis omitted). But the House was concerned that the definition might be given an unduly narrow interpretation. The House Report observed: “One term that the Committee was reluctant to define was the term ‘navigable waters.’ The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made

or may be made for administrative purposes.” H.R. Rep. No. 92–911, at 131 (1972). The Senate Report also expressed disapproval of the narrow construction by the Corps of the scope of waters protected under prior water protection statutes, stating “[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” S. Rep. No. 92–414, at 77 (1971). Thus, in conference the word “navigable” was deleted from that definition, and the conference report again urged that the term “be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Congress thus intended the agencies to which it granted authority to implement the Clean Water Act to interpret the scope of the definition of “navigable waters” consistent with Congress’s intent and objective in enacting the Act.

The Supreme Court has also affirmed the conclusion that it is the agencies’ role to interpret the term “waters of the United States.” As the Court explained in *Riverside Bayview*, Congress delegated a “breadth of federal regulatory authority” and expected the agencies to tackle the “inherent difficulties of defining precise bounds to regulable waters.” 474 U.S. at 134.

In addition, any ambiguity in Congress’s terms in Clean Water Act section 502(7) further underscores the role of the agencies in interpreting the statutory language. The *Riverside Bayview* Court deferred to and upheld the agencies’ interpretation of the Clean Water Act to protect wetlands adjacent to navigable-in-fact bodies of water, stating “[a]n agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.” 474 U.S. at 131 (citations omitted). All nine Justices in *Rapanos* again recognized that there was ambiguity in the terms of the Clean Water Act. 547 U.S. at 752, 758, 780, 796, 811–12. In concurring with the *Rapanos* plurality opinion, the Chief Justice explained that, given the “broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate” if they had addressed the relevant interpretive questions through rulemaking. 547 U.S. at 758 (Roberts, C.J., concurring). The

Chief Justice emphasized the breadth of the agencies’ discretion in defining “waters of the United States” through rulemaking; indeed, the agencies’ interpretations under the Clean Water Act, Chief Justice Roberts emphasized, are “afforded generous leeway by the courts.” *Id.* at 758.

In exercising their authority to interpret the statute in this rule, the agencies are “employing the traditional tools of statutory interpretation,” *American Hospital Association v. Becerra*, 142 S. Ct. 1896, 1906 (2022) (*per curiam*), beginning with “the text and structure of the statute,” *id.* at 1904, as well as “with reference to the statutory context, ‘structure, history, and purpose,’” *Abramski v. United States*, 573 U.S. 169, 179 (2014) (citation omitted). As discussed further in this section IV.A of the preamble, the agencies have used additional tools of statutory construction, including the statutory history, the statute as a whole, the objective of the Clean Water Act, and the legislative history, which clears up ambiguity, in construing the Act. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020) (discussing use of legislative history by the Supreme Court “when interpreting *ambiguous* statutory language” (emphasis in original) and noting that “[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it” (citing *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011))).

The agencies have also properly brought to bear their expertise and experience in construing the Clean Water Act. As the Supreme Court concluded in *Riverside Bayview*, “In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” 474 U.S. at 134. In addition, the agencies have more than 45 years of experience implementing the longstanding pre-2015 regulations defining “waters of the United States,” including more than a decade of implementing those regulations consistent with the Supreme Court’s decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*, and have concluded this rule is also consistent with the “longstanding practice of [the agencies] in implementing the relevant statutory authorities.” *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022). Finally, Congress is aware of the

agencies’ longstanding interpretation of “waters of the United States” and has not acted to limit the agencies’ interpretation, but rather has incorporated aspects of the agencies’ regulatory definition into the statute. *See* section IV.A.2.b of this preamble.

Further, agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”); *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”). Such a decision need not be based upon a change of facts or circumstances. A revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514–15). As discussed further in section IV.B.3 of this preamble, the agencies have reviewed the 2020 NWPR and determined that the rule should be replaced. This rule properly considers the objective of the Clean Water Act, is consistent with the text and structure of the Act, informed by relevant Supreme Court precedent, and reflects the record before the agencies, including consideration of the best available science, as well as the agencies’ expertise and experience implementing the pre-2015 regulatory regime.

To be clear, in this rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. Therefore, while the agencies’ interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court’s principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where “no opinion commands a majority.” *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) (“*Marks*”).) Rather, this rule codifies the agencies’ interpretation of “navigable waters” informed by the text of the relevant provisions of the Clean Water

Act and the statute as a whole, as well as the scientific record, relevant Supreme Court case law, input from public comment, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States," including more than a decade of implementing the regulations after *Rapanos*. Based on these considerations, the agencies have concluded that the significant nexus standard in this rule is the best interpretation of section 502(7) of the Clean Water Act.

2. This Rule Advances the Objective of the Clean Water Act

This rule is grounded in the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). This rule advances the Clean Water Act's objective by defining "waters of the United States" to include waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters; and waters that meet the relatively permanent standard. The limitations in the definition ensure that the agencies will not assert jurisdiction where the effect on traditional navigable waters, the territorial seas, and interstate waters—*i.e.*, the paragraph (a)(1) waters—is not significant. This rule is informed by the best available science on the functions provided by upstream waters, including wetlands, to restore and maintain the integrity of paragraph (a)(1) waters because the rule recognizes that upstream waters can have significant effects on such waters and enables the agencies to make science-informed decisions about such effects. This rule thus defines "waters of the United States" to include the familiar types of waters in the 1986 regulations—traditional navigable waters, interstate waters, impoundments, tributaries, the territorial seas, adjacent wetlands, and waters that do not fall within the other categories—while adding, where appropriate, a requirement that waters also meet either the significant nexus standard or the relatively permanent standard.

a. The Objective of the Clean Water Act To Protect Water Quality Must Be Considered When Defining "Waters of the United States"

A statute must be interpreted in light of the purposes Congress sought to achieve. *See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004).

When considering the scope of the Clean Water Act, the Supreme Court often begins with the objective of the Act and examines the relevant question through that lens. Thus, the agencies must consider the objective of the Clean Water Act in interpreting the scope of the statutory term "waters of the United States." Here, Congress made its purpose crystal clear by stating its objective in the first section of the statute. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To adequately consider the Clean Water Act's statutory objective, a rule defining "waters of the United States" must consider its effects on the chemical, physical, and biological integrity of the nation's waters. And—as the text and structure of the Clean Water Act, supported by legislative history and Supreme Court decisions, make clear—protecting the chemical, physical, and biological integrity of the nation's waters means protecting their water quality.

The Clean Water Act begins with the objective in section 101(a) and establishes numerous programs all designed to protect the integrity of the nation's waters, ranging from permitting programs and enforcement authorities, to water quality standards and effluent limitations guidelines, to research and grant provisions. Section 102 of the Clean Water Act requires the Administrator to, after consultation, develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters.

One of the Clean Water Act's principal tools in protecting the integrity of the nation's waters is section 301(a), which generally prohibits "the discharge of any pollutant by any person" without a permit or other authorization under the Act. Other substantive provisions of the Clean Water Act that use the term "navigable waters" and are designed to meet the statutory objective include the section 402 permit program, the section 404 dredged and fill permit program, the section 311 oil spill prevention and response program, the section 303 water quality standards and total maximum daily load programs, and the section 401 Tribal and State water quality certification process. Each of these programs is designed to protect water quality and, therefore, further the objective of the Clean Water Act. The question of Federal jurisdiction is foundational to most programs administered under the Clean Water

Act. *See* section III.A.1 of this preamble.⁴⁴

Two recent Supreme Court Clean Water Act decisions, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) ("*Maui*") and *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("*National Association of Manufacturers*"), affirm that Congress used specific language in the definitions of the Clean Water Act in order to meet the objective of the Act, that the definition of "waters of the United States" is fundamental to meeting the objective of the Act, and, therefore, that the objective of the Act must be considered in interpreting the term "waters of the United States."

In *Maui*, the Supreme Court instructed that "[t]he object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve." 140 S. Ct. at 1476. The Court, in recognizing that Congress's purpose to "restore and maintain the . . . integrity of the Nation's waters" is "reflected in the language of the Clean Water Act," also found that "[t]he Act's provisions use specific definitional language to achieve this result," noting that among that definitional language is the phrase "navigable waters." *Id.* at 1468–69 (quoting 33 U.S.C. 1251(a)).⁴⁵ Thus, in accordance with *Maui*, in interpreting the "specific definitional language" of the Clean Water Act, the agencies must ensure that they are advancing the statutory purposes Congress sought to achieve.

In *National Association of Manufacturers*, the Court confirmed the importance of considering the plain language of the objective of the Clean Water Act when interpreting the

⁴⁴ Additional provisions are also designed to achieve the Clean Water Act's statutory objective and use its specific language, including the definition of "pollution," which the Act defines as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. 1362(19).

⁴⁵ The Court explained:

The Act's provisions use specific definitional language to achieve this result. First, the Act defines "pollutant" broadly, including in its definition, for example, any solid waste, incinerator residue, "heat," "discarded equipment," or sand (among many other things). § 502(6), 86 Stat. 886. Second, the Act defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including, for example, any "container," "pipe, ditch, channel, tunnel, conduit," or "well." § 502(14), *id.*, at 887. Third, it defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source." § 502(12), *id.*, at 886.

Maui, 140 S. Ct. at 1469.

specific definitional language of the Act, and in particular when interpreting the definitional language “waters of the United States.” The Court identified section 301’s prohibition on unauthorized discharges as one of the Clean Water Act’s principal tools for achieving the objective and then identified the definition of “waters of the United States” as key to the scope of the Act: “Congress enacted the Clean Water Act in 1972 ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ [33 U.S.C.] 1251(a). One of the Act’s principal tools in achieving that objective is [section] 1311(a), which prohibits ‘the discharge of any pollutant by any person,’ except in express circumstances. . . . Because many of the Clean Water Act’s substantive provisions apply to ‘navigable waters,’ the statutory phrase ‘waters of the United States’ circumscribes the geographic scope of the Act in certain respects.” 138 S. Ct. 617, 624. Thus, consideration of the objective of the Clean Water Act is of particular importance when defining the foundational phrase “waters of the United States.”

Many other Supreme Court decisions confirm the importance of considering the Clean Water Act’s objective. When faced with questions of statutory interpretation on the scope of the Clean Water Act, many Supreme Court decisions begin with the objective of the Act and examine the relevant question through that lens. *See, e.g., PUD No. 1 of Jefferson Cty v. Washington Dep’t of Ecology*, 511 U.S. 700, 704 (1994) (interpreting the scope of Clean Water Act section 401 and finding that the Act “is a comprehensive water quality statute designed to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,’” that “[t]he Act also seeks to attain ‘water quality which provides for the protection and propagation of fish, shellfish, and wildlife,’” and that “[t]o achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments”); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203, 205 n.12 (1976) (“In 1972, prompted by the conclusion of the Senate Committee on Public Works that ‘the Federal water pollution control program . . . has been inadequate in every vital aspect,’ Congress enacted the [Clean Water Act], declaring ‘the national goal that the discharge of pollutants into the navigable waters be Eliminated by 1985.’”); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)

(reviewing the scope of EPA’s authority to issue a permit affecting a downstream State and finding that the Clean Water Act “anticipates a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters’”); *S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 126 S. Ct. 1843, 1852–53 (2006) (interpreting the scope of “discharge”) (“Congress passed the Clean Water Act to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,’ 33 U.S.C. [section] 1251(a)”); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492–93 (1987) (“Congress intended the 1972 Act amendments to ‘establish an all-encompassing program of water pollution regulation.’ . . . The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. . . . Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State.”).

Along with *Maui* and *National Association of Manufacturers*, these cases confirm that, for purposes of a rulemaking revising the definition of “waters of the United States,” the agencies must consider the rule’s effect on the chemical, physical, and biological integrity of the nation’s waters—*i.e.*, on the quality of those waters. The Supreme Court in *Riverside Bayview* explained the inherent link between the Clean Water Act’s objective and water quality: “This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, ‘the word “integrity” . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.’” 474 U.S. at 132 (citations omitted).

The statutory structure further confirms that “waters of the United States” must be interpreted to account for the Clean Water Act’s broader objective of promoting water quality. The Act is replete with 90 references to water quality—from the goals set forth to meet the statutory objective to the provisions surrounding research, effluent limitations, and water quality standards. *See, e.g.*, 33 U.S.C. 1251(a)(2) (“[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for

recreation in and on the water be achieved. . . .”), 1254(b)(6) (providing that the Administrator shall collect “basic data on chemical, physical, and biological effects of varying water quality”), 1311(b)(1)(C) (requiring permits to have limits as stringent as necessary to meet water quality standards), 1313(c) (providing that water quality standards “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]”). And Congress was clear that “[t]he development of information which describes the relationship of pollutants to water quality is essential for carrying out the objective of the Act.” S. Rep. No. 92–414 at 47 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3716; *see also id.* at 3717 (“Water quality is intended to refer to the biological, chemical and physical parameters of aquatic ecosystems, and is intended to include reference to key species, natural temperature and current flow patterns, and other characteristics which help describe ecosystem integrity. . . . The criteria will allow the translation of the narrative of the general objective of the Act to specific and precise parameters.”); *id.* at 3742 (“The Committee has added a definition of pollution to further refine the concept of water quality measured by the natural chemical, physical and biological integrity.”). As the Sixth Circuit explained shortly after the 1972 enactment of the Clean Water Act: “It would, of course, make a mockery of [Congress’s] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.” *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

To be clear, the objective of the Clean Water Act is not the only factor relevant to determining the scope of the Act. Rather, in light of the precise language of the definitions in the Act, the importance of water quality to the statute as a whole, and Supreme Court decisions affirming that consideration of the objective of the Act is of primary importance in defining its scope, the agencies conclude that a rule defining “waters of the United States” must substantively consider the effects of a revised definition on the integrity of the nation’s waters and advance the protection of the quality of those waters. As discussed further below, this rule

properly considers and advances the objective of the Clean Water Act because the science conclusively demonstrates that upstream waters, including wetlands, can affect the quality of downstream waters and ensures application of Clean Water Act water quality programs to upstream waters when their effect on downstream traditional navigable waters, territorial seas, and interstate waters is significant.

b. This Rule Is Founded on the 1986 Regulations, Which Advance the Objective of the Clean Water Act

The 1986 regulations—which are substantially the same as the 1977 regulations—represented the agencies’ interpretation of the Clean Water Act in light of its objective and their scientific knowledge about aquatic ecosystems. In this rule, the agencies are exercising their authority to construe “waters of the United States” to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies’ construction of limitations on the scope of “waters of the United States,” based on the law, the science, and agency expertise. Of particular import, the agencies are limiting the scope of the longstanding regulatory categories by adding a requirement that tributaries, adjacent wetlands (that are adjacent to waters other than paragraph (a)(1) waters), and lakes and ponds, streams, and wetlands that are not identified in paragraphs (a)(1) through (4) meet either the relatively permanent standard or the significant nexus standard as established in this rule. The agencies also considered the extensive public comment on the proposed rule in developing this final rule.

The best available science confirms that the 1986 regulations remain a reasonable foundation for a definition of “waters of the United States” that furthers the water quality objective of the Clean Water Act. *See* Technical Support Document. This section of the preamble describes the agencies’ historic rationale for the 1986 regulation and its regulatory categories and describes the latest science that supports the conclusion that the categories of waters identified in the 1986 regulations provide functions that restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters.

The agencies’ historic regulations, eventually promulgated and referred to as the 1986 regulations, were based on the agencies’ construction of the scope of the Clean Water Act and their scientific and technical judgment about which waters needed to be protected to

restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, the paragraph (a)(1) waters). For more than 45 years, the agencies recognized the need to protect “the many tributary streams that feed into the tidal and commercially navigable waters . . . since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material.” *See, e.g.*, 42 FR 37122, 37123 (July 19, 1977). The agencies have also long recognized that the nation’s wetlands are “a unique, valuable, irreplaceable water resource. . . . Such areas moderate extremes in waterflow, aid in the natural purification of water, and maintain and recharge the ground water resource.” EPA, Protection of Nation’s Wetlands: Policy Statement, 38 FR 10834 (May 2, 1973). In *Riverside Bayview*, the Supreme Court acknowledged that the agencies were interpreting the Clean Water Act consistent with its objective and based on their scientific expertise:

In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134.

And, as the Corps stated in promulgating the 1977 definition, “[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of . . . part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.” 42 FR 37128 (July 19, 1977).

Thus, this rule includes the categories long identified by the agencies as affecting the water quality of paragraph (a)(1) waters, including tributaries, adjacent wetlands, impoundments, and waters that do not fall within any of the more specific categories of the definition (a category that has been modified and codified in this rule as paragraph (a)(5) waters).

As discussed below, however, while these longstanding categories continue to provide a reasonable foundation for this rule, this rule codifies limitations on these categories based on the agencies’ interpretation of the Clean Water Act. To be clear, this rule does

not automatically include all tributaries, adjacent wetlands, and waters assessed under paragraph (a)(5) as jurisdictional waters. Rather, the agencies conclude that utilizing these longstanding, familiar categories of waters, subject to the relatively permanent or significant nexus jurisdictional standards, is consistent with the best available science because the significant nexus standard established in this rule is based on an assessment of the effects of waters in these categories on the water quality of paragraph (a)(1) waters. In addition, the agencies believe that waters that meet the relatively permanent standard individually and cumulatively provide many functions that benefit the integrity of paragraph (a)(1) waters. *See* section IV.A.3.a.ii of this preamble. This rule does categorically include wetlands adjacent to paragraph (a)(1) waters. *Riverside Bayview*, 474 U.S. at 135; *see also Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) (“As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*.”). This rule enables the agencies to make science-informed determinations of whether or not a water that falls within these categories meets either jurisdictional standard and therefore satisfies the definition of “waters of the United States” on a case-specific basis. For a detailed discussion of implementation of adjacent wetlands under this rule, *see* section IV.A.4 of this preamble; for additional guidance to landowners on jurisdictional determinations, *see* section IV.C.10 of this preamble.

i. The Agencies’ Longstanding Interpretation That Tributaries Can Be “Waters of the United States” Is a Reasonable Foundation for This Rule

The agencies have long construed the Clean Water Act to include tributaries as “waters of the United States.” In 1973, EPA’s General Counsel issued an opinion upon which the agency’s subsequent rulemaking was based that tributaries were included within the term “navigable waters,” finding that “this broad interpretation is well grounded in the language of the statute and in the legislative history, and comports with the expressed intent of Congress to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Envtl.*

Prot. Agency, Off. Gen. Counsel, Meaning of the Term “Navigable Waters” (February 13, 1973), 1973 WL 21937. The Corps explained in 1977 that its regulations necessarily encompassed “the many tributary streams that feed into the tidal and commercially navigable waters” because “the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material.” 42 FR 37123 (July 19, 1977).

The conclusion that the Clean Water Act includes tributaries is consistent with the structure and history of the statute. The Clean Water Act was not “merely another law ‘touching interstate waters,’” but rather “a ‘total restructuring’ and ‘complete rewriting’ of [then] existing water pollution legislation.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (citations omitted). Congress concluded that prior measures had been “inadequate in every vital aspect,” and it enacted a wholly new scheme of point-source-based pollution controls. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976) (citation omitted). The Clean Water Act thus reflected Congress’s fundamental dissatisfaction with prior law.

Even before it enacted the 1972 Clean Water Act amendments, Congress had recognized, and had acted to address, the danger that pollution of tributaries may impair the quality of traditional navigable waters downstream. Prior to those amendments, the Federal Water Pollution Control Act established procedures for abatement of “(t)he pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge *into a tributary of such waters*).” 33 U.S.C. 1160(a) (1970) (emphasis added). Under specified circumstances, the Attorney General was authorized to bring suit on behalf of the United States “to secure abatement of the pollution.” 33 U.S.C. 1160(g) (1970). Indeed, the regulation of tributaries as part and parcel of a Federal effort to protect traditional navigable waters has been a feature of Federal law for over 100 years. Since its enactment as section 13 of the Rivers and Harbors Appropriation Act of 1899 (RHA), Ch. 425, section 13, 30 stat. 1152, the Refuse Act of 1899 has prohibited the discharge of refuse material into any “navigable water of the United States or into any tributary of any navigable water of the United

States,” as well as depositing refuse material “on the bank of any navigable water, or on the bank of any tributary of any navigable water.” 33 U.S.C. 407. That provision does not limit the covered “tributar[ies]” to those that are themselves used or susceptible to use for navigation.

Thus, well over a hundred years ago, Congress understood the necessity of protecting tributaries in order to protect traditional navigable waters and recognized its authority over those tributaries, and in the Clean Water Act Congress sought to *expand* protection of the nation’s waters. It would therefore be unreasonable for the agencies to construe the Clean Water Act, with its comprehensive focus on limiting discharges of pollutants to “waters of the United States” and restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters, to exclude tributaries to traditional navigable waters, the territorial seas, and interstate waters.

Section 404(g) of the Clean Water Act further supports the agencies’ interpretation that the Act covers such tributaries. Section 404(g) authorizes States to administer their own permit programs over certain waters. Section 404(g)(1) provides, in relevant part, that any State “desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto)” may submit a description of this proposed program to EPA. 33 U.S.C. 1344(g)(1).⁴⁶ Section 404(g)(1)’s reference to navigable waters “other than those waters used or susceptible to use” for transporting commerce and their adjacent wetlands plainly indicates that the Clean Water Act covers more than the waters in this parenthetical.

The Supreme Court has also recognized the relevance of section 404(g) to interpreting the scope of Clean Water Act jurisdiction. In *Riverside Bayview*, while the Supreme Court stated that section 404(g) “does not *conclusively* determine the construction to be placed on the use of the term ‘waters’ elsewhere in the Act,” the Court went on to say with respect to the significance of section 404(g) that “the various provisions of the Act should be

⁴⁶ The Corps retains permitting authority over the “waters of the United States” that States cannot or do not assume.

read in *pari materia* [i.e., construed together],” ultimately concluding that section 404(g) “suggest[s] strongly that the term ‘waters’ as used in the Act” supports the Corps’ interpretation of “waters of the United States” to include wetlands. 474 U.S. at 138 n.11 (emphasis added). While the Court in *SWANCC* did not read section 404(g) to definitively answer the question of the scope of “waters of the United States,” the Court offered a hypothesis that “Congress simply wanted to include all waters adjacent to ‘navigable waters,’ such as non-navigable tributaries and streams.” 531 U.S. at 171. And all members of the Supreme Court agreed with the observation of the *Rapanos* plurality that the 1977 Clean Water Act’s authorization for States to administer the section 404 program for “navigable waters . . . other than” those used or suitable for use “to transport interstate or foreign commerce,” 547 U.S. at 731 (quoting 33 U.S.C. 1344(g)(1)), “shows that the Act’s term ‘navigable waters’ includes something more than traditional navigable waters.” *Id.* In light of the history of the Act as well as Congress’s clear understanding of the relationship between tributaries and traditional navigable waters, tributaries—whether or not they themselves are traditional navigable waters—are an obvious candidate for the Clean Water Act’s broader coverage. As noted above, even long before 1972, Congress had addressed the danger that pollution of tributaries may impair the quality of traditional navigable waters downstream, and it is implausible to suppose that Congress’s landmark 1972 legislation actually reduced the scope of the prior statutes.

Construing “waters of the United States” to include tributaries of traditional navigable waters, the territorial seas, interstate waters, or impoundments of “waters of the United States” is also consistent with the discussion of tributaries in the Clean Water Act’s legislative history. The Senate Report accompanying the 1972 Act states that “navigable waters” means “the navigable waters of the United States, portions thereof, *tributaries thereof*, and includes the territorial seas and the Great Lakes.” S. Rep. No. 92–414, at 77 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742 (emphasis added). Congress thus restated that “reference to the control requirements must be made to the navigable waters, portions thereof, *and their tributaries*.” *Id.* at 3743 (emphasis added).

In addition, this rule and the 1986 regulations construe the statute not to

distinguish between human-made or human-altered tributaries and natural tributaries. This construction is consistent with the text of the statute and science. Most obviously, such a distinction would render superfluous section 404's exception for "the discharge of dredged or fill material . . . for the . . . maintenance of drainage ditches," section 404(f)(1)(C), because if human-made or human-altered tributaries were not included, drainage ditches would not be covered in the first place. More broadly, many of the nation's urban waterways are channelized, and the Clean Water Act has long been understood to encompass "natural, modified, or constructed" tributaries of other covered waters. 80 FR 37078 (June 29, 2015). For example, many of the streams in Houston, Texas, have been channelized, culverted, or otherwise altered over time, in part for flood control purposes, and the Clean Water Act protects many of these human-modified streams. Removing the Clean Water Act's protections for these tributaries could increase contributions of nutrients, sediment, and other pollutants downstream to paragraph (a)(1) waters, such as the Trinity River. Such an approach would also affect millions of miles of other such tributaries, undermining the integrity of paragraph (a)(1) waters throughout the country.

Moreover, the Clean Water Act's specialized definition of "navigable waters" does not turn on any such distinctions between natural and human-made or -altered tributaries, which have no bearing on a tributary's capacity to carry water (and pollutants) to traditional navigable waters, the territorial seas, or interstate waters. *See, e.g.*, Technical Support Document section III.A.iv (explaining that manmade ditches "perform many of the same functions as natural tributaries," including "convey[ing] water that carries nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters, the territorial seas, and interstate waters"). Such a distinction would also be inconsistent with *Rapanos*. That decision addressed consolidated cases involving wetlands connected to traditional navigable waters by "ditches or man-made drains." *Rapanos*, 547 U.S. at 729 (plurality opinion). The *Rapanos* plurality concluded that the cases should be remanded for the lower courts to determine whether the channels at issue satisfied the plurality's jurisdictional standard, and those further lower-court proceedings would have been superfluous if the manmade

character of the ditches and drains had precluded their coverage as "waters of the United States."

As discussed below and further in section III.A of the Technical Support Document, the best available science supports the 1986 regulations' conclusions, and the agencies' construction of the Clean Water Act in this rule, about the importance of tributaries to the water quality of downstream paragraph (a)(1) waters: tributaries provide natural flood control, help sustain flow downstream, recharge groundwater, trap sediment, store and transform pollutants, decrease high levels of chemical contaminants, recycle nutrients, create and maintain biological diversity, and sustain the biological productivity of downstream rivers, lakes, and estuaries.

ii. The Agencies' Longstanding Interpretation of Adjacent Wetlands as "Waters of the United States" Is a Reasonable Foundation for This Rule

For more than four decades, the agencies have construed the "waters of the United States" to include wetlands adjacent to other jurisdictional waters. Wetlands, such as swamps, bogs, marshes, and fens, are "transitional areas between terrestrial and aquatic ecosystems" characterized by sustained inundation or saturation with water. Science Report at 2–5. Wetlands play a critical role in regulating water quality. Among other things, they provide flood control and trap and filter sediment and other pollutants that would otherwise be carried to downstream waters. *See* National Research Council, *Wetlands: Characteristics and Boundaries* 35, 38 (1995) (NRC Report, available at <https://nap.nationalacademies.org/catalog/4766/wetlands-characteristics-and-boundaries>; Technical Support Document section III.B.

The Corps published regulations to implement the section 404 permitting program in 1974. 39 FR 12115 (April 3, 1974). At that time, the Corps took the view that for purposes of section 404 "navigable waters" was an established term of art for waters that are subject to Congress's power to regulate interstate channels of commerce, and that the term should be given that meaning in the Clean Water Act—notwithstanding the specialized definition of "navigable waters" in the Act. *Id.* The Corps therefore asserted jurisdiction under section 404 only over the waters subject to section 10 of the Rivers and Harbors Act of 1899. *Id.* at 12119.

Reviewing courts, members of Congress, and EPA disagreed with the Corps' initial approach. *See, e.g., United States v. Ashland Oil & Transp. Co.*, 504

F.2d 1317, 1325 (6th Cir. 1974); H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23–27 (1974). In fact, EPA had previously promulgated a rule defining "waters of the United States" far more broadly than the Corps' regulations. 38 FR 13528 (May 22, 1973). Ultimately, the Corps was ordered to adopt new regulations recognizing the agency's "full regulatory mandate." *NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

The Corps responded by broadening its definition of "navigable waters" in a phased approach under which all of the waters in the final regulation were "waters of the United States," but the Corps would begin regulating activities within each type of "waters of the United States" in phases: Phase I, which was effective immediately, covered "coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States [a term for waters protected under the Rivers and Harbors Act] and freshwater wetlands contiguous or adjacent thereto"; Phase II, effective after July 1, 1976, covered "primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes"; and Phase III, effective after July 1, 1977, covered "discharges . . . into any navigable water" including intrastate lakes and rivers and their adjacent wetlands. 40 FR 31320, 31324, 31326 (July 25, 1975). The Corps defined "adjacent" to mean "bordering, contiguous, or neighboring," and specified that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 42 FR 37122, 37144 (July 19, 1977). The regulations also defined "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* The agencies have thus interpreted the term "waters of the United States" to include wetlands since at least 1975.⁴⁷

⁴⁷ The agencies' interpretation of "waters of the United States" as including wetlands is consistent not only with the history and text of Clean Water Act section 404(g), but also with other parts of the statute and of the United States Code. For example, in the Lake Champlain Basin Program, Congress referred to "streams, rivers, lakes, and other bodies of water, including wetlands." 33 U.S.C. 1270(g)(2) (emphasis added). Congress has also referred to "streams, rivers, wetlands, other waterbodies, and riparian areas," 33 U.S.C. 2336(b)(2) (emphasis added), and defined "coastal waters" to mean the waters of the Great Lakes "including" portions of other "bodies of water" with certain features, "including wetlands," *id.* at 2802(5).

Reacting to the Corps' broadened definition, leading up to the 1977 Amendments, Congress considered proposals to limit the geographic reach of section 404. "In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." *SWANCC*, 531 U.S. at 170. A version of that legislation, passed by the House, would have redefined "navigable waters" for purposes of section 404 to mean a limited set of traditional navigable waters and their adjacent wetlands. H.R. 3199, 95th Cong. section 16 (1977). But many legislators objected to the proposed changes. When Congress rejected the attempt to limit the geographic reach of section 404, it was well aware of the jurisdictional scope of EPA and the Corps' definition of "waters of the United States." For example, Senator Baker stated:

Interim final regulations were promulgated by the [C]orps [on] July 25, 1975. . . . Together the regulations and [EPA] guidelines established a management program that focused the decision-making process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the [C]orps revised its regulations to further streamline the program and correct several misunderstandings. . . .

Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries

123 Cong. Rec. 26,725 (1977). Legislators were concerned the proposed changes were an "open invitation" to pollute waters. *Id.* (remarks of Sen. Hart); *see also, e.g., id.* at 26,714–26,716. The proposal was ultimately voted down on the Senate floor. *Id.* at 26,728; *cf. S. Rep. No. 370*, 95th Cong., 1st Sess. 10 (1977) (hereinafter, "1977 Senate Report"); *Riverside Bayview*, 474 U.S. at 136–137 (noting that "efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, '[retained] the comprehensive jurisdiction over the Nation's waters'" (citation omitted)). Federal preservation of wetlands was at the heart of the debate over passage of the 1977 Act, with good reason. *See* 1977 Senate Report at 10 ("There is no question that the systematic destruction of the Nation's wetlands is causing

serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous [] game fish. They also provide nesting areas for a myriad of species of bird and wildlife. The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve."). Earlier Federal and State policy that encouraged filling wetlands had led to destruction of roughly 117 million acres of wetlands in the contiguous United States, or more than half the original total. *See* T.E. Dahl & Gregory J. Allord, "History of Wetlands in the Conterminous United States," in *National Water Summary on Wetland Resources* at 19 (1996, available at <https://pubs.usgs.gov/wsp/2425/report.pdf>).

Congress instead modified the Clean Water Act in other ways to respond to concerns about the scope of Federal authorities. Congress exempted certain agricultural and silvicultural activities from the section 404 permitting program. *See* 1977 Act section 67(b), 91 Stat. 1600 (33 U.S.C. 1344(f)(1)(A)). In addition, Congress authorized the Corps to issue general permits to streamline the permitting process. *Id.* (33 U.S.C. 1344(e)(1)). And importantly for understanding the scope of "waters of the United States," Congress modified section 404 in a way that incorporated into the statutory text an explicit endorsement of the Corps' regulation defining "waters of the United States," including its inclusion of adjacent wetlands. Specifically, the 1977 Act section 67(b), 91 Stat. 1601, establishing section 404(g), allowed Tribes and States to assume responsibility for the issuance of section 404 permits. As Congress explained in the legislative history, under section 404(g) States could administer a permitting program for the discharge of dredged or fill material into "phase II and III waters" following EPA approval, but the Corps would retain jurisdiction over "those waters defined as the phase I waters in the Corps . . . 1975 regulations, with the exception of waters considered navigable solely because of historical use." 123 Cong. Rec. 38,969 (December 15, 1977); H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 101 (1977), *reprinted in* 3 Legis. History 1977, at 185, 285. Accordingly, through section 404(g), Congress demonstrated its

understanding of the Corps' regulations and endorsed the scope of their coverage—allowing States to assume authority to administer the Clean Water Act as it pertained to the waters contained in phase II and III of the Corps' regulations (Phase II, effective after July 1, 1976, covered "primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes" and Phase III, effective after July 1, 1977, covered "discharges . . . into any navigable water" including intrastate lakes and rivers and their adjacent wetlands. 40 FR 31320, 31324, 31326 (July 25, 1975)), and reserving for the Corps alone authority over the waters contained in phase I of the Corps' regulations.

With respect specifically to the inclusion of adjacent wetlands, Congress was explicit in the text of the Clean Water Act. The text of section 404(g) authorizes States and Tribes to administer the section 404 permitting program covering "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto)." 33 U.S.C. 1344(g)(1) (emphasis added); *see* 33 U.S.C. 1377(e) (extension to Tribes). The italicized reservation of authority to the Corps in section 404(g) presupposed that "wetlands adjacent" to a subset of traditional navigable waters were subject to the section 404 program, since otherwise the exclusion of those wetlands from the Tribes' and States' potential permitting authority would have been superfluous. Other language in the 1977 legislative record confirms that understanding. *See* 1977 Senate Report 10 (stating that committee wished to "maintain[]" coverage of wetlands); H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 98, 104 (1977) (stating that the Corps will "continue" to exercise section 404 jurisdiction over "adjacent wetlands").

Moreover, with respect to *which* wetlands are adjacent, by using the pre-existing term "adjacent" wetlands from the Corps' 1977 regulations, Congress signaled its intent to incorporate the Corps' regulatory conception of adjacency. "When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted). Here, that soil includes the full breadth of the agencies' definition of "adjacent": bordering, contiguous, or neighboring, as well as wetlands behind a berm or

barrier. That definition accords with the term's plain meaning. Contemporaneous dictionaries defined the term "adjacent" in ways that do not require direct abutment. See *Black's Law Dictionary* at 62 (rev. 4th ed. 1968) ("Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch[.]" (capitalization altered; citation and emphasis omitted)); The *American Heritage Dictionary of the English Language* at 16 (1975) ("Close to; next to; lying near; adjoining."); *Webster's New International Dictionary of the English Language* at 32 (2d ed. 1958) ("Lying near, close, or contiguous; neighboring; bordering on." (emphasis omitted)).

Congress has on a number of additional occasions responded to concerns about the breadth of the scope of Federal authorities not by narrowing the scope of "waters of the United States," but by excluding particular types and sources of discharges of pollutants from the NPDES program or from Clean Water Act jurisdiction altogether. For example, the 1987 Water Quality Act (WQA) added section 402(l)(2) to the Clean Water Act. This new section prohibits EPA and the states from requiring NPDES permits for uncontaminated stormwater discharges from oil and gas exploration, production, processing or treatment operations, or transmission facilities. Later, section 323 of the Energy Policy Act of 2005 added a new provision to Clean Water Act section 502 defining the term "oil and gas exploration, production, processing, or treatment operations or transmission facilities." The 1987 WQA also enacted a new section 402(p) of the Act that established a comprehensive new program for stormwater regulation. In that section, Congress made clear that only some stormwater point source discharges need NPDES permit coverage—those from industrial activity, from large and medium municipalities, and that EPA or a State designates by rulemaking or adjudication to protect water quality or because the discharges contribute to violations of water quality standards or are significant contributors of pollutants. Congress has also taken numerous actions to amend the Clean Water Act to address discharges from vessels. The 1972 version of the Act excluded "sewage from vessels" from the definition of "pollutant" thus exempting it from the permitting regime in favor of regulatory standards of performance. See 33 U.S.C. 1322(b), 1362(6). In 1996, Congress similarly

excluded most discharges from vessels of the Armed Forces and tasked EPA and the Department of Defense to jointly promulgate uniform national discharge standards instead. See 33 U.S.C. 1322(n), 1362(6). In 2008, Congress passed the Clean Boating Act, which exempted discharges incidental to the normal operation of recreational vessels of all sizes from Clean Water Act permitting requirements, in favor of EPA regulations. See 33 U.S.C. 1322(o)(1)(B); see also 33 U.S.C. 1342(r). And in 2018, Congress enacted the Vessel Incidental Discharge Act which exempted from NPDES routine discharges from many other types of vessels including small vessels, fishing vessels, and commercial vessels larger than 79 feet. See 33 U.S.C. 1322(p)(9)(C)(ii).

Case law also supports the agencies' construction of the Clean Water Act to cover adjacent wetlands as defined by the agencies. In *Riverside Bayview*, the Supreme Court considered the "language, policies, and history" of the Clean Water Act, including the amendments in the 1977 Act, and unanimously upheld the Corps' exercise of Clean Water Act jurisdiction over such adjacent wetlands. 474 U.S. at 139. The Court held that the Corps' regulation defining "the waters of the United States" to include wetlands adjacent to navigable waters "is valid as a construction" of the Clean Water Act. *Id.* at 131. The Court first observed that "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." *Id.* at 132. To administer the statute, the Corps therefore "must necessarily choose some point at which water ends and land begins." *Id.* The Court further explained that, in drawing that jurisdictional line, the Corps may take into account "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Id.* at 133. It quoted with apparent approval the Corps' statement that "Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." *Id.* at 134 (quoting 42 FR 37128, July 19, 1977). The Court concluded that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*

The Court also viewed the 1977 Act as specifically approving the Corps' assertion of jurisdiction over adjacent wetlands—as considering those wetlands to be "waters" themselves. *Id.* at 137–139. The Court observed that "the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'" *Id.* at 137. The Court also cited section 404(g)(1) as express textual evidence "that the term 'waters' included adjacent wetlands." *Id.* at 138.

Congress had good reason to approve the inclusion of adjacent wetlands within the "waters of the United States." In the 1986 regulations, the agencies determined that wetlands adjacent to navigable waters generally play a key role in protecting and enhancing water quality, explaining: "Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 FR 37128 (July 19, 1977); see also 38 FR 10834. See section IV.C.8.b of this preamble for further discussion of the definition of "adjacent."

As discussed below and further in section III.B of the Technical Support Document, the best available science supports the 1986 regulations' conclusion that adjacent wetlands are part of the aquatic ecosystem, and the agencies' construction of the Clean Water Act in this rule, that adjacent wetlands that meet the relatively permanent standard or the significant nexus standard affect the chemical, physical, and biological integrity of paragraph (a)(1) waters by performing essential functions, including providing valuable flood control and water quality functions such as interruption and delay of the transport of water-borne contaminants over long distances, retention of sediment, prevention and mitigation of drinking water contamination, and assurance of drinking water supply. As Congress understood when it rejected efforts to narrow jurisdiction over wetlands in

1977 and the Supreme Court recognized in *Riverside Bayview*, allowing all adjacent wetlands to be filled without any permitting requirements would deprive interconnected aquatic systems of those benefits and thereby threaten the integrity of traditional navigable waters, the territorial seas, and interstate waters. Wetlands are recognized as “among the most important ecosystems on Earth.”⁴⁸ Among many other public benefits, wetlands play an “integral role” in maintaining the nation’s “water supply and quality.” 16 U.S.C. 3901(a)(1). “Research has demonstrated repeatedly that natural wetlands enhance water quality.”⁴⁹ Through chemical and biological processes, wetlands trap and filter sediment, nutrients, and other pollutants that would otherwise be carried into downstream waters.⁵⁰ For example, wetlands conservation is a crucial feature of the New York City municipal water system, which provides high quality drinking water to millions of people through watershed protection. New York protects adjacent wetlands of its source waters rather than investing in extensive and costly treatment. Wetlands also provide “cost-effective flood control,”⁵¹ capturing overflow from rivers and streams during times of high precipitation or snowmelt.⁵² For example, during Hurricane Sandy in 2012, wetlands are estimated to have helped prevent \$625 million in damage by protecting properties from flooding.⁵³

iii. It Is Reasonable for the Agencies To Continue To Include a Provision To Cover Certain Waters That Do Not Fall Within Other Jurisdictional Provisions

For more than 45 years the agencies’ regulations have included a provision to address waters that did not fall within the categories it established, such as tributaries and adjacent wetlands, because such waters could have effects on water quality and on interstate commerce. 42 FR 37128 (July 19, 1977). This rule substantially revises this provision by establishing that intrastate

lakes and ponds, streams, or wetlands not identified elsewhere in the rule may be determined to be “waters of the United States” if they meet either the relatively permanent standard or the significant nexus standard. Therefore, under this rule the agencies conclude that it is not appropriate to assert jurisdiction over non-navigable, intrastate waters based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce. See section IV.C.6 of this preamble for further discussion of the changes related to this provision. This rule replaces the interstate commerce test with the relatively permanent standard and the significant nexus standard.

For more than four decades, the agencies’ regulations defining “waters of the United States” have included provisions authorizing case-specific determinations of jurisdiction over waters that did not fall within the other jurisdictional provisions of the definition. The Corps’ 1975 interim final regulations addressed both “intrastate lakes, rivers, and streams that are used by interstate recreational travelers, for the removal of fish sold in commerce, for interstate industrial commercial purposes, or for the production of agricultural commodities sold in commerce,” and “other waters that the District Engineer determines necessitate regulation for protection of water quality.” 40 FR 31320, 31324 (July 25, 1975). As discussed above, Congress was well-aware of the scope of the Corps’ regulations when adopting the 1977 Act.

The rule properly authorizes case-specific consideration of certain waters not covered by the categories established in the rule. As discussed below and further in section IV.D of the Technical Support Document, the best available science shows that some of these waters—such as depressional wetlands, open waters, and peatlands—can provide important hydrologic (e.g., flood control), water quality, and habitat functions which can have effects on larger rivers, lakes, and estuaries, including paragraph (a)(1) waters. The functions that intrastate lakes and ponds, streams, and wetlands not identified in paragraphs (a)(1) through (4) of this rule (i.e., paragraph (a)(5) waters) can provide to paragraph (a)(1) waters include storage of floodwater, recharge of ground water that sustains river baseflow, retention and transformation of nutrients, metals, and pesticides, export of organisms to paragraph (a)(1) waters, and habitats needed for aquatic and semi-aquatic species that also utilize paragraph (a)(1)

waters. In addition, the agencies have never stated that the waterbody-specific categories alone identify every jurisdictional water under the Clean Water Act because in an area as vast and varied as the United States, it is not possible to create an exhaustive list of waters that provide these critical functions to paragraph (a)(1) waters. Indeed, a clear example of waters that do not fall within any of the categories are some lakes and ponds near jurisdictional tributaries or paragraph (a)(1) waters. They are not wetlands (so do not fall within the adjacent wetlands category), and many are not tributaries, but they are very likely to meet either the relatively permanent standard or the significant nexus standard. A lake that is not a tributary and is not a wetland may have a continuous surface connection to a traditional navigable water. It would not make sense to exclude such a lake from jurisdiction as it would have many of the same effects on the traditional navigable water as an adjacent wetland with the same continuous surface connection. Likewise, a lake that is not a tributary and is not a wetland may be near a jurisdictional tributary and significantly affect a paragraph (a)(1) water by providing similar functions as an adjacent wetland. Absent paragraph (a)(5) of this rule, these lakes would meet either the relatively permanent standard or the significant nexus standard, but would not fall within any of the categories of waters established by the definition. Thus, where waters do not fall within one of the more specific categories identified in paragraph (a)(1) through (4) of this rule, the rule provides for such waters to be evaluated for jurisdiction under paragraph (a)(5) and to be jurisdictional if they meet either standard.

c. The Best Available Science Demonstrates That This Rule Properly Advances the Objective of the Clean Water Act

This rule is informed by the best available science on the functions provided by waters, including wetlands, that are important for the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters. The scientific literature extensively illustrates the effects tributaries, adjacent wetlands, as well as intrastate lakes and ponds, streams, and wetlands can and do have on the integrity of traditional navigable waters, the territorial seas, and interstate waters. The relevant science on the relationship and effects of streams, wetlands, and open waters (such as lakes and ponds)

⁴⁸ William J. Mitsch & James G. Gosselink, *Wetlands* (5th ed.) at 3 (2015).

⁴⁹ National Research Council, *Wetlands: Characteristics and Boundaries* (“NRC Report”) at 38 (1995).

⁵⁰ Virginia Carter, “Wetlands Hydrology, Water Quality, and Associated Functions,” in *National Water Summary*, *supra*, at 44–45; Science Report at ES–2 to ES–4.

⁵¹ Carter, *supra* note 5050, at 44.

⁵² See, e.g., NRC Report at 35; Mitsch & Gosselink, *supra*, at 539–541; Science Report at ES–2 to ES–4.

⁵³ Narayan, Siddharth, et al. 2017. *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*. *Scientific Reports* 7: 9463; Technical Support Document section II.C.

on larger downstream waters has continued to advance in recent years and confirms the agencies' longstanding view that these waters should be assessed for jurisdiction under the Clean Water Act. The Science Report synthesized the peer-reviewed science regarding connectivity and effects of streams, wetlands, and open waters to larger downstream waters. Since the release of the Science Report, additional published peer-reviewed scientific literature has strengthened and supplemented the report's conclusions. The agencies have summarized and provided an update on more recent literature and scientific support for this section in the Technical Support Document section I.C. *See also* Technical Support Document section III. This section summarizes the best available science in support of the longstanding categories of the 1986 regulation, and in support of this rule and the agencies' conclusion that this rule advances the objective of the Clean Water Act. This section reflects the scientific consensus on the strength of the effects that tributaries, adjacent wetlands, and paragraph (a)(5) waters can and do have on traditional navigable waters, the territorial seas, and interstate waters. Note that for purposes of this final rule, the agencies have not made a categorical determination that all tributaries, adjacent wetlands, and paragraph (a)(5) waters significantly affect paragraph (a)(1) waters. *See* section IV.A.3.a.iii (discussing the final rule's reliance on a case-specific approach to assessing jurisdiction for certain types of waters) of this preamble.

As the agencies charged with construing the statute, EPA and the Corps must develop the outer bounds of the scope of the Clean Water Act. Congress chose to delegate this authority to the expert agency focused on environmental protection and, for the section 404 program, to the agency with extensive permitting experience for discharges to water. In section 501(a) of the Clean Water Act, Congress explicitly delegated regulatory authority to EPA: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act." The Supreme Court in *Riverside Bayview* recognized this decision by Congress and deferred to the agencies' scientific expertise and judgment, finding that "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the

relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." 474 U.S. at 134. Science alone cannot dictate where to draw the line defining "waters of the United States," but science is critical to understanding what scope of jurisdiction furthers Congress's objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters: only by relying upon scientific principles to understand the way waters affect one another can the agencies know whether they are achieving that objective. Because the definition of "waters of the United States" should advance the objective of the Clean Water Act and that objective is focused on restoring and maintaining water quality, the best available science informs this rule. *See* section IV.A.2 of this preamble; *see also* section IV.B.3 of this preamble for the agencies' conclusion that the 2020 NWPR was inconsistent with the best available science in important ways.

i. Tributaries Can Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Downstream Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

Tributaries play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream paragraph (a)(1) waters. *See* Technical Support Document section III.A. Tributaries slow and attenuate floodwaters; provide functions that help maintain water quality; trap and transport sediments; transport, store, and modify pollutants; and sustain the biological productivity of downstream paragraph (a)(1) waters. Indeed, the Supreme Court has recognized the importance of the physical integrity of upstream tributaries in overcoming sedimentation hazards to navigation. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). Tributaries can provide these functions whether they are natural, modified, or constructed and regardless of their flow regime.

All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to larger downstream waters via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. The agencies note that while the Science Report concluded such tributary streams were so connected, the significant nexus standard is distinct

from this scientific conclusion, and the agencies are not in this rule concluding that all tributary streams categorically meet the significant nexus standard. Streams, even where seasonally dry, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to mainstem river segments. Within stream and river networks, headwater streams make up most of the total channel length. The smallest streams represent an estimated three-quarters of the total length of stream and river channels in the United States.⁵⁴ Because of their abundance and location in the watershed, small streams offer the greatest opportunity for exchange between the water and the terrestrial environment.

In addition, compared with the humid regions of the country, stream and river networks in arid regions have a higher proportion of channels that do not flow perennially. For example, in Arizona, most of the stream channels—96% by length—are classified as ephemeral or intermittent. The functions that streams provide to benefit downstream waters occur even when streams do not flow constantly. For example, ephemeral headwater streams shape larger downstream river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris.⁵⁵ Due to the episodic nature of flow in ephemeral and intermittent channels, sediment and organic matter can be deposited some distance downstream in the arid Southwest in particular, and then moved farther downstream by subsequent precipitation events. Over time, sediment and organic matter continue to move downstream and influence larger downstream waters. These materials help structure downstream river channels by slowing the flow of water

⁵⁴ The actual proportion may be much higher because this estimate is based on the stream networks shown on the U.S. Geological Survey (USGS) National Hydrography Dataset, which does not show all headwater streams.

⁵⁵ Videos of ephemeral streams flowing after rain events in the Southwest highlight how effective ephemeral streams can be in transporting woody debris (e.g., tree branches) and sediment downstream during the rainy season. *See, e.g.*, U.S. Department of Agriculture, Agricultural Research Service, *Multi-flume Runoff Event August 1, 1990*, <https://www.tucson.ars.ag.gov/unit/WGWebcam/WalnutGulchWebcam.htm>; U.S. Geological Survey, *Post-fire Flash Flood in Coronado National Memorial, Arizona* (August 25, 2011), <https://www.youtube.com/watch?v=qj8jxBZt6Ws>; Santa Clara Pueblo Fire/Rescue/EMS Volunteer Department, Greg Lonewolf, #4 *Santa Clara Pueblo Flash Flood Event 01 Sept 2013* (April 14, 2017), <https://www.youtube.com/watch?v=nKQZkRi4BQ>; Rankin Studio, *Amazing Flash Flood/Debris Flow Southern Utah HD* (July 19, 2019), https://www.youtube.com/watch?v=_yCnQuILmsM.

through channels and providing substrate and habitat for aquatic organisms.

Stream and wetland ecosystems also process natural and human sources of nutrients, such as those found in leaves that fall into streams and those that may flow into creeks from agricultural fields. Some of this processing converts the nutrients into more biologically useful forms. Other aspects of the processing store nutrients, thereby allowing their slow and steady release and preventing the kind of short-term glut of nutrients that can cause algal blooms in downstream rivers or lakes. Small streams and their associated wetlands play a key role in both storing and modifying potential pollutants, ranging from chemical fertilizers to rotting salmon carcasses, in ways that maintain downstream water quality. Inorganic nitrogen and phosphorus, the main chemicals in agricultural fertilizers, are essential nutrients not just for plants, but for all living organisms. However, in excess or in the wrong proportions, these chemicals can harm natural systems and humans. Larger rivers process excess nutrients much more slowly than smaller streams. Loss of nutrient retention capacity in headwater streams is known to cause higher concentrations and loads of nitrogen and phosphorus in downstream waterbodies. In freshwater ecosystems, eutrophication, the enriching of waters by excess nitrogen and phosphorus, sets off a chain reaction of events that reduces water quality in streams, lakes, estuaries, and other downstream waterbodies. The excess nutrients lead to the overabundance of algae and aquatic plants. Too much algae clouds previously clear streams, such as those favored by trout. Algal blooms not only reduce water column visibility, but the microbial decay of algal blooms reduces the amount of oxygen dissolved in the water, and therefore the amount available to aquatic life, sometimes to a degree that causes fish kills. Fish are not the only organisms harmed by eutrophication: some of the algae species that grow in eutrophic waters generate tastes and odors or are toxic—a clear problem for stream systems, reservoirs, and lakes that supply drinking water for municipalities or that are used for swimming and other contact-recreational purposes. Algal blooms driven by excess nutrients also can injure people and animals, as toxins can kill native fish and other wildlife, and endanger human health. Algal blooms can also lead to beach closures. The overabundance of plant growth and alterations in water chemistry that occur

in eutrophic waters also changes the composition of natural communities of aquatic ecosystems.

Recycling organic carbon contained in dead plants and animals is another crucial function provided by headwater streams and wetlands. Ecological processes that transform inorganic carbon into organic carbon and recycle organic carbon are the basis for every food web on the planet. In freshwater ecosystems, much of the recycling happens in small streams and wetlands, where microorganisms transform everything from leaf litter and downed logs to dead salamanders into food for other organisms in the aquatic food web. Like nitrogen and phosphorus, carbon is essential to life but can be harmful to freshwater ecosystems if it is present in excess or in the wrong chemical form. If all organic material received by headwater streams and wetlands went directly downstream, the glut of decomposing material could deplete oxygen in downstream rivers, thereby damaging and even killing fish and other aquatic life. The ability of headwater stream ecosystems to transform organic matter into more usable forms helps maintain healthy downstream ecosystems.

Microorganisms in headwater stream systems use leaf litter and other decomposing matter for food and, in turn, become food for other organisms. For example, fungi that grow on leaf litter become nutritious food for aquatic insects that make their homes on the bottom of streams, including mayflies, stoneflies, and caddisflies. These animals provide food for larger animals, including birds such as flycatchers and fish such as trout. The health and productivity of downstream traditional navigable waters, the territorial seas, and interstate waters depend in part on processed organic carbon delivered by upstream headwater systems.

To be clear, the agencies recognize that *SWANCC* held that the use of an abandoned sand and gravel pit by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the Clean Water Act. Consideration of biological functions does not constitute an assertion of jurisdiction over a water based solely on its use by migratory birds. Rather, the agencies consider biological functions for purposes of significant nexus determinations under this rule only to the extent that the functions provided by tributaries, adjacent wetlands, and paragraph (a)(5) waters significantly affect the biological integrity of the traditional navigable waters, the territorial seas, or interstate waters. For example, salmon are a

critical component of the biological integrity in certain paragraph (a)(1) waters, and they provide one of the clearest illustrations of biological connectivity. To protect Pacific and Atlantic salmon in traditional navigable waters (and their associated commercial and recreational fishing industries), headwater streams must be protected because Pacific and Atlantic salmon require both freshwater and marine habitats over their life cycles and therefore migrate along river networks. Many Pacific salmon species spawn in headwater streams, where their young grow for a year or more before migrating downstream, live their adult life stages in the ocean, and then migrate back upstream to spawn. Even where they do not provide direct habitat for salmon themselves, ephemeral streams may contribute to the habitat needs of salmon by supplying sources of cold water that these species need to survive (*i.e.*, by providing appropriate physical conditions for cold water upwelling to occur at downstream confluences), transporting sediment that supports fish habitat downstream, and providing and transporting food for juveniles and adults downstream. These species thereby create a biological connection along the entire length of the river network, demonstrating how the upstream ephemeral waters can help to maintain the biological integrity of the downstream traditional navigable water. Many other species of anadromous fish (fish that are born in freshwater, spend most of their lives in saltwater, and return to freshwater to spawn) like certain lamprey, species of catadromous fish (fish that breed in the ocean but that spend most of their lives in freshwater) like American eels, and freshwater fish like rainbow trout and brook trout also require small headwater streams to carry out life cycle functions. *See* Technical Support Document sections III.A.iii and III.E.iv.

ii. Adjacent Wetlands Can Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

Adjacent wetlands provide valuable flood control and water quality functions that affect the chemical, physical, and biological integrity of paragraph (a)(1) waters including interruption and delay of the transport of water-borne contaminants over long distances; retention of sediment; retention and slow release of flood waters; and prevention and mitigation of drinking water contamination and assurance of drinking water supply. *See*

Technical Support Document section III.B. The agencies note that, while the Science Report concluded such adjacent wetlands were so connected, the significant nexus standard is distinct from this scientific conclusion, and the agencies are not concluding in this rule that all adjacent wetlands categorically meet the significant nexus standard.

Because adjacent wetlands retain sediment and augment streamflow via the gradual release of groundwater, stormwater, or water flowing just beneath the soil surface, wetland loss correlates with increased need for dredging and unpredictability of adequate streamflow for navigation. Headwater wetlands are located where erosion risk is highest and are therefore best suited to recapture and stabilize manageable amounts of sediment that might enter traditional navigable waters, the territorial seas, or interstate waters. Adjacent wetlands naturally serve to recapture and stabilize sediment carried by streams and rivers in times when flood flow distributes water across a floodplain.

Adjacent wetlands affect the integrity of paragraph (a)(1) waters by retaining stormwater and slowly releasing floodwaters that could otherwise negatively affect the condition or function of those paragraph (a)(1) waters. The filling or draining of wetlands, including those that are close to the stream network, reduces water storage capacity in a watershed and causes runoff from rainstorms to overwhelm the remaining available water conveyance system. The resulting stream erosion and channel downcutting impair water quality and quickly drain the watershed as surface water leaves via incised (deeper) channels. Disconnecting the incised channel from the wetlands leads to more downstream flooding. As the adjacent wetlands remain disconnected, riparian vegetation and wetland functions are reduced. Moreover, because less water is available in groundwater and wetlands for slow release to augment streamflow during dry periods, the filling or draining of wetlands can make the timing and extent of navigability on some waterways less predictable during dry periods. Therefore, intact adjacent wetlands, including headwater wetlands, can contribute to maintaining navigability on the nation's rivers and harbors and can reduce flooding in paragraph (a)(1) waters.

Wetlands adjacent to tributaries of navigable waters, the territorial seas, and interstate waters can also help promote improvements in drinking water supply and quality. Over 228

million people are served by nearly 15,000 public water systems using surface water such as streams, rivers, lakes, tributaries, and surface-water storage impoundments as a primary source of water.⁵⁶ An estimated 61% of water withdrawn for public water supply came from surface water sources in 2015.⁵⁷ Adjacent wetlands have an important role in mitigating the risk of contamination to sources of drinking water, and in water quality generally, due to their strategic location as buffers for other waterbodies and their filtration of surface water. Retention of water and its associated constituents by wetlands allows the biochemical uptake and/or breakdown of contaminants and the destruction of pathogens. The water retention capacity of adjacent wetlands also allows for the storage and gradual release of surface waters that may supply public water system intakes during times of drought. In either case, this retention substantially improves both the supply and quality of drinking water.

Though drinking water supplied through public water supplies is regulated by the Safe Drinking Water Act, many water suppliers also rely on source water protection efforts under the Clean Water Act, as the quality of the drinking water source is dependent on the protection of its upstream waters. Conserving wetlands in source water protection areas can help protect water quality, recharge aquifers, and maintain surface water flow during dry periods. For example, wetlands conservation is a crucial feature of the low-cost New York City municipal water system, which provides high-quality drinking water to millions of people through watershed protection, including of adjacent wetlands, of its source waters rather than extensive treatment.

Discharge of agricultural, industrial, sanitary, or other waste into any surface water may pose a public health risk downstream. For example, excessive upstream discharge may overwhelm a public water system filtration unit, allowing microbial pathogens into the drinking water system. EPA's Science Advisory Board cited drinking water

contamination by pathogens as one of the most important environmental risks.⁵⁸ Moreover, drinking water treatment to address microbial pathogens has little effect on many toxic chemicals, metals, and pesticides discharged into streams, drainage ditches, canals, or other surface waters.

In sum, adjacent wetlands can provide a variety of functions to paragraph (a)(1) waters. Based on the importance of these functions to paragraph (a)(1) waters, the agencies' interpretation of the Clean Water Act to protect adjacent wetlands where those adjacent wetlands meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Act and the best available science.

iii. Intrastate Lakes and Ponds, Streams, or Wetlands Not Identified in Paragraphs (a)(1) Through (4) of This Rule Can Provide Functions That Restore and Maintain the Chemical, Physical, and Biological Integrity of Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of the rule—examples of which could include, but are not limited to, prairie potholes, playa lakes, and vernal pools—can provide important functions that affect the chemical, physical, and biological integrity of paragraph (a)(1) waters. See Technical Support Document section III.D. The agencies note that while the Science Report concluded such intrastate lakes and ponds, streams, and wetlands can provide these functions, the significant nexus standard is distinct from this scientific conclusion, and the agencies are not concluding in this rule that all intrastate lakes and ponds, streams, and wetlands categorically meet the significant nexus standard. These functions are particularly valuable when considered cumulatively across the landscape or across different watershed or sub-watershed scales. They are similar to the functions that adjacent wetlands provide, including water storage to control streamflow and mitigate downstream flooding; interruption and delay of the transport of water-borne pollutants (such as excess nutrients and contaminants) over long distances; and retention of sediment. These functions can be important to the physical integrity of paragraph (a)(1) waters. For non-

⁵⁶ EPA data from 2022 Third Quarter Safe Drinking Water Information System/Federal Version.

⁵⁷ Comments submitted by Association of Metropolitan Water Agencies at 2 (February 4, 2022) (Docket ID No. EPA-HQ-OW-2021-0602-0252), <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0252> (citing Dieter, C.A., Maupin, M.A., Caldwell, R.R., Harris, M.A., Ivahnenko, T.I., Lovelace, J.K., Barber, N.L., and Linsey, K.S., 2018, *Estimated use of water in the United States in 2015*: U.S. Geological Survey Circular 1441. Retrieved from <https://pubs.usgs.gov/circ/1441/circ1441.pdf>).

⁵⁸ U.S. Environmental Protection Agency/Science Advisory Board. 1990. Reducing Risk: Setting Priorities and Strategies for Environmental Protection. SAB-EC-90-021. <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000PNG1.TXT>.

floodplain wetlands and open waters lacking a channelized surface or regular shallow subsurface connection, generalizations from the available literature about their specific effects on downstream waters are difficult because information on both function and connectivity is needed. Accordingly, a case-specific analysis of their effects on paragraph (a)(1) waters is appropriate from both a scientific and policy perspective.

For example, oxbow lakes and other lakes and ponds that are in close proximity to the stream network, that are located within floodplain or riparian areas, or that are connected via surface and shallow subsurface hydrology to the stream network or to other “waters of the United States” perform critical chemical, physical, and biological functions that affect paragraph (a)(1) waters. Like adjacent wetlands, these waters individually and collectively affect the integrity of paragraph (a)(1) waters by acting as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of those paragraph (a)(1) waters. They also provide important habitat for aquatic species that utilize both the lake and pond and the nearby paragraph (a)(1) water to forage, breed, and rest.

Intrastate lakes and ponds, streams, and wetlands not identified in paragraphs (a)(1) through (4) of the rule span the gradient of connectivity identified in the Science Report. They can be open waters located in the riparian area or floodplain of traditional navigable waters, the territorial seas, and interstate waters (e.g., oxbow lakes) and otherwise be physically proximate to the stream network (similar to adjacent wetlands) or they can be open waters or wetlands that are fairly distant from the network. They can also be connected to paragraph (a)(1) waters through biological connections, such as through the movement of aquatic and semi-aquatic species for habitat or other lifecycle needs and can serve as sources of food for larger aquatic and semi-aquatic animals that live in paragraph (a)(1) waters. See section III.D of the Technical Support Document. These waters can also provide additional functions such as storage and mitigation of peak flows, natural filtration by biochemical uptake and/or breakdown of contaminants, and, in some locations, high volume aquifer recharge that contributes to the baseflow in paragraph (a)(1) waters. The strength of functions provided by intrastate lakes and ponds, streams, and wetlands that are evaluated under paragraph (a)(5) on paragraph

(a)(1) waters will vary depending on the type and degree of connection (i.e., from highly connected to highly isolated) to paragraph (a)(1) waters and landscape features such as proximity to stream networks and to such waters with similar characteristics that function together to influence paragraph (a)(1) waters.

Since the publication of the Science Report in 2015, the published literature has expanded scientific understanding and quantification of the functions of these waters that affect the integrity of larger waters, including traditional navigable waters, the territorial seas, and interstate waters, particularly in the aggregate. More recent literature (i.e., 2014-present, as some literature from 2014 and 2015 may not have been included in the Science Report) has determined that non-floodplain wetlands can have demonstrable hydrologic and biogeochemical downstream effects, such as decreasing peak flows, maintaining baseflows, and performing nitrate removal, particularly when considered cumulatively.

Some intrastate lakes and ponds, streams, and wetlands not identified in paragraphs (a)(1) through (4) can, in certain circumstances, have strong chemical, physical, or biological connections to and effects on paragraph (a)(1) waters. However, some intrastate lakes and ponds, streams, and wetlands not identified in paragraphs (a)(1) through (4) of this rule do not have significant effects on paragraph (a)(1) waters because of their distance from paragraph (a)(1) waters, their landscape position, climatological variables, or other factors. The effect of distance on a significant nexus analysis, for example, may vary based on the characteristics of the aquatic resources being evaluated and other factors affecting the strength of their connectivity to paragraph (a)(1) waters. Waters are less likely to have a significant nexus if they are located outside of the riparian area or floodplain, lack a confined surface or shallow subsurface hydrologic connection to jurisdictional waters, or exceed the minimum distances necessary for aquatic species that cannot disperse overland to utilize both the subject waters⁵⁹ and the waters in the broader tributary network. However, sometimes it is their lack of a hydrologic surface connection that contributes to the important effect that they have on

⁵⁹In this preamble, the agencies use “subject waters” to mean the water or waters being assessed for jurisdiction. “Subject waters evaluated pursuant to the significant nexus standard” means the water either alone or in combination with similarly situated waters in the region.

paragraph (a)(1) waters; for example, depressional non-floodplain wetlands lacking surface outlets can function individually and cumulatively to retain and transform nutrients, retain sediment, provide habitat, and reduce or attenuate downstream flooding, depending on site-specific conditions such as landscape characteristics (e.g., slope of the terrain or permeability of the soils). Justice Kennedy’s insight that “[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system” is consistent with the science. See *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring in the judgment).

Based on the functions that can be provided by intrastate lakes and ponds, streams, and wetlands not identified in paragraphs (a)(1) through (4) to traditional navigable waters, the territorial seas, and interstate waters, assessing these waters to determine whether they meet either the relatively permanent standard or the significant nexus standard reflects proper consideration of the objective of the Clean Water Act and the best available science.

3. The Scope of This Rule Is Limited Consistent With the Law, the Science, and Agency Expertise

In this rule, the agencies are exercising their authority to construe “waters of the United States” to mean the waters defined by the familiar 1986 regulations with amendments to reflect the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States.” This construction is supported by consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court decisions, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.” This rule’s limitations are based on the agencies’ conclusion that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act. The agencies have also determined that the relatively permanent standard should be included in the rule because, while it identifies only a subset of the “waters of the

United States,” it provides important efficiencies and additional clarity for regulators and the public.

This section of the preamble first explains the agencies’ conclusion that utilization of both the relatively permanent standard and the significant nexus standard gives effect to the Clean Water Act’s text, including its objective as well as its limitations. The significant nexus standard is consistent with the text, objective, and legislative history of the Clean Water Act, as well as relevant Supreme Court case law and the best available science. The relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters, but standing alone the standard is insufficient to meet the objective of the Clean Water Act. This section also explains that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unusual under the Act. The agencies have the discretion to consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified (for example in this rule, paragraph (a)(1) waters and their adjacent wetlands) or on a case-specific, fact-based approach (for example, in this rule, tributaries and their adjacent wetlands that meet the relatively permanent standard or significant nexus standard). Finally, this section explains how this rule reflects full and proper consideration of the water quality objective in section 101(a) and the policies relating to responsibilities and rights of Tribes and States under section 101(b) of the Clean Water Act. Based on these considerations, the agencies have concluded that the significant nexus standard in this rule is the best interpretation of section 502(7) of the Act.

a. The Limitations Established by This Rule Advance the Objective of the Clean Water Act

This rule’s utilization of both the relatively permanent standard and the significant nexus standard gives effect to the Clean Water Act’s text and environmentally protective objective as well as its limitations. *See Rapanos*, 547 U.S. at 767–69 (Kennedy, J., concurring in the judgment) (observing “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems” and referring to the Clean Water Act as “a statute concerned with downstream water quality” (citations omitted)); *Riverside Bayview*, 474 U.S. at 133 (“Congress chose to define the waters covered by the Act broadly.”). The agencies, however, have concluded

that it is the significant nexus standard that advances the objective of the Clean Water Act because it is linked to effects on the water quality of paragraph (a)(1) waters while also establishing an appropriate limitation on the scope of jurisdiction by requiring that those effects be significant. The relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters, but, exclusive reliance on the standard for all determinations is inconsistent with the text of the statute and Supreme Court precedent and is insufficient to advance the objective of the Clean Water Act.

With this rule, the agencies conclude that if a water meets either the relatively permanent standard or the significant nexus standard, it falls within the protections established by the Clean Water Act. As discussed earlier, this rule is not based on an application of the *Marks* test for interpreting Supreme Court decisions; rather, with this rule, the agencies are interpreting the scope of the definition of “navigable waters,” informed by relevant Supreme Court precedent, but also based on the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.”

This section first discusses why the significant nexus standard is consistent with the text, objective, and legislative history of the Clean Water Act, as well as relevant Supreme Court case law and the best available science; then explains why the relatively permanent standard is administratively useful but on its own is insufficient; and, finally, explains that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unique to the definition of “waters of the United States.”

i. The Significant Nexus Standard Is Consistent With the Text and Objective of the Clean Water Act, Legislative History, Case Law, and the Best Available Science

The significant nexus standard, as the agencies have established it in this rule, is the best interpretation of the Clean Water Act because it is consistent with the text, including the Act’s statutory objective and statutory structure, the legislative history and case law, and is supported by the best available science. The standard is consistent with the plain language of the Act’s objective because it is based upon effects on the

water quality of paragraph (a)(1) waters and limits the scope of jurisdiction based on the text of that objective. Moreover, protection of waters that significantly affect the paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters—is consistent with the scope of Commerce Clause authority that the Supreme Court in *SWANCC* concluded that Congress was exercising, while also fulfilling Congress’s intent in exercising that authority in enacting the Clean Water Act.

The significant nexus standard effectuates the text of Clean Water Act section 502(7), which defines “navigable waters” as “the waters of the United States, including the territorial seas.” The standard is properly focused on protecting paragraph (a)(1) waters, which are the foundation of the Clean Water Act: traditional navigable waters (which “navigable waters” clearly invokes but is not limited to); “the territorial seas” (which are explicitly listed in section 502(7)); and interstate waters (which are unambiguously waters “of the United States,” as they are waters of the “several States,” U.S. Const. section 8). Further, each of the rule’s provisions identifies an aquatic resource that meets the definition of “water” or “waters” in either the *Rapanos* plurality’s preferred dictionary or the dictionary most contemporaneous with the passage of the Clean Water Act. *See* section IV.A.3.a.ii of this preamble for discussion of the plurality’s dictionary-based analysis. The first definition of “water” within Webster’s Second (1.a. of the definition) is “[t]he liquid which descends from the clouds in rain and which forms rivers, lakes, seas, etc.,” Webster’s New International Dictionary 2882 (2d ed. 1954). The definition of “waters,” plural, in the most contemporaneous Webster’s, is: “the water occupying or flowing in a particular bed.” Webster’s Third New Intl. (1966). Even the *Rapanos* plurality’s preferred definition includes “water as found in ‘streams,’ ” “water [a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies.” *Rapanos*, 547 U.S. at 732–33 (quoting Webster’s New International Dictionary 2882, definition 2.c). Traditional navigable waters; interstate waters; the territorial seas; impoundments of waters; tributaries; adjacent wetlands; and intrastate lakes and ponds, streams, and wetlands are “water” or “waters” under these definitions, as identified by hydrologists

and other scientists, and in practice. Moreover, with respect to whether wetlands are waters, that question has already been resolved by both science and a unanimous Supreme Court in *Riverside Bayview*, 474 U.S. at 137–39. The requirement that a significant nexus exist between upstream waters, including wetlands, and “navigable waters in the traditional sense” thus clearly advances Congress’s stated objective in the Act while fulfilling “the need to give the term ‘navigable’ some meaning.” *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment). See also section IV.C.2.b.iii of this preamble for discussion of the Clean Water Act’s jurisdiction over interstate waters. Finally, the text and focus of the rule’s significant nexus standard are derived from and designed to advance the text of the first sentence in the statute setting forth the Act’s sole statutory objective: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” See 33 U.S.C. 1251(a).

As noted above, a statute must be interpreted in light of the purposes Congress sought to achieve. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004). Thus, the agencies must consider the objective of the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” in interpreting the scope of the statutory term “waters of the United States.” See 33 U.S.C. 1251(a). This consideration is particularly important where, as here, Congress used specific language in the definitions in order to meet the objective of the Act and the definition of “waters of the United States” is fundamental to meeting the objective of the Act. See section IV.A.2 of this preamble. Congress was focused on water quality when it enacted the Clean Water Act and established the Act’s objective, and the significant nexus standard is derived from the objective of the Act to protect the water quality of the paragraph (a)(1) waters. The significant nexus standard is consistent with foundational scientific understanding about aquatic ecosystems: waters can significantly affect the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters. Therefore, assessing the effects that waters have on paragraph (a)(1) waters when considered, alone or in combination with other similarly situated waters in a region, is the best means of identifying those waters that must be protected in

order to advance the objective of the Clean Water Act.

The agencies have also considered the statute as a whole in construing the scope of “waters of the United States.” The comprehensive nature of the Clean Water Act and its pronounced change in approach from precursor water protection statutes is evident throughout the statute, and the agencies have considered the text of those provisions in defining “waters of the United States.” One of the Clean Water Act’s principal tools in protecting the integrity of the nation’s waters is section 301(a), which prohibits “the discharge of any pollutant by any person” without a permit or other authorization under the Act. Other substantive provisions of the Clean Water Act that use the term “navigable waters” and are designed to meet the statutory objective include the section 402 permit program, the section 404 dredged and fill permit program, the section 311 oil spill prevention and response program, the section 303 water quality standards and total maximum daily load programs, and the section 401 Tribal and State water quality certification process. Each of these programs is designed to protect water quality and, therefore, further the objective of the Clean Water Act. The agencies have also carefully considered the Act’s policies regarding the responsibilities and rights of Tribes and States. See section IV.A.3.b of this preamble. The agencies have thus construed “waters of the United States” to include waters that meet the significant nexus standard based on the text of the Clean Water Act’s interlocking provisions designed to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.

A significant nexus analysis is also consistent with the framework scientists apply to assess a river system—examining how the components of the system (e.g., wetlands or tributaries), alone or in the aggregate (in combination), in a region, contribute and connect to a river (significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters). Indeed, the significant nexus standard in this rule reflects the analysis in the Science Report by describing the components of a river system and watershed; the types of chemical, physical, and biological connections that link those components; the factors that influence connectivity and associated effects at various temporal and spatial scales; and methods for assessing downstream effects. The structure and function of rivers are highly dependent on the constituent

materials stored in and transported through them. Most of these materials originate from either the upstream river network or other components of the river system, including wetlands, and then are transported to the river by water movement or other mechanisms. Further, the significant nexus standard is supported by the Science Report’s discussion of connectivity, a foundational concept in hydrology and freshwater and marine ecology. See also Technical Support Document sections I.A.ii and III.E.

Connectivity is the degree to which components of a system are joined or linked by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity serves to demonstrate the “nexus” between upstream waterbodies and traditional navigable waters, the territorial seas, or interstate waters, and variations in the degree of connectivity influence the range of functions provided by streams, wetlands, and open waters and are critical to the integrity and sustainability of paragraph (a)(1) waters. For example, connections with low values of one descriptor can have important downstream effects when considered in context of other types of connections (e.g., a stream with low-duration flow during a flash flood can transfer large volumes of water and woody debris downstream, affecting the integrity of a paragraph (a)(1) water). Indeed, the seasonal or longer-term absence of surface connections can provide numerous functions that contribute to the chemical, physical, and biological integrity of paragraph (a)(1) waters: these wetlands can attenuate stormflow; increase baseflow; be a source of carbon and organic matter; and be a sink for sediment, nitrate, and other constituents that degrade water quality. While the scientific literature does not use the term “significant” in the same manner used by the Supreme Court, the literature does provide information on the strength of upstream effects on the chemical, physical, and biological functioning of the downstream waterbodies. The analysis in the literature permits the agencies to judge when an effect is significant such that a water, either alone or in combination with similar waters, should be protected by the Clean Water Act in order to meet the objective of the Act. The Science Report presents evidence of connections for various categories of waters, evaluated singly or in combination, which affect downstream waters and the strength of those effects. The

connections and mechanisms discussed in the Science Report include transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and metals (e.g., mercury); functions that streams, wetlands, and open waters perform, such as storing and cleansing water; and movement of organisms. Again, the significant nexus standard, under which waters are assessed alone or in combination for the functions they provide to paragraph (a)(1) waters, is consistent with the foundational scientific framework and concepts of hydrology.

The agencies' use of scientific principles to determine the scope of "waters of the United States" is consistent with the Supreme Court's approach in *Maui*. The Court in that case also looked to scientific principles to inform its interpretation of the Clean Water Act's jurisdictional scope, noting: "[m]uch water pollution does not come from a readily identifiable source. Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution." *Maui*, 140 S. Ct. at 1471 (citing the definition of "water pollution" from 3 Van Nostrand's Scientific Encyclopedia, at 5801). The Court then enumerated a series of factors, many of which are scientifically based, relevant to determining whether a discharge is jurisdictional under the Clean Water Act, including the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels. *Id.* at 1476–77.

In carefully considering the text and objective of the Clean Water Act and the best available science, this rule's incorporation of the significant nexus standard is also consistent with the legislative history of the Clean Water Act. The Supreme Court has noted that "some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020) (emphasis in original). In *Bostock*, the Court stated further that "while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the

time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters." *Id.* at 1750.

Bills introduced in 1972 in both the House of Representatives and the Senate defined "navigable waters" as "the navigable waters of the United States." See 2 Environmental Policy Div., Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of 1972* at 1069, 1698 (1973). The House and Senate Committees, however, expressed concern that the definition might be given an unduly narrow reading. Thus, the House Report observed: "One term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 92–911, at 131 (1972).

The Senate Report stated that "[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92–414, at 77 (1971). The Conference Committee deleted the word "navigable" from the definition of "navigable waters," broadly defining the term to include "the waters of the United States." The Conference Report explained that the definition was intended to repudiate earlier limits on the reach of Federal water pollution efforts: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 92–1236, at 144 (1972). The significant nexus standard thus fulfills Congress's intent that the scope of the term "navigable waters" be broader than the limitations of earlier water pollution control

statutes and agency determinations under them (section 10 waters and their tributaries, for example, under the Rivers and Harbors Act of 1899). And, because the significant nexus standard is focused on protecting waters to meet the objective of the Act, it also comports with congressional intent.

The significant nexus standard is also consistent with prior Supreme Court decisions and with every circuit decision that has gleaned a rule of law from that precedent. For example, in *Riverside Bayview*, the Court deferred to the agencies' interpretation: "In view of the breadth of Federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." 474 U.S. at 134. Indeed, the Court in *Riverside Bayview* concluded that "significant effects" is the relevant basis for asserting jurisdiction over adjacent wetlands: "If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* at 135 n.9. In *Rapanos*, Justice Kennedy—referencing the Court in *Riverside Bayview*—stated that "the Court indicated that 'the term 'navigable' as used in the Act is of limited import,' [and] it relied, in upholding jurisdiction, on the Corps' judgment that 'wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.'" 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (citing *Riverside Bayview*, 474 U.S. at 133, 135). "The implication," Justice Kennedy observed, "was that wetlands' status as 'integral parts of the aquatic environment'—that is, their *significant nexus* with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States." *Rapanos*, 547 U.S. at 779 (emphasis added); see also *id.* at 780 ("[W]etlands' ecological functions vis-à-vis other covered waters are the basis for the Corps' regulation of them."). The Court in *SWANCC* also characterized its decision in *Riverside Bayview* as informed by the "significant nexus between the wetlands and 'navigable waters.'" 531 U.S. at 167.

In *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC*

“establish the framework for” determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of “navigable waters,” finding that “the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a ‘navigable water’ under the Act,” and “[a]bsent a significant nexus, jurisdiction under the Act is lacking.” 547 U.S. at 767. Justice Kennedy also identified many of the same valuable wetland functions as the Science Report: “Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, ‘dead zone’ in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff” *Id.* at 777 (citing Brief for Association of State Wetland Managers et al. 21–23; Brief for Environmental Law Institute 23; OTA 43, 48–52; R. Tiner, In Search of Swampland: A Wetland Sourcebook and Field Guide 93–95 (2d ed. 2005); Whitmire & Hamilton, Rapid Removal of Nitrate and Sulfate in Freshwater Wetland Sediments, 34 J. Env. Quality 2062 (2005)).

The agencies are mindful of the Supreme Court’s decision in *SWANCC* regarding the specific Commerce Clause authority Congress was exercising in enacting the Clean Water Act—“its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made”—and the Court’s guidance on avoiding an administrative interpretation of a statute that invokes the outer limits of Congress’s power. 531 U.S. at 172; see also *id.* (“[W]e expect a clear indication that Congress intended that result.”). With respect to section 404 authority over an abandoned sand and gravel pit based simply on whether it was used by migratory birds (the “Migratory Bird Rule”), the *SWANCC* Court concluded that there was not a clear statement from Congress. *Id.* at 174. By placing traditional navigable waters, the territorial seas, and interstate waters at the center of the agencies’ jurisdiction and covering additional waters only where those waters significantly affect (a)(1) waters, this rule reflects the Court’s guidance. Further, in construing the statute in this rule, the agencies have not only eschewed the “Migratory

Bird Rule,” they have deleted the provisions in the 1986 regulations that authorized assertions of jurisdiction under broader Commerce Clause authority and replaced them with the relatively permanent and significant nexus standards.

Indeed, the provisions in the 1986 regulations authorized assertions of jurisdiction far more broadly than under the relatively permanent standard and significant nexus standard in this rule. First, the regulatory text authorized the assertion of jurisdiction over “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: Which are or could be used by interstate or foreign travelers for recreational or other purposes; or From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or Which are used or could be used for industrial purposes by industries in interstate commerce.” 33 CFR 328.3(a)(3) (2014). This regulatory text was based on all three categories of activity that Congress may regulate using its Commerce Clause authority: (1) the channels of interstate commerce; (2) persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). This approach thus overall was a far broader definition of “waters of the United States” than this rule, which recognizes that the Supreme Court in *SWANCC* held that Congress was not using all aspects of its Commerce Clause authority. Moreover, as discussed by the Court in *SWANCC*, the agencies stated in the preamble to the 1986 regulations that “waters of the United States” at 33 CFR 328.3(a)(3) also included waters that “are or would be used as habitat by birds protected by Migratory Bird Treaties; . . . [that] are or would be used as habitat by other migratory birds which cross state lines; . . . [that] are or would be used as habitat for endangered species; or . . . [waters] [u]sed to irrigate crops sold in interstate commerce.” 51 FR 41206, 41217 (November 13, 1986). This is the 1986 preamble language that became known as the “Migratory Bird Rule” and clearly established a far greater scope of “waters of the United States” than this rule, as migratory birds use waters large and small all over the United States with no connection to a traditional

navigable water, the territorial seas, or an interstate water.

The agencies also have carefully amended other provisions of the 1986 regulations not only to add the relatively permanent standard and the significant nexus standard as limitations on the scope of “waters of the United States” but to add additional limitations where the agencies were concerned assertions of jurisdiction could push the limits of the congressional authority granted to the agencies or constitutional limits. For example, in a change from the 1986 regulations, tributaries to intrastate lakes and ponds, streams, and wetlands that do not fall within other categories of the rule (paragraph (a)(5) waters in this rule, which are analogous to the “other waters” provision of the 1986 regulations) do not qualify as tributaries under this rule, nor do wetlands adjacent to such waters. As set forth in this rule, the relatively permanent standard and the significant nexus standard allow the agencies to fulfill the statute and Congress’s clearly stated objective, while being carefully crafted to fall well within the authority granted to the agencies by Congress and to Congress by the Constitution. As noted above, the *SWANCC* Court itself viewed “significant nexus” as the touchstone for determining the scope of “waters of the United States” in its decision in *Riverside Bayview*, concluding the decision was informed by the “significant nexus between the wetlands and ‘navigable waters.’” 531 U.S. at 167. The agencies agree with the analysis of Justice Kennedy, who explicitly addressed these constitutional concerns in *Rapanos*, stating: “In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.” 547 U.S. at 776. Moreover, the rule is consistent with decades of interpretation and implementation undisturbed by Congress.

Moreover, the *SWANCC* Court noted that the statement in the Conference Report for the Clean Water Act that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” S. Conf. Rep. No. 92–1236, at 144 (1972), signifies Congress’s intent with respect to its exertion of its commerce power over navigation. As the numerous Supreme Court decisions discussed above have found, Congress enacted the Clean Water Act to establish a comprehensive Federal law protecting

water quality. The agencies' construction of the statute must also give effect to the clearly stated objective of the Act and all the provisions of the Act designed to achieve that objective. See section IV.A.2 of this preamble. Thus, while the agencies must be mindful that Congress was utilizing an aspect of its commerce power, they must be similarly mindful that Congress intended to fully exercise that authority in order to comprehensively address water pollution. The agencies have concluded that the legislative history concerning the intent of Congress regarding the scope of the Clean Water Act's protections under its power over navigation confirms the appropriateness of the agencies' construction of the Clean Water Act in this rule. This rule ensures that waters, which either alone or in combination significantly affect the integrity of traditional navigable waters, the territorial seas, or interstate waters, are protected by the Clean Water Act, and thus this rule carefully balances the limits on Congress's authority and on the agencies' authority under the Act, with congressional intent to comprehensively protect water quality and to delegate the authority to do so to the agencies.

Finally, the Supreme Court has long held that authority over traditional navigable waters is not limited to either protection of navigation or authority over only the traditional navigable water. Rather, "the authority of the United States is the regulation of commerce on its waters . . . [f]lood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); see also *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–526 (1941) ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce."). As the United States Court of Appeals for the Sixth Circuit observed after the 1972 enactment of the Clean Water Act: "It would, of course, make a mockery of [Congress's] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The

tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). The significant nexus standard included in this rule ensures that the definition of "waters of the United States" remains within the bounds of the Clean Water Act and addresses the concerns raised by the Court in *SWANCC* while also fulfilling the directive of Congress in enacting the Clean Water Act.

ii. The Relatively Permanent Standard Is Administratively Useful, But Exclusive Reliance on the Standard for All Determinations Is Inconsistent With the Objective of the Act

The agencies conclude that Federal protection is appropriate where a water meets the relatively permanent standard: waters that are relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. Waters that meet this standard are a subset of the "waters of the United States" because they will virtually always significantly affect traditional navigable waters, the territorial seas, or interstate waters and therefore properly fall within the Clean Water Act's scope. However, limiting the definition of "waters of the United States" to the relatively permanent standard on its own would be inconsistent with the Act's text and objective and runs counter to scientific principles. As discussed further below, the agencies have included the relatively permanent standard in this rule because it provides efficiencies and additional clarity for regulators and the public.

Waters that meet the relatively permanent standard are within the scope of the Clean Water Act because scientific evidence supports the conclusion that tributaries of paragraph (a)(1) waters with relatively permanent, standing or continuously flowing water perform important functions that either individually, or cumulatively with similarly situated waters in the region, have significant effects on the chemical, physical, or biological integrity of paragraph (a)(1) waters. The same is true of adjacent wetlands and relatively permanent open waters with continuous surface connections to tributaries that meet the relatively permanent standard. See Technical Support Document sections III.A, III.B, and III.D.

Tributaries that meet the relatively permanent standard contribute consistent flow to paragraph (a)(1) waters and, with that flow, export nutrients, sediment, food resources, contaminants, and other materials that can both positively (*e.g.*, by contributing to downstream baseflow, providing food for aquatic species, and contributing to downstream aquatic habitat) and negatively (*e.g.*, by exporting too much sediment, runoff, or nutrients or exporting pollutants) affect the integrity of those paragraph (a)(1) waters. In addition, wetlands with a continuous surface connection to tributaries that meet the relatively permanent standard can and do attenuate floodwaters, trap sediment, and process and transform nutrients that might otherwise reach traditional navigable waters, the territorial seas, or interstate waters. If the agencies assessed waters that meet the relatively permanent standard (*e.g.*, tributaries that meet the relatively permanent standard or adjacent wetlands with a continuous surface connection to such tributaries) they would virtually always find evidence of strong factors, particularly hydrologic factors like flow frequency and duration, that lead to strong connections and associated effects on paragraph (a)(1) waters. Therefore, waters that meet the relatively permanent standard will virtually always meet the significant nexus standard.

The relatively permanent standard is useful for the agencies and the public because it generally requires less information gathering and assessment than the significant nexus standard. The significant nexus standard requires evaluating whether waters, alone or in combination, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters, *i.e.*, traditional navigable waters, the territorial seas, and interstate waters. Such an assessment requires considering the presence of functions for one or more subject waters and evaluating the strength of their effects on paragraph (a)(1) waters. In contrast, the relatively permanent standard has a more limited focus that requires considering the flow of a tributary or considering the surface connection between an adjacent wetland or open water and a relatively permanent covered water. As such, while both the significant nexus and relatively permanent standards require case-specific, fact-based inquiries before determining whether a water meets the definition of "waters of the United States," the relatively permanent standard will generally require less

assessment and thus can result in administrative efficiencies.

Standing alone as the sole test for Clean Water Act jurisdiction, however, the relatively permanent standard has no basis in the text of the statute and is contrary to the statute. Rather than a careful consideration of the Clean Water Act's specialized definitions in light of the objective of the Act, the standard's apparent exclusion of major categories of waters from the protections of the Clean Water Act, specifically with respect to tributaries that are not relatively permanent and adjacent wetlands that do not have a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters, is inconsistent with the Act's text and objective. In addition, the relatively permanent standard used alone runs counter to the science demonstrating how other categories of waters can affect the integrity of downstream waters, including traditional navigable waters, the territorial seas, and interstate waters. For example, many tributaries that flow for only a short duration in direct response to precipitation, and thus do not meet the relatively permanent standard, are regular and direct sources of freshwater for the sparse traditional navigable waters in the arid Southwest, such as portions of the Gila River. In addition, many adjacent wetlands do not have a continuous surface connection to jurisdictional waters but provide numerous flood protection and water quality benefits to traditional navigable waters, such as wetlands behind the extensive levee systems along the Mississippi River.

As discussed in section IV.A.2.c of this preamble and sections III.A.v and III.B of the Technical Support Document, there is overwhelming scientific information demonstrating the effects ephemeral streams can have on downstream waters and the effects wetlands can have on downstream waters when they do not have a continuous surface connection. The science is clear that aggregate effects of ephemeral streams "can have substantial consequences on the integrity of the downstream waters" and that the evidence of such downstream effects is "strong and compelling." Science Report at 6–10, 6–13. The SAB review of the draft Science Report explained that ephemeral streams "are no less important to the integrity of the downgradient waters" than perennial or intermittent streams.⁶⁰ There is thus no

scientific basis for excluding waters simply because they are not relatively permanent.

The science is also clear that wetlands may significantly affect paragraph (a)(1) waters when they have other types of surface or hydrologic connections, such as wetlands that overflow across uplands via sheetflow and flood jurisdictional waters or wetlands with less frequent surface water connections; wetlands with shallow subsurface connections to other protected waters; wetlands behind a natural berm, a beach dune, a manmade levee, or the like; or other wetlands proximate to jurisdictional waters. Such wetlands provide a number of functions, including water storage that can help reduce downstream flooding; recharging groundwater that contributes to baseflow of paragraph (a)(1) waters; improving water quality in paragraph (a)(1) waters through processes that remove, store, or transform pollutants such as nitrogen, phosphorus, and metals; and serving as unique and important habitats including for aquatic species that also utilize paragraph (a)(1) waters. *See, e.g.*, Science Report at 4–20 to 4–38.

The agencies have also concluded that there is no basis in the text of the statute to exclude waters from Clean Water Act jurisdiction solely because they do not meet the relatively permanent standard. As discussed in section IV.A.2.a of this preamble, the objective of the Clean Water Act is to restore and maintain the water quality of the nation's waters. The phrase "waters of the United States" is by its terms expansive and not expressly limited to relatively permanent, standing or continuously flowing bodies of water, or to wetlands with a continuous surface connection. The imposition of such limitations would disregard the science demonstrating the effects of upstream waters and wetlands on downstream paragraph (a)(1) waters. Taking science into account, the agencies agree with Justice Kennedy that the Clean Water Act intends to protect waters that do not meet the relatively permanent standard, where such waters have a significant nexus to a paragraph (a)(1) water. *Rapanos*, 547 U.S. at 773–74 (Kennedy, J., concurring in the judgment) ("Needless to say, a continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods."); *see also id.* at 775 ("In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to

major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.").

The agencies have concluded that there is no sound basis in the text of the statute to exclude tributaries solely on the basis that they are not relatively permanent, standing or continuously flowing bodies of water from the Clean Water Act. In interpreting the Clean Water Act to be limited in such a manner, the *Rapanos* plurality relied on a strained reading of the Act that is inconsistent with the text of the statute—including the statute's stated objective—the structure of the statute, the statutory history, and Supreme Court precedent interpreting the Clean Water Act.

First, the plurality stated that because one entry in a dictionary defines "waters" to mean "water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies,'" *Rapanos*, 547 U.S. at 732 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter, "Webster's Second")), the phrase "navigable waters" permits Corps and EPA to assert jurisdiction only over "relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732. The plurality leans heavily on the fact that Congress defined "navigable waters" as "the waters of the United States." 33 U.S.C. 1362(7) (emphasis added). But the article "the" and plural "waters" cannot bear this weight. Congress used the term "the waters" throughout the Clean Water Act and in usages where it would be illogical to swap in the plurality's preferred definition. For example, throughout the Act, Congress frequently refers to "the waters of the contiguous zone" and even "the waters of the territorial seas, the contiguous zone, and the oceans." 33 U.S.C. 1343(a), (c) (emphasis added). Congress is not making a careful distinction between some of "the waters" of the contiguous zone and other waters of the contiguous zone based on a dictionary definition. Nor did Congress intend to single out some waters of the Great Lakes when it instructed the Administrator to "conduct research and technical development work, and make studies, with respect to the quality of the waters of the Great Lakes." 33 U.S.C. 1254(f) (emphasis added).

⁶⁰ Letter from SAB to Gina McCarthy, Administrator, EPA (October 17, 2014) ("2014 SAB Review") at 22–23, 54 fig. 3.

The plurality relied on one particular dictionary definition to limit the scope of the “waters of the United States” in a way that is neither compelled by, nor consistent with, the text of the statute. The plurality selected a dictionary, Webster’s Second that was not even the most recent edition as of passage of the Clean Water Act, and thus not as reflective of common usage, and then selected a preferred definition within that dictionary. See *Rapanos*, 547 U.S. at 732. Webster’s Second does not have a separate entry for “waters” (plural), so the plurality relied on its entry for “water” (singular) and within that skipped over several more apt definitions to reach its preferred one. The first definition of “water” within Webster’s Second (1.a. of the definition) is “[t]he liquid which descends from the clouds in rain and which forms rivers, lakes, seas, etc.,” a definition that is substantially broader than the one chosen by the plurality. The plurality’s preferred definition, “water as found in streams and bodies forming geographical features such as oceans, rivers, and lakes,” is halfway down the column, definition 2.c. Moreover, the definition of “waters,” plural, in the most contemporaneous Webster’s, was also substantially broader, providing the following definition: “the water occupying or flowing in a particular bed.” Webster’s Third New Intl. (1966). Even taking the plurality’s preferred definition at face value, it does not support the relatively permanent standard. That definition includes “water as found in streams.” The plurality concluded that the streams referred to in the definition must be relatively permanent and thereby concluded that the “waters of the United States” do not include intermittent and ephemeral streams (although the plurality did not use those terms in the scientific sense and added caveats to its stated textual reading of the statute—stating that “relatively permanent” does not necessarily exclude waters “that might dry up in extraordinary circumstances, such as drought” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months”). *Rapanos*, 547 U.S. at 732 n.5 (emphasis in original). Intermittent and ephemeral streams are, of course, “streams”—as they are defined in the dictionary, understood in common parlance, and defined by scientists.

The agencies thus agree with Justice Kennedy that the limitations the plurality imposes on the Clean Water Act “are without support in the language and purposes of the Act or in

our cases interpreting it.” *Rapanos*, 547 U.S. at 768. The agencies also agree that a permanent standing water or continuous flow requirement “makes little practical sense in a statute concerned with downstream water quality.” *Id.* at 769. And, as discussed above, “a full reading of the dictionary definition precludes the plurality’s emphasis on permanence: The term ‘waters’ may mean ‘flood or inundation,’ events that are impermanent by definition;” it follows that “the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.” *Id.* at 770 (quoting Webster’s Second 2882).

The agencies also have concluded that *Riverside Bayview* does not support the plurality’s standard for tributaries. As Justice Kennedy stated: “To be sure, the Court there compared wetlands to ‘rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’” *Rapanos*, 547 U.S. at 771 (citing *Riverside Bayview*, 474 U.S. at 131). “It is quite a stretch to claim, however, that this mention of hydrographic features ‘echo[es]’ the dictionary’s reference to “‘geographical features such as oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 771 (citation omitted). “In fact, the *Riverside Bayview* opinion does not cite the dictionary definition on which the plurality relies, and the phrase ‘hydrographic features’ could just as well refer to intermittent streams carrying substantial flow to navigable waters.” *Id.* at 771 (citing Webster’s Second 1221 (defining “hydrography” as “[t]he description and study of seas, lakes, rivers, and other waters; specifically] . . . [t]he measurement of flow and investigation of the behavior of streams, esp[ecially] with reference to the control or utilization of their waters”)).

With respect to wetlands, the agencies have also concluded there is no sound basis in the text of the Clean Water Act or in other Supreme Court precedent for requiring that wetlands can be jurisdictional only if they satisfy the continuous surface connection requirement of the relatively permanent standard. The *Rapanos* plurality’s rationale for adopting such a test rested largely on a misreading of *Riverside Bayview*. The plurality’s brief discussion did not otherwise attempt to ground its relatively permanent standard in the text, history, or purpose of the Clean Water Act. In concluding that only wetlands with a continuous surface connection to other covered waters are protected by the Clean Water Act, the *Rapanos* plurality relied primarily on two related propositions

that it viewed as implicit in *Riverside Bayview*. First, the plurality suggested that in *Riverside Bayview* the Clean Water Act term “waters” cannot easily be construed to cover wetlands, and that discharges into wetlands therefore can be regulated only when particular wetlands “adjoined” waters of the United States and were thus deemed “part of” the waters to which they are adjacent. See 547 U.S. at 740. Second, the plurality concluded that this requirement will be satisfied only when “the wetland has a continuous surface connection with [the adjacent] water.” *Id.* at 742. Those propositions are unsound and rest on a misreading of *Riverside Bayview*.

The *Rapanos* plurality quoted the *Riverside Bayview* Court’s statement that, “[o]n a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’” 547 U.S. at 740 (quoting *Riverside Bayview*, 474 U.S. at 132). In the next sentence of its opinion, however, the *Riverside Bayview* Court continues, and the *Rapanos* plurality omits, that “[s]uch a simplistic response . . . does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.” 474 U.S. at 132. The *Riverside Bayview* Court concluded that “adjacent wetlands may be defined as waters under the Act.” *Id.* at 134. And, as explained above, the Clean Water Act’s text, history, and purpose likewise confirm that adjacent wetlands are themselves “waters” covered by the Act.

The *Rapanos* plurality read *Riverside Bayview* as resting on the “inherent ambiguity in drawing the boundaries of any ‘waters.’” 547 U.S. at 740. The plurality also described *SWANCC* as having read *Riverside Bayview* to be “refer[ring] to the close connection between waters and the wetlands that they gradually blend into.” *Rapanos*, 547 U.S. at 741. The plurality concluded that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right” can be protected by the Clean Water Act, because only in that circumstance is it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Id.* at 742. However, the *Rapanos* plurality misconceived the nature of the line-drawing problem in *Riverside Bayview*. The *Riverside Bayview* Court identified “shallows, marshes, mudflats, swamps, [and] bogs” as examples of “areas that are not wholly aquatic but nevertheless fall far short of being dry land,” and it

observed that “[w]here on this continuum to find the limit of ‘waters’ is far from obvious.” 474 U.S. at 132. The line-drawing problem in *Riverside Bayview* did not involve identifying the boundary between a jurisdictional stream and an adjacent wetland. Rather, the line-drawing problem involved the criteria that should be used to determine whether particular types of hydrogeographic features should be regarded as “waters” under the Clean Water Act. That line-drawing problem—in essence, determining how wet is wet enough—can arise even when a particular swamp or marsh is separated by a barrier from a nearby lake or stream. After discussing at some length the regulatory definition of “wetlands” and its application to the property at issue in that case, *see id.* at 129–131, the *Riverside Bayview* Court upheld as reasonable “the Corps’ approach of defining adjacent wetlands as ‘waters’ within the meaning of” the Clean Water Act. *Id.* at 132.

As further support for its relatively permanent standard, the *Rapanos* plurality invoked *SWANCC*’s holding that certain isolated ponds were not covered by the Clean Water Act. The *SWANCC* Court had described *Riverside Bayview* as resting on “the significant nexus between the wetlands and” the waters to which they are adjacent. 531 U.S. at 167. The *Rapanos* plurality in turn described *SWANCC* as “reject[ing] the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an independent basis for including entities like ‘wetlands’ . . . within the phrase ‘the waters of the United States.’” 547 U.S. at 741 (citation omitted). In the plurality’s view, “*SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps’ jurisdiction,” because the coverage inquiry for the “[i]solated ponds” at issue in that case “presented no boundary-drawing problem that would have justified the invocation of ecological factors.” *Id.* at 741–742. Contrary to the *Rapanos* plurality’s suggestion, the Court in *SWANCC* did not hold that the particular “ecological considerations upon which the Corps relied in *Riverside Bayview*,” 547 U.S. at 741—*i.e.*, the potential importance of wetlands to the quality of adjacent waters—were irrelevant to Clean Water Act jurisdiction. Rather, the Court held that a different ecological concern, namely the potential use of the isolated ponds as habitat for migratory birds, could not justify treating those ponds as

“waters of the United States.” *See* 531 U.S. at 164–165, 171–172. That ecological concern was not cognizable because it was unrelated to “what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *Id.* at 172 (citation omitted).

Aside from its mistaken reliance on *Riverside Bayview* and *SWANCC*, the *Rapanos* plurality did not attempt to ground the relatively permanent standard in the Clean Water Act’s text or history. *See* 547 U.S. at 739–742. And limiting Clean Water Act coverage to wetlands with a continuous surface connection would affirmatively undermine the Act’s purpose by creating an illogical jurisdictional gap. It would categorically exclude wetlands separated from covered waters by a dike or similar barrier, even if they are closely connected by subsurface flow or periodic floods, regardless of such wetlands’ ecological importance to covered waters nearby and downstream. The agencies have concluded that overwhelming scientific evidence shows that such wetlands may significantly affect paragraph (a)(1) waters. *See* Science Report 4–20 to 4–38; Technical Support Document section III.B.

Additionally, the relatively permanent standard was not briefed in *Rapanos*. *See* 547 U.S. at 800 (Stevens, J., dissenting). And the plurality’s terse discussion of the issue did not elaborate on either aspect of that standard in any detail. The plurality stated that “relatively permanent” does not necessarily exclude waters “that might dry up in extraordinary circumstances, such as drought” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” 547 U.S. at 732 n.5 (emphasis in original). The *Rapanos* plurality distinguished a “continuous surface connection” from “an intermittent, physically remote hydrologic connection,” but gave little further guidance on the application of its test. *Id.* at 742 (plurality opinion). As long as the relatively permanent standard is understood as a useful but not exclusive standard for Clean Water Act coverage, it has not created arbitrary and harmful results.

If the relatively permanent standard were the sole standard, a small surface connection would suffice, but the presence of a levee to protect a river and its adjacent wetlands could strip the wetlands of Clean Water Act coverage since, under the relatively permanent standard, a human-made barrier such as a levee means that there is not a

continuous surface connection between the river and the wetlands. This result would be irrational and contrary to the objectives of the statute. The Mississippi River, for example, features an extensive levee system built to prevent flooding. The Upper Mississippi Valley alone includes approximately 17,000 kilometers (more than 10,000 miles) of levees. Technical Support Document section III.B.ii.2. Those levees would preclude Clean Water Act coverage under the relatively permanent standard even though adjacent wetlands are often a necessary part of the flood-control project—detaining floodwaters to protect surrounding and downstream communities—and even though the wetlands maintain a hydrologic connection to the river system. *Cf.* R. Daniel Smith & Charles V. Klimas, Eng’r Rsch. & Dev. Ctr., A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valley 47, 48–49 (April 2002).

More broadly, the relatively permanent standard’s continuous surface connection requirement could make loss of Clean Water Act jurisdiction a consequence of building a road, levee, or other barrier—even if the construction had little or no effect on the interdependent relationship between a wetland and a neighboring water. That could create perverse incentives to build or modify such barriers in a manner aimed either at destroying or preserving Federal jurisdiction.

Further, as discussed above, Congress declined to narrow the scope of “waters of the United States” when it amended the Clean Water Act in 1977. The relatively permanent standard amends the Clean Water Act to limit its scope in ways that Congress has considered doing but has repeatedly declined to do, including through legislation introduced after the *Rapanos* decision and after promulgation of the 2020 NWPR.⁶¹ As Justice Kennedy stated:

⁶¹ *See, e.g.*, Navigable Waters Protection Act, S. 2567, 117th Cong. (2021) (proposing to codify the 2020 NWPR as Federal legislation); Define WOTUS Act, S. 2356, 116th Cong. (2019) (proposing to revise the Clean Water Act to define “navigable waters” to include the territorial seas, interstate waters used in the transport of interstate or foreign commerce, and waters meeting the *Rapanos* plurality’s standard); S.J. Res. 22, 114th Cong. (2015) (proposing to nullify the 2015 Clean Water Rule); Defense of Environment and Property Act, H.R. 3377, 113th Cong. (2013) (proposing to revise the Clean Water Act to limit “waters of the United States” to navigable-in-fact waters and “permanent or continuously flowing bodies of water that form geographical features commonly known as streams,

“To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so. Quite the opposite.” 547 U.S. at 770.

Finally, the agencies have consistently construed *Rapanos* to mean that a water is jurisdictional under the Clean Water Act if it meets either the relatively permanent standard or the significant nexus standard. The 2020 NWPR, however, interpreted the statute to primarily find waters jurisdictional only if they met the relatively permanent standard, as that standard was specifically interpreted in the 2020 NWPR. The 2020 NWPR argued that it reflected both the plurality and Kennedy opinions, which it characterized as having “sufficient commonalities . . . to help instruct the agencies on where to draw the line between Federal and State waters.” 85 FR 22250, 22268 (April 21, 2020). The opinions have important differences, however. Justice Kennedy looked to the existence of a significant nexus between waters at issue and traditional navigable waters, whereas the plurality held that “waters of the United States” is limited to “relatively permanent” waters connected to traditional navigable waters, and wetlands with a “continuous surface connection” with those waters. *Rapanos*, 547 U.S. at 742. Justice Kennedy rejected these two limitations in the plurality as “without support in the language and purposes of the Act or in our cases interpreting it.” *Id.* at 768; *see also id.* at 776 (“In sum the plurality’s opinion is inconsistent with the Act’s text, structure, and purpose.”). Yet the plurality’s limitation of jurisdiction to “relatively permanent” waters and those with a “continuous surface connection” to those waters pervades the 2020 NWPR. *See* 85 FR 22338–39; *see also* 2020 NWPR regulatory text at 33 CFR 328.3(a), (c)(1), (c)(6), (c)(12). The 2020 NWPR disregards the significant nexus standard, *see generally* 85 FR 22270, 22338–39 (April 21, 2020); 33 CFR 328.3, and, in doing so, restricted the scope of the statute using limitations Justice Kennedy viewed as anathema to the purpose and text of the Clean Water Act. For the reasons articulated throughout sections IV.A and IV.B of

oceans, rivers, and lakes that are connected to waters that are navigable-in-fact”); Amendment 2177, S. 3240, 112th Cong. (2012) (proposing to amend an appropriations bill to limit the Clean Water Act’s definition of “waters of the United States” to navigable-in-fact waters and “permanent, standing or continuously flowing bodies of water that form geographical features commonly known as streams, oceans, rivers, and lakes that are connected to waters that are navigable-in-fact”).

this preamble, the agencies reject the 2020 NWPR’s interpretation of “waters of the United States” as inconsistent with the objective of the Clean Water Act, the science, and the case law.

While the relatively permanent standard is administratively useful and includes waters that have important effects on the water quality of paragraph (a)(1) waters, the standard excludes waters that properly fall within the Clean Water Act’s protections. As a result, this rule’s incorporation of jurisdictional limitations based upon the relatively permanent standard and the significant nexus standard reflects the text of the statute as a whole. Thus, with this rule, the agencies properly fulfill their congressionally delegated responsibility to construe “waters of the United States” in a manner that advances the objective of the Act.

iii. Fact-Based Standards for Determining Clean Water Act Jurisdiction Are Appropriate

The agencies have the discretion to consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified (for example in this rule, paragraph (a)(1) waters and their adjacent wetlands) or a case-specific, fact-based approach (for example, in this rule, tributaries and their adjacent wetlands that meet the significant nexus standard or relatively permanent standard). While the latter does not necessarily provide the same certainty as defining waters as jurisdictional by category, case-specific determinations of the scope of Clean Water Act jurisdiction are not unusual—in fact, they are the norm. In the Supreme Court’s most recent decision addressing a question about the jurisdictional scope of the Clean Water Act, although not the scope of “waters of the United States,” the Court established a standard for determining jurisdiction that does not establish bright lines marking the bounds of Federal jurisdiction. Instead, like the significant nexus standard, the standard in *Mauí* requires an inquiry focused on the specific facts at issue and is guided by the purposes Congress sought to achieve under the Clean Water Act. In *Mauí*, the Supreme Court considered whether discharges to groundwater that reach navigable waters are jurisdictional under the Clean Water Act and thus subject to the Act’s section 402 permitting program. The Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.” *Mauí*, 140 S. Ct. at 1476. The Court explained that “[w]e

think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit.” *Id.* The Court further explained that, in applying its broadly worded standard, “[t]he object in a given scenario will be to advance, in a manner consistent with the statute’s language, the statutory purposes that Congress sought to achieve.” *Id.* The Court recognized that the difficulty with its approach was that “it does not, on its own, clearly explain how to deal with middle instances,” but reasoned that “there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.” *Id.* The Court enumerated a series of factors relevant to determining whether a discharge is the “functional equivalent” of direct discharge, including the time between when the discharge occurs and when the pollutants reach the navigable water, the distance the pollutants travel to the navigable water, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution (at that point) has maintained its specific identity. *Id.* at 1476–77.

The Supreme Court’s “functional equivalent” standard has several key characteristics in common with the significant nexus standard and the agencies’ approach in this rule. Both standards require an analysis focused on the specific facts at issue in a particular instance. Under the “functional equivalent” standard, factors that may be relevant, depending on the circumstances of a particular case, include transit time, distance traveled, the geologic substrate through which the discharges travels, the location and nature of the receiving water, and other factors. Similarly, the significant nexus standard requires consideration of scientific principles of upstream functions and effects on the integrity of paragraph (a)(1) waters and facts related to the specific waters at issue. Indeed, this rule includes a list of factors that would be considered when assessing whether waters significantly affect paragraph (a)(1) waters that is similar in nature to the factors identified by the Court that may be relevant to making a “functional equivalent” assessment. *See* section IV.C.9 of this preamble. The relatively permanent standard also

requires inquiry into specific facts about particular tributaries, wetlands, and open waters, although the inquiry generally requires less information-gathering and assessment than the significant nexus standard. The Court in *Maui* also explicitly rejected EPA's suggested approach, which established a bright line that categorically excluded all discharges to groundwater regardless of whether they reached navigable waters and instead adopted the "functional equivalent" analysis. 140 S. Ct. at 1474–75. The *Maui* Court's analysis underscores the agencies' concerns about the 2020 NWPR, which categorically excluded all ephemeral tributaries and wetlands that did not meet its very narrow definition in spite of their impact on the chemical, physical, and biological integrity of paragraph (a)(1) waters. In this rule, the agencies are rejecting that approach and resuming the use of the significant nexus standard to determine which waters have a sufficient impact on traditional navigable waters, the territorial seas, or interstate waters.

Finally, both the functional equivalent standard and the significant nexus standard should be applied while keeping in mind the purposes of the Clean Water Act. As the Court explained in *Maui*, "[t]he underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." *Id.* at 1477. Likewise, Justice Kennedy explained that, when assessing the existence of a "significant nexus" between wetlands and navigable waters, "[t]he required nexus must be assessed in terms of the statute's goals and purposes." *Rapanos*, 547 U.S. at 779.

The agencies recognize that in both *Rapanos* and *Maui*, the Supreme Court was clear that the agencies could promulgate regulations that further refine the case-specific jurisdictional tests. With this rule, the agencies have established limits that appropriately draw the boundary of "waters of the United States" by ensuring that, where upstream waters significantly affect the integrity of waters and the Federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters—Clean Water Act programs apply to ensure that the downstream waters are adequately protected (by protecting those upstream waters). This rule continues the use of case-specific jurisdictional tests but also provides needed clarity by establishing regulations that include definitions of key terms and specific exclusions.

Moreover, the agencies have extensive experience making jurisdictional determinations using the relatively permanent standard and the significant nexus standard. Field staff have gained extensive familiarity and practical experience with the national and regionally specific field methods, literature, datasets, models, and tools that are required to make such determinations, resulting in increased efficiencies over time. *See* section IV.C.10 of this preamble. In addition, this rule increases clarity and implementability by streamlining and restructuring the 1986 regulations, and this preamble provides implementation guidance informed by sound science, implementation tools (including modern assessment tools), and other resources.

b. This Rule Reflects Full and Appropriate Consideration and Balancing of the Water Quality Objective in Section 101(a) and the Policies Relating to Responsibilities and Rights of Tribes and States Under Section 101(b) of the Clean Water Act

This rule reflects consideration of the statute as a whole, including the objective of the Clean Water Act and the policies of the Act with respect to the role of Tribes and States. As discussed in section IV.A.2.a of this preamble, the agencies must consider the objective of the Clean Water Act in interpreting the scope of the statutory term "waters of the United States." In this rule, the agencies also consider the entire statute, including section 101(b) of the Clean Water Act, which provides that it is congressional policy to preserve the primary responsibilities and rights of States "to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of [the Administrator's] authority" under the Clean Water Act. 33 U.S.C. 1251(b). Determining where to draw the boundaries of Federal jurisdiction to ensure that the agencies advance Congress's objective while preserving and protecting the responsibilities and rights of the States is a matter of judgment assigned by Congress to the agencies.

The agencies find that this rule both advances the objective of the Clean Water Act in section 101(a) and respects the role of Tribes and States in section 101(b).⁶² The rule appropriately draws

the boundary of waters subject to Federal protection by limiting the scope to the protection of upstream waters that significantly affect the integrity of waters where the Federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters. Waters that do not implicate the Federal interest in these paragraph (a)(1) waters are not included within the scope of Federal jurisdiction. The scope and boundaries of the definition therefore reflect the agencies' considered judgment of both the Clean Water Act's objective in section 101(a) and the congressional policy relating to States' rights and responsibilities under section 101(b).

The agencies have carefully considered sections 101(a) and 101(b) as well as the agencies' analysis and application of these provisions in promulgating the 2020 NWPR. In several key respects, the agencies' consideration and weighing of these provisions in this rulemaking differs from the agencies' approach in the 2020 NWPR. The agencies explained in the preamble to the proposed rule why the agencies' revised approach represents a fuller and more appropriate consideration of these provisions than reflected in the 2020 NWPR, and the agencies reaffirm those positions. 86 FR 69399 (December 7, 2021). As discussed below, based on the text of section 101(b), the structure of section 101 and the Clean Water Act as a whole, Supreme Court precedent, and the history of Federal water pollution laws enacted by Congress up through the 1972 amendments, the construction of the Act in this rule fully and appropriately considers sections 101(a) and 101(b).

The policy in section 101(b) is both important and relevant to the agencies' defining an appropriate scope of "waters of the United States." Consistent with the text of the statute and as emphasized by the Supreme Court, Federal jurisdiction under the Clean Water Act has limits. As explained above, Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable Federal interest in the protection of the paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters. And consistent with the section 101(b) policy, where protection (or degradation) of waters does not implicate this Federal interest, such waters fall exclusively within Tribal or

⁶² While Clean Water Act section 101(b) does not specifically identify Tribes, the policy of preserving States' sovereign authority over land and water use is equally relevant to ensuring the primary

authority of Tribes to address pollution and plan the development and use of Tribal land and water resources.

State regulatory authority should they choose to exercise it. However, there is no indication in any text of the statute that Congress established section 101(b) as the lynchpin of defining the scope of “waters of the United States.” Rather, the Clean Water Act’s objective—restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters—is set forth in the first words of the first section of the statute. And the statute is designed to address that objective through a “comprehensive” Federal program of pollution control. Indeed, the text of section 101(b) is actually a recognition of States’ authority to “prevent, reduce, and eliminate pollution” and provide support for the Administrator’s exercise of his or her authority to advance the objective of the Clean Water Act.

The text of section 101(b) also expressly recognizes States’ role in administering the Federal permitting programs under section 402 of the Clean Water Act:

It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 [402] and 1344 [404] of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Thus, the text of section 101(b) as a whole does not reflect a general policy of deference to State regulation to the exclusion of Federal regulation, which would be inconsistent with Congress’s enactment of the Clean Water Act because of the failures of a statutory scheme that relied primarily on State enforcement of State water quality standards. S. Rep. No. 92–414, 92d Cong., 1st Sess. 7 (1971) (observing that prior statutes had been “inadequate in every vital aspect”). Instead, section 101(b) sets forth a policy focused on preserving the responsibilities and rights of States to work to achieve the objective of the Act. Those rights and responsibilities are to prevent, reduce, and eliminate pollution generally, including, but not limited to, through their authority over any source of pollution subject to State law, consulting with the Administrator in the exercise of his or her Clean Water Act authority, and implementing the Act’s regulatory permitting programs, in partnership and with technical and financial support from the Federal Government.

The agencies’ interpretation and consideration of section 101(b) in this rule is consistent with Supreme Court precedent. The Supreme Court has described, on numerous occasions, section 101(b) as creating a partnership between the Federal and State governments in which the States administer programs under federally mandated standards and are allowed to set even more stringent standards. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (stating that the Act “anticipates a partnership between the States and the Federal government” to meet the “shared objective” in section 101(a), with the Federal Government setting pollutant discharge limitations and States implementing water quality standards for their respective waterbodies); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 489–90 (1987) (describing section 101(b) as allowing the Federal Government to delegate administration of point source pollution permits to States and allowing States to establish more stringent discharge limitations than Federal requirements); *Train v. Colo. Pub. Interest Grp.*, 426 U.S. 1, 16 & n.13 (1976) (describing section 101(b) as providing States authority to develop permit programs and establish standards more stringent than those under the Clean Water Act); see also *City of Milwaukee v. Illinois*, 451 U.S. 304, 341 (1981) (Blackmun, J., dissenting) (describing section 101(b) as creating “shared authority between the Federal Government and the Individual States” that allows for the States to set more stringent standards than necessary by Federal law). While this rule does not directly establish or alter a Clean Water Act program, these decisions informed the agencies’ deliberations because the definition of “waters of the United States” affects the scope of Clean Water Act programs.

The agencies have also carefully considered the policy in section 101(b) as it relates to the Clean Water Act’s objective in section 101(a). The Clean Water Act’s structure makes clear that section 101(a) sets forth the foundational purpose of the statute that must be achieved. First, section 101(a) is the opening section of the statute and is labelled the “objective” of the Clean Water Act. The agencies interpret its placement and its simple, declarative, and overarching statement as a powerful expression by Congress that merits substantial weight in defining the scope of jurisdiction for all of the Clean Water Act’s regulatory programs. In contrast, section 101(b) is one of four congressional policies contained in section 101; the other three relate to

seeking to ensure foreign countries take action to prevent, reduce, and eliminate pollution; reducing paperwork, duplication, and government delays; and State authority to allocate quantities of water within their jurisdictions. See 33 U.S.C. 1251(c), (f), (g). Just as none of those policies plays a central role in defining the scope of the Clean Water Act, neither should section 101(b) be given such prominence as to undermine Congress’s stated objective. The prominently placed and single expression of the Clean Water Act’s overarching objective in section 101(a) merits greater weight in the agencies’ decision-making than any of the four congressional policies expressed in section 101 which, while important, appear subordinate to the objective—particularly given the statutory text and structure. To the extent there is ambiguity, the agencies have been delegated the authority to define “waters of the United States” and again conclude based on the statutory text and structure, and confirmed by the legislative history, that the overarching objective of the Act merits greater weight. The agencies have also thoroughly considered the other policies in section 101 of the Act, especially section 101(b) as discussed in this section of the preamble.

The remainder of the Clean Water Act’s text also demonstrates how important this objective was to Congress. In the Clean Water Act itself, Congress refers to the objective of the Act approximately a dozen times, including in sections 104, 105, 117, 120, 217, 301, 303, 304, 305, 308, 319, 402, 516, 518, and 603. The repeated reference to the objective highlights the importance of the Clean Water Act’s objective to the statute as a whole, supporting the agencies’ giving substantial weight to this provision. Section 101(b), in contrast, is not referred to elsewhere in the Clean Water Act.

Congress itself defined the contours of how it expected the agencies to both achieve its objective in section 101(a) and implement its policy in section 101(b) through the rest of the provisions of the Clean Water Act. Notably, a narrow definition of “waters of the United States” would not uniformly boost State authority as that definition is foundational to the scope of all of the Clean Water Act’s programs, including those in which the States are assigned authority. Indeed, in implementing Clean Water Act regulatory requirements, States can have more powerful and holistic tools than they would have in implementing State-only laws and regulations. For example,

section 401 requires State certification for federally licensed projects within a State's borders. A narrow definition of "waters of the United States" would thus actually *limit* States' ability to protect waters within their borders. Similarly, a narrow definition would limit the ability of a State to provide input during the permitting process for out-of-state section 402 and 404 permits that may affect its waters. See 33 U.S.C. 1341, 1342(b), 1344(h)(1)(E).

The agencies' careful balancing of section 101(a) and 101(b) in this rule is also informed by and consistent with the Court's decision in *SWANCC*, wherein the Court stated: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .' We thus read the statute as written to avoid the significant constitutional and federalism questions." 531 U.S. at 174 (citing 33 U.S.C. 1251(b)). Justice Kennedy further explained in *Rapanos*: "In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns." 547 U.S. at 776. Likewise here, this rule—by limiting jurisdiction only to those waters that significantly affect the integrity of waters where the Federal interest is indisputable (traditional navigable waters, the territorial seas, and interstate waters)—avoids constitutional and federalism concerns.

Under the Commerce Clause, Congress can regulate: (1) the channels of interstate commerce; (2) persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Regulation of "waters of the United States" as interpreted by this rule is a valid exercise of Congress's power under at least the first *Lopez* category. It is a well-settled proposition that Congress's power to regulate channels of interstate commerce also includes the power to adopt "appropriate and needful control of activities and agencies which, though intrastate, affect that commerce." *Rapanos*, 547 U.S. at 782–83 (citing *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–26 (1941)). Traditional navigable waters are squarely within Congress's power to regulate under its authority over the channels of interstate commerce. And "[i]t has long been settled that Congress has extensive authority over this Nation's waters

under the Commerce Clause" as channels of interstate commerce. See *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). Indeed, Congress has enacted "numerous laws touching interstate waters." *City of Milwaukee*, 406 U.S. at 101. Congress has broad power to keep the channels of commerce free from injurious uses. See, e.g., *Pierce Cnty. v. Guillen*, 537 U.S. 129, 146–47 (2003); *Lopez*, 514 U.S. at 558; *Perez v. United States*, 402 U.S. 146, 150 (1971); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *The Lottery Case (Champion v. Ames)*, 188 U.S. 321, 346–47 (1903). Thus, courts have recognized that the power over traditional navigable waters as channels of commerce includes "the power to regulate waters to limit pollution, prevent obstructions to navigation, reduce flooding, and control watershed development." *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (citations omitted). As noted earlier, Congress directed that the Clean Water Act "be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 144 (1972), and the "Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). The Supreme Court has stated that the term "navigable" must be given some meaning in defining "waters of the United States." *SWANCC*, 531 U.S. at 172; *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the judgment). The agencies' construction of the Clean Water Act does that by defining "waters of the United States" to include traditional navigable waters, the territorial seas, and interstate waters, and those waters that significantly affect those waters. But while Congress was utilizing only one prong of its Commerce Clause authority, that prong is nevertheless broad. Indeed, "there is no reason to believe Congress has less power over navigable waters than over other interstate channels," such that Congress cannot regulate non-navigable waters in order to protect water quality in traditional navigable waters. *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003). This rule and the significant nexus standard are squarely within the prong of Commerce Clause authority that Congress utilized in enacting the Clean Water Act and within the authority Congress delegated to the agencies under the Act. Both the rule and the standard are based on protecting

traditional navigable waters, the territorial seas, and interstate waters from the effects of upstream pollution.

Finally, in considering sections 101(a) and 101(b) for purposes of interpreting the scope of "waters of the United States," the agencies conclude that it is important to consider the statutory history that gave rise to this structure. Indeed, the agencies recognize that in passing the Federal Water Pollution Control Act Amendments of 1972, Congress was not acting on a blank slate—it was amending existing law that had primarily provided for States to establish water quality standards for a subset of waters. Water Quality Act of 1965, Public Law 89–234, 79 Stat. 903 (1965). Congress found the previous statute's focus on States' establishment and administration of water quality standards insufficient for the task of upgrading and protecting the quality of America's waters because States were lagging in establishing such standards and there was "an almost total lack of enforcement." S. Rep. 92–414 (1971) at 5. The Clean Water Act was enacted to address these shortcomings after "two of the important rivers [in the Sixth] circuit, the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio, reached a point of pollution by flammable materials in the last ten years that they repeatedly caught fire." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). With the 1972 amendments, Congress adopted an entirely new approach to water pollution control—a prohibition of discharges of pollutants unless authorized by the Clean Water Act and a new, comprehensive, Federal regulatory scheme grounded in technology-based effluent standards applied uniformly across industries of the same type. "The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology." S. Rep. 92–414 at 8. Congress also viewed the prohibition on discharges of pollutants unless authorized under the Act as "establish[ing] a direct link between the Federal government and each industrial source of discharge into the navigable waters." *Id.* Thus, Congress viewed the Clean Water Act as a change from previous laws that centered on States and State water quality standards to a system based on a prohibition of discharges of pollutants to waters unless permitted in accordance with a Federal regulatory scheme and technology standards established by EPA. Tribes

and States play a vital role in the implementation and enforcement of the Clean Water Act, and this rule does not change that framework. Instead, this rule reinforces that framework by establishing limitations that reflect careful consideration of how best to identify those waters for which Federal regulation is necessary to ensure the protection of the waters at the core of Congress's authority and interest and those for which it is not.

In the context of the scope of "waters of the United States," the Court stated that Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133. More recently, the Supreme Court in *Mauui* also noted that: "Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so." 140 S. Ct. at 1468 (citations omitted).

With respect to States' responsibilities and rights under section 101(b), Justice Kennedy in *Rapanos* cited State *amici* briefs that "not[e]d, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777. Indeed, the Supreme Court has recognized that this is an important aspect of the Clean Water Act's passage. *City of Milwaukee* involved alleged discharges of inadequately treated sewage from Milwaukee, Wisconsin, sewer systems directly into Lake Michigan, which also borders Illinois. The *City of Milwaukee* Court noted that prior to passage of the Clean Water Act, these discharges would have had to be resolved through litigation, in which the courts must apply "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." 451 U.S. at 317. The Clean Water Act, however, replaced this unpredictable and inefficient approach with "a comprehensive regulatory program supervised by an expert administrative agency," *id.*, including a "uniform system of interstate water pollution regulation," *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

An overly narrow definition of jurisdictional waters would threaten a return to pre-1972 regime, would exclude from Federal protection waters

that significantly affect paragraph (a)(1) waters, and would risk removing from the statutory scheme instances of interstate pollution the 1972 amendments were designed in part to address. Nationwide pollution controls are critical to protecting water quality in downstream States because downstream States have limited ability to control water pollution sources in upstream States. *See Int'l Paper Co. v. Ouellette*, 479 U.S. at 490–91. Several commenters stated that, under the 2020 NWPR, certain States were subject to harm from increased pollution flowing through interstate waters from upstream States. In addition, commenters noted that the water quality in States bordering the Great Lakes depended on adequate protection in other Great Lakes States, some of which removed clean water regulations following promulgation of the 2020 NWPR. The consequences of water pollution discharged in one State and flowing to another are also economic in nature. Such pollution also destroys or diminishes the value of water to "public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes" protected by the Clean Water Act. 33 U.S.C. 1313(c)(2)(A).

Moreover, an overly narrow definition of "waters of the United States" would substantially impinge upon States' responsibilities and rights under section 401 of the Clean Water Act. It is only through that provision of the Act that States have the authority to grant, deny, or waive certification of proposed Federal licenses or permits that may discharge into waters of the United States.

By promulgating a rule interpreting the Clean Water Act to cover waters that meet the relatively permanent standard or the significant nexus standard, the agencies have appropriately construed the Act to protect those waters necessary to protect the integrity of traditional navigable waters, the territorial seas, and interstate waters, while leaving regulatory authority over all the waters that do not have the requisite connection to paragraph (a)(1) waters exclusively to the Tribes and States. This construction respects the statutory history that gave rise to the Clean Water Act and gives effect to the comprehensive nature of the Act, its objective, and the many programs and policies affected by the scope of "waters of the United States" designed to meet that objective. This definition also ensures that States have sole authority over waters that do not significantly affect the paragraph (a)(1) waters clearly protected by the Act.

As discussed elsewhere, this rule defines "waters of the United States" to include tributaries, adjacent wetlands, and paragraph (a)(5) waters that meet the relatively permanent or significant nexus standards (*see* section IV.C of this preamble). This rule advances the Clean Water Act's objective by helping restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters—waters of longstanding and indisputable Federal interest—by protecting them from degradation of upstream waters that significantly affect them. At the same time, consistent with section 101(b), this rule recognizes, preserves, and protects the rights and responsibilities of Tribes and States by leaving within their purview all waters that do not significantly affect the paragraph (a)(1) waters of paramount Federal interest. The specific jurisdictional standards in this rule therefore bear a relationship to the nature and extent of the Federal and Tribal and State interests at play. This line-drawing highlights the agencies' deliberate and due consideration of sections 101(a) and 101(b) in developing this rule.

4. This Rule Is Both Generally Familiar and Implementable

As described above in section IV.A of this preamble, the agencies in this rule are interpreting "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of "waters of the United States" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." It also reflects consideration of extensive public comment.

The agencies have extensive experience implementing the pre-2015 regulatory regime, as described further below in this section, and this experience will assist the agencies in implementing this rule. The agencies' approach to implementation of the relatively permanent and significant nexus standards is broadly consistent with the pre-2015 regulatory regime, but the agencies have clarified and refined both the regulatory text and the guidance on how the agencies intend to implement these standards in order to promote consistent Clean Water Act protections for waters. For additional

clarity, this rule includes a definition of “significantly affect” for purposes of applying the significant nexus standard. See section IV.C of this preamble.

Additionally, the agencies are codifying the two familiar and longstanding exclusions from the definition of “waters of the United States” for prior converted cropland and waste treatment systems and adding exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime (see section IV.C.7 of this preamble). The features excluded under this rule were excluded by regulation or generally considered non-jurisdictional in practice under the pre-2015 regulatory regime and each of the subsequent rules defining “waters of the United States.”

The agencies have extensive experience implementing the 1986 regulations. Moreover, the scientific and technical information available to inform the significant nexus analysis and identify waters that meet the relatively permanent standard has also markedly improved over time and become more readily available since the agencies first started implementing both standards. See section IV.G of this preamble. Since the Court’s decision in *Rapanos*, the agencies have gained more than a decade of experience implementing the 1986 regulations consistent with the relatively permanent standard and the significant nexus standard under three different presidential Administrations, beginning with the *Rapanos* Guidance issued in 2007. The agencies have continued to implement the 1986 regulations consistent with the *Rapanos* Guidance in response to court decisions.

The agencies repromulgated the 1986 regulations in the 2019 Repeal Rule and implemented those rules nationwide until June 22, 2020, when the 2020 NWPR became effective. The agencies explained that with the 2019 Repeal Rule, they intended to “restore the regulatory text that existed prior to the 2015 Rule” and that the agencies would “implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.” 84 FR 56626 (October 22, 2019). The agencies concluded that this approach “will provide greater regulatory certainty and national consistency while the agencies consider public comments on the proposed [2020 NPWR].” *Id.* at 56660. To further justify a return to the 1986 framework, the agencies noted that “[t]he agencies, their co-regulators, and the regulated

community are . . . familiar with the pre-2015 Rule regulatory regime and have amassed significant experience operating under those pre-existing regulations. Agency staff in particular have developed significant technical expertise in implementing the 1986 regulations.” *Id.* The 2019 Repeal Rule would thus “provide greater certainty by reinstating nationwide a longstanding regulatory framework that is familiar to and well-understood by the agencies, States, Tribes, local governments, regulated entities, and the public.” *Id.* at 56661. Indeed, in their comments to the 2019 Repeal Rule proposal, a number of regulators and regulated parties alike expressed support for returning to the pre-2015 regulations, as implemented following *SWANCC* and *Rapanos*, due in part to their experience and familiarity with that regime.⁶³

Further, in responding to comments on the 2019 Repeal Rule proposal asserting that the agencies should not return to the pre-2015 regulatory regime because that regime would reduce regulatory certainty due to the prior regime’s reliance on case-specific significant nexus determinations, the agencies explained that “[f]ollowing the Supreme Court’s decisions in *SWANCC* and *Rapanos* . . . the Corps published a guidebook to assist district staff in issuing approved jurisdictional determinations. In particular, the guidebook outlines procedures and documentation used to support significant nexus determinations. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing jurisdictional determinations under this final rule.”⁶⁴ 84 FR 56660 (October 22, 2019). Even after the 2020 NWPR’s June 22, 2020, effective date, the agencies continued to implement the 2019 Repeal Rule consistent with the *Rapanos* Guidance in Colorado until April 2021 due to litigation barring

⁶³ See, e.g., comments submitted by American Water Works Association (August 13, 2018) (Docket ID: EPA-HQ-OW-2017-0203-15559); comments submitted by North Dakota’s Department of Agriculture (July 25, 2018) (Docket ID: EPA-HQ-OW-2017-0203-15541); comments submitted by the Office of the Governor of Utah (August 9, 2018) (Docket ID: EPA-HQ-OW-2017-0203-15202) (“Recodification of the regulations that existed prior to the 2015 Rule will provide continuity and certainty for regulated entities, States, the agencies’ staff, and the American public.”).

⁶⁴ For convenience, EPA decisions on jurisdiction are referred to as jurisdictional determinations throughout this document, but such decisions are not “approved jurisdictional determinations” as defined and governed by the Corps’ regulations at 33 CFR 331.2.

implementation of the 2020 NWPR in that State.

Like the past three presidential Administrations, courts have also found that the 1986 regulations, implemented consistent with the *Rapanos* standards, provide an appropriate regulatory framework to implement the Clean Water Act. Indeed, in staying the 2015 Clean Water Rule nationwide, the Sixth Circuit found that returning to the “familiar, if imperfect, pre-Rule regime” was the best path forward pending judicial review of the 2015 Clean Water Rule. *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015), vacated, 713 Fed. Appx. 489 (6th Cir. 2018). In doing so, the court recognized that returning to the status quo meant returning to the pre-2015 regulatory regime—not the 1986 regulations. See *id.* at 806 (finding that “the status quo at issue is the pre-[2015 Clean Water Rule] regime of federal-state collaboration that has been in place for several years, following the Supreme Court’s decision in *Rapanos*”). Likewise, in vacating the 2020 NWPR, the Arizona district court found that returning to the pre-2015 regulatory regime would provide for a regime that “is familiar to the Agencies and industry alike.” See *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021).

The agencies acknowledge that the need for case-specific analyses will continue under this rule for certain jurisdictional determinations, potentially raising some timeliness and consistency issues that the agencies’ rules in 2015 and 2020 were designed, in part, to reduce. The agencies’ experience suggests that the number of these analyses will be limited. Historically, only approximately 12% of resources assessed in approved jurisdictional determinations using the *Rapanos* Guidance required a significant nexus analysis.⁶⁵ And those significant nexus assessments often resulted in a conclusion that the resource, either alone or in combination with similarly situated waters, did not meet the significant nexus standard. Moreover, the agencies have provided more clarity in this rule by: adding limitations to the scope of the definition to the rule text; adding a definition of “significantly affect” that identifies the

⁶⁵ It is the agencies’ expectation that the number of significant nexus analyses will increase under this rule due to the assessment of paragraph (a)(5) waters under the significant nexus standard, but the agencies do not expect a corresponding increase in positive jurisdictional determinations. See section IV.C.6 of this preamble for discussion of the agencies’ intentions for implementation of paragraph (a)(5).

functions and factors to be evaluated as part of a significant nexus analysis; adding exclusions to the rule; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the rule's case-specific approach. Finally, as discussed above, the nature of the Clean Water Act's requirements in general can be a fact-based, case-specific inquiry and is not limited to whether a water meets the definition of "waters of the United States." The inquiry is an important one, for both discharges and the environment.

This rule is both consistent with the Clean Water Act's statutory text and purposes and its framework is longstanding and familiar to regulated parties and regulators alike. Moreover, all definitions of "waters of the United States," including the 2020 NWPR, require some level of case-specific analysis. Implementation of this rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are "waters of the United States" (see section IV.G of this preamble). Accordingly, the agencies have concluded that this rule is consistent with the Clean Water Act and that its clarity and familiar regulatory framework improve its implementability.

Through the various rulemakings and court decisions relating to the definition of "waters of the United States" since the *Rapanos* decision in 2006, the agencies have continued implementing the 1986 regulations consistent with the *Rapanos* standards nationwide or in numerous States across the country for various periods of time, learning as they did so. This experience has allowed the agencies to further develop expertise in implementing this regime. The agencies, most often the Corps, have made hundreds of thousands of Clean Water Act approved jurisdictional determinations since the issuance of the *Rapanos* Guidance. Of those, tens of thousands have required a case-specific significant nexus determination. The agencies have made such determinations in every State in the country as well as in the U.S. territories.

With field staff located in 38 Corps District offices and 10 EPA regional offices, the agencies have over a decade of nationwide experience in making decisions regarding jurisdiction under the pre-2015 regulatory regime

consistent with the relatively permanent standard and the significant nexus determinations have been made affirmatively for waters ranging from an ephemeral stream that flows directly into a traditional navigable water used extensively for recreational boating and fishing, to wetlands adjacent to a perennial tributary and separated by a levee, to a non-relatively permanent stream that provides flow to a drinking water source, to a group of floodplain wetlands that provide important protection from floodwaters to downstream communities alongside the traditional navigable water, to headwater mountain streams that provide high quality water that supplies baseflow and reduces the harmful concentrations of pollutants in the main part of the river below. The agencies have also made many findings of no jurisdiction under the 1986 regulations when they concluded the waters in question did not meet either the relatively permanent standard or the significant nexus standard as implemented by the *Rapanos* Guidance.

Through this experience, the agencies developed wide-ranging technical expertise in assessing the hydrologic flowpaths along which water and materials are transported and transformed and that determine the degree of chemical, physical, or biological connectivity and effects to paragraph (a)(1) waters. The agencies have also become deeply familiar with the variations in climate, geology, and terrain within and among watersheds that affect the functions (such as the transformation or filtering of pollutants) performed by streams, open waters, and wetlands for paragraph (a)(1) waters.

The agencies utilize many tools and many sources of information to help support decisions on jurisdiction, including U.S. Geological Survey (USGS) and State and local topographic maps, aerial photography, satellite imagery, gage data, soil surveys, National Wetlands Inventory maps, floodplain maps, watershed studies, modeling tools, scientific literature and references, and field work. As discussed further in section IV.G of this preamble, these tools have undergone important technological advances and have become increasingly available since the *Rapanos* decision. For example, USGS, State, and local stream maps and datasets, aerial photography, gage data, watershed assessments, monitoring data, and field observations are often used to help assess the flow contributions of tributaries, including intermittent and ephemeral streams, to downstream traditional navigable

waters, the territorial seas, or interstate waters. Similarly, floodplain and topographic maps from Federal, State, and local agencies, modeling tools, and field observations can be used to assess how wetlands are storing floodwaters that might otherwise affect the integrity of paragraph (a)(1) waters. Further, the agencies utilize the large body of scientific literature regarding the functions of tributaries, including tributaries with ephemeral, intermittent, and perennial flow, and of wetlands and open waters to inform their significant nexus analyses. In addition, the agencies have experience and expertise from decades of making decisions on jurisdiction that considered hydrology, ordinary high water mark (OHWM) and its associated indicators (see section IV.C.8.d of this preamble), biota, and other technical factors in implementing Clean Water Act programs. The agencies' immersion in the science, along with the practical expertise developed over more than a decade of case-specific determinations across the country, have helped the agencies determine which waters have a significant nexus and where to draw boundaries demarking the "waters of the United States."

Regulated entities and other interested parties also have substantial experience with the 1986 regulations and the two *Rapanos* standards. As the agencies have developed their expertise in implementing this regime, so have State and Tribal co-regulators and regulated entities, as well as interested citizens who may play an important role in the Act's permitting process. Individuals uncertain about the status of waters on their property may obtain a jurisdictional determination from the Corps. The Corps does not charge a fee for this service. See 33 CFR 325.1; Regulatory Guidance Letter 16-01 (2016).

Due in part to the familiarity of this regime, this rule will not undermine serious reliance interests in an alternative regime, including the 2020 NWPR, which the agencies have not implemented for over a year following the Arizona district court's August 30, 2021 vacatur order. The Supreme Court has held that agencies' changes in position do not require any reasons "more substantial than those required to adopt a policy in the first instance." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). The Court acknowledged that if an agency's "prior policy has engendered serious reliance interests," *id.* at 515, those interests cannot be ignored. However, the Court emphasized that even in the case of "serious reliance interests," "further

justification” beyond a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy” is not needed. *Id.* at 515–16. This rule does not implicate serious reliance interests because, first, the agencies are codifying a rule similar to the definition currently being implemented nationwide. As discussed in section V.A of this preamble, this rule will establish a regime that is generally comparable to current practice, and this rule is expected to generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing. Second, members of the public, Tribes, and States have been aware that the agencies might reconsider the 2020 NWPR since January 2021 and have had many opportunities to share their views with the agencies. President Biden indicated on his first day in office, following the issuance of Executive Order 13990, that this administration would be reviewing the 2020 NWPR and deciding whether to revise or replace the rule. *See* section III.B.5 of this preamble. On June 9, 2021, the agencies announced their intention to revise or replace the rule. The agencies subsequently embarked on an extensive stakeholder outreach process, including public meetings and federalism and Tribal consultations. *See* section III.C of this preamble. The agencies received over 32,000 recommendation letters from the public during pre-proposal outreach and over 114,000 comments on the proposed rule during the public comment period. The agencies also held a public hearing and multiple listening sessions with Tribal, State, and local governments during the public comment period to listen to feedback on the proposed rule from co-regulators and a variety of stakeholders.

Third, the 2020 NWPR was only in effect for approximately 14 months before it was vacated by the Arizona district court on August 30, 2021. *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021). Less than a month later, another district court issued an order vacating the 2020 NWPR on September 27, 2021. *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021). And several other district courts remanded the 2020 NWPR without vacatur or without addressing vacatur in six additional cases, starting in July 2021.⁶⁶ Following

the vacatur orders, the agencies clarified that the Corps will no longer rely on approved jurisdictional determinations issued under the 2020 NWPR in making new permit decisions—although so-called “stand-alone” approved jurisdictional determinations (*i.e.*, those that are *not* associated with a permit action) will not be reopened prior to their expiration date unless one of the criteria for revision is met or if the recipient requests that the Corps provide a new approved jurisdictional determination. *See* section IV.F of this preamble for further discussion of the status of approved jurisdictional determinations issued under prior rules.

Interested parties have thus had over a year to adapt to operating under the pre-2015 regulatory regime in the absence of the 2020 NWPR, including ample notice of the implications of the 2020 NWPR’s vacatur on the validity of approved jurisdictional determinations issued thereunder. Moreover, as discussed in this section, members of the public are familiar with this rule’s regulatory framework thereby minimizing the potential disruption of a change. Finally, even if serious reliance interests were at issue, which they are not, this rule provides a thorough and reasoned explanation for the changed definition of “waters of the United States.”

5. Public Comments Received and Agency Responses

The agencies received numerous comments on the basis for the proposed rule, including comments about the proposal’s consistency with the statute and Supreme Court decisions and about the proposal’s approach to various categories of waters. The agencies have fully considered these timely comments and made changes to the rule to reflect the comments, as discussed below. This section contains summaries of these comments and the agencies’ general responses; a more comprehensive response to these comments is in the response to comments document available in the docket for this rule at Docket ID No. EPA–HQ–OW–2021–0602.

⁶⁶ Sept. 16, 2021 (same); Order, *Conservation L. Found. v. EPA*, No. 1:20–cv–10820, ECF No. 122 (D. Mass. Sept. 1, 2021) (same); Order, *S.C. Coastal Conservation League v. Regan*, No. 2:20–cv–01687, ECF No. 147 (D.S.C. July 15, 2021) (remanding without vacating); Order, *Murray v. Wheeler*, No. 1:19–cv–01498, ECF No. 46 (N.D.N.Y. Sept. 7, 2021) (same).

⁶⁶ Order, *Pueblo of Laguna v. Regan*, No. 1:21–cv–00277, ECF No. 40 (D.N.M. Sept. 21, 2021) (declining to reach issue of vacatur in light of the *Pascua* decision); Order, *California v. Wheeler*, No. 3:20–cv–03005, ECF No. 271 (N.D. Cal. Sept. 16, 2021) (same); Order, *Waterkeeper All., Inc. v. Regan*, No. 3:18–cv–03521, ECF No. 125 (N.D. Cal.

a. Comments Regarding Consistency of the Proposed Rule With the Text of the Clean Water Act

Many commenters stated that the proposed rule is consistent with the Clean Water Act’s objective in section 101(a) to restore and maintain the chemical, physical, and biological integrity of the nation’s waters and provided multiple reasons to support that view, including the statutory text, legislative history, and science. Some commenters further asserted that the statute requires the agencies to regulate waters in addition to traditional navigable waters, the territorial seas, and interstate waters.

The agencies agree that the definition of “waters of the United States” must be designed to advance the objective of the Clean Water Act. For the reasons discussed in section IV.A.2 and IV.A.3 of this preamble, the agencies also interpret the Act based on factors other than the science and connectivity of waters, including the text of the statute as a whole and relevant Supreme Court decisions. Further, while the definition of “waters of the United States” is designed to advance the objective of restoring and maintaining the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters—*i.e.*, the paragraph (a)(1) waters—this rule covers additional waters that must be protected to safeguard paragraph (a)(1) waters. All “waters of the United States” receive the full protections of the Clean Water Act.

Commenters expressed various views on the import of the word “navigable” in the statutory term “navigable waters.” Some commenters asserted that the proposed rule did not give enough effect to the word “navigable,” while others suggested that the agencies’ jurisdiction over “waters of the United States” is limited to traditional navigable waters. Further, some commenters stated that Congress intended to exercise only its traditional commerce power over navigation rather than the full extent of its authority under the Commerce Clause. In contrast, other commenters asserted that legislative history demonstrates Congress’s intent to assert broad jurisdiction under the Clean Water Act beyond navigable-in-fact waters.

The agencies agree that while the Clean Water Act applies to “navigable waters,” Congress also broadly defined that term to include “the waters of the United States.” 33 U.S.C. 1362(7). The breadth of that definition reflects a deliberate choice. The relevant House bill would have defined “navigable

waters” as the “navigable waters of the United States, including the territorial seas.” H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 356 (1972). But in conference the word “navigable” was deleted from that definition, and the conference report urged that the term “be given the broadest possible constitutional interpretation.” S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 144 (1972). Additionally, the agencies disagree that Clean Water Act jurisdiction is limited to traditional navigable waters, as this interpretation would render the Clean Water Act narrower than the Rivers and Harbors Act of 1899. Limiting Clean Water Act jurisdiction to traditional navigable waters is also contrary to the views of all nine Supreme Court Justices in *Rapanos* and would undo Congress’s considered and deliberate choice to expand Clean Water Act jurisdiction beyond traditional navigable waters because it found the prior statutes limited to those waters insufficient. Indeed, the *Rapanos* plurality recognized that a wetland may be treated as a covered water if it has a continuous surface connection to a “relatively permanent” tributary that “connect[s] to” traditional navigable waters, without any further inquiry into the tributary’s navigability or status as a link in a channel of commerce. 547 U.S. at 742. The plurality further observed that the 1977 Clean Water Act’s authorization for States to administer the section 404 program for “navigable waters . . . other than” those used or suitable for use “to transport interstate or foreign commerce,” *id.* at 731 (quoting 33 U.S.C. 1344(g)(1)), “shows that the Act’s term ‘navigable waters’ includes something more than traditional navigable waters.” *Id.* (citing *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133). And neither Justice Kennedy nor the dissenting Justices in *Rapanos* endorsed such a jurisdictional limitation. *See id.* at 782–83 (Kennedy, J., concurring in the judgment); *id.* at 807–08 (Stevens, J., dissenting).

The agencies are mindful of the Supreme Court’s decision in *SWANCC* regarding the specific Commerce Clause authority Congress exercised in enacting the Clean Water Act. The *SWANCC* Court observed that Congress signified its intent to exercise its commerce power over navigation with the statement in the Conference Report for the Clean Water Act that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation.” 531 U.S. at 168 n.3 (citing S. Conf. Rep. No. 92–1236, at 144 (1972)). This rule ensures

that waters that either alone or in combination significantly affect the integrity of traditional navigable waters, the territorial seas, or interstate waters are protected under the Clean Water Act, and the Supreme Court has long held that authority over traditional navigable waters is not limited to either protection of navigation or authority over only the traditional navigable water. Rather, the Court has found that “the authority of the United States is the regulation of commerce on its waters . . . [f]lood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control.” *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–26 (1941) (“[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.” (citations omitted)). The significant nexus standard included in this final rule ensures that the definition of “waters of the United States” remains well within the bounds of the Commerce Clause, consistent with the text of the statute and the intent of Congress, and informed by the decision in *SWANCC*.

Some commenters suggested that the agencies cannot rely on the Clean Water Act’s statutory objective or on science to expand Federal jurisdiction beyond the authority granted to the agencies by Congress. However, this final rule does not establish jurisdiction beyond the scope of the Clean Water Act. Indeed, as discussed in section IV.A of this preamble, the agencies conclude that the objective of the Clean Water Act must be considered in defining “waters of the United States” and that consideration of the objective of the Act for purposes of a rule defining “waters of the United States” must include substantive consideration of the effects of a revised definition on the integrity of the nation’s waters. And since the objective of the Clean Water Act is to protect the water quality of the nation’s waters, this rule must be informed by science relevant to water quality, as discussed in section IV.A.2.a of this preamble. At the same time, the

agencies do not interpret the objective of the Clean Water Act to be the only factor relevant to determining the scope of the Act; rather, the limitations established in this rule are based on the agencies’ consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.” The agencies thus have established a definition of “waters of the United States” within the authority granted to the agencies by Congress.

Commenters also expressed various views about the import of Clean Water Act section 101(b). Some commenters asserted that the agencies must read sections 101(a) and 101(b) of the Clean Water Act together in a manner that recognizes States’ traditional authority over their water resources and contended that the agencies did not adequately consider section 101(b) in developing the proposed rule. In contrast, other commenters asserted that section 101(b) is not intended to serve as a limit on Federal jurisdiction, and some of these commenters further suggested that the agencies improperly relied on section 101(b) to limit the scope of “waters of the United States” in the proposed rule. As discussed in section IV.A of this preamble and section V.A of the preamble to the proposed rule, the agencies have carefully, and appropriately, balanced consideration of sections 101(a) and 101(b) in deciding in the rulemaking which waters are subject to Clean Water Act jurisdiction.

Additionally, multiple commenters asserted that a water that is not subject to Federal jurisdiction does not necessarily lack environmental protections because such waters may be subject to Tribal, State, or local regulations. Relatedly, some commenters suggested that improving and maintaining water quality is best achieved through partnerships and that the agencies should work with State and local governments in developing a definition of “waters of the United States.” The agencies recognize that waters that are not jurisdictional under the Clean Water Act do not necessarily lack environmental protections under potential Tribal, State, or local laws. However, Congress enacted the Clean Water Act precisely because of the failures of a statutory scheme that relied primarily on State water quality standards. In 1948, Congress enacted the Federal Water Pollution Control Act, ch.

758, 62 Stat. 1155 (June 30, 1948), which focused on State water quality standards rather than the conduct of individual polluters. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202–03 (1976). In 1972, Congress enacted the Clean Water Act after concluding that these prior efforts had been “inadequate in every vital aspect.” S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971). The Clean Water Act was a “‘complete rewriting’” of existing law, designed to “establish an all-encompassing program of water pollution regulation.” *City of Milwaukee*, 451 U.S. at 317–18 (1981) (citation omitted).

More recently, the Supreme Court in *Maui* identified a key dividing line between the areas where Congress intended to create a comprehensive floor of Federal water quality protections and those areas generally left to the States, observing that “the structure of the [Clean Water Act] indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States.” 140 S. Ct. at 1471 (citing Clean Water Act section 101(b)). The Clean Water Act thus sets a baseline of Federal protection for waters that meet the definition of “waters of the United States” and authorizes States to be more protective than the Act while also leaving substantial responsibility and autonomy to the States over those waters that do not have a significant nexus to the core waters covered by the Act. The agencies also agree that partnerships with Tribes, States, and local governments are important and can help facilitate meeting the objective of the Act and have coordinated with these entities over the course of this rulemaking to ensure that they had opportunities to provide input on this rule and will continue to work with Tribes and States to implement this rule.

b. Comments Regarding Supreme Court Case Law and the Significant Nexus and Relatively Permanent Standards

Many commenters addressed the legal standard for determining the controlling opinion in *Rapanos*. In particular, many commenters cited *Marks v. United States*, 430 U.S. 188 (1977) to support assertions around what controlling legal principles may be derived from the opinion of five or more Supreme Court Justices when there is no majority. Relying on *Marks*, some of these commenters asserted that the *Rapanos* plurality opinion should control the definition of “waters of the United States,” while other commenters stated

that *Marks* allows for use of either the plurality’s relatively permanent standard or Justice Kennedy’s significant nexus standard to assess Clean Water Act jurisdiction. As discussed above, the applicability of *Marks* is not the relevant inquiry for purposes of this rule. Rather, this rule reflects the agencies’ interpretation of the statute, informed by Supreme Court precedent, not an interpretation of the *Rapanos* decision.

The agencies received many comments on the proposed rule’s reliance on and approach to the significant nexus standard. As explained in section IV.A.3.a of this preamble, the agencies have concluded that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act. The agencies have the authority to define the scope of the term “navigable waters,” and they are exercising that authority in this rule. A principal advantage of the significant nexus standard is that it focuses directly and specifically on protecting the integrity of those waters in which the Federal interest is indisputable—traditional navigable waters, the territorial seas, and interstate waters. Further, while the agencies disagree that this rule’s significant nexus standard is inconsistent with Justice Kennedy’s concurring opinion in *Rapanos* (as some commenters had suggested), this rule represents the agencies’ interpretation of the statute, not an interpretation of *Rapanos*. The agencies have concluded that the significant nexus standard as established in this rule is the best interpretation of the statute and that the relatively permanent standard in the rule provides important efficiencies and additional clarity for regulators and the public. Thus, the rule gives effect to the Clean Water Act’s broad terms and environmentally protective aim as well as its limitations.

Some commenters suggested that the significant nexus standard is unclear or produces inconsistent results. In response to this concern, the agencies have established a definition of “significantly affect” in this rule, provided additional guidance on applying the significant nexus standard, and identified implementation tools and resources that will work together to provide clarity and further consistency in implementing the significant nexus standard (*see* section IV.C.9 and section IV.G of this preamble). The agencies have concluded that these actions, along

with the agencies’ extensive experience making determinations under the significant nexus standard, will increase the clarity and consistency of determinations of jurisdiction.

Several commenters discussed whether the proposed rule is consistent with Justice Scalia’s plurality opinion in *Rapanos* and expressed various views about the proper interpretation of that opinion. As discussed in section IV.A.3.a of this preamble, the agencies have concluded that use of the plurality’s approach alone has no grounding in the Clean Water Act’s text, structure, or history and would upend an understanding of the Act’s coverage that has prevailed for decades. Similarly, no Court of Appeals has held that the plurality’s relatively permanent standard is the sole test that may be used to establish Clean Water Act jurisdiction. Additionally, requiring a continuous surface *water* connection, as suggested by some commenters, would add a requirement and language that do not exist in the text of the plurality opinion. The plurality opinion states that “continuous surface connection” is a “physical-connection requirement.” *Rapanos*, 547 U.S. at 742, 751 n.13 (referring to “our [the plurality’s] physical-connection requirement” and asserting that *Riverside Bayview* does not reject “the physical-connection requirement”). The plurality does not state that this standard is a continuous surface *water* requirement. Therefore, the agencies disagree that their longstanding implementation of the continuous surface connection requirement (*see Rapanos* Guidance at 7 n.28), which does not require a continuous flow of water between the wetland and the jurisdictional water, is inconsistent with the plurality opinion. In addition, a continuous surface water connection for wetlands is illogical when many wetlands have surface water only seasonally or intermittently or meet the wetland hydrology factor through saturated soils, a high water table, or other indicators of hydrology, and no scientific or regulatory definition of wetlands demands year-round surface water. *See, e.g.*, 33 CFR 328.3(b) (2008); NRC Report 3–5; *see also* 85 FR 22309 (explaining that “not all abutting wetlands display surface water as the wetland hydrology factor but rather may have saturated soils, a high water table, or other indicators of hydrology”). *See* section IV.C.5.c.ii of this preamble for further discussion of the basis for the agencies’ implementation of the continuous surface connection requirement in this rule.

Additionally, multiple commenters suggested that the relatively permanent

standard is easier to apply than the significant nexus standard. While the agencies recognize that the relatively permanent standard can be easier to apply in many instances, that is not always the case. For example, in the case of a tributary that flows directly into a traditional navigable water, it may be easier to demonstrate that the tributary significantly affects the chemical, physical, or biological integrity of that paragraph (a)(1) water due to its direct contribution of flow, woody debris, and other materials and its close distance to the traditional navigable water than it would be to demonstrate that the flow in that tributary meets the relatively permanent standard. More importantly, greater simplicity that comes at the expense of a profound mismatch with the Clean Water Act's design is not a valid basis for determining the jurisdictional scope of the Act. *Cf. Maui*, 140 S. Ct. at 1470, 1476 (rejecting similar arguments about a need for bright-line certainty in favor of a fact-specific test). Further, treating the relatively permanent standard as the exclusive criterion for Clean Water Act coverage would lead to arbitrary and illogical results. The 2020 NWPR did rely primarily on the relatively permanent standard and, in doing so, introduced new implementation uncertainties, including uncertainties related to the rule's case-specific typical year analysis, which the 2020 NWPR required for most categories of jurisdictional waters and that proved challenging to implement and yielded arbitrary results (*see* section III.B.3 and IV.B.3 of this preamble). In contrast, as discussed above, the agencies now have over a decade of nationwide experience with the significant nexus standard, and it has proven to be eminently administrable. Moreover, the agencies have made changes to this rule to increase the ease of implementation of the significant nexus standard.

Commenters also provided a variety of views on the consistency of the proposed rule with the *SWANCC* Supreme Court decision. Some commenters expressed concern that the proposed rule would expand Federal jurisdiction over potentially all State waters, contrary to the Supreme Court's holding in *SWANCC* that—absent a clear statement from Congress—the Clean Water Act must be construed in a manner that avoids federalism and constitutional questions. The agencies disagree that this rule is contrary to the Supreme Court's holding in *SWANCC* and note that a principal advantage of the significant nexus standard is that it focuses directly and specifically on

protecting traditional navigable waters, the territorial seas, and interstate waters. By design, the significant nexus standard thereby permits jurisdiction over waters only if they significantly affect the waters over which Congress has unquestioned authority. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). Thus, an affirmative finding under the significant nexus standard is, by definition, a finding that Congress's core purpose is implicated. Commenters' constitutional concerns are therefore fully addressed by this rule.

In addition, a few commenters asserted that the Supreme Court in *SWANCC* rejected the notion that a biological or ecological connection alone is sufficient to support a finding of significant nexus. This reading of *SWANCC* is not correct. The Court in *SWANCC* did not hold that the particular “ecological considerations upon which the Corps relied in *Riverside Bayview*,” *Rapanos*, 547 U.S. at 741—*i.e.*, the potential importance of wetlands to the quality of adjacent waters—were irrelevant to Clean Water Act jurisdiction. Rather, the Court held that a different ecological concern—namely, the potential use of the isolated ponds as habitat for migratory birds—could not justify treating those ponds as “waters of the United States.” *See SWANCC*, 531 U.S. at 164–65, 171–72. The Court found that this specific ecological concern was not cognizable because it was unrelated to “what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *Id.* at 172. In contrast, in this rule, the agencies, through application of the significant nexus standard, provide Federal protections for adjacent wetlands and other categories of waters based on their importance to the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters. In addition, the objective of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. 1251(a) (emphasis added). Among the means to achieve the Clean Water Act's objective, Congress established an interim national goal to achieve wherever possible “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. 1251(a)(2). Therefore, the

agencies disagree that consideration of biological effects on paragraph (a)(1) waters is inconsistent with the Clean Water Act.

Finally, several commenters asserted that the Clean Water Act requires broader protections than those afforded by the significant nexus standard and relatively permanent standard. The agencies agree that the Clean Water Act requires broader protection than the relatively permanent standard, but have concluded, as explained in section IV.A.3 of this preamble, that the significant nexus standard is the best construction of the scope of the Clean Water Act.

c. Comments Regarding Categories of Waters in This Rule

Multiple commenters expressed concern that the proposed rule would exceed the agencies' statutory authority by providing for jurisdiction over broad categories of waters (for example, tributaries) that the commenters asserted are not within the limits of the Clean Water Act pursuant to *Rapanos*. The agencies disagree. As explained above, this rule reflects the agencies' independent judgment on the scope of “waters of the United States” based on the text of the relevant provisions of the Clean Water Act and the statute as a whole, the objective and history of the Clean Water Act, the scientific record, the agencies' experience and technical expertise, and other relevant Supreme Court cases. This rule reflects carefully tailored modifications to the 1986 regulations to incorporate both the relatively permanent standard and the significant nexus standard such that the waters covered by the definition are within the limits of the Clean Water Act.

Many commenters discussed the agencies' legal authority to assert jurisdiction over tributaries, including specific types of tributaries (*e.g.*, ephemeral, intermittent, and perennial). Some commenters asserted that providing for jurisdiction over ephemeral and intermittent streams in the definition of “waters of the United States” is not supported by *Rapanos*. In this rule, the agencies are neither categorically including nor categorically excluding ephemeral and intermittent tributaries. Nor are the agencies codifying the opinions in *Rapanos*. Rather, the agencies are interpreting the phrase “waters of the United States” to include tributaries that meet either the significant nexus standard or the relatively permanent standard based on their conclusions in section IV.A of this preamble. Further, there is nothing in the text of the statute or its legislative history that excludes some categories of

tributaries based on their flow regime. Indeed, as discussed further below, the best available science demonstrates that ephemeral and intermittent streams can significantly affect the chemical, physical, and biological integrity of paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters.

Multiple commenters suggested that, pursuant to Supreme Court precedent and the Clean Water Act, jurisdiction over non-navigable tributaries should be limited to tributaries (1) containing clearly discernible features and contributing consistent flow into traditional navigable waters; or (2) that carry a volume of water needed for navigable capacity of a traditional navigable water; or (3) of a quality needed for interstate commerce, where impairment of water quality would have a negative effect on interstate commerce. The agencies disagree that the case law, the statute, or the Constitution provide these precise limitations on the scope of tributaries covered by the Clean Water Act. The text of “navigable waters,” and of its specialized definition, does not include particular flow requirements. As discussed further below, the agencies have concluded that tributaries that meet either the relatively permanent standard or the significant nexus standard are “waters of the United States,” and flow is a consideration under both standards. These limitations are informed by Supreme Court case law and designed to be well within constitutional limits.

In contrast, other commenters asserted that tributaries should be categorically jurisdictional rather than subject to a case-specific analysis and that the *Rapanos* decision supports a categorical approach. The agencies agree that Justice Kennedy’s concurring opinion in *Rapanos* did not reject the agencies’ then-existing regulations governing tributaries, which were more categorical than this rule. 547 U.S. at 781; *see also id.* at 761. More broadly, it is a well-established principle of administrative law that agencies may choose to proceed via rulemaking or adjudication. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion.”). With respect to the significant nexus standard in particular, Justice Kennedy stated that the agencies could proceed to determine tributaries and their adjacent wetlands jurisdictional through regulations or adjudication. *See Rapanos*, 547 U.S. at 780–81. As explained in section IV.A.3.a.iii of this preamble, the

agencies have concluded that adjudication of which tributaries are within Clean Water Act protections, through case-specific application of the significant nexus standard or the relatively permanent standard under this rule, is appropriate. *See* section IV.C.10 of this preamble for additional guidance to landowners on determinations of jurisdiction and the appeals process for such determinations.

Many commenters also discussed the agencies’ legal authority to assert jurisdiction over adjacent wetlands. Some commenters stated that the proposed rule’s relatively permanent standard was inconsistent with the *Rapanos* plurality opinion, asserting that the plurality opinion requires a continuous surface connection for adjacent wetlands to be jurisdictional. As stated elsewhere, the agencies disagree that the relatively permanent standard as applied in this rule is inconsistent with the plurality opinion. Under this rule, an adjacent wetland is jurisdictional if there is a continuous surface connection between that adjacent wetland and a paragraph (a)(2) impoundment or jurisdictional tributary when the paragraph (a)(2) impoundment or jurisdictional tributary is relatively permanent.

In addition, some commenters expressed concern that the proposed rule’s aggregation of wetlands and the relevant reach approach would be contrary to Justice Kennedy’s significant nexus standard, which the commenters suggested requires that each wetland be judged in its own right. The agencies disagree that aggregation of wetlands and their tributaries is inconsistent with the significant nexus standard. First, Justice Kennedy explicitly stated that similarly situated waters should be assessed for a significant nexus “alone or in combination.” *Rapanos*, 547 U.S. at 780. Justice Kennedy understood that waters provide critical functions to downstream waters in combination, explaining: “With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 779–

780 (citing 33 CFR 320.4(b)(2)). And Justice Kennedy’s understanding is scientifically correct—though filling in a single wetland might not on its own materially influence a paragraph (a)(1) water, its impact is more likely to be significant when evaluated in combination with other similarly situated waters. Second, the agencies interpret “waters of the United States” to include waters that meet the significant nexus standard as codified in this rule because the agencies have determined, informed by the best available science and the text, structure, and legislative history of the Clean Water Act, that this standard, including the aggregation of waters authorized by it, advances the objective of the Act. The agencies have also established a definition of “significantly affect” in this rule that identifies the factors and the functions for determining whether the significant nexus standard is met, thus ensuring that the agencies’ determinations of jurisdiction are based on consistent application of sound scientific principles.

Further, several commenters stated that the agencies should assert jurisdiction only over those wetlands that directly abut other “waters of the United States.” These commenters asserted that doing otherwise would exceed the constitutional limits of the agencies’ Clean Water Act jurisdiction. For the reasons discussed above, the agencies disagree that only wetlands that directly abut other “waters of the United States” should be jurisdictional. Moreover, as discussed elsewhere in this preamble, the addition of the significant nexus standard in this rule ensures that the definition of “waters of the United States” does not exceed constitutional limits.

In contrast, several commenters asserted that all adjacent wetlands—not just those adjacent to the paragraph (a)(1) waters—should be categorically jurisdictional. Some of these commenters suggested that providing categorical protection for such wetlands is necessary to achieve the Clean Water Act’s statutory objective. The agencies agree that providing categorical protection of adjacent wetlands can be a means of achieving the Act’s objective but disagree that it is the only means. As noted by Justice Kennedy, the agencies can reasonably proceed to determine which tributaries and their adjacent wetlands are jurisdictional through regulations or adjudication, *see* 547 U.S. at 780–81; *see also NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. at 294. With respect to wetlands adjacent to tributaries, the agencies are requiring case-specific determinations

of whether such wetlands meet the relatively permanent standard or the significant nexus standard to be jurisdictional under this rule.

Many commenters also addressed the agencies' legal authority to assert jurisdiction over paragraph (a)(5) waters (the category of waters described in paragraph (a)(3) of the proposed rule). Some commenters suggested that, per the Supreme Court's decision in *SWANCC*, the agencies lack authority to assert jurisdiction over paragraph (a)(5) waters or that, under *Rapanos*, the significant nexus standard should be applied only to tributaries or wetlands adjacent to tributaries, not to paragraph (a)(5) waters. First, as explained further in section IV.A.1 of this preamble, in this rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. Therefore, while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of *SWANCC* or the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles as set forth in *Marks* to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where no opinion commands a majority. Furthermore, the agencies disagree that asserting jurisdiction over any waters that meet the significant nexus standard, including any paragraph (a)(5) waters, is inconsistent with *SWANCC* or *Rapanos*. Based on the law, the science, and agency expertise, the agencies conclude that the significant nexus standard applies to tributaries, adjacent wetlands, and intrastate lakes and ponds, streams, or wetlands not covered by other categories (*i.e.*, paragraphs (a)(3), (a)(4), and (a)(5) waters under this rule). Justice Kennedy's explication of the significant nexus standard applies to each of these types of waters. In *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* "establish the framework for" determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of "navigable waters"—"the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act;" and "[a]bsent a significant nexus, jurisdiction under the Act is lacking." 547 U.S. at 767. Justice Kennedy further explained that "[t]he required nexus must be assessed in

terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' and it pursued that objective by restricting dumping and filling in 'navigable waters.'" *Id.* at 779 (citing 33 U.S.C. 1251(a), 1311(a), 1362(12)). Justice Kennedy then concluded that the term "waters of the United States" encompasses wetlands and other waters that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (citation omitted). While Justice Kennedy's discussion of the application of the significant nexus standard focused on adjacent wetlands in light of the facts of the cases before him, his opinion is clear that he does not conclude that the significant nexus analysis applies only to adjacent wetlands. As he explicitly states, "the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act." *Id.* at 767 (emphasis added). Fundamentally, Justice Kennedy's significant nexus analysis is about the fact, long acknowledged by Supreme Court case law, that protection of waters from pollution can be achieved only by controlling pollution of upstream waters. In addition, the Court in *SWANCC* did not hold that "other waters" (a category that has been modified and codified in this rule as paragraph (a)(5) waters) could never be jurisdictional; rather it held that the potential use of isolated ponds as habitat for migratory birds could not be used as the sole basis to justify treating those ponds as "waters of the United States." *See* 531 U.S. at 164–65, 171–72. Indeed, the *SWANCC* Court in describing *Riverside Bayview* stated that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167. In this rule, the agencies are not protecting paragraph (a)(5) waters based on their potential use as habitat for migratory birds or based on their use broadly in interstate commerce as the 1986 regulations did. Instead, this rule includes paragraph (a)(5) waters on a case-specific basis based on their importance to the integrity of traditional navigable waters, the territorial seas, and interstate waters because they meet either the relatively permanent standard or the significant nexus standard.

Other commenters stated that the proposed rule does not go far enough in

protecting paragraph (a)(5) waters. The agencies have concluded that this rule's reliance on the relatively permanent standard and significant nexus standard properly balances the Clean Water Act's broad statutory objective, while giving meaning to the word "navigable." Accordingly, the agencies are not asserting jurisdiction over waters and wetlands simply where "the use, degradation or destruction of [such waters] could affect interstate or foreign commerce." *Cf.* 33 CFR 328.3(a)(3) (1999).

B. Alternatives to This Rule

In promulgating a rule to repeal existing regulations, agencies must address and consider alternative ways of achieving the relevant statute's objectives and must provide adequate reasons to abandon those alternatives. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As discussed below, the agencies have thoroughly considered alternatives to this rule and have concluded that this final rule best accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. The agencies have reconsidered the policies, interpretations, and conclusions of the 2020 NWPR. Although the 2020 NWPR has been vacated, it is the text currently in the Code of Federal Regulations. For the reasons articulated in this preamble, the agencies are changing their approach from that of the 2020 NWPR to interpreting the scope of "waters of the United States."

1. 2015 Clean Water Rule

The agencies are not repromulgating the 2015 Clean Water Rule. Unlike aspects of the 2015 Clean Water Rule, this rule is not based on categorical significant nexus determinations. Rather, this rule generally restores the longstanding and familiar categories of the 1986 regulations and establishes jurisdictional limitations based on case-specific application of the relatively permanent standard and the significant nexus standard to certain categories of waters in the rule.

Many commenters expressed support for the 2015 Clean Water Rule because they viewed it as informed by science, and because under that rule certain types of waters were categorically jurisdictional, which eliminated the need for extensive case-by-case

jurisdictional determinations. Many other commenters asserted that they did not support the 2015 Clean Water Rule because they viewed that rule as expanding Federal jurisdiction over waters that should not be jurisdictional. The agencies have concluded that the 2015 Clean Water Rule, while designed to advance the objective of the Clean Water Act, is not the best alternative to meet the policy goals of the agencies: to quickly promulgate a durable rule that retains the protections of the longstanding regulatory framework and avoids harms to important aquatic resources, informed by the best available science and consistent with the agencies' determination of the statutory limits on the scope of the "waters of the United States," informed by relevant Supreme Court case law. Moreover, agencies may choose to proceed via rulemaking or adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). With respect to the significant nexus standard in particular, Justice Kennedy also stated that the agencies could proceed to determine tributaries and their adjacent wetlands jurisdictional through regulations or adjudication. *See* 547 U.S. at 780–81. As explained in section IV.A.3.a.iii of this preamble, the agencies have concluded that the approach in this rule—*i.e.*, providing categorical jurisdiction for paragraph (a)(1) waters and for wetlands adjacent to paragraph (a)(1) waters, and adjudicating which waters in paragraphs (a)(2) through (5) are "waters of the United States" through case-specific application of the significant nexus standard or the relatively permanent standard under this rule—is appropriate and fulfills the goals of the agencies and the objective of the Clean Water Act.

2. 2019 Repeal Rule

The agencies agree with the concept in the 2019 Repeal Rule of returning to the pre-2015 regulatory framework as a means of restoring a longstanding and familiar regulatory regime,⁶⁷ but find that this rule is preferable to the 2019 Repeal Rule for several reasons. As an initial matter, like the 2019 Repeal Rule, this rule seeks to return generally to the

longstanding regulatory framework that existed prior to the 2015 Clean Water Rule, but this rule also restores those regulations with necessary limitations to ensure the definition of "waters of the United States" reflects consideration of the agencies' statutory authority under the Clean Water Act and relevant Supreme Court decisions. Additionally, compared to the 2019 Repeal Rule, this rule provides greater clarity by adding a new definition of "significantly affect" and by streamlining and restructuring the 1986 regulations, including by consolidating certain provisions. This rule also codifies a number of exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime and thus provides more clarity and certainty than the 2019 Repeal Rule.

Moreover, the agencies have substantial concerns regarding the legal rationale underpinning the 2019 Repeal Rule. In particular, the agencies are concerned that the interpretation of relevant Supreme Court case law in the 2019 Repeal Rule is flawed and thereby led to an erroneous assessment of the legality of the approach to the significant nexus standard in the 2015 Clean Water Rule. *See, e.g.*, 84 FR 56638–52 (October 22, 2019). The agencies' reading of the Clean Water Act in the 2019 Repeal Rule is also inconsistent with the agencies' considered interpretation, at this time, of the Act. For these reasons, the agencies find that the 2019 Repeal Rule is not an appropriate alternative to this rule.

3. 2020 NWPR

The agencies have also evaluated the 2020 NWPR as an alternative to this rule. After carefully considering the 2020 NWPR in light of the text, objective, and legislative history of the Clean Water Act, Supreme Court case law, the best available scientific information, and the agencies' experience in implementing it for over a year, the agencies do not find that the 2020 NWPR is a suitable alternative to this rule.

a. The 2020 NWPR Failed To Advance the Objective of the Clean Water Act

The agencies do not consider the 2020 NWPR to have advanced the statutory objective of the Clean Water Act, which the Supreme Court recently emphasized is an important aspect of defining the jurisdictional scope of the Act. *See, e.g., Maui*, 140 S. Ct. at 1468–69 (emphasizing the importance of considering the Clean Water Act's objective when determining the scope of the Act and finding that "[t]he Act's

provisions use specific definitional language to achieve this result," including the phrase "navigable waters"). One critical example of the 2020 NWPR's failure to advance the Clean Water Act's objective is its removal of the significant nexus standard without considering an alternative approach to protecting waters that significantly affect paragraph (a)(1) waters. To be clear, while the agencies view the significant nexus standard as the best interpretation of section 502(7) of the Clean Water Act, the agencies do not view the Supreme Court's interpretations of the scope of "waters of the United States" as requiring adoption of that approach. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). Yet the 2020 NWPR's rejection of the significant nexus standard while failing to adopt any alternative standard for jurisdiction that adequately addresses the effects of degradation of upstream waters on paragraph (a)(1) waters, fails to advance the Clean Water Act's objective.

The significant nexus inquiry reflects and furthers the objective of the Clean Water Act by allowing for a scientific evaluation of the effect of wetlands, tributaries, and other types of waters on paragraph (a)(1) waters. For that reason, evolving forms of this inquiry are present in *Riverside Bayview*, *SWANCC*, and Justice Kennedy's concurring opinion in *Rapanos*. The 2020 NWPR rejected this scientific approach and instead, for example, categorically excluded ephemeral features without appropriately considering scientific information about their important effects on the integrity of paragraph (a)(1) waters. In addition, in limiting the scope of protected wetlands to those that touch other jurisdictional waters or demonstrate evidence (which could include a natural berm, bank, dune, or similar natural feature) of a regular surface water connection to other jurisdictional waters, the 2020 NWPR failed to appropriately consider the many effects of other categories of wetlands on paragraph (a)(1) waters. For example, ephemeral streams that flow directly into the Rio Grande (a traditional navigable water) and wetlands separated from the Mississippi River (a traditional navigable water) by artificial levees and that lack a direct hydrologic surface connection to the river in a typical year, would be non-jurisdictional under the 2020 NWPR, yet both can have significant effects on these traditional navigable waters.

The 2020 NWPR contended that the drastic reduction in the scope of Clean Water Act jurisdiction "pursues" the objective of the Act because it would be

⁶⁷ 2019 Repeal Rule, Response to Comments at 9 ("The agencies find that reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period"), 15 ("[T]his final rule to recodify the 1986 regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on the proposed revised definition of "waters of the United States.").

supplemented by the Act's non-regulatory programs as well as Tribal, State, and local efforts. The 2020 NWPR explained: "The CWA's longstanding regulatory permitting programs, coupled with the controls that States, Tribes, and local entities choose to exercise over their land and water resources, will continue to address the discharge of pollutants into waters of the United States, and the CWA's non-regulatory measures will continue to address pollution of the nation's waters generally. These programs and measures collectively pursue the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." 85 FR 22269 (April 21, 2020). The agencies disagree with the 2020 NWPR's assertion that such "collective pursuit" of the objective of the Clean Water Act based on these programs and measures appropriately considers the objective of the Act and have concluded that the 2020 NWPR did not advance the objective of the Act, the proper measure under the statute and Supreme Court case law of a rule defining "waters of the United States."

The agencies agree with the 2020 NWPR's position that the Clean Water Act's non-regulatory measures, such as grantmaking and technical assistance authorities, advance the objective the Act. However, the agencies do not view these authorities as limiting the scope of "waters of the United States," or as relevant to determining whether a definition of "waters of the United States" advances the objective of the Clean Water Act. The non-regulatory Clean Water Act programs cited by the 2020 NWPR complement and support the permitting programs at the core of the Act, rather than limiting their geographic scope. For example, the 2020 NWPR cited the Clean Water Act's provisions to address pollution into key waters in its discussion, including the Great Lakes, 33 U.S.C. 1258, the Chesapeake Bay, *see id.* at 1267(a)(3), Long Island Sound, *see id.* at 1269(c)(2)(D), and Lake Champlain, *see id.* at 1270(g)(2). These resources are "waters of the United States" to which regulatory programs apply, and the technical assistance and grants in the cited sections assist States and others in achieving the requirements of the Clean Water Act, but they do not limit the regulatory programs' scope. To the extent there is ambiguity as to the effects of these non-regulatory programs on the scope of the "waters of the United States," the agencies have concluded based on the text and structure of the statute that they are complementary, rather than limiting.

As discussed in section III.A of this preamble, the Clean Water Act's fundamental innovation in 1972 was to "establish an all-encompassing program of water pollution regulation," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492–93 (1987). The definition of "waters of the United States" establishes the scope of that program. The agencies therefore find that it is appropriate to consider whether the definition of the scope of waters to which the Clean Water Act's water pollution regulations apply helps to achieve that objective. Thus, the 2020 NWPR's statement that this rule "pursues" the objective of the Act if Clean Water Act and non-Clean Water Act programs are viewed in "combination" is not consistent with the better reading of the text and structure of the Act, its legislative history, or Supreme Court decisions concerning the effect of enactment of the Clean Water Act in 1972, nor does it fulfill the agencies' obligation to consider the objective of the Clean Water Act by assessing the water quality effects of revising the definition of "waters of the United States."

The preamble to the 2020 NWPR also cited the introductory policy provision of the Clean Water Act in section 101(b), to protect the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" as a justification, in part, for its line-drawing. For example, one of the most environmentally significant decisions in the 2020 NWPR was its categorical exclusion of all ephemeral features from Clean Water Act jurisdiction. The agencies cited section 101(b) as a basis for this exclusion, because the exclusion would "respect[] State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events." 85 FR 22319. Nothing in the agencies' explanation, however, links the agencies' line-drawing to the text or purpose of section 101(b). Nor do the agencies, at this time, see any linkage between the flow regime of ephemeral features and the nature or extent of State authorities referenced in section 101(b). Indeed, as discussed in section IV.A.c.i of this preamble, available science unequivocally demonstrates that ephemeral features can implicate the important Federal interest in the protection of the integrity of traditional navigable waters, the territorial seas, and interstate waters. Likewise, the 2020 NWPR cited section 101(a) as support for categorically excluding ephemeral features, but again did not explain how this decision relates to or

advances the Clean Water Act's objective. 85 FR 22277 (April 21, 2020).

The 2020 NWPR similarly relied upon the policy provision in section 101(b) as a basis for its definition of adjacent wetlands, in particular the decision to exclude from consideration subsurface hydrologic connections between a wetland and an adjacent water when determining jurisdiction. It stated, "balancing the policy in CWA section 101(a) with the limitations on Federal authority embodied in CWA section 101(b), the agencies are finalizing the definition of 'adjacent wetlands' that does not include subsurface hydrologic connectivity as a basis for determining adjacency." *Id.* at 22313. Again, the 2020 NWPR did not explain how excluding consideration of subsurface hydrologic connections relates to or derives from the text of section 101(b), and the agencies do not now discern such a linkage. And as with the definition of "tributaries," the 2020 NWPR did not explain how this choice relates to or advances the objective of the Clean Water Act.

In sum, based on the text and structure of the statute and Supreme Court case law, the agencies have determined that the 2020 NWPR is not a suitable alternative to this rule because it fails to advance the objective of the Clean Water Act. The 2020 NWPR does not establish either the significant nexus standard or an alternative standard that similarly advances the objective of the Clean Water Act by protecting waters, including ephemeral features, wetlands, and paragraph (a)(5) waters where they have a significant effect on the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters. Nor does the 2020 NWPR appropriately value the importance of Federal programs in achieving the objective of the Clean Water Act.

b. The 2020 NWPR Was Inconsistent With the Best Available Scientific Information

The 2020 NWPR's exclusion of major categories of waters from the protections of the Clean Water Act, specifically in the definitions of "tributary" and "adjacent wetlands," runs counter to the scientific record demonstrating how such waters can affect the integrity of downstream waters. Specifically, as many commenters on the proposed rule noted, its categorical exclusion of ephemeral features and large categories of wetlands was inconsistent with the scientific record before the agencies. In addition, the 2020 NWPR's limits on the scope of protected wetlands to those

that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters run counter to the ample scientific information demonstrating the effects of wetlands on downstream waters, including paragraph (a)(1) waters, when they have other types of connections.

First, the definition of the term “tributary” in the 2020 NWPR categorically excluded ephemeral features from the regulatory protections of the Clean Water Act, contrary to scientific information conclusively demonstrating the vital role these streams can play in protecting the integrity of downstream waters, including paragraph (a)(1) waters. The science is clear that aggregate effects of ephemeral streams “can have substantial consequences on the integrity of the downstream waters” and that the evidence of such downstream effects is “strong and compelling,” as discussed above. Science Report at 6–10, 6–13. EPA’s SAB Review of the draft Science Report explains that ephemeral streams “are no less important to the integrity of the downgradient waters” than perennial or intermittent streams. 2014 SAB Review at 22–23, 54 fig. 3. While in the arid Southwest, streams flow into downstream waters less frequently than they do in the wetter East, the Science Report emphasizes that short duration flows through ephemeral streams can transport large volumes of water to downstream rivers. Science Report at 6–9. For instance, the report notes that ephemeral streams supplied 76% of flow to the Rio Grande following a large rainstorm. *Id.* at 3–8. The 2014 SAB Review emphasizes that the “cumulative effects” of ephemeral flows in arid landscapes can be “critical to the maintenance of the chemical, physical, and biological integrity” of downstream waters. 2014 SAB Review at 22.

Similarly, the 2020 NWPR’s definition of “adjacent wetlands” excluded many categories of wetlands that can play a vital role in protecting the integrity of waters to which they are connected, including paragraph (a)(1) waters. In defining “adjacent wetlands,” the 2020 NWPR limited the scope of wetlands protected by the Clean Water Act’s regulatory programs to those that either abut or have evidence of certain surface water connections to other protected waters in a typical year. 85 FR 22340. Specifically, the rule encompassed wetlands that (i) abut, meaning to touch, another jurisdictional water; (ii) are flooded by a jurisdictional water in a typical year; (iii) are separated from a jurisdictional water only by a natural feature, such as a berm, which provides

evidence of a direct hydrologic surface connection with that water; or (iv) are separated from a jurisdictional water only by an artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water in a typical year. *Id.* As with the tributary definition, the 2020 NWPR stated that the definition of “adjacent wetlands” is “informed by science.” *Id.* at 22314. Yet the 2020 NWPR’s limits on the scope of protected wetlands to those that touch or demonstrate evidence of a regular surface water connection to other jurisdictional waters contradicted the ample scientific information before the agencies conclusively demonstrating the effects of wetlands on downstream waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections; wetlands with shallow subsurface connections to other protected waters; or other wetlands proximate to jurisdictional waters. *See Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring in the judgment) (“Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system.”). As commenters noted, under the 2020 NWPR’s approach, if a river were surrounded by hundreds of acres of wetland, building a road or levee between a river and a wetland complex could potentially sever Clean Water Act protections for the entire wetland complex.

The overwhelming scientific information before the agencies weighs decisively against the limited definition of “adjacent wetlands” in the 2020 NWPR. Available scientific information demonstrates the significant effects of categories of wetlands excluded by the 2020 NWPR on the chemical, physical, and biological integrity of paragraph (a)(1) waters. For example, whereas the 2020 NWPR provided that wetlands flooded by jurisdictional waters are only protected if the flooding occurs in a “typical year,” the Science Report states that wetlands that are “rarely” or “infrequently” flooded by streams and rivers can be “highly connected” to those waters and have “long-lasting effects” on them. Science Report at 4–39. The Science Report notes that effects “critical to maintaining the health of the river” result from large floods that provide “infrequent connections” with more distant wetlands. *Id.* Reflecting these concerns, the October 16, 2019

SAB Draft Commentary on the proposed 2020 NWPR states that the narrow definition of “adjacent wetlands” in the 2020 NWPR as it was proposed “departs from established science.” The agencies have weighed these statements and in light of the information about the importance of “infrequently” flooded wetlands to downstream waters, have concluded that excluding wetlands that lack the limited types of surface water connections to other jurisdictional waters required by the 2020 NWPR lacks scientific support.

The SAB’s assessment of the 2020 NWPR proposal recognizes that the proposal was not consistent with the scientific information in the record, including the Draft Science Report that the SAB had previously reviewed. SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act (February 27, 2020) (hereinafter, “SAB Commentary”). The SAB Commentary emphasizes that the proposal does not “fully incorporate the body of science on connectivity” that the SAB had reviewed in the Draft Science Report and offers “no scientific justification for disregarding the connectivity of waters accepted by current hydrological science.” *Id.* at 2.

The 2020 NWPR stated that the “agencies’ decisions in support of this rule have been informed by science.” 85 FR 22288 (April 21, 2020). For example, the 2020 NWPR cited the concept of a “connectivity gradient” as a basis for excluding ephemeral features. *Id.* (citing the SAB Commentary). The 2020 NWPR referred to the SAB Commentary’s recommendation that the agencies recognize that connectivity occurs along a gradient allowing for variation in chemical, physical, and biological connections. *Id.* (citing the SAB Commentary at 3). The 2020 NWPR asserted that there is a “decreased” likelihood that waters with “less than perennial or intermittent” flow, *i.e.*, ephemeral streams, will affect the chemical, physical, and biological integrity of downstream waters. 85 FR 22288 (April 21, 2020).

Upon careful review, the agencies have concluded that the 2020 NWPR’s reliance on the SAB’s recommendation is out of context and is inconsistent with the information in the SAB Commentary as a whole. The connectivity gradient the 2020 NWPR cited was just a hypothetical example⁶⁸

⁶⁸The figure cited is captioned in part as “Hypothetical illustration of connectivity gradient and potential consequences to downstream waters.” 2014 SAB Review at 54 (emphasis added). Nowhere

meant to illustrate a single aspect of connectivity—hydrological, or physical connectivity—and sheds no light on the many other ways that features connect to and affect downstream waters. According to the SAB itself, the scientific information the agencies provided in support of categorically excluding ephemeral features does not fully represent the discussion in the cited SAB Commentary and runs counter to key elements of the scientific record before the agencies. SAB Commentary at 2.

The 2020 NWPR also stated that the line it drew between regulated and non-regulated wetlands, which excluded large categories of wetlands covered by previous regulatory regimes is “informed by science.” 85 FR 22314 (April 21, 2020). The 2020 NWPR cited statements from the 2014 SAB Review to the effect that wetlands situated alongside other waters are likely to be connected to those waters, whereas “those connections become less obvious” as the distance “increases.” *Id.* (citing the 2014 SAB Review at 55); *see also id.* at 22314 (citing the 2014 SAB Review at 60 (stating “[s]patial proximity is one important determinant [influencing the connections] between wetlands and downstream waters”). In addition, the 2020 NWPR cited a statement in the Science Report that explained, “areas that are closer to rivers and streams have a higher probability of being connected than areas farther away.” *Id.* at 22314 (citing the Science Report at ES-4).

Despite these citations, the 2020 NWPR’s definition of “adjacent wetlands” was not based on proximity, but instead on a “direct hydrologic surface connection,” a factor that is distinct from proximity. *See id.* at 22340. The 2020 NWPR’s definition of “adjacent wetlands” may exclude wetlands fifteen feet away from jurisdictional waters if they are separated by a levee that does not convey flow in a typical year, but include wetlands much further away so long as they are inundated by flooding from the jurisdictional water in a typical year. Therefore, neither of the two scientific rationales the 2020 NWPR cited for its conclusions actually support the lines drawn in that rule.

Many commenters agreed with the agencies that the 2020 NWPR was inconsistent with the best available science. Some commenters asserted, however, that the definition of “waters of the United States” is a policy interpretation that may be informed by

science but cannot be based on science alone. As discussed in section IV.A.2 of this preamble, the agencies agree that science alone cannot dictate where to draw the line defining “waters of the United States.” But science is critical to determining how to attain Congress’s plainly stated objective to restore and maintain the chemical, physical, and biological integrity of the nation’s waters and properly evaluating which waters are the subject of Federal jurisdiction due to their effects on paragraph (a)(1) waters. Only by relying upon scientific principles to understand the way waters affect one another can the agencies know whether they are achieving that objective. The 2020 NWPR is not a suitable alternative to this rule because it cannot advance the objective of the Act given its lack of scientific support.

c. The 2020 NWPR Was Difficult To Implement and Yielded Inconsistent Results

In addition to the above concerns, the agencies’ experience implementing the 2020 NWPR for over a year made clear that foundational concepts underlying much of the 2020 NWPR were confusing and difficult to implement. While any rule that draws lines between jurisdictional waters and non-jurisdictional waters will involve some implementation challenges, the agencies have found the challenges imposed by the 2020 NWPR to be impracticable in important respects.

Many commenters stated that the agencies should retain the 2020 NWPR because it was clear, pragmatic, and easy to implement. For example, commenters stated that the rule provided “bright lines,” was based on readily observable surface features, and categorically excluded certain categories of waters. The agencies recognize that the regulatory text of the 2020 NWPR contained categorical language and referred to observable surface features. However, the “bright lines” and surface feature tests relied upon the concept of “typical year,” which, as other commenters pointed out, and as discussed further below, was extremely challenging to implement and led to arbitrary results. As a commenter emphasized, contrary to statements often made about the 2020 NWPR, under that rule landowners could not determine whether a stream or wetland is jurisdictional by standing on their property. Rather, the commenter stated that property owners would need to determine the source and timing of flow, whether the stream flowed into a navigable water off-property, whether wetlands abutted a jurisdictional water,

and whether a downstream segment lacked sufficient flow or otherwise broke jurisdiction. The commenter asserted that many of these inquiries would require the decision-maker to trespass onto properties of others, or guess. Furthermore, the commenter stated that in many cases, critical information that the rule required the property owner to know—such as whether a wetland is inundated by flooding from a jurisdictional water in a typical year—is not normally recorded. This comment is consistent with the agencies’ experience that the 2020 NWPR did not “provide[] clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public.” *See* 85 FR 22252 (April 21, 2020). With respect to categorical exclusions, this rule retains and codifies a list of categorical exclusions, as did the 2020 NWPR and the 2015 Clean Water Rule. *See* further discussion in section IV.C.7 of this preamble. The challenges that the 2020 NWPR imposed to establish jurisdiction for features that it appears to define as jurisdictional, and that significantly affect the integrity of paragraph (a)(1) waters, further undermine the 2020 NWPR’s viability as an alternative to this rule.

i. “Typical Year” Metric

The “typical year” is a concept fundamental to many of the 2020 NWPR’s definitions. 85 FR 22273 (April 21, 2020). Under the rule, tributaries and lakes, ponds, and impoundments of jurisdictional waters were only jurisdictional if they had certain surface water connections with a traditional navigable water or the territorial seas at least once in a typical year. 33 CFR 328.3(c)(6), (12). Two categories of wetlands only met the adjacency test for jurisdiction if they had a surface water connection with other jurisdictional waters once in a typical year. 33 CFR 328.3(c)(1). As a scientific matter, the concept of “typical year conditions,” including precipitation normalcy, may be relevant to ensuring that certain surface water connections in natural streams are not being observed under conditions that are unusually wet or dry. In terms of implementation, the concept of precipitation normalcy is valid in certain contexts, such as to inform determinations as to the presence of a wetland. However, in many important contexts, available tools, including the tools the 2020 NWPR recommended, cannot reliably demonstrate the presence of surface water connections in a typical year, which are a necessary element of most categories of jurisdictional waters under the 2020 NWPR. For example, a recent

in its review does the 2014 SAB Review indicate that this is the actual or only connectivity gradient.

study by the Corps found that precipitation normalcy (as calculated based on the methodology described in the preamble to the 2020 NWPR) was neither a reliable predictor of streamflow normalcy, nor was it a precise predictor of streamflow percentiles, in an analysis of watersheds across the United States.⁶⁹ These challenges undermine the 2020 NWPR's claim that it enhanced the "predictability and consistency of Clean Water Act programs." See 85 FR 22250 (April 21, 2020).

One of the significant implementation challenges of the typical year metric is that it can be difficult and sometimes impossible to identify the presence of a surface water connection in a typical year. Such connections are often not apparent from visual field observation alone. For example, on the day of a visit to an intermittent stream that flows only several months or several weeks a year, it is very unlikely that an observer would see surface water flows connecting to a downstream jurisdictional water. Similarly, though many ponds or wetlands may be frequently inundated by flooding from another water, in arid areas those features may be inundated only a few times every year, and sometimes the inundation occurs on a single day or within a matter of hours. While these waters satisfy the 2020 NWPR's jurisdictional test, agency staff would probably not be able to determine that they do, given how unlikely they would be to observe these infrequent connections. The difficulty of finding the direct hydrologic connections required by the typical year concept during a field visit is exacerbated by the fact that the 2020 NWPR discouraged reliance on field indicators. See, e.g., *id.* at 22292 ("The agencies . . . conclude that physical indicators of flow, absent verification of the actual occurrence of flow, may not accurately represent the flow classifications required for tributaries under this rule.").

Given the insufficiency of visual field observations to assess the presence of a surface water connection as specified in the 2020 NWPR, under that rule agency staff often needed to expend substantial time and resources to try to obtain ancillary data to determine flow conditions at a particular site in a typical year. Hydrologic modeling tools and advanced statistical analyses could be employed where sufficient flow data

are available, but often data needed to conduct such analyses is limited or lacking altogether, especially for smaller streams. Few streams across the country have hydrologic gages that continuously measure flow, as most such gages are located on larger rivers with perennial flow. Moreover, "typical year conditions" are often irrelevant to the extent of flow in human-altered streams, including effluent-dependent streams. The 2020 NWPR did not explain why human-altered hydrology should be subject to the same typical year requirement as natural streams.

For the same reasons that agency staff are unlikely to witness the specific surface water connections required under the 2020 NWPR during a site visit in dry regions or during the dry season, they are also unlikely to capture evidence of a surface water connection between a stream and a downstream traditional navigable water or the territorial seas using available aerial photographs taken during typical year conditions. Aerial photographs are often taken just once per year or once every other year and staff have no way of ensuring that they were taken during a typical year. High-resolution satellite imagery can serve as a reliable source to demonstrate specific surface water connections. But the availability and usability of such imagery varies across the country, depending on access, update intervals, cloud cover, and land cover (*i.e.*, vegetation or trees that obscure aerial views of stream channels, requiring the use of advanced tools to detect features of interest or the presence of water), so that such tools may be unlikely to demonstrate that specific surface water connections are occurring in a typical year. Moreover, as the 2020 NWPR acknowledged, "characteristics of tributaries may not be visible in aerial photographs" taken during periods of "high shrub or tree cover," 85 FR 22299 (April 21, 2020). Commenters on the proposed rule stated that Tribes and States lacked sufficient data, aerial photography and access to other tools required to support the use of the typical year test in many locations. They expressed concern that under-resourced communities suffer a particular lack of data necessary to support this test. New satellites are expected to surmount some of these issues in the future, but as this information is not yet available, regulators could not use it to inform jurisdiction based on the requirements in the 2020 NWPR. Remote tools, such as aerial or satellite imagery, are often useful in implementing any definition of "waters of the United States," but the

2020 NWPR's typical year criteria made use of these resources particularly challenging.

The same difficulties created challenges in detecting surface hydrologic connections that occurred in a typical year to meet the 2020 NWPR's definition of "adjacent wetlands" or "lakes and ponds, and impoundments of jurisdictional waters." The 2020 NWPR's standard of inundation by flooding in a typical year was not tied to any commonly calculated flood interval, such as flood recurrence intervals, and the agencies are not aware of a tool capable of collecting the type of inundation data the 2020 NWPR required. Demonstrating that a wetland, lake, pond, or impoundment is inundated by flooding once in a typical year would require a field visit or a high-quality aerial photograph or satellite image coinciding with the exact time that the flooding occurs from a tributary to a wetland, lake, pond, or impoundment, as well as being able to demonstrate that this flooding occurred in a typical year. Determining that inundation by flooding occurs in a typical year was therefore extremely difficult, and sometimes impossible. Demonstrating that an artificial feature allows for a direct hydrologic surface connection between a wetland and a tributary in a typical year posed similar obstacles, requiring either auspiciously timed field visits, aerial photography, high-resolution satellite imagery, or data that the agencies may not be able to access, such as construction plans or operational records for an artificial levee.

The 2020 NWPR suggested the agencies "will generally use" precipitation data from the National Oceanic and Atmospheric Administration (NOAA) to help determine the presence of a surface water connection in a typical year, see 85 FR 22274 (April 21, 2020), but the methodology described in the 2020 NWPR preamble for determining precipitation in a typical year made it difficult to use these data to inform jurisdiction. NOAA precipitation totals over the three months prior to a site observation are compared to precipitation totals observed over the preceding 30 years to determine if conditions were wetter than normal, drier than normal, or normal ("typical"). Using the methodology in the preamble of the 2020 NWPR, only 40% of observations over a rolling 30-year period of record are considered "normal," while 30% of observations are considered to be "wetter than normal" and 30% of observations are considered to be "drier than normal." If

⁶⁹ Sparrow, K.H., Gutenson, J.L., Wahl, M.D. and Cotterman, K.A. 2022. *Evaluation of Climatic and Hydroclimatic Resources to Support the US Army Corps of Engineers Regulatory Program*. Engineer Research and Development Center (U.S.) Technical Report no. ERDC/CHL TR-22-19.

surface water flow was observed during normal or dry conditions, the agencies could have higher confidence that the surface water observations represented flow in a “typical year.” However, if flow was observed during the 30% of conditions that are “wetter than normal,” the surface water observations did not reveal whether flow would occur during a typical year. And if flow was *not* observed, precipitation data from the previous three months did not indicate whether flow might occur in that particular water feature under typical year conditions at a different point in the year. Therefore, if a site visit was conducted when surface water flow was not present, the agencies’ suggested approach for evaluating whether a feature meets the typical year test often did not provide meaningful and relevant information for the agencies to make accurate determinations of jurisdiction. Indeed, a commenter on the proposed rule emphasized that Tribes and States have found the “typical year” requirement to require extensive hydrologic modeling and advanced statistical analyses in complex conditions. Under any regulatory regime, the agencies use a weight of evidence approach to determine jurisdiction, but the 2020 NWPR typical year requirement placed onerous and, in many instances, arbitrary constraints on the data that can be used as evidence.

Furthermore, the typical year concept as applied to the 2020 NWPR does not account for the increasing number of recurrent heat waves, droughts, storms, and other extreme weather events in many parts of the country. These events can have profound impacts on local and regional hydrology, including streamflow. Commenters noted that determining what is “typical” under the 2020 NWPR in light of increased drought and floods was not simple for Tribal or State agencies; such determinations required expert analysis and left much to interpretation, undermining the assertion by the agencies that the 2020 NWPR would establish a clear, predictable regulatory framework that can be implemented in the field.

The concept of “typical year” in the 2020 NWPR sought to factor in long-term climatic changes over time to some degree by considering a thirty-year rolling period of data, *see* 33 CFR 328.3(c)(13). However, the 2020 NWPR did not allow the agencies flexibility to consider other time intervals when appropriate to reflect effects of a rapidly changing climate, including positive trends in temperature, increasing storm events, and extended droughts. In

response to more rapid recent changes in climate, NOAA has developed alternative approaches for estimating climate normals, including seasonal averages computed using shorter, annually updated averaging periods for temperature (10-year seasonal average) and total precipitation (15-year seasonal average). The rigid rolling thirty-year approach to determining typical year in the 2020 NWPR did not allow the agencies to use these updated methods.

The 2020 NWPR noted that the agencies can look to sources of information other than site visits, aerial photographs, and precipitation data to assess whether a feature has surface water flow in a typical year. It identified the Web-based Water-Budget Interactive Modeling Program, Climate Analysis for Wetlands Tables, and the Palmer Drought Severity Index, 85 FR 22275 (April 21, 2020). These methods, which provide information useful in many other contexts, often only look at climate-related conditions generally and often did not answer the jurisdictional questions posed by the 2020 NWPR. For example, they did not address whether surface water flow might connect a particular stream to a downstream traditional navigable water or the territorial seas, whether a particular wetland was inundated by or connected to a jurisdictional water as required under the 2020 NWPR, or how uncertainties at different locations and in different months affected the accuracy of condition estimates. While precipitation is an important factor, other information is also relevant to streamflow and surface water connections in a typical year, including the contributions of flow from wetlands, upgradient streams, and open waters in the watershed, evapotranspiration rates, water withdrawals including groundwater pumping, and other climatic conditions. Yet collecting this information from a variety of sources and interpreting it can be extremely time- and resource-intensive and may require special expertise. While the agencies have substantial experience using a weight of evidence approach to determine jurisdiction, for example as part of the significant nexus analysis, the typical year requirement makes it substantially more difficult to interpret available data and narrows the scope of data that can be used to determine jurisdiction.

Finally, the challenges presented by determining the presence of surface water flow in a typical year are even greater when evaluating a tributary at a distance from the downstream traditional navigable water or the territorial seas. Even streams that flow

perennially or intermittently often travel many miles prior to reaching the closest traditional navigable water or the territorial seas, meaning many downstream reaches may need to be assessed. Under the 2020 NWPR, any ephemeral reaches along that pathway that did not carry surface water flow once in a typical year would render all upstream waters non-jurisdictional. 85 FR 22277 (April 21, 2020). The need to assess lengthy tributary systems imposed an extraordinarily high burden of proof on the agencies to evaluate surface water flow in a typical year along the flow path from a stream of interest to a downstream traditional navigable water or the territorial seas. The longer the pathway, the more challenging the analysis. As a commenter noted, in adopting the test, the 2020 NWPR inserted case-by-case analyses for every jurisdictional determination despite the rule’s claim that it “provide[s] a predictable framework in which to establish federal jurisdiction.” *Id.* at 22273–22274. The uncertainty and implementation challenges generated by the 2020 NWPR’s foundational typical year test are yet another basis to replace that rule.

ii. Determining Adjacency

The 2020 NWPR provided that wetlands are “adjacent” when they: (1) abut a traditional navigable water or the territorial seas; a tributary; or a lake, pond, or impoundment of a jurisdictional water; (2) are inundated by flooding from one of these waters in a typical year; (3) are physically separated from one of these waters only by a natural berm, bank, dune, or similar natural feature; or (4) are physically separated from one of these waters only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. 85 FR 22338; 33 CFR 328.3(c)(1). In practice, agency staff have found several of these criteria for adjacency extremely difficult to implement in certain circumstances.

The artificial barrier provision led to arbitrary results. For example, under the fourth way to meet the adjacency definition, a wetland may be jurisdictional if it is separated from a jurisdictional water by an artificial structure, such as a levee, that allows for a direct hydrologic surface connection in a typical year through a culvert. However, the same wetland would not be jurisdictional if there was no levee present, even if there was a direct

hydrological surface connection in a typical year through a culvert (assuming the wetland did not meet another criterion for adjacency). The 2020 NWPR therefore established that certain wetlands with a direct hydrologic surface connection to a jurisdictional water are *only* jurisdictional due to the presence of an artificial barrier. This discrepancy bears no relationship to the actual connections between the features at issue and is not supported by science or the agencies' experience.

Moreover, the provision establishing that a wetland is "adjacent" if a jurisdictional water inundates it by flooding in a typical year was extremely difficult to implement. *See* 33 CFR 328.3(c)(1)(ii). Inundation by flooding in a typical year is not a metric that is normally recorded either by implementing agencies or the regulated community. Available models generally focus on flood recurrence intervals, which do not necessarily correspond to the likelihood of inundation by flooding in a given or typical year, and the agencies would typically be unable to demonstrate that these indicators reflect typical year conditions. Indeed, the 2020 NWPR acknowledged that inundation by flooding in a typical year could correspond to a variety of flood recurrence intervals depending on location, climate, season, and other factors. 85 FR 22311. Given the absence of existing records of inundation by flooding, determining whether inundation by flooding has occurred in a typical year is challenging in many circumstances.

Compounding the challenge, the 2020 NWPR provided that wetlands can be jurisdictional if they are inundated by flooding from a jurisdictional water in a typical year—but inundation in the other direction, *from* the wetlands *to* the jurisdictional water, is not grounds for jurisdiction. Not only is there no scientific or legal basis for distinguishing between inundation of the wetland as opposed to inundation *from* the wetland, *see Riverside Bayview*, 474 U.S. at 134 (upholding the Corps' assertion of jurisdiction over "wetlands that are not flooded by adjacent waters [but] may still tend to drain into those waters"), but determining whether the limited available photographs or other evidence of inundation reflects flooding in one direction as opposed to another adds to the difficulty in evaluating whether this standard is met. The same challenges apply to determining whether lakes, ponds, or impoundments of jurisdictional waters are inundated by flooding in a typical year, one basis for demonstrating Clean Water Act

jurisdiction over these features. 85 FR 22338–39 (April 21, 2020); 33 CFR 328.3(c)(vi).

iii. Ditches

Among other requirements, the 2020 NWPR provided that a ditch⁷⁰ is jurisdictional as a tributary if it was originally built in a tributary or adjacent wetland, as those terms are defined in the 2020 NWPR, and emphasized that the agencies bear the burden of proof to determine that a ditch was originally constructed in a tributary or adjacent wetland. 33 CFR 328.3(a)(2), (c)(12); 85 FR 22299. In other words, in order to find a ditch jurisdictional, the agencies had to demonstrate that a ditch was (1) originally constructed in a stream (2) that, at the time of construction, had perennial or intermittent flow and (3) a surface water connection to a downstream traditional navigable water or the territorial seas (4) in a "typical year." Alternatively, the agencies had to show that a ditch was (1) originally constructed in a wetland (2) that either abutted or had certain surface hydrologic connections to a jurisdictional water at the time the ditch was constructed (3) in a "typical year," in order to demonstrate that the ditch is jurisdictional. Americans have been building ditches, straightening streams, and draining wetlands for hundreds of years. And while under earlier guidance and practice, the agencies generally assessed whether a ditch was excavated in dry land when making a jurisdictional determination, that involved an assessment simply of whether the ditch was excavated in a stream, a wetland, or other aquatic resource. By contrast, to determine whether a ditch was jurisdictional under the 2020 NWPR, the agencies had to determine if it was originally built in a tributary or adjacent wetland that would have been jurisdictional under the 2020 NWPR, and therefore had to address all of the implementation challenges discussed in the preceding sections involved in determining surface water connections and wetland adjacency in a typical year—but often for ditches built twenty, one hundred, or even several hundred years ago. To the extent that sparse evidence is available to demonstrate a surface water connection in a typical year for tributaries using tools available today, evidence is even more difficult to find

⁷⁰ Ditches perform many of the same functions as natural tributaries. For example, like natural tributaries, ditches that are part of the stream network convey water that carries nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters, the territorial seas, and interstate waters.

when looking so far back in time. States approached the agencies seeking assistance in assessing the jurisdictional status of ditches, but the agencies were often unable to provide meaningful help given the burdens imposed by the 2020 NWPR's ditch definition.

The 2020 NWPR also provided that ditches are jurisdictional if they relocate a tributary, as that term was defined in the rule, 85 FR 22341 (April 21, 2020); 33 CFR 328.3(a)(2), (c)(12), but this standard as defined by the 2020 NWPR was also often extremely difficult to assess. The 2020 NWPR explained that a relocated tributary is "one in which an *entire portion* of the tributary may be moved to a different location." 85 FR 22290 (April 21, 2020) (emphasis added). In other words, the 2020 NWPR appeared to require a ditch to divert 100% of the tributary's flow to meet the "relocate a tributary" test. While prior rules have defined relocated tributaries as jurisdictional, the requirement that the entire portion be relocated is new and has created substantial implementation challenges. As a practical matter, when a tributary is relocated it often reroutes just a portion of its flow to the ditch. Assessing whether a ditch relocated 100% of a tributary's flow, as opposed to 80% or 50% of its flow, is extremely difficult and may not be possible in some circumstances. The scientific literature indicates that features like ditches that convey water continue to connect to and affect downstream waters. *See* section III.A.iv of the Technical Support Document for additional information. By establishing a jurisdictional standard that is extremely difficult to meet, the 2020 NWPR effectively removed from the protections of the Clean Water Act large numbers of ditches that function as tributaries and that significantly affect the integrity of downstream traditional navigable waters, the territorial seas, and interstate waters. As is the case with tributaries, lakes and ponds, impoundments, and wetlands, the 2020 NWPR's impracticable approach to ditches made it extremely difficult to implement. In the agencies' judgment, any efficiencies the 2020 NWPR may have achieved through categorical exclusions are outweighed by the challenges the agencies encountered in implementing the rule, coupled with its failure to implement the objective of the Clean Water Act by removing protections for waters that are properly within the statute's scope.

d. The 2020 NWPR Substantially Reduced Clean Water Act Protections Over Waters

The failure of the 2020 NWPR to advance the objective of the Clean Water Act, as well as its inconsistency with science and the challenges it presents in implementation, have had real-world consequences. The agencies have found that substantially fewer waters were protected by the Clean Water Act under the 2020 NWPR compared to under previous rules and practices. It is important to note that the definition of “waters of the United States” affects most Clean Water Act programs designed to restore and maintain water quality—including not only the section 402 NPDES and section 404 dredged and fill permitting programs, but also water quality standards under section 303, identification of impaired waters and total maximum daily loads under section 303, section 311 oil spill prevention, preparedness, and response programs, and the section 401 Tribal and State water quality certification programs—because the Clean Water Act provisions establishing such programs use the term “navigable waters” or “waters of the United States.” While the 2020 NWPR was promulgated with the expressed intent to decrease the scope of Federal jurisdiction, the agencies now are concerned that the actual decrease in water resource protections was more pronounced than the qualitative predictions in the 2020 NWPR preamble and supporting documents anticipated and acknowledged to the public. These data support the agencies’ conclusion that the 2020 NWPR is not a suitable alternative to this rule.

i. Jurisdictional Determination and Permitting Data Show a Large Drop in the Scope of Waters Protected Under the Clean Water Act

Through an evaluation of jurisdictional determinations completed by the Corps between 2016 and 2021,⁷¹

⁷¹ A jurisdictional determination is a written Corps determination that a water is subject to regulatory jurisdiction under section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a water is subject to regulatory jurisdiction under section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Jurisdictional determinations are identified as either preliminary or approved, and both types are recorded in determinations through an internal regulatory management database, called Operation and Maintenance Business Information Link, Regulatory Module (ORM2). This database documents Department of the Army authorizations under Clean Water Act section 404 and Rivers and Harbors Act section 10, including permit application processing and jurisdictional determinations. This database does not include aquatic resources that are not associated with a jurisdictional determination or that are not

EPA and the Army have identified consistent indicators of a substantial reduction in waters protected under the Clean Water Act by the 2020 NWPR (*see* Technical Support Document section II.B.i for additional discussion on methods and results of the agencies’ analyses). These indicators include an increase in the number and proportion of jurisdictional determinations completed where aquatic resources were found to be non-jurisdictional, an increase in determinations made by the Corps that no Clean Water Act section 404 permit is required for specific projects, and an increase in requests for the Corps to complete approved jurisdictional determinations (AJDs), rather than preliminary jurisdictional determinations (PJDs) which treat a feature as jurisdictional. These trends all reflect the narrow scope of jurisdiction in the 2020 NWPR’s definitions. Additionally, the agencies find that these indicators likely account for only a fraction of the 2020 NWPR’s impacts, because many project proponents did not seek any form of jurisdictional determination for waters that the 2020 NWPR categorically excluded, such as ephemeral features, and the Corps would not have knowledge of or ability to track such projects. A closer look at each of these indicators will help demonstrate some of the more pronounced impacts of the 2020 NWPR on paragraph (a)(1) waters than were identified for the public in the 2020 NWPR and its supporting documents. As explained in detail above, when a water falls outside the scope of the Clean Water Act, that means, among other things, that no Federal water quality standards will be established, and no Federal permit will be required to control the discharge of pollutants, including dredged or fill material, into such waters unless the pollutants reach jurisdictional waters. And since many entities did not believe that they would need to seek a

associated with alternatives to jurisdictional determinations (such as delineation concurrences or “No jurisdictional determination required” findings, where the Corps finds that a jurisdictional determination is not needed for a project), or permit request or resource impacts that are not associated with a Corps permit or enforcement action. An approved jurisdictional determination (AJD) is an official Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. A preliminary jurisdictional determination (PJD) is a non-binding written indication that there may be “waters of the United States” on a parcel; an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding Clean Water Act jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination.

jurisdictional determination under the 2020 NWPR, it is impossible to fully understand the scope of degradation the 2020 NWPR’s definition caused to paragraph (a)(1) waters.

Consistent with Executive Order 13990, EPA and Army staff have reviewed jurisdictional determinations as recorded in the Corps’ internal regulatory management database, referred to as the ORM2 database,⁷² to identify any noticeable trends in jurisdictional determinations under the past recent rules defining “waters of the United States.” The agencies found within the AJDs completed under the 2020 NWPR, the probability of finding resources to be non-jurisdictional increased precipitously. Of the 9,399 AJDs completed by the Corps under the 2020 NWPR during the first 12 months in which that rule was in effect,⁷³ the agencies found approximately 75% of AJDs completed had identified non-jurisdictional water resources and approximately 25% of AJDs completed identified jurisdictional waters.⁷⁴ Conversely, when the 1986 regulations and applicable guidance were in effect (including following the 2019 recodification of those regulations), substantially more jurisdictional waters were identified in AJDs on average per year than compared to the first twelve months of the 2020 NWPR.⁷⁵ During similar one-year calendar intervals when the 1986 regulations and applicable guidance were in effect, approximately 28% to 45% of AJDs completed identified non-jurisdictional aquatic resources, and 56% to 72% of AJDs identified jurisdictional resources.

⁷² *See supra* note 71.

⁷³ These AJDs were completed by the Corps between the 2020 NWPR’s effective date of June 22, 2020, and June 21, 2021.

⁷⁴ This excludes dryland AJDs and waters identified as jurisdictional only under section 10 of the Rivers and Harbors Act. In addition, under the 2020 NWPR, a single AJD in the Corps’ database can include both affirmative and negative jurisdictional determinations. Under prior regulatory regimes, the Corps’ database was structured such that a single AJD could be either affirmative, or negative, but not both. To account for this change in the structure of the database, a 2020 NWPR jurisdictional determination that includes both affirmative and negative jurisdictional resources was normalized and counted as two separate AJDs, one affirmative and one negative. The total number of AJDs considered after this process was carried out was 9,399. Prior to this normalization, the total number of AJDs considered was 7,769. More details on the agencies’ analysis can be found in the Technical Support Document section II.B.i.

⁷⁵ The time periods evaluated were June 22, 2016 to June 21, 2017; June 22, 2017 to June 21, 2018; and December 23, 2019 to June 21, 2020. The date ranges here constitute periods of time when the 1986 regulations (including the 2019 Repeal Rule’s recodification of those regulations) and applicable guidance were in effect nationally. 2015 Clean Water Rule determinations were not part of this analysis.

The change from a range of 28% to 45% non-jurisdictional AJD findings prior to the 2020 NWPR to 75% non-jurisdictional findings after issuance of the 2020 NWPR indicates that substantially fewer waters were protected by the Clean Water Act under the 2020 NWPR (see Technical Support Document section II.B.i for additional discussion). Again, as commenters on the proposed rule noted, these numbers do not account for the many entities that did not seek AJDs because they believed their features were excluded under the 2020 NWPR.

When evaluating the effect of the 2020 NWPR on the number of individual aquatic resources (as opposed to the AJDs completed), the agencies found a similar substantial reduction in protections provided by the Clean Water Act. Within the first twelve months of implementation of the 2020 NWPR, between June 22, 2020, and June 21, 2021, the Corps documented the jurisdictional status of 48,313 individual aquatic resources or water features through AJDs completed; of these individual aquatic resources, approximately 75% were found to be non-jurisdictional by the Corps. More specifically, 70% of streams and wetlands evaluated were found to be non-jurisdictional, including 11,044 ephemeral features (mostly streams) and 15,675 wetlands. Ditches were also frequently found to be non-jurisdictional (4,706 individual exclusions), which is likely the result of the narrowed definition of tributary under the 2020 NPWR and the requirement that a ditch was only jurisdictional as a tributary if it was originally built in a tributary or adjacent wetland, as those terms are defined in the 2020 NWPR. By comparison, only 45% of aquatic resources were found to be non-jurisdictional during similar year-long calendar intervals between 2016 and 2020 under the pre-2015 regulatory regime.⁷⁶ This increase in non-jurisdictional determinations, so that approximately 75% of water bodies are non-jurisdictional under the 2020 NWPR as opposed to only 45% under the prior regulations, undermined the agencies' ability to provide a baseline of Federal protection for the integrity of the nation's waters.

Of particular concern to the agencies is the 2020 NWPR's disproportionate effect on arid regions of the country, as the aquatic resources in these regions predominantly consist of ephemeral features. Under the 2020 NWPR, more permittees across the country, including

in the arid West, sought AJDs rather than PJDs, particularly for ephemeral features. Many more streams were evaluated and determined to be non-jurisdictional through AJDs in the arid West, while the number of individual stream reaches considered under PJDs declined precipitously. As mentioned previously, project proponents who request an AJD obtain an official Corps document that states either that there are no "waters of the United States" present on a parcel, or a statement that "waters of the United States" are present, accompanied by a map identifying their extent. In contrast, an applicant can elect to use a PJD to voluntarily waive or set aside questions regarding Clean Water Act jurisdiction over a particular site and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination. There are time savings and sometimes cost savings associated with requesting a PJD in lieu of an AJD. A decline in the proportion of PJDs being requested under the 2020 NWPR indicates that fewer project proponents requested that aquatic resources on their project site be treated as if they were jurisdictional.

In Arizona, the annual average number of individual stream reaches considered under PJDs and similar alternatives to AJDs between 2016 to 2020 was 941, while under the 2020 NWPR in 2020–2021 it was only 45.⁷⁷ Compared to pre-2015 regulatory practice, under the 2020 NWPR, Arizona experienced an approximate 95% decrease in individual stream reaches being considered via PJDs and a 9-fold increase in individual stream reaches being considered via AJDs. Similar metrics for New Mexico show an 84% decrease in individual streams being considered via PJDs and a 28-fold increase in individual streams being considered via AJDs under the 2020 NWPR.

The number of stream reaches assessed in Arizona under AJDs compared to the number of evaluations completed nationwide was disproportionately high under the 2020 NWPR. The number of stream reaches assessed in Arizona constituted 9% of the total stream reaches assessed nationally and 13% of the ephemeral reaches assessed nationally over the first

twelve months in which the 2020 NWPR was implemented.⁷⁸ This increase in the number of AJDs sought in Arizona under the 2020 NWPR compared to the number of AJDs sought in Arizona between 2016 and 2020 likely reflects the desire of landowners to confirm that features on their property were ephemeral or otherwise excluded under that rule, though it is possible the pace of landowners seeking AJDs would have slowed to some extent over time. The agencies understand the drastic decline in the number of PJDs requested compared to AJDs in the arid West, and the simultaneous increase in the number of AJD non-jurisdictional findings in the arid West, to have been driven largely by the categorical exclusion of ephemeral streams from jurisdiction. PJDs assume jurisdiction, and under the 2020 NWPR project proponents were less likely to assume that ephemeral streams were jurisdictional.

The Corps' data show that in New Mexico, of the 263 streams assessed via AJDs in the first twelve months of implementation of the 2020 NWPR (*i.e.*, between June 22, 2020, to June 21, 2021), 100% were found to be non-jurisdictional ephemeral features.⁷⁹ In Arizona, of the 1,525 streams assessed in AJDs in the first year of implementation of the 2020 NWPR, 1,518, or 99.5%, were found to be non-jurisdictional ephemeral resources. Eliminating these streams from jurisdiction under the 2020 NWPR also typically eliminated jurisdiction over wetlands which otherwise might meet adjacency criteria.

Some commenters asserted that the low percentage of jurisdictional AJD findings in Arizona under the 2020 NWPR does not have a statistically significant difference from the percentages of jurisdictional findings under the pre-2015 regulatory regime. The agencies agree that of Corps AJDs completed between 2016 and 2020, high percentages of streams in Arizona were found to be non-jurisdictional between 2016 and 2020. Proportionally, the non-jurisdictional findings via AJDs between 2016–2020 and the 2020 NWPR are similar. However, because the volume of streams assessed under AJDs in the arid West increased so substantially, there was a 10-fold increase in non-jurisdictional findings for streams in Arizona and a 36-fold increase in non-jurisdictional findings for streams in

⁷⁷ The AJD values associated with the 2020 NWPR fall outside of the 95% confidence interval calculated for annual data from 2016–2020. Note that in New Mexico and Arizona, the 2015 Clean Water Rule was never implemented due to litigation stays. The PJD values associated with the 2020 NWPR do not fall outside of the 95% confidence interval calculated for annual data from 2016–2020; this is likely a product of scale. See the Technical Support Document section II.B.i for more analysis.

⁷⁸ There were a total of 16,787 stream reaches assessed via AJDs nationwide between June 22, 2020 and June 21, 2021.

⁷⁹ These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

⁷⁶ Based on the average annual percentage of non-jurisdictional findings.

New Mexico following implementation of the 2020 NWPR. The average annual number of individual stream resources considered in AJDs in Arizona between 2016–2020 was 147 (of which 138 were determined non-jurisdictional), compared to 1,525 stream reaches assessed under the 2020 NWPR (of which 1,521 were determined non-jurisdictional accounting for all exclusions). Assessed together, the statistically significant increase in overall resources assessed via AJD combined with the shift away from requests for PJDs, as well as the consistent proportion of AJDs with non-jurisdictional findings indicates that many more project proponents viewed resources on their land as no longer “waters of the United States” under the 2020 NWPR. The agencies’ analysis also reflects the scope of the streams that the 2020 NWPR left unprotected, which in many cases are vitally important to desert aquatic ecosystems and to the hydrologic integrity of watersheds. See section IV.A.2.c.i of this preamble.

The Corps identified at least 368 projects from June 22, 2020, to June 21, 2021, through its ORM2 database that would have needed a Clean Water Act section 404 permit prior to the 2020 NWPR, but no longer did under the 2020 NWPR’s definition of “waters of the United States.”⁸⁰ Moreover, in comparing 2020–2021 to similar annual data from 2016–2020 from implementation of the 1986 regulations consistent with Supreme Court case law, there was an average increase of over 100% in the number of projects determined to not require section 404 permits under the Clean Water Act due to activities not occurring in “waters of the United States” or activities occurring in waters that were deemed no longer “waters of the United States” due to the 2020 NWPR. The number of projects that did not require a section 404 permit under the 2020 NWPR was likely much greater than these numbers indicate because project proponents did not need to notify the Corps if they had already received an AJD that concluded waters in the review area were not “waters of the United States,” and because many project proponents would not have sought a jurisdictional determination or applied for a permit at

⁸⁰ This tracking method only applies when 100% of jurisdiction is lost under the 2020 NWPR (*i.e.*, if even 1 aquatic resource out of 100 that is proposed to be impacted remains jurisdictional, this method is not used). Additionally, this tracking method was a new database feature, which was not yet implemented uniformly across the United States, and is likely under-representative even for those cases in which 100% of jurisdiction was lost under the 2020 NWPR.

all if they believed their aquatic resources were non-jurisdictional under the 2020 NWPR. Many projects could have occurred without consultation with the Corps due to the 2020 NWPR’s narrow definition of “waters of the United States” and expansive non-jurisdictional categories. Therefore, while the Corps’ ORM2 data shed light on the trend and magnitude of impacts to the scope of jurisdiction under the 2020 NWPR, it is fair to assume that these impacts are an underestimate.⁸¹

Many commenters cited the impacts referenced above as reasons to reject the 2020 NWPR’s definition of “waters of the United States.” In addition, many commenters cited national-scale assessments of the number of waterbodies that lost protection under the 2020 NWPR as evidence of environmental harm. Some commenters noted that 51% of wetlands and 18% of streams lost protections.⁸² Other commenters stated that 4.8 million miles of streams and 16.3 million acres of non-floodplain wetlands would be left without Federal level protections under the 2020 NWPR.⁸³

Commenters provided many potential examples of the harms caused by the 2020 NWPR around the country. One commenter stated that in the Northwest, an estimated 9,165 miles of ephemeral streams in Oregon’s Rogue River Basin that provide drinking water for the region, as well as habitat and spawning grounds for Federal threatened Southern Oregon/Northern California Coast coho

⁸¹ Requests for AJDs and the jurisdictional dispositions of the aquatic resources evaluated as part of those AJDs are imperfect measures of activities that might affect those jurisdictional or non-jurisdictional aquatic resources. The AJD data in the Corps ORM2 database generally contain only records for situations in which landowners or project proponents have requested jurisdictional determinations from the Corps or that are associated with an enforcement action, and thus do not represent all aquatic resources that exist within the United States. The proportion and specific types of aquatic resources evaluated for jurisdiction via AJDs varies both geographically and from year to year. In addition, the ORM2 data collected from AJDs conducted under different regulatory regimes have some metrics that are not directly comparable. Notwithstanding these limitations, the volume of ORM2 data on AJDs and associated aquatic resources is large and is tracked in a reasonably accurate fashion, and thus provides a reasonable estimate of overall trends and conditions on the ground. It represents the best data available to the agencies at this time.

⁸² Contained in the Resource and Programmatic Assessment for the Proposed Revised Definition of “Waters of the United States” (Docket ID No. EPA–HQ–OW–2021–0602–0039).

⁸³ Commenters cited to the following scientific paper as support: C.R. Lane and E. D’Amico. *Identification of putative geographically isolated wetlands of the conterminous United States*. 52 J Am Water Resource Association 705(2016); K. Fesenmyer et al., *Large portion of USA streams lose protection with new interpretation of Clean Water Act*. February 2021. *Freshwater Science* 40(1).

salmon and steelhead, would have lost protection under the 2020 NWPR. Another commenter stated that in the Midwest, protection would have been lost for an estimated 500 to 1,000 miles of ephemeral and ditched streams that flow into the Niagara River, the channel that connects Lake Erie and Lake Ontario. The commenter also noted that following promulgation of the 2020 NWPR, two Great Lakes states finalized legislative action to further reduce protections under State law for waters excluded by the 2020 NWPR. One commenter asserted that up to 202,244 acres of wetlands located behind levees in Missouri would have been excluded from jurisdiction under the 2020 NWPR because they are separated from jurisdictional waters by “upland or by dikes, barriers, or similar structures.” The commenter stated that these wetlands provide flood control, habitats, and improve water quality. In the Mountain West, a commenter stated that over half of Colorado’s streams and 22% of that State’s remaining wetlands would have been excluded from jurisdiction under the 2020 NWPR. With respect to the Southeast, a commenter cited analyses demonstrating that 162,149 acres of wetlands in Georgia’s Chattahoochee watershed were vulnerable to losing protection under the 2020 NWPR. The same commenter noted that, in the Mid-Atlantic, over 100,000 acres of wetlands would have lost protection under the 2020 NWPR in Virginia’s James River and Rappahannock River watersheds, which are vital to water quality in the Chesapeake Bay. Finally, in the Southwest, comments from the State of New Mexico estimated that under the 2020 NWPR, 25–45% of its Clean Water Act stormwater general permits and 50% of its individual permits would no longer be required. In Arizona, a commenter stated that 94% of all wetlands and flowlines in Arizona’s Upper San Pedro Watershed would have lost protection under the 2020 NWPR.

The agencies have not conducted an independent analysis to verify each of these comments but have carefully reviewed the concerns identified and the underlying analyses that commenters cited and found them generally consistent with the agencies’ own findings about the impacts of the 2020 NWPR. These examples illustrate the quality and importance of the waters that lost protection under the 2020 NWPR. As commenters emphasized, waters that the 2020 NWPR categorically excluded, such as ephemeral streams and their associated wetlands and wetlands that did not

meet the 2020 NWPR's adjacency criteria, provide critical ecosystem services. The absence of Clean Water Act protections for such resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm. Commenters stated that, specifically, the 2020 NWPR would have reduced the extent to which waters filter out pollutants before they reach traditional navigable waters; reduced flood protections and water storage services, and increased flooding; harmed fisheries and hunting sites; destroyed bird and wildlife habitat, including habitats relied on by endangered species; and reduced the quality of drinking water. Commenters also stated that the reduction in federally protected waters under the 2020 NWPR could increase water pollution near low-income communities and communities of color in particular and that they could experience associated increases in health risk.

The 2020 NWPR's removal of Federal protections from the nation's waters, and the resulting detriment to the services they provide, undermines the objective of the Clean Water Act, as discussed in section IV.A.2 of this preamble.

ii. Tribes and States Did Not Fill the Regulatory Gap Left by the 2020 NWPR

Some commenters asserted that the diminished scope of "waters of the United States" would not necessarily reduce protections for waters because Tribes, States, and local entities may regulate discharges even in the absence of Clean Water Act regulation. See section IV.A.3.b of this preamble. This perspective is consistent with the 2020 NWPR's emphasis that, in the face of a narrower scope of "waters of the United States," "the controls that States, Tribes, and local entities choose to exercise over their land and water resources" would help to achieve the objective of the Clean Water Act. 85 FR 22259 (April 21, 2020). Yet while some Tribes and States regulate "waters of the Tribe" or "waters of the State" more broadly than the Federal Government under their own laws, many newly non-jurisdictional waters under the 2020 NWPR were on Tribal lands or in States that do not regulate waters beyond those covered by the Clean Water Act. Under the 2020 NWPR, discharges into these waters could have occurred without any restriction.

As discussed in the Economic Analysis for the Final Rule, many Tribes and States do not regulate waters more broadly than the Clean Water Act. See

Economic Analysis for the Final Rule, Chapter II; 2020 NWPR Economic Analysis at 30–31. Contrary to the predictions made in the 2020 NWPR Economic Analysis, during the year in which the 2020 NWPR was in effect, the net change made by States was deregulatory in nature. Two States which had previously protected State waters beyond the scope of "waters of the United States" removed these expansive protections, and no States that lacked these broader protections established them. See 2020 NWPR Economic Analysis at 39–41 (estimating that certain States are likely to continue their current permitting practices for dredged and fill material) and the Economic Analysis for the Final Rule, Chapter II (indicating that two of those States reduced the scope of State clean water protections after the 2020 NWPR was finalized, and none of them formally expanded protections as a direct result of the 2020 NWPR).

The agencies understand that revising State regulations and/or laws takes time, and the agencies do not know how some States might have responded if the 2020 NWPR had been in place for more than a year, but the agencies have no basis to expect that more States that currently lack protections beyond the 2020 NWPR Federal floor would have established them. Indeed, the External Environmental Economics Advisory Committee has stated that the model that the 2020 NWPR used to forecast State responses to that rule was overly optimistic with respect to the likelihood that States would address a Federal regulatory gap, in part based on the agencies' failure to fully consider States' responses to past changes to the definition of "waters of the United States" (e.g., only three States directly increased protective regulations in response to the decision in *SWANCC* that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal authority under the Clean Water Act, and the agencies' resulting change in implementation of the Act).⁸⁴ Moreover, commenters,

⁸⁴ Prior to the 2016 Trump Administration, EPA's Science Advisory Board (SAB) had a subcommittee on environmental economics known as the Environmental Economics Advisory Committee (EEAC). When this committee was disbanded under the 2016 Administration, its members created an ad-hoc external committee. This External Environmental Economics Advisory Committee (E-EEAC) carried out an assessment of the economic analysis associated with the 2020 NWPR. See Keiser, D., S. Olmstead, K. Boyle, V. Flatt, B. Keeler, D. Phaneuf, J. Shapiro, and J. Shimshack (2020). *Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS)*. December 2020. As of today, the

including State entities, asserted that the Federal Government provided no assistance or support for overburdened State agencies trying to compensate for the sudden suspension in Federal protections under the 2020 NWPR. Finally, States asserted that in the absence of robust Federal protections, even if they were to expend substantial resources addressing discharges within their borders, they would not be able to limit pollutants flowing in from other States that may not have established such controls.

The agencies are also not aware of any Tribes that expanded their clean water protections to compensate for a reduction in protections under the 2020 NWPR. During the agencies' Tribal consultation and coordination for this rulemaking process, Tribes overwhelmingly indicated they lack the independent resources and expertise to protect their waters and therefore rely on Clean Water Act protections. See Summary of Tribal Consultation and Coordination, available in the docket for this rule. This feedback is consistent with the concerns expressed during the 2020 NWPR rulemaking process. See, e.g., 85 FR 22336–22337, April 21, 2020 ("[M]any Tribes may lack the capacity to create a [T]ribal water program under [T]ribal law, to administer a program, or to expand programs that currently exist. Other Tribes may rely on the Federal government for enforcement of water quality violations . . .").

Given the limited capacity of many Tribes and States to regulate waters more broadly than the Federal Government and limited authority under Tribal and State law, the narrowing of Federal jurisdiction would mean that many discharges into the newly non-jurisdictional waters would no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters. The agencies have heard concerns from a broad array of co-regulators and stakeholders, including Tribes, States, scientists, and non-governmental organizations, that corroborated the agencies' data and indicated that the 2020 NWPR's reduction in the jurisdictional scope of the Clean Water Act would cause substantial environmental harms, including to the quality of paragraph (a)(1) waters, that Tribes and States lack the authority or resources to address.

EPA's SAB has reinstated the EEAC, which assessed the proposed rule's economic analysis as part of the SAB's review of the rule.

In conclusion, the agencies do not find that the 2020 NWPR is a suitable alternative to this rule.

C. This Rule

1. Summary of This Rule

This rule establishes the definition of “waters of the United States” for purposes of the Clean Water Act. For clarity, this rule is divided into three parts: jurisdictional waters, exclusions, and definitions. This section of the preamble addresses each provision of the rule and provides an explanation of the rule text, a response to significant comments, and the agencies’ interpretation and implementation of the provisions of the rule.

The “waters of the United States” are defined in paragraph (a) of this rule: (1) traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters”); (2) impoundments of “waters of the United States” (“paragraph (a)(2) impoundments”); (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”); and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard (“paragraph (a)(5) waters”).

The “relatively permanent standard” means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. The “significant nexus standard” means waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.

Paragraph (b) of this rule contains the longstanding exclusions from the pre-

2015 regulations, as well as additional exclusions based on well-established practice, from the definition of “waters of the United States.” Paragraph (c) of this rule provides definitions for terms used in this rule.

Paragraph (a): Jurisdictional Waters

Paragraph (a)(1). This rule defines “waters of the United States” to include traditional navigable waters, the territorial seas, and interstate waters. The agencies are not making changes to the text or substance of the provisions of the 1986 regulations covering traditional navigable waters, the territorial seas, and interstate waters. The agencies are consolidating these three categories of waters into one paragraph at the beginning of the regulatory text. While combined into one paragraph, each category will remain distinct in separate subparagraphs. The agencies have concluded that this non-substantive change streamlines the regulatory text and increases clarity. This streamlining is not a substantive change and does not alter the agencies’ longstanding interpretation and implementation of these provisions.

Paragraph (a)(2). This rule defines “waters of the United States” to include impoundments of “waters of the United States.” Impoundments are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. In this rule, the paragraph (a)(2) impoundments category provides that “waters of the United States” do not lose their jurisdictional status simply because they are impounded. In a change from the 1986 regulations, waters that are jurisdictional under paragraph (a)(5) and that are subsequently impounded do not retain their jurisdictional status by rule under the paragraph (a)(2) impoundments provision, but may still be determined to be jurisdictional if they meet the requirements of a category of “waters of the United States” other than paragraph (a)(2) at the time of assessment (*i.e.*, as a traditional navigable water, the territorial seas, interstate water, jurisdictional tributary, jurisdictional adjacent wetland, or paragraph (a)(5) water).

Paragraph (a)(3). This rule defines “waters of the United States” to include tributaries of traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard. As compared to the 1986

regulations, this rule adds the territorial seas to the list of waters to which a water may be a tributary and deletes intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) (the (a)(3) “other waters” provision under the 1986 regulations) from the list.

Paragraph (a)(4). Aquatic resources that meet this rule’s definitions of “wetlands” and “adjacent” with regard to another jurisdictional water are assessed under this provision. The rule defines “waters of the United States” to include: (1) wetlands adjacent to traditional navigable waters, the territorial seas, or interstate waters; (2) wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; or (3) wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”).

Paragraph (a)(5). This rule defines “waters of the United States” to include intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard. In this paragraph, the agencies are retaining the category from the 1986 regulations sometimes referred to as “(a)(3) waters” or “other waters,” but with changes to reflect the agencies’ determination of the statutory limits on the scope of “waters of the United States” informed by the law, the science, and agency expertise, in addition to consideration of extensive public comment on the proposed rule. Of particular importance, the agencies have replaced the 1986 regulation’s broad Commerce Clause basis for jurisdiction for waters not identified in other provisions of the definition, with the relatively permanent standard and the significant nexus standard. In addition, the agencies have deleted the non-exclusive list of “other waters” in the 1986 regulation. Under this provision in the rule, only “intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4)” can be assessed for jurisdiction under the relatively permanent standard or significant nexus standard.

Paragraph (b): Exclusions

The agencies are promulgating a number of exclusions from the definition of “waters of the United States,” including longstanding

exclusions for prior converted cropland and waste treatment systems, and exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime. The agencies are listing these exclusions in the regulatory text in a new paragraph (b), which consolidates the exclusions together in a single regulatory section. Under this rule, where a feature satisfies the terms of an exclusion, it is excluded from jurisdiction even where the feature would otherwise be jurisdictional under paragraphs (a)(2) through (5) of this rule. Paragraph (a)(1) waters are not subject to the exclusions. The exclusions are:

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- (2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;
- (3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- (4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- (5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- (6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- (7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- (8) Swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Paragraph (c): Definitions

Paragraph (c) of this rule provides definitions for purposes of the rule. This rule contains several defined terms unchanged from the 1986 regulations: the definitions of “wetlands,” “adjacent,” “high tide line,” “ordinary high water mark,” and “tidal water.” This rule defines the term “significantly affect” for purposes of determining whether a water meets the significant nexus standard to mean “a material influence on the chemical, physical, or biological integrity of” a paragraph (a)(1) water. Under this rule, waters, including wetlands, are evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform. This rule identifies specific functions that will be assessed and identifies specific factors that will be considered when determining whether the functions provided by the water, either alone or in combination, have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. These factors include the distance from a paragraph (a)(1) water; hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; the size, density, or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall, and snowpack. The functions in this rule are indicators that are tied to the chemical, physical, or biological integrity of paragraph (a)(1) waters, including contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in paragraph (a)(1) waters; or provision of habitat and food resources for aquatic species located in paragraph (a)(1) waters.

Section IV.C of this preamble also provides guidance on implementation of each provision of this rule. In implementing this rule, the agencies generally will consider first if a water qualifies as a paragraph (a)(1) water (*i.e.*, a traditional navigable water, the territorial seas, or an interstate water). If a waterbody is determined to be a paragraph (a)(1) water, then it is jurisdictional with no need for further evaluation. If a water is not a paragraph (a)(1) water, the agencies generally will consider next whether any of the exclusions in paragraph (b) of this rule

apply to the water. The exclusions in this rule do not apply to paragraph (a)(1) waters, and therefore, a traditional navigable water, the territorial seas, or an interstate water cannot be excluded under this rule, even if the water would otherwise meet the criteria for an exclusion.⁸⁵ If a water does not qualify as a paragraph (a)(1) water and the agencies determine that an exclusion is applicable (*e.g.*, waters that meet the waste treatment system exclusion, wetlands that qualify as prior converted cropland), the water would not be jurisdictional under this rule. If the water is not a paragraph (a)(1) water, and an exclusion under paragraph (b) does not apply, then the agencies generally will determine next if the water can be assessed under paragraphs (a)(2) through (4) of this rule. If the water does not meet the criteria for paragraphs (a)(1) through (4), the agencies generally will assess next if the water is jurisdictional under paragraph (a)(5) of this rule. When assessing the jurisdictional status of waters after the effective date of the final rule, regulators and the public should use the definition of “waters of the United States” established by this rule. For example, when assessing whether a stream is a jurisdictional tributary, regulators and the public should consider the provisions related to tributaries in the final rule.⁸⁶ If a water is not jurisdictional under paragraphs (a)(1) through (5) of this rule, then the water does not meet the definition of “waters of the United States.”

It is important to note that some aquatic resources can potentially be assessed for jurisdiction under multiple categories of this rule. For example, certain streams, rivers, lakes, ponds, wetlands, and impoundments can be assessed as traditional navigable waters or interstate waters under paragraph (a)(1)(i) or (a)(1)(iii) of this rule. Other streams, rivers, lakes, ponds, and impoundments are situated such that they are part of the tributary system and can be assessed under paragraph (a)(3) of this rule. The agencies will assess intrastate lakes and ponds, streams, and

⁸⁵ See also discussion of the waste treatment system exclusion in section IV.C.7.b of this preamble, *infra*.

⁸⁶ The agencies will continue to evaluate potential enforcement actions using the regulations in place when the alleged violation occurred. For example, if a person excavated a ditch while the pre-2015 regulatory regime was in effect and the person complied with the terms of the pre-2015 regulatory regime, today's final rule does not create new liability. See *United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021) (explaining that the 2020 NWPR did not apply retroactively to the defendant's violations, which occurred before the 2020 NWPR became effective).

wetlands under paragraph (a)(5) of this rule only if they do not fall within paragraphs (a)(1) through (4). In any case, the agencies will identify the provision or provisions of the rule under which a determination of jurisdiction is made.

Section IV.C of this preamble provides increased clarity and substantial guidance to assist in implementing the relatively permanent standard and significant nexus standard. *See* sections IV.C.4, IV.C.5, and IV.C.6 of this preamble for additional information on how the agencies will implement these standards for tributaries, adjacent wetlands, and waters assessed under paragraph (a)(5) (these sections include guidance on identifying waterbodies on the landscape, determining which waters are “relatively permanent, standing or continuously flowing,” identifying waters with a “continuous surface connection” under the relatively permanent standard, and identifying which waters are “similarly situated” and “in the region” under the significant nexus standard).

As is typical after a rule is promulgated, the agencies have entered into a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies’ implementation of this rule, which is available in the docket for the final rule. *See* Docket ID No. EPA–HQ–OW–2021–0602. As part of these coordination procedures, EPA and Corps field staff will coordinate on all draft approved jurisdictional determinations based on the significant nexus standard, and the agencies will follow a process for elevating a subset of these determinations to EPA and Corps headquarters for review as necessary. That coordination will be enhanced for waters assessed under paragraph (a)(5), and headquarters at the agencies will review all draft approved jurisdictional determinations⁸⁷ for paragraph (a)(5) waters based on the significant nexus standard. After nine months, the agencies will reevaluate this requirement and assess the implementation and coordination memorandum approach. *See* section IV.C.6 of this preamble for additional discussion.

The agencies note that Congress exempted or excluded certain discharges from the Clean Water Act or from specific permitting requirements. This rule will not affect any of the

exemptions, including exemptions from section 404 permitting requirements provided by section 404(f), such as those for normal farming, ranching, and silviculture activities. 33 U.S.C. 1344(f); 40 CFR 232.3; 33 CFR 323.4. This rule will also not affect the existing statutory or regulatory exemptions or exclusions from section 402 NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. 33 U.S.C. 1342(j)(1), (j)(2); 33 U.S.C. 1362(14); 40 CFR 122.2, 122.3(f). In addition, where waters are covered by the Clean Water Act, the agencies have adopted measures to simplify compliance with the Act such as general permits and tools for expediting the permitting process (*e.g.*, mitigation banks, in-lieu fee programs, and functional/conditional assessment tools). The agencies intend to continue to develop general permits and other simplified procedures to ensure that projects, particularly those that offer environmental or public benefits, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Finally, with respect to determining whether a water meets the definition of “waters of the United States,” under case law and the Corps’ existing regulations “[u]nauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.” 33 CFR 323.2 (1987). Thus, for example, an unpermitted discharge of fill material into a jurisdictional adjacent wetland that destroys all wetland characteristics does not render that water no longer jurisdictional. Nor does an authorized discharge, filling in a part of a tributary, for example, sever jurisdiction upstream, provided that the upstream waters meet the definition of “waters of the United States” absent the unauthorized discharge.

2. Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

a. This Rule

The agencies are not making changes to the text or substance of the provisions of the 1986 regulations covering traditional navigable waters, the territorial seas, and interstate waters. The agencies are consolidating these three categories of waters into one paragraph at the beginning of the regulatory text. While combined into one paragraph, each category will remain distinct in separate subparagraphs. The agencies have

concluded that this non-substantive change streamlines the regulatory text and increases clarity. This consolidation requires corresponding changes to cross references and the numbering of other provisions in the rule. These changes increase clarity by reducing the number of cross references necessary and make practical sense because the jurisdictional status of other categories of waters relies on their connection to traditional navigable waters, the territorial seas, or interstate waters. For example, the definition of “significantly affect” refers simply to “the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section” rather than requiring multiple cross-references to three separate paragraphs. This streamlining is not a substantive change and does not alter the agencies’ longstanding interpretation and implementation of these provisions.

b. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

The agencies have concluded that the non-substantive change consolidating traditional navigable waters, the territorial seas, and interstate waters into paragraph (a)(1) streamlines the regulatory text and increases clarity. These changes increase clarity by reducing the number of cross references necessary and make practical sense because the jurisdictional status of other categories of waters relies on their connection to traditional navigable waters, the territorial seas, or interstate waters. The rationale for retaining each of these three water types is provided in the relevant subsections below.

Some commenters expressed support for the categorical protection and consolidation of traditional navigable waters, the territorial seas, and interstate waters. One commenter stated that the consolidation is “consistent with the history and text of the law.” Several commenters opposed the consolidation of the traditional navigable waters, the territorial seas, and interstate waters provisions into one jurisdictional category, arguing that the categories of waters are distinct and therefore should remain separate. The agencies agree that each of these provisions is a distinct category but disagree that consolidating them into one paragraph has any effect on distinguishing the types of waters which fall within each category. Further, the agencies have kept the text of each category the same as in the 1986 regulations and have established separate subparagraphs for each category to ensure there is no confusion. The jurisdictional standards for each of

⁸⁷ An approved jurisdictional determination is a Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. *See* 33 CFR 331.2.

the three categories are different, so the agencies will clearly identify the subparagraph under which a particular water is jurisdictional. A water which meets the test for traditional navigable waters under the Clean Water Act, for example, will be identified as jurisdictional under paragraph (a)(1)(i). Note that some waters may fall into more than one category of paragraph (a)(1) waters (e.g., a water may be both a traditional navigable water and an interstate water, such as Lake Tahoe, or a water may be both a traditional navigable water and part of the territorial seas, such as the Pacific Ocean).

A commenter stated that the protection of traditional navigable waters, the territorial seas, and interstate waters should not be affected by any exclusions that the agencies may include in this rule. The agencies agree and the text of this rule is clear that the exclusions do not apply to paragraph (a)(1) waters. *See also* section IV.C.7 of this preamble. The Clean Water Act fundamentally protects these three categories of waters: traditional navigable waters are clearly encompassed within the defined term “navigable waters”; the territorial seas are explicitly mentioned in the definition of “navigable waters”; and, as discussed further below, interstate waters, by definition, are waters of the “several States” and are unambiguously “waters of the United States.” While the agencies have authority to draw lines excluding some aquatic features from the definition of “waters of the United States,” the Clean Water Act provides no such authority to the agencies to exclude waters in these three unambiguous types of “waters of the United States” under the statute. Even if jurisdiction over one or all of these categories of waters were ambiguous, the agencies have concluded that since these are the fundamental waters that Congress intended to protect under the Clean Water Act, and that have had longstanding and unequivocal protection, with the exception of the 2020 NWPR, it is reasonable to establish unequivocal jurisdiction over these waters. Further, the agencies have concluded that there are no policy, practical, or technical bases to apply the exclusions to these paragraph (a)(1) waters given their crucial role in the statutory regime.

Some commenters expressed support for consolidating just traditional navigable waters and territorial seas into a single category of jurisdictional waters. A commenter added that this approach is logical because these two types of waters are the only types of

waters that are explicitly referenced in the operative sections of the Clean Water Act. The commenter asserted that combining these waters into one category would make the rule clearer and easier to administer. Similarly, a couple of commenters expressed concerns that the proposed rule too broadly categorized what is considered a “foundational” water. The 2020 NWPR consolidated the categories of traditional navigable waters and the territorial seas in the definition of “waters of the United States” into a single paragraph in the regulatory text in order to streamline the text but deleted the interstate waters category. 85 FR 22280, 22338, 22340 (April 21, 2020). The agencies agree that combining these waters into one category makes the rule clearer and easier to administer. However, the agencies have also combined interstate waters into the same paragraph because, as discussed above, protecting all three categories of waters is a fundamental aim of the Clean Water Act. *See* section IV.C.2.b.iii of this preamble (discussing protection under the Clean Water Act of interstate waters in the same manner as traditional navigable waters and the territorial seas). Under this rule, the jurisdictional status of the other categories of waters relies on their connection to any one of these three categories of waters—a traditional navigable water, the territorial seas, or an interstate water (and, where required, meeting either the relatively permanent standard or the significant nexus standard). Therefore, the agencies have concluded that streamlining the rule by including all three categories of these waters in one paragraph is reasonable and appropriate.

A commenter suggested that the agencies provide a definition of “foundational waters.” The commenter suggested that “if the common shorthand is that the waters used for commerce, the interstate waters[,] and the territorial seas are the ‘foundational waters[,]’ then the additional term ‘foundational waters’ should be defined as such.” The commenter asserted that this would make the rule text easier to understand and use. The agencies are not providing a definition for “foundational waters” because they are not using the term “foundational waters” in the rule text. The agencies used the phrase “foundational waters” in the preamble to the proposed rule simply for convenience and readability rather than writing the phrase “traditional navigable waters, the territorial seas, and interstate waters” repeatedly. As discussed above in this

preamble, in light of the new consolidated paragraph that groups those three categories of waters together, the agencies will simply refer to those waters as “paragraph (a)(1) waters” in this preamble.

i. Traditional Navigable Waters

(1) This Rule

The Clean Water Act, the 1986 regulations, the 2015 Clean Water Rule, the 2019 Repeal Rule, and the 2020 NWPR all include within the scope of “waters of the United States” traditional navigable waters, defined by regulation as “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” *E.g.*, 33 CFR 328.3(a)(1) (2014). With respect to traditional navigable waters, the text of the 1986 regulations and the text of the 2020 NWPR are identical. The agencies did not propose to amend the longstanding text defining “traditional navigable waters” and are not making changes to the text in this rule. As discussed above, the agencies are consolidating three categories of waters into one paragraph at the beginning of the regulatory text, and with this consolidation, “traditional navigable waters” are identified in paragraph (a)(1)(i) of this rule.

The agencies also are not making changes to their longstanding interpretation of traditional navigable waters for purposes of Clean Water Act jurisdiction. Thus, these paragraph (a)(1)(i) waters include all of the “navigable waters of the United States,” defined in 33 CFR part 329 and by numerous decisions of the Federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, Utah and Lake Minnetonka, Minnesota). To determine whether a waterbody constitutes a paragraph (a)(1)(i) water under the regulations, relevant considerations include the agencies’ regulations; prior determinations by the Corps, by EPA, and by the Federal courts; and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case.

As noted above, the paragraph (a)(1)(i) waters include, but are not limited to, the “navigable waters of the United States.” A water body qualifies as a “navigable water of the United States” if it meets any of the tests set forth in 33 CFR part 329 (e.g., the waterbody is (a) subject to the ebb and flow of the tide, and/or (b) the waterbody is

presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce).

Traditional navigable waters also include “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” Some examples of waters that will be considered traditional navigable waters, and thus jurisdictional under this provision of this rule include: waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments); waters that have historically been used for commercial navigation, including commercial waterborne recreation; or waters that are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation. See “Waters that Qualify as Traditional Navigable Waters Under Section (a)(1) of the Agencies’ Regulations,”⁸⁸ available at <https://www.epa.gov/wotus/waters-qualify->

⁸⁸ “Waters that Qualify as Traditional Navigable Waters Under Section (a)(1) of the Agencies’ Regulations,” began as “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations” in Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (available at <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll11/id/2316>) that was published in 2007 concurrently with the 2007 *Rapanos* Guidance and thus is often simply referred to as “Appendix D.” The *Rapanos* Guidance was updated in 2008, but Appendix D has remained unchanged since 2007. Paragraph (a)(1)(i) of this rule was paragraph (a)(1) of the regulations in place when the guidance was issued, but the text of that provision has not changed through the various rulemakings defining “waters of the United States,” and the agencies have continued to use the guidance for determining whether a water is a “traditional navigable water.” See 80 FR 37054, 37074 (June 29, 2015) (2015 Clean Water Rule); 85 FR 22250, 22281 (April 21, 2020) (2020 NWPR). There have been no substantive changes to the guidance since it was issued on May 30, 2007. In 2021, EPA and the Army established “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations,” as a standalone guidance document when rescinding a memorandum on traditional navigable waters finalized after the 2020 NWPR. However, for clarity the agencies have updated the title to “Waters that Qualify as Traditional Navigable Waters Under Section (a)(1) of the Agencies’ Regulations” and deleted references to the *Rapanos* Guidance. The agencies will continue to use this guidance to determine whether a water is a “traditional navigable water” for the purposes of the Clean Water Act and the agencies’ implementing regulations. This document is available at <https://www.epa.gov/wotus/waters-qualify-traditional-navigable-waters-under-section-a1-agencies-regulations>.

traditional-navigable-waters-under-section-a1-agencies-regulations.

2) Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

Supreme Court decisions have not questioned the inclusion of traditional navigable waters in the definition of “waters of the United States.” See, e.g., *SWANCC*, 531 U.S. at 172 (“The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”).

Some commenters voiced support for the agencies’ decision to interpret the scope of traditional navigable waters consistent with the agencies’ longstanding approach in the document known as “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations.” A commenter added that such an interpretation is consistent with the agencies’ longstanding guidance and is familiar to Tribal and State co-regulators as well as the general public. Another commenter stated that the agencies’ reference to “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations” would create additional confusion during the implementation of this rule. The agencies are maintaining their longstanding approach to traditional navigable waters for purposes of the Clean Water Act as reflected in this well-established document. The agencies have used this guidance since 2007 and through a number of rulemakings. The 2020 NWPR continued use of this guidance, stating, “because the agencies have not modified the definition of ‘traditional navigable waters,’ the agencies are retaining [‘Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations’] to help inform implementation of that provision of this final rule.” 85 FR 22281 (April 21, 2020). Given the longstanding use of the guidance, the agencies do not think it will cause confusion to continue to use it. To provide additional clarity, however, the agencies are maintaining this document as standalone guidance titled “Waters that Qualify as Traditional Navigable Waters Under Section (a)(1) of the Agencies’ Regulations,” with minor edits to the title and to reflect that the *Rapanos* Guidance is no longer in effect, simultaneously with this rule.

After the 2020 NWPR was promulgated, the agencies issued a coordination memorandum that created

some confusion. “U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)” (hereinafter, “TNW Coordination Memorandum”). The memorandum established an implementation process by which the agencies elevate to their headquarters certain case-specific and stand-alone Clean Water Act traditional navigable water determinations concluding that a water is “susceptible to use” solely based on evidence of recreation-based commerce. *Id.* The TNW Coordination Memorandum merely required enhanced coordination for such determinations and did not state that a “susceptible to use” determination could not be solely based on evidence of recreation-based commerce. On November 17, 2021, the agencies rescinded the TNW Coordination Memorandum but kept in place the “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations.”⁸⁹ A few commenters asserted that recreational activities are sufficient evidence to demonstrate that a water is susceptible to being used in the future for commercial navigation, thereby qualifying waters supporting recreational activities as traditional navigable waters for purposes of the Clean Water Act. Alternatively, several commenters asserted that recreational activities are not sufficient evidence to demonstrate that a water is a traditional navigable water. The Supreme Court has been clear that “[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use.” *PPL Montana v. Montana*, 565 U.S. 576, 600–01 (2012) (in the context of navigability at the time of statehood); *id.* at 601 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.” (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940))); *id.* (noting that the “fact that actual use has ‘been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling”” (quoting *United States v. Utah*, 283 U.S. 64, 82

⁸⁹ U.S. Environmental Protection Agency and U.S. Department of the Army. “Recission of June 30, 2020 Memorandum ‘U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA).’” November 17, 2021. Available at https://www.epa.gov/system/files/documents/2021-11/nwpr-tnw-coordination-rescission-memo_signed-11.17.2021.pdf.

(1931)). Therefore, the agencies are maintaining their longstanding position that commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments) can be considered when determining if a water is a traditional navigable water.

Some commenters stated that the agencies must ensure that traditional navigable waters are not limited to just the waters that the agencies have determined to be “navigable waters of the United States” under section 10 of the Rivers and Harbors Act of 1899. Other commenters stated that the agencies should limit the scope of traditional navigable waters to the section 10 waters under the Rivers and Harbors Act of 1899. The agencies are not changing their longstanding position that the traditional navigable waters for purposes of the Clean Water Act include, but are not limited to, the section 10 waters under the Rivers and Harbors Act of 1899, and include any of the waters that constitute traditional navigable waters under relevant judicial decisions. See “Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies’ Regulations.”⁹⁰ The scope of the Rivers and Harbor Act of 1899 is generally narrower than the scope of the Clean Water Act. See, e.g., *1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1392–93 (E.D. Va. 1983) (explaining that “[t]he term ‘navigable waters of the United States’ as used in the Rivers and Harbors Act of 1899 has a substantially different, and more limited, meaning than the term as used in the Clean Water Act” and that “the term has a more limited meaning, consistent with the concepts of ‘navigation’ and ‘navigability’ as of 1899”). The scope of “navigable waters of the United States” under the Rivers and Harbors Act of 1899 is thus more limited than the scope of traditional navigable waters for purposes of the Clean Water Act and as established in paragraph (a)(1)(i) of this rule. The Corps’ regulations reflect the difference and under the Corps’ regulations, “navigable waters of the United States” (i.e., waters that are subject to section 10 of the Rivers and Harbors Act of 1899) are limited to “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 CFR 329.4. Therefore, there are numerous waters that have been determined to be traditional navigable waters for purposes of the Clean Water Act, or navigable for other purposes under Federal law, but which

are not “navigable waters of the United States” under section 10 of the Rivers and Harbors Act of 1899. For example, the Supreme Court has found that the Great Salt Lake met the test for navigability for purposes of the ownership of the bed of the Lake at the time of Utah’s statehood, even though it was not part of a continuous waterborne highway of interstate commerce, but the Court of Appeals for the Tenth Circuit found that evidence insufficient to establish that the Lake is covered by the Rivers and Harbors Act of 1899. See *Utah v. United States*, 403 U.S. 9 (1971); *Hardy Salt Co. v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974). The Corps has determined the lake to be a traditional navigable water for purposes of the Clean Water Act based on the Supreme Court’s finding that the water in the past met the test for navigability. The distinction the agencies have drawn between section 10 waters and traditional navigable waters for purposes of the Clean Water Act is entirely consistent with Supreme Court case law. The Supreme Court in *Kaiser Aetna* rejected the notion “that the concept of ‘navigable waters of the United States’ has a fixed meaning that remains unchanged in whatever context it is being applied.” *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). Instead, the Court cautioned that “any reliance upon judicial precedent must be predicated upon a careful appraisal of the purpose for which the concept of ‘navigability’ was invoked in a particular case.” *Id.* at 171 (internal quotation marks omitted) (emphasis in original). The Supreme Court further stated that the “cases that discuss Congress’ paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream, in fact, is capable of supporting navigation or may be characterized as [a] ‘navigable water of the United States.’” *Id.* at 174. More recently, the Supreme Court has cautioned “that the test for navigability is not applied in the same way in [different] types of cases[.]” referring, for example, to cases arising under the Federal Power Act, Clean Water Act, and title disputes. *PPL Montana v. Montana*, 565 U.S. 576, 592 (2012).

A number of commenters stated that the agencies’ interpretation of traditional navigable waters was inconsistent with the test for navigability in *The Daniel Ball*, 77 U.S. 557 (1870), with the discussion of navigability in *SWANCC*, and with the

plurality and Justice Kennedy’s opinions in *Rapanos*. The agencies disagree. None of the opinions in *Rapanos* addressed the test for traditional navigable waters; rather, they simply cited to *The Daniel Ball*—the beginning of a long line of cases addressing navigability. As the Supreme Court has explained: “The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds.” *PPL Montana*, 565 U.S. at 592 (citing *The Montello*, 20 Wall. 430, 439 (1874); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 & n.21 (1940) (Federal Power Act); *Rapanos*, 547 U.S. at 730–31 (plurality opinion) (Clean Water Act); *id.* at 761 (Kennedy, J., concurring in judgment) (same)). In *PPL Montana*, the Supreme Court was clear that the test for navigability has evolved since *The Daniel Ball*; it depends upon the authority being exercised by the Federal Government and is a case-specific inquiry. “It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.” 565 U.S. at 592. Of particular relevance for traditional navigable waters for the Clean Water Act, “federal regulatory authority encompasses waters that only recently have become navigable, see, e.g., *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634–635, 32 S.Ct. 340, 56 L.Ed. 570 (1912), were once navigable but are no longer, see *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123–124, 41 S.Ct. 409, 65 L.Ed. 847 (1921), or are not navigable and never have been but may become so by reasonable improvements, see *Appalachian Elec. Power Co.*, *supra*, at 407–408, 61 S.Ct. 291. With respect to the Federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. See *The Daniel Ball*, *supra*, at 564. And, of course, the commerce power extends beyond navigation. See *Kaiser Aetna v. United States*, 444 U.S. 164, 173–174, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). . . . Indeed, [e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration.” *Appalachian Elec. Power Co.*, *supra*, at 406, 61 S.Ct. 291.” *PPL Montana*, 565 U.S. at 592–93. Thus, the agencies’ interpretation of traditional navigable waters for purposes of the Clean Water Act is consistent with *The Daniel Ball* as applied by the Supreme Court.

⁹⁰ See *supra* note 88.

ii. Territorial Seas

(1) This Rule

The Clean Water Act defines “navigable waters” to include “the territorial seas” in section 502(7). The Clean Water Act then defines the “territorial seas” in section 502(8) as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.” The territorial seas establish the seaward limit of “waters of the United States” and are clearly jurisdictional under the Clean Water Act.

The Clean Water Act, the 1986 regulations, the 2015 Clean Water Rule, the 2019 Repeal Rule, and the 2020 NWPR all included “the territorial seas” as “waters of the United States.” This rule makes no changes to “the territorial seas” provision and retains the provision in the regulatory text, consolidated in paragraph (a)(1).

(2) Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

As described above, the Clean Water Act explicitly defines the agencies’ jurisdiction to include “the territorial seas.” This rule confirms the agencies’ jurisdiction over these waters, consistent with Congress’s direction. A commenter stated that if the agencies combine traditional navigable waters, the territorial seas, and interstate waters into one category of waters in this rule, the agencies should clarify that the territorial seas represent a distinct basis for jurisdiction and are not a type of traditional navigable water. The agencies agree with this commenter that the territorial seas are an independent category of jurisdictional waters. However, in the preamble to the proposed rule, the agencies also stated that the territorial seas are a type of traditional navigable water. While most portions of the territorial seas are also traditional navigable waters, the agencies are clarifying in this rule that portions of the territorial seas that may not be navigable or capable of being used in interstate or foreign commerce are still jurisdictional if they meet the definition of the “territorial seas” in the Clean Water Act. The agencies did not intend to exclude any portion of the territorial seas as the term is defined in Clean Water Act section 502(8), 33 U.S.C. 1362(8). To avoid any confusion, this rule continues to list traditional navigable waters and the territorial seas

as separate categories of jurisdictional waters.

iii. Interstate Waters

(1) This Rule

This rule retains the longstanding categorical protections for interstate waters, regardless of their navigability, that were established by the earliest predecessors to the 1972 Clean Water Act and remained in place except during the time period the 2020 NWPR was in effect. Interstate waters are, by definition, waters of the “several States,” U.S. Const. Article I, section 8, and are unambiguously “waters of the United States.” In addition, categorical protection of interstate waters is the construction of the Clean Water Act that is most consistent with the text of the statute, including section 303(a), its purpose and history, Supreme Court case law, and the agencies’ charge to implement a “comprehensive regulatory program” that protects the chemical, physical, and biological integrity of the nation’s waters.

The agencies interpret interstate waters under this rule to mean “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries” based on precursor water protection statutes and practice. *See* 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948)). Interstate waters thus include waters that cross or form a part of State boundaries with other States and with other countries (Canada and Mexico). Examples of such waters include portions of the Amargosa River, which flows from Nevada into a dry playa in Death Valley, California, and the Great Dismal Swamp, a wetland which crosses the border between Virginia and North Carolina. The Amargosa River is not a traditional navigable water and does not otherwise flow to a traditional navigable water or the territorial seas, but under the agencies’ pre-2015 regulations and the final rule, the portion of the Amargosa River that crosses the California/Nevada border is an interstate water. Tributaries to interstate waters like the Amargosa River and wetlands adjacent to interstate waters and their tributaries are critical sources of life in desert climates. Interstate waters also include waters that meet the definition of a traditional navigable water or are tributaries of traditional navigable waters or the territorial seas, such as the portions of the Ohio River and Mississippi River that cross or serve as State boundaries; the portions of the Rio Grande that cross State boundaries (Colorado/New Mexico) or that cross the border or serve

as the border between the United States and Mexico; and Lake Champlain, which crosses the New York/Vermont border and crosses the border between the United States and Canada.

Because, as explained below, the Clean Water Act unambiguously includes interstate waters, they are fundamental to the Act in the same manner as traditional navigable waters and the territorial seas. Even if the text of the Clean Water Act does not unambiguously resolve the question of jurisdiction over interstate waters, the agencies have concluded that it is reasonable to construe the statute to protect interstate waters without need for further assessment based on the history of the statute, Supreme Court case law interpreting the Act, the legislative history, and the objective of the Act to restore and maintain the integrity of the nation’s waters. Therefore, this rule, like the 1986 regulations, provides Clean Water Act protections for interstate waters in the same manner as for traditional navigable waters and the territorial seas, and the following waters that meet the relatively permanent standard or significant nexus standard based on their connection to interstate waters are “waters of the United States”: tributaries to interstate waters, wetlands adjacent to interstate waters or to their jurisdictional tributaries, and paragraph (a)(5) waters.

Interstate waters may be streams, lakes or ponds, or wetlands. The longstanding definition of “waters of the United States” includes interstate wetlands. As discussed in section IV.A.2.b.ii of this preamble, the Clean Water Act’s statutory text, structure, and history establish that adjacent wetlands are “waters of the United States” covered by the Act. And, while the Supreme Court’s focus in *Riverside Bayview* was on adjacent wetlands, the Court’s unanimous conclusion that section 404(g)(1) provides express textual evidence “that the term ‘waters’ included adjacent wetlands,” 474 U.S. at 138, is informative for interstate wetlands as well. For more than 45 years the agencies have concluded that waters, for purposes of the Clean Water Act, include wetlands. The agencies have also, for more than 45 years, concluded that some of those wetlands are “waters of the United States,” and among those wetlands are interstate wetlands. Because the agencies consider wetlands to be waters, the rationale for covering interstate waters based on the history of the statute, Supreme Court case law interpreting the Act, legislative history, and the objective of the Act applies with full force to interstate wetlands.

Under this provision of the rule, consistent with the pre-2015 regulatory regime, lakes, ponds, impoundments, and similar lentic (or still) water resources, as well as wetlands, crossing State boundaries are jurisdictional as interstate waters through the entirety of their delineated extent.

For streams and rivers, the agencies will determine the upstream and downstream extent of the stream or river crossing a State boundary or serving as a State boundary that should be considered the “interstate water” using stream order. Stream order is a common, longstanding scientific concept of assigning whole numbers to indicate the branches of a stream network. Under this method, for rivers and streams, the “interstate water” extends upstream and downstream of the State boundary for the entire length that the water is of the same stream order. See section IV.C.4.c.ii.1 of this preamble for additional information about stream order.

(2) Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

Until 1972, the predecessors of the Clean Water Act explicitly protected interstate waters independent of their navigability. The 1948 Water Pollution Control Act declared that the “pollution of interstate waters” and their tributaries is “a public nuisance and subject to abatement.” 33 U.S.C. 466a(d)(1) (1952) (codifying Pub. L. 80–845 section 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.” 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948)).

In 1961, Congress broadened the 1948 statute and made the pollution of “interstate or navigable waters” subject to abatement, retaining the definition of “interstate waters.” 33 U.S.C. 466g(a) (1964) (codifying Pub. L. 87–88 section 8(a), 75 Stat. 204, 208 (1961)). In 1965, Congress required States to develop water quality standards for “interstate waters or portions thereof within such State.” 33 U.S.C. 1160(c)(1) (1970) (codifying Pub. L. 89–234 section 5, 79 Stat. 903, 908 (1965)); see also 33 U.S.C. 1173(e) (1970) (retaining definition of “interstate waters”). In the 1972 Clean Water Act, Congress abandoned the “abatement” approach initiated in the 1948 statute in favor of a focus on permitting for discharges of pollutants.

While the term “navigable waters” is ambiguous in some respects, interstate waters are waters that are clearly

covered by the plain language of the definition of “navigable waters.” Congress defined “navigable waters” to mean “the waters of the United States, including the territorial seas.” Interstate waters are, by definition, waters of the “several States,” U.S. Const. section 8, and consequently, are unambiguously “waters of the United States.” The 1972 Clean Water Act thus reflects Congress’s recognition that the degradation of water resources in one State may cause substantial harms in other States. The Supreme Court has recognized that “the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 282 (1981).

In addition, the text of the 1972 Clean Water Act specifically addresses “interstate waters” regardless of their navigability. Namely, section 303(a) of the 1972 Clean Water Act uses the term “interstate waters” and provides that pre-existing water quality standards for “interstate waters” remain in effect unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. 33 U.S.C. 1313(a)(1). That plain language is a clear indication that Congress intended the agencies to continue to protect the water quality of interstate waters without reference to their navigability. Excluding “interstate waters” as an independent category of Clean Water Act jurisdiction would disregard the plain language of section 303(a).

The Supreme Court has concluded that the 1972 Clean Water Act was “not merely another law ‘touching interstate waters,’” but rather “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (“*City of Milwaukee*”). Thus, the 1972 amendments superseded the Federal common law of nuisance as a means to protect interstate waters in favor of a statutory “all-encompassing program of water pollution regulation,” *id.* at 318, and they did not curtail the scope of protected waters.

Even if the text and history of the statute and Supreme Court case law interpreting the Clean Water Act do not unambiguously resolve the issue, the situation addressed by the Supreme Court in the *City of Milwaukee* case highlights the reasonableness of the agencies’ interpretation that the Act

protects interstate waters. The *City of Milwaukee* litigation involved alleged discharges of inadequately treated sewage from Milwaukee, Wisconsin sewer systems directly into Lake Michigan, which also borders Illinois. As the Supreme Court noted, prior to passage of the Clean Water Act, these discharges would have had to be resolved through litigation, in which the courts must apply “often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.” *Id.* at 317. However, the Clean Water Act replaced this unpredictable and inefficient approach with “a comprehensive regulatory program supervised by an expert administrative agency.” *Id.* The Court reiterated that view in *Arkansas v. Oklahoma*, stating in the context of an NPDES permit for a discharge of pollutants to interstate waters that, while the Clean Water Act may place some limits on downstream States’ participation in the permitting process, those limits “do not in any way constrain the EPA’s authority to require a point source to comply with downstream water quality standards.” 503 U.S. 91, 106 (1992) (emphasis in original).

The potential for interstate harm, and the consequent need for Federal regulation, is particularly clear with respect to waterbodies that span more than one State. The alternative interpretation would leave interstate waters that do not fall within any other provisions in the definition of “waters of the United States” without Federal protection. Parties in different States would need to resolve concerns about upstream discharges in non-jurisdictional waters through litigation using “often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.” *City of Milwaukee*, 451 U.S. at 317; see also 85 FR 22286 (April 21, 2020) (acknowledging in the 2020 NWPR that “remedies for pollution disputes among States that do not implicate CWA sections 319(g), 401, or 402 would likely derive from federal common law under the Supreme Court’s original jurisdiction. Remedies for disputes between a State and a public or private party would likely derive from State or federal common law and be heard by State or Federal courts” (citations omitted)). Restoration of longstanding protections for interstate waters, regardless of whether they are navigable-in-fact, enables the agencies to address interstate water quality issues efficiently and effectively. The agencies interpret interstate waters to encompass all waters that Congress has sought to protect since 1948: all rivers, lakes, and

other waters that flow across, or form a part of, State boundaries. Public Law 80–845, sec. 10, 62 Stat. 55, at 1161 (1948). These waters need not meet the relatively permanent standard or significant nexus standard to be jurisdictional under the final rule.

EPA has interpreted the Clean Water Act to cover interstate waters, with the exception of the 2020 NWPR, since 1973. 38 FR 13528 (May 22, 1973) (providing that the term “waters of the United States” includes “interstate waters and their tributaries, including adjacent wetlands”). In the final rule promulgated in 1977, the Corps adopted EPA’s definition and included “interstate waters and their tributaries, including adjacent wetlands” within the definition of “waters of the United States.” The preamble to that rule provided an explanation for the inclusion of interstate waters: “The affects [*sic*] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government’s traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.” 42 FR 37122, 37127 (July 19, 1977).

Because the Clean Water Act unambiguously includes interstate waters, they are fundamental to the Act in the same manner that traditional navigable waters and the territorial seas are. Traditional navigable waters, the territorial seas, and interstate waters cannot be protected without also protecting the waters that have a significant nexus to those waters. This rule protects interstate waters in the same manner as it protects traditional navigable waters and the territorial seas. Thus, the following waters that meet the relatively permanent standard or significant nexus standard based on their connection to interstate waters are “waters of the United States”: tributaries to interstate waters, wetlands adjacent to interstate waters or to their jurisdictional tributaries, and paragraph (a)(5) waters. The agencies received multiple comments on the proposed rule in favor of the categorical inclusion of interstate waters as “waters of the United States,” as well as multiple comments arguing that categorical inclusion of interstate waters is inconsistent with the Clean Water Act. Several commenters asserted that

asserting categorical jurisdiction over interstate waters is legally permissible, with some arguing that the statutory language unambiguously demonstrates that the Clean Water Act protects all interstate waters. One commenter stated that the agencies’ failure to protect all interstate waters in the 2020 NWPR “was an abdication of a core premise of the Clean Water Act’s cooperative federalism.” One commenter added that Federal jurisdiction over interstate waters protects State sovereignty, rather than threatening it, and quoted Justice Scalia’s plurality opinion in *Rapanos* that “the Act protects downstream States from out-of-state pollution that they cannot themselves regulate.” 547 U.S. at 777. Several of the commenters discussed downstream pollution to demonstrate their general support for including interstate waters as a jurisdictional category. Many of these commenters added that including interstate waters in the definition of “waters of the United States” helps reduce the burden of increased pollutants from out-of-state, upstream discharges.

Commenters opposed to the categorical inclusion of interstate waters stated that such an approach unlawfully reads the notion of navigability out of the Clean Water Act. A few commenters asserted that pursuant to *SWANCC*, *Riverside Bayview*, and *Rapanos*, interstate waters or interstate wetlands can only be jurisdictional if they are navigable or connected to navigable waters. In support of their arguments, some commenters cited the 2020 NWPR and the order of the U.S. District Court for the Southern District of Georgia remanding the 2015 Clean Water Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358–59 (S.D. Ga. 2019) (concluding that the categorical inclusion of interstate waters exceeds the agencies’ statutory authority because it “reads the term navigability out of the CWA”). For the reasons articulated above, the agencies conclude that the interpretation of the agencies’ authority over interstate waters articulated in the 2020 NWPR and in *Georgia v. Wheeler* is inconsistent with both the text and the history of the Clean Water Act, as well as Supreme Court case law.

A few commenters disagreed with the agencies’ proposal to determine jurisdiction over tributaries to interstate waters, wetlands adjacent to interstate waters or their jurisdictional tributaries, and paragraph (a)(5) waters, by applying the relatively permanent or significant nexus standards to analyze their connection to the interstate water. Alternatively, a few commenters supported interstate waters being

treated like traditional navigable waters and the territorial seas for purposes of determining the jurisdictional status of tributaries to interstate waters, wetlands adjacent to interstate waters or their jurisdictional tributaries, and paragraph (a)(5) waters. The agencies have concluded that, since interstate waters are clearly jurisdictional under the statute, the statute requires the same protections for them as the Clean Water Act does for traditional navigable waters and the territorial seas. As the scientific support for protecting tributaries, adjacent wetlands, and paragraph (a)(5) waters that satisfy the relatively permanent or significant nexus standard is the same for interstate waters as it is for traditional navigable waters and the territorial seas, the agencies have reasonably defined “waters of the United States” to protect such tributaries, adjacent wetlands, and paragraph (a)(5) waters.

In the proposed rulemaking, the agencies requested comment on approaches for implementing the interstate waters provision, including approaches for determining the upstream and downstream extent of a stream or river crossing a State boundary or serving as a State boundary that should be considered the “interstate water.” Several commenters stated that the entire length of a waterbody that is of the same stream order as the point that crosses State lines should be considered an interstate water, and therefore jurisdictional. These commenters added that where a river or stream itself forms the boundary, the entire length of stream forming the boundary should be considered an interstate water, and therefore jurisdictional. These commenters also added that any additional reach of the stream that is the same stream order as the portion forming the boundary should also be jurisdictional. One commenter stated that this stream order approach is well-understood and consistent with the longstanding pre-2015 regulatory regime and stated that it is also consistent with longstanding accepted scientific practice. Alternatively, a few commenters voiced opposition or concern for using stream order to determine the reach of an interstate water, with one commenter stating that the approach is restrictive and another stating that it could be too expansive. The agencies agree with commenters who stated that stream order is an appropriate approach for determining the upstream and downstream limits of an interstate water that is a stream or river. The agencies conclude that this

approach is reasonable and provides a method that is transparent, well-understood, predictable, and easy to implement. This approach is consistent with longstanding practice under the pre-2015 regulatory regime and thus is familiar to the agencies and the public. Additionally, this method is consistent with the agencies' approach to characterizing tributary reaches based on stream order for purposes of applying the relatively permanent standard in this rule (see section IV.C.4.c.ii of this preamble), and the agencies' approach to characterizing tributary reaches based on stream order to delineate the catchment for purposes of applying the significant nexus standard in this rule (see section IV.C.4.c.iii of this preamble).

(3) Waters That Cross a State-Tribal Boundary

The agencies requested comment in the proposed rule on whether interstate waters should encompass waters that flow across, or form a part of, boundaries of federally recognized Tribes where these waters simultaneously flow across, or form a part of, State boundaries. See Public Law 80-845, sec. 10, 62 Stat. 1155, at 1161 (1948). The agencies also sought comment on how to identify "Tribal boundaries" for purposes of implementing the interstate waters provision, such as boundaries associated with a Tribe's reservation or boundaries associated with the term "Indian country" as defined at 18 U.S.C. 1151.

Multiple commenters expressed support for treating waters that cross or serve as State/Tribal boundaries as interstate waters, with some commenters stating that waters that cross or serve as boundaries between the lands of different Tribes (*i.e.*, Tribal/Tribal boundaries) should also be deemed interstate waters under the rule. Other commenters did not support treating waters that cross or serve as State/Tribal boundaries as interstate waters. Some commenters provided input on which boundary should be considered a Tribal boundary for purposes of the interstate waters category, with many of those commenters expressing a preference for using "Indian country" as defined at 18 U.S.C. 1151 to delineate Tribal boundaries. A few commenters suggested that a category broader than "Indian country" should be used to adequately reflect Tribal interests and rights.

As evidenced by the feedback the agencies have received, the issue of how to address "Tribal boundaries" for

purposes of implementing the interstate waters provision is of great importance to Tribes as well as various stakeholders. The agencies recognize the range of views expressed on this issue to date, including support for interpreting Tribal boundaries to include all waters that flow across, or form a part of, Indian country boundaries; support for finding that interstate waters include waters outside of Indian country that flow into areas where Tribes exercise treaty or other rights; opposition to interstate waters generally including waters that flow across, or form part of, Tribal boundaries; and views in between. The agencies also acknowledge commenters who raised questions regarding implementation of potential interpretations of interstate waters as applied to Tribal boundaries.

The agencies have considered the input received during pre-proposal Tribal consultation and the public comment period for the proposed rule and, at this time, are continuing to evaluate the issue of interstate waters and Tribal boundaries, including what should appropriately be considered "Tribal boundaries" for purposes of identifying interstate waters under the Clean Water Act. The agencies have weighed the benefits of addressing this issue now, based on the record currently before them, versus undertaking additional analysis and outreach to Tribes to gain a better understanding of Tribal boundaries as related to interstate waters and related implications via a separate process, described below, to avoid delaying the entire rule.

Based on the agencies' evaluation of the comments received and the benefits of further analysis and outreach, the agencies have decided to conduct additional analysis and outreach to inform a future action related to considering designating waters that cross a State/Tribal boundary as interstate waters under the definition of "waters of the United States." The agencies recognize the importance of this issue to Tribes and are fully committed to directly engaging with Tribal governments as the agencies continue to evaluate this aspect of the scope of "waters of the United States."

Accordingly, the agencies will address this issue in a subsequent action after completing additional analysis and essential outreach and engagement activities with Tribes and interested stakeholders. Although the agencies are not taking a position on this specific issue at this time, a water that crosses a State/Tribal boundary may be jurisdictional if it otherwise falls within

this rule's definition of "waters of the United States."

3. Impoundments

a. This Rule

Consistent with the proposal, this rule retains the provision in the 1986 regulations that defines "waters of the United States" to include impoundments of "waters of the United States." Impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. Impoundments can be natural (like beaver ponds) or artificial (like reservoirs).

The agencies' implementation of the paragraph (a)(2) impoundments category⁹¹ is based on two primary principles. First, as a matter of policy, law, and science, impoundments do not render "waters of the United States" no longer "waters of the United States." Second, as a matter of policy and science, if an impounded water has the characteristics of another jurisdictional water, then the impoundment is jurisdictional. Based on these principles, in implementing this rule the agencies consider paragraph (a)(2) impoundments to include (1) impoundments created by impounding one of the "waters of United States" that was jurisdictional under this rule's definition at the time the impoundment was created, and (2) impoundments of waters that at the time of assessment meet the definition of "waters of the United States" under paragraph (a)(1), (a)(3), or (a)(4) of this rule, regardless of the water's jurisdictional status at the time the impoundment was created. Waters that are jurisdictional under paragraph (a)(5) are the exception to these two implementing principles. The text of this regulation states that they are not covered by paragraph (a)(2). Therefore, waters that are jurisdictional under paragraph (a)(5) do not categorically retain their jurisdictional status as "waters of the United States"

⁹¹ Impounded waters may be jurisdictional under provisions other than the paragraph (a)(2) impoundments provision. For example, they may be impoundments that are traditional navigable waters and would be jurisdictional under paragraph (a)(1), or they may be impounded adjacent wetlands and meet the requirements to be jurisdictional under the paragraph (a)(4) adjacent wetlands provision. To provide clarity in this preamble, when the agencies are discussing the subsection of impoundments that are jurisdictional under paragraph (a)(2) because they are impoundments of "waters of the United States," the agencies will refer to "paragraph (a)(2) impoundments."

under paragraph (a)(2).⁹² However, a subsequently impounded jurisdictional paragraph (a)(5) water may still be determined to be jurisdictional if it meets the requirements of a category of “waters of the United States” other than paragraph (a)(2) at the time of assessment (*i.e.*, as a traditional navigable water, the territorial seas, an interstate water, a jurisdictional tributary, a jurisdictional adjacent wetland, or a paragraph (a)(5) water).⁹³

Consistent with the 1986 regulations, under this rule tributaries may be tributaries to paragraph (a)(1) or (a)(2) waters. Tributaries to paragraph (a)(2) impoundments, and wetlands adjacent to such tributaries, are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. Additionally, wetlands adjacent to paragraph (a)(2) impoundments are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. In order for a tributary to a paragraph (a)(2) impoundment to meet the relatively permanent standard, the agencies must be able to trace evidence of a flowpath (*e.g.*, physical features on the landscape, such as a channel, ditch, pipe, or swale) directly or indirectly through another water or waters, downstream from the structure that creates the paragraph (a)(2) impoundment to a paragraph (a)(1) water. When evaluating a wetland adjacent to a paragraph (a)(2) impoundment under the relatively permanent standard, field staff would assess whether the impounded water is relatively permanent, standing or continuously flowing, and then determine whether the wetland has a continuous surface connection to the impoundment. When evaluating a wetland adjacent to a jurisdictional tributary to a paragraph (a)(2) impoundment when the jurisdictional tributary meets the relatively permanent standard, field staff would determine

⁹² When an approved jurisdictional determination does not exist for an impounded water that the agencies conclude based on its characteristics could only be jurisdictional under paragraph (a)(5), the paragraph (a)(2) impoundments provision does not apply and the water will be assessed under another jurisdictional category.

⁹³ For example, if a stream that is not part of the tributary system of a paragraph (a)(1) water, but which is assessed under paragraph (a)(5) and is determined to meet the significant nexus standard, is lawfully impounded subsequent to the jurisdictional determination, the stream is not automatically jurisdictional as a paragraph (a)(2) water under this rule. However, the impounded stream may still meet the significant nexus standard under paragraph (a)(5) or the impounded stream may develop the characteristics of a traditional navigable water and become jurisdictional under paragraph (a)(1).

whether the wetland has a continuous surface connection to the tributary. *See* section IV.C.4.c and section IV.C.5.c of this preamble for additional information on evaluations under the relatively permanent standard for tributaries and adjacent wetlands. For a tributary to a paragraph (a)(2) impoundment, a wetland adjacent to a paragraph (a)(2) impoundment, or a wetland adjacent to a tributary to a paragraph (a)(2) impoundment, that is assessed under the significant nexus standard, the significant nexus must be to a paragraph (a)(1) water. *See* sections IV.C.4.c and IV.C.5.c of this preamble for additional information on significant nexus evaluations for tributaries and adjacent wetlands.

b. Summary of the Agencies' Consideration of Public Comments and Rationale for This Rule

The agencies have determined that as a matter of law, science, and policy, impoundments do not de-federalize a water, and therefore impoundments of “waters of the United States” remain “waters of the United States.” The Supreme Court has confirmed that damming or impounding “waters of the United States” does not make those waters non-jurisdictional. *See S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“*S.D. Warren*”) (“[N]or can we agree that one can denationalize national waters by exerting private control over them.”). While *S.D. Warren* addressed the meaning of the word “discharge” rather than the definition of “waters of the United States,” the Court’s conclusion regarding the jurisdictional status of a dammed river supports the agencies’ longstanding interpretation of the Clean Water Act that “waters of the United States” remain “waters of the United States” even if impounded, as reflected in the 1986 regulations and continued in this rule. Essentially, the action of creating an impoundment cannot on its own render “waters of the United States” no longer jurisdictional.⁹⁴ The Court of Appeals for the Ninth Circuit has similarly found that “it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.” *United States v. Moses*, 496

⁹⁴ Note that a Clean Water Act section 404 permit may authorize impoundment of a water such that the water is no longer jurisdictional, for example, to create a waste treatment system that is excluded from the definition of “waters of the United States.” In such circumstances, the water is analyzed under the regulatory exclusion where applicable, not under the impoundments provision of the definition.

F.3d 984, 988 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).

Asserting Clean Water Act jurisdiction over impoundments also aligns with the scientific literature, as well as the agencies’ scientific and technical expertise and experience, which confirm that impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections. As discussed in section III.C of the Technical Support Document, impoundments are typically built to maintain some level of hydrologic connection between the water that is being impounded and the downstream tributary network. For example, water may pass from a reservoir to the downstream side of an impoundment by passing through a main spillway or outlet works, passing over an auxiliary spillway, or overtopping the impoundment. Indeed, berms, dikes, and similar features used to create impoundments typically do not block all water flow. Even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, generally do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself. *See, e.g.*, International Atomic Energy Agency, 2003, “Investigating Leaks in Dams & Reservoirs.” INIS-XA-616. Vienna, Austria (“All dams are designed to lose some water through seepage.”); U.S. Bureau of Reclamation, “Safety of Dams.” Provo Area Office (last updated July 1, 2017) (“All dams seep, but the key is to control the seepage through properly designed and constructed filters and drains.”); Federal Energy Regulatory Commission, 2005, “Chapter 14: Dam Safety Performance Monitoring Program.” Engineering Guidelines for the Evaluation of Hydropower Projects. (“Seepage through a dam or through the foundations or abutments of dams is a normal condition.”). Further, as an agency with expertise and responsibilities in engineering and public works, the Corps extensively studies water retention structures like berms, levees, and earth and rock-fill dams. The agency has found that all water retention structures are subject to seepage through their foundations and abutments. *See* section III.C of the Technical Support Document.

Paragraph (a)(2) waters include impoundments created in waters that were jurisdictional under this rule’s definition at the time the impoundment was created, as well as impoundments of waters that at the time of assessment are jurisdictional under paragraph (a)(1), (a)(3), or (a)(4) of this rule regardless of

the water's jurisdictional status at the time the impoundment was created.⁹⁵ This is generally consistent with the agencies' longstanding approach to impoundments. See U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (2007) at 58, available at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/> (hereinafter, "2007 Corps Instructional Guidebook"). The agencies have concluded that it is appropriate based on relevant case law, science, and as a practical matter to interpret "waters of the United States" to include both impoundments of waters that qualified as "waters of the United States" under this rule's definition at the time of impoundment, and impoundments of waters that at the time of assessment meet the definition of "waters of the United States" (other than waters jurisdictional under paragraph (a)(5)). As discussed above, waters that qualified as "waters of the United States" at the time of impoundment (other than waters jurisdictional under paragraph (a)(5)) remain "waters of the United States." And impoundments of waters that at the time of assessment fall within one of the other categories of "waters of the United States" in this rule (other than waters jurisdictional under paragraph (a)(5)) are jurisdictional under paragraph (a)(2).

The agencies received a variety of comments on impoundments during the public comment period. Some commenters supported the agencies' inclusion of impoundments of "waters of the United States" as a separate category of jurisdictional waters. A few commenters stated that the relatively permanent standard and significant nexus standard should also apply to impoundments for the purposes of jurisdiction. Some commenters agreed with the proposed rule's approach to not include impounded paragraph (a)(5) waters in the impoundments category. Many commenters requested the agencies provide greater clarity about the definition of impoundments.

After consideration of public comments and for the reasons described above and in section III.C of the Technical Support Document, the agencies affirm in this rule that impoundments of "waters of the United States" remain "waters of the United States," except for impoundments of paragraph (a)(5) waters, which the

agencies find are better assessed under other categories of this rule. As discussed above, paragraph (a)(2) impoundments of "waters of the United States" legally remain "waters of the United States," so the agencies are not requiring an additional determination of their jurisdiction under this rule. While the agencies are not defining "impoundment" in this rule, in this preamble the agencies are providing additional clarity below about the types of impoundments that are and that are not considered "waters of the United States" under paragraph (a)(2). Additionally, section IV.C.3.c of this preamble provides implementation guidance for identifying impoundments on the landscape.

As in the proposed rule, impoundments of waters that are determined to be jurisdictional under paragraph (a)(5) are not included in this rule as paragraph (a)(2) impoundments. As discussed above, impoundments of paragraph (a)(5) waters would need to be assessed for jurisdiction in their current state under paragraph (a)(1), (a)(3), (a)(4), or (a)(5) of this rule. Thus, if a water is determined to be jurisdictional under paragraph (a)(5) and is then later lawfully impounded, it is not jurisdictional by rule under the paragraph (a)(2) impoundments provision. Instead, the impoundment of a paragraph (a)(5) water would itself need to be assessed in its current state to determine whether it is jurisdictional under one of the provisions of the rule besides paragraph (a)(2). Impounded paragraph (a)(5) waters will most likely continue to not meet any of the other categories of jurisdictional waters and will therefore need to be re-assessed under paragraph (a)(5). However, if, once impounded, such a water became, for example, a traditional navigable water, it would be jurisdictional under paragraph (a)(1) of this rule. This approach in this rule is consistent with the agencies' careful approach to jurisdiction over paragraph (a)(5) waters. For example, as discussed in sections IV.C.4 and IV.C.5 of this preamble below, the "tributaries" category does not include tributaries to paragraph (a)(5) waters and the adjacent wetlands category does not include wetlands adjacent to paragraph (a)(5) waters. This change from the 1986 regulations reflects the agencies' consideration of the jurisdictional concerns and limitations of the statute as informed by *SWANCC* and *Rapanos*.

c. Implementation

Under this rule, for the reasons discussed above, impounding a water that meets the definition of "waters of

the United States" generally does not affect such water's jurisdictional status, consistent with pre-2015 practice. See 2007 Corps Instructional Guidebook at 58. A water can be found to be a jurisdictional impoundment under paragraph (a)(2) of this rule if (1) the impounded water met the definition of "waters of the United States" based on this rule's definition at the time the impoundment was created⁹⁶ (other than an impoundment of a paragraph (a)(5) water) or (2) the water that is being impounded, at the time of assessment, meets the definition of "waters of the United States" under paragraph (a)(1), (a)(3), or (a)(4), regardless of the water's jurisdictional status when the impoundment was created. The agencies also note that over time an impoundment of a water that does not initially meet the definition of "waters of the United States" can become jurisdictional under another provision of the regulation; for example, an impounded water could become navigable-in-fact and covered under paragraph (a)(1)(i) of this rule. This approach to implementation of impoundments is generally consistent with pre-2015 practice. This section of the preamble provides information for determining jurisdiction for impoundments under paragraph (a)(2) and for determining jurisdiction for tributaries of impoundments, wetlands adjacent to impoundments, and wetlands adjacent to tributaries of impoundments.

i. Determining the Presence of a Paragraph (a)(2) Impoundment

Impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. Impoundments can vary in size, with some being very small and others being very large, like Lake Mead, a reservoir on the Colorado River that is created by the Hoover Dam. Paragraph (a)(2) impoundments under this rule can include both natural impoundments (like beaver ponds) and artificial impoundments (like reservoirs). Paragraph (a)(2) impoundments under this rule can be located off-channel (*i.e.*,

⁹⁶ Note, however, if an impoundment is a waste treatment system constructed prior to the 1972 Clean Water Act amendments, it is eligible for the exclusion under paragraph (b) of this rule so long as the system is in compliance with currently applicable Clean Water Act requirements, such as treating water such that discharges, if any, from the system meet the Act's requirements. See section IV.C.7.b of this preamble.

⁹⁵ See *infra* for a discussion of impoundments of waters that are jurisdictional as paragraph (a)(5) waters, which are treated differently under this rule.

an impoundment with no outlet or hydrologic connection to the tributary network) or in-line with the channel (*i.e.*, an impoundment with a hydrologic connection to the tributary network).

An impoundment is jurisdictional under paragraph (a)(2) of this rule if the impounded water met the definition of “waters of the United States” based on this rule’s definition when the impoundment was created (other than impoundments of paragraph (a)(5) waters). To determine if an impoundment meets this criterion, the water would be assessed to see if the water was jurisdictional as a paragraph (a)(1) water, tributary, or adjacent wetland based on this rule’s definition at the time it was impounded. Tools that can be used for such assessment are discussed further in sections IV.C.4.c and IV.C.5.c of this preamble. Historic aerial photographs, maps, and geospatial datasets may be particularly useful in helping to determine if a water was jurisdictional under paragraph (a)(1), (a)(3), or (a)(4) of this rule at the time the impoundment was created, especially where such materials depict the aquatic system before and after the impoundment was created. Similarly, planning, engineering, and design documents, if available, may provide useful information.

Paragraph (a)(2) waters also include impoundments of waters that at the time of assessment are jurisdictional under paragraph (a)(1), (a)(3), or (a)(4) of this rule regardless of the water’s jurisdictional status at the time the impoundment was created. This approach is consistent with pre-2015 practice. *See* 2007 Corps Instructional Guidebook at 58. A water that is impounded may not meet this rule’s jurisdictional criteria at the time the water was originally impounded, but the water may meet this rule’s jurisdictional criteria at the time of the assessment (in some cases, many years later). This is because aquatic resources generally can evolve over time as aquatic landscapes, precipitation and other climatic patterns, and other environmental conditions change, or due to human-caused changes (*e.g.*, stream modification, filling in of wetlands, water withdrawals, or effluent discharges). Impounded waters may be particularly likely to evolve as the surface waters are raised or expanded behind the impoundment. To determine if an impoundment is jurisdictional based on such changes, the impounded water would be assessed to see if it is a traditional navigable water, the territorial seas, an interstate water, a jurisdictional tributary, or a jurisdictional adjacent wetland. Tools

that can be used for such assessment are discussed further in sections IV.C.4.c and IV.C.5.c of this preamble.

In assessing if an impoundment of a paragraph (a)(1) water is jurisdictional under paragraph (a)(2), the agencies would assess whether the water that is being impounded met the requirements to be a paragraph (a)(1) water under this rule either at the time of impoundment or at the time of assessment. Impoundments of paragraph (a)(1) waters that continue to meet the requirements under paragraph (a)(1) remain paragraph (a)(1) waters.

In assessing whether an impoundment of a tributary is jurisdictional under paragraph (a)(2), the agencies would first assess if the tributary either met this rule’s definition of “waters of the United States” at the time the impoundment was created or if the tributary meets this rule’s definition of “waters of the United States” at the time of assessment. For impoundments of tributaries that met this rule’s definition of “waters of the United States” at the time the impoundment was created, the agencies must be able to demonstrate that at the time the impoundment was created, there was evidence of a flowpath (*e.g.*, physical features on the landscape, such as a channel, ditch, pipe, or swale) directly or indirectly through another water or waters, downstream from the structure that created the impoundment to a paragraph (a)(1) water. Thus, an impoundment of a tributary that met this rule’s definition of “waters of the United States” at the time the impoundment was created could currently be located off-channel (*e.g.*, due to changes in hydrology) or in-line with the channel, but the flowpath would only need to be traceable at the time the impoundment was created. For impoundments of tributaries that meet this rule’s definition of “waters of the United States” at the time of assessment, the agencies must be able to at the time of assessment trace a flowpath directly or indirectly through another water or waters, downstream from the structure that creates the impoundment to a paragraph (a)(1) water. Thus, impoundments of tributaries that meet the definition of “waters of the United States” at the time of assessment will always be in-line with the channel due to the flowpath requirement. This is consistent with the agencies’ approach to tributaries under the final rule. *See* section IV.C.4. of this preamble. As with assessment of tributaries under this rule, while the physical flowpath from the paragraph (a)(2) impoundment to the paragraph (a)(1) water must be traceable, there is

not a need to demonstrate that flow from the impoundment reaches the paragraph (a)(1) water. For an off-channel impoundment (*i.e.*, an impoundment with no outlet to the tributary network), such as an impoundment of a jurisdictional adjacent wetland, such a flowpath is not required. Under the final rule, adjacent wetlands do not require a flowpath to the tributary network, and similarly, impoundments of such adjacent wetlands do not require a flowpath. The agencies would only need to determine that the impoundment was created in a water that is currently jurisdictional under paragraphs (a)(1) through (4) or that the impoundment was created in a water that was jurisdictional under paragraphs (a)(1) through (4) at the time the impoundment was created.

In assessing whether an impoundment of an adjacent wetland is jurisdictional under paragraph (a)(2), the agencies would need to determine that the impoundment was created in an adjacent wetland that was jurisdictional at the time the impoundment was created or that is currently jurisdictional at the time of assessment. Such impoundments of adjacent wetlands may be located either off-channel or in-line with the channel, and do not require a traceable flowpath that is required for impoundments of tributaries. This is because under the final rule, adjacent wetlands do not require a flowpath to the tributary network, and similarly, impoundments of such adjacent wetlands do not require a flowpath.

Because impoundments can be jurisdictional under other categories of “waters of the United States” under this rule, field staff may document that the impoundment is jurisdictional under other categories. For example, if an impoundment is itself a traditional navigable water, part of the territorial seas, or an interstate water, the agencies would typically determine that the impoundment is a paragraph (a)(1) water, rather than asserting jurisdiction under paragraph (a)(2) of this rule. Field staff may document any such waters as jurisdictional under the relevant provision of the rule rather than documenting that it is jurisdictional as a paragraph (a)(2) impoundment.

Finally, as discussed above in section IV.C.3.b of this preamble, waters that are jurisdictional under paragraph (a)(5) and that are subsequently impounded do not categorically retain their jurisdictional status as “waters of the United States” under paragraph (a)(2). If the impoundment of the paragraph (a)(5) water does not meet the jurisdictional standards under one of

the other categories of “waters of the United States” in this rule (*i.e.*, as a paragraph (a)(1) water, jurisdictional tributary, or jurisdictional adjacent wetland), the impoundment would be re-assessed as a paragraph (a)(5) water. Implementation of waters assessed under paragraph (a)(5) is discussed in section IV.C.6.c of this preamble.

ii. Determining Jurisdiction for Tributaries of Impoundments, Wetlands Adjacent to Impoundments, and Wetlands Adjacent to Tributaries of Impoundments

Tributaries of paragraph (a)(2) impoundments are jurisdictional, as with all tributaries under this rule, when they meet either the relatively permanent standard or the significant nexus standard. In order to determine if a water is a tributary of a paragraph (a)(2) impoundment, the same tools and methods can be used that are discussed in section IV.C.4.c.i of this preamble to trace the flowpath to the impoundment. Field staff would then determine if the tributary should be evaluated under the relatively permanent standard or the significant nexus standard. For tributaries assessed under the relatively permanent standard, the agencies must be able to trace evidence of a flowpath downstream from the structure that creates the impoundment to a paragraph (a)(1) water. To meet the latter standard, the significant nexus must be to a paragraph (a)(1) water. Implementation of the relatively permanent standard for tributaries is discussed in more detail in section IV.C.4.c.ii of this preamble. Implementation of the significant nexus standard for tributaries is discussed in section IV.C.4.c.iii of this preamble.

For tributaries of paragraph (a)(2) impoundments that are evaluated under the relatively permanent standard, field staff would determine if the tributary has flowing or standing water year-round or continuously during certain times of the year, *see* section IV.C.4.c.ii of this preamble, and then determine whether there is evidence of a flowpath downstream from the structure that creates the impoundment to a paragraph (a)(1) water. As with all tributaries under the rule, there is no requirement under the relatively permanent standard for relatively permanent flow for the entirety of a tributary’s flowpath to a downstream paragraph (a)(1) water. *See id.* Thus, under the relatively permanent standard for tributaries of paragraph (a)(2) impoundments, field staff would not need to determine that flow occurs over, through, around, or underneath the structure that creates the impoundment. Instead, the agencies will document that flow occurs from the

tributary to the impoundment, either directly or indirectly through another water or waters, including non-jurisdictional features, as described in section IV.C.4 of this preamble, and that there is evidence of a flowpath downstream of the structure (*e.g.*, physical features on the landscape, such as a channel, non-jurisdictional ditch, pipe, or swale) to a paragraph (a)(1) water, either directly or indirectly through another water or waters. For example, a tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a paragraph (a)(1) water.

If a wetland is adjacent to a paragraph (a)(2) impoundment and that wetland is evaluated under the relatively permanent standard, field staff would, only for purposes of determining whether the adjacent wetland meets the relatively permanent standard, assess whether the impounded water is relatively permanent, standing or continuously flowing. Next, field staff would determine whether the wetland has a continuous surface connection to the paragraph (a)(2) impoundment, consistent with section IV.C.5 of this preamble. If the paragraph (a)(2) impoundment is not relatively permanent, standing or continuously flowing, then field staff will assess the adjacent wetland under the significant nexus standard.

If a wetland is adjacent to a tributary to a paragraph (a)(2) impoundment, and the tributary meets the relatively permanent standard, the wetland would be assessed for whether it has a continuous surface connection to the tributary, consistent with section IV.C.5 of this preamble. If the adjacent wetland does not have a continuous surface connection, it will be assessed under the significant nexus standard. If the tributary does not meet the relatively permanent standard, then field staff will assess the adjacent wetland under the significant nexus standard. To apply the significant nexus standard to tributaries of paragraph (a)(2) impoundments, wetlands adjacent to those tributaries, or wetlands adjacent to paragraph (a)(2) impoundments, the agencies will assess if the waters of interest significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters using the tools and approaches described in sections IV.C.4.c.iii and IV.C.5.c.iii of this preamble. As part of that analysis, the agencies will determine if there is a surface or subsurface hydrologic connection downstream that is maintained over,

through, around, or underneath the structure that creates the impoundment. Such a hydrologic connection can occur in a variety of ways, such as overtopping of the structure or through features like dam spillways, drainage and other galleries, sluiceways, culverts, pipes, diversion tunnels, or conduits that are built to maintain a hydrologic connection through the dam or levee. Subsurface hydrologic connectivity can also occur via seepage through or underneath the dam or similar structure. Field staff can document that surface or subsurface hydrologic connectivity occurs using direct observation of overtopping or a feature that is constructed to maintain a hydrologic connection, through review of construction plans for the structure, through other field observations (*e.g.*, dye tests or tracer studies, or observations of flow within the spillway such as bent over vegetation or water staining where the spillway is concrete, soil saturation, changes in vegetation above and below the structure), or through remote tools (*e.g.*, aerial photography interpretation that provides indications of wetter signatures below the dam). As stated in section IV.C.9 of this preamble, a hydrologic connection to a paragraph (a)(1) water is not necessary to determine that the water being evaluated significantly affects the integrity of paragraph (a)(1) waters, though it is one of the factors that is considered. Where such a hydrologic connection exists at the surface or subsurface, it can help to facilitate the functions that the tributary of the paragraph (a)(2) impoundment performs that impact the downstream paragraph (a)(1) water, such as contribution of flow, pollutants, sediment, and organic material. In the rare circumstances where such a hydrologic connection does not exist, the lack of such a connection can facilitate other functions, such as holding back floodwaters that could otherwise harm paragraph (a)(1) waters. *See* preamble section IV.C.9 for additional information on implementing the significant nexus standard more generally.

4. Tributaries

a. This Rule

Consistent with the proposal, this rule retains the tributary provision of the 1986 regulations, updated to reflect consideration of the law, the science, and agency expertise. The 1986 regulations defined “waters of the United States” to include tributaries of traditional navigable waters, interstate waters, paragraph (a)(3) “other waters”

(a category that has been modified and codified in this rule as paragraph (a)(5) waters) and impoundments. With this rule, the agencies are adding the territorial seas to the list of waters to which tributaries may connect to constitute a jurisdictional tributary and removing paragraph (a)(3) waters from the list. This rule defines “waters of the United States” to include tributaries of traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments if the tributaries meet either the relatively permanent standard or the significant nexus standard.

The 1986 regulations do not contain a definition of “tributary,” and the agencies similarly are not including a definition in this rule. However, for more than 45 years, the agencies have recognized the need to protect “the many tributary streams that feed into the tidal and commercially navigable waters . . . since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material.”⁴² FR 37121, 37123 (July 19, 1977). Accordingly, the agencies are maintaining their interpretation of tributary for purposes of the definition of “waters of the United States.” See *Rapanos* Guidance at 6 n.24. A tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water. Waters through which a tributary may flow indirectly include, for example, impoundments, wetlands, lakes, ponds, and streams. A tributary may flow through a number of downstream waters, including a non-jurisdictional tributary or non-jurisdictional features, such as a ditch excluded under paragraph (b) of this rule or an excluded waste treatment system, and jurisdictional waters that are not tributaries, such as an adjacent wetland. But to be jurisdictional, the tributary must be part of a tributary system that eventually flows to a traditional navigable water, the territorial seas, or an interstate water. The agencies will utilize the Corps’ well-established definition of an ordinary high water mark (OHWM) to assist in identifying tributaries for purposes of this rule. See section IV.C.4.c.i of this preamble for information on using the OHWM to assist in identifying a water as a tributary for purposes of this rule. To be a jurisdictional tributary under this

provision of the rule, the tributary must meet either the relatively permanent standard or the significant nexus standard.

Like the 1986 regulations, this rule includes tributaries of interstate waters since interstate waters, like traditional navigable waters and the territorial seas, are waters clearly protected by the Clean Water Act. In this rule, the agencies are adding the territorial seas to the list of waters to which tributaries may connect to constitute a jurisdictional tributary because the territorial seas are explicitly protected by the Clean Water Act. Because the territorial seas are explicitly covered by the Clean Water Act, it is reasonable and appropriate to protect tributaries to the territorial seas that meet either the relatively permanent standard or the significant nexus standard for the same reasons that tributaries to traditional navigable waters are protected. In practice, the agencies recognize that most tributaries will reach a traditional navigable water before they reach the territorial seas. Finally, consistent with the 1986 regulations, this rule includes tributaries that flow directly or indirectly through another water or waters to paragraph (a)(2) impoundments.⁹⁷

The agencies’ longstanding interpretation of the Clean Water Act includes tributaries that are natural, modified, or constructed waters. The Clean Water Act, in defining “navigable waters,” does not turn on any such distinctions, which have no bearing on a tributary’s capacity to carry water (and pollutants) to paragraph (a)(1) waters. See, e.g., Technical Support Document section II.B.iv.3 (explaining that human-made ditches “perform many of the same functions as natural tributaries,” including “convey[ing] water that carries nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters”). Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish, as a practical or scientific matter, between natural watercourses and watercourses that are wholly or partly modified or constructed. For example, tributaries that have been channelized in concrete or otherwise have been modified would still be tributaries for purposes of this rule so long as they contribute flow to a traditional navigable water, the territorial seas, or an interstate water, and so long as they are not excluded

⁹⁷ See discussion of tributaries to paragraph (a)(2) impoundments in section IV.C.3 of this preamble.

under paragraph (b) of this rule. Thus, tributaries can include ditches and canals.

Under this rule, swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow are not tributaries and are not jurisdictional. See section IV.C.7 of this preamble.

Once a water is determined to be a tributary, under this rule, the tributary must meet either the relatively permanent or significant nexus standard to be jurisdictional. The relatively permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. In evaluating tributaries under the significant nexus standard, the agencies will determine whether the tributaries, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. Implementation of each of those standards for purposes of determining jurisdiction over tributaries is discussed below in section IV.C.4.c of this preamble.

b. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

Commenters expressed a range of views on the agencies’ proposed treatment of tributaries. This section of the preamble provides a summary of the major comments received on the regulatory text and the agencies’ consideration of the comments. The preamble to the proposed rule also provided information about the agencies’ longstanding interpretation of practice for identifying tributaries for purposes of the definition of “waters of the United States,” and this section also summarizes and addresses major comments received on those topics.

i. Comments on the Tributaries Provision of This Rule

Some commenters requested that the agencies include a definition of “tributary” in this rule. A subset of these commenters stated that the definition should include waters with a bed, bank, or other evidence of flow that contribute flow directly or indirectly to downstream paragraph (a)(1) waters. Other commenters maintained that the lack of a formal definition makes it unclear which features are tributaries and which are not. Some of these commenters stated that the lack of a

definition left too much discretion to the agencies to identify tributaries based on physical features, which they asserted would lead to confusion. Some commenters supported the proposed approach for assessing tributaries, stating that the longstanding interpretation and practice would allow for regionalized implementation. Although the agencies are not promulgating a new definition of “tributary” the agencies have decades of experience implementing the 1986 regulations (which also did not include a definition of “tributary”) and have concluded that a new regulatory definition of tributary is not required. To provide further clarity, the agencies have been careful in this preamble to articulate and explain the agencies’ well-established interpretation and practices for identifying tributaries. In addition, the agencies note that while the first step under this provision of the regulation is to identify whether a water is a tributary under longstanding practice, that is not the end of the inquiry under this rule, in contrast to the 1986 regulations. A water must not only be a tributary but must also meet either the relatively permanent standard or the significant nexus standard to be jurisdictional under this provision. These standards provide important limitations that also help define the scope of the tributaries that are jurisdictional under the rule.

Commenters on the proposed rule expressed a variety of perspectives on the appropriate scope of jurisdiction for tributaries. Some commenters supported the proposal that tributaries are jurisdictional if they meet either the relatively permanent or significant nexus standard. Other commenters asserted that tributaries should meet both standards. Some commenters stated that this rule should include categorical protections for all tributaries (e.g., features with an OHWM), rather than requiring case-by-case analysis, asserting that such an interpretation is supported by the science and Supreme Court case law. For the reasons described in section IV.A of this preamble, this rule defines “waters of the United States” to include tributaries that meet either the relatively permanent standard or the significant nexus standard on a case-specific basis.

Some commenters criticized the definition of “tributary” from the 2020 NWPR, while others supported that definition, stating that it was clear and logical. The 2020 NWPR defined “tributary” as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or a

traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary was required to be perennial or intermittent in a typical year. 85 FR 22251 (April 21, 2020). The definition of “tributary” in the 2020 NWPR failed to advance the objective of the Clean Water Act and was inconsistent with scientific information about the important effects of many types of tributaries on the integrity of downstream paragraph (a)(1) waters.

The key limitations that the 2020 NWPR created in its definition of “tributary,” which this rule does not adopt, are the categorical exclusion of ephemeral streams and the requirement that streams contribute flow to a traditional navigable water or territorial sea in a “typical year.” With respect to ephemeral streams, commenters provided a wide variety of perspectives on whether they should be jurisdictional under this rule. Some commenters asserted that the agencies’ interpretation of tributary should exclude ephemeral streams. Some commenters asserted that ephemeral streams should be categorically jurisdictional under this rule. These commenters referenced the importance of ephemeral streams for providing functions like nutrient and materials transport, erosion and flood control, water quality maintenance downstream, drinking water and irrigation provisioning, groundwater recharge, and wildlife habitat. Other commenters asserted that ephemeral streams are important for buffering against the impacts of climate change, supporting Tribal communities, and providing functions in specific regions like arid areas. Another group of commenters stated that all ephemeral streams should be non-jurisdictional across the country, or non-jurisdictional in certain regions such as the arid West. These commenters asserted that ephemeral streams do not flow frequently enough or provide sufficiently important functions to impact the integrity of downstream paragraph (a)(1) waters. As discussed further in section IV.A of this preamble, the agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in this rule. The agencies agree that ephemeral streams can provide many important functions for paragraph (a)(1) waters.

With respect to the “typical year requirement” in the 2020 NWPR definition of “tributary,” the agencies found it challenging and sometimes impossible to implement, for the reasons discussed in section IV.B.3.c of

this preamble. The “typical year” requirement for tributaries was also not supported by science. Scientific information does not demonstrate that only those streams that contribute intermittent or perennial flow to a traditional navigable water or territorial sea in a “typical year” have significant effects on the chemical, physical, and biological integrity of larger downstream waters, including paragraph (a)(1) waters. See sections IV.B.3.a and IV.B.3.b of this preamble. Because the limitations in the 2020 NWPR’s definition of “tributary” are inconsistent with science and created substantial implementation difficulties, the agencies are not adopting this definition. See section III.A of the Technical Support Document for more information on the agencies’ rationale for the scope of tributaries covered by this rule. Streams that are tributaries, regardless of their flow regime, will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(3) of this rule, and streams that are not tributaries will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(5) of this rule.

Some commenters opposed as arbitrary and unsupported by the law or science the agencies’ proposed approach to delete the category for intrastate lakes and ponds, streams, or wetlands that do not meet another jurisdictional category (the (a)(3) “other waters” provision from the 1986 regulations) as a category of waters to which tributaries may connect to be determined “waters of the United States.” Some of these commenters requested clarification as to how tributaries to intrastate lakes and ponds, streams, or wetlands that do not meet another jurisdictional category would be assessed. One commenter asserted that the agencies were “excluding” tributaries to paragraph (a)(5) waters. Streams that flow to paragraph (a)(5) waters are not excluded in this rule. Deleting the cross reference to the category for intrastate lakes and ponds, streams, or wetlands that do not meet another jurisdictional category (the (a)(3) “other waters” provision from the 1986 regulations) as a category of waters to which tributaries may connect reflects the agencies’ consideration of the statute as a whole and the jurisdictional concerns and limitations of SWANCC and *Rapanos*. The agencies have concluded that a provision that authorizes consideration of jurisdiction over tributaries that meet the relatively permanent or significant nexus standard when assessed based simply on connections to such waters would have

too tenuous a connection to paragraph (a)(1) waters. However, in this rule any such streams that flow to jurisdictional paragraph (a)(5) waters could be assessed themselves under the paragraph (a)(5) waters category to determine if they meet the relatively permanent or significant nexus standard. For example, a stream that flows to a lake that meets the significant nexus standard under the paragraph (a)(5) waters provision could itself be assessed under the paragraph (a)(5) waters provision to determine whether it significantly affects the chemical, physical, or biological integrity of a paragraph (a)(1) water.

ii. Comments on the Interpretation and Implementation of the Tributaries Provision of This Rule

As discussed further above, the agencies interpret tributary for purposes of this rule to include rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment. The agencies received comments on elements of this longstanding interpretation of tributary for purposes of the “waters of the United States.”

Some commenters disagreed with the agencies’ interpretation that tributaries include certain lakes and ponds. Some of these commenters stated that lakes and ponds should comprise a separate jurisdictional category. Several commenters asserted that considering certain lakes and ponds to be tributaries could lead to overly broad jurisdiction, and one commenter requested clarification in this rule that not every feature that might be considered a lake or a pond is necessarily jurisdictional. Other commenters agreed with the agencies’ longstanding approach. Lakes, ponds, and impoundments function as part of the tributary system where they contribute flow to downstream waters, and therefore it is reasonable to assess them for jurisdiction as tributaries under this rule. The agencies will continue to interpret the regulations to address lakes, ponds, and impoundments with both an inlet and outlet connected to the tributary network, as well as lakes, ponds, and impoundments with an outlet connected to the tributary network as tributaries if they contribute flow directly or indirectly through one or more waters or features that lie along the flowpath to a paragraph (a)(1) water. The agencies have extensive experience implementing this approach under pre-2015 practice. The agencies disagree

that this approach will lead to overly broad jurisdiction, as these lakes, ponds, and impoundments that are tributaries must meet either the relatively permanent standard or significant nexus standard to be jurisdictional. Therefore, not every lake, pond, or impoundment is jurisdictional as a tributary or under other provisions of this rule.

Some commenters supported the agencies’ longstanding interpretation that tributaries include waterbodies that flow “directly or indirectly” to a paragraph (a)(1) water, while other commenters asserted that tributaries must flow “directly” into a paragraph (a)(1) water. There is no text in the Clean Water Act supporting this limitation, and the agencies have never interpreted the Act to cover only such tributaries. Even the *Rapanos* plurality opinion did not so limit the scope of tributaries covered by the Act. 547 U.S. at 742. Moreover, the science is clear that the chemical, physical, and biological integrity of paragraph (a)(1) waters depends on the many tributaries, including headwater streams, that feed such waters. It would be impossible to restore and maintain the chemical, physical, and biological integrity as required by the Clean Water Act with a definition of “waters of the United States” that included solely the last tributary that flows “directly” into a paragraph (a)(1) water. Tributaries upstream provide key functions that support the chemical, physical, and biological integrity of paragraph (a)(1) waters. If protections for tributaries ended just above the very last one, functions like habitat for salmon spawning, baseflow to maintain water levels, and nutrient replenishment would all be at risk. See Technical Support Document sections I.A and III.E.ii.

A tributary may contribute flow through a number of downstream waters or features, including both non-jurisdictional features, such as a ditch excluded under paragraph (b) of this rule, and jurisdictional waters that are not tributaries, such as an adjacent wetland. However, the tributary must be part of a system that eventually flows to a paragraph (a)(1) water. Waters that are part of a system that never reaches a paragraph (a)(1) water, for example, a small system of streams that ultimately flow to a non-navigable stream in an intrastate basin with no outlet, are not jurisdictional under this provision of this rule.

Some commenters asserted that the agencies’ approach to interpreting “tributary” would potentially allow the agencies to include wetlands as tributaries. The agencies disagree. While

wetlands may be a water through which a tributary flows directly or indirectly to a paragraph (a)(1) water, the agencies do not consider that wetland to be a tributary itself. This is consistent with pre-2015 practice. Only when a wetland lies entirely below the OHWM, will it be identified as part of the tributary consistent with current practice; even then, the wetland is not identified as a tributary itself. Otherwise, such wetlands are considered adjacent wetlands and will be evaluated under paragraph (a)(4) of this final rule.

Some commenters supported the agencies’ longstanding interpretation that there is no meaningful distinction among natural, human-altered, or human-made tributaries in terms of their functions, values, and influence on the integrity of downstream waters. Some commenters requested clarification as to whether both human-made and natural tributaries would be regulated in this rule. Some commenters asserted that the agencies’ proposed approach to interpreting “tributary” is overly broad and expansive because it would potentially allow the agencies to include ditches and human-made conveyances as tributaries. The agencies disagree with commenters who asserted that the agencies’ approach to human-made tributaries is overly broad and expansive. The approach is consistent with the agencies’ decades-long practice and the scientific record, and such tributaries must still meet either the relatively permanent standard or the significant nexus standard to be jurisdictional under this rule. As noted above, given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly human-made or human-altered. Because natural, human-altered, and human-made tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to paragraph (a)(1) waters, the agencies have interpreted the 1986 regulations to cover such tributaries. Ditches, for example, are tributaries under this rule if they flow directly or indirectly to paragraph (a)(1) waters and they are jurisdictional tributaries if they also meet the relatively permanent standard or significant nexus standard and are not excluded from jurisdiction under this rule. See section IV.C.7 of this preamble for additional discussion on excluded ditches.

c. Implementation

A tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment. A tributary may flow through a number of downstream waters, including non-jurisdictional features. This section of the preamble provides additional information on the agencies' interpretation and implementation of the tributary provision of this rule. This section first explains how to determine whether a water is a tributary for purposes of this rule. The section next explains how to determine whether a tributary is jurisdictional under the relatively permanent standard or under the significant nexus standard.

i. Determining Whether a Water Is a Tributary for Purposes of This Rule

This section describes how to (1) identify a tributary for purposes of this rule and (2) determine whether the tributary is part of the tributary system of a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment.

(1) Identifying a Water as a Tributary

In implementing this rule, the agencies are maintaining their longstanding interpretation that tributaries for purposes of Clean Water Act jurisdiction include rivers, streams, lakes, ponds, and impoundments. See 2007 Corps Instructional Guidebook at 8, 9. As discussed above, although tributaries are required to flow directly or indirectly through another water or waters to certain downstream waters, tributaries are not required to have a specific flow regime to meet the agencies' interpretation of "tributary." However, flow characteristics like duration and timing of flow will be considered in determining whether tributaries meet the relatively permanent or significant nexus standard, as described further below in sections IV.C.4.c.ii and IV.C.4.c.iii of this preamble. Lakes, ponds, and impoundments may be at the headwaters of the tributary network (e.g., a lake with only an outlet to the tributary network) or farther downstream from the headwaters (e.g., a lake with both an inlet and outlet connected to the tributary network). Even though such waters are considered to be lentic or "still" systems, such waters still contribute flow downstream at the point that they outlet to the tributary network and therefore the

agencies have long concluded it is appropriate to consider such waters to be tributaries.

As discussed above in this section of the preamble, the agencies' longstanding interpretation of "tributary" for purposes of the definition of "waters of the United States" includes natural, human-altered, or human-made waterbodies that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water. See *Rapanos* Guidance at 6.

The agencies will utilize the Corps' well-established definition of an ordinary high water mark (OHWM) to assist in identifying tributaries for purposes of this rule. See section IV.C.8 of this preamble (adding the definition of OHWM to EPA's regulation). Tributaries typically have at least one indicator of an OHWM and, consistent with pre-2015 practice, physical OHWM characteristics are used to identify waterbodies including streams, lakes, ponds, and ditches that are present on the landscape. See, e.g., "Final Notice of Issuance and Modification of Nationwide Permits," 65 FR 12818, 12823–24 (March 9, 2000); 2007 Corps Instructional Guidebook; RGL 05–05 (December 7, 2005). The OHWM, a term unchanged since 1977, defines the lateral limits of jurisdiction in non-tidal "waters of the United States," provided the limits of jurisdiction are not extended by adjacent wetlands. See 42 FR 37144 (July 19, 1977); 33 CFR 323.3(c) (1978). The regulations at 33 CFR 328.3(e) and 329.11(a)(1) list the factors to be applied. RGL 05–05 further explains these regulations. Delineation of an OHWM in tributaries relies on the identification and interpretation of physical features, including topographic breaks in slope, changes in vegetation characteristics (e.g., destruction of terrestrial vegetation and change in plant community), and changes in sediment characteristics (e.g., sediment sorting and deposition). Field indicators, remote sensing, and mapping information can also help identify an OHWM. The Corps continues to improve regulatory practices across the country through ongoing research and the development of regional and national OHWM delineation procedures, as described further in section IV.A.ii of the Technical Support Document. For example, the Corps has developed field indicators to help field staff identify the OHWM in common stream types in the arid West. Consistent with longstanding practice, the agencies will apply the regulations and use RGL 05–05 and applicable OHWM delineation manuals, as well as

take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide. See *Rapanos* Guidance at 10–11 n.36.

The agencies will assess any discontinuity in the OHWM and, consistent with pre-2015 practice, a natural or human-made discontinuity in the OHWM does not necessarily sever jurisdiction upstream. A discontinuity may exist where the stream temporarily flows underground. Tributaries may temporarily flow underground in regions with karst geology or lava tubes, for example, maintaining similar flow characteristics underground and at the downstream point where they return to the surface. The agencies will also continue their familiar practice that a discontinuity in the OHWM also does not typically sever jurisdiction upstream where the OHWM has been removed by development, agriculture, or other land uses. For example, tributaries can be relocated below ground to allow reasonable development to occur. In urban areas, surface waters are often rerouted through an artificial tunnel system to facilitate development. See, e.g., Science Report at 3–3, and sections III.A and IV.A.ii of the Technical Support Document. Underground streams are distinct from groundwater due to their very direct hydrologic connection to the portions of the tributaries that are or re-surface above ground. Typically, groundwater connections would be much slower than connections via underground streams. Tributaries that have been rerouted underground are contained within a tunnel system or other similar channelized subsurface feature, while naturally occurring subterranean streams flow within natural conduits like karst formations or lava tubes. The agencies will look for indicators of flow both above and below the discontinuity. For example, a discontinuity in the OHWM may exist due to constructed breaks (e.g., culverts, pipes, or dams)⁹⁸ or natural breaks (e.g., debris piles or boulder fields). Site specific conditions will continue to determine the distance up the tributary network that is evaluated to see if the feature creates a temporary break or if it severs the upstream connection and constitutes the start of the tributary system.

⁹⁸ Under past practice, the agencies have sometimes characterized bridges as artificial breaks, such as under the 2015 Clean Water Rule. See 80 FR 37106 (June 29, 2015). However, bridges do not necessarily create discontinuity in the OHWM, and the agencies recognize that tributaries flowing under bridges may still show evidence of an OHWM and in such circumstances would continue to be jurisdictional where they meet either the relatively permanent or significant nexus standard.

Under this rule, swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow are not tributaries and are not jurisdictional. See section IV.C.7 of this preamble. Because swales and erosional features were considered to be generally non-jurisdictional features under pre-2015 practice, the agencies have extensive experience differentiating between these features and tributaries on the landscape. See *Rapanos* Guidance at 11–12. Streams are waterbodies that are typically characterized by the presence of a channel and an OHWM, and lakes and ponds are waterbodies that are also typically characterized by the presence of an OHWM, in the absence of adjacent wetlands. In contrast, erosional features like gullies and rills are typically more deeply incised than streams and lack an OHWM. Similarly, swales do not have an OHWM and typically lack a more defined channel that a stream exhibits. See section IV.C.7 of this preamble and section III.A.v of the Technical Support Document for additional discussion on how to distinguish between tributaries, erosional features, and swales; see section IV.A.ii of the Technical Support Document for additional discussion on how to identify tributaries based on an OHWM.

A variety of field and remote tools can be used to determine whether a water is a tributary.⁹⁹ Due to limitations associated with some remote tools, field verification for accuracy may be necessary (e.g., due to scale or vegetation cover, not all tributaries may be visible in satellite imagery and aerial photographs or mapped in the NHD). Examples of field indicators will be discussed in more detail below.

⁹⁹ Direct observation or various remote sensing resources such as USGS stream gage data (available at <https://waterdata.usgs.gov/nwis/rt/>), USGS topographic maps (available at <https://www.usgs.gov/the-national-map-data-delivery/topographic-maps>), high-resolution elevation data and associated derivatives (e.g., slope or curvature metrics), Federal Emergency Management Agency (FEMA) flood zone maps (available at <https://msc.fema.gov/portal/home>), NRCS soil maps (available at <https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>), National Hydrography Dataset (NHD) data, National Wetlands Inventory (NWI) data, maps and geospatial datasets from Tribal, State, or local governments, and/or aerial or satellite imagery can also be used. Tributaries are often observable in aerial imagery and high-resolution satellite imagery by their topographic expression, characteristic linear and curvilinear patterns, dark photographic tones, or the presence of riparian vegetation. USGS topographic maps often include different symbols to indicate mapped hydrographic features (see “Topographic Map Symbols,” available at <https://pubs.usgs.gov/gip/TopographicMapSymbols/topomapsymbols.pdf>).

(2) Identifying Whether the Water Is Part of the Tributary System of a Paragraph (a)(1) Water

The next step in determining whether a waterbody is a tributary is to identify whether the waterbody is part of the tributary system of a paragraph (a)(1) water. The tributary must flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or interstate water. Waters through which a tributary may flow indirectly include, for example, impoundments, wetlands, lakes, ponds, and streams. A tributary may flow through a number of downstream waters, including non-jurisdictional features, such as a ditch excluded under paragraph (b) of this rule or an excluded waste treatment system, and jurisdictional waters that are not tributaries, such as an adjacent wetland. But, the tributary must be part of a tributary system that eventually flows to a traditional navigable water, the territorial seas, or an interstate water to be jurisdictional. A tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a paragraph (a)(1) water. Tributaries are not required to have a surface flowpath all the way down to the paragraph (a)(1) water. For example, tributaries can contribute flow through certain natural and artificial breaks (including certain non-jurisdictional features), some of which may involve subsurface flow as described above in section IV.C.4.b of this preamble.

In evaluating the flowpath from a water feature, the agencies can use USGS maps; NWI data; Tribal, State, and local knowledge or maps; dye tests, tracers, or other on the ground tests; field observations; aerial photography; or other remote sensing information. The agencies can also use available models, including models developed by Federal, Tribal, State, and local governments, academia, and the regulated community.¹⁰⁰ These tools could be used in conjunction with field observations, data, and other desktop tools to evaluate whether a tributary flows directly or indirectly to a

¹⁰⁰ One such model includes the USGS StreamStats “Flow (Raindrop) Path” GIS tool which allows the user to click a point on a map, after which a flowpath is drawn to estimate where water may flow from that point to the stream network, eventually making its way to the ocean if the tributary network allows for it (available at <https://streamstats.usgs.gov/ss/>). The StreamStats tool may potentially be used to identify the flowpath from the subject waters to the downstream paragraph (a)(1) water using the “Flow (Raindrop) Path” component of the tool.

paragraph (a)(1) water. For tributaries to paragraph (a)(2) impoundments, a flowpath to the impoundment and to a paragraph (a)(1) water can be identified using these same tools.

ii. Determining Whether a Tributary Meets the Relatively Permanent Standard

Under this rule, tributaries that meet the relatively permanent standard are jurisdictional under the Clean Water Act as “waters of the United States.” In implementing the relatively permanent standard, the agencies draw key concepts from the 2020 NWPR’s interpretation, but modify that rule’s approach to ensure the term can be practically implemented. Specifically, under this rule the relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation. The approach in this rule would encompass tributaries considered relatively permanent under the 2020 NWPR, as well as those considered relatively permanent under the *Rapanos* Guidance, providing continuity in approach for the regulated community and other stakeholders. Tributaries that do not meet the relatively permanent standard must be assessed under the significant nexus standard. See section IV.C.4.c.iii of this preamble.

The agencies’ interpretation of relatively permanent tributaries to include surface waters that have flowing or standing water year-round or continuously during certain times of the year is consistent with the *Rapanos* plurality’s interpretation of “waters of the United States.” The *Rapanos* plurality interpreted “waters of the United States” as encompassing “relatively permanent, standing or continuously flowing bodies of water,” including streams, rivers, oceans, lakes, and other bodies of waters that form geographical features. 547 U.S. at 739, 742. The plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5 (emphasis in original); see also 85 FR 22289 (April 21, 2020) (citing the same language from the plurality in support of the 2020 NWPR’s interpretation of relatively permanent waters).

The agencies have decided to implement this approach because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools. It will therefore be a straightforward approach for the agencies and the regulated community to implement. In addition, maintaining an interpretation that encompasses the tributaries considered relatively permanent under the pre-2015 regulatory regime and the 2020 NWPR addresses the many comments from stakeholders emphasizing the need for clarity and certainty in the scope of “waters of the United States.”

“Flowing water” under this rule is meant to encompass not just streams and rivers, but also lakes, ponds, and impoundments that are part of the tributary system, as such waters outlet to the tributary network and contribute flow downstream at the outlet point. In addition, “flowing water” under this rule is meant to encompass those tributaries that are frozen for parts of the year. Such tributaries typically have flowing water underneath the frozen surface.

The phrase “certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought. The defining characteristic of relatively permanent waters with flowing or standing water continuously during only certain times of the year is a temporary lack of surface flow, which may lead to isolated pools or dry channels during certain periods of the year. The phrase “direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.

A number of commenters suggested that the agencies interpret relatively permanent tributaries to include those that flow year-round or at least seasonally (*e.g.*, typically three months), consistent with the approach in the *Rapanos* Guidance. This rule encompasses tributaries that are “relatively permanent” under the *Rapanos* Guidance. However, the agencies have decided not to use the term “seasonal” from the *Rapanos* Guidance for several reasons. First, the agencies have determined that directly describing the scenarios in which waters would be “relatively permanent” is clearer than using the term “seasonal,” the meaning of which can vary and could be misunderstood to

establish a specific required flow duration. *See* section IV.C.4.c.ii.1 of this preamble for further discussion of the challenges of requiring a specific flow duration. Relatively permanent flow may occur seasonally, but the phrase is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles. Specifically, relatively permanent waters may include tributaries in which flow is driven more by various water management regimes and practices, such as tributaries with extensive flow alteration (*e.g.*, diversions, bypass channels, water transfers) and effluent-dependent streams. For example, in areas of the West where water withdrawals or groundwater pumping can substantially modify flow characteristics, onset and cessation of streamflow in some tributaries may be more closely tied to changes in water use associated with irrigation than with seasons of the year. In such flow-altered tributaries, streamflow may change abruptly throughout the year due to adjustments in facility operations or may vary from year to year due to changes in water rights or water management regimes. In addition, tributaries that typically flow throughout the spring may run dry in years following a drought while storage reservoirs are being refilled. When evaluating these types of artificially manipulated regimes, the agencies may consider information about the regular manipulation schedule and may potentially consider other remote resources or on-site information to assess flow frequency.

Other commenters recommended defining relatively permanent tributaries using the 2020 NWPR’s terms “perennial” and “intermittent.” Relatively permanent tributaries under this rule encompass tributaries that were jurisdictional under the 2020 NWPR. However, the agencies have decided to explain directly the way that the relatively permanent standard should be implemented, rather than defining the phrase with these terms. As evidenced by the variety of comments proposing definitions for “perennial” and “intermittent,” adding these terms to this rule could cause confusion and uncertainty. Moreover, many definitions of intermittent incorporate “seasonal” flow, a concept that the agencies decided not to employ in this rule for the reasons discussed above. Other definitions of “perennial” and “intermittent” that commenters suggested would require specific sources of flow, which the agencies also

decided not to establish in this rule because such requirements cannot readily apply to hydrologically altered waters, and for the reasons discussed in section IV.C.4.c.ii.2 of this preamble.

While this rule implements the scope of relatively permanent tributaries consistent with the approach in the 2020 NWPR, it does not retain the 2020 NWPR’s requirement that the tributaries contribute surface water flow to a paragraph (a)(1) water in a “typical year.” *See* 85 FR 22251 (April 21, 2020). The 2020 NWPR defined a “typical year” as when “precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” As discussed in section IV.B.3 of this preamble and section II.B.iv.1 of the Technical Support Document, the typical year analysis proved difficult to implement and yielded arbitrary and potentially outdated results. Moreover, it is not required by the plurality opinion in *Rapanos*, which simply required a “connect[ion]” to paragraph (a)(1) waters. *See* 547 U.S. at 742 (describing a “wate[r] of the United States” as “*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters”). This rule’s requirement that jurisdictional tributaries flow directly or indirectly to downstream paragraph (a)(1) waters or paragraph (a)(2) impoundments implements the plurality’s “connect[ion]” requirement. *See also* section IV.C.4.b of this preamble.

(1) Duration and Timing of Flow for Relatively Permanent Tributaries

Many commenters recommended that the agencies establish a particular flow duration for relatively permanent waters. Suggestions ranged from a minimum of three months to 290 days. The agencies decided not to establish a minimum duration because flow duration varies extensively by region. Establishing a uniform number equally applicable to the deserts in the arid West, the Great Lakes region, and New England forests would not be scientifically sound. The agencies instead have chosen to establish a more flexible approach to implementing this rule that accounts for specific conditions in each region. Moreover, it would often be infeasible for the regulated community or agency staff to determine whether a stream ordinarily flows or whether a lake contains standing water, for example, 12 weeks as opposed to 11 weeks per year. Even if this determination was possible, such a bright line cutoff would not reflect

hydrological diversity among different regions and alterations in flow characteristics. The agencies' conclusion that a minimum duration is not feasible is consistent with the pre-2015 regulatory regime, which did not establish a bright line cutoff (though provided three months as an example of seasonal flow) and with the approach of the 2020 NWPR. *See* 85 FR 22292 (April 21, 2020) ("The agencies are not providing a specific duration (*e.g.*, the number of days, weeks, or months) of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.").

Many factors, including climate, hydrology, topography, soils, and other conditions, may affect the period in which relatively permanent flow may occur for those relatively permanent waters that do not have continuously flowing or standing water year-round. The factors which affect streamflow and flow cessation are climatically and geographically specific and therefore the periods during which a tributary might have relatively permanent flow vary by region. Non-relatively permanent tributaries are similarly diverse, and the mechanisms which differentiate relatively permanent flow from non-relatively permanent flow also vary by region.

For example, in parts of the Southeastern United States, precipitation is distributed somewhat uniformly throughout the year, but increased evapotranspiration during the growing season can reduce surficial ground water levels and reduce or remove surface flows late in the growing season (*e.g.*, late summer or early autumn). Consequently, certain streams in the Southeast may flow primarily in the winter or early spring. Non-relatively permanent tributaries in the Southeast may often be characterized by the repeated sequence of streamflow, flow cessation, and channel drying throughout the year, where the onset of streamflow coincides with distinct rainfall events and is driven primarily by storm runoff. Streamflow in these systems may persist anywhere from a few hours to days at a time, where the cessation of flow is most often associated with termination of overland flow, hillslope runoff recession, and the depletion of water in saturated soils. Although streamflow in these tributaries may occur regularly, off and on, over the duration of a season or longer, they do not exhibit continuously flowing water for an extended period at any point during the year. In other areas of the

United States, snowpack melt drives streamflow more than rainfall, and relatively permanent flow may therefore coincide with warming temperatures in the spring or early summer.

Many headwater streams in mountainous regions flow through channels incised in bedrock with no groundwater interface with the bed of the stream. Instead, these streams are often fed primarily by high elevation snowpack melt. The same scenario may also exist in Northern regions, where flows could be fed almost exclusively through melting snowpack absent elevated groundwater tables. In these regions, relatively permanent flows coincide with warming temperatures in the spring or early summer and may persist well into the summer until there are no longer enough inputs to sustain surface water, or later into autumn when more permanent sources of meltwater (*e.g.*, glaciers or snowfields) begin to freeze. Non-relatively permanent flows in these regions may occur in basins with thin layers of snow, where snow melts rapidly at the onset of spring thaw, and the snowmelt produced is not sufficient to sustain flows for an extended period and into the summer.

To determine the flow characteristics of a tributary for purposes of implementing this rule, the agencies will evaluate the entire reach of the tributary that is of the same Strahler¹⁰¹ stream order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream; *see* Technical Support Document section IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream they connect to. Consistent with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (*i.e.*, the point the tributary enters a higher order stream). *Rapanos* Guidance at 6 n.24. Where data indicate the flow characteristics at the downstream limit are not representative of the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used.

(2) Source of Flow for Relatively Permanent Tributaries

Implementation of the relatively permanent standard for tributaries in

this rule does not require that relatively permanent flow come from particular sources. This rule's approach is consistent with the plurality opinion in *Rapanos*, which lays out the relatively permanent standard and does not require that relatively permanent waters originate from any particular source. *See, e.g.*, 547 U.S. at 739. This rule's approach is also science-based, as the source of a tributary's flow does not influence its effect on downstream waters, including paragraph (a)(1) waters. This rule's approach is similar to the familiar approach taken in the *Rapanos* Guidance and the 2020 NWPR, which also did not specify that relatively permanent flow come from particular sources.

Sources of flow in relatively permanent tributaries may include an elevated groundwater table that provides baseflow to a channel bed. Relatively permanent flow could also result from upstream contributions of flow, effluent flow, or snowpack that melts slowly over time in certain geographic regions or at high elevations. In addition, in certain regions relatively permanent flow could result from a concentrated period of back-to-back precipitation events that leads to sustained flow through a combination of runoff and upstream contributions of flow or an elevated groundwater table that provides baseflow to the channel bed. In contrast, non-relatively permanent tributaries may flow only during or shortly after individual precipitation events (including rainfall or snowfall events). Non-relatively permanent flow may occur simply because it is raining or has very recently rained, or because a recent snow has melted.

Streamflow that occurs during the monsoon season in certain parts of the country (typically June through September in the arid West) may be relatively permanent or non-relatively permanent, depending on the conditions at the location. Many tributaries in the arid West are dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams that often dry rapidly following a storm event (*e.g.*, within minutes, hours, or days). These streams are not relatively permanent under this rule. However, relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed, during which the combination of runoff and upstream contributions of flow is high enough to exceed rates of transmission loss for an extended period of time. Relatively permanent flow may also follow one or more larger storm events, when

¹⁰¹ Strahler, A.N. 1957. "Quantitative analysis of watershed geomorphology." *American Geophysical Union Transactions* 38: 913-920.

floodwaters locally recharge the riparian aquifer through bank infiltration, which supplies sustained baseflow throughout the monsoon season.

Similar to the 2020 NWPR's approach, the agencies will consider tributaries that flow in direct response to "snowfall" for only a short duration during or shortly after that snowfall event to be non-relatively permanent waters under this rule. Streams that flow as a result of "snowpack melt" will be considered relatively permanent waters under this rule, where snowpack is defined as "layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions)." See 85 FR 22275 (April 21, 2020). Tributaries that receive effluent flow that is relatively permanent will also be assessed under the relatively permanent standard.

(3) Tools Available To Determine Whether a Tributary Meets the Relatively Permanent Standard

Section IV.C.4.c.i of this preamble discusses how to determine if features on the landscape are tributaries. Direct observations and various remote tools and resources can be used to identify tributary reaches based on stream order, and topographic characteristics can assist in determining stream order. USGS topographic map blue line symbology and contour line patterns can be used to interpret the connectivity and contribution of flow within a river network, as well as topography within an evaluation area. Elevation models, including those based on light detection and ranging (LIDAR) derived data, may also illustrate tributary connectivity and flow patterns, as well as topography. In addition, aerial and satellite imagery along with maps or geospatial mapping products (e.g., NHD, NWI, soil maps, and Tribal, State, or local maps) can be used to help identify tributary reaches based on stream order. In addition to remote tools and resources, factors identified through field observations can be used to help determine the extent of a tributary reach. For example, tributary systems can be traversed to identify and characterize the branches of the network that contribute flow to a particular evaluation area. Certain geographic features (e.g., non-jurisdictional ditches, swales) may also be found to contribute to a tributary's surface hydrology.

Many available resources and tools can assist in determining whether tributaries are relatively permanent. For instance, the agencies have been working to develop regionalized streamflow duration assessment

methods (SDAMs, available at <https://www.epa.gov/streamflow-duration-assessment>), which are rapid field-based assessment methods that can be used to classify streamflow duration and assist in determining whether tributaries are "relatively permanent." These methods rely on physical and/or biological field indicators, such as the presence of hydrophytic vegetation and benthic macroinvertebrates, that can be collected or observed in a single site visit to determine the flow duration of a tributary in a reliable and rapid way. EPA, the Corps, and the State of Oregon developed a regionalized SDAM that has been validated for use throughout the Pacific Northwest (available at <http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest>). EPA and the Corps have also developed a beta SDAM for the arid West (available at <https://www.epa.gov/streamflow-duration-assessment/beta-streamflow-duration-assessment-method-arid-west>) and the Western Mountains (available at <https://www.epa.gov/streamflow-duration-assessment/beta-streamflow-duration-assessment-method-western-mountains>). EPA and the Corps are working to develop additional regionalized SDAMs in other parts of the country. Other agencies have developed similar tools that may be useful in implementing this rule.¹⁰² The agencies, co-regulators, and stakeholders can use the regionalized field indicators from SDAMs to quickly and easily identify tributaries that are relatively permanent as interpreted by the agencies under this rule.

Remote or desktop tools can also help the agencies and the public better understand streamflow and whether tributaries have continuously flowing or standing water year-round or during certain times of the year for more than for a short duration in direct response to precipitation.¹⁰³ Satellite imagery and

¹⁰² E.g., the Streamflow Methodology for Identification of Intermittent and Perennial Streams and Their Origins, developed by the North Carolina Division of Water Quality, available at https://files.nc.gov/ncdeq/Water%20Quality/Surface%20Water%20Protection/401/Policies_Guides_Manuals/StreamID_v_4point11_Final_sept_01_2010.pdf.

¹⁰³ These tools include local maps, StreamStats by the USGS (available at <https://streamstats.usgs.gov/ss/>), Probability of Streamflow Permanence (PROSPER) by the USGS, which provides streamflow permanence probabilities during the summer for stream reaches in the Pacific Northwest (available at <https://www.usgs.gov/centers/wyoming-montana-water-science-center/science/probability-streamflow-permanence-prosper>), and NRCS hydrologic tools and soil maps. Other tools include regional desktop tools that provide for the hydrologic estimation of a discharge sufficient to generate intermittent or perennial flow (e.g., a regional regression analysis or hydrologic

aerial photographs showing visible water on multiple dates can provide evidence as to whether tributaries have relatively permanent flow. Aerial photographs may show other indicators commonly used to identify the presence of an OHWM.¹⁰⁴ These indicators may include the destruction of terrestrial vegetation, the absence of vegetation in a channel, and stream channel morphology with evidence of scour, material sorting, and deposition. These indicators from aerial photographs can be correlated to the presence of USGS stream data to support an assessment of flow characteristics for a tributary.

In addition to satellite imagery and aerial photographs, desktop tools, such as a regional regression analysis and the Hydrologic Modeling System (HEC-HMS), provide for the hydrologic estimation of stream discharge in tributaries under regional conditions. The increasing availability of LIDAR-derived data can also be used to help implement this rule.¹⁰⁵ Potential LIDAR-indicated tributaries can be correlated with aerial photography or high-resolution satellite imagery interpretation and USGS stream gage data, to reasonably conclude the presence of an OHWM and shed light on the flow characteristics.

Regional field observations can be used to verify desktop assessments of the relative permanence of a tributary, when necessary. Geomorphic indicators could include active/relict floodplains, substrate sorting, clearly defined and continuous bed and banks, depositional bars and benches, and recent alluvial deposits. Hydrologic indicators might

modeling), or modeling tools using drainage area, precipitation data, climate, topography, land use, vegetation cover, geology, and/or other publicly available information. Some models that are developed for use at the reach scale may be localized in their geographic scope. NOAA national snow analyses maps can facilitate the evaluation of seasonal flow from snowmelt (available at <https://www.noahsc.noaa.gov/nsa/>), as can NRCS sources (available at <https://www.wcc.nrcs.usda.gov/snow/>), and hydrographs that may indicate a large increase in stream discharge due to the late spring/early summer thaws of melting snow.

¹⁰⁴ See definition of OHWM in section IV.C.8.d of this preamble and <https://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/>.

¹⁰⁵ Where LIDAR data have been processed to create elevation data such as a bare earth model, detailed depictions of the land surface are available and subtle elevation changes can indicate a tributary's bed and banks and channel morphology. Visible linear and curvilinear incisions on a bare earth model can help identify the flow characteristics of a water in greater detail than aerial photography interpretation alone. Several tools (e.g., TauDEM, Whitebox, GeoNet) can assist in developing potential stream networks based on contributing areas, curvature, and flowpaths using GIS.

include wrack/drift deposits, hydric soils, or water-stained leaves. Biologic indicators could include aquatic mollusks, crayfish, benthic macroinvertebrates, algae, and wetland or submerged aquatic plants. As noted above, the agencies are developing SDAMs for use throughout the country which evaluate and interpret these indicators and can show whether tributaries have continuously flowing or standing water year-round or during certain times of the year for more than a short duration in direct response to precipitation. Ultimately, multiple indicators, data points, and sources of information may be used to determine whether a water, including a tributary, is relatively permanent.

iii. Determining Whether a Tributary Meets the Significant Nexus Standard

In evaluating tributaries under the significant nexus standard, the agencies will determine whether the tributaries, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. *See* section IV.C.9 of this preamble for additional discussion on the definition of “significantly affect” in this rule, including the factors that will be evaluated and the functions that will be assessed as part of a significant nexus analysis. The agencies consider tributaries and their adjacent wetlands to be “similarly situated” waters. The agencies consider similarly situated waters to be “in the region” when they lie within the catchment area of the tributary of interest. Identifying the catchment area for purposes of this significant nexus analysis is described below. The agencies developed this updated evaluation method from the current pre-2015 implementation approach informed by their experience, the best available science, Supreme Court decisions, and public comments. Accordingly, in implementing the significant nexus standard under this rule, all tributaries and adjacent wetlands within the catchment area of the tributary of interest will be analyzed as part of the significant nexus analysis.¹⁰⁶

For purposes of a significant nexus analysis, the agencies will identify the “region” as the catchment that drains to and includes the tributary of interest. A catchment is the area of the land surface that drains to a specific location for a

specific hydrologic feature. Catchments will be delineated from the downstream-most point of the tributary reach of interest and include the land uphill that drains to that point. For example, if the tributary of interest is a second order stream, the catchment would be delineated from the point that the second order stream enters a third order stream. *See* discussion of stream order in section IV.C.4.c.ii.1 of this preamble. Topography and landscape position influence the size and configuration of a catchment.

There are many existing spatial analysis tools that can be used to delineate catchments quickly and reliably in most parts of the country. USGS topographic maps can be manually interpreted to delineate catchments based on the location of the outlet point (the downstream-most point of the tributary of interest where the tributary enters a higher order stream), using calculations informed by topographic contours, the alignment of topographic high spots, and grouping of lower, valley bottoms. Various GIS tools, web applications, and automated modeling systems can also delineate catchments based on one or more of the many factors that can influence drainage, including surface topography, climate, land use, the presence of hydrologic sinks, topology of sewer systems, and design of wastewater treatment plant service areas.¹⁰⁷

After identifying the catchment, the next step is to identify the tributaries within the catchment under the agencies’ longstanding interpretation of tributary, *see* section IV.C.4.a of this preamble above, and any of their adjacent wetlands within the catchment area. *See* section IV.C.5 of this preamble for additional discussion on how to identify adjacent wetlands. The agencies’ longstanding practice in conducting the significant nexus analysis is to assess a tributary in combination with wetlands that meet the definition of “adjacent” under the regulations. *Rapanos* Guidance at 10. This approach to the significant nexus analysis recognizes the ecological

relationship between the tributaries and their adjacent wetlands, and the role those similarly situated waters have in influencing the chemical, physical, or biological integrity of paragraph (a)(1) waters. *See* section III.E.iii of the Technical Support Document. For purposes of this rule, the agencies will therefore assess the tributaries and their adjacent wetlands in a catchment. If the tributaries in the region, including the tributary under assessment, have no adjacent wetlands, the agencies consider only the factors and functions of the tributaries in determining whether there is a significant effect on the chemical, physical, or biological integrity of downstream paragraph (a)(1) waters. If any of the tributaries in the region, including the tributary under assessment, have adjacent wetlands, the agencies will consider the factors and functions of the tributaries, including the tributary under assessment, together with the functions performed by the wetlands adjacent to the tributaries in the catchment, in evaluating whether a significant nexus is present.

In conducting a significant nexus analysis under this rule, the agencies will evaluate available hydrologic information (*e.g.*, gage data, precipitation records, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM. To understand the chemical, physical, and biological functions provided by tributaries and their adjacent wetlands, and the effects those functions have on paragraph (a)(1) waters, it is important to use relevant geographic water quality data in conjunction with site-specific data from field sampling and hydrologic modeling. *See* section IV.C.9.c of this preamble for additional discussion on implementing the significant nexus analysis; *see also* section IV.C.10 of this preamble.

5. Adjacent Wetlands

a. This Rule

Consistent with the proposal, this rule retains the adjacent wetlands provision of the 1986 regulations, with amendments to reflect the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States” informed by the law, the science, and agency expertise. Aquatic resources that meet this rule’s definitions of “wetlands” and “adjacent” are assessed under this provision where they are adjacent to traditional navigable waters, the territorial seas, interstate waters,

¹⁰⁶ This implementation approach to the region for purposes of the significant nexus standard is a change from the *Rapanos* Guidance. *See* section IV.C.9.c of this preamble for additional discussion on implementing the significant nexus analysis.

¹⁰⁷ NHDPlus provides delineated catchments for individual stream segments by linking the mapped stream network to the landscape. In addition, StreamStats by the USGS (*available at* <https://streamstats.usgs.gov/ss/>) is a map-based web tool that can delineate drainage areas for streams and estimate flow characteristics for selected sites based on stream gage data, basin characteristics, climate, etc. EPA’s EnviroAtlas Interactive Map (*available at* <https://www.epa.gov/enviroatlas/enviroatlas-interactive-map>) has a wide variety of tools that can help delineate catchments, including a tool that illustrates how precipitation will flow over the land surface, mapped elevation profiles for selected tributaries, and designations of upstream and downstream watersheds within a stream network.

impoundments of jurisdictional waters, and tributaries.

As discussed further in section IV.C.8.a of this preamble, in this rule the agencies are retaining their longstanding definition of “wetlands” from the 1986 regulations: “Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

Additionally, as discussed further in section IV.C.8.b of this preamble, in this rule the agencies are retaining their longstanding definition of “adjacent” unchanged for most of the past 45 years, which provides: “Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are ‘adjacent wetlands.’” Under this definition, adjacency is focused on the distance between the wetland and the jurisdictional water. Whether the distance between the wetland and the jurisdictional water qualifies the wetland as bordering, contiguous, or neighboring (and therefore “adjacent”) depends on the factual circumstances. The agencies have three well-established criteria to determine adjacency; if any one of the criteria is met, the wetland is “adjacent,” but may require further analysis to determine if it is “waters of the United States.” See *Rapanos* Guidance at 5–8. First, there is an unbroken surface or shallow subsurface connection to a jurisdictional water, which can be established, for example, where the wetland directly abuts the jurisdictional water or by a non-jurisdictional physical feature that provides the direct connection between the wetland and a jurisdictional water, such as a pipe, culvert, non-jurisdictional ditch, or flood gate, that has at least periodic flow. Second, the wetland is physically separated from a jurisdictional water by human-made dikes or barriers, or natural landforms (e.g., river berms, beach dunes). Or third, the wetland’s proximity to a jurisdictional water is reasonably close such that “adjacent wetlands have significant effects on water quality and the aquatic ecosystem.” *Riverside Bayview*, 474 U.S. at 135 n.9. The agencies conclude that close proximity between an adjacent wetland and a jurisdictional water means the wetland can modulate water quantity or water quality in the jurisdictional water, and

the jurisdictional water can modulate water quantity or quality in the wetland. See section IV.C.5.c of this preamble for further discussion on the implementation of this provision and the three criteria. The agencies have not established a specific distance limitation in the rule beyond which wetlands are never adjacent because whether a wetland is reasonably close such that the wetland can modulate water quantity or quality in the jurisdictional water or the jurisdictional water can modulate water quantity or quality in the wetland as part of the same aquatic ecosystem, depends on regional variations in climate, landscape, and geomorphology. But the agencies can state based on nearly 45 years of implementation of this definition that in a substantial number of cases, adjacent wetlands abut (touch) a jurisdictional water. And, on the whole, nationwide, adjacent wetlands are within a few hundred feet from jurisdictional waters (and in the instances where the distance is greater than a few hundred feet, adjacency is likely supported by a pipe, non-jurisdictional ditch, karst geology, or some other feature that connects the wetland directly to the jurisdictional water). Because of regional variability and its effects on proximity for purposes of adjacency, wetlands in the arid West—where rainfall is generally lower, evaporation rates are higher, and riparian areas and floodplains do not extend far from the tributary network—are likely to be much closer than a few hundred feet to be considered adjacent under this rule. On the other hand, where the jurisdictional water is wide, topography is flat lending to larger floodplains and riparian areas, and rainfall is higher, wetlands are more likely to be determined to be reasonably close where they are a few hundred feet from that tributary because the site-specific conditions contribute to the close relationship between the wetland and the jurisdictional water, including any unbroken surface or shallow subsurface hydrologic connections between the waters.

While bright-line rules (for example, wetlands that are more than a specific number of feet from a jurisdictional water are not “adjacent”) are easiest to understand and implement, convenience is not the only goal the agencies must consider in administering the Clean Water Act. Because the relationship between a wetland and a proximate jurisdictional water can depend upon a number of site-specific factors, like climate, geomorphology, landscapes, hydrology, and size of the

jurisdictional water (e.g., the ocean compared to a headwater stream), and because the central purpose of the Act is to protect the integrity of the nation’s waters, a more nuanced analysis is required. While science says that all things being equal, distance, location in a riparian area or floodplain, or discrete hydrologic connections are more likely to strengthen the relationship between a wetland and a nearby water, science does not provide bright lines on appropriate distances to determine adjacency. In implementing this provision over the years, the agencies have worked hard to balance the desire for clarity and predictability with the agencies’ scientific understanding of the resources Congress has charged the agencies with protecting. The agencies have carefully considered options for nationally applicable bright lines with respect to adjacency, such as establishing that any wetland within a certain number of feet from a jurisdictional tributary is *per se* jurisdictional, in order to facilitate implementation of the Clean Water Act and to minimize the burden on both landowners and the agencies to evaluate the scope of “waters of the United States.” However, the United States is a vast country with many different types of waters, watersheds, landscapes, and hydrology. In fact, in the 2015 Clean Water Rule the agencies sought to establish a distance-based bright line for determining adjacency. As discussed in section IV.B.1 of this preamble, that rule was immediately challenged, and the distance-based limitations were a substantial factor in many of the challenges. As the Supreme Court itself has recognized, the scope of Clean Water Act jurisdiction does not easily lend itself to bright lines: “In sum, we recognize that a more absolute position . . . may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes.” *Maui*, 140 S. Ct. at 1477. Ultimately, for purposes of this rule, the agencies concluded that there was not a reasoned basis, consistent with the text of the statute, to establish such a regulatory bright line.

The adjacent wetlands provision in the 1986 regulations defined “waters of the United States” to include wetlands adjacent to traditional navigable waters, interstate waters, paragraph (a)(3) “other waters,” impoundments of “waters of the United States,” tributaries, and the territorial seas. This rule provides additional constraints on jurisdiction relative to the 1986 regulatory text by

defining “waters of the United States” to include: (1) wetlands adjacent to traditional navigable waters, the territorial seas, and interstate waters; (2) wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and (3) wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard. In other words, for wetlands adjacent to waters that are not paragraph (a)(1) waters, an additional showing of a continuous surface connection to a relatively permanent water or of a significant nexus to a paragraph (a)(1) water is required. The determination of whether a wetland is “adjacent” is distinct from whether an “adjacent” wetland meets the relatively permanent standard; however, wetlands that have a continuous surface connection to a relatively permanent water meet the definition of “adjacent” and thus are a subset of adjacent wetlands. See section IV.C.5.c of this preamble for further information related to implementing the final rule’s adjacent wetlands provision.

Under this rule, the relatively permanent standard and the significant nexus standard are independent jurisdictional standards. Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. A natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. Again, the determination of whether a wetland is “adjacent” under the rule is distinct from whether an “adjacent” wetland has a continuous surface connection. See section IV.C.5.c of this preamble, below, for further discussion of implementation of the final rule’s adjacent wetlands provision.

The agencies have amended the regulatory text from the proposed rule to be clearer that a wetland adjacent to but lacking a continuous surface connection to a tributary that is relatively permanent must be assessed under the

significant nexus standard. For example, if a wetland is “neighboring” to a tributary that is relatively permanent, and thus “adjacent,” but lacks a continuous surface connection to that tributary, the wetland would need to be assessed under the significant nexus standard in order to determine its jurisdictional status. This is consistent with pre-2015 practice under the *Rapanos* Guidance for wetlands adjacent to relatively permanent tributaries and was the agencies’ intent under the proposed rule language. See *Rapanos* Guidance at 8; 86 FR 69423 (“Wetlands adjacent to relatively permanent tributaries but that lack a continuous surface connection to such waters would then be assessed under the significant nexus [standard], along with the tributary.”).

In addition, under this rule, wetlands adjacent only to paragraph (a)(5) waters cannot be considered for jurisdiction under the paragraph (a)(4) adjacent wetlands category, which represents a change from the 1986 regulations. Instead, such wetlands could be considered for jurisdiction solely under paragraph (a)(5) of this rule.

Further, in this rule, the agencies are deleting the parenthetical from the 1986 regulations that limited the scope of jurisdictional adjacent wetlands to wetlands adjacent to waters “(other than waters that are themselves wetlands)” for the reasons discussed below.

b. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

The agencies received numerous comments on the scope and implementation of the adjacent wetlands provision.

i. Comments on the Adjacent Wetlands Provision

The agencies received a wide range of comments on adjacent wetlands. Some commenters stated that they agreed with the agencies’ approach in the proposed rule for adjacent wetlands, with several adding that they believed the proposed rule’s approach to adjacency was consistent with prior practice, the relevant case law, the statute, the Constitution, or congressional intent. Other commenters disagreed and stated that the agencies’ approach was not consistent with case law, the statute, the Constitution, or congressional intent. Many of those commenters stated that wetlands should only be jurisdictional if they meet the relatively permanent standard. Other commenters requested greater jurisdictional protections for wetlands due to the many functions that they provide that benefit downstream

waters, with some commenters requesting that adjacent wetlands be treated as categorically jurisdictional, similar to the 2015 Clean Water Rule.

After careful consideration of public comments and for the reasons described in this preamble, the agencies are promulgating the adjacent wetlands provision of this rule with minimal changes to the proposed rule. For wetlands adjacent to paragraph (a)(1) waters, adjacency alone supports jurisdiction. For wetlands that are adjacent to waters that are not paragraph (a)(1) waters, like tributaries, this rule establishes an additional limitation on jurisdiction. In that case, the adjacent wetlands are jurisdictional only if they meet either the relatively permanent standard or the significant nexus standard. The agencies agree with commenters who stated that the proposed rule’s approach to adjacent wetlands was generally consistent with prior practice and consistent with the relevant case law, the statute, the Constitution, and congressional intent, and thus disagree with commenters who took the contrary view. This rule defines “waters of the United States” to include adjacent wetlands and reflects the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States” informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, relevant Supreme Court decisions, the scientific record, the agencies’ experience and technical expertise, and consideration of public comments on the proposed rule. The agencies disagree with commenters who stated that only adjacent wetlands that meet the relatively permanent standard should be considered jurisdictional. As discussed further in section IV.A.3.a.ii of this preamble, the agencies have concluded that the relatively permanent standard is administratively useful but is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act because it is inconsistent with the Act’s text and objective. Protecting only waters that meet the relatively permanent standard also runs counter to the scientific principles underlying protection of water quality. The agencies thus are promulgating an approach to adjacent wetlands that includes, but that is not limited to, the relatively permanent standard. The ecological relationship between jurisdictional waters and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The scientific literature

also supports the conclusion that adjacent wetlands, either alone or in combination with similarly situated waters, provide many important functions that can significantly affect the chemical, physical, and biological integrity of paragraph (a)(1) waters. See Technical Support Document section III.B. Section IV.A of this preamble provides additional information about the legal basis for the agencies' conclusions in this rule and the scientific support for the rule's provisions regarding adjacent wetlands. The agencies are not making additional categorical determinations of jurisdiction based on the significant nexus standard, as described further in section IV.A of this preamble. Even under the 2020 NWPR, which purported to enhance clarity, a landowner could not tell simply by looking at their property whether it contained "waters of the United States" because, in the case of adjacent wetlands, it was necessary to determine (1) whether the property contained a wetland as defined in the regulations, (2) whether there was evidence of a continuous surface connection between the wetland and a water that was part of the tributary network of a traditional navigable water or the territorial seas, (3) whether there was evidence that the continuous surface connection occurred in a "typical year," as the rule defined that term, and (4) in the case of a continuous surface connection based on inundation, whether the inundation originated in the jurisdictional water (relevant to adjacency under that rule) or the wetland (irrelevant to adjacency under that rule).

The challenge inherent in establishing bright lines to address the complex and variable ways in which waters move in different regions across the country is longstanding. As the Supreme Court itself has recognized, the scope of Clean Water Act jurisdiction does not easily lend itself to bright lines: "In sum, we recognize that a more absolute position . . . may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes." *Mau'i*, 140 S. Ct. at 1477. Further, as early Supreme Court decisions recognized, the Clean Water Act replaced a system whereby water quality protection had to be resolved through litigation in which courts had to apply "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee*, 451 U.S. at 317. The Clean Water Act replaced this

unpredictable and inefficient approach with "a comprehensive regulatory program supervised by an expert administrative agency," *id.*, including a "uniform system of interstate water pollution regulation," *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). Shrinking Federal jurisdiction, as the 2020 NWPR did, for example, would place many waters back within the "vague and indeterminate" legal regime that the Supreme Court recognized the Clean Water Act was designed to replace. See 451 U.S. at 317.

The agencies also received a variety of comments critiquing or supporting various past practice and rulemaking approaches to adjacency including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR. The agencies are retaining their longstanding definition of adjacency and establishing an approach to adjacency that is generally consistent with the pre-2015 regulatory regime, with some changes to implementation discussed below. The agencies are rejecting certain aspects of the 2020 NWPR's approach to adjacent wetlands for the reasons discussed in this section and section IV.B.3 of this preamble. The definition of "adjacent wetlands" in the 2020 NWPR failed to advance the objective of the Clean Water Act. It also was inconsistent with scientific information about the important effects of wetlands that do not abut jurisdictional waters and that lack evidence of specific surface water connections to such waters on the integrity of paragraph (a)(1) waters. In addition, key elements of the 2020 NWPR's definition of "adjacent wetlands" were extremely difficult to implement. These deficiencies are reflected in substantial losses of Federal protections on the ground. See section IV.B.3 of this preamble. The agencies are maintaining the approach of the pre-2015 regulatory regime and the 2015 Clean Water Rule under which wetlands adjacent to traditional navigable waters, the territorial seas, and interstate waters are jurisdictional without need for further determinations, but the agencies are not determining that any additional adjacent wetlands are categorically jurisdictional in this rule. The agencies have authority to determine which tributaries and their adjacent wetlands are jurisdictional either through regulations or adjudication. See *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring in the judgment); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). With respect to wetlands adjacent to waters other than paragraph (a)(1) waters, the agencies

have decided to proceed through case-specific jurisdictional determinations under this rule, rather than through categorical determinations by rule.

The agencies will continue to assert jurisdiction over wetlands adjacent to traditional navigable waters, the territorial seas, and interstate waters without need for further assessment, as they did under the 1986 regulations and the *Rapanos* Guidance. Indeed, in *Rapanos*, at least five Justices agreed that wetlands adjacent to traditional navigable waters are "waters of the United States." See *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."), *id.* at 810 (Stevens, J., dissenting) ("Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met."); see also *Riverside Bayview*, 474 U.S. at 134 ("[T]he Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."); *Rapanos* Guidance at 5. Moreover, ample scientific information makes clear that the health and productivity of rivers and lakes, including paragraph (a)(1) waters, depends upon the functions provided by upstream tributaries, adjacent wetlands, and paragraph (a)(5) waters. Under this rule, the agencies also define "waters of the United States" to include wetlands adjacent to the territorial seas without need for further assessment, as they did under the 1986 regulations, as the territorial seas are categorically protected under the Clean Water Act. Additionally, under this rule the agencies continue to define "waters of the United States" to include wetlands adjacent to interstate waters without need for further assessment since interstate waters, like traditional navigable waters and the territorial seas, are waters clearly protected by the Clean Water Act. See section IV.C.2 of this preamble for further discussion of traditional navigable waters, the territorial seas, and interstate waters.

The agencies are retaining the 1986 regulations' coverage of wetlands adjacent to paragraph (a)(2)

impoundments and wetlands adjacent to tributaries to paragraph (a)(2) impoundments, updated to include the requirement that the wetlands also meet either the relatively permanent or significant nexus standard. As discussed above in section IV.C.3 of this preamble, the agencies' longstanding interpretation of the Clean Water Act is that "waters of the United States" remain "waters of the United States" even if impounded. Since the impoundment does not "denationalize" the "waters of the United States," *see S.D. Warren*, 547 U.S. at 379 n.5, the agencies similarly interpret the Clean Water Act to continue to protect wetlands adjacent to the paragraph (a)(2) impoundment and adjacent to jurisdictional tributaries to the impoundment where those wetlands meet the relatively permanent standard or the significant nexus standard. *See* section IV.C.3 of this preamble for additional discussion of impoundments under this rule.

The agencies are also deleting the cross reference to paragraph (a)(5) waters as waters to which wetlands may be adjacent to be determined "waters of the United States" under the adjacent wetlands category of this rule. This change reflects the agencies' consideration of the jurisdictional concerns and limitations of the statute, informed by *SWANCC* and *Rapanos*. The agencies have concluded that a provision that authorizes consideration of jurisdiction over adjacent wetlands that meet the relatively permanent or significant nexus standard when assessed based simply on connections to paragraph (a)(5) waters would have too tenuous a connection to paragraph (a)(1) waters. Rather, any such wetlands that are adjacent only to paragraph (a)(5) waters would be assessed themselves under paragraph (a)(5) of this rule to determine if they meet the relatively permanent or significant nexus standard. For example, a wetland adjacent to a lake that meets the significant nexus standard under paragraph (a)(5) would itself need to be assessed under paragraph (a)(5) to determine whether it significantly affects the chemical, physical, or biological integrity of a paragraph (a)(1) water. *See* section IV.C.6.c of this preamble for further discussion on implementation of paragraph (a)(5) waters.

The agencies have removed the parenthetical "(other than waters that are themselves wetlands)" from the regulatory text because it has caused confusion for the public and the regulated community and is unnecessary. The parenthetical from the

1986 regulations limited the scope of jurisdictional adjacent wetlands to wetlands adjacent to waters "(other than waters that are themselves wetlands)." Under that provision, a wetland was not jurisdictional simply because it was adjacent to another adjacent wetland or to a wetland jurisdictional under paragraph (a)(3) of the 1986 regulations. The provision has created confusion under the pre-2015 regulatory regime, as some have asserted that a wetland that is indeed adjacent to a jurisdictional tributary, but that is separated from that tributary by another adjacent wetland, should not be determined to be a jurisdictional adjacent wetland because of that parenthetical. Several commenters discussed the parenthetical in the 1986 regulation's "adjacent wetlands" category. Most of those commenters were in favor of removing the parenthetical, claiming that it created "confusion" and citing concerns that the parenthetical could improperly limit jurisdiction of wetlands. Other commenters voiced support for keeping the parenthetical. Some even suggested that the parenthetical flatly excluded all wetlands that are adjacent to other wetlands, regardless of any other considerations. These interpretations are inconsistent with the agencies' intent and longstanding interpretation of the parenthetical. *See Universal Welding & Fabrication, Inc. v. U.S. Army Corps of Eng'rs*, 708 Fed. Appx. 301, 303 (9th Cir. 2017) (observing that "[d]espite the subject wetland's adjacency to another wetland, the Corps determined that its regulatory authority was not precluded by the parenthetical language within [section] 328.3(a)(7), which it interpreted as prohibiting the exercise of jurisdiction over a wetland only if *based upon* that wetland's adjacency to another wetland" and holding that the Corps' interpretation is "the most reasonable reading of the regulation's text"). Therefore, to streamline the regulation and provide additional clarity, the agencies have deleted the text of the parenthetical in this rule. In addition, wetlands adjacent to interstate wetlands or wetlands adjacent to tidal wetlands (which are traditional navigable waters) are jurisdictional under this rule, consistent with the 1986 regulations and longstanding practice.

ii. Comments on the Interpretation and Implementation of the Adjacent Wetlands Provision

The agencies will continue to implement a number of longstanding interpretations of "adjacent" based on scientific principles and practical administration of the definition with

this rule. As stated previously, the agencies consider wetlands "adjacent" if one of the following three criteria is satisfied. First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters. All wetlands that directly abut jurisdictional waters have an unbroken surface or shallow subsurface connection because they physically touch the jurisdictional water. Wetlands that do not directly abut a jurisdictional water may have an unbroken surface or shallow subsurface connection to jurisdictional waters. Water does not need to be continuously present in the surface or shallow subsurface connection. Second, they are physically separated from jurisdictional waters by human-made dikes or barriers, or natural landforms (*e.g.*, river berms, beach dunes). Or third, their proximity to a jurisdictional water is reasonably close. Wetlands that meet one of these three criteria are considered bordering, contiguous, or neighboring for purposes of this rule.

Several commenters provided input on these three criteria. Some commenters stated that shallow subsurface hydrologic connections are appropriate to consider for adjacency, while others stated that such connections should not be considered. Several commenters stated that there are regional differences in proximity relevant to adjacency. Some commenters stated that wetlands should be considered adjacent even if they are separated by human-made dikes or barriers, natural river berms, beach dunes and the like, while other commenters did not support that view.

The agencies agree with commenters who stated that shallow subsurface connections can be relevant to adjacency and will continue to use the criteria from pre-2015 practice that an unbroken shallow subsurface connection between a wetland and another water can demonstrate adjacency.

While this rule does not explicitly identify regional factors that influence what is "reasonably close" for purposes of adjacency, the agencies recognize there may be site-specific factors (*e.g.*, topography) that influence what is "reasonably close." This rule does not establish specific distance limitations for adjacency, which helps ensure that site-specific and regional factors can be considered when a wetland is being evaluated (*see* section IV.C.5.c of this preamble, below).

The agencies agree with commenters who supported the 1986 regulation's definition of "adjacent" to include wetlands even if they are separated by

natural landforms or human-made barriers for the reasons discussed in sections IV.A.2.b.ii (explaining that the agencies' longstanding definition of "adjacent," which includes such wetlands, is a reasonable foundation for this rule), and IV.C.8.b of this preamble, and section III.B.ii of the Technical Support Document.

c. Implementation

Under this provision of the rule, wetlands adjacent to traditional navigable waters, the territorial seas, or interstate waters are jurisdictional and do not need further analysis to determine if they are "waters of the United States." Further, wetlands adjacent to paragraph (a)(2) impoundments and to jurisdictional tributaries are assessed for jurisdiction under the relatively permanent standard or significant nexus standard. Wetlands adjacent to but lacking a continuous surface connection with tributaries that are relatively permanent must be assessed under the significant nexus standard.

i. Determining the Presence of an Adjacent Wetland

Before determining if a wetland is jurisdictional, the agencies first determine if the wetland in question meets the definition of "wetlands" under this rule (see section IV.C.8.a of this preamble).

In identifying wetlands, the agencies will ordinarily consider all wetlands within a wetland mosaic collectively. The agencies have long considered wetland mosaics to be delineated as one wetland. Wetland mosaics are landscapes where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately, and the wetlands in the mosaic generally act as a single ecological unit. In certain regions where wetland mosaics are common, Corps regional wetland delineation manuals address how to delineate such wetlands. Longstanding practice is that wetlands in the mosaic are not individually delineated, but that the agencies consider the entire mosaic and estimate percent wetland in the mosaic. See Technical Support Document section IV.A.iii. These longstanding implementation approaches for purposes of jurisdictional determinations are supported by the science (see Technical Support Document section IV.A.iii) and the technical expertise the agencies have developed through years of performing these assessments.

Once a feature is identified as a wetland, if the wetland itself is not

jurisdictional under paragraph (a)(1) of this rule as a traditional navigable water (such as a tidal wetland) or an interstate water, the agencies assess whether it is adjacent to a traditional navigable water, territorial sea, interstate water, paragraph (a)(2) impoundment, or jurisdictional tributary. Wetlands are "adjacent" if they are "bordering, contiguous, or neighboring." The agencies consider the entire wetland to be "adjacent" if any part of the wetland is "adjacent."

Under this rule's definition and consistent with the agencies' longstanding definition, adjacency is focused on the distance between the wetland and the jurisdictional water. Whether the distance between the wetland and the jurisdictional water qualifies the wetland as bordering, contiguous, or neighboring (and therefore "adjacent") depends on the factual circumstances, so the agencies will assess adjacency using the three criteria noted above in section IV.C.5.a of this preamble. This section of the preamble explains each of the criteria in further detail. These criteria are consistent with the text of the regulation, the underlying scientific rationale for defining "waters of the United States" to include adjacent wetlands, and pre-2015 practice. See *Rapanos* Guidance at 5–6.

The longstanding definition, by its terms, does not require flow from the wetland to the jurisdictional water or from the jurisdictional water to the wetland (although such flow in either direction can be relevant to the determination of adjacency). The Supreme Court in *Riverside Bayview* in deferring to the Corps' ecological judgment about the relationship between waters and their adjacent wetlands as an "adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act," rejected an argument that such wetlands had to be the result of flow in a particular direction to be adjacent: "This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and

streams and thus prevent flooding and erosion. In addition, adjacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.'" 447 U.S. at 134 (citing 33 CFR 320.4(b)(2)(iv), (v), (vii) (1985)).

Wetlands with an unbroken surface or shallow subsurface connection to jurisdictional waters are adjacent, including those wetlands that directly abut a jurisdictional water (*i.e.*, they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent). All wetlands that directly abut jurisdictional waters have an unbroken surface or shallow subsurface connection because they physically touch the jurisdictional water. An unbroken surface or shallow subsurface connection to jurisdictional waters can also be established by a non-jurisdictional physical feature or discrete conveyance that supports at least periodic flow between the wetland and a jurisdictional water, such as a pipe, culvert, non-jurisdictional ditch, or flood gate. Water does not have to be continuously present in this hydrologic connection and the flow between the wetland and the jurisdictional water may move in either or both directions.

A shallow subsurface hydrologic connection is predominantly lateral water flow through a shallow subsurface layer. Such flows may be found, for example, in wetlands on slopes, where water seeps through surface soils to downstream waters, in soils with a restrictive horizon, in the hyporheic zone, or in karst systems. A shallow subsurface connection also exists, for example, when the adjacent wetland and the water to which it is adjacent are in contact with the same shallow aquifer or with the same shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface. Shallow subsurface connections can also be maintained as water moves through karst topography, and through confined human-made subsurface conveyance systems such as drain tiles and storm sewers. Shallow subsurface connections may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. A variety of factors may reflect the presence of a shallow subsurface connection, including position of the wetland in the landscape (for example, on a slope above the jurisdictional waters), stream hydrographs, soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable

layer), and information indicating that the water table in the stream is lower than the shallow subsurface. The agencies may also utilize direct observations in the field or tracer studies to demonstrate shallow subsurface flow. Shallow subsurface connections convey water quickly through the soil and impact surface water directly within hours or days rather than the months or years it may take long pathways to reach surface waters. However, neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves “waters of the United States.” Some examples of wetlands that are adjacent under the final rule due to an unbroken surface or shallow subsurface connection include wetlands that are connected to a tributary via karst topography, which provide a direct subsurface hydrologic connection between the wetlands and the tributary and that is traceable via a dye test, even if those wetlands are more than several hundred feet from the tributary; and wetlands within a couple of hundred feet of a tributary, where the subsurface hydrologic connection is demonstrated via soil maps which demonstrate continuous hydric soils with indicators of high transmissivity over an impermeable layer between the tributary and the proximate wetlands. See Technical Support Document section III.B.ii for additional information on surface and shallow subsurface hydrologic connections.

If a wetland is separated from a jurisdictional water by man-made dikes or barriers, natural river berms, beach dunes, and the like, then the wetlands are adjacent under this rule, consistent with the 1986 regulations. No additional identification of a hydrologic connection between the wetland and the jurisdictional water is required for such wetlands to be considered adjacent. For example, a wetland that is separated from a jurisdictional tributary simply by a 40-foot road meets the longstanding definition of adjacent. It is also important to note that natural river berms are formed by sediment deposits accumulating at or near stream banks during flood events. Such berms vary in height from inches to feet, and also can be quite wide. With respect to beach dunes and similar natural landforms, more than one dune may exist between an adjacent wetland and jurisdictional water (including primary and secondary dunes), because beach dunes typically function as an interdunal system (particularly on barrier islands). For example, interdunal wetlands which are

located between dune ridges would be adjacent.

In some cases, a wetland may be separated from a jurisdictional water by more than one human-made dike or barrier or multiple types of barriers and landforms (e.g., a wetland separated by a human-made barrier and a natural river berm). The agencies will assess such wetlands consistent with the other adjacency criteria previously described (i.e., by identifying the presence of an unbroken surface or shallow subsurface connection or determining that their proximity to a jurisdictional water is reasonably close).

For purposes of determining whether a wetland is “adjacent,” artificial structures do not divide a wetland if a hydrologic connection is maintained between the divided portions of the wetland. Rather, the wetland is treated as one wetland. For example, if a wetland is divided by a road, a culvert could maintain a hydrologic connection. The agencies may also consider if a subsurface hydrologic connection is maintained, using indicators such as hydric soils, the permeability of the artificial structure, and/or the permeability of the soils below the artificial structure.

Wetlands are also adjacent when their proximity to a jurisdictional water is reasonably close. The Supreme Court in *Riverside Bayview* deferred to the Corps’ judgment that adjacent wetlands “that form the border of or are in reasonable proximity to” other “waters of the United States” “may be defined as waters under the Act.” *Riverside Bayview*, 474 U.S. at 134. Where the wetland is reasonably close to the jurisdictional water, the agencies have concluded that “adjacent wetlands have significant effects on water quality and the aquatic ecosystem.” *Id.* at 135 n.9. The close proximity between an adjacent wetland and a jurisdictional water means the wetland can modulate water quantity and water quality in the jurisdictional water, and the jurisdictional water can modulate water quantity and water quality in the wetland. For example, wetlands typically help to store floodwaters, pollutants, and sediments that could otherwise reach the jurisdictional water to which they are adjacent. They can also provide flow contributions to the jurisdictional waters to which they are adjacent during high hydroperiods, where water spills from the wetland to the nearby jurisdictional water, and such contributions of flow are facilitated by the wetland’s close proximity to the jurisdictional water. The proximate jurisdictional waters can serve as important sources of water for adjacent

wetlands, for example, through overtopping events where flow from the jurisdictional waters is stored in the wetlands. While under this rule the agencies are not establishing distance limits for adjacency, the agencies recognize that as the distance between the wetland and jurisdictional water increases, the reasonableness of the connection between the waters will generally decrease, particularly in the absence of the type of surface or shallow subsurface connections described above, and a finding of adjacency is less likely. The distance between a jurisdictional water and its adjacent wetlands may vary by region, as well as based on site-specific factors within regions. In practice, under this criterion, the agencies have found that adjacent wetlands are on the whole, nationwide, within a few hundred feet of jurisdictional waters. This can vary from site to site and region to region due to differences in climate, geomorphology, landscape setting, hydrology, soils, vegetation, elevation, size of the jurisdictional water, and other site-specific variables.

Field data, including visual observations, can assist with determining if a wetland is adjacent. In addition, a variety of remote tools can help to assess adjacency, including maps, high-resolution elevation data, aerial photographs, and high-resolution satellite imagery. For example, visual observation, NWI and USGS topographic maps, elevation data, and NHD data may identify a physical barrier or illustrate the location of the traditional navigable water, territorial sea, interstate water, paragraph (a)(2) impoundment, or jurisdictional tributary; the wetland’s proximity to the jurisdictional water; and the nature of topographic relief between the two aquatic resources. Visual observations, aerial photographs, or high-resolution satellite imagery may illustrate hydrophytic vegetation from the boundary (e.g., OHWM for non-tidal waters or high tide line for tidal waters) of the traditional navigable water, the territorial seas, the interstate water, the paragraph (a)(2) impoundment, or the jurisdictional tributary to the wetland boundary, or the presence of water or soil saturation. Soil samples or NRCS soil maps may identify the presence of hydric soil types, soil saturation, or potential surface or subsurface hydrologic connections. Additionally, methods that overlay depressions on the landscape with hydric soils and hydrophytic vegetation can be used to identify likely wetlands and hydrologic connections. Field work can help

confirm the presence and location of the OHWM or high tide line of the jurisdictional water and can provide additional information about the wetland's potential adjacency to that water.¹⁰⁸

ii. Determining Whether an Adjacent Wetland Meets the Relatively Permanent Standard

Wetlands that are adjacent to paragraph (a)(1) waters are jurisdictional without the need for further analysis. Wetlands adjacent to paragraph (a)(2) impoundments and wetlands adjacent to jurisdictional tributaries must meet a second requirement to be jurisdictional as "waters of the United States" under this rule—they must satisfy either the relatively permanent standard or the significant nexus standard.

Under this rule, adjacent wetlands meet the relatively permanent standard if they have a continuous surface connection to a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard. As discussed previously in this section of this preamble, wetlands that have a continuous surface connection to such waters are a subset of adjacent wetlands. Wetlands that do not have a continuous surface connection but are adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries will be evaluated for jurisdiction under the significant nexus standard. *See also* section IV.C.5.c.iii of this preamble.

A continuous surface connection does not require a constant hydrologic connection. Rather, the agencies will identify a continuous surface connection consistent with the *Rapanos* plurality opinion, which indicates that the continuous surface connection requirement is a "physical-connection requirement." 547 U.S. at 751 n.13; *see also Rapanos* Guidance at 7. Wetlands meet the continuous surface connection requirement if they physically abut or touch a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard. Wetlands also meet the continuous surface connection requirement if they are connected to relatively permanent waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. This is

because a ditch or other such feature can serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. This approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and experience. As the Court of Appeals for the Sixth Circuit has explained, "it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally." *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) ("*Cundiff*") (holding wetlands were jurisdictional under the *Rapanos* plurality where plaintiff created a continuous surface connection by digging ditches to enhance the acid mine drainage into the creeks and away from his wetlands).

Similarly, a natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. This approach is consistent with the agencies' interpretation in the 2020 NWPR that natural berms and similar natural landforms "are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events." 85 FR 22311 (April 21, 2020). As the 2020 NWPR explained, "a natural river berm can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and a wetland." *Id.* (citing Science Report at A-7). The 2020 NWPR noted that the adjacent wetland could have been formed at the same time as or after the formation of the natural river berm due to repeated flooding and the impeded return flow created by the berm. Natural banks can also provide evidence of a continuous surface connection because the processes that result in their formation can also be representative of the interconnected relationship between the wetlands and the relatively permanent water. Adjacent wetlands may be separated by a bank from a relatively permanent water due to an elevation difference between the bank and the water (*e.g.*, when the stream is incised). The surface water flow of a tributary over time can erode a channel, which creates a bank separating the tributary from the adjacent wetland. *See* 85 FR 22311 (April 21, 2020). In addition, the presence of a beaver dam between a wetland and a relatively permanent

water can be evidence of a continuous surface connection between the two features, even if the dam itself blocks surface hydrologic flow for periods of time. Beach dunes may also separate adjacent wetlands and relatively permanent waters. Beach dunes are sometimes formed through wind erosion which results in the sand surface interacting with the water table, providing enough hydrology to create wetlands. Beach dunes may also be formed when water levels drop in lakes or from historic glacial retreat. Many interdunal wetlands have seasonally variable hydroperiods where they may be dry during periods of low rainfall. All of these processes and the resulting natural berm, bank, dune, or similar natural landform indicate that the wetlands are integrated and "inseparably bound up" with the relatively permanent waters. *See* 85 FR 22280 (April 21, 2020) (citing *Rapanos*, 547 U.S. at 732 (Scalia, J., plurality opinion)). The agencies recognize that not all natural berms, banks, dunes, and similar natural landforms demonstrate evidence of a continuous surface connection. For example, an adjacent wetland may be separated from a relatively permanent water by a relict landform like a natural berm that no longer interacts hydrologically with the tributary network. Such relict barriers do not demonstrate evidence of a continuous surface connection and may in fact sever the continuous surface connection.

While natural barriers may at times occur within a floodplain, the existence of a floodplain (and other land masses similar to a floodplain, such as a riparian area or fluvial terrace) generally is not sufficient to indicate a continuous surface connection. Wetlands separated from jurisdictional waters by cliffs, bluffs, or canyon walls also typically do not have a continuous surface connection, and thus would be assessed under the significant nexus standard. However, if these cliffs, bluffs, or canyon walls have gaps or built structures (*e.g.*, culverts, pipes, or waterfalls) that provide for a continuous surface connection between the adjacent wetlands and the relatively permanent water, this type of connection would satisfy the physical connection requirement for a continuous surface connection. The same is true for dikes or other artificial barriers with gaps or structural components that allow for a continuous surface connection. For example, an upland levee that separates an adjacent wetland from a tributary that is relatively permanent may have gaps along the length of the levee that

¹⁰⁸ Field work may include, *e.g.*, traversing the landscape from the traditional navigable water, territorial sea, interstate water, paragraph (a)(2) impoundment, or jurisdictional tributary to the wetland and examining topographic and geomorphic characteristics, as well as hydrologic and biologic indicators.

provide for a physical connection between the wetlands and the tributary that satisfies the requirement for a continuous surface connection.

Some commenters asserted that the agencies' use of the relatively permanent standard in the proposed rule is inconsistent with the *Rapanos* plurality opinion because it does not require a continuous hydrologic connection for adjacent wetlands to be jurisdictional, with one commenter referencing the agencies' statement in the proposed rule that a continuous surface connection "does not require surface water to be continuously present between the wetland and the tributary." Another commenter asserted that the proposed rule's approach to adjacent wetlands is inconsistent with the *Rapanos* plurality opinion because it allows for the continuous surface connection requirement to be satisfied by physical connections such as non-jurisdictional ditches with an irregular flow surface connection requirement. The agencies disagree that the approach in this rule is inconsistent with the plurality opinion. The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement." *Rapanos*, 547 U.S. at 751 n.13 (referring to "our physical-connection requirement" and later stating that *Riverside Bayview* does not reject "the physical-connection requirement"). This approach to the continuous surface connection requirement is consistent with the *Rapanos* Guidance. *Rapanos* Guidance at 7 & n.28. A continuous surface connection is not the same as a continuous surface *water* connection, by its terms and in effect. Therefore, because the plurality opinion requires only a "continuous surface connection," the relatively permanent standard in this rule, consistent with the plurality opinion, does not require surface water to be continuously present between the wetland and the tributary. The agencies also disagree that it is inconsistent with the plurality opinion for adjacent wetlands to be considered to meet the continuous surface connection requirement if they are connected to relatively permanent waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. This is because a ditch or other such feature can serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. This approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and

experience. See *Cundiff*, 555 F.3d at 213.

The agencies agree with commenters who stated that a continuous surface connection does not require the continuous presence of surface water between the adjacent wetland and relatively permanent paragraph (a)(2) impoundment or jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, and the agencies continue this longstanding approach in this rule. The agencies' approach is consistent with science, as well as the longstanding regulatory definition of "wetlands," which does not require such aquatic resources to contain surface water. See 33 CFR 328.3(b)(2014) and 40 CFR 232.2 (2014) (defining wetlands as "areas that are inundated or *saturated* by surface or *ground water* at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions" (emphasis added)); see also Technical Support Document section III.B. Since wetlands frequently do not contain surface water, a requirement for continuous surface water between a relatively permanent water and adjacent wetlands would be illogical as a scientific and practical matter.

The agencies have a variety of tools for determining whether adjacent wetlands have a continuous surface connection to relatively permanent waters, or if they are separated from them by natural landforms or artificial barriers, including the same tools used to establish adjacency. Visual observations, high-resolution satellite imagery, NRCS soil maps, USGS topographic maps, and NHD data may show soil saturation, surface flow patterns and infrastructure crossings (e.g., roads) that can be used to indicate possible culvert locations. Visual observations, high-resolution satellite imagery, elevation data such as LIDAR-based topographic models, and USGS topographic maps may identify the presence of swales that are located between a wetland and a relatively permanent water. Similar tools (described below) and visual observations can be used to identify the potential presence of natural landforms that can maintain a continuous surface connection and the potential presence of breaks that may sever a continuous surface connection. Distinguishing between landforms like upland breaks and natural berms can be facilitated by assessing their linear extent and continuity, or observations on how they hydrologically interact with an associated relatively permanent water.

To assess whether wetlands are separated from relatively permanent waters by natural landforms or artificial barriers, the agencies can rely upon a variety of tools. For example, USGS topographic maps may show topographic highs between the wetland and relatively permanent water, or simple indices can be calculated based on topography to indicate where these separations occur and their linear extent. FEMA flood zone or other floodplain maps may indicate constricted floodplains along the length of the tributary channel with physical separation of flood waters. High-resolution elevation data can illustrate topographic highs between a wetland and tributary channel that extend along the length of a tributary's channel. Aerial photographs or high-resolution satellite imagery may illustrate upland vegetation along the tributary channel between the wetland and tributary channel, or bright soil signatures indicative of higher ground. NRCS soil maps may identify mapped linear, upland soil types along the tributary channel. Field work may help to confirm the presence and location of the OHWM of a tributary that is relatively permanent. In addition, field work may confirm whether there is a continuous physical connection between the wetland and the tributary, or identify breaks that may sever the continuous surface connection.¹⁰⁹

iii. Determining Whether an Adjacent Wetland Meets the Significant Nexus Standard

The agencies note again that the determination of adjacency and the determination of a significant nexus are different and that there are two key differences. First, adjacency is about the relationship between a wetland and a jurisdictional water and is based on reasonable proximity, whereas significant nexus is about the functions provided by an adjacent wetland to a paragraph (a)(1) water—the significant nexus assessment is not to the jurisdictional water to which the wetland is adjacent (if the jurisdictional water is a paragraph (a)(1) water, it is jurisdictional without a case-specific significant nexus assessment). Second, a wetland must meet the adjacency standard on its own, whereas a significant nexus assessment is based on whether an adjacent wetland alone or in combination with other similarly situated waters significantly affects the

¹⁰⁹ Field work may include, e.g., traversing the landscape from the tributary to the wetland and examining topographic and geomorphic characteristics, the linear extent of those features, as well as hydrologic and biologic indicators.

integrity of a paragraph (a)(1) water. Once a wetland has been determined to be “adjacent,” if the adjacent wetland does not meet the relatively permanent standard, the agencies will conduct a significant nexus analysis to assess if the wetland is jurisdictional.

Under the regulations, the adjacent wetlands which do not meet the relatively permanent standard and for which a significant nexus analysis must be conducted are: (1) adjacent wetlands that lack a continuous surface connection to a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, and (2) wetlands adjacent to a paragraph (a)(2) impoundment or a tributary when the paragraph (a)(2) impoundment or the tributary is not relatively permanent. In evaluating such adjacent wetlands under the significant nexus standard, the agencies will determine whether the wetlands, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. See section IV.C.9 of this preamble for additional discussion on the definition of “significantly affect” in this rule, including the factors that will be evaluated and the functions that will be assessed as part of a significant nexus analysis. The agencies consider tributaries and their adjacent wetlands to be “similarly situated” waters. The agencies consider similarly situated waters to be “in the region” when they lie within the catchment area of the tributary of interest. Therefore, in implementing the significant nexus standard under this rule, all tributaries and adjacent wetlands within the catchment area of the tributary of interest will be analyzed as part of the significant nexus analysis.

For a significant nexus analysis, the region would be the catchment that drains to and includes the tributary to which the wetland in question is adjacent. A catchment is the area of the land surface that drains to a specific location for a specific hydrologic feature, such as a tributary. Catchments will be delineated from the downstream-most point of the tributary reach to which the wetland is adjacent and include the land uphill that drains to that point, as discussed in further detail in section IV.C.4.c of this preamble and its subsections.

After identifying the catchment, the next step is to identify the tributaries within the catchment under the agencies’ longstanding interpretation of tributary, see section IV.C.4.a of this

preamble, and their adjacent wetlands within the catchment area, see section IV.C.5.c.i of this preamble. When evaluating whether an adjacent wetland meets the significant nexus standard, the agencies will consider the factors in the final rule, along with the functions of the tributaries in the catchment together with the functions performed by the wetlands adjacent to the tributaries in the catchment, including the subject wetland, in relation to the chemical, physical, or biological integrity of the paragraph (a)(1) water. This approach to the significant nexus analysis recognizes the ecological relationship between wetlands and the tributaries to which they are adjacent, and the role those similarly situated waters have in influencing the chemical, physical, or biological integrity of paragraph (a)(1) waters. See Technical Support Document section III.E.

Section IV.C.9.c of this preamble discusses a variety of tools and sources of information that can be used to assess significant effects on the chemical, physical, and biological integrity of paragraph (a)(1) waters. Remote tools, field indicators and observational methods, and datasets can all assist in determining whether adjacent wetlands meet the significant nexus standard. In addition, a variety of modeling approaches can be used to quantify the connectivity and cumulative effects of wetlands, including non-floodplain wetlands, on other waters, as discussed further in section IV.A.v of the Technical Support Document.¹¹⁰

6. Waters Not Identified in Paragraphs (a)(1) Through (4)

a. This Rule

Paragraph (a)(5) of this rule defines “waters of the United States” to include “intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4)” that meet either the relatively permanent standard or the significant nexus standard. Waters in this category in the 1986 regulations were sometimes referred to as “(a)(3) waters” or “other waters.” With this

rule, the agencies have made important changes to the 1986 regulations to reflect the agencies’ construction of the statutory limits on the scope of “waters of the United States” informed by the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.” Of particular importance, the agencies have replaced the broad Commerce Clause basis for jurisdiction from the 1986 regulations for waters not identified in other provisions of the definition with the relatively permanent standard and the significant nexus standard. Because the relatively permanent standard and the significant nexus standard require connections to a paragraph (a)(1) water, and the significant nexus standard further requires that waters significantly affect paragraph (a)(1) waters, this provision of the rule is substantially narrower than the 1986 regulations. The 1986 regulations, for example, authorized the assertion of jurisdiction over waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

The agencies are including a provision for intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of the rule because such waters can provide functions that restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters. See section IV.A.2.c.iii of this preamble. For example, a large lake that is very close to a tributary or paragraph (a)(1) water, but that is not part of the tributary system, would be non-jurisdictional if the agencies did not include the category for assessing such waters under paragraph (a)(5) in this rule, even if that lake provides many functions that significantly affect a traditional navigable water.

The agencies have streamlined and clarified the provision for paragraph (a)(5) waters as compared to the 1986 regulations. The agencies have added the requirement that these waters must meet either the relatively permanent standard or significant nexus standard to be “waters of the United States.” In addition, the agencies have deleted the non-exclusive list of “other waters” that was featured in paragraph (a)(3) of the 1986 regulations. Under the final rule’s new paragraph (a)(5) provision, only “intrastate lakes and ponds, streams, or wetlands not identified in paragraphs

¹¹⁰ Some examples include the Soil and Water Assessment Tool (SWAT, available at <https://swat.tamu.edu/>), the Hydrologic Simulation Program in Fortran (available at <https://www.epa.gov/ceam/hydrological-simulation-program-fortran-hspf>), and DRAINMOD for Watersheds (DRAINWAT, available at <https://www.bae.ncsu.edu/agricultural-water-management/drainmod/>). Other examples of models applicable to identifying effects of wetlands on downstream waters include the USGS hydrologic model MODFLOW (available at https://www.usgs.gov/mission-areas/water-resources/science/modflow-and-related-programs?qt-science_center_objects=0#qt-science_center_objects) and the USGS flow simulation model VS2DI (available at <https://www.usgs.gov/software/vs2di-version-13>).

(a)(1) through (4)” can be assessed for jurisdiction under the relatively permanent standard or significant nexus standard. As discussed further below, however, the agencies have concluded that the more specific water types previously listed in paragraph (a)(3) of the 1986 regulations nonetheless generally fall within one of the four water types listed in paragraph (a)(5) of this rule.

Finally, the agencies have moved the provision for paragraph (a)(5) waters to the end of the section of the regulation which defines the categories of jurisdictional waters, since paragraph (a)(5) waters are those that are not covered by the preceding categories. As a result, “other waters” are now in paragraph (a)(5) of this rule. In light of these changes to the regulatory text, the agencies refer to these waters as “those not identified in paragraphs (a)(1) through (4)” or “paragraph (a)(5) waters” for purposes of this rule.

Waters assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or a tributary that is relatively permanent. The agencies will assess waters under paragraph (a)(5) to determine if they are relatively permanent using a similar approach to the one described for tributaries in section IV.C.4 of this preamble, and the agencies will assess a continuous surface connection between waters assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for adjacent wetlands in section IV.C.5 of this preamble. Waters assessed under paragraph (a)(5) meet the significant nexus standard if they significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or an interstate water. See section IV.C.6.c of this preamble for further discussion on implementation of these standards for waters assessed under paragraph (a)(5). The agencies also note that the characteristics of a water considered for jurisdiction under paragraph (a)(5) can change over time such that it meets the requirements for consideration under another category of “waters of the United States.” For example, a river that does not drain to a paragraph (a)(1) water could potentially become a traditional navigable water, for instance, if it is impounded and becomes a navigable-in-fact reservoir. Such water would then be assessed as a traditional navigable water under paragraph

(a)(1)(i) of the final rule. Similarly, a wetland that historically was not adjacent can become an adjacent wetland, for example, if a ditch is constructed that connects the wetland to a jurisdictional tributary. Such a wetland would then be considered under paragraph (a)(4) of the final rule due to the unbroken surface connection to a jurisdictional water via the ditch.

b. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

The agencies received numerous comments on whether to include a category for waters that do not fall within one of the more specific categories in the definition of “waters of the United States” and the standard upon which to base jurisdiction over such waters, as well as on implementation of this provision of the rule.

i. Comments on the Provision for Waters That Do Not Fall Within One of the More Specific Categories

Some commenters expressed general support for including a category for waters that do not fall within one of the more specific categories in this rule, while others opposed including such a category. Many commenters requested clarification of the category for waters that do not fall within one of the more specific categories. Many commenters addressed the agencies’ legal authority to assert jurisdiction over waters that do not fall within one of the more specific categories. Some commenters asserted that following the Supreme Court’s decisions in *SWANCC* and *Rapanos*, the agencies lack authority to assert jurisdiction over such waters. Other commenters stated that the proposed rule’s approach to such waters is legally defensible. Several commenters further stated that the proposed rule does not go far enough in protecting waters that do not fall within one of the more specific categories and asserted that broader protection would be consistent with *Rapanos*, *SWANCC*, and *Maui*.

The agencies disagree that the agencies lack authority to assert jurisdiction over waters that do not fall within one of the more specific categories. The agencies’ regulations have long had provisions for case-specific determinations of jurisdiction over waters that did not fall within the other jurisdictional categories. See section IV.A.2.b of this preamble. Such waters under this rule can be assessed under paragraph (a)(5), and they are only jurisdictional if they meet the relatively permanent standard or significant nexus standard. The agencies

have thus established limits on the scope of these waters consistent with the law, the science, and agency expertise. See section IV.A of this preamble. In addition, the agencies have carefully considered the limitations on their authority under the Clean Water Act, especially concerning paragraph (a)(5) waters. The agencies have made a number of changes to the 1986 regulations that collectively ensure the definition of “waters of the United States” remains well within statutory and constitutional limits. Those changes include replacing the broad Commerce Clause basis for jurisdiction over paragraph (a)(5) waters with the narrower relatively permanent and significant nexus standards, eliminating jurisdiction over tributaries and adjacent wetlands based on their connection to paragraph (a)(5) waters, and eliminating jurisdiction by rule over impoundments of paragraph (a)(5) waters. See sections IV.A.3.a.i, IV.C.3, IV.C.4, and IV.C.5 of this preamble. In addition, as discussed further in the implementation section below, the agencies are intending to continue a thoughtful, careful approach to implementation and coordination for paragraph (a)(5) waters.

The agencies also received numerous comments on the standard to be used for determining jurisdiction over waters that do not fall within one of the more specific categories. Some commenters supported the proposed rule’s requirement that such waters meet either the relatively permanent standard or the significant nexus standard. However, other commenters did not support this approach. One commenter recommended that the agencies not apply the relatively permanent standard to waters that do not fall within one of the more specific categories because it would be duplicative. Specifically, the commenter asserted that waters that meet the relatively permanent standard as described in the proposed rule would always meet the jurisdictional criteria for another rule category. A few commenters disagreed with applying the significant nexus standard to waters that do not fall within one of the more specific categories, asserting that it goes beyond the scope of jurisdiction contemplated by Justice Kennedy in *Rapanos*. Many other commenters opposed the proposed rule’s removal of the interstate and foreign commerce jurisdictional basis for protecting waters that do not fall within one of the more specific categories. Commenters expressed that this basis would protect many important waterways which provide valuable public health,

agricultural, recreational, drinking water, ecological, and economic services important to local, regional, and national interests.

Under the 1986 regulations, “other waters” (such as intrastate rivers, lakes, and wetlands that were not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation, or destruction of the water could affect interstate or foreign commerce. This rule amends the 1986 regulations to delete all the provisions referring to authority over activities that “could affect interstate or foreign commerce” and replaces them with the relatively permanent and significant nexus standards. Thus, this rule would provide for case-specific analysis of waters not addressed by any other provision of the definition to determine whether they are “waters of the United States” under the relatively permanent or significant nexus standards.

The text of the 1986 regulations reflected the agencies’ interpretation at the time, based primarily on the legislative history of the Clean Water Act, that the jurisdiction of the Act extended to the maximum extent permissible under the Commerce Clause of the Constitution. While *SWANCC* did not invalidate the 1986 regulations’ “other waters” provision or any other parts of the 1986 regulations’ definition of “waters of the United States,” the Court cautioned that that it “assum[es] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” 531 U.S. at 172–73. Therefore, the agencies conclude that asserting jurisdiction over non-navigable, intrastate waters based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce pushes the limit of the Clean Water Act where those waters do not significantly affect paragraph (a)(1) waters. This rule thus replaces the interstate commerce test with the relatively permanent and significant nexus standards. As discussed in section IV.A of this preamble, the agencies have concluded that the significant nexus standard is consistent with the statutory text and legislative history, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act. The relatively permanent standard is included in the rule because it provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually

always significantly affect paragraph (a)(1) waters. Thus, this rule gives effect to the Clean Water Act’s broad terms and environmentally protective aim as well as its limitations.

Accordingly, waters that do not fall within one of the more specific categories identified in paragraphs (a)(1) through (4) of this rule may still be jurisdictional. This is consistent with the text of the statute, relevant Supreme Court case law, and the science. See section IV.A of this preamble and Technical Support Document section III.D. The *Rapanos* plurality concluded, “relatively permanent, standing or continuously flowing bodies of water,” 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742, and waters with a “continuous surface connection” to such water bodies, *id.* (Scalia, J., plurality opinion), are “waters of the United States” under the relatively permanent standard. Without paragraph (a)(5), a relatively permanent lake that is not a tributary and is not a wetland, but which nonetheless has a continuous surface connection to a traditional navigable water, could not be evaluated for jurisdiction. Justice Kennedy concluded that *SWANCC* held that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759 (citing *SWANCC*, 531 U.S. at 167, 172). Many lakes and ponds that are not part of the tributary system and that do not qualify as a paragraph (a)(1) water can only be assessed under paragraph (a)(5) of this rule. There is no basis in the statute or the science for excluding a lake or pond from the definition of “waters of the United States” that is situated on the landscape in a similar manner as an adjacent wetland, solely because it is a lake and not a wetland.

Multiple commenters stated that the proposed rule’s inclusion of waters that do not fall within one of the more specific categories would impermissibly assert jurisdiction over a wide range of features that are far from traditional navigable waters and that have only minor volumes of flow. A few commenters suggested that although the proposed rule recognizes the importance of the strength of connection, particularly the distance of such waters to navigable waters, it suggests that the agencies may rely too much on scientific principles when making jurisdictional determinations in a manner that improperly expands the scope of the agencies’ authority. Another commenter asserted that the agencies should not consider water functions that indicate isolation

between water features as a basis for finding a significant nexus for waters that do not fall within one of the more specific categories.

The agencies disagree that this rule’s category for waters that do not fall within one of the more specific categories, paragraph (a)(5), improperly expands the scope of their authority. The agencies have not only narrowed this category from the 1986 regulations by replacing the broad Commerce Clause provisions with the relatively permanent standard and the significant nexus standard, but they have also made additional changes from the 1986 regulations in order to ensure that they are not pushing the outer limits of the authority granted to them by Congress under the Clean Water Act. See section IV.A.3.a.i of this preamble. Impoundments of waters jurisdictional under paragraph (a)(5) no longer remain jurisdictional by rule. Tributaries to waters jurisdictional under paragraph (a)(5) are not tributaries under paragraph (a)(3) of this rule and must themselves be assessed under paragraph (a)(5). Wetlands adjacent to waters jurisdictional under paragraph (a)(5) are not adjacent wetlands under paragraph (a)(4) of this rule and must themselves be assessed under paragraph (a)(5). In addition, as discussed further below, the agencies have established enhanced coordination procedures for waters assessed under the significant nexus standard under paragraph (a)(5) in order to ensure that such jurisdictional determinations are consistent with this rule. The agencies have also carefully defined “significantly affect,” and have drawn upon the scientific literature to identify the factors and functions that will be used to make significant nexus determinations. See section IV.C.9 of this preamble. In addition, the agencies will be appropriately relying on both scientific principles and requirements of the relatively permanent standard or the significant nexus standard when assessing jurisdiction under this provision of the rule. As described in section IV.A.2.c.iii of this preamble, paragraph (a)(5) waters can provide functions that restore and maintain the chemical, physical, and biological integrity of paragraph (a)(1) waters. Therefore, the agencies have determined that including the category for paragraph (a)(5) waters in this rule best advances the objective of the Clean Water Act. The agencies disagree with the commenter that asserted that the agencies should not consider water functions that indicate isolation between water features as a basis for finding a significant nexus. That

position is contrary to Justice Kennedy's opinion on the role the absence of a hydrologic connection should play in a significant nexus analysis. See *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring in the judgment) ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."). That argument is also inconsistent with the science regarding the functions that waters that do not fall within one of the more specific categories provide to paragraph (a)(1) waters. See Technical Support Document section III.D.

Many commenters stated that certain types of wetlands should be categorically protected in the rule category for waters that do not fall within one of the more specific categories, such as Carolina and Delmarva bays, pocosins, prairie potholes, vernal pools, and other non-floodplain wetlands, because they provide functions that protect the chemical, physical, or biological integrity of paragraph (a)(1) waters. These commenters also stated that these waters provide valuable public health, agricultural, recreational, drinking water, ecological, and economic services important to local, regional, and national interests. The agencies acknowledge commenters who discussed the functions that these waters can provide. Agencies may choose to proceed via rulemaking or adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). With respect to the significant nexus standard in particular, Justice Kennedy stated that the agencies could proceed to determine waters jurisdictional through regulations or adjudication. See 547 U.S. at 780–81. The agencies have concluded that adjudication of which waters assessed under paragraph (a)(5) are within Clean Water Act protections through case-specific application of the significant nexus standard or the relatively permanent standard under this rule, is appropriate. Therefore, the agencies are not categorically including or excluding waters that do not fall within one of the more specific categories as jurisdictional under this rule. See also section III.D of the Technical Support Document for more information on the agencies' rationale for evaluating waters under paragraph (a)(5). Waters assessed under paragraph (a)(5) will be evaluated using the

relatively permanent standard or significant nexus standard to determine their jurisdictional status.

Some commenters expressed that the category for waters that do not fall within one of the more specific categories is too ambiguous or too inclusive of waters that they believed should not be protected. The agencies disagree with commenters who asserted that the category for waters that do not fall within one of the more specific categories should be removed, or that the category is too confusing or overly broad. Waters assessed under paragraph (a)(5) in this rule are only jurisdictional if they meet the relatively permanent standard or the significant nexus standard. The agencies have also amended this provision of the rule to more clearly identify the types of waters addressed by this provision of the rule. Additionally, a category for waters that do not fall within one of the more specific categories is a longstanding and generally familiar category of waters included in the definition of "waters of the United States" under the 1986 regulations. The agencies have extensive experience implementing the relatively permanent standard and significant nexus standard for wetlands, streams, lakes, and ponds, which are the types of resources that are assessed under paragraph (a)(5) of this rule, and so will be able to use their experience and implementation resources to ensure consistency of jurisdictional determinations.

The 1986 regulations contained a non-exclusive list of water types that could be jurisdictional if they were not jurisdictional under the other provisions of the definition: "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds." The agencies sought comment in the proposed rule on whether it would be helpful to the public to delete the list of water types or to otherwise provide more clarity to the list of water types in the regulation. Commenters provided a variety of perspectives on the specific list of waters in the 1986 regulations. Several commenters recommended that the agencies clarify that the example list of waters is illustrative and not exhaustive. Commenters requested additions to the example list of waters, such as Delmarva bays, vernal pools, and seepage lakes. Other commenters requested that certain features be excluded from the example list of waters, such as prairie potholes. Some commenters expressed confusion as to why the example list from the 1986 regulations included

"intermittent streams" but not "ephemeral streams."

In this rule, the agencies have made changes to the 1986 regulations to clarify the list of water types that can be jurisdictional under this provision, and to clarify that waters assessed under paragraph (a)(5) include waters that do not meet the requirements under paragraphs (a)(1) through (4) of this rule. The list of water types in the 1986 regulations led to confusion as it was sometimes incorrectly read as an exclusive list. There has also been confusion about some of the listed water types. For example, the list includes intermittent streams and was meant to allow for jurisdictional evaluation of intermittent streams that do not fall within the other categories (such as intermittent streams that are not tributaries to the requisite water types but which under the 1986 regulations could affect interstate commerce and under the proposed rule could meet the significant nexus standard). The list was not meant to imply that intermittent streams were not jurisdictional under the tributary provision of the 1986 regulations. In addition, a flowing aquatic feature that is human-made or human-altered but which is neither a jurisdictional tributary nor an excluded ditch would be assessed as a stream under paragraph (a)(5).

Paragraph (a)(5) of this rule identifies as "waters of the United States" "intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4)" that meet either the relatively permanent standard or significant nexus standard. Removing the list of water types from the 1986 regulations is not meant to imply that any of the water types listed in the 1986 regulations are *not* potentially subject to jurisdiction; rather, the revised list of water types is intended to more clearly inform the public of the types of waters that can be assessed for jurisdiction under paragraph (a)(5), and in this rule the list is intended to be exclusive. The revised list is also streamlined for clarity. The agencies have concluded that the more specific water types previously listed in paragraph (a)(3) of the 1986 regulations fall within one of the four water types in the rule. For example, prairie potholes were in the list of water types in the 1986 regulations and, depending upon the characteristics of a particular prairie pothole, they may fall within the wetlands water type on the list (where they meet the regulatory definition of wetlands) or they may be lakes or ponds. Other examples include sloughs, as they typically fall within the wetlands water type or the streams

water type, and playa lakes, which may fall within the lakes or ponds water type depending upon their size. Finally, the list of water types included in paragraph (a)(5) does not reflect a conclusion that these waters are categorically jurisdictional; rather, these waters are only jurisdictional if the subject waters meet either the relatively permanent standard or the significant nexus standard.

ii. Comments on Interpretation and Implementation of Paragraph (a)(5) Waters

The agencies received many comments supporting, opposing, or recommending changes related to the implementation of the category for waters that do not fall within one of the more specific categories. Some commenters asserted that the proposed rule lacked sufficient implementation guidance, and one commenter specifically stated that the proposed rule lacked sufficient guidance as to how the agencies will apply the significant nexus standard to waters that do not fall within one of the more specific categories. A few commenters recommended an approach for including waters that do not fall within one of the more specific categories as jurisdictional in a manner similar to adjacent wetlands, with some arguing that this approach would streamline the permitting process, and others stating general support for this approach. A number of commenters recommended that the agencies adopt regionalized implementation approaches for certain types of waters that do not fall within one of the more specific categories, such as prairie potholes, Carolina Bays, and Indiana dune and swale wetland complexes. The agencies acknowledge commenters who requested additional implementation guidance in the final rule, and additional guidance has been added to this rule including for the significant nexus standard. See section IV.C.6.c of this preamble for additional discussion on implementation of the significant nexus standard for waters assessed under paragraph (a)(5). While the agencies' intended implementation approach for paragraph (a)(5) waters has some differences from the implementation approach for adjacent wetlands, as described further below, the agencies have determined that the approach is reasonable and implementable. This rule does not preclude the agencies from taking into account regional considerations as part of the significant nexus analysis, but the agencies are not explicitly including regional criteria in the rule to ensure

they have the flexibility to address local conditions.

Under the pre-2015 regulatory regime, the agencies established coordination procedures for paragraph (a)(3) "other waters." See 68 FR 1991, 1995 (January 15, 2003) ("SWANCC Guidance") ("[F]ield staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions."). Several commenters stated that the agencies should retain the requirement for field staff to request headquarters review of approved jurisdictional determinations for waters that do not fall within one of the more specific categories in this rule. These commenters stated that review of the scientific justification for a conclusion under the significant nexus standard must be conducted by senior officials for accuracy and thoroughness, and agency headquarters should provide such oversight. In contrast, several commenters stated that the agencies should abandon the requirement for field staff to request headquarters review of approved jurisdictional determinations for waters that do not fall within one of the more specific categories. These commenters stated that headquarters review should not be necessary because agency field staff have considerable experience with and expertise regarding the significant nexus standard. The commenters also stated that requiring headquarters review would equate to continued exclusion of waters that do not fall within one of the more specific categories but should be provided Clean Water Act protection. Finally, commenters asserted that reducing the number of approved jurisdictional determinations needing review by agency headquarters would streamline the permitting process.

As discussed further below, the agencies have established coordination procedures under which the agencies' headquarters will review all draft approved jurisdictional determinations for waters assessed under paragraph (a)(5) based on the significant nexus standard. This approach represents enhanced oversight by headquarters staff over approved jurisdictional determinations for waters assessed under paragraph (a)(5) to ensure implementation consistency and to gather more robust data about the number and types of waters under paragraph (a)(5) evaluated by the agencies, any regional or geographic issues, and the information and implementation resources needed to make approved jurisdictional determinations for this category.

c. Implementation

This rule provides for case-specific analysis of waters not addressed by any other provision of the definition to determine whether they are "waters of the United States" under the relatively permanent or significant nexus standards. Waters assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent. Waters assessed under paragraph (a)(5) meet the significant nexus standard if they "significantly affect" the chemical, physical, or biological integrity of a paragraph (a)(1) water.

The agencies will generally assess jurisdiction over aquatic resources based on the requirements in paragraphs (a)(1) through (4) under this rule before assessing jurisdiction over aquatic resources based on paragraph (a)(5). Examples of aquatic resources that could be assessed for jurisdiction under paragraph (a)(5) include a stream that does not meet the agencies' interpretation of a tributary because it does not contribute flow directly or indirectly to a paragraph (a)(1) water or a paragraph (a)(2) impoundment; a wetland that does not meet this rule's definition of "adjacent"; or a lake or pond that does not meet the agencies' interpretation of a tributary because it is not connected to the tributary network. A ditch that does not meet the agencies' interpretation of tributary could also be assessed for jurisdiction under paragraph (a)(5), so long as the ditch does not meet the terms of the paragraph (b)(3) exclusion. The preamble to the proposed rule stated that consistent with previous practice, the agencies would not assess whether a ditch was jurisdictional under the paragraph (a)(3) "other waters" provision. 86 FR 69433 (December 7, 2021). However, the agencies have reconsidered this statement and determined that under previous practice, the agencies did in fact assess whether ditches were jurisdictional under the paragraph (a)(3) "other waters" provision, and the agencies will continue to assess ditches that are not excluded under paragraph (b)(3) under the relevant jurisdictional categories in this final rule. The following sections of the preamble cover how to identify waters assessed under paragraph (a)(5) on the landscape, implementation of the relatively permanent standard for waters assessed under paragraph (a)(5), and implementation of the significant nexus

standard for waters assessed under paragraph (a)(5).

i. Identifying Waters Assessed Under Paragraph (a)(5) on the Landscape

Under this rule, waters that will be assessed for jurisdiction under paragraph (a)(5) are: intrastate lakes and ponds, streams, and wetlands that do not meet the requirements to be considered under paragraphs (a)(1) through (4) of this rule. The agencies will identify waters assessed under paragraph (a)(5) on the landscape using the implementation tools that have previously been described for these aquatic resources (see sections IV.C.4 and IV.C.5 of this preamble). The agencies can draw upon a variety of remote- and field-based methods, including a variety of mapping resources for identifying aquatic resources.

ii. Implementing the Relatively Permanent Standard for Waters Assessed Under Paragraph (a)(5)

Waters assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or a tributary that is relatively permanent. The agencies have decided to implement this approach consistent with the *Rapanos* plurality opinion, and it reflects and accommodates regional differences in hydrology and water management and can be implemented using available, easily accessible tools. See sections IV.C.4.c and IV.C.5.c of this preamble.

The agencies intend to identify relatively permanent waters under paragraph (a)(5) using a similar approach to the one described for relatively permanent tributaries in section IV.C.4.c.ii of this preamble. In summary, relatively permanent waters under paragraph (a)(5) include surface waters that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters under paragraph (a)(5) include certain rivers and streams that have “flowing water.” The phrase “standing water” is intended to describe waters that are lentic or “still” systems, such as lakes, ponds, and impoundments, which are characterized by standing water and do not have a flowing outlet to the tributary system. In the context of waters assessed under paragraph (a)(5), the phrase “standing water” can also describe certain wetlands that are characterized by standing water (e.g., many swamps). Relatively permanent waters under

paragraph (a)(5) do not include features with flowing or standing water for only a short duration in direct response to precipitation. These features may include, for example, certain wetlands that are not characterized by standing water (e.g., many pocosin wetlands). See section IV.C.4.c.ii of this preamble for a description of implementation tools that can be used to identify relatively permanent waters under paragraph (a)(5).

The agencies intend to identify a continuous surface connection between waters assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for adjacent wetlands in section IV.C.5.c of this preamble (although waters assessed under paragraph (a)(5) are not subject to the adjacency requirement for jurisdictional adjacent wetlands). In summary, there must be a continuous surface connection on the landscape for waters assessed under paragraph (a)(5) to be jurisdictional under the relatively permanent standard. However, a continuous surface connection does not require a constant hydrologic connection. Waters assessed under paragraph (a)(5) can meet the continuous surface connection requirement if they are connected to a paragraph (a)(1) water or a tributary that is relatively permanent by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. Similarly, a natural berm, bank, dune, or similar natural landform between a water assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. See section IV.C.5.c of this preamble for a description of implementation tools that can be used to assess a continuous surface connection for a water assessed under paragraph (a)(5).

Under this rule, certain aquatic resources that do not meet the jurisdictional requirements for tributaries or adjacent wetlands could be jurisdictional as paragraph (a)(5) waters under the relatively permanent standard. For example, lakes and ponds that are not connected to a tributary system but are relatively permanent waters and have a continuous surface connection to a paragraph (a)(1) water or a tributary that is relatively permanent, could be jurisdictional as paragraph (a)(5) waters. To illustrate, a relatively permanent lake that is located near a tributary that meets the relatively permanent standard, but is separated by a natural berm, to the extent the berm

provides evidence of a continuous surface connection, is jurisdictional as a paragraph (a)(5) water under the relatively permanent standard. See section IV.C.4.c.ii of this preamble. Similarly, a relatively permanent oxbow pond located near a traditional navigable water and connected to that traditional navigable water via a swale that provides a continuous surface connection between the pond and the traditional navigable water is jurisdictional as a paragraph (a)(5) water under the relatively permanent standard.

iii. Implementing the Significant Nexus Standard for Waters Assessed Under Paragraph (a)(5)

Waters assessed under paragraph (a)(5) that do not meet the relatively permanent standard may be found jurisdictional under the significant nexus standard. Waters assessed under paragraph (a)(5) meet the significant nexus standard if they significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or an interstate water. Examples of waters assessed under paragraph (a)(5) include familiar types of waters like lakes and ponds, streams, and wetlands that have been the subject of significant nexus analyses under the tributaries and adjacent wetlands provisions of the pre-2015 regulations since the *Rapanos* Guidance was issued. See section IV.C.9 of this preamble for additional discussion on the definition of “significantly affect” in this rule, including the factors that will be considered and the functions that will be assessed as part of a significant nexus analysis. Consistent with longstanding practice, the agencies will assess these waters based on best professional judgment informed by the best available information.

In implementing the significant nexus standard, the agencies generally intend to analyze waters under paragraph (a)(5) individually to determine if they significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water. This approach reflects the agencies’ consideration of public comments, as well as implementation considerations for waters assessed under paragraph (a)(5). While the agencies’ regulations have long authorized the assertion of jurisdiction on a case-specific basis over waters that do not fall within the other jurisdictional provisions, since *SWANCC* and the issuance of the *SWANCC* Guidance with its requirement of headquarters approval over determinations under that

provision, the agencies have not in practice asserted jurisdiction over paragraph (a)(3) “other waters” under the pre-2015 regulatory regime.¹¹¹

Some commenters specifically addressed implementation of the significant nexus standard for waters that do not fall within one of the more specific categories, with commenters supporting and opposing aggregation of such waters as part of a significant nexus analysis. Commenters opposing aggregation requested that the agencies assess water features individually to determine their significance to chemical, physical, or biological integrity of downstream paragraph (a)(1) waters. Commenters supporting aggregation of waters that do not fall within one of the more specific categories stated that such an approach was consistent with *Rapanos* and the science. The agencies addressed such waters individually on a case-by-case basis under pre-2015 practice and have concluded at this time that individual assessments are practical and implementable for significant nexus determinations for waters assessed under paragraph (a)(5).

iv. Joint Agency Coordination on Waters Assessed Under Paragraph (a)(5)

As is typical after a rule is promulgated, the agencies have entered into an agreement via a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies’ implementation of this rule. As part of these coordination procedures, EPA and Corps field staff will coordinate on all draft approved jurisdictional determinations¹¹² based on the significant nexus standard, and the agencies will follow a process for elevating a subset of these determinations to headquarters for review as necessary. That coordination will be enhanced for waters assessed under paragraph (a)(5) to ensure this provision is carefully implemented and to gather more robust data about the number and types of waters assessed under paragraph (a)(5) by the agencies,

¹¹¹ Note that when the 2015 Clean Water Rule was in effect, the agencies did assert jurisdiction over waters that would have been known as paragraph (a)(3) “other waters” by rule if they were adjacent waters as defined by that rule and on a case-specific basis if they fell within the provisions requiring case-specific significant nexus determinations. The 2020 NWPR also asserted jurisdiction over certain lakes and ponds that would have been jurisdictional as paragraph (a)(3) “other waters.”

¹¹² An approved jurisdictional determination is “a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel.” 33 CFR 331.2.

any regional or geographic issues, and the information and implementation resources needed to complete approved jurisdictional determinations for this category. As part of these coordination procedures, headquarters at the agencies will review all draft approved jurisdictional determinations for waters assessed under paragraph (a)(5) based on the significant nexus standard. The agencies do not intend for this coordination to result in the exclusion of paragraph (a)(5) waters that meet the significant nexus standard and are thus jurisdictional under this rule, but rather to serve as an additional check as to whether one of the jurisdictional standards is met. In addition, the agencies have established timelines for the review of certain draft approved jurisdictional determinations to ensure that there will not be unnecessary delay. Moreover, the coordination will enable the agencies to quickly address any potential inconsistencies, and that will enhance the efficiency of the approved jurisdictional determination process under this rule. Finally, after the memorandum is in effect for nine months, the agencies will reevaluate this requirement and assess the implementation and coordination approach, including assessing the scope and need for the coordination process.

7. Exclusions

The agencies are including in the final rule regulatory text several exclusions from the definition of “waters of the United States,” including longstanding exclusions for prior converted cropland and waste treatment systems, and exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime. The regulatory text for this rule excludes the following features:

- waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- prior converted cropland;
- ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- artificially irrigated areas that would revert to dry land if the irrigation ceased;
- artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking

dry land to retain water for primarily aesthetic reasons;

- waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
- swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

These features were excluded by regulation or general practice under the pre-2015 regulatory regime and each of the subsequent rules defining “waters of the United States.” These exclusions from the definition provide important clarity on which features are and are not jurisdictional. As described in more detail below, to provide further clarity and certainty to the public, the agencies are codifying exclusions in the regulatory text for the features described in the proposed rule preamble as generally non-jurisdictional. Note that the word “features” when used in section IV.C.7 of this preamble refers broadly to landscape elements that may be evaluated in a determination of jurisdiction, e.g., streams, ponds, swales, wetlands, and depressions.

The agencies are listing these exclusions in the regulatory text in a new paragraph (b) which consolidates the exclusions together in a single regulatory section. With this change, the regulatory text now identifies jurisdictional waters in paragraph (a), exclusions in paragraph (b), and definitions in paragraph (c). This change is consistent with the 2015 Clean Water Rule and 2020 NWPR, which both organized the regulatory text into these three paragraphs. This organizational structure clearly delineates waters that are jurisdictional from those waters and features that are excluded and provides a familiar and clear framework for the regulations. This reorganization does not affect the substance of the definition of “waters of the United States.”

As explained in this rule’s regulatory text, where a feature satisfies the terms of an exclusion, it is excluded from jurisdiction even where the feature would otherwise be jurisdictional under any of paragraphs (a)(2) through (5) of this rule. In such an instance, the feature is not considered “waters of the United States.” However, where a feature satisfies the terms of an exclusion but would otherwise be jurisdictional under paragraph (a)(1) of

this rule, the feature is not excluded.¹¹³ For example, where applicable, the exclusion in this rule for ditches excludes a ditch that is excavated wholly in dry land, drains only dry land, and does not carry a relatively permanent flow of water. However, all tidally-influenced ditches are jurisdictional under paragraph (a)(1)(i) of the rule because they are “subject to the ebb and flow of the tide,” and therefore the exclusion is not applicable to those ditches. In addition, if a ditch was excavated in dry land very close to a territorial sea and, over time due to erosion, sea level rise, or other factors, the ditch develops a hydrologic connection to the territorial sea and becomes tidally-influenced, the ditch would then be considered jurisdictional under paragraph (a)(1) of this rule and would no longer be excluded. This is consistent with the agencies’ longstanding position that a feature is not excluded where it would otherwise be jurisdictional as a traditional navigable water, territorial sea, or interstate water. *See* 51 FR 41217 (November 13, 1986) (explaining that “[n]on-tidal drainage and irrigation ditches excavated on dry land” are generally not considered “waters of the United States” under the 1986 regulations but not including similar language for tidally-influenced ditches). The Clean Water Act fundamentally protects these three categories of waters: traditional navigable waters are clearly encompassed within the defined term “navigable waters”; the territorial seas are explicitly mentioned in the statutory definition of “navigable waters”; and, as discussed further in section IV.C.2.b.iii of this preamble, interstate waters are, by definition, waters of the “several States” and are unambiguously “waters of the United States.” While the agencies have authority to draw lines excluding some aquatic features from the definition of “waters of the United States,” the Clean Water Act provides no such authority to the agencies to exclude waters in these three unambiguous types of “waters of the United States” under the statute. Even if jurisdiction over one or all of these categories of waters were ambiguous, the agencies have concluded that since these are the fundamental waters that Congress intended to protect under the Clean Water Act, and that have had longstanding and unequivocal protection, with the exception of the 2020 NWPR, it is reasonable to establish unequivocal jurisdiction over these

waters. Further, the agencies have concluded that there are not policy, practical, or technical bases to apply the exclusions to these paragraph (a)(1) waters given their crucial role in the statutory regime. The agencies recognize that the 2020 NWPR allowed certain traditional navigable waters and the territorial seas to be excluded from jurisdiction if they satisfied the terms of certain exclusions. The 2020 NWPR did not provide a rationale for this aspect of the final rule. The agencies are restoring historic practice and, consistent with the Clean Water Act and as discussed above, are ensuring the protection of all paragraph (a)(1) waters in this rule.

The exclusions reflect the agencies’ longstanding practice and technical judgment that certain waters and features are not subject to the Clean Water Act. The exclusions are also guided by Supreme Court precedent. The plurality opinion in *Rapanos* noted that there were certain features that were not primarily the focus of the Clean Water Act. *See* 547 U.S. at 734. In this section of the rule, the agencies are promoting regulatory certainty by expressly stating that certain waters and features are not subject to jurisdiction under the Clean Water Act. Based on decades of implementation experience, the agencies have determined that waters that satisfy the terms of an exclusion are not “waters of the United States.” Clearly identifying these exclusions in this rule is an important aspect of the agencies’ policy goal of providing clarity and certainty. The categorical exclusions in this rule will simplify the process of determining jurisdiction, and they reflect the agencies’ determinations of the lines of jurisdiction based on case law, policy determinations, and the agencies’ experience and expertise.

In addition, even when the features described below are not “waters of the United States” because they are excluded (e.g., certain ditches, swales, gullies, erosional features), these and other non-jurisdictional features may be relevant to the analysis of whether another water meets the final rule’s definition of “waters of the United States.” For example, consistent with longstanding practice, excluded surface features may still contribute to a hydrologic connection relevant for asserting jurisdiction (e.g., between an adjacent wetland and a jurisdictional water). *See* section IV.C.5 of this preamble; *Rapanos* Guidance at 12. Discharges to these non-jurisdictional features may also be subject to certain Clean Water Act regulations. For example, a discharge from a point source to a non-jurisdictional ditch that

connects to a jurisdictional water may require a Clean Water Act section 402 permit. *See Rapanos* Guidance at 12. In addition, non-jurisdictional ditches may themselves function as point sources (i.e., “discernible, confined, and discrete conveyances”), such that discharges of pollutants from these features could require a Clean Water Act permit. *See also Rapanos*, 547 U.S. at 743–44. While not the focus of this section, subsurface features that are non-jurisdictional may also be relevant to assessing jurisdiction of water features. *See* sections IV.C.4 and IV.C.5 of this preamble.

Several commenters requested that the agencies exclude features from the definition of “waters of the United States” beyond those longstanding exclusions and historically non-jurisdictional features identified in the proposed rule. For example, several commenters requested that the agencies exclude stormwater control features, wastewater and drinking water treatment systems, and water recycling structures from the definition of “waters of the United States.” The agencies are not excluding these or other additional features in this rule. The proposed additional exclusions would not achieve the agencies’ goal of maintaining consistency with the pre-2015 regulatory regime while continuing to advance the objective of the Clean Water Act. This approach is consistent with the agencies’ intent in this rule to interpret “waters of the United States” to mean the waters defined by the longstanding 1986 regulations, with amendments to reflect the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States,” informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies’ experience and technical expertise, in addition to consideration of extensive public comment on the proposed rule. However, even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under this rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may already be covered by one or more of the exclusions the agencies are including in this rule. For example, certain features that convey stormwater may be excluded as ditches under this

¹¹³ *See also* discussion of the waste treatment system exclusion in section IV.C.7.b of this preamble, *infra*.

rule. Similarly, some of the features that commenters mentioned, like sheetflow, are not waters at all and would not be considered “waters of the United States.” Even though certain features may not be explicitly excluded, the agencies will not assert Clean Water Act jurisdiction over features that do not satisfy the definition of “waters of the United States” articulated in paragraph (a) of this rule.

Several commenters requested that the agencies explicitly exclude groundwater in this rule’s regulatory text while other commenters requested that the agencies not exclude groundwater from jurisdiction under this rule. In this rule, the agencies are not adding an exclusion for groundwater to the regulatory text because groundwater is not surface water and therefore does not fall within the possible scope of “navigable waters.” There is thus no need for a regulatory exclusion. This position is longstanding and consistent with Supreme Court case law. The agencies have never taken the position that groundwater falls within the scope of “navigable waters” under the Clean Water Act. *See, e.g.*, 80 FR 37099–37100 (June 29, 2015) (explaining that the agencies have never interpreted “waters of the United States” to include groundwater); 85 FR 22278 (April 21, 2020) (explaining that the agencies have never interpreted “waters of the United States” to include groundwater). This position was recently confirmed by the U.S. Supreme Court. *Maui*, 140 S. Ct. at 1472 (“The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.”). While groundwater itself is not jurisdictional as “waters of the United States,” discharges of pollutants to groundwater that reach a jurisdictional surface water require a NPDES permit where the discharge through groundwater is the “functional equivalent” of a direct discharge from the point source into navigable waters. *Maui*, 140 S. Ct. at 1468. Groundwater that is not jurisdictional includes both shallow and deep groundwater, even where such shallow subsurface water serves as a hydrologic connection that is assessed in determining if another water is jurisdictional. Groundwater drained through subsurface drainage systems also is not jurisdictional. When groundwater emerges on the surface, for

example when it becomes baseflow in streams or joins spring fed ponds, it is no longer considered to be groundwater under this rule.

While groundwater is not jurisdictional under the statute or this rule, many States include groundwater in their definitions of “waters of the State” and therefore may subject groundwater to State regulation. Indeed, the Clean Water Act incentivizes State protection of groundwater. For example, grants to States under Clean Water Act section 319 may support management programs that include groundwater quality protection activities as part of a comprehensive nonpoint source pollution control program. 33 U.S.C. 1329(h)(5)(D). In addition, groundwater quality is regulated and protected through several other legal mechanisms, including the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and various Tribal, State, and local laws.

Several commenters suggested that wetlands that develop entirely within the confines of a non-jurisdictional feature should be considered part of the excluded feature and not be considered “waters of the United States.” The agencies agree with these commenters and find that wetlands that develop entirely within the confines of an excluded feature are not jurisdictional. This interpretation is consistent with the agencies’ longstanding approach to this issue and with the agencies’ rationale for excluding these features. This approach also provides environmental benefits because it removes the incentive for parties to clear vegetation from an excluded feature to prevent that vegetation from developing into a wetland and becoming jurisdictional, thus allowing vegetation within the confines of an excluded feature to provide water quality benefits for the duration of its existence.

However, a wetland may be located both within and outside the boundaries of a non-jurisdictional feature or entirely outside the boundaries of non-jurisdictional feature. In these circumstances, the wetland will be evaluated under this rule’s provisions for “adjacent wetlands” and paragraph (a)(5) “intrastate lakes and ponds, streams, or wetlands” and not considered as part of the non-jurisdictional feature. It is important to note, however, that although some low gradient depressional areas are colloquially referred to as “swales,” these areas do not meet the regulatory exclusion’s criteria for swales that are discrete topographic features “characterized by low volume,

infrequent, or short duration flow.” As such, the agencies would not consider wetlands forming within low gradient depressional areas to be “within the confines of a non-jurisdictional feature,” and such wetlands would be assessed to determine if they meet any of the provisions of this rule.

While the agencies evaluate whether any exclusions apply when making approved jurisdictional determinations for purposes of efficiency, the person asserting that the water at issue is excluded under the Clean Water Act or that the person’s activities at issue in the case are exempt under the Act, may have information that is material to proving that the exclusion or exemption applies. There are circumstances where, absent this information from the requestor, the agency will be unable to determine that an exclusion applies. While the requestor is not required to provide information regarding applicability of the exclusions to the agencies during the jurisdictional determination process, it is to their benefit to do so because the person asserting that a water is excluded or that a person’s activities are exempt under the Clean Water Act bears the burden of proving that the exclusion or exemption applies. *See, e.g., United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986) (“Akers must establish that his activities are exempt.”). Where the agencies, based on the information that they have in the record, are unable to conclude that an exclusion applies, the agencies will assess the water to see if it meets the jurisdictional criteria of this rule under paragraphs (a)(1) through (5).

a. Prior Converted Cropland

i. This Rule

This rule repromulgates the regulatory exclusion for prior converted cropland first codified in 1993, which provided that prior converted cropland is “not ‘waters of the United States.’” This rule restores longstanding and familiar practice under the pre-2015 regulatory regime. The rule maintains consistency and compatibility between the agencies’ implementation of the Clean Water Act and the U.S. Department of Agriculture’s (USDA) implementation of the Food Security Act by providing that prior converted cropland under the Clean Water Act encompasses areas designated by USDA as prior converted cropland. Areas USDA has not so designated are not eligible for this Clean Water Act exclusion. The Clean Water Act exclusion for prior converted cropland only covers wetlands and does not exclude other types of non-wetland aquatic resources (*e.g.*, tributaries,

ponds, ditches) that are located within the prior converted cropland area.

The exclusion would cease upon a change in use that renders the area no longer available for the production of agricultural commodities. For example, areas used for any agricultural purposes, including agroforestry, as well as areas left idle, generally remain available for the production of agricultural commodities. In response to requests from commenters to increase the clarity of the exclusions through the regulatory text, the agencies are noting in the regulations that this exclusion encompasses areas that USDA has designated as prior converted cropland, and that the exclusion will cease when the area has changed use so that it is no longer available for the production of agricultural commodities, such as when it has been filled for development.

The agencies are also retaining the longstanding provision that “for purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.” This categorical exclusion for prior converted cropland will simplify the process of determining jurisdiction while providing certainty to farmers seeking to conserve and protect land and waters pursuant to Federal law. It reflects the agencies’ determinations of the lines of jurisdiction based on the case law, policy determinations, and the agencies’ experience and expertise.

ii. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

The concept of prior converted cropland originates in the wetland conservation provisions of the Food Security Act of 1985, 16 U.S.C. 3801 *et seq.* These provisions were intended to disincentivize the conversion of wetlands to croplands. Under the Food Security Act wetland conservation provisions, farmers who convert wetlands to make possible the production of an agricultural commodity crop may lose eligibility for certain USDA program benefits, unless an exemption applies. If a farmer had converted wetlands to cropland prior to December 23, 1985, however, then the land is considered prior converted cropland and the farmer does not lose eligibility for benefits if the area is further manipulated.¹¹⁴ USDA defines a prior converted cropland for Food Security Act purposes in its regulations as “converted wetland where the

conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland.” 7 CFR 12.2. USDA defines an agricultural commodity, in turn, as “any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane.” *Id.* at 12.2; *see also* 16 U.S.C. 3801(a)(1).

In 1993, EPA and the Corps codified an exclusion for prior converted cropland from the definition of “waters of the United States” regulated pursuant to the Clean Water Act. The exclusion stated, “[w]aters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.” 58 FR 45008, 45036 (August 25, 1993); 33 CFR 328.3(a)(8) (1994); 40 CFR 230.3(s) (1994). The 1993 preamble stated that EPA and the Corps would interpret the prior converted cropland exclusion consistent with the definition in the National Food Security Act Manual (NFSAM) published by the USDA Soil Conservation Service, now known as USDA’s Natural Resource Conservation Service (NRCS). 58 FR 45031 (August 25, 1993). It cited the NFSAM definition of prior converted cropland as “areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. [Prior converted] cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothole or playa wetlands.” *Id.* The agencies chose not to codify USDA’s definition of prior converted cropland, ensuring that they would retain flexibility to accommodate changes USDA might make. *Id.* at 45033.

The purpose of the exclusion, as EPA and the Corps explained in the 1993 preamble, was to “codify existing policy,” as the agencies had not been implementing the Clean Water Act to regulate prior converted cropland, and to “help achieve consistency among various federal programs affecting wetlands.” *Id.* The 1993 preamble further stated that excluding prior converted cropland from “waters of the United States” was consistent with protecting aquatic resources because “[prior converted cropland] has been significantly modified so that it no

longer exhibits its natural hydrology or vegetation. . . . [Prior converted] cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act.” *Id.* at 45032. The agencies explained that “in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.” *Id.*

The 1993 preamble stated that, consistent with the NFSAM, an area would lose its status as prior converted cropland if the cropland is “abandoned,” meaning that crop production ceases and the area reverts to a wetland state. *Id.* at 45034. Specifically, the 1993 preamble stated that prior converted cropland that now meets wetland criteria will be considered abandoned unless “once in every five years it has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production.” *Id.* at 45034.

Three years later, the Federal Agriculture Improvement and Reform Act of 1996 amended the Food Security Act and clarified that this “abandonment” principle did not apply to prior converted cropland. *See* Public Law 104–127, 110 Stat. 988–89 (1996). Additional amendments clarified that any certification by the Secretary, including those of prior converted cropland, remain valid and in effect as long as it continues to be available for agricultural purposes, a new approach referred to as “change in use.” H.R. Conf. Rep. No. 104–494, at 380 (1996). EPA and the Corps did not address the 1996 amendments in rulemaking. In 2005, the Corps and NRCS issued a joint Memorandum to the Field in an effort to again align the Clean Water Act section 404 program with the Food Security Act by adopting the principle that a wetland can lose prior converted cropland status following a “change in use.” The Memorandum stated, “[a] certified [prior converted] determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes.” It defined “agricultural use” as “open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA

¹¹⁴ A farmer that “commenced conversion” of a wetland prior to December 23, 1985, could also be eligible for a prior converted cropland designation, subject to certain limitations. 7 CFR 12.2, 12.5(b)(2).

programs, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation.” The agencies rescinded the 2005 Memorandum on January 28, 2021, following publication of the 2020 NWPR.

One district court set aside the Corps’ adoption of “change in use” on the grounds that it was a substantive change in Clean Water Act implementation that the agencies had not issued through notice and comment rulemaking. *New Hope Power Co. v. U.S. Army Corps of Eng’rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010). Following *New Hope Power*, the agencies did not implement “change in use” in areas subject to the court’s jurisdiction.

The 2015 Clean Water Rule repromulgated the exclusion for prior converted cropland without any changes from the 1993 regulations, as did the 2019 Repeal Rule. The 2020 NWPR also repromulgated the exclusion but defined prior converted cropland for purposes of the Clean Water Act for the first time since 1993. The 2020 NWPR provided that an area is prior converted cropland if “prior to December 23, 1985, [it] was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible.” 85 FR 22339 (April 21, 2020); 33 CFR 328.3(c)(9). The 2020 NWPR’s term “agricultural product” potentially extended prior converted cropland status far beyond those areas USDA considers prior converted cropland for purposes of the Food Security Act. Specifically, USDA’s regulation defining prior converted cropland refers to conversion that makes possible production of an “agricultural commodity,” a defined term, while the 2020 NWPR defined prior converted cropland to encompass any area used to produce an “agricultural product,” a term not used in the regulations that introduced ambiguity and further distinguished the Clean Water Act’s prior converted cropland exclusion from USDA’s approach. *Compare* 7 CFR 12.2 with 33 CFR 328.3(c)(9). The absence of a definition in the 2020 NWPR for the term “agricultural product” or any explanation as to how it may differ from an “agricultural commodity” was unclear and undermined the original purpose of the exclusion, which was to help achieve consistency among Federal programs affecting wetlands. *See* 58 FR 45031 (August 25, 1993).

Furthermore, the 2020 NWPR’s approach to prior converted cropland substantially reduced the likelihood that prior converted cropland would lose its excluded status because it provided that

an area would remain prior converted cropland for purposes of the Clean Water Act unless the area is abandoned and reverts to wetlands, and defined abandonment to occur when prior converted cropland “is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.” 85 FR 22320 (April 21, 2020). The 2020 NWPR then presented a broad interpretation of “agricultural purposes,” including but not limited to crop production, haying, grazing, idling land for conservation uses (such as habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters such as hurricanes and drought. *Id.* at 22321. Under the 2020 NWPR, prior converted cropland maintained its excluded status if it was used at least once in the five years preceding a jurisdictional determination for any of these agricultural purposes. These wetlands could then have been filled and paved over during that five-year term without triggering any Clean Water Act regulatory protection.

This rule restores the exclusion’s original purpose of maintaining consistency among Federal programs addressing wetlands while furthering the objective of the Clean Water Act. 58 FR 45031–32 (August 25, 1993). Some commenters asserted that prior converted cropland should not be categorically excluded because there is no legal or scientific basis to exclude areas from the protections of the Clean Water Act that maintain some wetland characteristics or could be restored to be wetlands. The agencies disagree. As the agencies explained in 1993, “effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to the environmental protection goals of the Clean Water Act.” *Id.* at 45031. The 1993 preamble emphasized that statutes other than the Clean Water Act have become essential to the Federal Government’s effort to protect wetlands. The wetlands protection effort will be most effective if the agencies administering these other statutes have, to the extent possible, “consistent and compatible approaches to insuring wetlands protection.” *Id.* at 45031–32. This rule’s return to implementing USDA’s approach to prior converted cropland will help enhance the consistency and compatibility of the Federal Government’s multi-pronged wetlands protection efforts, thereby enhancing their effectiveness.

Some commenters asked that the agencies codify a particular definition of prior converted cropland; some recommended codifying USDA’s definition and others advocated codifying the definition in the 2020 NWPR. The agencies instead decided to clarify that the exclusion encompasses prior converted cropland designated by USDA, and no additional areas. This clarification provides certainty and transparency as well as flexibility. The agencies chose not to codify the 2020 NWPR’s definition because that interpretation does not carry out the original purpose of the exclusion, which is to ensure consistency among Federal wetland protection programs while protecting the integrity of the nation’s waters.

iii. Implementation

This rule will implement the prior converted cropland exclusion so that it encompasses all areas designated by USDA, and no additional areas. USDA interprets prior converted cropland to be a “converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland.” 7 CFR 12.2. The 2020 NWPR introduced ambiguity by saying that prior converted cropland applies to certain areas used for “agricultural products,” as opposed to “agricultural commodities.” In addition, the 2020 NWPR was unclear regarding the extent to which the agencies should designate areas not subject to a USDA designation as prior converted cropland under the Clean Water Act. The agencies are restoring clarity and consistency with USDA’s approach by implementing the exclusion as only applying to areas USDA has designated, which include areas where commodity crops were produced prior to December 23, 1985, and that meet the other applicable criteria. This is consistent with the agencies’ longstanding approach to the exclusion. *See* 58 FR 45033 (August 25, 1993) (“[R]ecognizing [NRCS]’s expertise in making these [prior converted] cropland determinations, we will continue to rely generally on determinations made by [NRCS].”). USDA defines agricultural commodity crops to mean “any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane.” 7 CFR 12.2.

The agencies have also decided to enhance consistency between prior converted cropland under the Food

Security Act and under the Clean Water Act, without undermining the goals of the Clean Water Act, by implementing the exclusion as ceasing upon the area's "change in use." The agencies view a "change in use" as an action that would make the prior converted cropland no longer available for the production of an agricultural commodity. In response to requests from commenters to clarify the scope of exclusions in the regulatory text, the regulation specifies that the exclusion will cease upon change in use, and that a change in use means that the prior converted cropland is no longer available for the production of an agricultural commodity.

Consistent with USDA's interpretation, a "change in use" would not occur "[a]s long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops." 7 CFR 12.30(c)(6). The agencies do not interpret changes in use to include discharges associated with agricultural uses identified in the Corps' and NRCS's 2005 Memorandum to the Field, such as planting of agricultural crops, production of food or fiber, haying or grazing, idling consistent with USDA programs, or diversion from crop production for purposes of preventing erosion or other degradation, as these uses keep the land available for future production of agricultural commodities. Similarly, an area may retain its prior converted cropland status if it is used for any of the agricultural purposes identified in the 2020 NWPR preamble, which "includ[e] but [are] not limited to idling land for conservation uses (e.g., habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought," as well as "crop production, haying, and grazing," so long as the area remains available for the production of agricultural commodities. See 85 FR 22321 (April 21, 2020). Consistent with USDA practice, an area has not experienced a change in use if, for example, it transitions into a long-term rotation to agroforestry or perennial crops, such as vineyards or orchards, or if it lies idle and the landowner passively preserves the area for wildlife use. Generally speaking, idling the land retains its availability for the production of an agricultural commodity. Implementing "change in use" consistent with USDA's implementation of the Food Security Act fulfills the exclusion's purpose of promoting

consistency among Federal programs affecting wetlands. See 58 FR 45031 (August 25, 1993). Under the Food Security Act, a wetland certification made by the Secretary is only valid so long as the area is devoted to an agricultural use. 16 U.S.C. 3822(a)(4). Because the wetland conservation provisions of the Food Security Act only apply to the production of agricultural commodities, a prior converted cropland designation becomes moot for USDA purposes once land is removed from agricultural use.

A "change in use" is a proposed or planned modification of prior converted cropland for filling and development, so that the area would no longer be available for commodity crop production after development. For example, if prior converted cropland is left idle for several years and reverts to wetland, and the property is then sold for conversion to a residential development, the discharge of dredged or fill material from development would require prior authorization under Clean Water Act section 404. Plans or proposals for development may include applications for Clean Water Act section 404 permits or other Federal, State, or local permits for residential, commercial, or industrial development; energy infrastructure; mining; or other non-agricultural uses. On the one hand, the agencies recognize that plans and proposals do not themselves change the characteristics of a wetland, and that some do not come to fruition. On the other hand, the agencies would like to provide certainty and fair notice to landowners and other persons about the status of the areas under their control while they are in the planning stage. Interpreting a change in use as only occurring when heavy machinery begins actually dredging and filling a wetland, and potentially violating the Clean Water Act, would not provide the certainty and fair notice necessary to appropriately plan development. To address these considerations, the agencies will interpret the prior converted cropland designation to continue to apply to a farmer's use of prior converted cropland for agricultural purposes even after development plans or proposals have been developed, and even after land has been sold. However, the prior converted cropland designation would not be available to the developer for the same parcel once proposals or plans for development have begun, even prior to a discharge occurring in the wetland.

Some commenters stated that, for example, building houses in an area should not constitute a "change in use," because the houses could potentially be

removed and the area returned to commodity crop production. The agencies disagree. A "change in use" includes areas that have undergone soil disturbance such that substantial effort, such as the removal of concrete or other permanent structures, would be required to enable the production of agricultural commodities. The agencies interpret availability for commodity crop production to mean that it is reasonably conceivable that the area in its current condition could be returned to crop production. Areas that will be developed for residential, commercial, or industrial use; energy infrastructure; mining; or other non-farming related activities will not meet this standard of availability for commodity crop production.

The agencies will not implement the exclusion using the "abandonment" approach, which the 2020 NWPR implemented instead of "change in use," as "abandonment" is not consistent with USDA's approach or with the purposes of the Clean Water Act. Generally speaking, under the 2020 NWPR's approach to abandonment, an area would only regain jurisdictional status if the area has not been used for agricultural purposes at least once in every five years and the area reverts to a wetland that meets the definition of "waters of the United States." For example, under abandonment, if prior converted cropland is used for an agricultural purpose, such as grazing, two years prior to being sold for conversion to a residential development, discharges of dredged or fill material from the construction of the residential development into the wetlands during the three years remaining in the five-year abandonment time frame would not require authorization under Clean Water Act section 404, even though those discharges have nothing to do with farming. In contrast, under the "change in use" approach that the agencies will implement under this rule, the reverted wetland area would regain jurisdictional status if it meets the definition of "waters of the United States" and is subject to a "change in use," meaning that it is no longer available for production of an agricultural commodity.

The abandonment approach implemented in the 2020 NWPR presents three key concerns. First, it incentivizes disturbance of the area by a farmer once every five years to retain the exclusion. Second, it creates a substantial loophole in Clean Water Act section 404 protections by allowing any form of development of otherwise jurisdictional wetlands without

authorization, so long as it occurs within five years of use of the area for agricultural purposes. Third, it undermines governmental coordination and efficiency because it is not consistent with USDA's approach to prior converted cropland.

A number of commenters urged the agencies to maintain the 2020 NWPR's approach to implementing prior converted cropland, emphasizing that on a national scale, developing wetlands, such as for purposes of mining or other industrial uses, could provide billions of dollars to farmers. The agencies have concluded that this potential financial benefit to farmers does not effectuate the original purpose of the exclusion, which was to promote consistency among Federal clean water protection programs in order to help restore and maintain the nation's waters. Moreover, the exclusion was originally intended to allow farmers to farm their land. The financial benefit the commenters cite comes from selling farmland to be developed. Further facilitating these sales does nothing to support farmers who seek to continue to farm and could even undermine their incentives to do so. By contrast, the agencies' approach in this rule strikes an appropriate balance between effectuating the goals of the Clean Water Act and the purposes of the exclusion. It aligns implementation of the Food Security Act and the Clean Water Act as much as possible while providing farmers with clarity that routine farming and related activity conducted in prior converted croplands will not require Clean Water Act authorization.

The agencies' approach to prior converted cropland under this rule also imposes less of a burden on farmers than the approach under the 2020 NWPR. Under the 2020 NWPR, an area was not considered abandoned so long as it is used for or in support of agricultural purposes at least once in the immediately preceding five years. The 2020 NWPR's preamble explained that prior converted cropland would not be considered abandoned if it were idled or lay fallow "for conservation or agricultural purposes." 85 FR 22320 (April 21, 2020). By contrast, under "change in use," the land will not lose its prior converted cropland status so long as it remains available for crop production, regardless of whether the purpose for idling the land was related to conservation or agricultural purposes. In other words, under this rule, a farmer could maintain prior converted cropland status without needing to demonstrate that the area was used for in support of agricultural purposes at least once in the immediately preceding

five years or had been idled for conservation or agricultural purposes.

The exclusion for prior converted cropland does not apply to areas designated by USDA as meeting other Food Security Act exemptions, including exemptions for farmed wetlands, or areas that meet the USDA definition of wetlands and do not have a valid prior converted cropland designation. This rule would maintain the provision promulgated in 1993 that EPA retains final authority to determine whether an area is subject to the requirements of the Clean Water Act. The presence of a jurisdictional wetland, or any jurisdictional water in an agricultural setting, in no way affects the availability of exemptions for discharges associated with many farming activities pursuant to Clean Water Act section 404(f).

b. Waste Treatment System

i. This Rule

This rule in paragraph (b)(1) retains the agencies' longstanding waste treatment system exclusion, with no changes from the proposed rule. Specifically, this rule provides that "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" are not "waters of the United States." This language is the same as the agencies' 1986 regulation's waste treatment system exclusion,¹¹⁵ with a ministerial change to delete the exclusion's cross-reference to a definition of "cooling ponds" that no longer exists in the Code of Federal Regulations, and the addition of a comma that clarifies the agencies' longstanding implementation of the exclusion as applying only to systems that are designed to meet the requirements of the Act.

ii. Summary of the Agencies' Consideration of Public Comments and Rationale for This Rule

EPA first promulgated the waste treatment system exclusion in a 1979 notice-and-comment rulemaking revising the definition of "waters of the United States" in the agency's NPDES regulations. 44 FR 32854 (June 7, 1979). A "frequently encountered comment" was that "waste treatment lagoons or other waste treatment systems should not be considered waters of the United States." *Id.* at 32858. EPA agreed, except as to cooling ponds that otherwise meet the criteria for "waters of the United States." *Id.* The 1979 revised definition of "waters of the United States" thus

provided that "waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States." *Id.* at 32901 (40 CFR 122.3(t) (1979)).

The following year, EPA revised the exclusion, but again only in its NPDES regulations, to clarify its application to treatment ponds and lagoons and to specify the type of cooling ponds that fall outside the scope of the exclusion. 45 FR 33290, 33298 (May 19, 1980). EPA also decided to revise this version of the exclusion to clarify that "treatment systems created in [waters of the United States] or from their impoundment remain waters of the United States," while "[m]anmade waste treatment systems are not waters of the United States." *Id.* The revised exclusion read: "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States." The provision further provided that the exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 45 FR 33424 (May 19, 1980) (40 CFR 122.3).

Two months following this revision, EPA took action to "suspend [] a portion" of the waste treatment system exclusion in its NPDES regulations in response to concerns raised in petitions for review of the revised definition of "waters of the United States." 45 FR 48620 (July 21, 1980). EPA explained that industry petitioners objected to limiting the waste treatment system exclusion to manmade features, arguing that the revised exclusion "would require them to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years." *Id.* at 48620. The petitioners argued that "[i]n many cases, . . . EPA had issued permits for discharges from, not into, these systems." *Id.* Agreeing that the regulation "may be overly broad" and "should be carefully reexamined," EPA announced that it was "suspending [the] effectiveness" of the sentence limiting the waste treatment system exclusion to manmade bodies of water. *Id.* EPA then stated that it "intend[ed] promptly to develop a revised definition and to publish it as a proposed rule for public comment," after which the agency would decide whether to "amend the rule, or terminate the suspension." *Id.*

¹¹⁵ 51 FR 41250 (November 13, 1986); 53 FR 20764 (June 6, 1988).

In 1983, EPA republished the waste treatment system exclusion in its NPDES regulations with a note explaining that the agency's July 1980 action had "suspended until further notice" the sentence limiting the exclusion to manmade bodies of water, and that the 1983 action "continue[d] that suspension." 48 FR 14146, 14157 (April 1, 1983) (40 CFR 122.2) (1984). EPA subsequently omitted the exclusion's suspended sentence altogether in revising the definition of "waters of the United States" in other parts of the Code of Federal Regulations. See, e.g., 53 FR 20764, 20774 (June 6, 1988) (revising EPA's section 404 program definitions at 40 CFR 232.2). Separately, the Corps published an updated definition of "waters of the United States" in 1986. This definition contained the waste treatment system exclusion but likewise did not include the exclusion's suspended sentence: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States." 51 FR 41250 (November 13, 1986); 33 CFR 328.3 (1987).

Later revisions to the definition of cooling ponds rendered the exclusion's cross-reference to 40 CFR 123.11(m) outdated. See 47 FR 52290, 52291, 52305 (November 19, 1982) (revising regulations related to cooling waste streams and deleting definition of cooling ponds). In this rule, the agencies have deleted this obsolete cross-reference, consistent with other recent rulemakings addressing the definition of "waters of the United States."¹¹⁶

This rule also deletes the suspended sentence in EPA's NPDES regulations limiting application of the waste treatment system exclusion to manmade bodies of water. The suspended sentence, which since 1980 has only ever appeared in the version of the waste treatment system exclusion contained in EPA's NPDES regulations (40 CFR 122.2), provides: "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United

States." Because EPA suspended this sentence limiting application of the exclusion in 1980, EPA has *not* limited application of the waste treatment system exclusion to manmade bodies of water for over four decades. Removing the suspended sentence in this rule thus aligns with EPA's decades-long practice implementing the exclusion—in addition to ensuring consistency with the text of other versions of the exclusion found in the agencies' regulations (both past and present)—and maintains the 2020 NWPR's deletion of the suspended sentence as well.

Some commenters expressed support for deleting the suspended sentence, stating that doing so in this rule would be consistent with the agencies' longstanding approach to implementing the waste treatment system exclusion. Other commenters asserted that the agencies should limit application of the exclusion to human-made features, with some expressing concern that the agencies have not provided a meaningful opportunity to comment on this aspect of the rulemaking. The agencies agree that removing the suspended sentence—which has not been in effect for over 40 years—ensures that this rule will continue the agencies' longstanding approach to excluding waste treatment systems, while providing additional clarity. Indeed, for decades, both agencies have *not* limited application of the exclusion to manmade bodies of water. The agencies disagree that they did not satisfy notice-and-comment requirements with respect to this aspect of the rulemaking. The preamble to the proposed rule explained that the agencies were considering deleting the suspended sentence and explicitly solicited comment on that approach. See 86 FR 69427.

Multiple commenters expressed concern over the agencies' proposed addition of a comma after the word "lagoons" in the text of the exclusion, which provides: "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States." In particular, many of these commenters asserted that the new comma would narrow the exclusion such that a system constructed prior to the enactment of the Clean Water Act could not qualify for the exclusion because it was not "designed" to meet the requirements of the Act. As explained in the preamble to the proposed rule, the purpose of adding a comma after "lagoons" is to clarify that the exclusion is available only to systems meeting the requirements of the Clean Water Act, thereby continuing the agencies'

longstanding approach to implementing the exclusion. Under this approach, a waste treatment system constructed *prior* to the 1972 Clean Water Act amendments is eligible for the exclusion so long as the system is in compliance with currently applicable Clean Water Act requirements, such as treating water such that discharges, if any, from the system meet the Act's requirements. A waste treatment system constructed *after* passage of the 1972 Clean Water Act amendments is similarly eligible for the exclusion if it was constructed and is operating in a manner that is consistent with the Act, such as by treating water so that discharges, if any, from the system meet the Act's requirements, and it was constructed in compliance with the Act's requirements (e.g., where the system was lawfully created pursuant to a section 404 permit). A waste treatment system that was created after the 1972 amendments but was constructed in violation of the Clean Water Act—for example, a system constructed without a section 404 permit when one was necessary—is not eligible for the exclusion, regardless of whether the system is currently treating discharges to meet the Act's requirements.

Finally, several commenters asserted that the waste treatment system exclusion violates the Clean Water Act. The agencies disagree that the waste treatment system exclusion is contrary to the Clean Water Act. Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979, and the waste treatment system exclusion is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States." See *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 212 (4th Cir. 2009) (upholding the waste treatment system exclusion as a lawful exercise of the agencies' "authority to determine which waters are covered by the CWA").

iii. Implementation

Consistent with the 1986 regulations, this rule provides that a waste treatment system must be "designed to meet the requirements of the Clean Water Act." A waste treatment system may be "designed to meet the requirements of the Clean Water Act" where, for example, it is constructed pursuant to a Clean Water Act section 404 permit, *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 214–15 (4th Cir. 2009), or where it is "incorporated in an NPDES permit as part of a treatment system," *N. Cal. River Watch v. City of*

¹¹⁶ 85 FR 22250, 22325 (April 21, 2020) ("One ministerial change [to the waste treatment system exclusion] is the deletion of a cross-reference to a definition of 'cooling ponds' that no longer exists in the Code of Federal Regulations."); 80 FR 37054, 37097 (June 29, 2015) ("One ministerial change [to the waste treatment system exclusion] is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists.").

Healdsburg, 496 F.3d 993, 1001 (9th Cir. 2007).

To be clear, the exclusion does not free a discharger from the need to comply with the Clean Water Act, including any effluent limitations guidelines and new source performance standards requirements applicable to the waste treatment system, and requirements applicable to the pollutants discharged from a waste treatment system to “waters of the United States”; only discharges into the waste treatment system are excluded from the Act’s requirements. As such, any entity would need to comply with the Clean Water Act by obtaining a section 404 permit for a new waste treatment system that will be constructed in “waters of the United States,” and a section 402 permit if there are discharges of pollutants from a waste treatment system into “waters of the United States.” Under the section 402 permit, discharges from the waste treatment system would need to meet the requirements of applicable effluent limitations guidelines and new source performance standards, as well as any required water quality-based effluent limitations. Further, consistent with the agencies’ general practice implementing the exclusion, under this rule, a waste treatment system that ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets this rule’s definition of “waters of the United States.”

Moreover, as explained in section IV.C.7 of this preamble, the exclusions in this rule—including the waste treatment system exclusion—do not apply to features that, at the time they are assessed, are jurisdictional under paragraph (a)(1). Note, however, that an excluded waste treatment system—such as a cooling pond—may over time take on the characteristics of a jurisdictional water, such as a paragraph (a)(1) traditional navigable water.¹¹⁷ In this scenario, the exclusion continues to apply and the waste treatment system does not become a jurisdictional water under paragraph (a)(1) or any other provision of the rule, unless or until the system ceases to serve the treatment function for which it was designed (as discussed in the immediately preceding paragraph).

With respect to the scope of the waste treatment system exclusion in this rule, the agencies do not interpret the

¹¹⁷ This situation may arise where, for example, a manmade cooling pond constructed in uplands takes on the characteristics of a traditional navigable water.

exclusion to allow any party to dispose of waste or discharge pollutants into the excluded feature without authorization. Rather, for waters that would otherwise meet this rule’s definition of “waters of the United States,” the agencies’ intent, consistent with prior application of the NPDES program, is that the waste treatment system exclusion is generally available only for discharges associated with the treatment function for which the system was designed. Relatedly, consistent with the agencies’ longstanding practice, a waste treatment system does not itself sever upstream waters from Clean Water Act jurisdiction.¹¹⁸ In other words, if those upstream waters were “waters of the United States,” they remain “waters of the United States” and discharges to them thus may require a section 402 or 404 permit.

c. Other Exclusions

In this rule, the agencies are codifying exclusions for several features that they generally considered non-jurisdictional under the pre-2015 regulatory regime and the 2019 Repeal Rule and expressly excluded by regulation in the 2015 Clean Water Rule and 2020 NWPR. These features are: ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water; artificially irrigated areas that would revert to dry land if the irrigation ceased; artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons; waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

¹¹⁸ See, e.g., Memorandum of Non-Concurrence with Jurisdictional Determinations POA-1992-574 & POA-1992-574-Z (October 25, 2007), available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1454> (“EPA and the Corps agree that the agencies’ designation of a portion of waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system.”).

Under the pre-2015 regulatory regime, the features listed above were generally not considered “waters of the United States” even though they were not explicitly excluded by regulation. The preamble to the 1986 regulations explained that the agencies “generally do not consider [these] waters to be ‘Waters of the United States.’” 51 FR 41217 (November 13, 1986). The preamble further stated that “the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are ‘waters of the United States.’” *Id.* The *Rapanos* Guidance expanded on the list of features that were generally considered non-jurisdictional. *Rapanos* Guidance at 11–12. In practice, the agencies did not generally assert jurisdiction over such waters. To provide clarity on which waters are jurisdictional and which are not, and to enhance certainty for the public, the agencies are codifying exclusions for these features in the regulatory text and removing the possibility that these waters could be found jurisdictional on a case-by-case basis. Because the agencies did not generally assert jurisdiction over these features in practice, codifying exclusions for these features is not a substantial change from the pre-2015 regulatory regime or the 2019 Repeal Rule. Many commenters supported codifying exclusions for these features. This approach is generally consistent with the 2015 Clean Water Rule and 2020 NWPR and will be familiar to the public.

In the final regulatory text for these exclusions, the agencies are consistently using the term “dry land,” rather than “upland.” The proposed rule and the pre-2015 regulatory regime used the phrases “dry land” and “upland” interchangeably in their description of features that the agencies considered to be generally non-jurisdictional. To provide additional clarity, the agencies are consistently using the term “dry land” throughout the regulatory text.¹¹⁹ The term “dry land” refers to areas of the geographic landscape that do not include waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like. It is important to note that jurisdictional and non-jurisdictional waters are not considered “dry land” just because they lack water

¹¹⁹ While the agencies consistently use the phrase “dry land” in the regulatory text to provide clarity to the public, this preamble and documents supporting this rule use the phrases “dry land” and “upland” interchangeably.

at a given time. Similarly, an area may remain “dry land” even if it is wet after a precipitation event.

The agencies recognize that for certain longstanding exclusions, the 2020 NWPR replaced the word “upland” in the regulatory text with the word “upland” and a reference to non-jurisdictional features. For example, the 2020 NWPR regulatory text excluded “[w]ater-filled depressions constructed or excavated in upland or in non-jurisdictional waters.” 85 FR 22338 (April 21, 2020) (emphasis added). This approach was a deviation from longstanding practice as both the pre-2015 regulatory regime and the 2015 Clean Water Rule limited the exclusions to features constructed in upland. The distinction between “upland” or “dry land” and “non-jurisdictional features” is important because “non-jurisdictional features” can include features like certain ephemeral streams and wetlands that are not jurisdictional but are not “dry.” This change in the 2020 NWPR resulted in an expansion of the exclusion as compared to the pre-2015 regulatory regime. The agencies disagree with the approach in the 2020 NWPR. It deviated from the longstanding concept of limiting certain exclusions to instances where features are constructed in dry land. Limiting the exclusions in this rule to features constructed in dry land more appropriately captures the agencies’ intent to exclude features associated with areas that are commonly understood as “dry.” Limiting the exclusions in this way also puts reasonable bounds on these categorical exclusions and ensures that features constructed in land that is *not* dry are examined more closely to determine whether they are jurisdictional.

i. Ditches

(1) This Rule

In this rule, the agencies are codifying an exclusion for ditches (including roadside ditches) excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water. Excluding these ditches from jurisdiction is consistent with the scope of ditches that were generally non-jurisdictional under the pre-2015 regulatory regime and the 2019 Repeal Rule. The preamble to the 1986 regulations explains that “[n]on-tidal drainage and irrigation ditches excavated on dry land” are generally not considered “waters of the United States.” 51 FR 41217 (November 13, 1986). The agencies shifted this approach slightly in the *Rapanos* Guidance and explained that “ditches (including roadside ditches) excavated

wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States.” *Rapanos* Guidance at 11–12. Excluding certain ditches from jurisdiction is also consistent with the 2015 Clean Water Rule and the 2020 NWPR. While these rules took different approaches to determining which ditches should be excluded, due in part to different overall constructs for the definition of “waters of the United States” under those rules, both rules excluded some ditches. The agencies, in this rule, are continuing the approach described in the *Rapanos* Guidance and are codifying that approach in the regulatory text to provide clarity and certainty. As discussed above, the agencies are also maintaining their longstanding position that paragraph (a)(1) waters are not subject to the exclusions and, most relevant to the exclusion for ditches and consistent with the 1986 preamble, tidal ditches will continue to be jurisdictional under paragraph (a)(1). Continuing the approach described in the *Rapanos* Guidance is consistent with the agencies’ intent with this rule to interpret “waters of the United States” to mean the waters defined by the longstanding 1986 regulations, with amendments to reflect the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States,” informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, public comment, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining “waters of the United States.”

(2) Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

Consistent with the *Rapanos* Guidance, this rule excludes “ditches (including roadside ditches) that are excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.” *Rapanos* Guidance at 8. The scope of the ditch exclusion is consistent with the agencies’ longstanding practice and technical judgment that certain waters and features are not subject to regulation under the Clean Water Act. The exclusion is also informed by *Rapanos*. The agencies have concluded that the relatively permanent standard in *Rapanos* on its own is insufficient to achieve the objective of the Act. See section IV.A of this preamble. However, the relatively permanent standard is

generally consistent with the agencies’ longstanding practice of finding certain ditches that lack important hydrogeomorphic features to be non-jurisdictional. The ditches excluded under this rule and longstanding practice are often part of Tribal, State, and local land use planning and can also be subject to Tribal or State jurisdiction, as the Clean Water Act recognizes that Tribes and States can regulate more broadly than the Federal Government. Excluding certain ditches from jurisdiction under this rule also improves administrative efficiency and provides certainty and clarity to the public. This exclusion simplifies the approved jurisdictional determination process and makes it more straightforward for agency staff to implement the rule and for the public to determine whether certain features are subject to Federal jurisdiction.

Several commenters requested that the agencies exclude a broader set of ditches from the definition of “waters of the United States.” The agencies find that it would not be appropriate to exclude a broader set of ditches from the definition of “waters of the United States” in this rule. Congress clearly intended that some ditches are jurisdictional under the Clean Water Act. The Clean Water Act states that, with some exceptions, the discharge of dredge or fill material “for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches” is not prohibited by or otherwise subject to regulation under the Clean Water Act. 33 U.S.C. 1344(f)(1)(C). Because this exemption only applies to discharges of dredged or fill material into “waters of the United States,” there would be no need for such a permitting exemption if all ditches were considered non-jurisdictional under the Clean Water Act. The agencies in the 2020 NWPR similarly interpreted section 404(f) as an indication that Congress intended that ditches could in some instances be jurisdictional under the Clean Water Act. 85 FR 22297 (April 21, 2020). The agencies’ approach in this rule—which finds that some ditches are jurisdictional while others are not—reflects full and appropriate consideration of section 404(f), the water quality objective in Clean Water Act section 101(a), and the policies relating to responsibilities and rights of Tribes and States under section 101(b). The approach of finding certain ditches jurisdictional while excluding others from jurisdiction is also consistent with the 2015 Clean Water Rule and the 2020 NWPR, as well as the pre-2015

regulatory regime and the 2019 Repeal Rule. Human-made tributaries like ditches can provide functions that restore and maintain the chemical, physical, and biological integrity of downstream paragraph (a)(1) waters. The scientific literature indicates that structures like ditches that convey water continue to connect to and effect downstream waters, though the connectivity and effects can be different than that of natural streams. Indeed, ditches can enhance the extent of connectivity by more effectively conveying the water downstream. See section III.A of the Technical Support Document for additional information; see also section IV.A.2.b.i of this preamble for further discussion of these issues.

Several commenters asked for additional explanation of terms and phrases used in the exclusion for certain ditches. The phrase “excavated wholly in and draining only dry land” means that at the time the ditch was constructed, it was excavated in dry land as that term is described above. It further means that at the time of construction, the ditch was excavated entirely, or wholly, in dry land. Finally, it means that the ditch is not situated close enough to a water feature, including wetlands, to drain that water feature. For example, a ditch that is constructed in dry land and receives water from runoff and other ditches constructed in dry land and draining only dry land, or from groundwater intercepted as the ditch was dug, would be considered a ditch “excavated wholly in and draining only dry land.” In contrast, a ditch that is constructed in dry land but also drains a wetland would not be considered a ditch that drains only dry land, and a ditch constructed in both a wetland and in dry land would not be considered to be excavated wholly in dry land. The jurisdictional status of a ditch is assessed on a case-by-case basis by considering the specific characteristics of the site at issue.

The phrase “do not carry a relatively permanent flow of water” means that the ditch is not a relatively permanent water as that term is explained in this rule. Relatively permanent flow, as discussed in section IV.C.4.c.ii of this preamble, means the ditch contains flowing or standing water year-round or continuously during certain times of the year for more than a short duration in direct response to precipitation. The language “do not carry a relatively permanent flow of water” is consistent with the language in the *Rapanos* Guidance.

The use of the word “and” in the exclusion for ditches indicates that all three criteria (excavated wholly in dry land, draining only dry land, and not carrying a relatively permanent flow of water) must be satisfied for the ditch to be excluded. However, even where a ditch is not excluded, it is only jurisdictional if it satisfies the terms of the categories of waters that are considered jurisdictional under this rule. For example, a ditch that is not excluded, but does not satisfy either the relatively permanent or significant nexus standard would not be jurisdictional under this rule.

In addition, the agencies’ longstanding interpretation of the Clean Water Act is that it is not relevant whether a water has been constructed or altered by humans for purposes of determining whether a water is jurisdictional under the Clean Water Act. In *S.D. Warren v. Maine Board of Env’tl Protection*, Justice Stevens, writing for a unanimous Court, stated: “nor can we agree that one can denationalize national waters by exerting private control over them.” 547 U.S. 370, 379 n.5 (2006). In *Rapanos*, all members of the Court generally agreed that “highly artificial, manufactured, enclosed conveyance systems—such as ‘sewage treatment plants,’ . . . and the ‘mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents’ . . . likely do not qualify as ‘waters of the United States,’ despite the fact that they may contain continuous flows of water.” 547 U.S. at 737 (Scalia, J., plurality opinion). But there was also agreement that certain waters that are human-made or man-altered, such as canals with relatively permanent flow, are “waters of the United States.” *Id.* at 736 n.7. Justice Kennedy and the dissent rejected the conclusion that because the word “ditch” was in the definition of “point source” a ditch could never be “waters of the United States”: “certain water bodies could conceivably constitute both a point source and a water.” *Id.* at 772 (Kennedy, J., concurring in the judgment); see also *id.* at 802 (Stevens, J., dissenting) (“The first provision relied on by the plurality—the definition of ‘point source’ in 33 U.S.C. 1362(14)—has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones, since ‘pipe[s], ditch[es], channel[s], tunnel[s], conduit[s], [and] well[s]’ can all hold water permanently as well as intermittently.”). While the plurality, Justice Kennedy, and the dissent formulated different standards for determining what are “waters of the

United States,” none of the standards qualified jurisdiction on a distinction between “natural” versus “human-made” or “human-altered” waters or excluded ditches in their entirety. Further, no Federal Court of Appeals has interpreted *Rapanos* to exclude ditches from the Clean Water Act. This case law demonstrates that certain ditches have long been subject to regulation as “waters of the United States.”

Several commenters suggested that certain types of ditches, including roadside ditches, ditches associated with railroad operations, and agricultural ditches, should be excluded in this rule. This rule does not explicitly exclude these types of ditches, but the exclusions included in this rule address many ditches of these types. Moreover, since the exclusion for ditches in this rule focuses on the physical (e.g., constructed in dry land) and flow characteristics of ditches, the exclusion addresses all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines.

(3) Implementation

When assessing the jurisdictional status of a ditch, the agencies will evaluate the entire reach of the ditch to determine if it has relatively permanent flow, consistent with the reach approach for tributaries described in section IV.C.4.c of this preamble. As described for tributaries, the agencies will assess the flow characteristics of a particular ditch reach at the farthest downstream limit of the ditch reach (i.e., the point the ditch enters a higher order in the network). Where data indicate the flow characteristics at the downstream limit is not representative of the entire reach of the ditch, the flow characteristics that best characterizes the entire ditch reach will be used. For example, if the majority of the ditch reach lacks relatively permanent flow but some portions of the reach contain isolated pools of standing water, that reach of the ditch likely would not be considered to have relatively permanent flow. As a result, such a ditch could be excluded from jurisdiction if it satisfies the other requirements of the ditch exclusion. Additionally, a situation could arise where there is one reach of a ditch with relatively permanent flow that is jurisdictional and is connected to downstream waters via a separate reach of the ditch that is non-jurisdictional. This approach to evaluating jurisdiction of each reach of a ditch separately is

consistent with the agencies' approach for evaluating jurisdiction over tributaries, which evaluates each reach of a tributary separately. See section IV.C.4.c.ii of this preamble for further discussion of applying the relatively permanent standard to tributary reaches.

Questions have sometimes arisen regarding the distinctions between ditches and human-altered natural streams and rivers. Alteration or modification of a natural stream or river for flood control, erosion control, development, agriculture, and other reasons does not convert the stream or river to an excluded ditch. A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, is not a ditch. A stream that has banks stabilized through use of concrete or rip-rap (e.g., rocks or stones) is not a ditch. In these instances, the altered or modified streams and rivers are not ditches and would also not satisfy the exclusion for ditches because they are not "excavated wholly in and draining only dry land." See section IV.A.2.b.i of this preamble for further discussion of this rule's coverage of human-made or human-altered tributaries.

Questions have also arisen regarding relocated streams and rivers. A stream or river that has been relocated is not a ditch and would also not satisfy the exclusion for ditches because it is not "excavated wholly in and draining only dry land." A stream or river that is relocated should be evaluated as a tributary when it contributes flow directly or indirectly to a paragraph (a)(1) water. A stream or river is considered relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. Even where the stream or river has been relocated (i.e., the majority of its flow has been redirected), the remnant portions of the former stream may still be jurisdictional where it satisfies the terms of paragraph (a) of this rule.

The agencies note that an excluded ditch that connects downstream to a jurisdictional tributary would not be jurisdictional merely because of its downstream connection to the jurisdictional tributary. Furthermore, wetlands that develop entirely within the confines of an excluded ditch are not jurisdictional, as discussed further in section IV.C.5.b of this preamble.

Certain excluded ditches (such as roadside and agricultural ditches that satisfy the requirements of the ditch exclusion) may receive backflow from a jurisdictional water, such as a perennial river that overflows into the ditch and

extends the OHWM of the contributing water into the ditch. In these circumstances, the agencies will continue the practice of extending the OHWM of the jurisdictional contributing water up to the location of its OHWM within the otherwise non-jurisdictional ditch, as required by Corps regulations. See 33 CFR 328.4(c). In these instances, the ditch is not necessarily jurisdictional; the feature extending into the ditch is jurisdictional. For example, an excluded ditch may connect with a relatively permanent river, and at times, high flows from the river may extend into the excluded ditch such that the OHWM of the jurisdictional river also extends into the ditch. The agencies will continue to treat the portion of the relatively permanent river that extends into the excluded ditch, up to the OHWM of the river, as part of the jurisdictional river. The ditch remains excluded, but the flow in the ditch that is from the relatively permanent river will be jurisdictional as part of the river.

The agencies will use the most accurate and reliable resources to support their decisions regarding whether a feature is an excluded ditch. This will typically involve the use of multiple sources of information and those sources may differ depending on the resource in question or the region in which the resource is located. Along with field data and other current information on the subject waters, historic tools and resources may be used to determine whether a feature is an excluded ditch. Several sources of information may be required to make such determination. Information sources may include historic and current topographic maps, historic and recent aerial photographs, Tribal, State, and local records and surface water management plans (such as county ditch or drainage maps and datasets), NHD or NWI data, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts. For example, when a USGS topographic map displays a tributary located upstream and downstream of a potential ditch, this may indicate that the potential ditch was constructed in or relocated a tributary. As another example, an NRCS soil survey displaying the presence of specific soil series which are linear in nature and generally parallel to a potential ditch may be indicative of alluvial deposits

formed by a tributary in which the potential ditch was constructed. Additionally, the presence of a pond in a historic aerial photograph that lies along the flowpath of the potential ditch, for example, may provide an indication that the potential ditch was not constructed wholly in and drained only dry land.

This rule does not affect the permitting exemptions for certain activities described in Clean Water Act section 404(f), including the exemption in section 404(f)(1)(C) for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches. The agencies have historically taken the position that a ditch can be both "waters of the United States" and a point source. The 2020 NWPR, however, changed the agencies' longstanding position and stated that a ditch is either "waters of the United States" or a point source. 85 FR 22297 (April 21, 2020). The 2020 NWPR justified this position by noting that the Clean Water Act defines "point sources" to include ditches and that the plurality opinion in *Rapanos* stated that "[t]he definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." See 547 U.S. at 735–36 (Scalia, J., plurality opinion); NWPR Response to Comments, Section 6 at 12–13.

The agencies have further evaluated this question and concluded that the better reading of the statute is the agencies' historic position that a ditch can be both a point source and "waters of the United States." That position dates back to 1975 in an opinion of the General Counsel of EPA interpreting the Clean Water Act. That opinion stated: "it should be noted that what is prohibited by section 301 is 'any addition of any pollutant to navigable waters from any point source.' It is therefore my opinion that, even should the finder of fact determine that any given irrigation ditch is a navigable water, it would still be permissible as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present." *In re Riverside Irrigation District*, 1975 WL 23864, at *4 (June 27, 1975) (emphasis in original). The opinion stated that "to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." *Id.*

In addition, in *Rapanos*, Justice Kennedy and the dissent rejected the

conclusion that because the word “ditch” was in the definition of “point source” a ditch could never be “waters of the United States”: “certain water bodies could conceivably constitute both a point source and a water.” 547 U.S. at 772 (Kennedy, J., concurring in the judgment); *see also id.* at 802 (Stevens, J., dissenting) (“The first provision relied on by the plurality—the definition of “point source” in 33 U.S.C. [section] 1362(14)—has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones, since ‘pipe[s], ditch[es], channel[s], tunnel[s], conduit[s], [and] well[s]’ can all hold water permanently as well as intermittently.”).¹²⁰ Even the plurality opinion in *Rapanos*, which was relied upon by the agencies in the 2020 NWPR for its change in position, left room for some ditches to both point sources and “waters of the United States,” finding that the two categories should not be “significantly” overlapping. 547 U.S. at 735–36 (Scalia, J., plurality opinion).

There is simply no indication in the text of the Clean Water Act that ditches that meet the definition of a point source cannot also be “waters of the United States.” To the contrary, the fact that Congress provided an exemption for discharges of dredged or fill material for construction or maintenance of certain types of ditches from permitting in Clean Water Act section 404(f) is further evidence that under the plain language of the statute ditches can, at least in some cases, be both point sources and “waters of the United States.” The agencies therefore find that their longstanding, historic view that a ditch can be both a point source and “waters of the United States” is the better interpretation.

ii. Other Features

(1) This Rule

In this rule, the agencies are codifying exclusions for certain other features that were not generally considered jurisdictional under the pre-2015 regulatory regime. Consistent with the

features listed in the preamble to the 1986 regulations, the agencies are codifying exclusions for: artificially irrigated areas that would revert to dry land if the irrigation ceased; artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; and waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States.” *See* 51 FR 41217 (November 13, 1986). In addition, consistent with the *Rapanos* Guidance, the agencies are excluding swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow. *See Rapanos* Guidance at 11–12. Excluding these features from jurisdiction is consistent with the 2015 Clean Water Rule and the 2020 NWPR, as well as the pre-2015 regulatory regime and the 2019 Repeal Rule, which considered these features to be generally non-jurisdictional. The agencies are codifying exclusions for these features in the regulatory text to provide clarity and certainty.

The agencies are finalizing two minor changes to the exclusion for swales and erosional features in this rule as compared to the language in the *Rapanos* Guidance. The Guidance explained that the agencies generally found “[s]wales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow)” to be non-jurisdictional. *Rapanos* Guidance at 11–12. First, this rule’s regulatory text excludes “swales and erosional features” rather than “swales or erosional features.” The agencies find that the use of “or” in this phrase in the *Rapanos* Guidance was confusing because swales are substantively different from erosional features and thus should not be referred to in the alternative. To provide additional clarity, the agencies are using the connector “and” in this rule’s regulatory text for this exclusion. Second, the agencies are moving the parentheses in this provision so that only the phrase “*e.g.*, gullies, small washes” is included in parentheses.

This change clarifies that the rest of the language in this exclusion, “characterized by low volume, infrequent, or short duration flow” applies to both swales and erosional features. This change ensures that the exclusion more accurately describes those swales and erosional features which are discrete topographic features on the landscape, rather than low gradient depressional areas that convey only overland sheetflow and which are not included within this exclusion. The agencies are making these two ministerial changes from the *Rapanos* Guidance to provide additional clarity in this rule, but the agencies’ application of the exclusion for these features as compared to the pre-2015 regulatory regime remains substantively and operationally unchanged.

(2) Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

As described at the beginning of this section, codifying exclusions for these features is consistent with the agencies’ longstanding practice that certain waters and features are not subject to the Clean Water Act. The exclusions are also guided by Supreme Court cases that recognized that there are certain features that were not primarily the focus of the Clean Water Act. *See, e.g., Rapanos* 547 U.S. at 734. The exclusions are an important aspect of the agencies’ policy goal of providing clarity, certainty, and predictability for the regulated public and regulators. The categorical exclusions will simplify the process of determining jurisdiction, and they reflect the agencies’ determinations of the lines of jurisdiction based on the case law, policy determinations, and the agencies’ experience and expertise.

Many commenters generally supported adding the exclusions in the regulatory text. Several of these commenters stated that adding the exclusions to the regulatory text would provide clarity and certainty and avoid time and cost burdens. The agencies agree with these commenters and have added these exclusions, along with the exclusion for ditches, to the regulatory text. Other commenters stated that exclusions of certain waterbodies were not based on science or the significant nexus standard. Determinations about the scope of “waters of the United States” are informed by science but also informed by the agencies’ decades of implementation experience. This rule reflects the judgment of the agencies in balancing the science, the agencies’ expertise, and the regulatory goals of providing clarity to the public while

¹²⁰ The agencies considered that a district court has reached a contrary conclusion, but the agencies decline to adopt the decision’s reasoning in this rule, including because it relies on the change in interpretation articulated for the first time in the 2020 NWPR and which the agencies reject in this rule, and is inconsistent with the position of five Justices in *Rapanos*. *See Toxics Action Center, Inc. & Conservation Law Found. v. Casella Waste Systems, Inc.*, 2021 WL 3549938, *8 (D.N.H. Aug. 11, 2021) (“If a waterway can simultaneously be a navigable water (that is, a water of the United States) and a point source, the distinction the statute draws between the two categories using the prepositions ‘from’ and ‘to’ would be rendered meaningless.”).

protecting the integrity of paragraph (a)(1) waters, consistent with the law.

(3) Implementation

This section addresses implementation of the exclusions for certain other features that were not generally considered jurisdictional under the pre-2015 regulatory regime in the order in which the relevant provision appears in the regulatory text.

In this rule, the agencies clarify their longstanding view that the exclusion for certain artificially irrigated areas applies only to the specific land being directly irrigated that would reasonably revert to dry land should irrigation cease. The exclusion does not apply to all waters within watersheds where irrigation occurs.

Questions have arisen in the past regarding whether a feature that initially satisfied the terms of an exclusion but no longer satisfies those terms continues to be excluded from jurisdiction. For example, if an artificial pond created by excavating land to collect and retain water is initially used exclusively for stock watering, irrigation, settling basins, or rice growing but is subsequently used for a different purpose, the question has arisen whether that pond is still excluded from jurisdiction. Consistent with the agencies' longstanding practice, if a previously excluded feature no longer meets the terms of the exclusion, it is no longer excluded. If it no longer satisfies the terms of an exclusion, it would be jurisdictional if it otherwise meets the definition of "waters of the United States" under this rule.

The agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes, such as animal habitat, water retention, or recreation. For example, artificial lakes and ponds that are created by excavating dry land to collect and retain water for stock watering are often extensively used by waterfowl and other wildlife. The agencies' historic practice, which the agencies intend to continue under this rule, is to consider these features as excluded even when there is another incidental beneficial use of the feature.

The artificial lakes and ponds exclusion applies only to those lakes and ponds that satisfy the terms of the exclusion. Paragraph (a)(2) impoundments are not covered under this exclusion. This exclusion only applies to features that were excavated in dry land or were diked in dry land. Paragraph (a)(2) impoundments are not excavated in dry land or diked in dry land. However, consistent with the agencies' longstanding practice, when

an applicant receives a permit to impound "waters of the United States" to construct a waste treatment system, the resulting waste treatment system is subject to that exclusion as long as it is used for this permitted purpose. *See* the discussion above regarding waste treatment systems.

Artificial lakes and ponds that satisfy the terms of the exclusion would not be jurisdictional under this rule even if they have a hydrologic surface connection to "waters of the United States." Non-jurisdictional conveyances created in dry land that are physically connected to and are a part of the excluded feature remain excluded.

Swales and erosional features are excluded when characterized by low volume, infrequent, or short duration flow. Swales are generally shallow features in the landscape that may convey water across dry land areas during and following storm events and typically have grass or other low-lying vegetation throughout the swale. While a swale is a discrete topographic feature, it does not have a defined channel, nor an OHWM. This distinguishes a swale from an ephemeral stream because ephemeral streams typically have a channel and at least one indicator of an OHWM. *See* section IV.A.ii of the Technical Support Document for additional discussion of swales. Erosional features can typically be distinguished from swales because erosional features are generally deeper than swales and have an absence of vegetation. Erosional features can be distinguished from tributaries by the absence of a channel and an OHWM. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with a channel and OHWM. Some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a channel and an OHWM. Regardless of the name they are given locally, waters that are tributaries under this rule are not excluded erosional features. *See* Technical Support Document section IV.A.ii for additional discussion on how to distinguish between tributaries, swales, and erosional features.

Erosional features like rills and gullies also typically lack a defined channel and an OHWM. Rills are very small incisions formed by overland water flows eroding the soil surface during rainstorms. Rills are less permanent on the landscape than streams. Gullies tend to be much smaller than streams, and are often deeper than they are wide, with very steep banks. Gullies are commonly found in areas without much

vegetation or with soils that are prone to erosion.

8. Other Definitions

The final rule regulatory text defines the terms "wetlands," "high tide line," "ordinary high water mark," and "tidal water." The definitions of these four terms in the final rule are identical to the definitions of these terms in the 1986 regulations, 2019 Repeal Rule, and 2020 NWPR. While the 1986 regulations included these definitions only in the Corps' regulations, not EPA's regulations, the 2015 Clean Water Rule and 2020 NWPR included these definitions in both agencies' regulations. To provide additional clarity and consistency in comparison to the 1986 regulations, the final rule includes these definitions in both agencies' regulations. The agencies are not amending the definitions of these terms from the 1986 regulations.

The regulatory text in the final rule also defines the term "adjacent." The agencies amended the definition of "adjacent" in the 2020 NWPR but are returning to the longstanding definition of that term in the 1986 regulations. Returning to the definition of "adjacent" from the 1986 regulations is consistent with the agencies' intent to return to the pre-2015 regulatory regime's approach to "waters of the United State." This section briefly describes these five definitions and their history and implementation. *See* section IV.G of this preamble and previous sections of IV.C of this preamble above for further discussion on implementation.

Many commenters suggested that the agencies include additional definitions in this rule, including definitions for "navigable"; "similarly situated"; "tributary"; and "physical integrity," "chemical integrity," and "biological integrity." The agencies find that the regulatory text in this rule and the preamble's explanation of the regulatory text clearly present the agencies' definition of "waters of the United States" and that additional definitions are not needed. Moreover, the agencies seek to avoid regulatory language that is overly detailed or prescriptive, as interpretations of some of these terms could vary depending on the region or evolve over time with scientific advances.

a. Wetlands

This rule makes no changes to the definition of "wetlands" contained in the 1986 regulations (and in the 2020 NWPR, which made no changes to the 1986 regulation). "Wetlands" are defined as "those areas that are inundated or saturated by surface or

ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” Wetlands have been defined in the Corps’ regulations since 1975 and in EPA’s regulations since 1979, with only minor differences from the 1986 regulations. The agencies are not amending this longstanding definition in this rule.

Wetlands, including “the classic swamplands in the Southeast, such as the great Okefenokee, the Great Swamp of New Jersey, . . . the majestic, sweeping marshes of the Everglades, the remote Alakai in Hawaii, and the tiny bogs of New England,” Senate Debate, August 4, 1977, Comments of Mr. Chafee at 13560, are “transitional areas between terrestrial and aquatic ecosystems.” Science Report at 2–5. Scientific systems for classifying areas as wetlands vary but typically include three components: “the presence of water, either at the surface or within the root zone,” “unique soil conditions,” and the presence of vegetation “adapted to the wet conditions.”¹²¹ The agencies’ longstanding definition of wetlands, unchanged in this rule, requires these three factors of hydrology, hydric soils, and hydrophytic vegetation under normal circumstances.

Due to the many important functions that wetlands perform that impact the integrity of paragraph (a)(1) waters, wetlands have long been considered waters that can be subject to Clean Water Act jurisdiction. The Corps first added wetlands explicitly in the definition of “waters of the United States” in 1975 and EPA did the same in 1979. 40 FR 31320, 31324–5 (July 25, 1975); 44 FR 32854, 32901 (June 7, 1979). In contrast, as discussed in section IV.C.7 of this preamble, dry lands are areas that do not meet all three wetland factors and that are not other waterbody types (such as lakes, ponds, streams, ditches, and impoundments). For example, an area that under normal circumstances contains only hydrophytic vegetation without the presence of wetland hydrology and hydric soils and that lacks an OHWM would typically be considered dry land. Only those wetlands that meet the provisions to be a paragraph (a)(1) water, jurisdictional adjacent wetland, paragraph (a)(2) impoundment, or paragraph (a)(5) water would be

considered “waters of the United States” under this rule.

As under prior regimes, wetlands are identified in the field in accordance with the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and applicable regional delineation manuals. Field work is often necessary to confirm the presence of a wetland and to accurately delineate its boundaries. However, in addition to field observations on hydrology, vegetation, and soils, remote tools and resources can be used to support the identification of a wetland.¹²²

b. Adjacent

This rule defines the term “adjacent” with no changes from the 45-year-old definition. “Adjacent” is defined as “bordering, contiguous, or neighboring. Wetlands separated from other ‘waters of the United States’ by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” This is a longstanding and familiar definition that is supported by the text of the statute, Supreme Court case law, and science. *See, e.g., Riverside Bayview*, 474 U.S. at 134 (“[T]he Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”). Thus, the longstanding definition of “adjacent” reasonably advances the objective of the Clean Water Act. To be jurisdictional under this rule, however, wetlands must meet this definition of adjacent *and* either be adjacent to a traditional navigable water, the territorial seas, or an interstate water, *or* otherwise fall within the adjacent wetlands provision and meet either the relatively permanent standard or the significant nexus standard. The determination of whether a wetland is “adjacent” is distinct from whether an “adjacent” wetland meets the relatively permanent standard; however, wetlands that have a continuous surface connection to a relatively permanent water meet the definition of “adjacent” and are,

therefore, a subset of adjacent wetlands. *See* section IV.C.5 of this preamble for further discussion of the adjacent wetlands provision of this rule.

The longstanding definition, by its terms, does not require flow from the wetland to the jurisdictional water or from the jurisdictional water to the wetland (although such flow in either direction can be relevant to the determination of adjacency). The Supreme Court in *Riverside Bayview*, in deferring to the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands as an “adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act,” rejected an argument that such wetlands had to be the result of flow in a particular direction to be adjacent: “This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams, and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may ‘serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species.’” 447 U.S. at 134–35.

The agencies will continue their longstanding practice under this definition and consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters. All wetlands that directly abut jurisdictional waters have an unbroken surface or shallow subsurface connection because they physically touch the jurisdictional water. Wetlands that do not directly abut a jurisdictional water may have an unbroken surface or shallow subsurface connection to jurisdictional waters. Water does not need to be continuously present in the surface or shallow subsurface connection. Second, they are physically separated from jurisdictional waters by “man-made dikes or barriers, natural

¹²² Examples include USGS topographic maps (available at <https://www.usgs.gov/the-national-map-data-delivery/topographic-maps>), NRCS soil maps and properties of soils including flood frequency and duration, ponding frequency and duration, hydric soils, and drainage class (available at <https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx> or via the NRCS Soil Survey Geographic Database (SSURGO) available at <https://catalog.data.gov/dataset/soil-survey-geographic-database-ssurgo>), aerial or high-resolution satellite imagery, high-resolution elevation data (e.g., <https://apps.nationalmap.gov/downloader/#/>), and NWI maps (available at <https://www.fws.gov/program/national-wetlands-inventory/wetlands-mapper>).

¹²¹ *See* William J. Mitsch & James G. Gosselink, *Wetlands* at 29 (5th ed. 2015).

river berms, beach dunes, and the like.” Or third, their proximity to a jurisdictional water is reasonably close, such that “adjacent wetlands have significant effects on water quality and the aquatic ecosystem.” *Riverside Bayview*, 474 U.S. at 135 n.9. See section IV.C.5 of this preamble.

“Adjacent” under the well-established definition the agencies are maintaining in this rule includes wetlands separated from other “waters of the United States” by “man-made dikes or barriers, natural river berms, beach dunes, and the like.” Such adjacent wetlands continue to have a hydrologic connection to the water to which they are adjacent because constructed dikes or barriers, natural river berms, beach dunes, and the like typically do not block all water flow. This hydrologic connection can occur via seepage or over-topping, where water from the nearby traditional navigable water, interstate water, the territorial seas, impoundment, or tributary periodically overtops the berm or other similar feature. Water can also overtop a natural berm or artificial dike and flow from the wetland to the water to which it is adjacent. As noted above, the Supreme Court has concluded that adjacent wetlands under this definition are not limited to only those that exist as a result of “flooding or permeation by water having its source in adjacent bodies of open water,” and that wetlands may affect the water quality in adjacent waters even when those waters do not actually inundate the wetlands. *Riverside Bayview*, 474 U.S. at 134–35. In addition, river berms, natural levees, and beach dunes are all examples of landforms that are formed by natural processes and do not isolate adjacent wetlands from the streams, lakes, or tidal waters that form them. River berms, natural levees, and the wetlands and waters behind them are part of the floodplain. Natural levees are discontinuous, and the openings in these levees allow for a hydrologic connection to the stream or river and thus the periodic mixing of river water and backwater. Beach dunes are formed by tidal or wave action, and the wetlands that establish behind them experience a fluctuating water table seasonally and yearly in synchrony with sea or lake level changes. The terms “earthen dam,” “dike,” “berm,” and “levee” are used to describe similar constructed structures whose primary purpose is to help control flood waters. Such levees and similar structures also do not isolate adjacent wetlands.

In addition, adjacent wetlands separated from a jurisdictional water by

a natural or man-made¹²³ berm serve many of the same functions as other adjacent wetlands. There are also other important considerations, such as chemical and biological functions provided by the wetland. For instance, adjacent waters behind berms can still serve important water quality functions, including filtering pollutants and sediment before they reach other jurisdictional waters and ultimately a paragraph (a)(1) water. Wetlands behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. Adjacent wetlands separated from jurisdictional waters by berms and the like also maintain ecological connection with those waters. For example, wetlands behind natural and artificial berms can provide important habitat for aquatic and semi-aquatic species that use both the wetlands and the nearby water for basic food, shelter, and reproductive requirements. Though a berm may reduce habitat functional value and may prevent some species from moving back and forth from the wetland to the nearby jurisdictional water, many species remain able to use both habitats despite the presence of such a berm. In some cases, the natural landform or artificial barrier can provide extra refuge from predators, for rearing young, or other life cycle needs.

The agencies received a number of comments on the definition of “adjacent.” Many commenters supported the continued use of the well-established definition, while several commenters suggested that the agencies should use only the relatively permanent standard or continue the approach to adjacent wetlands that was included in the 2020 NWPR. Some commenters critiqued the proposed definition of “adjacent,” with some stating that the definition was “overly-broad and ambiguous.” A commenter asserted that the word “adjacent” should be given its plain meaning for the sake of regulatory certainty, adding that the term “neighboring” within the definition of “adjacent” goes “beyond the ordinary understanding” of adjacency. The agencies disagree with these commenters and are finalizing the longstanding definition of “adjacent.” In section IV.A.3.b.ii of this preamble, the agencies concluded that the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act.

¹²³ While the agencies use the phrase “human-made” in place of “man-made” in many instances throughout this preamble, they are retaining the phrase “man-made” in the regulatory text’s definition of “adjacent” to maintain consistency with the 1986 regulatory text.

The 2020 NWPR’s limits on the scope of jurisdictional adjacent wetlands were based on an interpretation of the relatively permanent standard. Therefore, the agencies have concluded that the 2020 NWPR’s approach to adjacent wetlands is inconsistent with the statute for the same reasons the relatively permanent standard is when used as the sole standard. The record demonstrates the effects of wetlands on the integrity of paragraph (a)(1) waters when they have other types of surface connections, such as wetlands that overflow and flood jurisdictional waters or wetlands with less frequent surface water connections; wetlands with shallow subsurface connections to other protected waters; wetlands separated from other protected waters by artificial barriers but that lack a direct hydrologic surface connection to those waters in a typical year; or other wetlands proximate to jurisdictional waters. As discussed in section IV.B.3 of this preamble, within the first year of implementation of the 2020 NWPR, 70% of streams and wetlands evaluated were found to be non-jurisdictional, including 15,675 wetlands that did not meet the 2020 NWPR’s revised adjacency criteria. The substantial increase in waters lacking Federal protection compromises the agencies’ ability to fulfill the objective of the Clean Water Act to protect the integrity of a large swath of the nation’s waters (see section IV.B.3 of this preamble). Neither Tribal nor State regulations have been passed to fill this gap.

Retaining the longstanding definition of “adjacent” is also consistent with *Riverside Bayview* and Justice Kennedy’s opinion in *Rapanos*, as well as with scientific information indicating that wetlands meeting this definition provide important functions that contribute to the integrity of traditional navigable waters, the territorial seas, and interstate waters. See section IV.A of this preamble.

The agencies agree with commenters who stated that it is appropriate to include wetlands behind natural and artificial berms and the like as adjacent wetlands for the reasons discussed in section IV.A of this preamble. As noted above, adjacent wetlands behind natural and artificial berms can serve important water quality functions, such as filtering pollutants and sediment before they reach other jurisdictional waters and ultimately paragraph (a)(1) waters, and can help reduce the impacts of storm surges caused by hurricanes; see also section III.B of the Technical Support Document. The Supreme Court in *Riverside Bayview* deferred to the agencies’ interpretation of the Clean

Water Act to include adjacent wetlands. *Riverside Bayview*, 474 U.S. at 135 (“[T]he Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. . . . [W]e therefore conclude that a definition of ‘waters of the United States’ encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.”). Justice Kennedy stated: “In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps’ definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.” *Rapanos*, 547 U.S. at 775.

The agencies also disagree that regulatory certainty requires revision of the definition of adjacent, including deleting the term “neighboring.” Regulatory certainty is provided by the fact that the agencies are retaining the definition that has been in place for decades and will continue to interpret and implement it as they have for decades. In addition, the longstanding regulation properly defines the term “adjacent” for purposes of the Clean Water Act because it is based on the concept of both reasonable proximity and scientific connections.

c. High Tide Line

This rule makes no changes to the definition of “high tide line” contained in the 1986 regulations (and in the 2020 NWPR, which made no changes to the 1986 regulation). The term “high tide line” is defined as “the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of

the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.” The agencies are not amending this definition. This definition has been in place since 1977 (see 42 FR 37144 (July 19, 1977); 33 CFR 323.3(c) (1978)), and like the definitions discussed above, is a well-established definition that is familiar to regulators, environmental consultants, and the scientific community. This term defines the landward limits of jurisdiction in tidal waters when there are no adjacent non-tidal “waters of the United States.” 51 FR 41206, 41251 (November 13, 1986).

d. Ordinary High Water Mark

This rule makes no changes to the definition of “ordinary high water mark” (“OHWM”) contained in the 1986 regulations (and in the 2020 NWPR, which made no changes to the 1986 regulation). OHWM is defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 CFR 328.3(e) (2014). This term, unchanged since 1977, see 41 FR 37144 (July 19, 1977), defines the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands. When adjacent wetlands are present, Clean Water Act jurisdiction extends beyond the OHWM to the limits of the adjacent wetlands. 33 CFR 328.4; RGL 05–05 at 1 (December 7, 2005).

e. Tidal Water

This rule makes no changes to the definition of “tidal water” contained in the 1986 regulations (and in the 2020 NWPR, which made no changes to the 1986 regulation). The term “tidal water” is defined as “those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.” Although the term “tidal waters” was referenced throughout the Corps’ 1977 regulations, including the preamble (see, e.g., 42 FR 37123, 37128, 37132, 37144, 37161 (July 19, 1977)), it was not defined in regulations until 1986. As explained in the preamble to the 1986 regulations, this definition is

consistent with the way the Corps has traditionally interpreted the term. 51 FR 41217, 41218 (November 13, 1986). The agencies are not amending this definition in this rule.

9. Significantly Affect

a. This Rule

As discussed above, waters are protected by the Clean Water Act under this rule if they meet the significant nexus standard; that is, they alone, or in combination with other similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of the waters identified in paragraph (a)(1) of this rule. This rule defines the term “significantly affect” for these purposes to mean “a material influence on the chemical, physical, or biological integrity of” a paragraph (a)(1) water. Under this rule, waters, including wetlands, are evaluated either alone or in combination with other similarly situated waters in the region based on the functions the evaluated waters perform. This rule identifies specific functions that will be assessed¹²⁴ and identifies specific factors that will be considered when determining whether the functions provided by the water, alone or in combination, have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. Thus, the significant nexus standard concerns the effects of waters on paragraph (a)(1) waters; it is not an assessment of whether a particular discharge of a pollutant will have an effect on a paragraph (a)(1) water, although, of course, contribution of flow and the associated transport of pollutants are important functions of upstream waters and are identified in the rule. Essentially, this provision of the rule provides regulators and the public with a clear framework for the significant nexus analysis that will be done on a case-specific basis under the rule: (1) the functions that will be assessed are clearly identified and constitute the “nexus” between the waters being assessed and the paragraph (a)(1) water, and (2) the logical and practical factors that will be considered to figure out the strength, or “significance,” of those functions for the integrity of the paragraph (a)(1) water are explicitly established.

The functions identified in the rule are based on the well-known benefits that lakes and ponds, streams, and

¹²⁴ The agencies are not requiring the use of “functional assessments” for significant nexus analyses under this rule; see section IV.C.9.c of this preamble for further discussion.

wetlands can provide to paragraph (a)(1) waters. *See* section IV.A.2.c of this preamble. Wetlands, for example, function like natural tubs or sponges, storing water and slowly releasing it. This process slows the water's momentum and erosive potential, reduces flood heights, and allows for groundwater recharge, which contributes baseflow to surface water systems during dry periods. An acre of wetland can store 1–1.5 million gallons of floodwater. After being slowed by a wetland, water moves around plants, allowing the suspended sediment to drop out and settle to the wetland floor. Nutrients that are dissolved in the water are often absorbed by plant roots and microorganisms in the soil. Other pollutants stick to soil particles. In many cases, this filtration process removes much of the water's nutrient and pollutant load by the time it leaves a wetland. Wetlands are also some of the most biologically productive natural ecosystems in the world, comparable to tropical rain forests and coral reefs in their productivity and the diversity of species they support. Abundant vegetation and shallow water provide diverse habitats for fish and wildlife. Seventy-five percent of commercially harvested fish are wetland-dependent. Add shellfish species and that number jumps to 95 percent. Streams are the dominant source of water in most rivers, and they also convey water into local storage compartments, such as ponds, shallow aquifers, or stream banks, that are important sources of water for maintaining baseflow in rivers. Discharging pollutants or filling in some lakes and ponds, streams, and wetlands reduces the amount of rainwater, runoff, and snowmelt the stream network can absorb before flooding. The increased volume of water in small streams scours stream channels, changing them in a way that promotes further flooding. Such altered channels have bigger and more frequent floods. The altered channels are also less effective at recharging groundwater, trapping sediment, and recycling nutrients. As a result, downstream lakes and rivers have poorer water quality, less reliable water flows, and less diverse aquatic life. Algal blooms and fish kills can become more common, causing problems for commercial and sport fisheries. Recreational uses may be compromised. In addition, the excess sediment can be costly, requiring additional dredging to clear navigational channels and harbors and increasing water filtration costs for municipalities and industry. *See, e.g.*, sections I and III of the Technical Support Document. So

the significant nexus standard is focused on identifying those lakes and ponds, streams, and wetlands that provide these well-understood functions such that they need baseline Federal protections under the Clean Water Act in order to protect the integrity of traditional navigable waters, the territorial seas, and interstate waters. As discussed elsewhere, a determination that a water falls within the definition of "waters of the United States" does not mean that discharges or activities cannot occur in that water. *See* section IV.C.10 of this preamble.

The functions assessed in this rule are well-known indicators that are tied to the chemical, physical, or biological integrity of paragraph (a)(1) waters. The functions assessed are: contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in paragraph (a)(1) waters; or provision of habitat and food resources for aquatic species located in paragraph (a)(1) waters.

The factors considered in this rule are readily understood criteria that influence the types and strength of chemical, physical, or biological connections and associated effects on paragraph (a)(1) waters. In other words, the factors are site-specific conditions that influence the strength of the functions that lakes and ponds, streams, and wetlands provide to paragraph (a)(1) waters. These factors include the distance from a paragraph (a)(1) water; hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; the size, density, or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall, and snowpack. The first two factors identified in the regulatory definition are key to a significant nexus determination: distance and hydrology. The definition of "significantly affect" is derived from the objective of the Clean Water Act and is informed by and consistent with Supreme Court case law. It is also informed by the agencies' technical and scientific judgment and supported by the best available science regarding the functions provided by upstream waters to paragraph (a)(1) waters relevant to achieving the Clean Water Act's objective. The significant nexus standard in this rule is carefully constructed to fall within the bounds of the Clean Water Act. Not all waters subject to evaluation under the

significant nexus standard will have the requisite connection to paragraph (a)(1) waters sufficient to be determined jurisdictional.

In conducting a significant nexus evaluation, the agencies will consider each factor in the rule to evaluate the likely strength of any effect of functions on a paragraph (a)(1) water. For example, in evaluating a stream, under the first factor, the agencies will consider the distance of the stream from the paragraph (a)(1) water. Under the second factor, the agencies will consider hydrologic factors, such as the amount of water from the stream that reaches the paragraph (a)(1) water. Under the third factor, the agencies will consider the size, density, or number of similarly situated waters, such as, for example, the length, width, and depth of the stream. Under the fourth factor, the agencies will evaluate landscape position and geomorphology, such as the soil type and slope between the stream and the paragraph (a)(1) water. Finally, under the fifth factor, the agencies will evaluate the climate in the area of the stream, such as whether high temperatures lead to high evaporation rates. After noting the relevant factors, agencies will then apply them to the list of functions to determine the strength of the functions that the stream provides to the paragraph (a)(1) water. As noted above, the first two factors, distance from the paragraph (a)(1) water and hydrology, will generally be given the greatest weight in the assessment of functions provided.

The agencies regularly determine that waters do not have the requisite significant nexus. First, the standard is limited to consideration of effects on traditional navigable waters, the territorial seas, and interstate waters. Second, the standard is limited to effects only on the three statutorily identified aspects of those fundamental waters: chemical, physical, or biological integrity. Third, the standard cannot be met by merely speculative or insubstantial effects on those aspects of those paragraph (a)(1) waters, but rather requires the demonstration of a "material influence." In this rule, the agencies have specified that a "material influence" is required for the significant nexus standard to be met. The phrase "material influence" establishes that the agencies will be assessing the influence of the waters either alone or in combination on the chemical, physical, or biological integrity of a paragraph (a)(1) water and will provide qualitative and/or quantitative information and articulate a reasoned basis for determining that the waters being

assessed significantly affect a paragraph (a)(1) water.

This section of the preamble addresses public comment on the definition of “significantly affect” and on the agencies’ interpretation and implementation of the definition. This section then provides the agencies’ general approach to implementation of the definition, including elements of the definition such as “similarly situated” and “in the region” for purposes of a significant nexus analysis. Discussion of the agencies’ approach to implementation of the significant nexus standard for particular categories of waters can be found in the sections of this preamble addressing tributaries, adjacent wetlands, and paragraph (a)(5) waters. See sections IV.C.4.c, IV.C.5.c, and IV.C.6.c of this preamble.

b. Summary of the Agencies’ Consideration of Public Comments and Rationale for This Rule

i. Comments on the Definition of “Significantly Affect”

The agencies received numerous comments on the definition of “significantly affect,” including the standard established by the definition, and the factors and functions.

Some commenters asserted that the phrase “more than speculative or insubstantial” in the proposed rule is open-ended, subjective, broad, and could increase the number of jurisdictional waters as compared to the pre-2015 regulatory regime. Commenters were concerned that while waters that have speculative or insubstantial effects on paragraph (a)(1) waters do not meet the significant nexus standard, the proposed language was unclear and implied that no additional findings were required. In response to public comment, this rule replaces the phrase “more than speculative or insubstantial” effects in the definition of “significantly affect.” Commenters were concerned that while waters that have speculative or insubstantial effects on paragraph (a)(1) waters do not meet the significant nexus standard, the proposed language was unclear and implied that no additional findings were required. This rule requires that waters have a “material influence,” and the agencies have concluded that this term will increase the clarity and transparency of this rule.

The agencies have concluded that this term will increase the clarity of this rule. In assessing whether a water meets the significant nexus standard, the agencies will continue to examine the “influence” of the subject waters on the paragraph (a)(1) water. And the

“influence” must be “material”—the agencies must explain why the subject waters, either alone or in combination with similarly situated waters, matters to the integrity of the paragraph (a)(1) water. The word “material” also reflects not only that the influence is, of course, more than speculative or insubstantial, but that the agencies will provide qualitative and/or quantitative information and articulate a reasoned basis for determining that a significant nexus exists, consistent with longstanding practice. The phrase “material influence” thus reflects the agencies’ longstanding position that significant nexus determinations should be supported by the factual record, relevant scientific data and information, and available tools. And that record, data and information, and tools must show, either quantitatively or qualitatively based on the five factors, that the subject waterbody provides functions that materially influence the chemical, physical, or biological integrity of a paragraph (a)(1) water. The agencies have provided a number of examples in this section of waters that do not have a “material influence,” and therefore do not meet the significant nexus standard. The agencies will continue to document the required findings as part of the administrative record. See, for example, direction to field staff under the *Rapanos* Guidance at 11 (“Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands.”).

Some commenters supported the proposed definition of “significantly affect” as “more than speculative or insubstantial” effects on paragraph (a)(1) waters. Other commenters asserted that “more than speculative or insubstantial” does not mean an effect is significant, and some of these commenters requested that the agencies use quantitative or statistical thresholds to determine significance. Commenters generally requested clarification on how to determine if effects are significant or not. One commenter recommended that waters should be considered to “significantly affect” downstream jurisdictional waters unless a science-based determination shows that the effects are so speculative or insubstantial as to not affect the integrity of downstream waters. Another

commenter recommended that an effect should only be significant if it would cause the paragraph (a)(1) water to exceed applicable water quality standards.

The agencies disagree that a quantitative or statistical threshold should be required to determine significance for several reasons. First, the statute contains no text suggesting that the scope of the “waters of the United States” must be identified based on a quantitative or statistical threshold, nor is a quantitative or statistical assessment necessary to meet the statutory objective the definition is designed to achieve: “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). Second, such an approach would be unworkable given the extensive regional differences in water systems and the variability of individual waterbodies across the nation. For this reason, the agencies have long established the practice of site-specific assessment. Third, the appellate courts have not held that the term “significant” for purposes of Clean Water Act jurisdiction requires statistical significance or quantitative measurement. See, e.g., *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng’rs*, 603 Fed. Appx. 149, 151–52 (4th Cir. 2015) (“*Precon II*”) (unpublished opinion); *Cundiff*, 555 F.3d at 211 (“Though no doubt a district court could find such evidence persuasive, the *Cundiffs* point to nothing—no expert opinion, no research report or article, and nothing in any of the various *Rapanos* opinions—to indicate that [laboratory analysis] is the sole method by which a significant nexus may be proved . . .”). The Court of Appeals for the Fourth Circuit has noted that the standard “is a ‘flexibly ecological inquiry,’” and that “[q]uantitative or qualitative evidence may support [applicability of the CWA].” *Precon II*, 603 Fed. Appx. at 151–52 (citation omitted). The same court also has clarified that the burden of establishing applicability of the Clean Water Act should not be “unreasonable.” *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 297 (4th Cir. 2011) (“*Precon I*”). While the appellate courts have accepted laboratory analysis or quantitative or empirical data, see, e.g., *United States v. Donovan*, 661 F.3d 174, 186 (3d Cir. 2011); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000–1001 (9th Cir. 2007), such quantitative evidence is not required. *Precon I*, 633 F.3d at 294 (“We agree that the significant nexus test does

not require laboratory tests or any particular quantitative measurements in order to establish significance.”). The appellate courts have accepted a variety of evidence, including but not limited to, photographs, visual observation of stream condition, flow and morphology, studies, dye tests, scientific literature, maps, aerial photographs, and remote sensing data. *United States v. Lucas*, 516 F.3d 316, 326–27 (5th Cir. 2008); see also *Deerfield Plantation Phase II–B Property Owners Ass’n v. U.S. Army Corps of Eng’rs*, 501 Fed. Appx. 268, 270 (4th Cir. 2012) (unpublished opinion) (noting that in addition to conducting two site visits, the Corps relied upon infrared aerial photography, agency records, a county soil survey, a topographic map, and a wetland inventory); *Donovan*, 661 F.3d at 185–86. As under the pre-2015 regulatory regime, the agencies will continue to reasonably determine, based on the record before them, if a water, either alone or in combination with similarly situated waters in the region, significantly affects a paragraph (a)(1) water.

Some commenters agreed with the agencies that a water may constitute “waters of the United States” when it significantly affects any one form of chemical, physical, or biological integrity of a paragraph (a)(1) water. However, other commenters disagreed and stated that a water should significantly affect all three forms of integrity—chemical, physical, and biological—to be considered “waters of the United States.” Some of these commenters asserted that the use of “or” has the potential to greatly expand the scope of jurisdiction. The agencies disagree that this approach would expand the scope of jurisdiction because it is consistent with the pre-2015 regulatory regime and longstanding practice. The agencies acknowledge that Justice Kennedy used the conjunction “and” when concluding that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos*, 547 U.S. at 780. However, the agencies disagree that the use of the word “and” in this context represents a holding by Justice Kennedy that only a water that alone or combination significantly affects every single aspect of integrity is jurisdictional. It is simply not reasonable to read Justice Kennedy’s opinion to stand for the proposition that

a wetland that provides important pollutant retention and trapping functions that protect the chemical integrity of a paragraph (a)(1) water and also provides important benefits for the salmon population of that river is not jurisdictional because it does not also significantly affect the physical structure of that water. In any case, the agencies are not implementing a Supreme Court opinion, but rather are construing the Clean Water Act, as informed by relevant Supreme Court opinions. Congress intended the Clean Water Act to “restore and maintain” all three forms of “integrity,” section 101(a), so if any one of them is compromised, then the statute’s stated objective would be contravened. It would be contrary to the plain language of the statute and subvert the law’s objective if the Clean Water Act only protected paragraph (a)(1) waters upon a showing that there were effects on every attribute of their integrity. This interpretation is consistent with the agencies’ longstanding position. As the agencies stated in the *Rapanos* Guidance: “Consistent with Justice Kennedy’s instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.” *Rapanos* Guidance at 10 & n.35.

Some commenters stated that the proposed definition of “significantly affect” was too expansive and would allow the agencies to assert jurisdiction over any body of water, no matter the size, even if connections are remote or scientifically questionable. Some commenters asserted that overall, the proposed definition of “significantly affect” was unclear, difficult to understand, and provides the agencies with too much discretion to make jurisdictional decisions. A couple of these commenters stated that the definition would require case-by-case assessments and as a result, the approach does not give fair notice to stakeholders of when the Clean Water Act applies. The agencies disagree for the reasons outlined below, including that this rule’s definition of “significantly affect” is consistent with case law and the science and places appropriate limitations on the significant nexus standard.

The agencies’ definition of the term “significantly affect” in this rule is linked directly to the objective of the Act and to the effects upstream waters have on the water quality of paragraph (a)(1) waters. The definition is also informed by and consistent with Supreme Court case law addressing the scope of “waters of the United States.”

Beginning with *Riverside Bayview*, the Supreme Court stated that the “objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, ‘the word “integrity” . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained.’ H.R. Rep. No. 92–911, p. 76 (1972).” 474 U.S. at 132. The definition of “significantly affect” finds further support in the Court’s conclusion that: “If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” *Id.* at 138 n.9. The majority opinion in *SWANCC* introduced the phrase “significant nexus” as the concept that informed the Court’s reading of Clean Water Act jurisdiction over waters that are not navigable in fact. 531 U.S. at 167, 172. Based on *SWANCC*, Justice Kennedy’s concurrence in *Rapanos* stated that to constitute “waters of the United States” covered by the Clean Water Act, “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172). And five Justices support jurisdiction under Justice Kennedy’s conclusion that wetlands possess the requisite significant nexus if the wetlands “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 547 U.S. at 780.

Justice Kennedy’s assessment of the facts and the evidence in the cases before the justices further inform the scope of this rule’s definition of “significantly affect.” In *Rapanos*, Justice Kennedy stated that in both the consolidated cases before the Court the record contained evidence suggesting the possible existence of a significant nexus according to the principles he identified. See *id.* at 783. Justice Kennedy concluded that “the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid.” *Id.* Justice Kennedy remanded the cases because neither the agency nor the reviewing courts applied the proper legal standard. See *id.* Justice Kennedy was clear however, that “[m]uch the same

evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected.” *Id.* at 784.

With respect to one of the wetlands at issue in the consolidated *Rapanos* cases, Justice Kennedy stated: “In *Carabell*, No. 04–1384, the record also contains evidence bearing on the jurisdictional inquiry. The Corps noted in deciding the administrative appeal that ‘[b]esides the effects on wildlife habitat and water quality, the [district office] also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology.’ . . . The Corps’ evaluation further noted that by ‘eliminat[ing] the potential ability of the wetland to act as a sediment catch basin,’ the proposed project ‘would contribute to increased runoff and . . . accretion along the drain and further downstream in Auvase Creek.’ And it observed that increased runoff from the site would likely cause downstream areas to ‘see an increase in possible flooding magnitude and frequency.’” *Id.* at 785–86 (citations omitted). Justice Kennedy also expressed concern that “[t]he conditional language in these assessments—‘potential ability,’ ‘possible flooding’—could suggest an undue degree of speculation.” *Id.* at 786. Justice Kennedy’s observations regarding the underlying case inform this rule’s definition of “significant nexus”: the functions and factors established by the definition are consistent with those identified as relevant by Justice Kennedy, and the requirement that waters have a “material influence” on paragraph (a)(1) waters ensures that the assessment under the significant nexus standard is well-documented and reasonable based on that record.

This rule’s definition of “significantly affect” is also consistent with the best available information, as summarized in the Science Report and the Technical Support Document. *See* section III.E of the Technical Support Document. The Science Report concluded that watersheds are integrated at multiple spatial and temporal scales by flows of surface water and ground water, transport and transformation of physical and chemical materials, and movements of organisms. Further, the Science Report stated, although all parts of a watershed are connected to some degree—by the hydrologic cycle or dispersal of organisms, for example—the degree and downstream effects of

those connections vary spatially and temporally, and are determined by characteristics of the chemical, physical, and biological environments and by human activities. Those spatial and temporal variations are reflected in the agencies’ final rule defining “significantly affect” to mean “a material influence,” in the functions the agencies assess, and in the factors they use to consider the strength of those functions.

The agencies have more than a decade of experience implementing the significant nexus standard by making determinations of whether a water alone or in combination with similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a paragraph (a)(1) water. The agencies under the pre-2015 regulatory regime routinely conducted case-specific significant nexus analyses and in many cases concluded that there was no significant nexus. Based on the agencies’ experience, many waters under this rule will not have a significant nexus to paragraph (a)(1) waters, and thus will not be jurisdictional under the Clean Water Act. The agencies also note that the vast majority of resources assessed in approved jurisdictional determinations under the *Rapanos* Guidance were not assessed under the significant nexus standard. Historically, roughly 12% of resources assessed in approved jurisdictional determinations under the *Rapanos* Guidance required a significant nexus analysis. It is the agencies’ expectation that the number of significant nexus analyses will increase under this rule due to the assessment of waters under paragraph (a)(5) pursuant to the significant nexus standard, but it is correspondingly expected that the percent of resources found to be jurisdictional under significant nexus analyses will decrease because generally waters will be assessed individually under paragraph (a)(5) to determine if they meet the significant nexus standard (*see* section I.B.3.6 of the Economic Analysis for the final rule).

The agencies disagree that the definition of “significantly affect” and the associated case-by-case assessments do not give fair notice to stakeholders of when the Clean Water Act applies. Because of the factual nature of the jurisdictional inquiry, any standard will require some case-specific factual determinations. The 2020 NWPR acknowledged that “[a]s to simplicity and clarity, the agencies acknowledge that field work may frequently be necessary to verify whether a feature is a water of the United States.” 85 FR

22270 (April 21, 2020). As the Supreme Court has recently recognized in *Maui*, the scope of Clean Water Act jurisdiction does not easily lend itself to bright lines: “In sum, we recognize that a more absolute position . . . may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes.” *Maui*, 140 S. Ct. at 1477. Like the Court in *Maui*, the agencies have established factors to be used in considering the strength of the effects on paragraph (a)(1) waters and have identified the functions they will assess in making significant nexus determinations under the proposed rule. This definition increases the implementability of this rule and is consistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes. This rule also clearly identifies the categories of waters subject to assessment under the relatively permanent standard and significant nexus standard and those features that are excluded from the definition of “waters of the United States.” *See* section IV.C.10 of this preamble for additional guidance to landowners on jurisdictional determinations.

Some commenters supported the specific list of factors in the proposed rule. Other commenters asserted that the list was broad and unclear, and some of these commenters stated that the factors would lead to subjective, unpredictable outcomes and lengthy project delays. Some commenters addressed specific aspects of the proposed factors. For example, some commenters stated that the proposed factor “distance from a paragraph (a)(1) water” and the proposed factor “distance from a water of the United States” were redundant. Other commenters requested that the agencies add factors on soil and watershed characteristics. Some commenters requested specific examples of how the factors would be implemented and considered together in a significant nexus determination.

The agencies disagree that the factors listed in the proposed rule were broad, subjective, and unclear. However, the agencies have modified the factors in response to public comments and to increase clarity in this rule. The agencies agree with commenters who asserted that distance from “waters of the United States” is not necessary to include in light of the other factors, such as distance from a paragraph (a)(1) water and landscape position and geomorphology, and have not included the factor in this rule. In response to

public comments requesting additional detail on how the factors will be applied, the agencies have modified the proposed language on “hydrologic factors, including subsurface flow” in this rule to provide additional specificity by referring to “hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow.” The agencies added a new factor on “landscape position and geomorphology” in response to public comments requesting that the agencies consider watershed and soil characteristics. Landscape position and geomorphology capture characteristics like topography, slope, and soil porosity which may, for example, affect the strength of the hydrologic or biological connections between the subject waters and a paragraph (a)(1) water.

Some commenters asserted that the proposed factors were only related to physical integrity, and requested that the agencies add factors that they asserted are related to chemical and biological integrity (e.g., water quality parameters, pH, or biological indicators). The agencies disagree that the factors are only related to physical integrity. The factors in this rule influence the types and strength of chemical, physical, or biological connections and associated effects that streams, wetlands, and open waters have on paragraph (a)(1) waters. As described further in section IV.C.9.c of this preamble, in general, identified functions coupled with stronger factors increase the likelihood of demonstrating a significant nexus. For example, similarly situated waters that have the capacity to trap or transform pollutants are more likely to affect the chemical integrity of a paragraph (a)(1) water if the similarly situated waters are closer to the paragraph (a)(1) water, or if there is a larger number or higher density of those similarly situated waters.

Many commenters on the proposal requested that the agencies add a specific list of functions that upstream wetlands and waters can provide to paragraph (a)(1) waters to the definition of “significantly affect.” The commenters differed in whether they thought the list should be exhaustive or non-exhaustive, and whether all functions need to be demonstrated or just one function needs to be demonstrated to support a significant nexus determination. Some commenters supported the use of functions listed in the proposed rule from the *Rapanos* Guidance in significant nexus determinations. Some commenters requested that the agencies consider

additional functions that are based on the best available science. Some commenters asserted that when functions such as flood storage and pollutant retention result from a lack of hydrologic connection, those functions should not be considered in a significant nexus analysis.

The agencies agree that including a list of functions in this rule would promote clarity and implementation consistency. The agencies selected a list of functions based on the functions identified in the *Rapanos* Guidance discussed in the preamble to the proposed rule, the agencies’ experience implementing the significant nexus standard, public comments on that list of functions, and consideration of the best available science. The functions in this rule that can be provided by tributaries, wetlands, and open waters are keyed to the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters. Additionally, assessment of the functions in this rule is consistent with the agencies’ implementation of the pre-2015 regulatory regime. See *Rapanos* Guidance at 8, 9. The agencies disagree with commenters who asserted that when functions such as flood storage and pollutant retention result from a lack of hydrologic connection, those functions should not be assessed in a significant nexus analysis. Such a rigid, categorical test would ignore that, even in the absence of a hydrologic connection, an upstream water could still have an important functional relationship to a downstream traditional navigable water, the territorial seas, or an interstate water, most notably where the upstream water retains floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, the territorial seas, or interstate water. See Technical Support Document section III.D.1; see also 547 U.S. at 775 (Kennedy, J., concurring in the judgment) (“[I]t may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.”).

The identification of each of the functions in this rule is supported by the best available science. The contribution of flow downstream is an important function, as upstream waters can be a cumulative source of the majority of the total mean annual flow to bigger downstream rivers and waters, including via the recharge of baseflow. Streams, wetlands, and open waters contribute surface and subsurface water downstream, and are the dominant sources of water in most rivers.

Contribution of flow can significantly affect the integrity of downstream paragraph (a)(1) waters, helping to sustain the volume of water in larger waters which also influences the concentrations of chemicals within those waters.

Trapping, transformation, filtering, and transporting materials (including nutrients, sediment, and other pollutants) are important functions influencing the integrity of paragraph (a)(1) waters. Sediment storage and export via streams to downstream waters is important for maintaining the physical river network, including the formation of channel features. Nutrient recycling in upstream waters results in the uptake and transformation of large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, thereby decreasing impairments of paragraph (a)(1) waters. Streams, wetlands, and open waters also improve water quality through the assimilation and sequestration of pollutants, including chemical contaminants such as pesticides and metals that can degrade the integrity of paragraph (a)(1) waters. Streams can also transport excess nutrients, excess sediment, and other pollutants downstream, such as the case of the tributaries in the Ohio River and Missouri River Basins that transport excess nitrogen downstream that contributes to “dead zones” in the Gulf of Mexico, or tributaries to the Guadalupe, San Joaquin, and Sacramento Rivers contributing contaminated mercury sediments from mine operations to San Francisco Bay. Contaminants are commonly transported from streams to larger downstream rivers bound to sediments.

Wetlands and small streams are particularly effective at retaining and attenuating floodwaters. Streams, wetlands, and open waters affect the physical integrity of paragraph (a)(1) waters by retaining large volumes of stormwater that could otherwise negatively affect the condition or function of those paragraph (a)(1) waters. This retention and subsequent slowed release of floodwaters can reduce flood peaks in paragraph (a)(1) waters and can also maintain river baseflows in paragraph (a)(1) waters by recharging alluvial aquifers.

Water temperature is critical to the distribution and growth of aquatic life in downstream waters, both directly (through its effects on organisms) and indirectly (through its effects on other physiochemical properties, such as dissolved oxygen and suspended solids). For example, water temperature controls metabolism and level of

activity in cold-blooded species like fish, amphibians, and aquatic invertebrates. Temperature can also control the amount of dissolved oxygen in streams, as colder water holds more dissolved oxygen, which fish and other fauna need to breathe. Tributaries provide both cold and warm water refuge habitats that are critical for protecting aquatic life in downstream paragraph (a)(1) waters. Floodplain wetlands and open waters also exert substantial controls on water temperature in the downgradient tributary network and ultimately in the paragraph (a)(1) water.

Streams, wetlands, and open waters supply habitat and food resources for paragraph (a)(1) waters, such as dissolved and particulate organic matter (e.g., leaves, wood), which support biological activity throughout the river network. In addition to organic matter, streams, wetlands, and open waters can also export other food resources downstream, such as aquatic insects that are the food source for fish in paragraph (a)(1) waters. The export of organic matter and food resources downstream is important to maintaining the food webs and thus the biological integrity of paragraph (a)(1) waters. Streams, wetlands, and open waters provide life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in paragraph (a)(1) waters. Many species require different habitats for different needs (e.g., food, spawning habitat, overwintering habitat), and thus move throughout a river network over their life-cycles. For example, to protect Pacific and Atlantic salmon in traditional navigable waters (and their associated commercial and recreational fishing industries), protections must be provided from the headwater streams where the fish are born and spawn to the marine waters where they spend most of their lives. Additionally, headwater streams can provide refuge habitat when adverse conditions exist in the larger waterbodies downstream, enabling fish to persist and recolonize downstream areas once conditions have improved. These upstream systems form integral components of downstream food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects, including for species that are critical to downstream ecosystem function. The provision of life-cycle dependent aquatic habitat for species located in paragraph (a)(1) waters can significantly affect the

biological integrity of those downstream waters.

It is also important to note that the agencies' significant nexus standard in this rule is carefully tailored so that only particular types of functions provided by upstream waters can be assessed. Wetlands, streams, and open waters are well-known to provide a wide variety of functions that translate into ecosystem services. A significant nexus analysis, however, is limited to an assessment of only those functions identified in this rule that have a nexus to the chemical, physical, or biological integrity of paragraph (a)(1) waters. Thus, there are some important functions provided by wetlands, tributaries, and waters evaluated under paragraph (a)(5) that will not be assessed by the agencies when making jurisdictional decisions under this rule. For example, for purposes of a jurisdictional analysis under the significant nexus standard, the agencies will not be taking into account the carbon sequestration benefits that aquatic resources like wetlands provide. Provision of habitat for non-aquatic species, such as migratory birds, and endemic aquatic species would not be considered as part of a significant nexus analysis under this rule.¹²⁵ Furthermore, the agencies would not assess soil fertility in terrestrial systems, which is enhanced by processes in stream and wetland soils and non-floodplain wetlands that accumulate sediments, prevent or reduce soil erosion, and retain water on the landscape, benefiting soil quality and productivity in dry lands. There are also a wide variety of functions that streams, wetlands, and open waters provide that translate into ecosystem services that benefit society that would not be assessed in a significant nexus analysis under this rule. These include provision of areas for personal enjoyment (e.g., fishing, hunting, boating, and birdwatching areas), ceremonial or religious uses, production of fuel, forage, and fibers, extraction of materials (e.g., biofuels, food, such as shellfish, vegetables, seeds, nuts, rice), plants for clothes and other materials,

¹²⁵ As this preamble has stated, consideration of biological functions such as provision of habitat is relevant for purposes of significant nexus determinations under this rule only to the extent that the functions provided by tributaries, adjacent wetlands, and waters assessed under paragraph (a)(5) significantly affect the biological integrity of a paragraph (a)(1) water. For example, to protect Pacific and Atlantic salmon in traditional navigable waters (and their associated commercial and recreational fishing industries), protections must be provided from the headwater streams where the fish are born and spawn to the marine waters where they spend most of their lives.

and medical compounds from wetland and aquatic plants or animals. While these types of ecosystem services can contribute to the economy, they are not relevant to the chemical, physical, or biological integrity of paragraph (a)(1) waters and would not be considered in a significant nexus analysis under this rule.

ii. Comments on Interpretation and Implementation of "Significantly Affect"

The agencies proposed that waters can significantly affect paragraph (a)(1) waters either alone or in combination with similarly situated waters in the region. The agencies solicited comment on approaches for implementing this rule, including regarding which waters are "similarly situated," and thus should be analyzed in combination, in the scope of the "region," for purposes of a significant nexus analysis. Some commenters asserted that the agencies need to consider cumulative impacts of water features and their collective influence on downstream waters. These commenters supported aggregating waters as part of a significant nexus analysis and provided various suggestions for interpreting "similarly situated" and "in the region." Some commenters stated that the agencies should not aggregate waters as part of a significant nexus analysis, asserting that aggregation would lead to subjectivity, lack of clarity, implementation challenges, and arbitrary outcomes. Some of these commenters did not believe it would be appropriate to aggregate features far from a project site with features on the project site in assessing impacts on downstream waters. Some commenters asserted that the proposed rule would presume that virtually the entire tributary system, along with isolated waters and wetlands, perform functions in the aggregate that benefit downstream waters. Other commenters asserted that aggregation should not be expanded beyond the *Rapanos* Guidance approach, and they expressed concern that the proposed rule would aggregate waters more broadly than the guidance. Some commenters expressed concern that with an aggregation approach to significant nexus, all waters assessed within a given region could be determined to be jurisdictional, including waters outside the project area. Some of these commenters suggested that the agencies would eventually assert jurisdiction across most of the country, one watershed at a time.

The agencies disagree that aggregating waters as part of a significant nexus

analysis is inappropriate. The agencies have retained the language in this rule that waters will be assessed either alone or in combination with similarly situated waters in the region. See sections IV.C.9.c, IV.C.4.c, IV.C.5.c, and IV.C.6.c of this preamble for a discussion on the agencies' approach to implementing the significant nexus standard for tributaries, adjacent wetlands, and paragraph (a)(5) waters. The agencies have also added language to the definition of "significantly affect" to further clarify that waters will be assessed either alone or in combination with similarly situated waters in the region. Assessing the functions of identified waters in combination is consistent not only with the significant nexus standard, as described in section IV.A of this preamble, but with the science demonstrating how upstream waters affect downstream waters. Scientists routinely analyze the combined effects of groups of waters, aggregating the known effect of one water with those of ecologically similar waters in a specific geographic area, or to a certain scale. This is because the chemical, physical, and biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow to them, including any tributaries and connected wetlands. As a result, the scientific literature and the Science Report consistently document that the health of larger downstream waters is directly related to the aggregate health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to mitigate the potential impacts of flooding and pollutant contamination on downstream waters. See Technical Support Document section III.E.ii.

The agencies also disagree that the agencies would assert jurisdiction too broadly based on the definition of "significantly affect." As discussed in section IV.A of this preamble, the agencies have carefully crafted a rule that falls within the limitations of the statute while achieving the Clean Water Act's objective. Historically, only roughly 12% of resources assessed in approved jurisdictional determinations under the *Rapanos* Guidance required a significant nexus analysis, and the agencies routinely concluded that waters do not meet the significant nexus standard. Based on the agencies' experience, many waters assessed under this rule will not have a significant nexus to paragraph (a)(1) waters, and thus will not be jurisdictional under the Clean Water Act under this rule.

The following are examples of waters that would likely not be jurisdictional under this rule, although the agencies recognize that each significant nexus determination is case-specific. Examples of waters that would not likely have a significant nexus to paragraph (a)(1) waters based on an assessment under this rule of the regulatory factors and functions include: a headwater non-relatively permanent tributary located within a catchment with no other tributaries and few adjacent wetlands in the Eastern United States, which is many miles from the paragraph (a)(1) water and contributes low duration, low magnitude, and low volume flows downstream; a group of non-relatively permanent tributaries and adjacent wetlands located within a closed basin in the arid West that does not connect to any paragraph (a)(1) water; a non-relatively permanent tributary located within a small catchment with another non-relatively permanent tributary and few adjacent wetlands in the arid West, which exhibits losing stream conditions and capacity to provide only infrequent and very low volume flows to the paragraph (a)(1) water; a ditched and straightened non-relatively permanent tributary with no adjacent wetlands in the Southeastern United States that exhibits minimal in-stream or riparian habitat value, carries only limited amounts of stormwater from a small catchment, and is located miles upstream from the paragraph (a)(1) water; a non-adjacent wetland in the Northwestern United States that would likely provide only minimal functions to a paragraph (a)(1) water given its landscape position in relation to the tributary network and the paragraph (a)(1) water; and a non-tributary pond that is hydrologically connected to the nearest jurisdictional water only during infrequent flooding events but which is miles from the paragraph (a)(1) water and would be unlikely to have a material influence on that paragraph (a)(1) water. While in most of these examples, the tributary, wetland, lake, or pond may well have had some effect on a paragraph (a)(1) water, under the hypothetical circumstances described, the water(s) would not have a material influence on the chemical, physical, or biological integrity of the identified paragraph (a)(1) water, *i.e.*, does not significantly affect that water, and therefore the water(s) would not be jurisdictional under the Clean Water Act.

Conversely, the following are examples of waters that would likely be jurisdictional under this rule, although again, each significant nexus

determination is case-specific. Examples include: a second-order headwater non-relatively permanent tributary located within a catchment with several other tributaries and several adjacent wetlands in the Southwestern United States, which are a moderate distance from the paragraph (a)(1) water but contribute high magnitude and high volume flows downstream during seasonal precipitation events that lead to strong effects of the functions on the paragraph (a)(1) water, including the transport of large volumes of sediment and woody debris that help shape and structure the channel of the paragraph (a)(1) water by slowing the flow of water through channels and providing habitat and food sources for the fish that live in the paragraph (a)(1) water; a non-relatively permanent tributary with several adjacent wetlands in the Midwestern United States that provides breeding grounds for fish that live in paragraph (a)(1) waters, contributes flows of moderate magnitude and moderate volume downstream during frequent precipitation events, and is located within a short distance of a paragraph (a)(1) water; and an adjacent wetland in the Mountain West that is similarly situated with dozens of other adjacent wetlands and several tributaries, has the capacity to store high volumes of floodwaters and to store and process nutrients that would otherwise reach a downstream paragraph (a)(1) water, thereby reducing flooding and the potential for algal blooms in the paragraph (a)(1) water, and that provides strong functions to a paragraph (a)(1) water given its landscape position in relation to the tributary network and the paragraph (a)(1) water. Under the hypothetical circumstances described, the water(s) would have a material influence on the chemical, physical, or biological integrity of the identified paragraph (a)(1) water, *i.e.*, significantly affects that water, and therefore the water(s) would be jurisdictional under the Clean Water Act.

The agencies also disagree that any aggregation approach would be subjective, unclear, or difficult to implement. The proposed rule included alternative options for aggregation (*i.e.*, how to interpret "similarly situated" and "in the region") for the public to comment upon. After considering public comments, the agencies are providing additional information in this preamble to provide clarity regarding implementation of "similarly situated" and "in the region" for purposes of aggregating waters as part of a significant nexus analysis. Furthermore, the agencies have extensive experience

aggregating waters under prior regulatory regimes. This preamble discusses a variety of tools that are available for identifying waters that are similarly situated in the region as part of a significant nexus analysis (*see, e.g.*, section IV.C.4.c of this preamble).

This rule's provision for waters to be assessed either alone, or in combination with other similarly situated waters in the region, is consistent with the Science Report. An example from the Science Report is illustrative. The amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have important consequences on the chemical, physical, or biological integrity of the downstream waters. Science Report at 6–10; *see also* sections III.A.v and III.E.ii of the Technical Support Document. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters. The Science Report finds, “[t]he amount of nutrients removed by any one stream over multiple years or by all headwater streams in a watershed in a given year can have substantial consequences for downstream waters.” Science Report at 1–11. The cumulative effects of nutrient export from the many small headwater streams of the Mississippi River have resulted in large-scale ecological and economically harmful impacts hundreds of miles downstream, thereby impacting commercial and recreational fisheries in the northern Gulf of Mexico.

Many commenters asserted that the proposed rule was unclear as to how the agencies would interpret the “region” for purposes of a significant nexus analysis. Some of these commenters expressed concern that the region would be determined on a case-specific basis, leading to regulatory uncertainty. Some commenters asserted that the “region” should be interpreted narrowly, and many of these commenters opposed any expansion of the scope of analysis as compared to the *Rapanos* Guidance. Several commenters stated that a watershed or ecoregion approach to interpreting the “region” would be too expansive. Many commenters supported a watershed approach to interpreting the “region,” with some commenters supporting a large single point of entry watershed and other commenters supporting smaller watersheds (*e.g.*, hydrologic unit code (HUC) 10 or HUC

12). These commenters asserted that a watershed-based approach is consistent with the science and would ultimately protect the traditional navigable waters, the territorial seas, and interstate waters that are the focus of Clean Water Act protections. Some commenters criticized the *Rapanos* Guidance approach for determining the “region,” asserting that it was too narrow and not based on scientific evidence. Some commenters supported an interpretation of “region” based on hydrological characteristics or geomorphic characteristics, and some of these commenters stated that such approaches would allow for the consideration of site-specific field data. Other commenters supported an ecoregion-based approach, although these commenters differed in the “level” of ecoregion sizes that they recommended using. As discussed in the implementation section below, the agencies have determined that the catchment of the tributary is a reasonable and technically appropriate scale for identifying “in the region” for purposes of the significant nexus standard. The catchment is an easily identified and scientifically defensible unit for identifying the scope of waters that together may have an effect on the chemical, physical, or biological integrity of a particular traditional navigable water, the territorial seas, or an interstate water.

c. Implementation

This rule provides increased clarity and substantial guidance to assist in implementing the significant nexus standard. The agencies have more than a decade of experience implementing the significant nexus standard by making determinations of whether a water alone or in combination with similarly situated waters in the region significantly affects a paragraph (a)(1) water. This section of the preamble provides the agencies' general approach to implementing the definition of “significantly affect” for purposes of the significant nexus standard. *See* sections IV.C.4, IV.C.5, and IV.C.6 of this preamble for additional information on how the agencies will implement the significant nexus standard, including identifying waterbodies on the landscape and determining which waters are “similarly situated” and “in the region.”

i. General Scope of the Significant Nexus Analysis

Under the significant nexus standard in this rule, the agencies must identify the waters that are “similarly situated” and the “region” for purposes of

determining whether waters “significantly affect” paragraph (a)(1) waters. The agencies will interpret these terms for purposes of this rule in a similar, but not identical, manner to the approach to these terms in the *Rapanos* Guidance. The agencies' approach in this rule is based on longstanding practice, the scientific support for this rule, and practical implementation considerations.

The focus of the significant nexus standard is on restoring and maintaining the chemical, physical, and biological integrity of paragraph (a)(1) waters. Therefore, the agencies have interpreted the phrase “similarly situated” under pre-2015 practice and will continue to interpret that phrase in this rule, in terms of whether waters are providing common, or similar, functions for paragraph (a)(1) waters such that it is reasonable to consider their effects together. In implementing this rule, the agencies will continue their practice under the *Rapanos* Guidance of assessing the flow characteristics and functions of tributaries, together with the functions performed by any wetlands adjacent to those tributaries, to determine whether collectively they have a significant nexus with paragraph (a)(1) waters. *See Rapanos* Guidance at 8. The agencies continue to conclude that implementation of “similarly situated” to include tributaries and their adjacent wetlands in this way is reasonable because of its strong scientific foundation—that is, the integral ecological relationship between a tributary and its adjacent wetlands. *See Rapanos* Guidance at 10. In considering how to apply the significant nexus standard, the agencies have long focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical, or biological integrity of paragraph (a)(1) waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. *Id.* at 9.

This approach to implementing similarly situated is also consistent with the scientific support for this rule. Stream and wetland connectivity to downstream waters, and the resulting effects on the integrity of downstream paragraph (a)(1) waters, is best understood and assessed when considered cumulatively. One of the main conclusions of the Science Report is that the incremental contributions of

individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed. See Technical Support Document section III.E.ii and section IV.A of this preamble for additional discussion. Furthermore, this approach is clear and implementable, and this preamble discusses a variety of tools that are available for determining which waters are similarly situated as part of a significant nexus analysis. See, e.g., section IV.C.4.c of this preamble. See section IV.C.6.c of this preamble for discussion on how the agencies intend to implement the significant nexus standard for waters assessed under paragraph (a)(5).

The agencies have identified “in the region” for purposes of the significant nexus standard in this rule as the catchment of the tributary. The catchment is the area of the land surface that drains to a specific location for a specific hydrologic feature, in this case the tributary. Catchments will be delineated from the downstream-most point of the tributary reach of interest and include the area uphill that drains to that point. Topography and landscape position influence the size and configuration of a catchment. For example, if the tributary of interest is East Fork Clear Creek—a second order stream that is a tributary that flows indirectly to a traditional navigable water—the catchment would be delineated from the point that East Fork Clear Creek enters Clear Creek, a third order stream, and include the area uphill that drains to that point. The catchment for East Fork Clear Creek would include not just East Fork Clear Creek, but also any first order streams that flow into East Fork Clear Creek, and these streams would be aggregated together along with any wetlands adjacent to the streams as part of a significant nexus analysis. As another example, if the tributary of interest is Willow Creek—a first order stream that is a tributary that flows indirectly to a traditional navigable water—the catchment would be delineated from the point that Willow Creek enters a second order stream and include the area uphill that drains to that point. The catchment would then only include Willow Creek, and Willow Creek would be aggregated together along with any adjacent wetlands as part of a significant nexus analysis. See discussion of stream order in section IV.C.4.c.i of this preamble. The catchment of the tributary of interest may contain not just the tributary of interest, but also lower order

tributaries that are aggregated together along with any adjacent wetlands as part of a significant nexus analysis.

This region (*i.e.*, the catchment of the tributary) for the vast majority of tributaries is smaller, and usually substantially smaller, than the region identified by the watershed that drains to the nearest point of entry of a paragraph (a)(1) water, which was the “region” used to implement the 2015 Clean Water Rule. While this region is generally larger than the region assessed in the *Rapanos* Guidance under which the agencies assessed the relevant reach of a tributary in combination with its adjacent wetlands, the catchment is an easily identified and scientifically defensible unit for identifying the scope of waters that together may have an effect on the chemical, physical, or biological integrity of a particular traditional navigable water, the territorial seas, or an interstate water. Moreover, the catchment is often considered an appropriate spatial unit for water resource management. Anthropogenic actions and natural events can have widespread effects within the catchment that collectively impact the integrity and quality of the relevant paragraph (a)(1) water. The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the paragraph (a)(1) water. For these reasons, it is more appropriate to conduct a significant nexus analysis at the catchment scale than to focus on a specific site, such as an individual stream segment. In light of the scientific literature, the longstanding approach of the agencies’ implementation of the Clean Water Act, and the statutory goals underpinning Justice Kennedy’s significant nexus framework, the agencies consider the catchment of the tributary to be the appropriate “region” for a significant nexus analysis. Therefore, all tributaries in a catchment and their adjacent wetlands, if any, will be assessed in combination to determine whether the significant nexus standard is met.

For practical administrative purposes, this rule does not require evaluation of all similarly situated waters when concluding that those waters have a significant nexus to a paragraph (a)(1) water. When an identified subset of similarly situated waters provides a sufficient science-based justification to conclude presence of a significant nexus, for efficiency purposes a significant nexus analysis need not require time and resources to locate and analyze all similarly situated waters in the entire catchment. For example, if a single waterbody or a group of similarly

situated waterbodies in a portion of the catchment is determined to significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water, the analysis does not have to document all of the similarly situated waterbodies in the catchment in order to complete the significant nexus analysis for the water(s) subject to the jurisdictional determination. A conclusion that a significant nexus is lacking may not, however, be based on consideration of some subset of similarly situated waters because under the significant nexus standard, the inquiry is how the similarly situated waters in combination affect the integrity of the paragraph (a)(1) water. Individuals uncertain about the status of waters on their property may obtain a jurisdictional determination from the Corps. The Corps does not charge a fee for this service. See 33 CFR 325.1; RGL 16–01 (2016).

ii. Assessing the Functions and Considering the Factors

In determining whether a water alone or in combination with similarly situated waters in the region has a material influence on the chemical, physical, or biological integrity of a paragraph (a)(1) water, the agencies will assess the functions in paragraph (c)(6)(i) of this rule and consider the factors in paragraph (c)(6)(ii) of this rule in order to reasonably determine jurisdiction based on the record before them.¹²⁶ The agencies will consider the factors in this rule to analyze the strength of the influence of the functions on paragraph (a)(1) waters. In general, functions associated with stronger factors increase the likelihood of demonstrating a material influence on paragraph (a)(1) waters. For example, when assessing the functions provided by the subject waters (and any similarly situated waters) to paragraph (a)(1) waters, the agencies would consider whether the factors are likely to increase the strength of the influence on the paragraph (a)(1) water. Distance from a paragraph (a)(1) water; high frequency, magnitude, or duration of hydrologic connections; high density of similarly situated waters; landscape position and geomorphology translating to a high likelihood of effects on paragraph (a)(1) waters; and/or certain climatological variables like rainfall patterns leading to more frequent hydrologic connections

¹²⁶ The agencies are not requiring the use of “functional assessment” methods for significant nexus analyses under this rule. “Functional assessment” methods are used in other regulatory contexts, such as for mitigation planning, to explicitly measure the strength of functions at the impact site and potential mitigation site(s).

all translate to a higher likelihood of effects on paragraph (a)(1) waters. Functions associated with weaker factors decrease the likelihood of demonstrating a material influence on paragraph (a)(1) waters. For example, when assessing the functions provided by the subject waters (and any similarly situated waters) to paragraph (a)(1) waters, the agencies would consider whether the factors are likely to decrease the strength of the influence on the paragraph (a)(1) water. These factors can include a far distance from a paragraph (a)(1) water; low frequency, magnitude, or duration of hydrologic connections; low density of similarly situated waters; landscape position and geomorphology translating to a low likelihood of effects on paragraph (a)(1) waters; and/or climatological variables like rainfall patterns translating to a low likelihood of effects on paragraph (a)(1) waters. Thus, analyses of waters that provide the listed functions to paragraph (a)(1) waters, but where only weak factors are present, may not be sufficient to demonstrate a material influence. In assessing the functions under this rule, if a water, either alone or in combination with similarly situated waters in the region, performs one function that has a material influence on the integrity of a paragraph (a)(1) water, that water would have a significant nexus. The agencies will consider all of the factors together when assessing the functions and the strength of the influence in the context of each case-specific determination of jurisdiction. Consistent with longstanding practice, the agencies will make decisions based on best professional judgment and on the best available information.

When assessing the functions and considering the factors in the final rule to analyze the influence of subject waters on the integrity of paragraph (a)(1) waters, the likelihood of a material influence is generally greater with increases in the number or size of the aquatic resource or resources being considered, decreasing distance from the identified paragraph (a)(1) water, as well as with increased density of the waters considered in combination as similarly situated waters. However, the agencies also recognize that in watersheds with fewer aquatic resources, a smaller number and/or lower density of similarly situated waters can provide functions that have disproportionate effects on paragraph (a)(1) waters. Hydrologic factors include the frequency, duration, magnitude, timing, and rate of hydrologic connections, as well as surface and

shallow subsurface hydrologic connections. The presence of a surface or shallow subsurface hydrologic connection, as well as increased frequency, magnitude, or duration of such connections, can increase the strength of the functions that the subject waters provide to paragraph (a)(1) waters, and the corresponding chemical, physical (*i.e.*, hydrologic), or biological influence that a water has on paragraph (a)(1) waters. In some situations, streams with low duration but a high volume of flow can provide strong functions to paragraph (a)(1) waters by transporting large volumes of water, sediment, and woody debris that help maintain the integrity of those larger waters. A lack of hydrologic connections can also in some cases contribute to the strength of effects for certain functions such as floodwater attenuation or the retention and transformation of nutrients and other pollutants. Landscape position and geomorphology provide critical information about the relative location of the subject waters being considered within the watershed and their spatial relationship to the paragraph (a)(1) water. The slope, soil composition and transmissivity, and waterbody substrate composition and other physical characteristics (*e.g.*, channel shape) can all impact the strength of the functions identified in this rule and the associated influence on paragraph (a)(1) waters. Climatological factors like temperature, rainfall, and snowpack in a given region can influence the strength of the functions provided by the subject waters to paragraph (a)(1) waters by affecting the frequency, duration, magnitude, timing, and rate of hydrological connections.

There are ways the agencies can consider a changing climate under the significant nexus standard, but only to the extent it is relevant to the evaluation of whether the subject waters significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. For example, a lake that dries up from warming temperatures due to climate change and no longer has a surface hydrologic connection to downstream waters at the time of assessment might become non-jurisdictional, whereas another lake that previously had limited surface hydrologic connectivity might have increased hydrologic connectivity with higher precipitation conditions under a changing climate.

In addition, under the significant nexus standard the agencies can consider the functions of streams, wetlands, and open waters that support the resilience of the chemical, physical, or biological integrity of paragraph (a)(1)

waters to climate change. For example, more intense and frequent storms and other shifts in precipitation cause floods to increase in frequency and volume in some areas of the United States. A significant nexus determination can evaluate the strength of the effect of runoff storage in wetlands, open waters, and headwater tributaries in mitigating increased flood risk associated with climate change in paragraph (a)(1) waters. In other areas of the country, drought is leading to decreased baseflows in paragraph (a)(1) waters. A significant nexus analysis can assess whether the transmission of flows into alluvial or regional aquifer storage through tributaries and wetlands can mitigate for these climate change-related conditions, and assess those benefits to paragraph (a)(1) waters. Changes in flow in tributaries caused by climate change will also be relevant to the relatively permanent standard, but that standard does not allow the agencies to take into account the contribution of upstream waters to the resilience of the integrity of downstream waters. However, considering on a case-specific basis the strength and importance of the functions provided by aquatic resources that contribute to the resilience of the integrity of paragraph (a)(1) waters to climate change is consistent with the policy and goals of the Clean Water Act, case law, and the policy goals of this administration as articulated in Executive Order 13990.

The agencies recognize that there are climate benefits that streams, wetlands, and open waters provide that are not related to restoring or maintaining the integrity of paragraph (a)(1) waters, such as carbon sequestration. Those functions are not considered under this rule, because they are not directly related to the chemical, physical, or biological integrity of paragraph (a)(1) waters and therefore are not relevant to Clean Water Act jurisdiction.

The record for determinations of jurisdiction (*e.g.*, approved jurisdictional determinations for section 404 permits) for waters evaluated under the significant nexus standard will include available information supporting the determination. In addition to location and other descriptive information regarding the water at issue, the record will include an explanation of the rationale for the jurisdictional conclusion and a description of the information used. Relevant information can come from many sources and may in some cases include studies of the same type of water or similarly situated waters that apply to the water being evaluated. The determination of jurisdiction applies

only to the subject waters located in the area of interest and is a case-specific determination based on current conditions (except in the case of a potential enforcement action). Any similarly situated waters that are part of the significant nexus analysis but that are not in the area of interest are not subject to the jurisdictional decision (and so would not automatically be deemed jurisdictional or non-jurisdictional). For example, where the subject water is a portion of a tributary reach, the significant nexus analysis would encompass the entire tributary reach of the same order, any tributaries within the catchment of that reach, and any wetlands adjacent to those tributaries. However, the jurisdictional determination would only apply to the portion of the tributary reach that is subject to the determination.

iii. Tools for a Significant Nexus Analysis

The agencies have used many tools and sources of information to assess significant effects on the chemical, physical, and biological integrity of paragraph (a)(1) waters. Some tools and resources that the agencies have used to provide and evaluate evidence of a significant effect on the physical integrity of paragraph (a)(1) waters include USGS stream gage data, floodplain maps, statistical analyses, hydrologic models and modeling tools such as USGS's StreamStats or the Corps' Hydrologic Engineering Centers River System Analysis System (HEC-RAS), physical indicators of flow such as the presence and characteristics of a reliable OHWM with a channel defined by bed and banks, or other physical indicators of flow including such characteristics as shelving, wracking, water staining, sediment sorting, and scour, information from NRCS soil surveys, precipitation and rainfall data, and NRCS snow telemetry (SNOTEL) data or NOAA national snow analyses maps.

To evaluate the evidence of a significant effect on the biological integrity of paragraph (a)(1) waters, the agencies and practitioners have used tools and resources such as: population survey data and reports from Federal, Tribal, and State resource agencies, natural history museum collections databases, bioassessment program databases, fish passage inventories, U.S. Fish and Wildlife Service (FWS) Critical Habitat layers, species distribution models, and scientific literature and references from studies pertinent to the distribution and natural history of the species under consideration.

Tools and resources that can provide and evaluate evidence of a significant effect on the chemical integrity of paragraph (a)(1) waters include data from USGS water quality monitoring stations; Tribal, State, and local water quality reports; water quality monitoring and assessment databases; EPA's How's My Waterway (*available at <https://www.epa.gov/waterdata/how-my-waterway>*), which identifies Clean Water Act section 303(d) listed waters, water quality impairments, and total maximum daily loads; watershed studies; stormwater runoff data or models; EPA's NEPAassist (*available at <https://www.epa.gov/nepa/nepassist>*), which provides locations and information on wastewater discharge facilities and hazardous-waste sites; the National Land Cover Database (NLCD); and scientific literature and references from studies pertinent to the parameters being reviewed. EPA has developed a web-based interactive water quality and quantity modeling system (Hydrologic and Water Quality System, HAWQS, *available at <https://www.epa.gov/waterdata/hawqs-hydrologic-and-water-quality-system>*) that is being used to assess the cumulative effects of wetlands on the larger waters to which they drain. Additional approaches to quantifying the hydrologic storage capacity of wetlands include statistical models, such as pairing LIDAR-based topography with precipitation totals. Both statistical and process-based models have been used to quantify the nutrient removal capacities of non-floodplain wetlands, and in some cases to assess the effects of non-floodplain wetland nutrient removal, retention, or transformation on downstream water quality. Evaluations of a significant effect on the chemical integrity of a paragraph (a)(1) water may include qualitative reviews of available information or incorporate quantitative analysis components including predictive transport modeling.

10. Guidance for Landowners on How To Know When Clean Water Act Permits are Required

The agencies understand that landowners would like to be able to easily discern whether their property contains any "waters of the United States" such that they may need to apply for a relevant Clean Water Act permit. With this rule, the agencies strive to provide additional clarity for the public. To that end, the rule clearly excludes some waters from Clean Water Act jurisdiction, thereby narrowing the category of waters that require additional jurisdictional analysis. The rule also clearly identifies some

categories of waters as jurisdictional by rule without the need for further analysis. For the small percentage of waters that are not categorically excluded from, or included in, Clean Water Act jurisdiction, and which do not meet the relatively permanent standard, the agencies have established a new regulatory provision defining the meaning of "significantly affect" to guide implementation of the significant nexus standard. This provision provides the public with a clearer picture of the functions the agencies will assess and the factors the agencies will consider in determining whether waters being analyzed "significantly affect" (*i.e.*, have a material influence on) the integrity of traditional navigable waters, the territorial seas, or interstate waters and therefore meet the rule's definition of "waters of the United States."

Recognizing the concerns of landowners, the discussion below is designed to bring together information from the statute, the final rule's text, and this preamble—including the many useful tools identified in this preamble—to provide individual landowners with the step-by-step information needed to make informed decisions.¹²⁷ In addition, as discussed further below, the Corps has established a process for landowners to request an official determination of whether or not there are "waters of the United States" on their property. The Corps does not charge a fee for this service.¹²⁸ In cases where a landowner seeks to undertake an activity that involves discharges of dredged or fill material into areas that are "waters of the United States" that is not exempt from the permit requirements of the Clean Water Act, this section provides information about some of the general permits the Corps¹²⁹ has established that allow certain activities to proceed with little or no delay if the general conditions and any special conditions for the permit are met. Lastly, this section provides information for those rare occasions when a landowner needs an individual section 404 permit for an activity regulated under that section of the Clean Water Act.

¹²⁷ See also <https://www.epa.gov/wotus> for the latest information on implementation of the definition of "waters of the United States."

¹²⁸ To obtain a speedier determination, some landowners choose to incur some expense in providing site information supporting the jurisdictional determination request, such as a delineation of the lake or pond, stream, or wetland.

¹²⁹ The agencies note that New Jersey, Michigan, and Florida have assumed administration of section 404 programs for certain waters in those States under section 404(g) of the Act.

Step 1: Is the activity I want to take on my property exempt from needing a Clean Water Act permit?

Not all activities in or discharges to “waters of the United States” require authorization under the Clean Water Act. Generally, section 402 or section 404 permits are required if a person is discharging, or adding, a “pollutant” from a “point source” to the “waters of the United States.” The terms “discharge of a pollutant,” “pollutant,” and “point source” all have specific definitions in the Clean Water Act that must be met for the Act’s requirements to apply. Even if a landowner is discharging a “pollutant” from a “point source,” those discharges still may not require a Clean Water Act permit because the statute and the agencies’ regulations exempt some types of discharges from permitting under section 404 (for dredged and fill material) and section 402 (for other pollutants).

If a landowner wants to dredge or fill “waters of the United States,” many activities are exempt from the Clean Water Act’s section 404 permitting requirements,¹³⁰ including:

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
- Maintenance (but not construction) of drainage ditches;
- Construction and maintenance of irrigation ditches;
- Construction and maintenance of farm or stock ponds;
- Construction and maintenance of farm and forest roads, in accordance with best management practices; and
- Maintenance of structures such as dams, dikes, and levees.

Additionally, many discharges of pollutants other than dredged or fill material do not require section 402 permits:¹³¹

- Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel;
- Any introduction of pollutants from nonpoint-source agricultural and

silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands;

- Return flows from irrigated agriculture; and
- Discharges from a water transfer.

Step 2: Is water on my property covered by this rule?

The Clean Water Act does not cover every geographic feature with water in it; nor does it subject all activities in waters meeting the definition of “waters of the United States” to regulation (as discussed in Step 1). Puddles may periodically contain water, but they are not lakes, ponds, streams, or wetlands and they are not “waters of the United States.” The rule also has a well-established, very specific, three-factor definition of wetlands. That definition requires the presence of particular wetland hydrology, soils, and vegetation. Therefore, a homeowner’s backyard that is soggy only immediately after a rainstorm is not “waters of the United States” under the rule.

Some waters are always jurisdictional under the rule: traditional navigable waters, the territorial seas, and interstate waters. Lakes and ponds, streams (including certain ditches), and wetlands that are not always jurisdictional under paragraph (a)(1) of the rule require additional assessment to determine whether they are “waters of the United States” under other categories of the rule. This additional assessment follows longstanding principles.

If a landowner’s property does *not* contain the types of waters, including wetlands, covered by this rule, it is not jurisdictional.

Step 3: Is the water on my property excluded from the definition of “waters of the United States”?

In evaluating whether a water, including a wetland, on a landowner’s property is covered by the Clean Water Act, first determine whether it fits into one of this rule’s categorical exclusions. The rule excludes certain features that commonly contain water but are not “waters of the United States” (so long as the features are not the types of waters that are always jurisdictional—traditional navigable waters, the territorial seas, and interstate waters):

- prior converted cropland;
- ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- artificially irrigated areas that would revert to dry land if the irrigation ceased;
- artificial lakes or ponds created by excavating or diking dry land to collect

and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

- artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

• waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States”;

- swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow; and

• waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

These exclusions are discussed in more detail in section IV.C.7 of this preamble.

Where a feature located on a landowner’s property satisfies the terms of an exclusion, it is not jurisdictional under the Clean Water Act. That is the case even where the feature would otherwise be jurisdictional as an impoundment; tributary; adjacent wetland; or intrastate lake or pond, stream, or wetland under this rule.

Step 4: If the activity I want to undertake on my property is not exempt from permitting requirements, and the feature on my property is likely a water for purposes of the rule (and is not covered by one of the exclusions), what do I do next?

If the feature on a landowner’s property is likely a geographic feature considered to be a water, including a wetland, for purposes of the rule and is not covered by one of the exclusions, the next step is to determine if the water is a “water of the United States” under one of the longstanding categories in the rule: (1) traditional navigable waters, the territorial seas, and interstate waters; (2) jurisdictional impoundments of “waters of the United States”; (3) jurisdictional tributaries; (4) jurisdictional adjacent wetlands; and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of the rule that meet either the relatively permanent standard or the significant nexus standard.

This preamble identifies publicly available tools and resources to assist landowners in understanding the jurisdictional status of waters, including tributaries and wetlands, that may be

¹³⁰ Note, however, that Clean Water Act section 404(f) establishes circumstances (based on certain effects on “waters of the United States”) under which an activity listed as exempt is no longer exempt. For more detail, see section 404(f) and the regulations on “discharges not requiring a permit” at 33 CFR 323.4.

¹³¹ See 40 CFR 122.3 for the regulatory provisions.

present on their lands. At the same time, the agencies recognize there are circumstances under which it may be difficult for an individual landowner to determine on their own whether a water on their land is jurisdictional. This section can help landowners to conclude whether a water on their land is likely to be jurisdictional; if landowners want certainty, they can ask the Corps for an approved jurisdictional determination. The Corps does not charge a fee for this service.

Alternatively, as discussed below, some of these activities are readily authorized under a nationwide or regional general permit issued by the Corps. A landowner does not need an approved jurisdictional determination for an activity authorized by a general permit.

(1) Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

Traditional navigable waters, the territorial seas, and interstate waters are always jurisdictional. Section IV.C.2. of this preamble explains how the agencies will identify these waters.

(2) Jurisdictional Impoundments of “Waters of the United States”

Impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. Impoundments can be natural (like beaver ponds) or artificial (like reservoirs). Under the rule, jurisdictional impoundments include (1) impoundments created by impounding one of the “waters of United States” that was jurisdictional under this rule’s definition at the time the impoundment was created, and (2) impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under the rule as a traditional navigable water, the territorial seas, interstate water, jurisdictional tributary, or jurisdictional adjacent wetland, regardless of the water’s jurisdictional status at the time the impoundment was created. Section IV.C.3 of this preamble explains how the agencies will identify jurisdictional impoundments.

(3) Jurisdictional Tributaries

The agencies understand that it can be confusing to determine if certain waters and features are tributaries, and whether those tributaries are “waters of the United States.” It can be especially confusing if waters or features on a landowner’s property are periodically dry—some examples include washes,

swales, and ephemeral streams. So how can a landowner determine whether features like this are jurisdictional?

The first question is whether the water or feature on a landowner’s property is excluded as an erosional feature or is potentially jurisdictional as a stream. Section IV.C.7.c.ii.3 of this preamble discusses the distinctions between excluded erosional features like swales, washes, and gullies and potentially jurisdictional streams. So, for example, a water would be a stream, not an excluded erosional feature, if the water has a defined channel and an indicator of an ordinary high water mark such as a natural line impressed on the bank.¹³²

If the water is determined to be a stream, the next question is whether that stream is part of the tributary system of a traditional navigable water, the territorial seas, or an interstate water. For tools that can help a landowner make this determination, see Step 5, below. If it is part of such a tributary system, the final question is whether it satisfies either the relatively permanent standard or the significant nexus standard under this rule. See section IV.C.4.c of this preamble for additional information on how to apply these standards. Also, the landowner can ask the Corps to determine whether the feature on their property is jurisdictional as discussed further below.

The agencies recognize that it can be confusing that streams with less than relatively permanent flow, which often look dry, can be “waters of the United States.” But such streams, where they meet the significant nexus standard, are important parts of the ecological system that sustains traditional navigable waters, the territorial seas, and interstate waters. For example, while almost all the streams in Arizona regularly do not have water in them, they are essential to the flow in downstream waters, like the Colorado River. Similarly, headwater ephemeral streams in the forests of the Northeastern United States are essential to flow in downstream rivers. Filling ephemeral streams could cause significant harm to the downstream rivers. The importance of ephemeral streams is evident from videos of these streams flowing after rain events in the Southwest. This video¹³³ also

highlights the difference between dry land and ephemeral tributaries and demonstrates why landowners would not want to construct a building in an ephemeral stream.

(4) Jurisdictional Adjacent Wetlands

The rule uses the same definition of “adjacent” that has been used by the agencies for the past 45 years:¹³⁴ adjacent means bordering, contiguous, or neighboring. The agencies have long used three criteria to identify wetlands that are adjacent. These criteria are: (1) the wetland has an unbroken surface or shallow subsurface connection to a jurisdictional water; (2) the wetland is separated from a jurisdictional water by an artificial dike, natural berm, or the like; or (3) the wetland is reasonably close to a jurisdictional water. There is an extensive discussion of how the agencies will implement these criteria in section IV.C.5.c of this preamble. The agencies have not established a specific distance limitation in the rule beyond which wetlands are never adjacent, but nearly 45 years of implementation of this definition shows in a substantial number of cases, adjacent wetlands abut (touch) a jurisdictional water. And, on the whole, nationwide, adjacent wetlands are within a few hundred feet from jurisdictional waters (and in the instances where the distance is greater than a few hundred feet, adjacency is likely supported by a pipe, non-jurisdictional ditch, karst geology, or some other feature that connects the wetland directly to the jurisdictional water).

Examples of “adjacent” wetlands include wetlands that touch jurisdictional tributaries. If the wetland is only separated from the jurisdictional tributary by a levee, it is adjacent. If there is a barrier, like a river berm or a dike, between the wetland and a jurisdictional tributary, for example, the wetland still meets the definition of “adjacent.” If the wetland is connected to a jurisdictional tributary by a ditch that is not jurisdictional, the wetland is adjacent.

If your property contains a “wetland” and it is “adjacent” it must also meet one of the rule’s jurisdictional tests. Wetlands that are themselves traditional navigable waters, interstate waters, or are “adjacent” to such waters are “waters of the United States” by rule.

¹³² The Corps has useful guidance on how to identify an ordinary high water mark, including Regulatory Guidance Letter 05–05, “Ordinary High Water Mark” (available at <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-05.pdf>).

¹³³ U.S. Department of Agriculture, Agricultural Research Service, Multiflume Runoff Event August 1, 1990, <https://www.tucson.ars.ag.gov/unit/WGWebcam/WalnutGulchWebcam.htm>.

¹³⁴ The 2020 NWPR had a different definition and was in effect from June 22, 2020 (in all jurisdictions except Colorado, where the rule did not go into effect until April 26, 2021) to August 30, 2021, when the rule was vacated by the Arizona district court. The 2015 Clean Water Rule had the same definition of “adjacent” but added a definition of “neighboring.”

This includes, for example, tidal marshes along the Atlantic Coast that are subject to the ebb and flow of the tide and therefore are traditional navigable waters, wetlands that are separated from the Mississippi River from levees, and the Great Dismal Swamp, a wetland which crosses the border between Virginia and North Carolina. Other “adjacent” wetlands are only “waters of the United States” if they satisfy either the relatively permanent standard or the significant nexus standard.

(5) Jurisdictional Intrastate Lakes and Ponds, Streams, or Wetlands Not Identified in Paragraphs (a)(1) Through (4) of the Rule

The rule defines “waters of the United States” to include “intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4)” that meet either the relatively permanent standard or the significant nexus standard. The agencies intend to identify relatively permanent waters under this provision using a similar approach to the one described for relatively permanent tributaries in section IV.C.4.c.ii of this preamble. In implementing the significant nexus standard, the agencies generally intend to analyze these waters individually to determine if they significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water. One example of the kind of water that is likely to be assessed under this provision is a lake that is close to a jurisdictional tributary or traditional navigable water, the territorial seas, or an interstate water, but that is not part of the tributary system; this is because the adjacency provision in the rule (and in the longstanding regulations) applies only to wetlands, not to lakes and ponds.

Step 5: Are there resources and sources of help from the agencies to aid me in this process?

Yes, in addition to the rule and preamble, the agencies have identified several other types of resources to help landowners in the jurisdictional and permitting process. First, the agencies have identified a number of publicly available, user-friendly tools and resources for landowners seeking more information about whether their property contains “waters of the United States.” Next, the Corps has established a process for landowners to request an official determination of whether or not there are “waters of the United States” on their property. Finally, in cases where a landowner is undertaking an activity that is not exempt from the permit requirements of the Clean Water

Act and their land contains waters that are likely to be or that the Corps has determined to be “waters of the United States,” this section provides information about some of the general permits the Corps has established that allow certain activities to proceed with little or no delay if the general and any special conditions for the permit are met. In addition, EPA and authorized states have established general permits for a wide variety of discharges subject to permitting under section 402 that have minimal impacts to waters. Finally, this section also provides information on those rare occasions when a landowner needs an individual Clean Water Act section 404 permit.

(1) Are there any publicly available tools and resources to help me get more information about waters on my land?

This preamble includes an extensive discussion of the many tools and resources the agencies can use when making jurisdictional determinations. It also discusses publicly available resources that provide jurisdictional and permit information. See sections IV.G and H of this preamble. Some of these publicly available tools and resources may be particularly useful for landowners seeking more information about whether their property might contain “waters of the United States.” For example, EPA’s Clean Water Act Approved Jurisdictional Determination website (*available at <https://watersgeo.epa.gov/cwa/CWA-JDs/>*) includes a map viewer that shows where waters have been determined to be jurisdictional or non-jurisdictional based on approved jurisdictional determinations. Users can quickly and easily input a location (*e.g.*, a city and State, or a latitude and longitude) to view approved jurisdictional determinations that have been finalized in a specific geographic area. Additionally, publicly available map viewers integrate datasets, allowing users to consolidate and evaluate relevant data from multiple sources in one visual platform. EPA’s EnviroAtlas (*available at <https://www.epa.gov/enviroatlas/enviroatlas-interactive-map>*) is a map viewer that provides information and interpretative tools to help facilitate surface water assessments using multiple data layers such as land cover, stream hydrography, soils, and topography. Users can quickly and easily input a location (*e.g.*, a city and State, or a latitude and longitude) and select relevant map layers from a list of individual datasets and indices. The EPA Watershed Assessment, Tracking, and Environmental Results System (WATERS) Geoviewer (*available at [*geoviewer*\) provides many map layers, including water map layers like NHDPlus, and watershed reports for analysis and interpretation. Similarly, in the USGS National Map Viewer \(*available at <https://apps.nationalmap.gov/viewer/>*\) users can view different map layers, including aerial imagery, water map layers like the NHD and NHDPlus High Resolution, wetlands map layers like NWI, and land cover, elevation data, and topographic maps. EPA’s How’s My Waterway mapper \(*available at <https://mywaterway.epa.gov/>*\) provides users with information about the water quality of their local waterways, including information about water quality impairments and section 402 permitted dischargers.](https://www.epa.gov/waterdata/waters-</i></p>
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(2) How can I obtain a jurisdictional determination for a water on my property?

The Corps has long provided jurisdictional determinations as a public service. The Corps does not charge a fee for this service. There are two types of jurisdictional determinations provided by the Corps: approved jurisdictional determinations and preliminary jurisdictional determinations. An approved jurisdictional determination is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. A preliminary jurisdictional determination is a document indicating that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. The Corps recognizes the value of jurisdictional determinations to the public and reaffirms the Corps’ commitment to continue its practice of providing jurisdictional determinations, for which it does not charge a fee, upon request. A landowner who would like to know whether areas on their property meet the definition of “waters of the United States” may contact their local Corps district regulatory office at any time. The list of local district regulatory offices is available at the following link: <https://www.usace.army.mil/Missions/Locations/>. Contact information is available at the link for each local office.

When a local district regulatory office is contacted, district personnel will ensure that the landowner understands the different types of jurisdictional determinations so the landowner can make an informed decision about which type of jurisdictional determination is most appropriate for the landowner’s circumstances. See section III.A.1.b of this preamble for a discussion of the

types of jurisdictional determinations the Corps issues. Once the landowner determines the best option for their particular circumstance, it is the Corps' policy to honor the request unless it is impracticable.

The Corps may need to conduct one or more site visits to collect information when a landowner requests an approved or preliminary jurisdictional determination. In addition to information collected during the site visit(s), the Corps will use data from other resources (such as those described in this preamble) as well as any information the landowner wishes to provide to inform the jurisdictional determination. A landowner may choose to hire an environmental consultant who can assist by providing site evaluation information and data collection, thereby supporting a more efficient process. Once the Corps has completed the jurisdictional determination, they will provide it to the landowner in a letter.

If the jurisdictional determination is an approved jurisdictional determination, the letter from the Corps will typically include one or more approved jurisdictional determination forms that explain the basis for the determination that the aquatic resources on the landowner's property are or are not "waters of the United States." The landowner will also receive a form to request an appeal of the approved jurisdictional determination. Consistent with Regulatory Guidance Letter 05-02, "Expiration of Geographic Jurisdictional Determinations of 'Waters of the United States,'" the landowner can rely upon the approved jurisdictional determination until it expires unless new information warrants revision of the approved jurisdictional determination prior to its expiration.

If the landowner disagrees with the Corps' approved jurisdictional determination, the landowner can request that it be reconsidered and submit any available new information or data to the district. If, after such reconsideration, or in the absence of any new information, the landowner disagrees with the approved jurisdictional determination, the landowner may administratively appeal the decision by sending a completed Request for Administrative Appeal form to the appropriate Corps' division office. The Corps' regulations at 33 CFR part 331 describe the administrative appeal process. The Corps' division may determine that none of the reasons for appeal have merit, in which case the approved jurisdictional determination remains in effect until it expires or it is revised by the Corps district.

Alternatively, the Corps' division may determine that one or more of the reasons for appeal have merit in which case the approved jurisdictional determination is remanded to the district for reconsideration. The landowner may also challenge the approved jurisdictional determination in Federal district court.¹³⁵

(3) Are there general permits under section 404 of the Clean Water Act for individual landowners? How do I obtain coverage under a nationwide permit?

Landowners that wish to pursue activities that are or may be subject to the permit requirements of the Clean Water Act and that will impact "waters of the United States" on their property may be able to obtain coverage under a general permit. General permits are issued on a nationwide, regional, or statewide basis for particular categories of activities that result in no more than minimal individual or cumulative adverse environmental effects. While some general permits require the applicant to submit a pre-construction notification to the Corps or a State, others allow the project proponent to proceed with the authorized activity with no formal notification. The general permit process allows certain activities to proceed with little or no delay if the conditions of the general permit are met. For example, minor road construction activities, utility line backfill, and minor discharges for maintenance can be authorized by a general permit, where the activity meets the acreage limits and other limits specified in the general permit.

As of the date of this rule, the Corps has issued 57 nationwide permits (NWP), a number of which may be of particular use to individual property owners. Authorization to discharge dredged or fill material is provided under the following NWPs: NWP 3 authorizes discharges associated with maintenance of previously authorized and serviceable structures and fill; NWP 18 authorizes minor discharges of less than 25 cubic yards that result in the loss of no more than $\frac{1}{10}$ -acre of "waters of the United States," which can include activities undertaken by a landowner; NWP 29 authorizes discharges that result in the loss of no more than $\frac{1}{2}$ -acre of non-tidal "waters of the United States" to support the construction or expansion of a single residence or a residential development; NWP 33 authorizes temporary

discharges associated with construction activities and access to construction sites, including for the construction or expansion of a home or residential development if the area is restored to pre-construction conditions; NWP 57 authorizes discharges associated with electric utility and telecommunication line activities that result in the loss of no more than $\frac{1}{2}$ -acre of "waters of the United States," including connecting these services to a home or residential development; NWP 58 authorizes discharges associated utility line activities for water and other substances that result in the loss of no more than $\frac{1}{2}$ -acre of "waters of the United States," including connecting water and sewer lines to a home or residential development. These are general descriptions of the selected NWPs. The requirements and conditions that apply to the NWPs are set forth in the rules promulgating the NWPs. Corps personnel in the local district office can help explain the requirements of each NWP, including any conditions that have been added to the NWPs on a regional basis. Corps districts may add conditions to activity-specific NWP authorizations to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects. Corps districts across the country have issued approximately 450 regional general permits, and information on these permits is provided on each district's website. All general permits, including NWPs, are valid for a maximum of five years and are subject to change, so this overview is for illustrative purposes only. Property owners should always consult the most recently promulgated general permit information.

Additional information on NWPs is available at the following link: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

(4) If I need an individual section 404 permit, how do I obtain coverage?

The vast majority of activities subject to Clean Water Act section 404 permits are authorized under general permits; however, some activities do require authorization under an individual permit (generally because of a high level of impact on "waters of the United States" or because the project proponent cannot comply with all applicable conditions of a general permit). While the process of applying for and evaluating an individual permit is more involved than for a general permit, the time and complexity involved is commensurate with the level of impact and can still be efficient. The Corps

¹³⁵ In *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Supreme Court held that approved jurisdictional determinations are subject to judicial review.

Regulatory Program personnel will work with an applicant to ensure potential adverse impacts associated with the proposed action have been to the extent practicable avoided or minimized. This effort focuses not only on lessening adverse impacts to waters, including wetlands, but also other important aspects of the human environment including endangered species and historic properties. Focused consideration of these and other environmental factors during the project planning stage could help avoid more complex and time-consuming evaluations and consultations. As a result of this process of avoidance, minimization, and with the implementation of certain compensatory mitigation, the Corps ends up denying less than 1% of individual permit requests¹³⁶ while still ensuring compliance with important Federal laws such as the Endangered Species Act and the National Historic Preservation Act. The Corps estimates that the typical cost associated with the individual permit process for a project affecting up to three acres of jurisdictional waters is between \$15,500 and \$37,300. The typical homeowner's project is far more likely to fall within the terms of a general permit (e.g., NWP 29, which authorizes discharges that result in the loss of no more than 1/2-acre of non-tidal "waters of the United States" to support the construction or expansion of a single residence or a residential development) than to require filling multiple acres of jurisdictional waters.¹³⁷

D. Placement of the Definition of "Waters of the United States" in the Code of Federal Regulations

1. This Rule

Prior to the 2020 NWPR, the definition of "waters of the United States" was historically placed in eleven locations in the Code of Federal Regulations (CFR). For the sake of simplicity, in this rule, as in the 2020 NWPR, the agencies are codifying the definition of "waters of the United States" in only two places in the CFR—in Title 33, which generally implements the Corps' statutory authority, at 33 CFR 328.3, and in Title 40, which generally implements EPA's statutory authority, at 40 CFR 120.2. Additionally, the agencies' final rule makes several ministerial changes to EPA's regulations

at part 120: (1) this rule deletes the definition of "navigable waters" at 40 CFR 120.2 and adds the definition to the section "purpose and scope" at 40 CFR 120.1 and (2) this rule adds clarifying text to the section "purpose and scope" at 40 CFR 120.1.

2. Summary of the Agencies' Consideration of Public Comments and Rationale for This Rule

The agencies proposed to maintain the definition of "waters of the United States" at 33 CFR part 328 and in one location at 40 CFR 120.2. The agencies also proposed to delete the definition of "navigable waters" at 40 CFR 120.2 and to add the definition to the section "purpose and scope" of part 120 at 40 CFR 120.1. Additionally, the agencies proposed to add additional clarifying text to the section "purpose and scope" at 40 CFR 120.1.

The agencies solicited comment on their deletion of the definition of "navigable waters" at 40 CFR 120.2 and adding it instead to the section "purpose and scope" at 40 CFR 120.1. One commenter supported the proposed changes to placement of the definition of "waters of the United States." As the agencies stated in the preamble to the 2020 NWPR, the placement of the definition in two locations, at 33 CFR 328.3 and 40 CFR 120.2, increases convenience for the reader and provides clarity to the public that there is a single definition of "waters of the United States" applicable to the Clean Water Act and its implementing regulations. The placement has no substantive implications for the scope of Clean Water Act jurisdiction. 85 FR 22328 (April 21, 2020). In the sections of the CFR where EPA's definition previously existed, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to 40 CFR part 300, the 2020 NWPR cross-references the then-newly created section of the regulations containing the definition of "waters of the United States." The cross-references to 40 CFR 120.2 are maintained by this rule.

As discussed in the preamble of the proposed rule, the agencies intend for the other revisions to 40 CFR 120—deleting the definition of "navigable waters" at 40 CFR 120.2, adding the definition into the section "purpose and scope" at 40 CFR 120.1, and adding clarifying text to the section "purpose and scope" at 40 CFR 120.1—to be editorial and clarifying changes and not substantive changes from EPA's regulations. The agencies have concluded that these minor revisions add consistency between EPA's regulations at 40 CFR 120 and the

Corps' regulations defining "waters of the United States" at 33 CFR 328.3. As a result of this non-substantive revision, the agencies' definitions will have parallel numerical and alphabetical subsections, providing clarity for the public. The changes have no implications for Clean Water Act program implementation. They are made for the sole purpose of enhancing the clarity of EPA's regulation and providing consistency across the implementing agencies' regulations.

E. Severability

The purpose of this section is to clarify the agencies' intent with respect to the severability of provisions of this rule. Each category and subcategory of jurisdictional waters in this rule is capable of operating independently. If any provision or jurisdictional category or subcategory of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid. Likewise, if the application of any portion of this rule to a particular circumstance is determined to be invalid, the agencies intend that the rule remain applicable to all other circumstances.

For example, in the absence of jurisdiction over a subcategory of jurisdictional tributaries, adjacent wetlands, or paragraph (a)(5) waters, references to those subcategories of waters could be removed, and the agencies would continue to exercise jurisdiction under the remainder of this rule (including unaffected subcategories). Each exclusion in paragraph (b) and each definitional provision of paragraph (c) also operates independently of the other provisions in this rule and is intended to be severable. Moreover, as noted, the agencies intend applications of this rule to be severable from other applications, such that if the application of this rule to a given circumstance is held invalid, the rule remains enforceable in all other applications. For example, if a court were to determine that a wetland cannot be treated as adjacent if it is separated from a jurisdictional water by road or other barrier, the agencies intend that other categories of wetlands within the rule's definition of "adjacent" would remain subject to jurisdiction.

F. Jurisdictional Determinations Issued Under Previous Rules

The agencies recognize that promulgation of this rule could lead to questions regarding AJDs issued under prior rules defining "waters of the United States" and the utility of such AJDs to support actions, such as

¹³⁶ Based on data from the Corps' ORM2 database.

¹³⁷ According to recent U.S. Census data, even in the State with the largest lot size, California, the average lot size is substantially smaller than three acres, see <https://www.census.gov/construction/charts/>, meaning the acreage of jurisdictional waters would be smaller still.

requests for permits, following the effective date of this rule. In this section, the agencies seek to provide clarity on the effect of this rule on previously issued AJDs and the extent to which AJDs issued under prior rules may be relied upon. To be clear, this discussion merely explains pre-existing legal principles and does not create new requirements.

An AJD is a Corps document stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. *See* 33 CFR 331.2. As a matter of policy, AJDs are valid for a period of five years from the date of issuance, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit reevaluation on a more frequent basis. *See* U.S. Army Corps of Engineers, RGL No. 05–02, section 1(a), p. 1 (June 2005). Additionally, the possessor of a valid AJD may ask the Corps to reassess a parcel and issue a new AJD before the five-year expiration date.¹³⁸

This rule does not invalidate AJDs issued under prior definitions of “waters of the United States.” As such, any existing AJD—except AJDs issued under the vacated 2020 NWPR, which are discussed below—will remain valid to support regulatory actions, such as permitting, until its expiration date, unless one of the criteria for revision is met under RGL 05–02 or the recipient of such an AJD asks the Corps to issue a new AJD. Because agency actions are governed by the rule in effect at the time an AJD is issued and not when the request was made, all approved jurisdictional determinations issued on or after the effective date of this rule will be made consistent with this rule.

Because two district courts vacated the 2020 NWPR, the agencies have received many questions regarding the validity of AJDs issued under the 2020 NWPR (hereinafter, “NWPR AJDs”). In response to such inquiries, the agencies have explained through previous public statements that NWPR AJDs, unlike AJDs issued under other rules that were changed pursuant to notice-and-comment rulemaking rather than vacatur, may not reliably state the presence, absence, or limits of “waters of the United States” on a parcel and

will not be relied upon by the Corps in making new permit decisions following the Arizona district court’s August 30, 2021 order vacating the 2020 NWPR.¹³⁹ Therefore, for any currently pending or future permit action that intends to rely on a NWPR AJD, the Corps will discuss with the applicant, as detailed in RGL 16–01,¹⁴⁰ whether the applicant would like to receive a new AJD completed under the regulatory regime in effect at that time (*i.e.*, the pre-2015 regulatory regime until this rule is effective or this rule after it becomes effective) to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary jurisdictional determination or “no JD whatsoever.”¹⁴¹

NWPR AJDs issued prior to the Arizona district court’s vacatur decision and that are *not* associated with a permit action (also known as “stand-alone” AJDs under RGL 16–01) will remain valid stand-alone AJDs until their expiration date unless one of the criteria for revision is met under RGL 05–02 or if the recipient of such an AJD requests that a new AJD be provided. A recipient of a stand-alone NWPR AJD should nonetheless be aware of the reliability considerations noted above. Moreover, a recipient of a stand-alone NWPR AJD that intends to discharge into waters identified as non-jurisdictional under the vacated 2020 NWPR but that may be jurisdictional under the pre-2015 regulatory regime or this rule may want to discuss their options with the Corps due to the unreliability of those jurisdictional findings.

G. Implementation Tools

This rule provides implementation guidance informed by sound science, implementation tools, and other resources, drawing on more than a decade of post-*Rapanos* implementation experience. Section IV.C of this preamble addressing specific categories of waters provides guidance on implementation of each provision of this rule. This section addresses advancements in the implementation data, tools, and methods that are

relevant to jurisdictional determinations under this rule. Although the agencies may also rely on site-specific information from landowners or field visits, the agencies generally use publicly available data, tools, and methods to inform determinations of jurisdiction. These same resources can also be used by the public and practitioners to assess aquatic resources to better understand whether a particular resource may be jurisdictional. Some of these resources are freely available, and others may charge a fee for use. Note that members of the public are not required to conduct or provide any of the analyses described in this section as part of a JD request. JD requesters need only provide the agencies with a minimal amount of information, including identification of the boundaries of the area of interest, to request a JD. *See* RGL 16–01, Appendix 1. The following discussion is provided to clarify how available data, tools, and methods inform the agencies’ determinations and confirm that interested parties may use these same resources to inform their own siting decisions, if so desired.

Since the *Rapanos* decision, there have been dramatic advancements in the data, tools, and methods used to make jurisdictional determinations, including in the digital availability of information and data. In 2006, when the agencies began to implement the *Rapanos* and *Carabell* decisions, there were fewer implementation tools and support resources to guide staff in jurisdictional decision-making under the relatively permanent and significant nexus standards. Agency staff were forced to rely heavily on information provided in applicant submittals and available aerial imagery to make jurisdictional decisions or to schedule an in-person site visit to review the property themselves. The 2007 Corps Instructional Guidebook encouraged practitioners to utilize maps, aerial photography, soil surveys, watershed studies, scientific literature, previous jurisdictional determinations for the review area, and local development plans to complete accurate jurisdictional decisions or analysis. For more complicated situations or decisions involving significant nexus evaluations, the Guidebook encouraged practitioners to identify and evaluate the functions relevant to the significant nexus by incorporating literature citations and/or references from studies pertinent to the parameters being reviewed. For significant nexus decisions specifically, the Guidebook instructed practitioners to consider all

¹³⁸ In contrast to AJDs, preliminary jurisdictional determinations (PJDs) are advisory in nature and have no expiration date. *See* 33 CFR 331.2; *see also* U.S. Army Corps of Engineers, RGL No. 16–01 (October 2005) (RGL 16–01). This rule has no impact on existing PJDs.

¹³⁹ U.S. Army Corps of Engineers, *Navigable Waters Protection Rule Vacatur* (published January 5, 2022), available at <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>; U.S. Environmental Protection Agency, *Current Implementation of Waters of the United States* (published January 5, 2022), available at <https://www.epa.gov/wotus/current-implementation-waters-united-states>.

¹⁴⁰ U.S. Army Corps of Engineers, RGL No. 16–01 (October 2016).

¹⁴¹ *See* RGL 16–01 (explaining the “no JD whatsoever” option).

available hydrologic information (*e.g.*, gage data, precipitation records, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM.

The Corps also issued RGL No. 07–01¹⁴² in 2007. RGL No. 07–01 laid out principal considerations for evaluating the significant nexus of a tributary and its adjacent wetlands which included the volume, duration, and frequency of flow of water in the tributary, proximity of the tributary to a traditional navigable water, and functions performed by the tributary and its adjacent wetlands. This RGL highlighted wetland delineation data sheets, delineation maps, and aerial photographs as important for adequate information to support all jurisdictional decision-making. Gathering the data necessary to support preliminary or approved jurisdictional decisions was often time consuming for staff and the regulated public. There were not many nationally available repositories for much of the information that the agency staff utilized in decision-making, particularly during the first years of implementing the guidance. Despite these challenges, the agencies and others in the practitioner community gained substantial collective experience implementing the relatively permanent and significant nexus standards from 2006 to 2015.

Since 2015, there have been dramatic improvements to the quantity and quality of water resource information available on the internet, including information and tools that are freely available to the public. The agencies and other practitioners can use online mapping tools to determine whether waters are connected or sufficiently close to “waters of the United States,” and new user interfaces have been developed that make it easier and quicker to access information from a wide variety of sources. Furthermore, some information used to only be available in hard-copy paper files, including water resource inventories and habitat assessments, and many of these resources have been made available online or updated with new information.

The following overview of several tools and data that have been developed or improved since 2015 is intended to demonstrate how case-specific evaluations can be made more quickly

¹⁴² RGL No. 07–01 was later superseded by RGL 08–02, which was superseded by RGL 16–01, neither of which addressed significant nexus evaluations.

and consistently than ever before. Advancements in geographic information systems (GIS) technology and cloud-hosting services have led to an evolution in user interfaces for publicly available datasets frequently used in jurisdictional decision-making such as the NWI, USGS NHD, soil surveys, aerial imagery, and other geospatial analysis tools like USGS StreamStats. Not only are the individual datasets more easily accessible to users, but it has also become much easier for users to quickly integrate these various datasets using desktop or online tools like map viewers to consolidate and evaluate the relevant data in one visual platform. Such map viewers can assist, for example, with considering the factors and assessing the functions in paragraph (c)(6). The EPA Watershed Assessment, Tracking, and Environmental Results System (WATERS) GeoViewer is an example of a web mapping application that provides accessibility to many spatial dataset layers like NHDPlus and watershed reports for analysis and interpretation. Another web mapping application is the EPA’s EnviroAtlas, which provides information and interpretative tools to help facilitate surface water assessments using multiple data layers such as land cover, stream hydrography, soils, and topography. Several States also have State-specific interactive online mapping tools called Water Resource Registries (WRRs). WRRs host publicly available GIS data layers providing various information such as the presence of wetlands, land use/cover, impaired waters, and waters of special concern. Other websites like the Corps’ Jurisdictional Determinations and Permits Decision site and web services like EPA’s Enforcement and Compliance History Online (ECHO) Map Services allow users to find geospatial and technical information about Clean Water Act section 404 and NPDES permitted discharges. Information on approved jurisdictional determinations finalized by the Corps is also available on the Corps’ Jurisdictional Determinations and Permit Decisions site and EPA’s Clean Water Act Approved Jurisdictional Determinations website.

The data that are available online have increased in quality as well as quantity. The NHD has undergone extensive improvements in data availability, reliability, and resolution since 2015, including the release of NHDPlus High Resolution datasets for the conterminous U.S. and Hawaii, with Alaska under development. One notable improvement in NHD data quality is

that the flow-direction network data are much more accurate than in the past. Improvements have also been made to the NWI website and geospatial database, which has served as the primary source of wetland information in the United States for many years. In 2016, NWI developed a more comprehensive dataset (NWI Version 2) that is inclusive of all surface water features in addition to wetlands. This NWI Version 2 dataset provides more complete geospatial data on surface waters and wetlands than has been available in the past and provides a more efficient means to make determinations of flow and water movement in surface water basins and channels, as well as in wetlands. The agencies and other practitioners can use this dataset to help assess potential hydrologic connectivity between waterways and wetlands. For example, it can be used in part to help the agencies identify wetlands that do not meet the definition of adjacent (waters assessed under paragraph (a)(5)).

The availability of aerial and satellite imagery has improved dramatically since 2015. This imagery is used to observe the presence or absence of flow and identify relatively permanent flow in tributary streams and hydrologic connections to waters. The agencies often use a series of aerial and satellite images, spanning multiple years and taken under normal climatic conditions, to determine the flow characteristics of a tributary, as a first step to determine if additional field-based information is needed to determine the flow characteristics. Other practitioners may also use aerial and satellite images to identify aquatic resources and inform assessments of those aquatic resources. The growth of the satellite imagery industry has reduced the need to perform as many field investigations to verify Clean Water Act jurisdiction.¹⁴³ Some of these services charge a fee for use, but others are freely available.

Similarly, the availability of LIDAR data has increased in availability and utility for informing decisions on Clean

¹⁴³ For example, satellite imagery services are available through services such as DigitalGlobe, available at <https://discover.maxar.com/>, and aerial photography and imagery are available through services such as USGS EarthExplorer, available at <https://earthexplorer.usgs.gov/>, and National Aeronautics and Space Administration (NASA) Earth Data, available at <https://earthdata.nasa.gov/>. The USGS Landsat Level-3 Dynamic Surface Water Extent (DSWE) product, available at https://www.usgs.gov/landsat-missions/landsat-dynamic-surface-water-extent-science-products?qt-science_support_page_related_con=0#qt-science_support_page_related_con, is a specific example of a tool that may be useful for identifying surface water inundation on the landscape in certain geographic areas.

Water Act jurisdiction. LIDAR produces high-resolution elevation data (<1–3 meter) which can be used to create maps of local topography. The high-resolution maps can highlight the potential hydrologic connections and flowpaths at a site. Where LIDAR data have been processed to create a bare earth model, detailed depictions of the land surface reveal subtle elevation changes and characteristics of the land surface, including the identification of tributaries. Hydrologists, for example, have long used digital elevation models of the earth's surface to model watershed dynamics, and the agencies have used such information where available to help inform jurisdictional decisions. LIDAR-derived digital elevation models tend to be high resolution (<1–3 meter), so they are particularly helpful for identifying fine-scale surface features. For example, LIDAR-indicated tributaries can be correlated with aerial photography or other tools to help identify channels and to help determine flow permanence (e.g., relatively permanent flow) in the absence of a field visit. The agencies have been using such remote sensing and desktop tools to assist with identifying jurisdictional tributaries for many years, and such tools are particularly critical where data from the field are unavailable, or a field visit is not possible. High-resolution LIDAR data are becoming more widespread for engineering and land use planning purposes. The USGS is in the process of collecting LIDAR data for the entire United States.¹⁴⁴ LIDAR data are available for download via the National Map Download Client (*available at <https://apps.nationalmap.gov/downloader/#/>*) and LIDAR-derived digital elevation models are available via the 3DEP LidarExplorer (*available at <https://apps.nationalmap.gov/lidar-explorer/#/>*). However, LIDAR-derived elevation maps are not always available, so the agencies use other elevation data, including digital elevation models derived from other sources (e.g., 10-meter digital elevation models) and topographic maps to help determine the elevation on a site and to assess the potential location of tributaries.

Since 2015, tools have been developed that automate some of the standard practices the agencies rely on to assist in jurisdictional determinations. One example of this automation is the Antecedent Precipitation Tool (APT), which was

released to the public in 2020 and had been used internally by the agencies prior to its public release. The APT is a desktop tool developed by the Corps and is commonly used by the agencies to help determine whether field data collection and other site-specific observations occurred under normal climatic conditions. In addition to providing a standardized methodology to evaluate normal precipitation conditions (“precipitation normalcy”), the APT can also be used to assess the presence of drought conditions, as well as the approximate dates of the wet and dry seasons for a given location. As discussed in section IV.B.3 of this preamble, above, precipitation data are often not useful in providing evidence as to whether a surface water connection exists in a typical year, as required by the 2020 NWPR. However, the agencies have long used the methods employed in the APT to provide evidence that wetland delineations are made under normal circumstances or to account for abnormalities during interpretation of data. The development and public release of the APT has accelerated the speed at which these analyses are completed; has standardized methods, which reduces errors; and has enabled more people to perform these analyses themselves, including members of the public. Automated tools like the APT will continue to be important for supporting jurisdictional decision-making. The agencies will consider opportunities to develop and improve tools that should be helpful for further automating and streamlining the JD process in the future.

Site visits are still sometimes needed to perform on-site observations of surface hydrology or collect regionally-specific field-based indicators of relatively permanent flow (e.g., the presence of riparian vegetation or certain aquatic macroinvertebrates). The methods and instruments used to collect field data have also improved since 2015, such as the development of rapid, field-based SDAMs that use physical and biological indicators to determine the flow duration class of a stream reach. The agencies have previously used existing SDAMs developed by Federal and State agencies to identify perennial, intermittent, or ephemeral streams. The agencies will continue to use these tools whenever they are determined to be a reliable source of information for the specific water feature of interest. The agencies are currently working to develop region-specific SDAMs for nationwide coverage, which will promote consistent

implementation across the United States in a manner that accounts for differences between each ecoregion. The region-specific SDAMs will be publicly available, with user manuals that will guide not only the agencies, but also other practitioners, in applying the methods to assess aquatic resources. Additional information on the agencies' efforts to develop SDAMs is available on the Regional Streamflow Duration Assessment Methods web page, *available at <https://www.epa.gov/streamflow-duration-assessment>*. Consistent with longstanding practice, the agencies will make decisions based on the best available information.

EPA and the Army have also been working with other Federal agencies on improving aquatic resource mapping and modeling, including working with the Department of Interior (DOI). EPA, USGS, and FWS have a long history of working together to map the nation's aquatic resources. The agencies will continue to collaborate with DOI to enhance the NHD, NWI, and other products to better map the nation's water resources while enhancing the utility and availability of such geospatial products for implementation of Clean Water Act programs.

H. Publicly Available Jurisdictional Information and Permit Data

The agencies have provided information on jurisdictional determinations that is readily available to the public. The Corps maintains a website, *available at <https://permits.ops.usace.army.mil/orm-public>*, that presents information on the Corps' approved jurisdictional determinations and Clean Water Act section 404 permit decisions. The website allows users to search and view basic information on approved jurisdictional determinations and permit decisions (including latitude and longitude) and to filter the determinations using different parameters like Corps District and year. The website also contains a link to an associated approved jurisdictional determination form. Similarly, EPA maintains a website, *available at <https://watersgeo.epa.gov/cwa/CWA-JDs/>*, that presents information on approved jurisdictional determinations made by the Corps under the Clean Water Act since August 28, 2015. EPA's website also allows users to search, sort, map, view, filter, and download information on approved jurisdictional determinations using different search parameters (e.g., by year, location, State, watershed, regulatory regime). The website includes a map viewer that shows where waters have been determined to be jurisdictional or non-

¹⁴⁴ See U.S. Geological Survey, “What is Lidar data and where can I download it?” *Available at <https://www.usgs.gov/faqs/what-lidar-data-and-where-can-i-download-it>*.

jurisdictional based on the approved jurisdictional determinations available on the site.¹⁴⁵ These websites will incorporate information on approved jurisdictional determinations made under the revised definition of “waters of the United States.” EPA also maintains on its website information on certain dischargers permitted under Clean Water Act section 402, including the Permit Compliance System and Integrated Compliance Information System database, available at <https://www.epa.gov/enviro/pcs-icis-overview>, as well as the EnviroMapper, available at <https://enviro.epa.gov/enviro/em4ef.home>, and How’s My Waterway, available at <https://www.epa.gov/waterdata/how-my-waterway>. The agencies also intend to provide links to the public to any guidance, forms, or memoranda of agreement relevant to the definition of “waters of the United States” on EPA’s website at <https://www.epa.gov/wotus>.

V. 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; Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. The agencies prepared an economic analysis of the potential costs and benefits associated with this action. This analysis, the Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule, is available in the docket for this action.

This rule establishing the definition of “waters of the United States” does not by itself impose costs or benefits. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of

“waters of the United States” (*i.e.*, sections 303, 311, 401, 402, and 404) that are not otherwise modified by this rule. Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations.

The agencies prepared the economic analysis pursuant to the requirements of Executive Orders 12866 and 13563 to provide information to the public. The economic analysis was done for informational purposes and the final decisions on the scope of “waters of the United States” in the rulemaking are not based on consideration of the potential benefits and costs in the economic analysis. Within the Economic Analysis for the Final Rule, the agencies have analyzed the potential benefits and costs associated with various Clean Water Act programs that could result from this rule relative to two baselines. The primary baseline analyzes costs and benefits associated with moving from the pre-2015 regulatory regime that is currently being implemented to the definition in this rule. This rule imposes *de minimis* costs and generates *de minimis* benefits under the primary baseline.

Though two courts have vacated the 2020 NWPR and the pre-2015 regulatory regime is currently being implemented, the agencies have chosen to provide additional information to the public with the 2020 NWPR as a secondary baseline in the Economic Analysis for the Final Rule. This rule will replace the 2020 NWPR in the Code of Federal Regulations as the definition of “waters of the United States” in the agencies’ regulations. The agencies project that compared to the 2020 NWPR, this rule would define more waters as within the scope of the Clean Water Act. The analysis of estimated costs and benefits of this rule is contained in the Economic Analysis for the Final Rule and is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA process.

C. Regulatory Flexibility Act (RFA)

The agencies certify that this rule will not have a significant economic impact on a substantial number of small entities under the RFA for several reasons. First, as demonstrated in Chapter I of the Economic Analysis for the Final Rule, this rule would codify a regulatory regime with *de minimis* differences from the one currently being implemented nationwide due to the vacatur of the 2020 NWPR.

This rule will also not have a significant economic impact on a substantial number of small entities under the RFA because under the RFA, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives “which minimize any significant economic impact of the proposed rule on small entities.” 5 U.S.C. 603(a). This rule does not directly apply to specific entities and therefore it does not “subject” any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory term “navigable waters,” defined as “waters of the United States,” which defines the scope of Clean Water Act jurisdiction. 33 U.S.C. 1362(7). The scope of Clean Water Act jurisdiction is informed by the text, structure, and history of the Clean Water Act and relevant Supreme Court case law, as well as the best available science and the agencies’ experience and technical expertise. None of these factors are readily informed by an RFA analysis. *See, e.g., Cement Kiln Recycling Coal v. EPA*, 255 F.3d 856, 869 (D.C. Cir. 2001) (“[T]o require an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.”); *Michigan v. EPA*, 213 F.3d 663, 688–89 (D.C. Cir. 2000) (holding that the RFA imposes “no obligation to conduct a small entity impact analysis of effects” on entities which it regulates only “indirectly”); *Am. Trucking Ass’n v. EPA*, 175 F.3d 1027, 1045 (D.C. Cir. 1999) (“[A]n agency may justify its certification under the RFA upon the ‘factual basis’ that the rule does not directly regulate any small entities.”); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (“Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”).

¹⁴⁵ With respect to the waters determined to be non-jurisdictional, section IV.C.7 of this preamble describes the regulatory exclusions in this rule, which reflect the agencies’ longstanding practice and technical judgment that certain waters and features are not subject to the Clean Water Act. Additionally, based on the agencies’ experience, many waters assessed under this rule will not have a significant nexus to paragraph (a)(1) waters, and thus will not be jurisdictional under the Clean Water Act under this rule. *See* section IV.C.9.b of this preamble for examples of waters that would not likely have a significant nexus under this rule.

Finally, the agencies conclude that this rule will not significantly impact small entities because it narrows the scope of jurisdiction from the text of the 1986 regulations. Because fewer waters will be subject to the Clean Water Act under this rule than fall within the scope of the text of the regulations in effect, this action will not affect small entities to a greater degree than the existing regulations currently in effect. A key change is the deletion of the provision in the 1986 regulations that defines “waters of the United States” as all paragraph (a)(3) “other waters” such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. Under this rule, a broad interstate commerce connection is not sufficient to meet the definition of “waters of the United States.” Instead, waters must meet either the relatively permanent standard or the significant nexus standard. Further, the final rule eliminates jurisdiction over tributaries and adjacent wetlands based on their connection to paragraph (a)(5) waters. In addition, this rule would explicitly exclude some features and waters over which the agencies have not generally asserted jurisdiction, but which are not excluded in the text of the 1986 regulations, and in so doing eliminates the authority of the agencies to determine in case-specific circumstances that some such waters are jurisdictional “waters of the United States.” This rule also provides new limitations on the scope of jurisdictional tributaries and most adjacent wetlands by establishing a requirement that they meet either the relatively permanent standard or the significant nexus standard. Together, these changes serve to narrow the scope of this rule in comparison to the text of the regulation in effect. Because the rule narrows the scope of jurisdiction from the text of the 1986 regulations, this action will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

Nevertheless, the agencies recognize that the scope of the term “waters of the

United States” is of great national interest, including within the small business community. Given this interest, the agencies sought early input from representatives of small entities while formulating a proposed definition of this term, including holding a public meeting dedicated to hearing feedback from small entities on August 25, 2021 (see Environmental Protection Agency, 2021 “Waters of the United States” Public Meeting Materials, available at <https://www.epa.gov/wotus/2021-waters-united-states-public-meeting-materials>). The agencies also met with small entities during the public comment period to hear their thoughts on the proposed rule. The Office of Advocacy of the U.S. Small Business Administration hosted EPA and Army staff in January 2022 to discuss the proposed rule with small entities at its Small Business Environmental Roundtables. The agencies met with small agricultural interests and their representatives for a roundtable on January 7, 2022, and met with other small entities on January 10, 2022. The agencies have addressed this feedback in the preamble relating to these topics and in the discussion above.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The final definition of “waters of the United States” applies broadly to Clean Water Act programs. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

E. Executive Order 13132: Federalism

Consulting with State and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have federalism implications under the terms of Executive Order 13132. The agencies engaged State and local governments over a 60-day federalism consultation period during development of this rule, beginning with the initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. Twenty intergovernmental organizations, including eight of the ten organizations identified in EPA’s 2008 Executive Order 13132 Guidance, attended the initial Federalism consultation meeting, as well as 12 associations representing State and local governments. Organizations in attendance included the following: National Governors Association,

National Conference of State Legislatures, United States Conference of Mayors, National League of Cities, National Association of Counties, National Association of Towns and Townships, County Executives of America, Environmental Council of the States, Association of State Wetland Managers, Association of State Drinking Water Administrators, National Association of State Departments of Agriculture, Western States Water Council, National Association of Clean Water Agencies, National Rural Water Association, National Association of Attorneys General, National Water Resources Association, National Municipal Stormwater Alliance, Western Governors’ Association, American Water Works Association, and Association of Metropolitan Water Agencies. In addition, the agencies received letters from State and local governments, as well as government associations, as part of this initial federalism consultation process. A total of 37 letters were submitted from twelve State government agencies, five local government agencies, seventeen intergovernmental associations, and three State-level associations of local governments. All letters received by the agencies during this consultation may be found in the docket (Docket ID No. EPA–HQ–OW–2021–0602) for this rule.

A Summary Report of Federalism Consultation for the proposed rule was published in December 2021. The agencies continued to engage with State and local governments during the public comment period. The agencies hosted two roundtable sessions for State and local officials on January 24 and January 27, 2022. These State and local government roundtables provided an overview of the proposed rule and discussions of a variety of topics including significant nexus, specific waters, exclusions, and State regulatory programs. Each roundtable meeting included breakout groups for officials by region so they could discuss and provide feedback to the agencies. Organizations in attendance included a wide variety of State and local government agencies, as well as intergovernmental associations and State-level associations of local governments. These meetings and the letters provided represent a wide and diverse range of interests, positions, comments, and recommendations to the agencies. Common themes from the feedback included the importance of promoting State-Federal partnerships; the need for the agencies to take a regional approach to determinations of jurisdiction; and support for further

clarity and consistency with significant nexus and relatively permanent determinations. The agencies have prepared a report summarizing their consultation and additional outreach to State and local governments and the results of this outreach. A copy of the final report is available in the docket (Docket ID. No. EPA-HQ-OW-2021-0602) for this rule.

Under the technical requirements of Executive Order 13132, agencies must conduct a federalism consultation as outlined in the Executive Order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on State and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt State law. The agencies conducted a 60-day federalism consultation due to strong interest on the part of State and local governments on this issue over the years and potential effects associated with a change in the definition of “waters of the United States.” However, the agencies have concluded that compared to the status quo, this rule does not impose any new costs or other requirements on States, preempt State law, or limit States’ policy discretion; rather, it defines the scope of “waters of the United States” to which Clean Water Act programs apply. Executive Order paras. (6)(b) and (6)(c). This final rule draws a boundary between waters subject to Clean Water Act protections and those that Tribes and States may manage under their independent authorities. As compared to the status quo, this action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Documentation for this decision is contained in the Economic Analysis for the Final Rule, which can be found in the docket for this action.

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

This action may have Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law.

EPA and the Army consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* and the *Department of the Army American Indian and Alaska Native Policy* early in the process of developing this regulation to permit

them to have meaningful and timely input into its development.

The agencies initiated a Tribal consultation and coordination process before proposing this rule by sending a “Notification of Consultation and Coordination” letter on July 30, 2021, to all 574 Tribes federally recognized at that time. The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process. The agencies engaged Tribes over a 66-day Tribal consultation period during development of the proposed rule. The consultation included two webinars on August 19 and August 24, 2021, in which the agencies answered questions directly from Tribal representatives and heard their initial feedback on the agencies’ rulemaking effort. The agencies responded to all requests for one-on-one consultation and met with four Tribes at a staff-level and with four Tribes at a leader-to-leader level. All letters received by the agencies as part of Tribal consultation may be found in the docket (Docket ID No. EPA-HQ-OW-2021-0602) for this rule.

The agencies also continued to engage with Tribes post-proposal, including via regional Tribal meetings and through a virtual Tribal roundtable on January 20, 2022. The topics addressed during this roundtable included options for describing and implementing the relatively permanent and significant nexus standards, the definitions of specific waters such as interstate waters and paragraph (a)(5) waters, and the implementation of exclusions. The most common themes from the feedback were: the importance of streams and wetlands to Tribal cultural resources; the need for the agencies to consider regional differences; the need for the agencies to respect the Federal trust responsibility and Tribal treaty rights; and the importance of restoring a broad definition of “waters of the United States.” Some Tribes commented on the importance of protecting ephemeral streams, which were eliminated from jurisdiction under the 2020 NWPR, as well as protecting wetlands that were excluded under the 2020 NWPR. Several Tribes spoke about the need to include “waters of the tribe” in the definition of “waters of the United States.” Additionally, several Tribes stated support for furthering environmental justice with the proposed rulemaking. Some Tribes also expressed support for accounting for climate change in some manner in the definition of “waters of the United States.” The agencies have prepared a report summarizing the consultation and

further engagement with Tribal Nations. This report (Docket ID. No. EPA-HQ-OW-2021-0602) is available in the docket for this rule.

As required by Executive Order 13175 section 7(a), the EPA’s Tribal Consultation Official has certified that the requirements have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

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

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have 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 the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This rule does not involve technical standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (Indigenous peoples and/or people of color) and low-income populations.

EPA and the Army believe that this action does not have disproportionately high and adverse human health or environmental effects on Indigenous peoples, people of color, and/or low-income populations. The documentation for this decision is contained in the Economic Analysis for

the Final Rule, which can be found in the docket for this action.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns (*e.g.*, Indigenous peoples, people of color, and low-income populations), and have qualitatively assessed impacts to these groups in the Economic Analysis for the Final Rule. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns.

For this rule, consistent with Executive Order 12898 and Executive Order 14008 on “Tackling the Climate Crisis at Home and Abroad” (86 FR 7619; January 27, 2021), the agencies examined whether the change in benefits due to this rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to both baselines. Regardless of baseline, for most of the wetlands and affected waters impacted by this rule at a hydrologic unit code (HUC) 12 watershed level,¹⁴⁶ there was no evidence of potential environmental justice impacts warranting further analysis. It is expected that where there were environmental justice impacts at the HUC 12 scale as compared to the secondary baseline of the 2020 NWPR, those impacts would be beneficial to communities with environmental justice concerns because this rule will result in more waters being jurisdictional than would be under the 2020 NWPR. For example, communities with environmental justice concerns in the arid West may have experienced increased water pollution and associated health impacts under the 2020 NWPR due to that rule’s lack of Federal protection for ephemeral streams and their adjacent wetlands.

K. Congressional Review Act

This action is subject to the Congressional Review Act, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects

33 CFR Part 328

Administrative practice and procedure, Environmental protection,

¹⁴⁶ HUC boundaries are established by USGS and NRCS. These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.

Navigation (water), Water pollution control, Waterways.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

Michael L. Connor,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Michael S. Regan,

Administrator, Environmental Protection Agency.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Revise § 328.3 to read as follows:

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters, including interstate wetlands;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

(iii) Waters identified in paragraph (a)(2) or (3) of this section when the

wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of

water meets the definition of waters of the United States; and

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(2) *Adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”

(3) *High tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(6) *Significantly affect* means a material influence on the chemical,

physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:

(i) Functions to be assessed:
(A) Contribution of flow;
(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);

(C) Retention and attenuation of floodwaters and runoff;

(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or

(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;

(ii) Factors to be considered:

(A) The distance from a water identified in paragraph (a)(1) of this section;

(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;

(C) The size, density, or number of waters that have been determined to be similarly situated;

(D) Landscape position and geomorphology; and

(E) Climatological variables such as temperature, rainfall, and snowpack.

Title 40—Protection of Environment

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

■ 3. The authority citation for part 120 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 4. Revise § 120.1 to read as follows:

§ 120.1 Purpose and scope.

This part contains the definition of “waters of the United States” for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations. EPA regulations implementing the Clean Water Act use the term “navigable waters,” which is defined at section 502(7) of the Clean Water Act as “the waters of the United States, including the territorial seas,” or the term “waters of the United States.”

In light of the statutory definition, the definition in this section establishes the scope of the terms “waters of the United States” and “navigable waters” in EPA’s regulations.

■ 5. Revise § 120.2 to read as follows:

§ 120.2 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(1) Waters which are:
(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(ii) The territorial seas; or
(iii) Interstate waters, including interstate wetlands;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.

(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(2) *Adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”

(3) *High tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun.

Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:

(i) Functions to be assessed:

(A) Contribution of flow;

(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);

(C) Retention and attenuation of floodwaters and runoff;

(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or

(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;

(ii) Factors to be considered:

(A) The distance from a water identified in paragraph (a)(1) of this section;

(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;

(C) The size, density, or number of waters that have been determined to be similarly situated;

(D) Landscape position and geomorphology; and

(E) Climatological variables such as temperature, rainfall, and snowpack.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine; Proposed Rule

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 217**

[Docket No. 230104–0003]

RIN 0648–BL78

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to construction at the Portsmouth Naval Shipyard in Kittery, Maine, over the course of five years (2023–2028). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requests comments on the proposed regulations. NMFS responses to comments will be included in the notice of the final decision.

DATES: Comments and information must be received no later than February 17, 2023.

ADDRESSES: A copy of the Navy's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-portsmouth-naval-shipyard-kittery-maine-0>. In case of problems accessing these documents, please call the contact listed below.

Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov and enter NOAA–NMFS–2022–0133 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information

submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT:

Reny Tyson Moore, Office of Protected Resources, NMFS, ITP.tyson.moore@noaa.gov, (301) 427–8401.

SUPPLEMENTARY INFORMATION:**Purpose and Need for Regulatory Action**

We received an application from the Navy requesting 5-year regulations and authorization to take multiple species of marine mammals. This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take by Level A and Level B harassment of marine mammals incidental to the Navy's construction activities related to the multifunctional expansion and modification of Dry Dock 1 at the Portsmouth Naval Shipyard in Kittery, Maine. Please see “Background” below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce 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 for up to 5 years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the “least practicable adverse impact” on the affected species or stocks and their habitat (see the discussion below in the Proposed Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing 5-year regulations, and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule

regarding the Navy's construction activities. These measures include:

- Required monitoring of the in-water construction areas to detect the presence of marine mammals before beginning in-water construction activities;
- Shutdown of in-water construction activities under certain circumstances to avoid injury of marine mammals;
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power; and
- Implementation of a bubble curtain during rock hammering and down-the-hole (DTH) cluster drilling to reduce underwater noise impacts.

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 proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is 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 the proposed action (*i.e.*, the promulgation of regulations and subsequent issuance

of LOAs) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the proposed action qualifies to be categorically excluded from further review under NEPA.

Information in the Navy's application and this document collectively provide the environmental information related to the proposed issuance of these regulations and subsequent incidental take authorization for public review and comment. We will review all comments submitted in response to this document prior to concluding our review process under NEPA and making a final decision on the request for an incidental take authorization.

Summary of Request

On May 9, 2022, NMFS received a request from the Navy for authorization to take marine mammals incidental to construction activities related to the multifunctional expansion and modification of Dry Dock 1 at Portsmouth Naval Shipyard in Kittery, Maine. We provided comments on the application, and the Navy submitted revised versions and responses to our comments on July 5, 2022, August 15, 2022, August 19, 2022, and August 25, 2022, with the latter version deemed adequate and complete. On September 1, 2022, we published a notice of receipt of the Navy's application in the **Federal Register** (87 FR 53731), requesting comments and information related to the request. During the 30-day comment period, we received two supportive letters from private citizens.

On October 19 and 25, 2022, NMFS was notified by the Navy of project modifications and shifting Fleet submarine schedules that required the resequencing of certain activities associated with the construction at Dry Dock 1 in order to accommodate the modifications and meet the new vessel docking demands. On October 31, 2022, the Navy submitted an addendum to its application describing these changes. The requested regulations would be valid for 5 years, from April 1, 2023 through March 31, 2028. The Navy's

request is to be authorized to take five species by Level A and Level B harassment. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity.

NMFS previously issued five IHAs to the Navy for waterfront improvement work at the Portsmouth Naval Shipyard: in 2016 (81 FR 85525; November 28, 2016), 2018 (83 FR 3318; January 24, 2018), 2019 (84 FR 24476; May 28, 2019), a renewal of the 2019 IHA (86 FR 14598; March 17, 2021), and in 2022 (87 FR 19886; April 6, 2022). The most recent IHA (87 FR 19886) provided authorization to take marine mammals during the first year of the construction project described in this notice. As required, the applicant provided monitoring reports (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>) which confirm that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of Proposed Activity

Overview

Multifunctional Expansion of Dry Dock 1 (P-381) is one of three projects that support the overall expansion and modification of Dry Dock 1, located in the western extent of the Portsmouth Naval Shipyard. The two additional projects, construction of a super flood basin (P-310) and extension of portal crane rail and utilities (P-1074), are currently under construction. In-water work associated with these projects was completed under the aforementioned separate IHAs issued by NMFS. The projects have been phased to support Navy mission schedules. P-381 will be constructed within the same footprint of the super flood basin over an approximate 7-year period, during which 5 years of in-water work would occur. An IHA was issued by NMFS for the first year of P-381 construction activities between April 1, 2022 and March 31, 2023 (87 FR 19866; April 6, 2022). This request is associated with the remaining 4 years of P-381 in-water construction activities planned to occur from April 1, 2023 through March 31, 2028, as well as for additional in-water construction activities associated with the removal of emergency repair components of the super flood basin that will occur during the proposed period of effectiveness for the proposed regulations. Although the in-water construction described in this proposed

rule is anticipated to be completed by December 2026, unanticipated schedule delays could result in the Navy conducting construction activity over the full 5 years.

The purpose of the proposed project (P-381) is to modify the super flood basin to create two additional dry docking positions (Dry Dock 1 North and Dry Dock 1 West) in front of the existing Dry Dock 1 East. The Navy's specified activity also includes emergency repairs of the P-310 super flood basin. Construction activities will include the excavation and/or installation of 1,118 holes, 198 shafts, and 580 sheet piles via impact and vibratory pile driving, hydraulic rock hammering, rotary drilling, and mono and cluster DTH. The construction activities are expected to require approximately 2,498 days if the activities are considered independently over the 5-year period. However, the actual construction duration is expected to be within four years as many of the construction activities will occur concurrently. Harbor porpoises (*Phocoena phocoena*), harbor seals (*Phoca vitulina*), gray seals (*Halichoerus grypus*), and harp seals (*Pagophilus groenlandicus*) have been observed in the proposed action area. In addition, hooded seals (*Cystophora cristata*) could occur in the proposed action area.

Dates and Duration

The in-water construction activities associated with this proposed rule are anticipated to begin in April 2023 and proceed to December 2026 (4 years); however, the request for incidental take authorization is for 5 years in the event of unexpected scheduled delays. In-water construction activities would occur consecutively over a 4-year period. The Navy plans to conduct all in-water work activities with expected potential for incidental harassment of marine mammals during daylight hours.

Table 1 provides the estimated schedule and production rates for P-381 construction activities. Many of the activities included in Table 1 would span across multiple construction years and/or would occur concurrently. Because of mission requirements and operational schedules at the dry docking positions and berths, this schedule is subject to change. In-water construction activities for P-381 would occur consecutively over a 4-year period. Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; Year 1 of the Navy's construction activities is currently ongoing in association with a previously issued IHA (87 FR 19886; April 6, 2022). Vibratory pile driving

and extraction is assumed to occur for 141 days. Impact pile driving would occur for 34 days. DTH excavation (mono-hammer and cluster drill) would occur for 1,446 days. Rotary drilling would occur for 238 days (assuming that

casings and sockets for cluster drills would be set, excavated, and removed in a single day). Rock hammering would occur for 277 days. Note that pile driving days are not necessarily consecutive, and certain activities may

occur at the same time, decreasing the total number of actual in-water construction days. The contractor could be working in more than one area of the berths at a time.

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
A1 ¹	Center Wall—Install Foundation Support Piles.	Drill 18 shafts Apr 23 ³ to Aug 23 (2).	Install 102-inch diameter outer casing.	Rotary drill	1 shaft/day, 1 hour/day ...	4 18
A2 ¹			Pre-drill 102-inch diameter socket.	Rotary drill	1 shaft/day, 9 hours/day	4 18
A3 ¹			Remove 102-inch outer casing.	Rotary drill	1 casing/day, 15 minutes/casing.	4 18
A4 ¹			Drill 78-inch diameter shaft.	Cluster drill DTH	6.5 days/shaft, 10 hours/day.	4 117
R ¹	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles Apr 23 ³ to May 23 (2).	28-inch wide Z-shaped sheets.	Impact with initial vibratory set.	8 sheets/day, 5 minutes and 300 blows/pile.	46
1	Berth 11—Remove Shutter Panels.	Remove 112 panels Apr 23 ³ to May 23 (2).	Concrete shutter panels	Hydraulic rock hammering.	5 hours/day	4 56
2	Berth 1— Remove Sheet Piles.	Remove 168 sheet piles Apr 23 ³ to Jun 24 (2, 3).	25-inch-wide Z- shaped	Vibratory extraction	4 piles/day	4 42
3	Berth 1—Remove Granite Block Quay Wall.	2,800 cubic yards (cy) Apr 23 ³ to Jun 24 (2, 3).	Removal of granite blocks.	Hydraulic rock hammering.	2.5 hours/day	4 47
4	Berth 1—Top of Wall Removal for Waler Installation.	320 linear feet (lf) Apr 23 ³ to Jun 24 (2, 3).	Mechanical concrete removal.	Hydraulic rock hammering.	10 hours/day	4 74
5	Berth 1—Install southeast corner Support of Excavation (SOE).	Install 28 sheet piles Apr 23 to Jul 23 (2).	28-inch-wide Z-shaped ..	Impact with initial vibratory set.	4 piles/day, 5 minutes/pile and 300 blows/pile.	4 8
6	Berth 11—Mechanical Rock Removal at Basin Floor.	700 cy Apr 23 ³ to Aug 23 (2).	Excavate Bedrock	Hydraulic rock hammering.	12 hours/day	3 460
7	Berth 11 Face—Mechanical Rock Removal at Basin Floor.	Drill 924 relief holes Apr 23 ³ to Aug 23 (2).	4–6 inch diameter holes	DTH mono-hammer	27 holes/day, 22 min/hole.	4 35
8	Install Temporary Cofferdam Extension.	Install 14 sheet piles Apr 23 to Jun 23 (2).	28-inch-wide Z-shaped ..	Impact with initial vibratory set.	4 piles/day, 5 minutes/pile and 300 blows/pile.	4
9a	Gantry Crane Support Piles at Berth 1 West.	Drill 16 shafts Apr 23 to Aug 23 (2).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day, 1 hours/day	16
9b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	16
9c			Remove 102- inch casing.	Rotary drill	1 casing/day 15, minutes/casing.	16
9d			72-inch diameter shafts	Cluster drill DTH	5 days/shaft, 10 hours/day.	80
10 ²	Berth 1—Mechanical Rock Removal at Basin Floor.	300 cy Apr 23 ³ to Sep 23 (2).	Excavate Bedrock	Hydraulic rock hammering.	13 cy/day 12 hours/day	5 25
11	Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors Apr 23 ³ to Oct 23 (2).	9-inch diameter holes	DTH mono-hammer	2 holes/day, 5 hours/hole	4 25
12	Center Wall—Install Tie-In to Existing West Closure Wall.	Install 15 sheet piles Apr 23 to Dec 23 (2).	28-inch wide Z- shaped	Impact with initial vibratory set.	4 piles/day 5 minutes/pile and 300 blows/pile.	4
13a	Dry Dock 1 North—Temporary Work Trestle Piles.	Drill 20 shafts May 23 to Nov 24 (2, 3).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day, 1 hours/day	20
13b			Pre-drill 102- inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	20
13c			Remove 102- inch casing.	Rotary drill	1 casing/day, 15 minutes/casing.	20
13d			84-inch diameter shafts	Cluster drill DTH	3.5 days/shaft, 10 hours/day.	70
14	Dry Dock 1 North—Remove Temporary Work Trestle Piles.	Remove 20 piles May 23 to Nov 24 (2, 3).	84-inch diameter drill piles.	Rotary drill	1 day/pile, 15 minutes/pile.	20
15a	Dry Dock 1 North—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts May 23 to Nov 24 (2, 3).	Set 84-inch casing	Rotary drill	1 shaft/day, 1 hours/day	18
15b			Pre-drill 84-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	18
15c			Remove 84-inch casing	Rotary drill	1 casing/day, 15 minutes/casing.	18

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES—Continued

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
15d			78-inch diameter shaft ...	Cluster drill DTH	7.5 days/shaft, 10 hours/day.	135
16a	Wall Support Shafts for Dry Dock 1 North (Berth 11 Face and Head Wall).	Drill 20 shafts Jun 23 to Nov 24 (2, 3).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day, 1 hours/day	20
16b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	20
16c			Remove 102-inch casing	Rotary drill	1 casing/day, 15 minutes/casing.	20
16d			Drill 78-inch diameter shaft.	Cluster drill DTH	7.5 days/shaft, 10 hours/day.	150
17a	Foundation (Floor) Shafts for Dry Dock 1 North (Foundation Support Piles).	Drill 23 shafts Jun 23 to Nov 24 (Const. years 2, 3).	Set 126-inch diameter Casing.	Rotary drill	1 shaft/day, 1 hours/day	23
17b			Pre-drill 126-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	23
17c			Remove 126-inch casing	Rotary drill	1 casing/day, 60 minutes/casing.	23
17d			Drill 108-inch diameter shafts.	Cluster drill DTH	8.5 days/shaft, 10 hours/day.	196
18	Berth 11 End Wall—Remove Temporary Guide Wall.	Remove 60 sheet piles Jul 23 to Aug 23 (2, 3).	28-inch wide Z- shaped	Vibratory extraction	8 piles/day, 5 minutes/pile.	⁵ 10
19	Remove Berth 1 southeast corner SOE.	Remove 28 sheet piles Jul 23 to Sep 23 (2).	28-inch-wide Z-shaped ..	Vibratory extraction	8 piles/day, 5 minutes/pile.	45
20 ²	Removal of Berth 1 Emergency Repair Sheet Piles.	Remove 108 sheet piles Apr 23 ³ to Jul 23 (2).	28-inch-wide Z-shaped ..	Vibratory extraction	6 piles/day, 5 minutes/pile.	18
21 ²	Removal of Berth 1 Emergency Repair Tremie Concrete.	500 cy Apr 23 ³ to Aug 23 (2).	Mechanical concrete removal.	Hydraulic rock hammering.	4 hours/day	15
22	Center Wall Foundation—Drill in Monolith Tie Downs.	Install 72 rock anchors Aug 23 to May 24 (2, 3).	9-inch diameter holes	DTH mono- hammer	2 holes/day, 5 hours/hole	36
23	Center Wall—Remove Tie-In to Existing West Closure Wall (Dry Dock 1 North) ⁴ .	Remove 16 sheet piles ⁶ Aug 23 to Aug 24 (2, 3).	28-inch-wide Z- shaped	Vibratory extraction	8 piles/day, 5 minutes/pile.	⁵ 3
24	Center Wall East—Sheet Pile Tie-In to Existing Wall.	Install 23 sheet piles Aug 23 to Oct 24 (2, 3).	28-inch wide Z-shaped ..	Impact with initial vibratory set.	2 piles/day, 5 minutes/pile and 300 blows/pile.	12
25	Remove Tie-In to West Closure Wall (Dry Dock 1 West).	Remove 15 sheet pile Dec 23 to Dec 24 (2, 3).	28-inch wide Z- shaped	Vibratory extraction	8 piles/day, 5 minutes/pile.	⁵ 3
26	Remove Center Wall East—Sheet Pile Tie-In to Existing Wall (Dry Dock 1 West).	Remove 23 sheet piles Dec 23 to Dec 24 (2, 3).	28-inch wide Z-shaped ..	Vibratory extraction	8 piles/day, 5 minutes/pile.	⁵ 12
27	Dry Dock 1 North Entrance—Remove Temporary Cofferdam.	Remove 96 sheet piles Jan 24 to Sep 24 (Const. years 2, 3).	28-inch wide Z-shaped ..	Vibratory extraction	8 piles/day, 5 minutes/pile.	12
28	Remove Temporary Cofferdam Extension.	Remove 14 sheet piles Jan 24 to Sep 24 (2, 3).	28-inch wide Z-shaped ..	Vibratory extraction	8 piles/day, 5 minutes/pile.	2
29a	Dry Dock 1 West—Install Temporary Work Trestle Piles.	Drill 20 shafts Apr 24 to Feb 26 (3, 4).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day, 1 hours/day	20
29b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	20
29c			Remove 102-inch casing	Rotary drill	1 casing/day, 15 minutes/casing.	20
29d			84-inch diameter shafts	Cluster drill DTH	3.5 days/shaft, 10 hours/day.	70
30	Dry Dock 1 West—Remove Temporary Work Trestle Piles.	Remove 20 piles Apr 24 to Feb 26 (3, 4).	84-inch diameter piles	Rotary drill	1 day/pile, 15 minutes/pile.	20
31a	Wall Support Shafts for Dry Dock 1 West (Berth 1 Face).	Drill 22 shafts Jun 24 to Feb 26 (3, 4).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day, 1 hours/day	22
31b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	22
31c			Remove 102-inch casing	Rotary drill	1 casing/day, 15 minutes/casing.	22
31d			78-inch diameter shaft ...	Cluster drill DTH	7.5 days/shaft, 10 hours/day.	165

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES—Continued

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
32a	Foundation (Floor) Shafts for Dry Dock 1 West (Foundation Support Piles).	Drill 23 shafts Jun 24 to Feb 26 (3, 4).	Set 126-inch casing	Rotary drill	1 shaft/day, 1 hours/day	23
32b			Pre-drill 126- inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	23
32c			Remove 126- inch casing.	Rotary drill	1 casing/day, 15 minutes/casing.	23
32d			Drill 108-inch diameter shaft.	Cluster drill DTH	8.5 days/shaft, 10 hours/day.	196
33a	Dry Dock 1 West—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts Jun 24 to Feb 26 (3, 4).	Set 84-inch casing	Rotary Drill	1 shaft/day, 1 hours/day	18
33b			Pre-drill 84-inch rock socket.	Rotary drill	1 shaft/day, 9 hours/day	18
33c			Remove 84-inch casing	Rotary drill	1 casing/day, 15 minutes/casing.	18
33d			Drill 78-inch diameter shaft.	Cluster drill DTH	7.5 days/shaft, 10 hours/day.	135
34	Dry Dock 1 North—Tie Downs.	Install 36 rock anchors Jul 24 to Jul 25 (3, 4).	9-inch diameter holes	DTH mono-hammer	2 holes/day, 5 hours/hole	18
35	Dry Dock 1 West—Install Tie Downs.	Install 36 rock anchors Dec 25 to Dec 26 (4, 5).	9-inch diameter hole	DTH mono-hammer	2 holes/day, 5 hours/hole	18
Total excavated holes/drilled shafts/sheet piles.		1,118/198/580				2,498

* Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; potential marine mammal takes incidental to Year 1 of the Navy's construction activities were authorized under a previously issued IHA (87 FR 19886; April 6, 2022).

¹ These activities were not included in the original application made available for public review during the Notice of Receipt comment period (NOR; 87 FR 53731), but have been added due to changes needed in the proposed construction schedule.

² These activities were included in the original application, but the amount of activity proposed has been modified due to changes needed in the proposed construction schedule.

³ These activities began in construction year 1.

⁴ These activities began in year 1. Only the number of production days occurring in construction years 2 through 6 are presented.

⁵ Additional production days are included to account for equipment repositioning.

⁶ Sheet piles were installed in construction year 1.

Specific Geographic Region

The shipyard is located in the Piscataqua River in Kittery, Maine. The Piscataqua River originates at the boundary of Dover, New Hampshire, and Eliot, Maine (Figure 1). The river flows in a southeasterly direction for 2,093 meters (m) (13 miles (mi)) before entering Portsmouth Harbor and emptying into the Atlantic Ocean. The lower Piscataqua River is part of the Great Bay Estuary system and varies in width and depth. Many large and small islands break up the straight-line flow of the river as it continues toward the Atlantic Ocean. Seavey Island, the location of the proposed activities, is located in the lower Piscataqua River approximately 500 m, 1640 feet (ft) from its southwest bank, 200 m (656 ft) from its north bank, and approximately 4 kilometers (km) (2.5 mi) from the mouth of the river.

Water depths in the proposed project area range from 6.4 m (21 ft) to 11.9 m (39 ft) at Berths 11, 12, and 13. Water depths in the lower Piscataqua River near the proposed project area range from 4.6 m (15 ft) in the shallowest areas to 21 m (69 ft) in the deepest areas. The river is approximately 914 m (3,300 ft) wide near the proposed project area,

measured from the Kittery shoreline north of Wattlebury Island to the Portsmouth shoreline west of Peirce Island. The furthest direct line of sight from the proposed project area would be 1,287 m (0.8 mi) to the southeast and 418 m (0.26 mi) to the northwest.

The nearshore environment of the Shipyard is characterized by a mix of hard bottom, gravel, soft sediments, rock outcrops, and rocky shoreline associated with fast tidal currents near the installation. The nearshore areas surrounding Seavey Island are predominately hard bottom (65 percent of benthic habitat) and gravel (26 percent) habitat, with only 9 percent soft bottom sediments within the surveyed area around Seavey Island (Tetra Tech, 2016). Much of the shoreline in the proposed project area is composed of hard shores (rocky intertidal). In general, rocky intertidal areas consist of bedrock that alternates between marine and terrestrial habitats, depending on the tide. Rocky intertidal areas consist of “bedrock, stones, or boulders that singly or in combination cover 75 percent or more of an area that is covered less than 30 percent by vegetation” (Federal Geographic Data Committee, 2013).

The lower Piscataqua River is home to Portsmouth Harbor and is used by commercial, recreational, and military vessels. Between 150 and 250 commercial shipping vessels transit the lower Piscataqua River each year (Magnusson *et al.*, 2012). Commercial fishing vessels are also very common in the river year-round, as are recreational vessels, which are more common in the warmer summer months. The shipyard is a dynamic industrial facility situated on an island with a narrow separation of waterways between the installation and the communities of Kittery and Portsmouth (Figure 2). The predominant noise sources from Shipyard industrial operations consist of dry dock cranes; passing vessels; and industrial equipment (*e.g.*, forklifts, loaders, rigs, vacuums, fans, dust collectors, blower belts, heating, air conditioning, and ventilation (HVAC) units, water pumps, and exhaust tubes and lids). Other components such as construction, vessel ground support equipment for maintenance purposes, vessel traffic across the Piscataqua River, and vehicle traffic on the shipyard's bridges and on local roads in Kittery and Portsmouth produce noise, but such noise generally represents a transitory contribution to

the average noise level environment (Blue Ridge Research and Consulting (BRRC), 2015; ESS Group, 2015).

Ambient sound levels recorded at the shipyard are considered typical of a large outdoor industrial facility and vary

widely in space and time (ESS Group, 2015).

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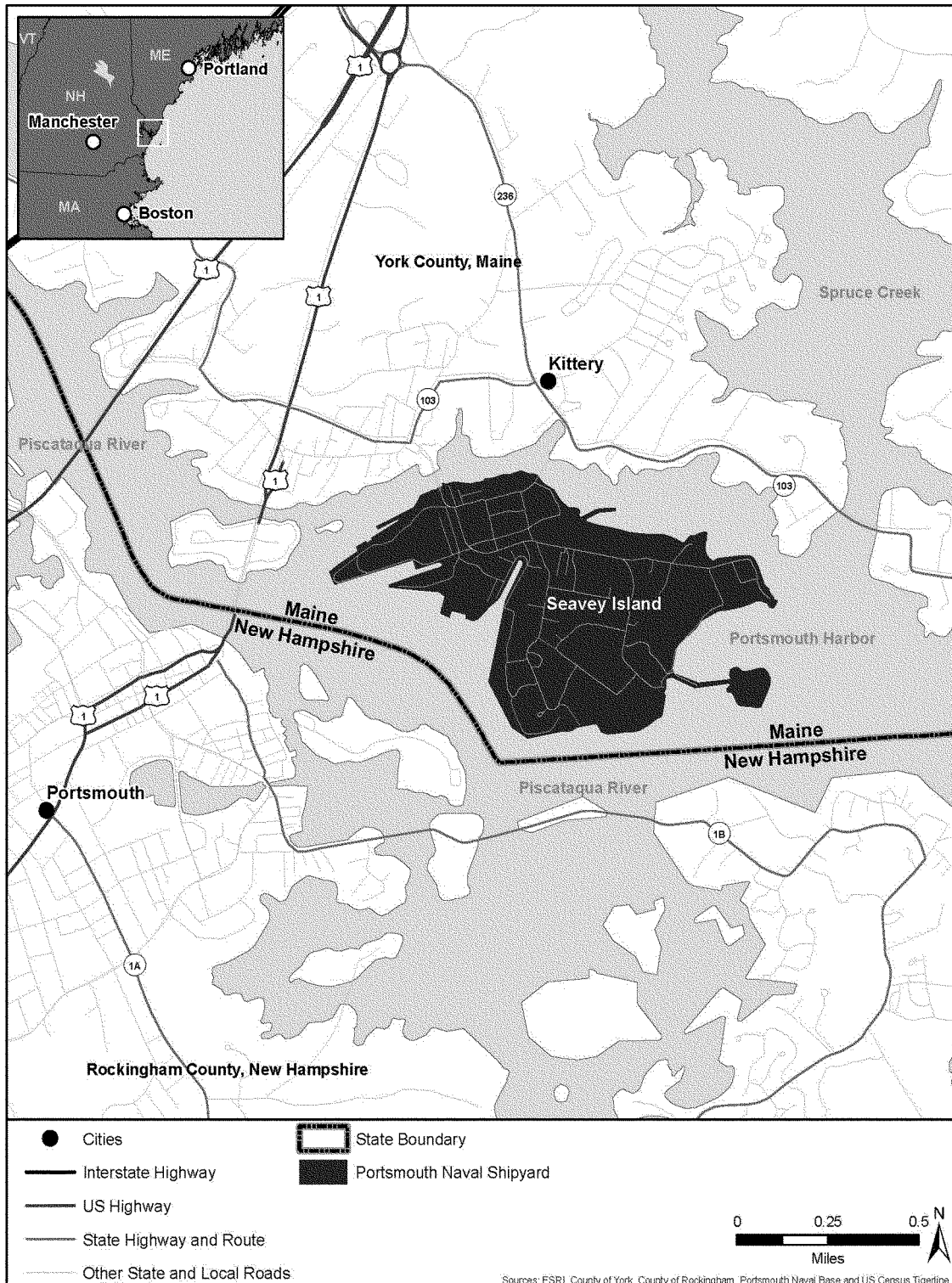


Figure 1. Site Location Map of the Project Area



Figure 2. Region of Influence for Underwater Noise for P-381 In-water Construction Activities

Detailed Description of the Specified Activity

The Navy's proposed P-381 project would modify the super flood basin to create two additional dry docking positions (Dry Dock 1 North and Dry Dock 1 West) in front of the existing Dry Dock 1 East. The super flood basin provides the starting point for the P-381 work. Several steps are required to convert the super flood basin to a dry dock with two positions fully capable of supporting the maintenance of submarines while maintaining access to the existing interior dry dock (Dry Dock 1 East). The dry dock positions (including the center wall) will be constructed using large precast segments (referred to as monoliths) that require both sidewall and base support. The monoliths will be manufactured offsite and transported to the construction site. Segments will be floated and/or lifted into place to create the center wall, followed by Dry Dock 1 North, and finally Dry Dock 1 West. Once the monoliths are set and grouted in place, the respective dry docks can be dewatered allowing the remaining interior construction to be performed in dry conditions.

P-381 years 2 through 5 (*i.e.*, the time period of the Navy's specified activity for this proposed rule) construction activities will complete bedrock removal and the preparation of the walls and floors of the super flood basin to support the placement of the monoliths and the construction of the two dry dock positions. Most of the in-water construction will occur behind the existing super flood basin walls that would act as a barrier to sound and would contain underwater noise to within a small portion of the Piscataqua River. However, the west closure wall will be removed in order to install the Dry Dock 1 North entrance structure and caisson. In addition, the caissons may not always be in place throughout in-water construction. As such, the analyses presented herein conservatively assume the west closure wall, as well as the future caissons, would not be present throughout in-water construction activities.

The Navy's request also considers emergency repairs of the P-310 super flood basin. During P-310 super flood testing in January 2022, excessive exfiltration (*i.e.*, transport of material outside of the basin) was observed along Berths 1 and 2 and between the west closure wall and super flood basin entrance structure. Emergency structural repairs were required to reduce excessive transport of material through the berths and west closure wall/

entrance structure and prevent further damage. As a result, 216 28-inch Z-shaped sheet piles were installed along the Berth 1 face. After installation, these sheet piles were cut off approximately 10 ft above the mudline and concrete was tremie placed behind them to plug any gaps in the existing structure that contributed to the exfiltration. The removal of these 216 Berth 1 emergency repair piles and excess tremie concrete (approximately 382 cubic meters, 500 cubic yards (cy)) will be completed during this LOA period and are accounted for in the Navy's request. Similarly, 10 28-inch wide, Z-shaped sheet piles were installed between the super flood basin entrance structure and the west closure wall, cut off approximately 3 m (10 ft) above the mudline, and had concrete tremie placed behind them. These 10 sheet piles will be removed during the P-381 year 1 IHA period (covered under the IHA issued by NMFS for the first year of P-381 construction activities; 87 FR 19866; April 6, 2022).

Several additional preparatory activities (*e.g.*, torch cutting, dredging, etc) will not create noise expected to result in harassment of marine mammals. Noise created during dredging of sediment and demolition debris (*e.g.*, bedrock, granite blocks, concrete) is unlikely to exceed that generated by other normal shipyard activities and is not expected to result in incidental take of marine mammals. Activities such as grouting (*i.e.*, pouring of concrete) and torch cutting are not noisy by design and would not result in incidental take of marine mammals. These activities are not addressed in the analyses of noise producing actions in the Navy's request, and are not considered by NMFS in our analysis, but are included in the work descriptions to clarify the construction progression.

P-381 In-Water Construction Activities

The proposed work remaining for P-381 can be generally grouped into five categories for ease of explanation: temporary structures, mechanical bedrock removal, continued demolition of super flood basin wall components, center wall tie-downs, and dry dock foundation and gantry crane support. Each category involves one or more activities expected to generate noise that could result in injury or harassment of marine mammals. Some of these activities are a continuation of work started in year 1, which were covered under a separate IHA issued by NMFS on April 6, 2022 (87 FR 19886).

Temporary Structures—Several temporary structures would be installed

and removed to facilitate the construction of the dry docks. The conversion of the existing west closure wall to the Dry Dock 1 North entrance requires reinforcement of the section of the west closure wall that will become the new dry dock entrance. The existing west closure wall structure will be surrounded by a temporary cofferdam. The cofferdam will be constructed with 48 28-inch wide, Z-shaped sheet piles. The sheet piles will be installed using an initial vibratory set followed by driving with impact hammers to refusal.

The temporary guide wall along the Berth 11 end wall installed during year 1 (60 28-inch wide, Z-shaped sheet piles) would be removed with a vibratory hammer. An extension to the temporary cofferdam around the Dry Dock 1 entrance structure installed during P-381 year 1 would also be constructed. The extension would consist of 14 28-inch wide, Z-shaped sheet piles. The extension and the cofferdam (96 28-inch wide, Z-shaped sheet piles) would be removed in 2024 using a vibratory hammer.

A temporary work trestle would be constructed to support the excavation of large shafts within the individual dry docking positions. The trestle would be installed in Dry Dock 1 North first and then relocated to Dry Dock 1 West. The trestle system would be supported by 4 84-inch steel pipe piles and would be relocated five times within each dry dock. As a result, the piles would be installed and removed 20 times in Dry Dock 1 North and 20 times in Dry Dock 1 West. The piles would be installed with a cluster drill consisting of multiple DTH hammers and removed with a rotary drill. Before the cluster drill would be deployed, a 102-inch casing would be set into bedrock and a 5-ft (1.5-m) deep rock socket would be excavated with a rotary drill (see Figure 1-4 in the Navy's application). The socket would be filled with concrete and a second, 84-inch casing would be installed inside the larger casing and set in the concrete. No drilling would be required to install the second casing. The outer casing would then be removed with a rotary drill. The 84-inch diameter cluster drill would operate independently inside the second casing to excavate the shaft. Once the shaft is drilled the inner casing would be removed by torch cutting.

A temporary tie-in consisting of 15 28-inch wide, Z-shaped sheet piles would be installed between the center wall foundation and the west closure wall at Dry Dock 1 West. Twenty-three 28-inch wide, Z-shaped sheet piles would also be installed on the easterly end of Dry Dock 1 west to provide a

similar temporary tie-in to the center wall foundation near the entrance to Dry Dock 1 east. The sheet piles would be installed using an initial vibratory set followed by driving with impact hammers. These tie-ins would be removed using a vibratory hammer along with the Dry Dock 1 North tie-in to the west closure wall (16 28-inch wide, Z-shaped sheet piles) that was installed under the P-381 year 1 IHA (87 FR 19886).

To support excavation activities along Berth 1, 28 28-inch wide, Z-shaped sheet piles would be installed at the southeast corner of the berth using a combination of vibratory and impact hammers. These piles would be removed using a vibratory hammer.

Mechanical Bedrock Removal—Mechanical removal of bedrock would be completed by the end of 2023 using various methods appropriate for the removal location and as needed to avoid damage to adjacent structures. Bedrock removal would occur along the Berth 11 face and abutment and along Berth 1.

Bedrock would be removed by breaking it up with a hydraulic hammer (*i.e.*, hoe ram or breaker). To protect adjacent structures during mechanical bedrock removal, 924 4–6-inch diameter relief holes would be drilled using a DTH mono-hammer. A total of approximately 918 cubic meters (1,200 cy) of bedrock are anticipated to be removed.

Demolition of Super Flood Basin Wall Components—Demolition of existing wall components would include the removal of shutter panels, granite quay walls, sheet piles, and concrete making up the super flood basin. Demolition of existing wall structures would be conducted using a rock hammer. Specifically, the remaining sections of the existing concrete shutter panels making up the face of Berth 11 (112 panels), portions of the granite block quay wall (2,141 cm, 2,800 cy) at Berth 1, and the remaining existing sheet pile wall at Berth 1 (168 25-inch wide, Z-shaped sheet piles) would be removed.

The installation of a structural support waler (steel beam) at Berth 1 would also be completed. To complete the installation of the waler, about 98 m (320 linear ft) of concrete wall would be demolished using a hydraulic rock hammer.

Center Wall Tie-downs—Additional work in the center wall area would involve the installation of support tie downs for future tremie concrete work. The tie downs require the placement of a total of 194 rock anchors requiring 9-inch diameter holes. The rock anchors would be installed using a DTH mono-hammer.

Dry Dock and Gantry Crane Support—The location of the future center wall requires reinforcement to allow placement of the large pre-cast monolith structures forming the separation between the two new dry docking positions. Specifically, the floor of the existing basin must be able to provide an adequate foundation for the pre-cast monoliths that will make up the dry dock interiors and center wall. The basin floor will be reinforced by excavating 18 78-inch diameter shafts throughout the footprint of the center wall that will be filled with concrete to create the structural support piles for the center wall. The shafts will be excavated using a cluster drill consisting of multiple DTH mono-hammers. Before the cluster drill is deployed, a 102-inch diameter casing would be set into bedrock and a 5 foot deep rock socket would be excavated using a 102-inch diameter rotary drill (see Figure 1–4 of the Navy's application). The rock socket would be filled with concrete and a second, 78-inch diameter casing would be installed inside the 102-inch casing and set in the concrete. No drilling is required to install the second casing. The 102-inch diameter outer casing would then be removed with a rotary drill.

The future Dry Dock 1 North and Dry Dock 1 West require significant structural reinforcement to provide an adequate foundation for the installation of the large pre-cast monolith structures forming the dry dock interior. Reinforcement of the individual dry dock foundations and walls would begin first at Dry Dock 1 North and, once completed, continue at Dry Dock 1 West. Twenty 78-inch diameter shafts would be excavated along the Berth 11 face and head wall to support the walls of Dry Dock 1 North. Along the floor of Dry Dock 1 North, 23 108-inch diameter shafts would be excavated for the installation of the foundation support piles and 18 78-inch diameter shafts would be excavated for the installation of leveling piles (*i.e.*, diving board shafts).

The dry dock foundation and wall support pile and leveling pile shafts would be filled with concrete to create the support piles for the dry dock walls and floors. The shafts would be excavated using a cluster drill consisting of multiple DTH hammers in the same manner as previously described for the temporary work trestle piles. Once the wall and foundation support piles and leveling piles for Dry Dock 1 North have been installed, foundation and wall support piles and leveling piles would be installed for Dry Dock 1 West. Twenty-two 78-inch

diameter shafts would be excavated along the Berth 1 face to support the walls of Dry Dock 1 West. Twenty-three 108-inch diameter shafts would be excavated along the floor of Dry Dock 1 West for the installation of foundation support piles and 18 78-inch shafts would be excavated for the installation of leveling piles (*i.e.*, diving board shafts). The casing sizes and rotary drill sizes proposed for each shaft are specified in Table 1.

The large concrete monolithic sections used to create the dry docks and the center wall separation would be placed using a gantry crane. The gantry crane system would be structurally supported by the installation of 16 72-inch diameter shafts installed along the western extent of the Berth 1 face. The shafts would be installed using a DTH cluster drill as described for the temporary work trestle piles. The casing sizes and rotary drill sizes proposed for the gantry crane support shafts are specified in Table 1.

P-310 Emergency Repairs

Testing of the super flood basin on January 5, 2022 resulted in excess exfiltration through Berths 1 and 2, prompting the need for emergency repairs along Berth 1 as well as between the super flood basin entrance structure and the west closure wall. Emergency repairs consisted of the installation of sheet piles and the tremie pouring of concrete to fill in gaps along the structure walls and floor. Installation of emergency repairs at Berth 1 and the installation and removal of emergency repairs at the west closure wall and entrance structure occurred before the period described in the Navy's LOA application. Only the removal of Berth 1 emergency repair components would occur during the requested LOA period.

The removal of the 216 28-inch wide, Z-shaped sheet piles along the Berth 1 face would be completed through direct pulling via barge-mounted crane or by vibratory hammer. Specific methods will be determined by the contractor based on resistance to extraction from the seabed. Direct pulling via crane is not anticipated to generate harmful levels of underwater sound. If required, the use of the vibratory hammer to extract the installed sheet piles would be limited to an initial effort to break the sheets loose, allowing them to be directly pulled out. As a conservative measure, vibratory extraction of these sheet piles is assumed for all analyses.

The removal of 765 cubic meters (1,000 cy) of tremie concrete is anticipated to require use of a hydraulic rock hammer to break up material into smaller pieces. Smaller pieces would

then be retrieved via excavator bucket for offsite disposal. The Navy estimates daily active use of the rock hammer for the removal of concrete from emergency repairs to be 4 hours per day.

Means and Methods for Noise Producing Activities

Only 28-inch wide, Z-shaped sheet piles would be installed or removed with pile-driving equipment during P-381 construction. The installation of 28-inch wide, Z-shaped steel sheet piles would be installed initially using vibratory means and then finished with impact hammers, if necessary. Impact hammers would also be used to push obstructions out of the way and where sediment conditions do not permit the efficient use of vibratory hammers. Pile removal activities would use cranes and vibratory hammers exclusively.

The removal of bedrock and concrete and the demolition of concrete shutter panels at Berth 11 and granite blocks and sheet piles at Berth 1 during P-381 construction would be by mechanical

means. These features would be demolished using a hydraulic rock hammer (*i.e.*, hoe ram). The type/size of rock hammers used would be determined by the contractor selected to perform the work.

Two methods of rock excavation would be used during P-381 construction; DTH excavation and rotary drilling. During P-381 construction, rotary drilling would be used to set the casings and pre-drill rock sockets for DTH cluster drills. DTH excavation using mono-hammers would be used to create shafts for rock anchors and tie downs and for the excavation of relief holes during mechanical bedrock removal. For the largest shafts (greater than 42-inches in diameter), DTH excavation would use a cluster drill. A cluster drill uses multiple mono-hammers within a single bit to efficiently break up bedrock and create large diameter holes (see Figure 1-5 in the Navy’s application).

Concurrent Activities

In order to maintain project schedules, it is likely that multiple pieces of equipment would operate at the same time within the basin. No ancillary activities are anticipated during the construction period that would require unimpeded access to the super flood basin. Therefore, it is anticipated that there would be space available within the project area for additional construction equipment. A maximum of 13 pieces of equipment could potentially operate in the project area at a single time. While this is an unlikely scenario, it could occur for a very brief period. Construction equipment would be staged along the perimeter of the super flood basin (Berth 11, Berth 1 and head wall) as well on multiple barges within the super flood basin. Table 2 provides a summary of possible equipment combinations that could be used simultaneously over the course of the proposed construction period.

TABLE 2—SUMMARY OF MULTIPLE EQUIPMENT SCENARIOS

Year	Quantity	Equipment	
2023	5	Rock Hammer (2), Vibratory Hammer (2), Impact Hammer (1).	
	5	Rock Hammer (2), Vibratory Hammer (1), Impact Hammer (1), DTH Mono-hammer (1).	
	5	Rock Hammer (1), Vibratory Hammer (1), Impact Hammer (1), DTH Mono-hammer (1), Rotary Drill (1).	
	5	Rock Hammer (1), Vibratory Hammer (1), DTH Mono-hammer (1), Cluster Drill (2).	
	5	Cluster Drill (2), Vibratory Hammer (1), Mono-hammer DTH (1), Rotary Drill (1).	
	5	Rock Hammer (1), Impact Hammer (1), DTH Mono-hammer (1), Cluster Drill (2).	
	6	Rock Hammer (2), DTH Mono-hammer (2), Cluster Drill (1), Rotary Drill (1).	
	6	Rock Hammer (2), Vibratory Hammer (1), DTH Mono-hammer (1), Rotary Drill (2).	
	8	Rock Hammer (2), Vibratory Hammer (2), DTH Mono-hammer (2), Cluster Drill (2).	
	10	Rock Hammer (3), Vibratory Hammer (2), Impact hammer (1), DTH Mono-hammer (2), Cluster Drill (2).	
	13	Rock Hammer (5), Cluster Drill (2), Vibratory Hammer (2), Impact Hammer (1), Mono-hammer DTH (3).	
	2024	8	Rock Hammer (2), Vibratory Hammer (2), DTH Mono-hammer (2), Cluster Drill (2).
		5	Cluster Drill (2), DTH mono-hammer (1), Vibratory hammer (1), Impact Hammer (1).
3		Cluster Drill (2), DTH mono-hammer (1).	
3		Cluster Drill (1), Rotary Drill (1), DTH mono-hammer (1).	
3		Rotary Drill (2), DTH mono-hammer (1).	
2025	3	Cluster Drill (2), DTH mono-hammer (1).	
	3	Cluster Drill (1), Rotary Drill (1), DTH mono-hammer (1).	
	3	Rotary Drill (2), DTH mono-hammer (1).	
	2	Rotary Drill (2).	
	2	Cluster Drill (2).	

Source: 381 Constructors, 2022.

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. NMFS fully considered all of this information, and we refer the

reader to these descriptions, incorporated in this preamble by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS’ Stock Assessment Reports (SARs; 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’ website (<https://www.fisheries.noaa.gov/find-species>).

Table 3 lists all species or stocks for which take is expected and proposed to be authorized for this 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. 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' SARs). While no serious injury or mortality is expected to occur, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks 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' 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 stocks managed under the MMPA in this

region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 3 are the most recent available at the time of publication (including from the 2021 SARs) and are available online at: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments).

TABLE 3—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	MMPA stock	ESA/MMPA status; strategic (Y/N) ¹	Stock abundance N _{best} , (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Cetartiodactyla—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Phocoenidae (porpoises):						
Harbor Porpoise	<i>Phocoena phocoena</i>	Gulf of Maine/Bay of Fundy ...	-; N	95,543 (0.31; 74,034; 2016) ..	851	164
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	<i>Phoca vitulina</i>	Western North Atlantic	-; N	61,336 (0.08, 57,637; 2018) ..	1,729	339
Gray seal	<i>Halichoerus grypus</i>	Western North Atlantic	-; N	27,300 ⁴ (0.22; 22,785; 2016)	1,389	4,453
Harp seal	<i>Pagophilus groenlandicus</i>	Western North Atlantic	-; N	7,600,000 (unk, 7,100,000, 2019).	426,000	178,573
Hooded seal	<i>Cystophora cristata</i>	Western North Atlantic	-; N	593,500	Unknown	1,680

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 from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁴ This abundance value and the associated PBR value reflect the US population only. Estimated abundance for the entire Western North Atlantic stock, including animals in Canada, is 451,600. The annual M/SI estimate is for the entire stock.

As indicated above, all five species (with five managed stocks) in Table 3 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur.

Harbor Porpoise

Harbor porpoises occur from the coastline to deep waters (>1,800 m, 5906 ft); Westgate *et al.*, 1998), although the majority of the population is found over the continental shelf (Hayes *et al.*, 2022). Based on genetic analysis, it is assumed that harbor porpoises in U.S. and Canadian waters are divided into four populations, as follows: (1) Gulf of St. Lawrence; (2) Newfoundland; (3) Greenland; and (4) Gulf of Maine/Bay of Fundy (Hayes *et al.*, 2022). For management purposes in U.S. waters, harbor porpoises have been divided into ten stocks along both the East and West Coasts. In the project area, only the Gulf of Maine/Bay of Fundy stock of harbor porpoise may be present. This stock is found in U.S. and Canadian Atlantic waters and is concentrated in the northern Gulf of Maine and southern Bay of Fundy region, generally in waters

less than 150 m (492 ft) deep (Hayes *et al.*, 2022).

The Navy has been collecting data on marine mammals in the Piscataqua River since 2017 through construction monitoring and non-construction related monthly surveys (2017–2018). Three harbor porpoises were observed travelling quickly through the river channel during marine mammal monitoring conducted between April and December 2017 in support of the Berth 11 Waterfront Improvements Project (Cianbro, 2018). Two harbor porpoises were observed during construction monitoring that occurred between January 2018 and January 2019 (Cianbro, 2018; Navy, 2019). One harbor porpoise was observed in March 2017 during non-construction related surveys conducted on 12 days (one per month) in 2017, and two harbor porpoises (one in August and one in November) were observed in monthly surveys conducted in 2018 (Naval Facilities Engineering Systems Command (NAVFAC) Mid-Atlantic 2018, 2019b). There was one sighting of a harbor porpoise during P–310 year 1 monitoring events (May

through December 2020) (NAVFAC, 2021). No harbor porpoise were sighted in 2021 (NAVFAC, 2022).

Harbor Seal

Harbor seals are found in all nearshore waters of the North Atlantic and North Pacific Oceans and adjoining seas above about 30° N (Burns, 2009). They can be found year-round in coastal waters of eastern Canada and Maine and occur seasonally (September through late May) along the coasts of southern New England to Virginia (Ampela *et al.*, 2018; Hayes *et al.*, 2022; Jones and Rees, 2020). Overall, there are five recognized subspecies of harbor seal, two of which occur in the Atlantic Ocean. The western Atlantic harbor seal is the subspecies likely to occur in the proposed project area. There is some uncertainty about the overall population stock structure of harbor seals in the western North Atlantic Ocean. However, it is theorized that harbor seals along the eastern U.S. and Canada are all from a single population (Temte *et al.*, 1991). Haulout and pupping sites are located

off Manomet, MA and the Isles of Shoals, ME (Hayes *et al.*, 2022).

Harbor seals are the most abundant pinniped in the Piscataqua River. The majority of harbor seals occur along the Maine coast with a large portion of them hauling out at the Isles of Shoals (see Figure 4–1 of the Navy’s application), which is located approximately 14.5 km (9 mi) from the project area. There are no major rookeries near the Navy’s proposed project area. The closest haul-out site is at Hicks Rocks, located approximately 2.4 km (1.5 mi) from the proposed project area, but it is on the opposite side of Seavey Island and not within the project area. Pupping season for harbor seals is May to June. No harbor seal pups were observed during recent monitoring events conducted in the area (Cianbro, 2018) as pupping sites are north of the Maine-New Hampshire border (Hayes *et al.*, 2022). During construction monitoring between the months of April and December 2017, there were 199 observations of harbor seals (Cianbro, 2018) in the project area. A total of 249 harbor seals were observed during construction monitoring between the months of January 2018 and January 2019 for the same project (Navy, 2019). The primary behaviors observed during monitoring were milling that occurred almost 60 percent of the time followed by swimming and traveling by the proposed project area at 29 percent and 12 percent, respectively (Cianbro, 2018). A total of 17 and 83 harbor seals were observed during the one-day monthly surveys conducted in 2017 and 2018, respectively (NAVFAC Mid-Atlantic, 2018; 2019b). Construction monitoring conducted between May and December of 2020 and January through December 2021 as part of P–310 recorded 721 harbor seals and 451 harbor seals, respectively (NAVFAC, 2021; 2022).

Gray Seal

There are three major populations of gray seals found in the world; eastern Canada (western North Atlantic stock), northwestern Europe and the Baltic Sea. Gray seals in the project area belong to the western North Atlantic stock. The range for this stock is from New Jersey to Labrador. Current population trends show that gray seal abundance is likely increasing in the U.S. Atlantic Exclusive Economic Zone (EEZ) (Hayes *et al.*, 2022). Although the rate of increase is unknown, surveys conducted since their arrival in the 1980s indicate a steady increase in abundance in both Maine and Massachusetts (Hayes *et al.*, 2022). It is believed that recolonization by Canadian gray seals is the source of the U.S. population (Hayes *et al.*, 2022).

In U.S. waters, gray seals have been observed using an historic pupping site on Muskeget Island in Massachusetts since 1988 and on Seal and Green Islands in Maine since approximately the mid-1990s. All of these sites are more than 180 km (112 mi) from the Shipyard. In general, this species can be found year-round in the coastal waters of the Gulf of Maine (Hayes *et al.*, 2022).

During construction monitoring for the waterfront improvements project, there were 24 observations of gray seals within the proposed project area between the months of April and December 2017 (Cianbro, 2018) and a total of 12 observed between January 2018 and January 2019 (Navy, 2019). Ten of the 12 observations occurred during the winter months (Navy, 2019). The primary behavior observed during surveys was milling at just over 60 percent of the time followed by swimming within and traveling through the proposed project area. Gray seals were observed foraging approximately 5 percent of the time (Cianbro, 2018). The one-day monthly marine mammal surveys during 2017 and 2018 recorded six and three sightings, respectively, of gray seal (NAVFAC Mid-Atlantic, 2018, 2019b). A total of 47 gray seals were observed during P–310 year 1 monitoring events from May through December 2020 (NAVFAC, 2021). In 2021, 21 gray seals were sighted during monitoring (NAVFAC, 2022). No gray seal pups were observed during the surveys (Cianbro, 2018; Navy, 2019) as pupping sites for gray seals (like harbor seals) are known to occur north of Maine-New Hampshire border.

Hooded Seal

Hooded seals are generally found in deeper waters or on drifting pack ice. The world population of hooded seals has been divided into three stocks, which coincide with specific breeding areas, as follows: (1) Northwest Atlantic, (2) Greenland Sea, and (3) White Sea (Hayes *et al.*, 2022). The hooded seal is a highly migratory species, and its range can extend from the Canadian arctic to Puerto Rico. In U.S. waters, the species has an increasing presence in the coastal waters between Maine and Florida (Hayes *et al.*, 2022). In the U.S., they are considered members of the western North Atlantic stock and generally occur in New England waters from January through May and further south in the summer and fall seasons (Hayes *et al.*, 2022).

Hooded seals are known to occur in the Piscataqua River; however, they are not as abundant as the more commonly observed harbor seal. Anecdotal sighting information indicates that two hooded

seals were observed from the Shipyard in August 2009, but no other observations have been recorded (Trefry November 20, 2015). Hooded seals were not observed during marine mammal monitoring or survey events that took place in 2017, 2018, 2020, or 2021 (Cianbro, 2018; NAVFAC Mid-Atlantic 2018, 2019b; Navy 2019; NAVFAC 2021, 2022).

Harp Seal

The harp seal is a highly migratory species, its range extending throughout the Arctic and North Atlantic Oceans. The world’s harp seal population is separated into three stocks, based on associations with specific locations of pagophilic breeding activities: (1) off eastern Canada, (2) on the West Ice off eastern Greenland, and (3) in the White Sea off the coast of Russia. The largest stock, which includes two herds that breed either off the coast of Newfoundland/Labrador or near the Magdalen Islands in the Gulf of St. Lawrence, is equivalent to the western North Atlantic stock. Harp seals that occur in the United States are considered members of the western North Atlantic stock and generally occur in New England waters from January through May (Hayes *et al.*, 2022).

Harp seals are known to occur in the Piscataqua River; however, they are not as abundant as the more commonly observed harbor seal and were last documented in the river in May of 2020. Two harp seals were sighted on two separate occasions (on May 12 and May 14, 2020) during construction monitoring for P–310 (Stantec, 2020). No pile-driving was occurring at the time of the sighting. Previous to that, the last harp seal sighting was in 2016 (NAVFAC Mid-Atlantic, 2016; NMFS, 2016). Harp seals were not observed during marine mammal monitoring or survey events that took place in 2017 and 2018 (Cianbro, 2018; NAVFAC Mid-Atlantic, 2018, 2019b; Navy, 2019). No harp seals were sighted in 2021 (NAVFAC, 2021, 2022).

Unusual Mortality Events (UMEs)

Between July 2018 and March 2020 elevated numbers of harbor seal and gray seal mortalities occurred across Maine, New Hampshire and Massachusetts. This event was declared an Unusual Mortality Event (UME). Seals showing clinical signs were observed stranding as far south as Virginia, although not in elevated numbers. Therefore the UME investigation encompassed all seal strandings from Maine to Virginia. Lastly, ice seals (harp and hooded seals) also started stranding with clinical

signs, again not in elevated numbers, and those two seal species were added to this UME investigation. Information on this UME is available online at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along>.

Since July 2022, a second UME of harbor seals and gray seals in this region has been declared after elevated numbers of sick and dead individuals were documented along the southern and central coast of Maine from Biddeford to Boothbay (including Cumberland, Lincoln, Knox, Sagadahoc and York Counties). Information on this UME is available online at: <https://www.fisheries.noaa.gov/2022-pinniped-unusual-mortality-event-along-maine-coast>.

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. 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, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical

modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (i.e., low-frequency cetaceans). Subsequently, NMFS (2018a) 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 4.

TABLE 4—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, <i>Kogia</i> , river dolphins, Cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>).	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 (2018a) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which 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 whether

those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Acoustic effects on marine mammals during the specified activity can occur from impact and vibratory pile installation and removal, rotary drilling, DTH, and rock hammering. The effects of underwater noise from the Navy's proposed activities have the potential to result in Level A and Level B harassment of marine mammals in the action area.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see, e.g., Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983).

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the "loudness" of a sound and is typically described using the relative unit of the dB. A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (µPa)), and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level represents the SPL referenced at a distance of 1 m from the source (referenced to 1 µPa), while the received level is the SPL at

the listener's position (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa and all airborne sound levels in this document are referenced to a pressure of 20 μPa .

Root mean square (RMS) is the quadratic mean sound pressure over the duration of an impulse. RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). RMS accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB referenced to 1 micropascal squared per second (re 1 $\mu\text{Pa}^2\text{-s}$)) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.*, 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse, or calculated over periods containing multiple pulses. Cumulative SEL (SELcum) represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, and is represented in the same units as the RMS sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for sound produced by the construction activities considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which 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 (American National Standards Institute standards (ANSI), 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.*, vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kilohertz (kHz) (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The Shipyard is a dynamic industrial facility situated on an island with a narrow separation of waterways between the installation and the communities of Kittery and Portsmouth. The predominant noise sources from Shipyard industrial operations consist of dry dock cranes; passing vessels; and industrial equipment (*e.g.*, forklifts, loaders, rigs, vacuums, fans, dust collectors, blower belts, heating, air conditioning, and ventilation units, water pumps, and exhaust tubes and lids). Other components such as construction, vessel ground support equipment for maintenance purposes, vessel traffic across the Piscataqua River, and vehicle traffic on the Shipyard's bridges and on local roads in Kittery and Portsmouth produce noise,

but such noise generally represents a transitory contribution to the average noise level environment (Blue Ridge Research and Consulting, 2015; ESS Group, 2015).

Ambient sound levels recorded at the Shipyard are considered typical of a large outdoor industrial facility and vary widely in space and time (ESS Group, 2015). Thirteen underwater acoustic recordings were logged in 2017 with sensors placed in depths of 4.5 m (15 ft) within the security fencing area of the Shipyard Berth 11. Recordings ranged from 140 dB to 161.3 dB peak SPL and from 128.2 dB to 133.8 dB RMS SPL. Conditions at which the recordings were made were with little wind and near peak tidal flow. A mean SPL of 131 dB RMS was evenly distributed within the security fencing area and is consistent with observations made at other locations near the Shipyard and documented background sound levels in estuarine or tidal locations (Hydrosonic LLC, 2017). Due to the close proximity to the Shipyard that measurements were recorded, ambient underwater noise levels further into the navigation channel are likely to be lower.

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 and vibratory pile installation and removal, rotary drilling, DTH, and rock hammering. The sounds produced by these activities fall into one of two general sound types: impulsive and non-impulsive (defined below). 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). Please see Southall *et al.* (2007) for an in-depth discussion of these concepts.

Impulsive sound sources (e.g., explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; Harris, 1998; National Institute for Occupational Safety and Health (NIOSH), 1998; International Organization for Standardization (ISO) 2003; ANSI 2005) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of impulses (e.g., rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Impact and vibratory hammers would be used on this project. 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 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). Vibratory pile drivers will be used to the greatest

extent possible during the Navy's proposed construction activities to minimize high SPLs associated with impact pile driving.

Hydraulic rock hammers (*i.e.*, hoe rams) will be used for removal and demolition purposes. These tools are impact devices designed to break rock or concrete. A rock hammer operates by using a chisel-like hammer to rapidly strike an exposed surface to break it up into smaller pieces that will be removed by a clamshell dredge or bucket excavator, as appropriate. Few data exist regarding the underwater sounds produced by rock hammers. Data reported by Escude (2012), however, suggest that the sounds produced by hoe rams are comparable to impact hammers. Therefore, for the purposes of this analysis, it is assumed that hydraulic rock hammers act as an impulsive source characterized by rapid rise times and high peak levels.

DTH systems, involving both mono-hammers and cluster-hammers, and rotary drills will also be used during the proposed construction. In rotary drilling, the drill bit rotates on the rock while the drill rig applies pressure. The bit rotates and grinds continuously to fracture the rock and create a hole. Rotary drilling is considered a non-impulsive noise source, similar to vibratory pile driving. 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 the DTH hammer to increase speed of progress through the substrate (*i.e.*, it is similar to a "hammer drill" hand tool). Rock socketing involves using DTH equipment to create a hole in the bedrock inside which the pile is placed to give it lateral and longitudinal strength. The sounds produced by the DTH methods 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 the Navy's proposed activities 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, given there are no known pinniped haul-out sites in the vicinity of the Shipyard, visual and other non-acoustic stressors would be limited, and any impacts to marine mammals are

expected to primarily be acoustic in nature.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving or drilling is the primary means by which marine mammals may be harassed from the Navy'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 or drilling 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 as 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 or drilling 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, 2018a). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018a), 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). When analyzing the auditory effects of noise exposure, it is often helpful to broadly categorize sound as either impulsive or non-impulsive. When considering auditory effects, vibratory pile driving and rotary drilling are considered non-impulsive sources while impact pile driving and rock hammering are treated as an impulsive source. DTH is considered to have both non-impulsive and impulsive components.

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 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.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.*, Southall *et al.*, 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulsive sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.*, 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise

(*Neophocoena asiaorientalis*) 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).

Behavioral Harassment—Exposure to noise from pile driving and drilling also has the potential to behaviorally disturb marine mammals. Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.*, minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Disturbance may result in changing durations of surfacing and dives, changing direction and/or speed; reducing/increasing vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); eliciting a visible startle response or aggressive behavior (such as tail/fin 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) and Gomez *et al.* (2016) for reviews of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.*, 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a "progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial," rather than as, more generally, moderation in response to human disturbance (Bejder *et al.*, 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

As noted above, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.*, 1995; National Research Council (NRC), 2003; Wartzok *et al.*, 2003). Controlled experiments with captive marine mammals have showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.*, 1997; Finneran *et al.*, 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.*, 1995; Nowacek *et al.*, 2007).

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). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (e.g., Frankel and Clark, 2000; Costa *et al.*, 2003; Ng and Leung, 2003; Nowacek *et al.*, 2004; Goldbogen *et al.*, 2013a,b). Variations in dive behavior may reflect interruptions in biologically significant activities (e.g., foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

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.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics,

again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (e.g., Kastelein *et al.*, 2001, 2005, 2006; Gailey *et al.*, 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.*, 2000; Fristrup *et al.*, 2003; Foote *et al.*, 2004), while right whales (*Eubalaena glacialis*) have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007). In some cases, animals may cease sound production during production of aversive signals (Bowles *et al.*, 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.*, 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.*, 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (e.g., Bowles *et al.*, 1994; Goold, 1996; Stone *et al.*, 2000; Morton and Symonds, 2002; Gailey *et al.*, 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (e.g., Blackwell *et al.*, 2004; Bejder *et al.*, 2006; Teilmann *et al.*, 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (e.g., directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and

Heithaus, 1996, Bowers *et al.*, 2018). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England, 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.*, when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.*, Beauchamp and Livoreil, 1997; Fritz *et al.*, 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction of fitness (*e.g.*, decline in body condition) and subsequent reduction in reproductive success, survival, or both (*e.g.*, Harrington and Veitch, 1992; Daan *et al.*, 1996; Bradshaw *et al.*, 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a 5-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007).

Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

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 construction projects.

Auditory Masking—Since many marine mammals rely on sound to find prey, moderate social interactions, and facilitate mating (Tyack, 2008), noise from anthropogenic sound sources can interfere with these functions, but only if the noise spectrum overlaps with the hearing sensitivity of the marine mammal (Southall *et al.*, 2007; Clark *et al.*, 2009; Hatch *et al.*, 2012). Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.*, 2009). Acoustic masking is when other noises such as from human sources interfere 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; Erbe *et al.*, 2016). Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. 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.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound

exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (e.g., Clark *et al.*, 2009) and may result in energetic or other costs as animals change their vocalization behavior (e.g., Miller *et al.*, 2000; Foote *et al.*, 2004; Parks *et al.*, 2007; Di Iorio and Clark, 2009; Holt *et al.*, 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.*, 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (e.g., Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (e.g., Branstetter *et al.*, 2013).

Marine mammals in the Piscataqua River are exposed to anthropogenic noise which may lead to some habituation, but is also a source of masking. Vocalization changes may result from a need to compete with an increase in background noise and include increasing the source level, modifying the frequency, increasing the call repetition rate of vocalizations, or ceasing to vocalize in the presence of increased noise (Hotchkiss and Parks, 2013).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources. Energy distribution of pile driving covers a broad frequency spectrum, and sound from pile driving would be within the audible range of pinnipeds and cetaceans present in the proposed action area. While some construction during the Navy's activities may mask some acoustic signals that are relevant to the daily behavior of marine mammals, the short-term duration and limited areas

affected make it very unlikely that survival would be affected.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with construction activities that have the potential to cause behavioral harassment, depending on their distance from these activities. 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 airborne acoustic criteria. Although pinnipeds are known to haul-out regularly on man-made objects, we believe that incidents of take resulting solely from airborne sound are unlikely due to the sheltered proximity between the proposed project area and the haulout sites (e.g., Hicks Rocks located on the opposite side of the island where activities are occurring). Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

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.

Potential Effects on Marine Mammal Habitat

Water quality—Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during the installation and removal of piles and bedrock removal when bottom sediments are disturbed. The installation and removal of piles and bedrock removal and dredging will disturb bottom sediments and may cause a temporary increase in suspended sediment in the project area.

Using available information collected from a project in the Hudson River, pile-driving activities are anticipated to produce total suspended sediment (TSS) concentrations of approximately 5.0 to 10.0 milligrams per liter (mg/L) above background levels within approximately 91 m (300 ft) of the pile being driven (Federal Highway Administration, 2012). During pile extraction, sediment attached to the pile moves vertically through the water column until gravitational forces cause it to slough off under its own weight. The small resulting sediment plume is expected to settle out of the water column within a few hours. Studies of the effects of turbid water on fish (marine mammal prey) suggest that concentrations of suspended sediment can reach thousands of milligrams per liter before an acute toxic reaction is expected (Burton, 1993). The TSS levels expected for pile-driving or removal (5.0 to 10.0 mg/L) are below those shown to have adverse effects on fish (580.0 mg/L for the most sensitive species, with 1,000.0 mg/L more typical) and benthic communities (390.0 mg/L; Environmental Protection Agency, 1986).

Impacts to water quality from DTH mono-hammers are expected to be similar to those described for pile driving. Impacts to water quality would be localized and temporary and would have negligible impacts on marine mammal habitat. The cluster drill system and rotary drilling of shafts would have negligible impacts on water quality from sediment resuspension because the system would operate within a casing set into the bedrock. The cluster drill would collect excavated material inside of the apparatus where it would be lifted to the surface and placed onto a barge for subsequent disposal.

TSS concentrations associated with mechanical clamshell bucket dredging operations have been shown to range from 105 mg/L in the middle of the water column to 445 mg/L near the bottom (210 mg/L, depth-averaged) (Army Corps of Engineers, 2001). Furthermore, a study by Burton (1993) measured TSS concentrations at distances of 152, 305, 610, and 1006 m (500, 1,000, 2,000, and 3,300 ft) from dredge sites in the Delaware River and were able to detect concentrations between 15 mg/L and 191 mg/L up to 610 m (2,000 ft) from the dredge site. In support of the New York/New Jersey Harbor Deepening Project, the U.S. Army Corps of Engineers conducted extensive monitoring of mechanical dredge plumes (Army Corps of Engineers, 2015). Independent of bucket

type or size, plumes dissipated to background levels within 183 m (600 ft) of the source in the upper water column and 732 m (2,400 ft) in the lower water column. Based on these studies, elevated suspended sediment concentrations at several hundreds of mg/L above background may be present in the immediate vicinity of the bucket, but would settle rapidly within a 732 m (2,400 ft) radius of the dredge location. The TSS levels expected for mechanical dredging (up to 445.0 mg/L) are below those shown to have adverse effect on fish (typically up to 1,000.0 mg/L; see summary of scientific literature in Burton 1993, Wilber and Clarke 2001).

Effects to turbidity and sedimentation are expected to be short-term, minor, and localized. Since the currents are so strong in the area, following the completion of sediment-disturbing activities, suspended sediments in the water column should dissipate and quickly return to background levels in all construction scenarios. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary. In general, the area likely impacted by the proposed construction activities is relatively small compared to the available marine mammal habitat in Great Bay Estuary.

Potential Effects on Prey—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 and, for some, is not well documented. Studies regarding the effects of noise on known marine mammal prey are described here.

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; Jorgensen and Gyselman, 2009; Cott *et al.*, 2012). More commonly, though, the impacts of noise on fish are temporary.

SPLs of sufficient strength have been known to cause injury to fish and fish mortality (summarized in Popper *et al.*, 2014). 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 greatest potential impact to fish during construction would occur during impact pile driving, rock hammering, and DTH excavation (DTH mono-hammer and cluster drill). However, the duration of impact pile driving would be limited to the final stage of

installation (“proofing”) after the pile has been driven as close as practicable to the design depth with a vibratory driver. In-water construction activities would only occur during daylight hours allowing fish to forage and transit the project area in the evening. Additionally, the Back Channel of the Piscataqua River would be unaffected by construction activities and would provide a pathway for unrestricted fish movement. Vibratory pile driving and rock hammering would possibly elicit behavioral reactions from fish such as temporary avoidance of the area but is unlikely to cause injuries to fish or have persistent effects on local fish populations. In addition, it should be noted that the area in question is low-quality habitat since it is already highly developed and experiences a high level of anthropogenic noise from normal Shipyard operations and other vessel traffic. In general, impacts on marine mammal prey species are expected to be minor and temporary.

In-Water Construction Effects on Potential Foraging Habitat

The proposed activities would not result in permanent impacts to habitats used directly by marine mammals. The total seafloor area affected by pile installation and removal is a very small area compared to the vast foraging area available to marine mammals outside this project area. Construction would have minimal permanent and temporary impacts on benthic invertebrate species, a marine mammal prey source. Benthic invertebrates that are commonly prey for marine mammals, such as squid species, were not detected during a 2014 benthic survey of the proposed project area (CR Environmental, Inc., 2014). The majority of direct benthic habitat loss previously occurred with the permanent loss of approximately 3.5 acres of benthic habitat from construction of the super flood basin (P-310). The water surface of Great Bay Estuary extends approximately 4.45 square mi (124,000,000 square ft) at low tide (Mills, No date). Therefore, that loss of approximately 152,000 square ft represented approximately one-tenth of 1 percent of the benthic habitat in the estuary at low tide. Additional areas that would be permanently removed by the multifunctional expansion of Dry Dock 1 (P-381) are either previously impacted by P-310 construction activities or beneath and adjacent to the existing berths along the Shipyard’s industrial waterfront and are regularly disturbed as part of the construction dredging to maintain safe navigational depths. Further, vessel activity at the berths creates minor disturbances of

benthic habitats (e.g., vessel propeller wakes) during waterfront operations. Therefore, impacts of the project are not likely to have adverse effects on marine mammal foraging habitat in the proposed project area.

The area impacted by the project is relatively small compared to the available habitat just outside the project area, and there are no areas of particular importance that would be impacted by this project. 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. As described in the preceding, the potential for the Navy's construction to affect the availability of prey to marine mammals or to meaningfully impact the quality of physical or acoustic habitat is considered to be insignificant.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this LOA, which will inform both NMFS' consideration of "small numbers" and NMFS' negligible impact determinations.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. 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 installation and removal, rotary drilling, DTH, and rock hammering) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency species and/or phocids because predicted auditory injury zones are larger than for mid-frequency species and/or otariids. The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent

practicable. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, 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) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential 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 estimates.

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—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 or exposure context (e.g., frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (e.g., bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (e.g., Southall *et al.*, 2007, 2021, Ellison *et al.*, 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous

(e.g., vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

The Navy's proposed activity includes the use of continuous (vibratory pile driving/removal, rotary drilling) and intermittent (impact pile driving, rock hammering) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μ Pa, respectively, are applicable. DTH systems have both continuous and intermittent components as discussed in the *Description of Sound Sources* section above. When evaluating Level B harassment, NMFS recommends treating DTH as a continuous source and applying the RMS SPL thresholds of 120 dB re 1 μ Pa (see NMFS recommended guidance on DTH systems at https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf; NMFS, 2022).

Level A Harassment—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). The Navy's proposed activity includes the use of impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving/removal, rotary drilling, DTH) sources.

These thresholds are provided in the table 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: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.

TABLE 5—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 μ Pa, and cumulative sound exposure level (L_E) has a reference value of 1 μ Pa²s. 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 are used in estimating the area ensonified above the acoustic thresholds, including 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, rotary drilling, rock hammering, and DTH).

Sound Source Levels of Proposed Activities—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment (*e.g.*, sediment type) in which the activity takes place. The Navy evaluated sound source level (SL) measurements available for certain pile types and sizes from similar environments from other Navy pile driving projects, including from past projects conducted at the Shipyard, and used them as proxy SLs to determine reasonable SLs likely to result from the pile driving and drilling activities in their application. Projects reviewed were those most similar to the

specified activity in terms of drilling and rock hammering activities, type and size of piles installed, method of pile installation, and substrate conditions. Some of the proxy source levels proposed by the Navy are expected to be more conservative as compared to what may be realized by the actual pile driving to take place, as the values are from larger pile sizes. In some instances, for reasons described below, NMFS relied on alternative proxy SLs in our evaluation of the impacts of the Navy’s proposed activities on marine mammals (Table 6). Note that the source levels in this Table represent the SPL referenced at a distance of 10 m from the source.

TABLE 6—SUMMARY OF UNATTENUATED IN-WATER PILE DRIVING SOURCE LEVELS

Pile type	Installation method	Pile diameter	Peak SPL (dB re 1 μ Pa)	RMS SPL (dB re 1 μ Pa)	SEL _{SS} (dB re 1 μ Pa ² sec)
Casing/Socket	Rotary Drill	126-inch	NA	154 (169 at 1 m) ...	NA
		102-inch	NA	154 (169 at 1 m) ...	NA
		84-inch	NA	154 (169 at 1 m) ...	NA
Shaft	DTH Cluster Drill	108-inch	NA	201.6 ⁵ (Level A) ...	NA
		84-inch	NA	174 ⁶ (Level B)	
			NA	196.7 ⁵ (Level A) ...	NA
		78-inch	NA	174 ⁶ (Level B)	
			NA	195.2 ⁵ (Level A) ...	181
72-inch	NA	174 ⁶ (Level B)			
		193.7 ⁵ (Level A) ...	NA		
		174 ⁶ (Level B)			
Rock anchor	DTH mono-hammer	9-inch	172	167	146
Relief hole	DTH mono-hammer	4 to 6-inch	170	156 ⁶	144
Z-shaped Sheet	Impact	28-inch ¹	211	196	181
		Vibratory	NA	167	167
		Vibratory	NA	167	167
Bedrock and concrete demolition	Rock Hammer ⁴	25-inch ³	NA	167	167
		NA	197	186 ⁴	4 171

¹ An appropriate proxy value for impact driving 28-inch wide, Z-shaped sheet piles is not available, so a value for 30-inch steel pipe piles was used as a proxy value (NAVFAC SW, 2020 [p. A–4]).

² An appropriate proxy value for vibratory pile driving 28-inch wide, Z-shaped sheet piles is not available, so a value for 30-inch steel pipe piles was used as a proxy value (Navy, 2015 [p. 14]).

³ An appropriate proxy value for vibratory pile driving 25-inch sheet piles is not available, so the value for 28-inch wide, Z-shaped sheet piles was used as a proxy.

⁴ Escude, 2012.

⁵ RMS SPL values were derived from regression and extrapolation calculations of existing data by NMFS.

⁶ SPLs vary from those proposed in the Navy’s application as the NMFS DTH recommended guidance updated the source level proxy it recommends for some DTH systems after the Navy’s application was deemed adequate and complete (NMFS, 2022).

Notes: All SPLs are unattenuated and represent the SPL referenced at a distance of 10 m from the source; NA = Not applicable; single strike SEL are the proxy source levels for impact pile driving used to calculate distances to PTS; dB re 1 μ Pa = decibels (dB) referenced to a pressure of 1 microPascal, measures underwater SPL.; dB re 1 μ Pa²-sec = dB referenced to a pressure of 1 microPascal squared per second, measures underwater SEL.

With regards to the proxy values summarized in Table 6, very little information is available regarding source levels for in-water rotary drilling activities. As a conservative measure and to be consistent with previously issued IHAs for similar projects in the region, a proxy of 154 dB RMS is proposed for all rotary drilling activities (Dazey, 2012).

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and the continuous threshold is used to evaluate Level B harassment. The Navy consulted with NMFS to obtain the appropriate proxy values for DTH mono- and cluster-hammers. With regards to DTH mono-hammers, NMFS recommended proxy levels for Level A harassment based on available data regarding DTH systems of similar sized piles and holes (Table 6) (Denes *et al.*, 2019; Guan and Miner, 2020; Reyff and Heyvaert, 2019; Reyff, 2020; Heyvaert and Reyff, 2021). No hydroacoustic data exist for cluster DTH systems; therefore, NMFS recommends proxy values based off of regression and extrapolation calculations of existing data for mono-hammers until hydroacoustic data on DTH cluster drills be obtained (NMFS, 2022). Because of the high number of hammers and strikes for this system, DTH cluster drills were treated as a continuous sound source for the time component of Level A harassment (*i.e.*, for the entire duration DTH cluster drills are operational, they were considered to be producing strikes, rather than indicating the number of strikes per second, which was unknown), but still used the impulsive thresholds.

At the time of the Navy's application submission, NMFS recommended that the RMS SPL at 10 m should be 167 dB when evaluating Level B harassment (Heyvaert and Reyff, 2021 as cited in NMFS, 2021b) for all DTH pile/hole sizes. However, since that time, NMFS has received additional clarifying information regarding DTH data presented in Reyff and Heyvaert (2019) and Reyff (2020) that allows for different RMS SPL at 10 m to be recommended for piles/holes of varying diameters (NMFS, 2022). Therefore, NMFS proposes to use the following proxy RMS SPLs at 10 m to evaluate Level B

harassment from this sound source in this analysis (Table 6): 156 dB RMS for the 4 to 6 inch mono hammers (Reyff and Heyvaert, 2019; Reyff, 2020), 167 dB RMS for the 9 inch mono-hammers (Heyvaert and Reyff, 2021), and 174 dB RMS for all DTH cluster drills greater or equal to 74 inches (Reyff and Heyvaert, 2019; Reyff, 2020). See Footnote 6 to Table 6.

Rock hammering is analyzed as an impulsive noise source. For purposes of this analysis, it is assumed that the hammer would have a maximum strike rate of 460 strikes per minute and would operate for a maximum duration of 15 minutes before needing to reposition or stop to check progress. Therefore, noise impacts for rock hammering activities are assessed using the number of blows per 15-minute interval (6,900 blows) and the number of 15-minute intervals anticipated over the course of the day based on the durations provided in Tables 1, 7, and 8. As with rotary drilling, very little information is available regarding source levels associated with nearshore rock hammering. In previous IHAs related to the Shipyard, NMFS relied on preliminary measurements from the Tappan Zee Bridge replacement project (Reyff, 2018a, 2018b) as well as data from a WSDOT concrete pier demolition project (Escude, 2012) to inform proxy SLs for rock hammering. However, a few discrepancies in the preliminary data of the Tappan Zee Bridge reports have been identified resulting from NMFS' further inspection into the report's data. Therefore, NMFS proposes to use the SLs reported only from the Escude (2012) concrete pier demolition project as proxy values for rock hammering activities associated with P-381 (Table 6).

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:

$$TL = B * \log_{10} (R1/R2),$$

Where:

B = transmission loss coefficient (assumed to be 15)

R1 = the distance of the modeled SPL from the driven pile, and

R2 = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. 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 the Navy's proposed construction activities in the absence of specific modelling. All Level B harassment isopleths are reported in Tables 7 and 8 considering RMS SLs.

Level A Harassment Zones—The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources (such as from impact and vibratory pile driving, drilling, DTH, and rock hammering), the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the User Spreadsheet can be found in Appendix A of the Navy's application, Appendix A of the Navy's addendum, and the resulting isopleths are reported in Tables 7 and 8.

TABLE 7—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR IMPULSIVE NOISE [DTH, impact pile driving, hydraulic rock hammering]

Activity ID	Year ^{1/} activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment ²		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
1	2/Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	5 hours/day (20 intervals/day at 15 each).	56	5,034.5 m/0.417417 km ² .	2,261.9 m/0.417417 km ² .	541.17 m/0.277858 km ² .
3	2-3/Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	2.5 hours/day (10 intervals/day at 15 min each).	47	3,171.6 m/0.417417 km ² .	1,424.9 m/0.417417 km ² .	541.17 m/0.277858 km ² .
4	2-3/Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	10 hours/day (40 intervals/day at 15 min each).	74	7,991.8 m/0.417417 km ² .	3,590.5 m/0.417417 km ² .	541.17 m/0.277858 km ² .
6	2/Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	12 hours/day (48 intervals/day at 15 min each).	60	9,024.7 m/0.417417 km ² .	4,054.5 m/0.417417 km ² .	541.17 m/0.277858 km ² .
10	2/Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	12 hours/day (48 intervals/day at 15 min each).	25	9,024.7 m/0.417417 km ² .	4,054.5 m/0.417417 km ² .	541.17 m/0.277858 km ² .
21	2/Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	4 hours/day (16 intervals/day at 15 min each).	15	4,388.6 m/0.417417 km ² .	1,949.2 m/0.417417 km ² .	541.17 m/0.277858 km ² .
7	2/DTH Mono-hammer.	Relief Holes at Berth 11 Basin Floor.	924 4–6 inch holes, 27 holes/day.	35	178.9 m/0.047675 km ²	80.4 m/0.014413 km ²	2,512 m/0. 417417 km ² .
11	2/DTH Mono-hammer.	Dry Dock 1 North entrance Rock Anchors.	50 9-inch holes, 2 holes/day.	25	244.8 m/0.073751 km ²	110 m/0.022912 km ² ..	13,594 m/0.417417 km ² .
22	2-3/DTH Mono-hammer.	Center Wall Foundation Rock Anchors.	72 9-inch holes, 2 holes/day.	36	244.8 m/0.073751 km ²	110 m/0.022912 km ² ..	13,594 m/0.417417 km ² .
34	3-4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors.	36 9-inch holes, 2 holes/day.	18	244.8 m/0.073751 km ²	110 m/0.022912 km ² ..	13,594 m/0.417417 km ² .
35	4-5/DTH Mono-hammer.	Dry Dock 1 West Rock Anchors.	36 9-inch holes, 2 holes/day.	18	244.8 m/0.073751 km ²	110 m/0.022912 km ² ..	13,594 m/0. 417417 km ² .
R	2/Impact Pile Driving.	Dry Dock 1 North Entrance Temporary Cofferdam.	48 28-inch Z-shaped sheets, 8 sheets/day.	6	1,568.6 m/0.417417 km ² .	704.7 m/0.364953 km ²	2,512 m/0.417417 km ² .
5	2/Impact Pile Driving.	Berth 1 Support of Excavation.	28 28-inch Z-shaped sheets, 4 piles/day.	8	988.2 m/0.403411 km ²	444.0 m/0.201158 km ²	2,512 m/0.417417 km ² .
8	2/Impact Pile Driving.	Temporary Cofferdam Extension.	14 28-inch Z-shaped sheets, 4 piles/day.	4	988.2 m/0.403411 km ²	444.0 m/0.201158 km ²	2,512 m/0.417417 km ² .
12	2/Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	15 28-inch Z-shaped sheets, 4 piles/day.	4	988.2 m/0.403411 km ²	444.0 m/0.201158 km ²	2,512 m/0.417417 km ² .
24	2-3/Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	23 28-inch Z-shaped sheets, 2 piles/day.	12	622.5 m/0.334747 km ²	279.7 m/0.090757 km ²	2,512 m/0.417417 km ² .
A4	2/DTH Cluster Drill.	Dry Dock 1 North Entrance Foundation Support Piles.	18 78-inch shafts, 10 hours/day, 6.5 days/shaft.	117	84,380.4 m/0.417417 km ² .	37,909.7 m/0.417417 km ² .	39,811 m/0.417417 km ² .
9d	2/DTH Cluster Drill.	Gantry Crane Support Piles.	16 72-inch shafts, 10 hours/day, 5 days/shaft.	80	67,025.7 m/0.417417 km ² .	30,112.8 m/0.417417 km ² .	39,811 m/0.417417 km ² .
13d	2-3/DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	20 84-inch shafts, 10 hours/day, 3.5 days/shaft.	70	106,228.6 m/0.417417 km ² .	47,725.5 m/0.417417 km ² .	39,811 m/0.417417 km ² .
15d	2-3/DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	18 78-inch shafts, 10 hours/day, 7.5 days/shaft.	135	84,380.4 m/0.417417 km ² .	37,909.7 m/0.417417 km ² .	39,811 m/0.417417 km ² .
16d	2-3/DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North.	20 78-inch shafts, 10 hours/day, 7.5 days/shaft.	150	84,380.4 m/0.417417 km ² .	37,909.7 m/0.417417 km ² .	39,811 m/0.417417 km ² .
17d	2-3/DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	23 108-inch shafts, 10 hours/day, 8.5 days/shaft.	196	225,376.2 m/0.417417 km ² .	101,255.2 m/0.417417 km ² .	39,811 m/0.417417 km ² .
29d	3-4/DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	20 84-inch shafts, 10 hours/day, 3.5 days/shaft.	70	106,228.6 m/0.417417 km ² .	47,725.5 m/0.417417 km ² .	39,811 m/0.417417 km ² .
31d	3-4/DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West.	22 78-inch shafts, 10 hours/day, 7.5 days/shaft.	165	84,380.4 m/0.417417 km ² .	37,909.7 m/0.417417 km ² .	39,811 m/0.417417 km ² .

TABLE 7—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR IMPULSIVE NOISE—
Continued
[DTH, impact pile driving, hydraulic rock hammering]

Activity ID	Year 1/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment ²		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
32d	3–4/DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	23 108-inch shafts, 10 hours/day, 8.5 days/ pile.	196	225,376.2 m/0.417417 km ² .	101,255.2 m/0.417417 km ² .	39,811 m/0.417417 km ² .
33d	3–4/DTH Cluster Drill.	Dry Dock 1 West Lev- eling Piles (Diving Board Shafts).	18 78-inch shafts, 10 hours/day, 7.5 days/ pile.	135	84,380.4 m/0.417417 km ² .	37,909.7 m/0.417417 km ² .	39,811 m/0.417417 km ² .

¹ Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886; April 6, 2022).

² To determine underwater harassment zone size, ensounded areas from the source were clipped along the shoreline using Geographical Information Systems (GIS).

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE
[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year 1/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment ²		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
R	2/Vibratory Pile Driv- ing.	Dry Dock 1 North En- trance Temporary Cofferdam.	48 28-inch Z-shaped sheets, 8 sheets/day.	6	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
2	2–3/Vibra- tory Ex- traction.	Remove Berth 1 Sheet Piles.	168 25-inch Z-shaped sheets, 4 piles/day.	42	12.2 m/0.000454 km ²	5.0 m/0.000078 km ² ...	13,594 m/0.417417 km ² .
5	2/Vibratory Pile Driv- ing.	Install Berth 1 Support of Excavation.	28 28-inch Z-shaped sheets, 4 piles/day.	8	12.2 m/0.000454 km ²	5.0 m/0.000078 km ² ...	13,594 m/0.417417 km ² .
8	2/Vibratory Pile Driv- ing.	Install Temporary Cofferdam Exten- sion.	14 28-inch Z-shaped sheets, 4 piles/day.	4	12.2 m/0.000454 km ²	5.0 m/0.000078 km ² ...	13,594 m/0.417417 km ² .
12	2/Vibratory Pile Driv- ing.	Center Wall Tie-In to Existing West Clo- sure Wall.	15 28-inch Z-shaped sheets, 4 piles/day.	4	12.2 m/0.000454 km ²	5.0 m/0.000078 km ² ...	13,594 m/0.417417 km ² .
18	2/Vibratory Extrac- tion.	Berth 11 End Wall Temporary Guide Wall.	60 28-inch Z-shaped sheets, 8 piles/day.	10	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
19	2/Vibratory Extrac- tion.	Remove Berth 1 Sup- port of Excavation.	28 28-inch Z-shaped sheets, 8 piles/day.	5	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
20	2/Vibratory Extrac- tion.	Remove Berth 1 Emergency Repairs.	108 28-inch Z-shaped sheets, 6 piles/day.	18	16.0 m/0.000733 km ²	6.6 m/0.000136 km ² ...	13,594 m/0.417417 km ² .
23	2–3/Vibra- tory Ex- traction.	Dry Dock 1 North-Re- move Center Wall Tie-in to West Clo- sure Wall.	16 28-inch Z-shaped sheets, 8 piles/day.	3	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
24	2–3/Vibra- tory Pile Driving.	Center Wall East Tie- in to Existing Wall.	23 28-inch Z-shaped sheets, 2 piles/day.	12	7.7 m/0.000185 km ² ...	3.2 m/0.000032 km ² ...	13,594 m/0.417417 km ² .
25	2–3/Vibra- tory Ex- traction.	Dry Dock 1 West Re- move Center Wall Tie-in to West Clo- sure Wall.	15 28-inch Z-shaped sheets, 8 piles/day.	3	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
26	2–3/Vibra- tory Ex- traction.	Remove Center Wall Tie-in to Existing Wall.	23 28-inch, Z-shaped sheets, 8 piles/day.	12	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
27	2–3/Vibra- tory Ex- traction.	Remove Temporary Cofferdam.	96 28-inch Z-shaped sheets, 8 piles/day.	12	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
28	2–3/Vibra- tory Ex- traction.	Remove Temporary Cofferdam Exten- sion.	14 28-inch Z-shaped sheets, 8 piles/day.	2	19.4 m/0.001041 km ²	8.0 m/0.0002 km ²	13,594 m/0.417417 km ² .
A1	2/Rotary Drill.	Dry Dock 1 North En- trance Foundation Support Piles—In- stall Outer Casing.	18 102-inch borings, 1 hour/day, 1 casing/ day.	18	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
A2	2/Rotary Drill.	Dry Dock 1 North En- trance Foundation Support Piles—Pre- Drill Socket.	18 102-inch borings, 9 hours/day, 1 socket/ day.	18	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.41747 km ² .

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE—
Continued
[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year 1/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment ²		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
A3	2/Rotary Drill.	Dry Dock 1 North Entrance Foundation Support Piles—Remove Outer Casing.	18 102-inch borings, 15 minutes/casing, 1 casing/day.	18	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
9a	2/Rotary Drill.	Gantry Crane Support—Install Outer Casing.	16 102-inch borings, 1 hour/day, 1 casing/day.	16	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
9b	2/Rotary Drill.	Gantry Crane Support—Pre-Drill Socket.	16 102-inch borings, 9 hours/day, 1 socket/day.	16	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
9c	2/Rotary Drill.	Gantry Crane Support—Remove Outer Casing.	16 102-inch borings, 15 minutes/casing, 1 casing/day.	16	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
13a	2–3/Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	20 102-inch borings, 1 hour/day, 1 casing/day.	20	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
13b	2–3/Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	20 102-inch borings, 9 hours/day, 1 socket/day.	20	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
13c	2–3/Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	20 102-inch borings, 15 minutes/casing, 1 casing/day.	20	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
14	2–3/Rotary Drill.	Remove Dry Dock 1 North Temporary Work Trestle Piles.	20 84-inch borings, 15 minutes/casing, 1 casing/day.	20	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
15a	2–3/Rotary Drill.	Dry Dock 1 North Leveling Piles—Install Outer Casing.	18 84-inch borings, 1 hour/day, 1 casing/day.	18	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
15b	2–3/Rotary Drill.	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	18 84-inch borings, 9 hours/day, 1 socket/day.	18	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
15c	2–3/Rotary Drill.	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	18 84-inch borings, 15 minutes/casing, 1 casing/day.	18	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
16a	2–3/Rotary Drill.	Dry Dock 1 North Wall Shafts—Install Outer Casing.	20 102-inch borings, 1 hour/day, 1 casing/day.	20	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
16b	2–3/Rotary Drill.	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	20 102-inch borings, 9 hours/day, 1 socket/day.	20	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
16c	2–3/Rotary Drill.	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	20 102-inch borings, 15 minutes/casing, 1 casing/day.	20	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
17a	2–3/Rotary Drill.	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	23 126-inch borings, 1 hour/day, 1 casing/day.	23	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
17b	2–3/Rotary Drill.	Dry Dock 1 North Foundation Shafts Pre-Drill Sockets.	23 126-inch borings, 9 hours/day, 1 socket/day.	23	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
17c	2–3/Rotary Drill.	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	23 126-inch borings, 15 minutes/casing, 1 casing/day.	23	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
29a	3–4/Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	20 102-inch borings, 1 hour/day, 1 casing/day.	20	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
29b	3–4/Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	20 102-inch borings, 9 hours/day, 1 socket/day.	20	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
29c	3–4/Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	20 102-inch borings, 15 minutes/casing, 1 casing/day.	20	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
30	3–4/Rotary Drill.	Dry Dock 1 West Remove Temporary Work Trestle Piles.	20 84-inch borings, 15 minutes/pile, 1 pile/day.	20	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
31a	3–4/Rotary Drill.	Dry Dock 1 West Wall Shafts—Install Outer Casing.	22 102-inch borings, 1 hour/day, 1 casing/day.	22	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE—
Continued
[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year 1/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment ²		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
31b	3-4/Rotary Drill.	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	22 102-inch borings, 9 hours/day, 1 socket/ day.	22	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
31c	3-4/Rotary Drill.	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	22 102-inch borings, 15 minutes/casing, 1 casing/day.	22	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
32a	3-4/Rotary Drill.	Dry Dock 1 West Foundation Shafts— Install Outer Casing.	23 126-inch borings, 1 hour/day, 1 casing/ day.	23	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
32b	3-4/Rotary Drill.	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	23 126-inch borings, 9 hours/day, 1 socket/ day.	23	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
32c	3-4/Rotary Drill.	Dry Dock 1 West Foundation Shafts— Remove Outer Cas- ing.	23 126-inch borings, 15 minutes/casing, 1 casing/day.	23	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .
33a	3-4/Rotary Drill.	Dry Dock 1 North Lev- eling Piles—Install Outer Casing.	18 84-inch borings, 1 hour/day, 1 casing/ day.	18	2.1 m/0.000014 km ² ...	1.3 m/0.000005 km ² ...	1,848 m/0.417417 km ² .
33b	3-4/Rotary Drill.	Dry Dock 1 West, Lev- eling Piles—Pre-Drill Socket.	18 84-inch borings, 9 hours/day, 1 socket/ day.	18	8.9 m/0.000248 km ² ...	5.4 m/0.000091 km ² ...	1,848 m/0.417417 km ² .
33c	3-4/Rotary Drill.	Dry Dock 1 North Lev- eling Piles—Remove Outer Casing.	18 84-inch borings, 15 minutes/casing, 1 casing/day.	18	0.8 m/0.000002 km ² ...	0.5 m/0.000001 km ² ...	1,848 m/0.417417 km ² .

¹ Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886; April 6, 2022).

² To determine underwater harassment zone size, ensouffied areas from the source were clipped along the shoreline using Geographical Information Systems (GIS).

The calculated maximum distances corresponding to the underwater marine mammal harassment zones from impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving, rotary drilling) noise and the area of the harassment zone within the region of influence (ROI) are summarized in Tables 7 and 8, respectively. Sound source locations were chosen to model the greatest possible affected areas; typically, these locations would be at the riverward end of the super flood basin. The calculated distances do not take the land masses into consideration, but the ensouffied areas do. Neither consider the reduction that would be achieved by the required use of a bubble curtain and therefore all take estimates are considered conservative. Refer to Figures 6–1 through 6–20 of the Navy's application for visual representations of the calculated maximum distances corresponding to the underwater marine mammal harassment zones from impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving, rotary drilling) noise and the corresponding area of the harassment zone within the ROI.

Calculated distances to Level A harassment and Level B harassment

thresholds are large, especially for DTH and rock hammering activities. However, in most cases the full distance of sound propagation would not be reached due to the presence of land masses and anthropogenic structures that would prevent the noise from reaching nearly the full extent of the harassment isopleths. Refer to Figure 1–3 in the Navy's application for the ROI, which illustrates that the land masses preclude the sound from traveling more than approximately 870 m (3,000 ft) from the source, at most. Areas encompassed within the threshold (harassment zones) were calculated by using a Geographical Information System (GIS) to clip the maximum calculated distances to the extent of the ROI (see Figure 2).

Concurrent Activities—Simultaneous use of pile drivers, hammers, and drills could result in increased SPLs and harassment zone sizes given the proximity of the component sites and the rules of decibel addition (see Table 9 below). Due to the relatively small size of the ROI, the use of a single DTH cluster drill or rock hammer would ensouffied the entire ROI to the Level A (PTS Onset) harassment thresholds (refer to Table 7). Therefore, when this equipment is operated in conjunction

with other noise-generating equipment, there would be no change in the size of the harassment zone. The entire ROI would remain ensouffied to the Level A harassment thresholds for the duration of the activity and there would be no Level B harassment zone. However, when DTH cluster drills or rock hammers are not in use, increased SPLs and harassment zone sizes within the ROI could result. Due to the substantial amount of rock hammering and DTH excavation required for the construction of the multifunctional expansion of Dry Dock 1, the only scenarios identified in which cluster drills and/or rock hammers would not be in operation would be at the end of the project (construction years 3 and 4) when two rotary drills or two rotary drills and a DTH mono-hammer (9-inch) could be used simultaneously (refer to Table 2).

When two noise sources have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources because the isopleth of one sound source encompasses the sound source of another isopleth. In such instances, the sources are considered additive and combined using the rules of decibel addition, presented in Table 9 below (NMFS, 2021d; WSDOT, 2020).

TABLE 9—ADJUSTMENTS FOR SOUND EXPOSURE LEVEL CRITERION

Source types	Difference in sound level (at specified meters)	Adjustments to specifications for Level A harassment RMS/SEL _{ss} * calculations
Non-impulsive, continuous/Non-impulsive, continuous, OR.	0 or 1 dB	Add 3 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
	2 or 3 dB	Add 2 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
Impulsive source (multiple strikes per second)/Impulsive source (multiple strikes per second).	4 to 9 dB	Add 1 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
	10 dB or more	Add 0 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).

* RMS level for vibratory pile driving/rotary hammer and single strike SEL (SEL_{ss}) level for DTH/rock hammer.

For simultaneous usage of three or more continuous sound sources, the three overlapping sources with the highest SLs are identified. Of the three highest SLs, the lower two are combined using the above rules, then the combination of the lower two is combined with the highest of the three. For example, with overlapping isopleths from 24-, 36-, and 42-inch diameter steel pipe piles with sound source levels of 161, 167, and 168 dB RMS respectively,

the 24- and 36-inch would be added together; given that 167–161 = 6 dB, then 1 dB is added to the highest of the two sound source levels (167 dB), for a combined noise level of 168 dB. Next, the newly calculated 168 dB is added to the 42-inch steel pile with sound source levels of 168 dB. Since 168–168 = 0 dB, 3 dB is added to the highest value, or 171 dB in total for the combination of 24-, 36-, and 42-inch steel pipe piles (NMFSS, 2021d). By using this method,

revised proxy SPLs were determined for the use of two 102-inch diameter rotary drills and the use of two 108-inch rotary drills and one 9-inch DTH mono-hammer. The revised proxy values are presented in Table 10 and the resulting harassment zones are summarized in Table 11 (visually depicted in Figures 6–21 and 6–22 in the Navy’s application).

TABLE 10—REVISED PROXY VALUES FOR SIMULTANEOUS USE OF NON-IMPULSIVE SOURCES

Source A		Source B		Revised proxy RMS SPL (dB re 1 μPa)
Equipment	RMS SPL (dB re 1 μPa)	Equipment	RMS SPL (dB re 1 μPa)	
Rotary Drill	154	Rotary Drill	154	157
Two Rotary Drills	157	DTH Mono-Hammer	167	167

TABLE 11—LEVEL A AND LEVEL B HARASSMENT ZONES RESULTING FROM CONCURRENT ACTIVITIES

Multiple source scenario	Level A harassment		Level B harassment
	High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
2 Rotary Drills (9 hrs)	23.6 m/0.001514 km ²	9.7 m/0.000294 km ²	2,929 m/0.417417 km ² .
2 Rotary Drills (9 hrs) and 1 DTH Mono-Hammer (5 hrs).	74.2 m/0.012773 km ²	30.5 m/0.002489 km ²	13,594 m/0.417417 km ² .

Marine Mammal Occurrence and Take Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information, that will inform the take calculations. We also describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

Potential exposures to impact and vibratory pile driving, rotary drilling, DTH, and rock hammering noise for each acoustic threshold were estimated using marine mammal density estimates (N) from the Navy Marine Species

Density Database (NMSDD; Navy, 2017) or from monitoring reports from the Berth 11 Waterfront Improvements and P-310 construction projects. Specifically, where monitoring data specific to the project area were available, they were used, and the NMSDD data were used when there were no monitoring data available. The take estimate was determined using the following equation: take estimate = N * days of activity * area of harassment. A 10 m shutdown zone designed to prevent animal interactions with equipment was subtracted from the Level A harassment zone, and the area of the Level A harassment zone was subtracted from the Level B harassment

zone to avoid double counting of takes during these take calculations. Days of construction were conservatively based on relatively slow daily production rates. The pile type, size, and installation method that produce the largest zone of influence were used to estimate exposure of marine mammals to noise impacts. In instances where an activity would ensnare the entire ROI to the Level A harassment threshold, all potential takes are assumed to be by Level A harassment.

Because some construction activities would occur over more than one construction year, the number of takes per year were determined by the percent

duration of each construction activity occurring each year (calculated by months). For example, if an activity were to occur for 6 months, with 3 months occurring in year 2 and 3 months occurring in year 3, then 50

percent of the takes were assigned to year 2 and 50 percent to year 3. In instances where only 1 take was calculated but activities spanned more than one construction year, one take was requested for each construction

year. Table 12 summarizes the calculated duration percentages for each activity that were used to divide take numbers by year.

TABLE 12—DIVISION OF TAKES BY CONSTRUCTION YEAR

Activity ID	Total amount and estimated dates	Activity component	Year 2 ¹ % takes	Year 3 ¹ % takes	Year 4 ¹ % takes	Year 5 ¹ % takes
(A1,2,3,4) Center Wall—Install Foundation Support Piles.	Drill 18 shafts, <i>Apr 23 to Aug 23</i>	Install 102-inch diameter outer casing.	100	0	0	0
		Pre-drill 102-inch outer casing	100	0	0	0
		Remove 102-inch outer casing	100	0	0	0
		Drill 79-inch diameter shaft	100	0	0	0
(R) Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles, <i>Apr 23 to May 23</i> .	28-inch wide Z-shaped sheets	100	0	0	0
(1) Berth 11—Remove Shutter Panels.	Remove 112 panels, <i>Apr 23 to Apr 23</i> .	Concrete shutter panels	100	0	0	0
(2) Berth 1—Remove Sheet Piles	Remove 168 sheet piles, <i>Apr 23 to Jun 24</i> .	25-inch-wide Z-shaped	80	20	0	0
(3) Berth 1—Remove Granite Block Quay Wall.	2,800 cy, <i>Apr 23 to Jun 24</i>	Removal of granite blocks	80	20	0	0
(4) Berth 1—Top of Wall Removal for Waler Installation.	320 lf, <i>Apr 23 to Jun 24</i>	Mechanical concrete removal	80	20	0	0
(5) Berth 1—Install southeast corner SOE.	Install 28 sheet piles, <i>Apr 23 to Jul 23</i> .	28-inch-wide Z-shaped	100	0	0	0
(6) Berth 11—Mechanical Rock Removal at Basin Floor.	700 cy, <i>Apr 23 to Aug 23</i>	Excavate Bedrock	100	0	0	0
(7) Berth 11 Face—Mechanical Rock Removal at Basin Floor.	Drill 924 relief holes, <i>Apr 23 to Aug 23</i> .	4–6 inch diameter holes	100	0	0	0
(8) Temporary Cofferdam Extension.	Install 14 sheet piles, <i>Apr 23 to Jun 23</i> .	28-inch-wide Z-shaped	100	0	0	0
(9a, b, c, d) Gantry crane Support Piles at Berth 1 West.	Drill 16 shafts, <i>Apr 23 to Aug 23</i>	Set 102-inch diameter casing	100	0	0	0
		Pre-drill 102-inch rock socket	100	0	0	0
		Remove 102-inch casing	100	0	0	0
		72-inch diameter shafts	100	0	0	0
(10) Berth 1—Mechanical Rock Removal at Basin Floor.	500 cy, <i>Apr 23 to Sep 23</i>	Excavate Bedrock	100	0	0	0
(11) Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors, <i>Apr 23 to Oct 23</i> .	9-inch diameter holes	100	0	0	0
(12) Center Wall—Install Tie-In to Existing West Closure Wall.	Install 15 sheet piles, <i>Apr 23 to Dec 23</i> .	28-inch wide Z-shaped	100	0	0	0
(13a, b, c, d) Dry Dock 1 North—Temporary Piles.	Drill 20 shafts, <i>May 23 to Nov 24</i>	Set 102-inch diameter casing	60	40	0	0
		Pre-drill 102-inch rock socket	60	40	0	0
		Remove 102-inch casing	60	40	0	0
		84-inch diameter shafts	60	40	0	0
		84-inch diameter drill piles	60	40	0	0
(14) Dry Dock 1 North—Remove Temporary Work Trestle Piles.	Remove 20 piles, <i>May 23 to Nov 24</i> .					
(15a, b, c, d) Dry Dock 1 North—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts, <i>May 23–Nov 24</i> ...	Set 84-inch casing	60	40	0	0
		Pre-drill 84-inch rock socket	60	40	0	0
		Remove 84-inch casing	60	40	0	0
		78-inch diameter shaft	60	40	0	0
(16a, b, c, d) Wall Shafts for Dry Dock 1 North.	Drill 20 shafts, <i>Jun 23 to Nov 24</i>	Set 102-inch diameter casing	60	40	0	0
		Pre-drill 102-inch rock socket	60	40	0	0
		Remove 102-inch casing	60	40	0	0
		Drill 78-inch diameter shaft	60	40	0	0
(17a, b, c, d) Foundation Shafts for Dry Dock 1 North.	Drill 23 shafts, <i>Jun 23 to Nov 24</i>	Set 126-inch diameter Casing	60	40	0	0
		Pre-drill 126-inch rock socket	60	40	0	0
		Remove 126-inch casing	60	40	0	0
		Drill 108-inch diameter shafts	60	40	0	0
(18) Berth 11 End Wall—Remove Temporary Guide Wall.	Remove 60 sheet piles, <i>Jul 23 to Aug 23</i> .	28-inch wide Z-shaped	100	0	0	0
(19) Remove Berth 1 southeast corner SOE.	Remove 28 sheet piles, <i>Jul 23 to Sep 23</i> .	28-inch-wide Z-shaped	100	0	0	0
(20) Removal of Berth 1 Emergency Repair Sheet Piles.	Remove 216 sheet piles, <i>Aug 23 to Mar 24</i> .	28-inch-wide Z-shaped	100	0	0	0
(21) Removal of Berth 1 Emergency Repair Tremie Concrete.	765 cubic meters (1,000 cy), <i>Aug 23 to Mar 24</i> .	Mechanical concrete removal	100	0	0	0
(22) Center wall foundation—Drill in monolith Tie Downs.	Install 72 rock anchors, <i>Aug 23 to May 24</i> .	9-inch diameter holes	80	20	0	0
(23) Center Wall—Remove tie-in to existing west closure wall (Dry Dock 1 North).	Remove 16 sheet piles, <i>Aug 23 to Aug 24</i> .	28-inch-wide Z-shaped	60	40	0	0
(24) Center wall East—sheet pile tie-in to Existing Wall.	Install 23 sheet piles, <i>Aug 23 to Oct 24</i> .	28-inch wide Z-shaped	50	50	0	0
(25) Remove tie-in to West Closure Wall (Dry Dock 1 West).	Remove 15 sheet pile, <i>Dec 23 to Dec 24</i> .	28-inch wide Z-shaped	30	70	0	0

TABLE 12—DIVISION OF TAKES BY CONSTRUCTION YEAR—Continued

Activity ID	Total amount and estimated dates	Activity component	Year 2 ¹ % takes	Year 3 ¹ % takes	Year 4 ¹ % takes	Year 5 ¹ % takes
(26) Remove Center wall East—sheet pile tie-in to Existing Wall (Dry Dock 1 West).	Remove 23 sheet piles, <i>Dec 23 to Dec 24.</i>	28-inch wide Z-shaped	30	70	0	0
(27) Dry Dock 1 north entrance—Remove Temporary Cofferdam.	Remove 96 sheet piles, <i>Jan 24 to Sep 24.</i>	28-inch wide Z-shaped	33	66	0	0
(28) Remove Temporary Cofferdam Extension.	Remove 14 sheet piles, <i>Jan 24 to Sep 24.</i>	28-inch wide Z-shaped	33	66	0	0
(29a, b, c, d) Dry Dock 1 West—Install Temporary Piles.	Drill 20 shafts, <i>Apr 24 to Feb 26</i>	Set 102-inch diameter casing	0	50	50	0
		Pre-drill 102-inch rock socket	0	50	50	0
		Remove 102-inch casing	0	50	50	0
		84-inch diameter shafts	0	50	50	0
		84-inch diameter piles	0	50	50	0
(30) Dry Dock 1 West—Remove Temporary Work Trestle Piles.	Remove 20 piles, <i>Apr 24 to Feb 26.</i>	84-inch diameter piles	0	50	50	0
(31a, b, c, d) Wall Shafts for Dry Dock 1 West.	Drill 22 shafts, <i>Jun 24 to Feb 26</i>	Set 102-inch diameter casing	0	50	50	0
		Pre-drill 102-inch rock socket	0	50	50	0
		Remove 102-inch casing	0	50	50	0
		78-inch diameter shaft	0	50	50	0
		Set 126-inch casing	0	50	50	0
(32a, b, c, d) Foundation Shafts for Dry Dock 1 West.	Drill 23 shafts, <i>Jun 24 to Feb 26</i>	Pre-drill 126-inch rock socket	0	50	50	0
		Remove 126-inch casing	0	50	50	0
		Drill 108-inch diameter shaft	0	50	50	0
		Set 84-inch casing	0	50	50	0
		Pre-drill 84-inch rock socket	0	50	50	0
(33a, b, c, d) Dry Dock 1 West—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts, <i>Jun 24 to Feb 26</i>	Remove 84-inch casing	0	50	50	0
		Drill 78-inch diameter shaft	0	50	50	0
		9-inch diameter holes	0	70	30	0
		Install 36 rock anchors, <i>Jul 24 to Jul 25.</i>	0	0	30	70
		Install 36 rock anchors, <i>Dec 25 to Dec 26.</i>	0	0	30	70

¹Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886; April 6, 2022).

We describe how the information provided above is brought together to produce a quantitative take estimate in the species sections below. A summary of take proposed for authorization is available in Table 16.

Harbor Porpoise

Harbor porpoises are expected to be present in the proposed project area from April to December. Based on density data from the NMSDD, their presence is highest in spring, decreases

in summer, and slightly increases in fall. During construction monitoring in the project area, there were three harbor porpoise observations between April and December of 2017; two harbor porpoise observations in early August of 2018; and one harbor porpoise observation in 2020 (Cianbro, 2018; Navy, 2019; NAVFAC, 2021). There were no harbor porpoise observations in the project area in 2021 (NAVFAC, 2022). Given that monitoring data specific to the project area are available,

the more general NMSDD data were not used to determine species density in the project area. Instead, the Navy used observation data from the 2017 and 2018 construction monitoring for the Berth 11 Waterfront Improvements Project and determined that the density of harbor porpoise for the largest harassment zone was equal to 0.04/km². Estimated take was calculated with this density estimate multiplied by the harassment zone multiplied by the days for each activity (see Table 13).

TABLE 13—ESTIMATED TAKE OF HARBOR PORPOISE BY PROJECT ACTIVITY

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment					Level B harassment zone (km ²)	Proposed take by Level B harassment				
						Total	Year 2	Year 3	Year 4	Year 5		Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill ...	Center Wall—Install Foundation Support Piles.	0.04	18	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill ...	Center Wall—Install Foundation Support Piles.	0.04	18	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill ...	Center Wall—Install Foundation Support Piles.	0.04	18	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2 DTH Cluster Drill.	Center Wall—Install Foundation Support Piles.	0.04	117	0.417417	2	2	0	0	0	0.417417	0	0	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.04	6	0.0014041	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.04	6	0.417417	0	0	0	0	0	0.417417	0	0	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	0.04	56	0.417417	1	1	0	0	0	0.277858	0	0	0	0	0
2	2-3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	0.04	42	0.000454	0	0	0	0	0	0.417417	12	1	0	0	0
3	2-3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	0.04	47	0.417417	12	1	1	0	0	0.277858	0	0	0	0	0
4	2-3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Wall Install (320 lf).	0.04	74	0.417417	12	1	1	0	0	0.277858	0	0	0	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation.	0.04	8	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation ...	0.04	8	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	0.04	60	0.417417	1	1	0	0	0	0.277858	0	0	0	0	0
7	2 DTH Mono-hammer.	Relief Holes at Berth 11 Basin Floor.	0.04	35	0.047675	0	0	0	0	0	0.417417	1	0	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	0.04	4	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	0.04	4	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
9	2 Rotary Drill ...	Gantry Crane Support—Install Outer Casing.	0.04	16	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill ...	Gantry Crane Support—Pre-Drill Socket.	0.04	16	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill ...	Gantry Crane Support—Remove Outer Casing.	0.04	16	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2 DTH Cluster Drill.	Gantry Crane Support Piles	0.04	80	0.417417	1	1	0	0	0	0.417417	0	0	0	0	0
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	0.04	25	0.417417	0	0	0	0	0	0.277858	0	0	0	0	0
11	2 DTH Mono-hammer.	Dry Dock 1 North Entrance Rock Anchors.	0.04	25	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie-In to Existing West Closure Wall.	0.04	4	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	0.04	4	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
13	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2-3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	0.04	70	0.417417	12	1	1	0	0	0.417417	0	0	0	0	0

14	2-3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	0.04	20	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
15	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.04	18	0.000014	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	0.04	18	0.000248	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.04	18	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
16	2-3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	0.04	135	0.417417	2	1	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North	0.04	150	0.417417	3	2	1	0	0	0	0	0	0	0	0.417417	0	0	0	0
17	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	0.04	23	0.000014	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Pre-Drill Sockets.	0.04	23	0.000248	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	0.04	23	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	0.04	196	0.417417	3	2	1	0	0	0	0	0	0	0	0.417417	0	0	0	0
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	0.04	10	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	0.04	5	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs.	0.04	18	0.000733	0	0	0	0	0	0	0	0	0	0	0.417417	1	0	0	0
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	0.04	15	0.417417	0	0	0	0	0	0	0	0	0	0	0.277858	0	0	0	0
22	2-3 DTH Mono-hammer.	Center Wall Foundation Rock Anchors.	0.04	36	0.073751	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
23	2-3 Vibratory Extraction.	Dry Dock 1 North-Remove Center Wall Tie-in to West Closure Wall.	0.04	3	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
24	2-3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.04	12	0.000185	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	2-3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.04	12	0.334747	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
25	2-3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	0.04	3	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
26	2-3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	0.04	12	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
27	2-3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	0.04	12	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
28	2-3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	0.04	2	0.001041	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
29	3-4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
30	3-4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	0.04	70	0.417417	1	2	0	1	0	0	0	0	0	0	0.417417	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Remove Temporary Work Trestle Piles.	0.04	20	0.000002	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0
31	3-4 Rotary Drill	Dry Dock 1 West Wall Shafts—Install Outer Casing.	0.04	22	0.000014	0	0	0	0	0	0	0	0	0	0	0.417417	0	0	0	0

TABLE 13—ESTIMATED TAKE OF HARBOR PORPOISE BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment					Level B harassment zone (km ²)	Proposed take by Level B harassment				
						Total	Year 2	Year 3	Year 4	Year 5		Total	Year 2	Year 3	Year 4	Year 5
32	3-4 Rotary Drill	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	0.04	22	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	0.04	22	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West	0.04	165	0.417417	3	0	1	2	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	0.04	23	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	0.04	23	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
33	3-4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	0.04	23	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	0.04	196	0.417417	3	0	1	2	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.04	18	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	0.04	18	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3-4 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.04	18	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
34	3-4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	0.04	135	0.417417	2	0	1	1	0	0.417417	0	0	0	0	0
	3-4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors	0.04	18	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
35	4-5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	0.04	18	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
	Total					29	13	10	6	0		4	3	2	0	0

* Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a pre-viously issued IHA (87 FR 19886; April 6, 2022).

¹ In instances where only 1 take was calculated but activities spanned more than one construction year, one take was requested by the Navy for each construction year.

² One take by Level B harassment was added to construction year 3 to account for average group size of harbor porpoises (see <https://www.fisheries.noaa.gov/species/harbor-porpoise#:~:text=The%20harbor%20porpoise%20is%20a%20estuarine%20species%20found%20in%20shallow%20waters%20of%20the%20Atlantic%20coast%20of%20the%20United%20States>).

** No additional takes are expected to result from the simultaneous use of two rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of two rotary drills in construction year 4.

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is proposed for authorization.

Harbor Seal

Harbor seals may be present year-round in the project vicinity, with consistent densities throughout the year. Harbor seals are the most common pinniped in the Piscataqua River near the Shipyard. Sightings of this species were recorded during monthly surveys conducted in 2017 and 2018 (NAVFAC Mid-Atlantic, 2018, 2019b) as well as during Berth 11 and P-310 construction monitoring in 2017, 2018, 2020 and 2021 (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022), and therefore density estimates from these efforts were considered in the analysis. Based on observations recorded during the Berth 11 Waterfront Improvements (199 observations of harbor seals during year 1 and 249 observations of harbor seals during year 2 [448 total] over 322 days) and P-310 project construction monitoring (721 observations of harbor seals during year 1 and 451 observations of harbor seals during year 2 [1,172 total] over 349 days), harbor seal density was estimated to be 3.0/km² in the project area (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022).

Takes by Level A harassment were calculated for harbor seals where the density of animals (3 harbor seals/km²) was multiplied by the harassment zone and the number of days per construction activity. This method was deemed to be inappropriate by the Navy for calculating takes by Level B harassment for harbor seals as it produced take numbers that were lower than the number of harbor seals that has been previously observed in the Navy’s monitoring reports. Therefore, the Navy is proposing (and NMFS concurs) to increase the take by Level B harassment to more accurately reflect harbor seal observations in the monitoring reports, by using the value of three harbor seals observed a day multiplied by the total number of construction days (*i.e.*, 349 days), resulting in 1,047 takes per year by Level B harassment. This method is consistent with the methodology used to estimate takes by Level B harassment in IHA issued by NMFS for the first year of P-381 construction activities (87 FR 19866; April 6, 2022).

Additional takes by Level B harassment may occur during the simultaneous use of two rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of two rotary drills in construction year 4. The simultaneous use of two rotary drills would result in 28 additional takes by Level B harassment of harbor seals. The simultaneous use of two rotary drills and a DTH mono-hammer would result in 22 additional takes by Level B harassment of harbor seals. Note, the use of cluster drills and rock hammers in construction years 2 and 3 result in

the entire ROI being ensouffied to Level A harassment thresholds; therefore, there would be no change to the size of the harassment zones from concurrent construction activities during these years and thus no need to authorize additional takes. To account for concurrent activities in construction years 3 and 4, the Navy is requesting to add additional takes by Level B harassment to their proposed take numbers (22 harbor seal in construction year 3 and 50 harbor seal in construction year 4). Therefore the Navy requests 1,047 takes by Level B harassment for harbor seals in construction year 2, 1,069 takes by Level B harassment for harbor seals in construction year 3, 1,097 takes by Level B harassment for harbor seals in construction year 4, and 1,047 takes by Level B takes for harbor seals in construction year 5 (note the division of takes over the construction years is summarized in Table 12).

Take by Level A harassment of harbor seals is shown in Table 14 below. Note that where the Level A harassment zone is as large as the Level B harassment zone and fills the entire potentially ensouffied area, the enumerated takes in the Level A harassment column may be in the form of Level A harassment and/or Level B harassment, but would be authorized as takes by Level A harassment. The proposed takes by Level B harassment were not included in Table 14 as they were calculated by a different method (*i.e.*, by using the value of three harbor seals observed per day multiplied by the total number of construction days; *i.e.*, 349 days).

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000005	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000091	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000001	0	0	0	0	0
	2 DTH Cluster Drill	Center Wall—Install Foundation Support Piles.	3	117	0.417417	147	147	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	3	6	0.0002	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	3	6	0.364953	7	7	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	3	56	0.417417	70	70	0	0	0
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	3	42	0.000078	0	0	0	0	0
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	3	47	0.417417	59	47	12	0	0
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	3	74	0.417417	93	74	19	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation	3	8	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation	3	8	0.201158	5	5	0	0	0

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	3	60	0.417417	75	75	0	0	0
7	2 DTH Mono-hammer.	Relief Holes at Berth 11 Basin Floor	3	35	0.014413	1	1	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	3	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	3	4	0.201158	2	2	0	0	0
9	2 Rotary Drill	Gantry Crane Support—Install Outer Casing.	3	16	0.000005	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Pre-Drill Socket.	3	16	0.000091	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Remove Outer Casing.	3	16	0.000091	0	0	0	0	0
	2 DTH Cluster Drill	Gantry Crane Support Piles	3	80	0.417417	100	100	0	0	0
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	3	25	0.417417	31	31	0	0	0
11	2 DTH Mono-hammer.	Dry Dock 1 North Entrance Rock Anchors.	3	25	0.022912	2	2	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie-in to Existing West Closure Wall.	3	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	3	4	0.201158	2	2	0	0	0
13	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	2-3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	3	70	0.417417	88	53	35	0	0
14	2-3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	3	20	0.000002	0	0	0	0	0
15	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	3	18	0.000005	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	3	18	0.000091	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	3	18	0.000001	0	0	0	0	0
	2-3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	3	135	0.417417	169	101	68	0	0
16	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	2-3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North	3	150	0.417417	188	113	75	0	0
17	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	3	23	0.000005	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Pre-Drill Sockets.	3	23	0.000091	0	0	0	0	0
	2-3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	3	23	0.000001	0	0	0	0	0
	2-3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	3	196	0.417417	245	147	98	0	0
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	3	10	0.0002	0	0	0	0	0
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	3	5	0.0002	0	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs	3	18	0.000136	0	0	0	0	0
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	3	15	0.417417	19	19	0	0	0
22	2-3 DTH Mono-hammer.	Center Wall Foundation Rock Anchors.	3	36	0.022912	2	1	1	0	0
23	2-3 Vibratory Extraction.	Dry Dock 1 North-Remove Center Wall Tie-in to West Closure Wall.	3	3	0.0002	0	0	0	0	0
24	2-3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	3	12	0.000032	0	0	0	0	0
	2-3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	3	12	0.090757	3	2	1	0	0
25	2-3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	3	3	0.0002	0	0	0	0	0
26	2-3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	3	12	0.0002	0	0	0	0	0
27	2-3 Vibratory Extraction.	Remove Temporary Cofferdam	3	12	0.0002	0	0	0	0	0

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	3	2	0.0002	0	0	0	0	0
29	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	3	70	0.417417	88	0	44	44	0
30	3–4 Rotary Drill	Dry Dock 1 West Remove Temporary Work Trestle Piles.	3	20	0.000002	0	0	0	0	0
31	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Install Outer Casing.	3	22	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	3	22	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	3	22	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West	3	165	0.417417	206	0	103	103	0
32	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	3	23	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Pre-Drill Sockets.	3	23	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	3	23	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	3	196	0.417417	245	0	122	123	0
33	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	3	18	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	3	18	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	3	18	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	3	135	0.417417	169	0	84	85	0
34	3–4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors	3	18	0.022912	1	0	1	0	0
35	4–5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	3	18	0.022912	1	0	0	0	1
Total						2,018	999	663	355	1

* Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886; April 6, 2022).

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is proposed for authorization.

Gray Seal

Gray seals may be present year-round in the project vicinity, with consistent densities throughout the year. Gray seals are less common in the Piscataqua River than the harbor seal. A total of nine sightings of gray seals were recorded during P–310 construction monitoring (NAVFAC, 2021, 2022). Density estimates of gray seals were based on the Berth 11 Waterfront Improvements (24 observations of gray seals during

year 1 and 12 observations of gray seals during year 2 [36 total] over 322 days) and P–310 project construction monitoring (47 observations of gray seals during year 1 and 21 observations of gray seals during year 2 [68 total] over 349 days) and was estimated to be 0.2/km² (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022). These data were preferred in this analysis over the more general density data from the NMSDD.

Takes by Level A harassment were calculated for gray seals where the density of animals (0.2 gray seals/km²) was multiplied by the harassment zone and the number of days per construction activity. This method was deemed to be inappropriate by the Navy for calculating takes by Level B harassment for gray seals as it produced take that were fewer than the number of gray seals that has been previously observed in the Navy's monitoring reports. Therefore, the Navy is proposing (and NMFS concurs), to increase the take by

Level B harassment to more accurately reflect gray seal observations in the monitoring reports, by using the value of 0.2 gray seals a day multiplied by the total number of construction days (*i.e.*, 349 days) resulting in 70 takes by Level B harassment proposed for authorization per year. This method is consistent with the methodology used to estimate takes by Level B harassment in IHA issued by NMFS for the first year of P–381 construction activities (87 FR 19866; April 6, 2022).

Additional takes by Level B harassment may occur during the simultaneous use of two rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of two rotary drills in construction year 4. The simultaneous use of two rotary drills would result in 2 additional Level B takes of gray seals. The simultaneous use of two rotary drills and a DTH mono-hammer would result in 1 additional Level B take of

gray seals. Note, the use of cluster drills and rock hammers in construction years 2 and 3 result in the entire ROI being ensonified to Level A harassment thresholds; therefore, there would be no change to the size of the harassment zones from concurrent construction activities during these years and thus no need to request additional takes. To account for concurrent activities in construction years 3 and 4, the Navy is requesting additional takes by Level B harassment to their proposed take numbers (1 gray seal in construction

year 3 and 3 gray seals in construction year 4). Therefore the Navy requests 70 takes by Level B takes for gray seals in construction year 2, 71 takes by Level B harassment for gray seals in construction year 3, 73 takes by Level B harassment for gray seals in construction year 4, and 70 takes by Level B harassment for gray seals in construction year 5 (note the division of takes over the construction years is summarized in Table 12).

Take by Level A harassment of gray seals is shown in Table 15 below. Note that where the Level A harassment zone

is as large as the Level B harassment zone and fills the entire potentially ensonified area, the enumerated takes in the Level A harassment column may be in the form of Level A harassment and/or Level B harassment, but would be authorized as takes by Level A harassment. The proposed takes by Level B harassment were not included in Table 15 as they were calculated by a different method (*i.e.*, by using the value of 0.2 gray seals observed a day multiplied by the total number of construction days; *i.e.*, 349 days).

TABLE 15—CALCULATED PROPOSED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000005	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000091	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000001	0	0	0	0	0
	2 DTH Cluster Drill	Center Wall—Install Foundation Support Piles.	0.2	117	0.417417	10	10	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.2	6	0.0002	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.2	6	0.364953	0	0	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	0.2	56	0.417417	5	5	0	0	0
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	0.2	42	0.000078	0	0	0	0	0
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	0.2	47	0.417417	4	3	1	0	0
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	0.2	74	0.417417	6	5	1	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation	0.2	8	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation	0.2	8	0.201158	0	0	0	0	0
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	0.2	60	0.417417	5	5	0	0	0
7	2 DTH Mono-hammer.	Relief Holes at Berth 11 Basin Floor	0.2	35	0.014413	0	0	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	0.2	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	0.2	4	0.201158	0	0	0	0	0
9	2 Rotary Drill	Gantry Crane Support—Install Outer Casing.	0.2	16	0.000005	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Pre-Drill Socket.	0.2	16	0.000091	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Remove Outer Casing.	0.2	16	0.000091	0	0	0	0	0
10	2 DTH Cluster Drill	Gantry Crane Support Piles	0.2	80	0.417417	7	7	0	0	0
	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	0.2	25	0.417417	2	2	0	0	0
11	2 DTH Mono-hammer.	Dry Dock 1 North Entrance Rock Anchors.	0.2	25	0.022912	0	0	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie-In to Existing West Closure Wall.	0.2	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	0.2	4	0.201158	0	0	0	0	0
13	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	0.2	70	0.417417	6	4	2	0	0
14	2–3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	0.2	20	0.000002	0	0	0	0	0
15	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.2	18	0.000005	0	0	0	0	0

TABLE 15—CALCULATED PROPOSED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
16	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	0.2	18	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.2	18	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	0.2	135	0.417417	11	7	4	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
17	2–3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North	0.2	150	0.417417	13	8	5	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	0.2	23	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Pre-Drill Sockets.	0.2	23	0.000091	0	0	0	0	0
18	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	0.2	23	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	0.2	196	0.417417	16	10	6	0	0
19	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	0.2	10	0.0002	0	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	0.2	5	0.0002	0	0	0	0	0
21	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs	0.2	18	0.000136	0	0	0	0	0
22	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	0.2	15	0.417417	1	1	0	0	0
23	2–3 DTH Mono-hammer.	Center Wall Foundation Rock Anchors.	0.2	36	0.022912	0	0	0	0	0
24	2–3 Vibratory Extraction.	Dry Dock 1 North-Remove Center Wall Tie-in to West Closure Wall.	0.2	3	0.0002	0	0	0	0	0
25	2–3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.2	12	0.000032	0	0	0	0	0
	2–3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.2	12	0.090757	0	0	0	0	0
26	2–3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	0.2	3	0.0002	0	0	0	0	0
27	2–3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	0.2	12	0.0002	0	0	0	0	0
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam	0.2	12	0.0002	0	0	0	0	0
29	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	0.2	2	0.0002	0	0	0	0	0
30	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	0.2	70	0.417417	6	0	3	3	0
31	3–4 Rotary Drill	Dry Dock 1 West Remove Temporary Work Trestle Piles.	0.2	20	0.000002	0	0	0	0	0
32	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Install Outer Casing.	0.2	22	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	0.2	22	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	0.2	22	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West	0.2	165	0.417417	14	0	7	7	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	0.2	23	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Pre-Drill Sockets.	0.2	23	0.000091	0	0	0	0	0
33	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	0.2	23	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	0.2	196	0.417417	16	0	8	8	0
	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.2	18	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	0.2	18	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.2	18	0.000001	0	0	0	0	0

TABLE 15—CALCULATED PROPOSED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km ²)	Proposed take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
34	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	0.2	135	0.417417	11	0	6	5	0
	3–4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors	0.2	18	0.022912	0	0	0	0	0
35	4–5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	0.2	18	0.022912	0	0	0	0	0
Total						133	67	43	23	0

*Note, for the purposes of this analysis, the proposed construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886; April 6, 2022).

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is proposed for authorization.

Hooded Seal

Hooded seals may be present in the project vicinity from January through May, though their exact seasonal densities are unknown. In general, hooded seals are much rarer than the harbor seal and gray seal in the Piscataqua River. NMFS authorized one take by Level B harassment per month from January to May of a hooded seal for the Berth 11 Waterfront Improvements Construction project (NMFS, 2018b) and for P-310 (Super Flood Basin) (NMFS, 2016; NMFS, 2019; NMFS 2021c). To date, the monitoring for those projects and for the density surveys have not recorded a sighting of hooded seal in the project area (Cianbro, 2018; NAVFAC

Mid-Atlantic, 2018, 2019b; Navy 2019; NAVFAC, 2021, 2022). In order to guard against the potential for unauthorized take, the Navy is again requesting one take by Level B harassment of hooded seal per month (between the months of January and May) for each construction year. This will result in five takes by Level B harassment per year. Given the size of the shutdown zones in relation to the Level A harassment isopleths (see the Proposed Mitigation section below), NMFS also proposes to authorize five takes by Level A harassment per year to safeguard against unauthorized take of hooded seals that may occur unnoticed in the Level A harassment zone for sufficient duration to incur PTS.

Harp Seal

In general, harp seals are much rarer than the harbor seal and gray seal in the Piscataqua River. Harp seals were not observed during marine mammal monitoring or survey events that took place in 2017, 2018, or 2021 (Cianbro, 2018; NAVFAC Mid-Atlantic, 2018, 2019b; Navy, 2019; NAVFAC, 2021, 2022); however, two harp seals (n =2) were observed in the River in 2020 (Stantec, 2020), and another harp seal

was observed in 2016 (NAVFAC Mid-Atlantic, 2016; NMFS, 2016). As above for hooded seals, the Navy is proposing one take by Level B harassment of harp seal per month of construction (between the months of January and May) for each construction year as was authorized by NMFS for the Berth 11 Waterfront Improvements Project (NMFS, 2018b) and for P-310 (Super Flood Basin) construction activities (NMFS, 2019, 2021a). Harp seals may occur in the area from January through May. Anticipating one Level B harassment harp seal take per month for 5 months per year during in-water construction would guard against potential unauthorized take of this species. Given the size of the shutdown zones in relation to the Level A harassment isopleths (see the Proposed Mitigation section below), NMFS also proposes to authorize five takes by Level A harassment per year to safeguard against unauthorized take of harp seals that may occur unnoticed in the Level A harassment zone for sufficient duration to incur PTS.

Table 16 below summarizes the authorized take for all the species described above as a percentage of stock abundance.

TABLE 16—PROPOSED TAKE ESTIMATES AS A PERCENTAGE OF STOCK ABUNDANCE

Construction year	Species	Stock (N _{EST})	Annual proposed Level A harassment	Annual proposed Level B harassment	Total proposed take	Percent of stock
2—Apr 2023—Mar 2024.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	13	3	16	0.02
	Harbor seal	Western North Atlantic (61,336)	999	1,047	2,046	3.33
	Gray seal	Western North Atlantic (451,600)	67	70	137	0.03
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
3—Apr 2024—Mar 2025.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	10	2	12	0.01
	Harbor seal	Western North Atlantic (61,336)	663	1,069	1,732	2.82
	Gray seal	Western North Atlantic (451,600)	43	71	114	0.03
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
4—Apr 2025—Mar 2026.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	6	0	6	0.01
	Harbor seal	Western North Atlantic (61,336)	355	1,097	1,452	2.37
	Gray seal	Western North Atlantic (451,600)	23	73	96	0.02

TABLE 16—PROPOSED TAKE ESTIMATES AS A PERCENTAGE OF STOCK ABUNDANCE—Continued

Construction year	Species	Stock (N _{EST})	Annual proposed Level A harassment	Annual proposed Level B harassment	Total proposed take	Percent of stock
5—Apr 2026—Mar 2027.	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	0	0	0	0
6—Apr 2027—Mar 2028.	Harbor seal	Western North Atlantic (61,336)	1	1,047	1,048	1.71
	Gray seal	Western North Atlantic (451,600)	0	70	70	0.02
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	0	0	0	<0.01
Total Estimated Proposed Take ¹ .	Harbor seal	Western North Atlantic (61,336)	0	0	0	<0.01
	Gray seal	Western North Atlantic (451,600)	0	0	0	<0.01
	Harp seal	Western North Atlantic (7.6 million)	0	0	0	<0.01
	Hooded seal	Western North Atlantic (593,500)	0	0	0	<0.01
	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	29	5	34	NA
	Harbor seal	Western North Atlantic (61,336)	2,018	4,260	6,278	NA
	Gray seal	Western North Atlantic (451,600)	133	284	438	NA
	Harp seal	Western North Atlantic (7.6 million)	25	25	50	NA
	Hooded seal	Western North Atlantic (593,500)	25	25	50	NA

¹ The total estimated proposed take does not include take that may occur in year six as a result of schedule delays, as these potential takes are already accounted for in previous years.

Proposed Mitigation

In order to issue an LOA under section 101(a)(5)(A) 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 (latter not applicable for this action). 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, NMFS considers 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.

The following mitigation measures apply to the Navy’s in-water construction activities.

General

In-water construction activities 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. If such circumstances recur, the Navy will consult with NMFS concerning the potential need for an additional take authorization.

Coordination

The Navy shall conduct briefings between construction supervisors and crews, the marine mammal monitoring team, and Navy staff prior to the start of in-water construction activities and when new personnel join the work, to ensure that responsibilities, communication procedures, marine mammal monitoring protocols, and operational procedures are clearly understood.

Soft Start

The Navy shall use soft start techniques when impact pile driving. The objective of a soft start is to provide a warning and/or give animals in close proximity to pile-driving a chance to leave the area prior to an impact driver operating at full capacity, thereby exposing fewer animals to loud underwater and airborne sounds. Soft start requires contractors to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. Note the number of strikes will vary at reduced energy because raising the hammer at less than full power and then releasing it results in the hammer “bouncing” as it strikes the pile, resulting in multiple “strikes.” A soft start will 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. Soft start is not applicable to other in-water construction activities.

Bubble Curtain

During construction of the multifunctional expansion of Dry Dock 1, portions of the west closure wall and/or the super flood basin caisson gate may not be in place. A bubble curtain would be installed across the entrance openings to mitigate underwater noise impacts outside of the basin for those activities where Level A harassment thresholds are achieved across the entire ROI (*i.e.*, cluster drill and hydraulic rock

hammering (Table 7)). A bubble curtain similar to the one employed during P-310 blasting activities and proposed for use during P-381 year 1 construction is proposed to be used to minimize potential impacts outside of the basin. Hydroacoustic monitoring would be conducted inside of the bubble curtain to measure construction generated noise levels. Should the results of the recordings inside the bubble curtain show that the source levels do not result in the Level A harassment thresholds being achieved across the entire ROI by the activity occurring, upon review of the data by NMFS, the Navy may discontinue use of the bubble curtain for those activities that are not actually exceeding thresholds. The bubble curtain must adhere to the following restrictions:

- The bubble curtain must distribute air bubbles around 100 percent of the piling circumference for the full depth of the water column;

- The lowest bubble ring must be in contact with the substrate for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent substrate contact. No parts of the ring or other objects shall prevent full substrate contact; and

- Air flow to the bubblers must be balanced around the circumference of the pile;

Avoiding Direct Physical Interaction

During all in-water construction activities, in order to prevent injury from physical interaction with construction equipment, a shutdown zone of 10 m (33 ft) will be implemented. If a marine mammal comes within 10 m (33 ft) of such activity, operations shall cease and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions. If human safety is at risk, the in-water

activity will be allowed to continue until it is safe to stop.

Shutdown Zones

The Navy shall establish shutdown zones for all in-water construction activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 17). The shutdown zone distances for rock hammering, impact pile-driving of sheet piles, and DTH excavation (200 m (656 ft) for harbor porpoise and 50 m (164 ft) for seals) are consistent with those implemented for the same activities for P-381 year 1 construction activities (NMFS, 2022a; 87 FR 19886). NMFS has preliminarily determined that these shutdown zones represent the largest area that can practicably be monitored.

TABLE 17—PILE DRIVING SHUTDOWN ZONE AND MONITORING ZONES DURING PROJECT ACTIVITIES

LOA year	Activity, size, and component	Shutdown zone (m)		Monitoring zone ¹ (km ²)
		Harbor porpoise	Seals	
2	Rock Hammering ²	200	50	ROI. ³
2	Impact Pile Driving—8 sheet piles per day	200	50	ROI. ⁴
2	Impact Pile Driving—4 sheet piles per day	200	50	ROI. ⁴
2/3	Impact Pile Driving—2 sheet piles per day	200	50	ROI. ⁴
2/3	Vibratory Pile Driving/Extraction—8 sheet piles per day	20	10	ROI. ⁴
2	Vibratory Pile Driving/Extraction—6 sheet piles per day	20	10	ROI. ⁴
2	Vibratory Pile Driving/Extraction—4 sheet piles per day	15	10	ROI. ⁴
2/3	Vibratory Pile Driving/Extraction—2 sheet piles per day	10	10	ROI. ⁴
2	DTH mono-hammer 4–6 inch relief holes	180	50	ROI. ⁴
2/3/4/5	DTH mono-hammer 9-inch rock anchors for tie-downs	200	50	ROI. ⁴
2/3/4	Rotary Drilling—1 hour to set casings	10	10	ROI. ⁴
2/3/4	Rotary drilling—9 hours to drill socket	10	10	ROI. ⁴
2/3/4	Rotary Drilling—15 minutes to remove casings and temporary work trestle piles	10	10	ROI. ⁴
2/3/4	Cluster Drilling ²	200	50	ROI. ^{3,4}

Notes:

- ¹ In instances where the harassment zone is larger than the region of influence (ROI), the entire ROI is indicated as the limit of monitoring (see Figure 1–3 in the Navy’s application).
- ² Activities will employ a bubble curtain to reduce underwater noise impacts outside of the basin.
- ³ The entire ROI would be ensouified to the Level A threshold.
- ⁴ The entire ROI would be ensouified to the Level B threshold.

The Navy must delay or shutdown in-water construction activities should a marine mammal approach or enter the appropriate shutdown zone. The Navy may resume activities after one of the following conditions have been met: (1) the animal is observed exiting the shutdown zone; (2) the animal is thought to have exited the shutdown zone based on a determination of its course, speed, and movement relative to the pile driving location; or (3) the shutdown zone has been clear from any additional sightings for 15 minutes.

Protected Species Observers

The Navy shall employ at least three protected species observers (PSOs) to monitor marine mammal presence in the action area during all in-water construction activities. Additional PSOs may be added if warranted by site conditions (rough seas, rain) and the level of marine mammal activity. All PSOs will be approved by NMFS and the Navy prior to starting work as a PSO. PSOs must track marine mammals observed anywhere within their visual range relative to in-water construction

activities, and estimate the amount of time a marine mammal spends within the Level A or Level B harassment zones while construction activities are underway.

Monitoring must take place from 30 minutes prior to initiation of pile driving or drilling activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of pile driving or drilling activity. Pre-start clearance monitoring must be conducted for 30 minutes to ensure that the shutdown zones indicated in Table 17 are clear of

marine mammals, and pile driving or drilling may commence when observers have declared the shutdown zone clear of marine mammals. Monitoring must occur throughout the time required to drive/drill a pile. If work ceases for more than 30 minutes, the pre-start clearance monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye).

The placement of PSOs during all pile driving and drilling activities (described in the Proposed Monitoring and Reporting section) must ensure that the entire shutdown zone and Level A harassment zone is visible during pile driving and drilling. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone or Level A harassment zone would not be visible (*e.g.*, fog, heavy rain), in-water construction activities must be delayed until the PSO is confident marine mammals within the shutdown zone or Level A harassment zone could be detected. However, if work on a pile has already begun, work is allowed to continue until that pile is installed.

If an in-water construction activity 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 indicated in Table 17 or 15 minutes have passed without re-detection of the animal. If in-water construction activities cease for more than 30 minutes, the pre-activity monitoring of the shutdown zone must commence.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of 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 LOA for an activity, section 101(a)(5)(A) 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 while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Under the MMPA implementing regulations, 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 activity; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of the construction covered by this proposed rule. The plan will incorporate all monitoring and mitigation measures and reporting requirements of the incidental take regulations.

Monitoring Zones

The Navy shall conduct monitoring to include the entire ROI, which includes the area within the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB RMS threshold for impact driving and hydraulic rock hammering, and the 120 dB RMS threshold during vibratory pile driving, rotary drilling, and DTH) (see Table 7 and 8). These monitoring zones provide

utility for monitoring conducted for mitigation purposes (*i.e.*, shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of these zones enables observers to be aware of and communicate the presence of marine mammals in the project area, but outside the shutdown zone, and thus prepare for potential shutdowns of activity.

Protected Species Observer (PSO) Monitoring Requirements and Locations

PSOs shall be responsible for monitoring the shutdown zones, the monitoring zones and the pre-clearance zones, as well as effectively documenting takes by Level A and B harassment. As described in more detail in the Reporting section below, they shall also (1) document the frequency at which marine mammals are present in the project area, (2) document behavior and group composition, (3) record all construction activities, and (4) document observed reactions (changes in behavior or movement) of marine mammals during each sighting. The PSOs shall monitor for marine mammals during all in-water construction activities associated with the project. The Navy shall monitor the project area to the extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. Visual monitoring shall be conducted by three PSOs. It is assumed that three PSOs shall be located on boats, docks, or piers sufficient to monitor the respective ROIs given the abundance of suitable vantage points (see Figure 11–1 of the Navy's application). The PSOs must record all observations of marine mammals, regardless of distance from the in-water construction activity.

In addition, PSOs shall work in shifts lasting no longer than 4 hrs with at least a 1-hr break between shifts and will not perform duties as a PSO for more than 12 hrs in a 24-hr period (to reduce PSO fatigue).

Monitoring of in-water construction activities shall be conducted by qualified, PSOs. The Navy shall adhere to the following conditions when selecting PSOs:

- 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 activities pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree

in biological science or related field), or training;

- Where a team of three PSOs are required, a lead observer or monitoring coordinator shall 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; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this proposed rule.

The Navy will ensure that the PSOs have the following additional qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
 - Experience and 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.

Hydroacoustic Monitoring

The Navy shall conduct a sound source verification (SSV) study effort to measure SPLs from in-water construction activities not previously monitored as part of P-310 or as part of P-381 year 1 construction. The Navy will collect and evaluate acoustic sound record levels for the rock excavation (rotary drilling or DTH excavation) activities conducted up to a maximum limit of 10 piles/holes. One hydrophone would be placed at locations 10 m (33 ft) from the noise source and a second hydrophone would be placed at a representative monitoring location at an intermediate distance between the cetacean and phocid shutdown zones. These locations would be adhered to as practicable given safety considerations and levels of activity in the basin. For the 10 rock excavation (rotary drilling or DTH excavation) events acoustically measured, 100 percent of the data will be analyzed.

At a minimum, the methodology includes:

- For underwater recordings, a stationary hydrophone system with the ability to measure SPLs will be placed in accordance with NMFS' most recent guidance for the collection of source levels (NMFS, 2012).
- Hydroacoustic monitoring will be conducted for each type of activity not previously monitored under P-310 or the P-381 year 1 IHA up to a maximum limit of 10 piles/holes (Table 18). Monitoring will occur from the same locations approved by NMFS for P-310 construction activities. The resulting data set will be analyzed to examine and confirm sound pressure levels and rates of TL for each separate in-water construction activity. With NMFS concurrence, these measurements may be used to recalculate the limits of shutdown and Level A and Level B harassment zones, as appropriate. Hydrophones will be placed in the same manner as for P-310 construction activities. Locations of hydroacoustic recordings will be collected via global positioning system. A depth sounder and/or weighted tape measure will be used to determine the depth of the water. The hydrophone will be attached to a-weighted nylon cord or chain to maintain a constant depth and distance from the pile/drill/hammer location. The nylon cord or chain will be attached to a float or tied to a static line.

TABLE 18—HYDROACOUSTIC MONITORING SUMMARY

Pile type/shaft size	Number installed/removed	Method of install/removal	Number monitored
126-inch shaft	138	Rotary Drill	10
84-inch shaft	148	Rotary Drill	10
108-inch shaft	46	DTH Cluster Drill	10
84-inch shaft	40	DTH Cluster Drill	10
72-inch shaft	16	DTH Cluster Drill	10

▪ Each hydrophone will be calibrated at the start of each action and will be checked frequently to the applicable standards of the hydrophone manufacturer.

▪ For each monitored location, a single hydrophone will be suspended midway in the water column in order to evaluate site-specific attenuation and propagation characteristics that may be present throughout the water column.

▪ Environmental data will be collected, including but not limited to, the following: wind speed and direction, air temperature, humidity, surface water temperature, water depth, wave height, weather conditions, and other factors that could contribute to

influencing the airborne and underwater sound levels (e.g., aircraft, boats, etc.).

▪ The chief inspector will supply the acoustics specialist with the substrate composition, hammer/drill model and size, hammer/drill energy settings, depth of drilling, and boring rates and any changes to those settings during the monitoring.

▪ For acoustically monitored construction activities, data from the continuous monitoring locations will be post-processed to obtain the following sound measures:

- Maximum peak sound pressure level recorded for all activities, expressed in dB re 1 µPa. This maximum value will originate from the phase of drilling/hammering during

which drill/hammer energy was also at maximum (referred to as Level 4).

○ From all activities occurring during the Level 4 phase these additional measures will be made, as appropriate:

- mean, median, minimum, and maximum RMS sound pressure level in (dB re 1 µPa);
- mean duration of a pile strike (based on the 90 percent energy criterion);
- number of hammer strikes;
- mean, median, minimum, and maximum single strike SEL (dB re µPa² sec);

○ Median integration time used to calculate SPL RMS (for vibration monitoring, the time period selected is 1-second intervals. For impulsive

monitoring, the time period is 90% of the energy pulse duration).

- A frequency spectrum (power spectral density) (dB re μPa^2 per Hz) based on allstrikes with similar sound. Spectral resolution will be 1 Hz, and the spectrum will cover nominal range from 7 Hz to 20 kHz.

- Finally, the cumulative SEL will be computed from all the strikes associated with each pile occurring during all phases, *i.e.*, soft start, Level 1, to Level 4. This measure is defined as the sum of all single strike SEL values. The sum is taken of the antilog, with \log_{10} taken of result to express (dB re μPa^2 sec).

Maine Mammal Monitoring Reporting

The Navy shall submit annual draft reports to NMFS for each construction year within 90 calendar days of the completion of marine mammal monitoring as well as a draft 5-year comprehensive summary report at the end of the project. The report(s) will detail the monitoring protocol and summarize the data recorded during monitoring. Annual reports will also include results from acoustic monitoring (see below). Final annual report(s) (each portion of the project and comprehensive) must be prepared and submitted to NMFS within 30 days following resolution of any NMFS comments on the draft reports. If no comments are received from NMFS within 30 days of receipt of the draft report, the report shall be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

A draft five-year comprehensive summary report shall be submitted to NMFS 90 days after the expiration of the regulations. The draft report would synthesize the data recorded during hydroacoustic and marine mammal monitoring. NMFS would provide comments within 30 days after receiving this draft report, and the Navy would address the comments and submit revisions within 30 days of receipt. If no comment is received from NMFS within 30 days, the draft report would be considered as final.

All draft and final marine mammal monitoring reports must be submitted to PR.ITP.MonitoringReports@noaa.gov and ITP.tyson.moore@noaa.gov. The report must contain the following informational elements, at minimum, (and be included in the Marine Mammal Monitoring Plan), including:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including:

- How many and what type of piles/shafts were driven and by what method (*e.g.*, impact, vibratory, rotary drilling, rock hammering, mono- or cluster-DTH); and

- Total duration of driving time for each pile/hole (vibratory driving, rotary drilling) and number of strikes for each pile/hole (impact driving, hydraulic rock hammering); and

- For DTH excavation, the duration of operation for both impulsive and non-pulse components, as well as the strike rate.

- 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:

- PSO who sighted the animal and PSO location and activity at time of sighting;

- Time of sighting;

- Identification of the animal (*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 in-water construction activity for each sighting (if the in-water construction was occurring at time of sighting);

- Estimated number of animals (minimum/maximum/best);

- Estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.);

- Animal's closest point of approach and estimated time spent within each harassment zone; and

- Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses to 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, by species;

- Detailed information about implementation of any mitigation (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal, if any; and

- All PSO datasheets and/or raw sightings data.

The draft and final reports must also contain the informational elements described in the Hydroacoustic Monitoring Plan which, at minimum, must include:

- Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);

- Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.*, hammer model and energy), and total pile driving duration;

- Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;

- For impact pile driving and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 μPa); root mean square sound pressure level (SPLrms); cumulative sound exposure level (SELcum), peak sound pressure level (SPLpeak), and single-strike sound exposure level (SELs-s);

- For vibratory driving/removal and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 μPa); root mean square sound pressure level (SPLrms), cumulative sound exposure level (SELcum) (and timeframe over which the sound is averaged);

- One-third octave band spectrum and power spectral density plot; and

- General Daily Site Conditions

- Date and time of activities;

- Water conditions (*e.g.*, sea state, tidal state); and

- Weather conditions (*e.g.*, percent cover, visibility).

Reporting of Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to NMFS Office of Protected Resources (OPR) (PR.ITP.MonitoringReports@noaa.gov), NMFS (301-427-8401) and to the Greater Atlantic Region New England/Mid-Atlantic Stranding Coordinator (866-755-6622) as soon as feasible. The incident 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.

If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR 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 this proposed rule. The Navy shall not resume their activities until notified by NMFS that they can continue.

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 impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), 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’ 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 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, this introductory discussion of our analysis applies to all the species listed in Table 3, given that many of the anticipated effects of this project on different marine mammal

stocks are expected to be relatively 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, they are described independently in the analysis below.

Construction 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 A and Level B harassment from underwater sounds generated by pile driving activities, rotary drilling, rock hammering, and DTH. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level A and Level B harassment, identified above, while activities are underway.

The Navy’s proposed activities and associated impacts will occur within a limited, confined area of the stocks’ range. Most of the work will occur behind the existing super flood basin walls that would act as a barrier to sound and would contain underwater noise to within a small portion of the Piscataqua River. The implementation of a soft start and a bubble curtain during some activities, along with other mitigation and monitoring measures already described, are expected to minimize the effects of the expected takes on the affected individuals. In addition, NMFS does not anticipate that serious injury or mortality will occur as a result of the Navy’s planned activity given the nature of the activity, even in the absence of required mitigation.

Exposures to elevated sound levels produced during pile driving and drilling may cause behavioral disturbance of some individuals. Effects on individuals that are taken by Level B harassment, as enumerated in the Estimated Take section, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.*, Thorson and Reyff, 2006). 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 or increased haul out time (Thorson and Reyff, 2006). Data from recent observations of harbor seals

in the project area support the assumption that may behavioral responses to the proposed construction monitoring may be mild in nature (Navy, 2022). The Navy has observed 116 harbor seals in the project since January 20, 2022. This includes observations at the conclusion of P-310 construction (January to February 2022) and the start of P-381 construction (May 2022 through October 16, 2022). Forty-eight of these observations occurred during periods with active construction, and the most common behavior recorded (n=28; 58.3 percent) was no response. The other common behaviors noted for these observations were swimming or milling (n=18; 37.5 percent), with notably lower observations of retreat/flush behaviors (n=1, 2.1 percent) (Navy, 2022).

Additionally, some of the species present in the region will only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species will be exposed to even smaller periods of noise-generating activity, further decreasing the impacts. Most likely, individual animals will simply move away from the sound source and be temporarily displaced from the area, although even this reaction has been observed primarily only in association with impact pile driving. The activities analyzed here are similar to numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. These reactions and behavioral changes are expected to subside quickly when the exposures cease. The intensity of Level B harassment events will be minimized through use of mitigation measures described herein, including the soft starts and the use of the bubble curtain, which was not quantitatively factored into the take estimates. The Navy will use at least three PSOs stationed strategically to increase detectability of marine mammals during in-water construction activities and removal, enabling a high rate of success in implementation of shutdowns to avoid or minimize injury for most species. Further, given the absence of any major rookeries and only one isolated pinniped haul-out site at Hicks Rocks approximately 2.4 km (1.5 mi) from the proposed project area, we assume that potential takes by Level B harassment would have a negligible short-term effect on individuals and would not result in population-level impacts.

Due to the levels and durations of likely exposure, animals that experience PTS will likely only receive slight PTS,

i.e., minor degradation of hearing capabilities within regions of hearing that align most completely with the frequency range of the energy produced by Navy's proposed in-water construction activities (*i.e.*, the low-frequency region below 2 kHz), not severe hearing impairment or impairment in the regions of greatest hearing sensitivity. If hearing impairment does occur, it is most likely that the affected animal will lose a few dBs in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Data do not suggest that a single instance in which an animal accrues PTS (or TTS) and is subject to behavioral disturbance would result in impacts to reproduction or survival. If PTS were to occur, it would be at a lower level likely to accrue to a relatively small portion of the population by being a stationary activity in one particular location.

The project is also not expected to have significant adverse effects on any marine mammal habitat. The project activities will not modify existing marine mammal habitat since the project will occur within the same footprint as existing marine infrastructure. Impacts to the immediate substrate are anticipated, but these would be limited to minor, temporary suspension of sediments, which could impact water quality and visibility for a short amount of time but which would not be expected to have any effects on individual marine mammals. The nearshore and intertidal habitat where the project will occur is an area of consistent vessel traffic from Navy and non-Navy vessels, and some local individuals would likely be somewhat habituated to the level of activity in the area, further reducing the likelihood of more severe impacts. The closest pinniped haulout used by harbor and gray seals is Hicks Rocks, located approximately 2.4 km (1.5 mi) away on the opposite side of the island and not within the ensonified area. There are no other biologically important areas for marine mammals near the project area.

In addition, impacts to marine mammal prey species are expected to be minor and temporary. Overall, the area impacted by the project is very small compared to the available surrounding habitat, and does not include habitat of particular importance. The most likely impact to prey will be temporary behavioral avoidance of the immediate area. During construction activities, it is expected that some fish and marine mammals would temporarily leave the area of disturbance, thus impacting marine mammals' foraging

opportunities in a limited portion of the foraging range. But, because of the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

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 any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or proposed for authorization;
- Level A harassment proposed for authorization is expected to be of a lower degree that would not impact the fitness of any animals;
- Anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior;
- The required mitigation measures (*i.e.*, soft starts, bubble curtain, shutdown zones) are expected to be effective in reducing the effects of the specified activity;
- Minimal impacts to marine mammal habitat/prey are expected;
- There is one pinniped haulout in the vicinity of the project area (Hicks Rocks), but it is on the opposite side of Seavey Island and not within the ensonified area; and
- There are no known biologically important areas in the vicinity of the project.

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 previously, 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 maximum annual amount of take NMFS proposes to authorize for five marine mammal stocks is below one-third of the estimated stock abundance for all species (see Table 16). The number of animals proposed for authorization to be taken from these stocks would be considered small relative to the relevant stock's abundances even if each estimated take occurred to a new individual, which is an unlikely scenario.

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 would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy construction activities would contain an adaptive management component. The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by

MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

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 ensure 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 LOAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Request for Information

NMFS requests that interested persons submit comments, information, and suggestions concerning the Navy's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare a final rule and make final determinations on whether to issue the requested authorization. This notice of proposed rulemaking and supporting documents provide all environmental information relating to our proposed action for public review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that would be subject to the requirements in these proposed regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This proposed rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency.

Dated: January 5, 2023.

Samuel D. Rauch, III,

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

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Alaska, Endangered and threatened species, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine mammals, Oil and gas exploration, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation, Wildlife.

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Add Subpart N to part 217 to read as follows:

Subpart N—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine

Sec.

217.130 Specified activity and geographical region.

217.131 Effective dates.

217.132 Permissible methods of taking.

217.133 Prohibitions.

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217.135 Requirements for monitoring and reporting.

217.136 Letters of Authorization.

217.137 Renewals and modifications of Letters of Authorization.

217.138 [Reserved]

217.139 [Reserved]

§ 217.130 Specified activity and geographical region.

(a) Regulations in this subpart apply only to taking of marine mammals by the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities that occurs incidental to construction activities related to the multifunctional expansion and modification of Dry Dock 1 in the areas outlined in paragraph (b) of this section.

(b) The taking of marine mammals by the Navy may be authorized in a Letter

of Authorization (LOA) only if it occurs at Portsmouth Naval Shipyard, Kittery, Maine.

§ 217.131 Effective dates.

Regulations in this subpart are effective for a period of five years from the date of issuance.

§ 217.132 Permissible methods of taking.

Under an LOA issued pursuant to § 216.106 of this chapter and § 217.136, the Holder of the LOA (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.130(b) by harassment associated with construction activities related to the multifunctional expansion and modification of Dry Dock 1, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 217.133 Prohibitions.

(a) Except for the takings contemplated in § 217.1322 and authorized by a LOA issued under § 216.106 of this chapter and § 217.136, it is unlawful for any person to do any of the following in connection with the activities described in § 217.130:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 217.136;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA after NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

§ 217.134 Mitigation requirements.

(a) When conducting the activities identified in § 217.130(a), the mitigation measures contained in this subpart and any LOA issued under § 216.106 of this chapter and § 217.136 must be implemented. These mitigation measures include:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA at all times that activities subject to this LOA are being conducted.

(2) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain, night), the Navy shall delay pile driving and drilling until observers are confident marine mammals within the shutdown zone could be detected.

(3) The Navy must ensure that construction supervisors and crews, the monitoring team, and relevant Navy staff are trained prior to the start of construction activity subject to this rule, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project will be trained prior to commencing work.

(4) The Navy, construction supervisors and crews, protected species observers (observers), and relevant Navy staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations will cease and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary, to avoid direct physical interaction.

(5) For all pile driving and drilling activities, the Navy must implement shutdown zones with radial distances as identified in a LOA issued under § 216.106 of this chapter and § 217.136. If a marine mammal comes within or approaches the shutdown zone, such operations must cease.

(6) The Navy must monitor the project area to the maximum extent possible based on the required number of protected species observers (PSOs), required monitoring locations, and environmental conditions as described in the NMFS-approved Marine Mammal Monitoring Plan.

(7) Monitoring must take place from 30 minutes prior to initiation of pile driving or drilling activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of pile driving or drilling activity. Pre-activity monitoring must be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving or drilling may commence when PSOs have declared the shutdown zone clear of marine mammals. Monitoring must occur throughout the time required to drive/drill a pile. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown

zone and surrounding waters must be visible to the naked eye).

(8) If a marine mammal enters a shutdown zone, all pile driving or drilling activities at that location must be halted. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals must be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior must be monitored and documented. If a marine mammal is observed within the shutdown zone, pile driving or drilling activities may not commence or resume until at least one of the following conditions has been met:

- (i) The animal has been observed exiting the shutdown zone;
- (ii) The animal is thought to have exited the shutdown zone based on a determination of its course, speed, and movement relative to the pile driving location; or
- (iii) The shutdown zone has been clear from any additional sightings for fifteen minutes.

(9) The Navy must conduct monitoring to include the entire region of influence, which includes the area within the Level A and Level B harassment zones with radial distances as identified in a LOA issued under § 216.106 of this chapter and § 217.136.

(10) The Navy must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes from the hammer at reduced energy, followed by a 30-second waiting period. Then two subsequent reduced-energy strike sets would occur. A soft start will 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.

(11) The Navy must install a bubble curtain across the entrance openings during cluster drill and hydraulic rock hammering activities. The bubble curtain must adhere to the following restrictions:

- (i) The bubble curtain must distribute air bubbles around 100 percent of the piling circumference for the full depth of the water column;
- (ii) The lowest bubble ring must be in contact with the substrate for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent substrate contact. No parts of the ring or other objects shall prevent full substrate contact; and
- (iii) Air flow to the bubblers must be balanced around the circumference of the pile.

(iv) The bubble curtain may be discontinued for certain activities should the results of hydroacoustic recordings inside the bubble curtain show that the source levels from those activities do not result in the Level A harassment thresholds being achieved across the entire region of influence, upon review of the data by NMFS.

(12) Pile driving and drilling activity must be halted upon observation of either a species entering or within the harassment zone, 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.

(b) [Reserved]

§ 217.135 Requirements for monitoring and reporting.

(a) The Navy must submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction. Marine mammal monitoring must be conducted in accordance with the conditions in this section and the Marine Mammal Monitoring Plan.

(b) Monitoring must be conducted by qualified PSOs in accordance with the following conditions:

(1) PSOs must be independent (*i.e.*, not construction personnel) and have no other assigned tasks during monitoring periods.

(2) At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(3) Other PSOs may substitute 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 incidental take authorization.

(4) One PSO must be designated as lead PSO or monitoring coordinator. The lead PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(5) PSOs must be approved by NMFS prior to beginning any activity subject to this LOA.

(c) For all pile driving activities, a minimum of three PSOs must be stationed on boats, docks, or piers sufficient to monitor the harassment and shutdown zones, and as described in the Marine Mammal Monitoring Plan.

(d) PSOs must record all observations of marine mammals, regardless of distance from the pile/hole being driven/drilled, as well as additional data indicated in the reporting requirements.

(e) The shutdown/monitoring zones may be modified with NMFS' approval following NMFS' acceptance of an acoustic monitoring report.

(f) The Navy must submit a draft monitoring report to NMFS within 90 work days of the completion of required monitoring for each portion of the project as well as a comprehensive summary report at the end of the project. The report will detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports (each portion of the project and comprehensive) must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. The reports must at minimum contain the informational elements described as follows (as well as any additional information described in the Marine Mammal Monitoring Plan), including:

(1) Dates and times (begin and end) of all marine mammal monitoring.

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or drilled and by what method (*i.e.*, impact, vibratory, rotary drilling, rock hammering, mono- or cluster- down-the-hole (DTH)), the total duration of driving time for each pile/ hole (vibratory driving, rotary drilling) and number of strikes for each pile/hole (impact driving, hydraulic rock hammering), and for DTH excavation, the duration of operation for both impulsive and non-pulse components as well as the strike rate.

(3) Environmental conditions during monitoring periods (at beginning and end of observer 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 (if less than the harassment zone distance);

(4) Upon observation of a marine mammal, the following information:

(i) PSO who sighted the animal and observer location, as well as the activity at the time of the sighting;

(ii) Time of sighting;

(iii) Identification of the animal (*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;

(iv) Distances and bearings of each marine mammal observed in relation to the pile being driven or drilled for each sighting (if pile driving or drilling was occurring at time of sighting).

(v) Estimated number of animals (min/max/best);

(vi) Estimated number of animals by cohort (adults, juveniles, neonates, group composition *etc.*);

(vii) Animal's closest point of approach and estimated time spent within the harassment zone; and

(viii) Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses to the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

(ix) Number of marine mammals detected within the harassment zones, by species;

(x) Detailed information about any implementation of any mitigation (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting changes in the behavior of the animal, if any; and

(xi) All PSO datasheets and/or raw sightings data.

(g) The Navy must conduct hydroacoustic data collection (sound source verification and propagation loss) in accordance with a hydroacoustic monitoring plan that must be approved by NMFS in advance of construction. This includes measurements from 10 piles/holes during the rotary drilling of 126-inch and 84-inch shafts, and DTH cluster drilling of 108-inch, 84-inch, and 72-inch shafts. The Navy must report the hydroacoustic data collected as required by a LOA issued under § 216.106 of this chapter and § 217.136 and as described in the Acoustic Monitoring Plan, which at a minimum, must include:

(1) Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);

(2) Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.*, hammer model and energy), and total pile driving duration;

(3) Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;

(4) For impact pile driving and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 μ Pa): root mean square sound

pressure level (SPL_{rms}); cumulative sound exposure level (SEL_{cum}), peak sound pressure level (SPL_{peak}), and single-strike sound exposure level (SEL_{s-s});

(5) For vibratory driving/removal and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 μ Pa): root mean square sound pressure level (SPL_{rms}), cumulative sound exposure level (SEL_{cum}) (and timeframe over which the sound is averaged);

(6) One-third octave band spectrum and power spectral density plot; and

(7) General Daily Site Conditions, including the date and time of activities, the water conditions (*e.g.*, sea state, tidal state), and the weather conditions (*e.g.*, percent cover, visibility).

(h) All draft and final monitoring reports must be submitted to PR.ITP.MonitoringReports@noaa.gov and ITP.tyson.moore@noaa.gov.

(i) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy must report the incident to NMFS Office of Protected Resources (OPR), and to the Greater Atlantic Region New England/Mid-Atlantic Stranding Coordinator, as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR 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 this rule and the LOA issued under § 216.106 of this chapter and § 217.136. The Navy will not resume their activities until notified by NMFS. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

§ 217.136 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of

time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 217.137.

(e) The LOA will set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA will be published in the **Federal Register** within 30 days of a determination.

§ 217.137 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.136 for the activity identified in § 217.130(a) may

be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under § 216.106 of this chapter and § 217.136 for the activity identified in § 217.130(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the

goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment;

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to § 216.106 of this chapter and § 217.136, a LOA may be modified without prior public notice or opportunity for public comment. Notification would be published in the **Federal Register** within 30 days of the action.

§ 217.138–217.139 [Reserved]

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Part IV

Department of Housing and Urban Development

Allocations for Community Development Block Grant Disaster Recovery and Implementation of the CDBG-DR Consolidated Waivers and Alternative Requirements Notice; Notice

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

[Docket No. FR–6368–N–01]

**Allocations for Community
Development Block Grant Disaster
Recovery and Implementation of the
CDBG–DR Consolidated Waivers and
Alternative Requirements Notice**

AGENCY: Office of the Assistant
Secretary for Community Planning and
Development, HUD.

ACTION: Notice.

SUMMARY: In March 2022, HUD allocated nearly \$3 billion in Community Development Block Grant Disaster Recovery (CDBG–DR) funds appropriated by the Disaster Relief Supplemental Appropriations Act, 2022 for major disasters occurring in 2020 and 2021. HUD allocated an additional \$1.447 billion in CDBG–DR funds appropriated by the Continuing Appropriations Act, 2023 for major disasters occurring in 2021. This Allocation Announcement Notice identifies grant requirements for these funds, including requirements in HUD’s CDBG–DR Consolidated Notice (“Consolidated Notice”) found in Appendix B, and some amendments to the Consolidated Notice that apply to CDBG–DR grants for disasters occurring in 2020 and 2021. The Consolidated Notice, as amended by this Allocation Announcement Notice, includes waivers and alternative requirements, relevant regulatory requirements, the grant award process, criteria for action plan approval, and eligible disaster recovery activities.

DATES: *Applicability Date:* January 23, 2023.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW, Room 10166, Washington, DC 20410, telephone number 202–708–3587 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Facsimile inquiries may be sent to Ms.

Kome at 202–708–0033 (this is not a toll-free number). Email inquiries may be sent to disaster_recovery@hud.gov.

SUPPLEMENTARY INFORMATION:

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I. Allocations

In March 2022, HUD allocated \$2,213,595,000 in CDBG–DR funds from the Disaster Relief Supplemental Appropriations Act, 2022 (Pub. L. 117–43 known as the “2022 Appropriations Act”) for disasters occurring in 2021. The Continuing Appropriations Act, 2023 (Pub. L. 117–180) approved September 30, 2022 (the “2023 Appropriations Act”) makes available \$2,000,000,000 in CDBG–DR funds. These CDBG–DR funds are for necessary expenses for activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) (HCDA) related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation in the “most impacted and distressed” (MID) areas resulting from a qualifying major disaster in 2021 or 2022. This notice announces allocations of \$1,446,629,000 from the 2023 Appropriations Act for disasters occurring in 2021. When additional data becomes available for disasters occurring in 2022, the remaining \$553,371,000 will be allocated for those disasters in a subsequent notice. The 2023 Appropriations Act requires HUD to include with any final allocation for the total estimate of unmet need an

additional amount of 15 percent of that estimate for mitigation activities that reduce risk in the MID areas (see Table 1).

The 2023 Appropriations Act provides that grants shall be awarded directly to a state, local government, or Indian tribe at the discretion of the Secretary.

Pursuant to the 2023 Appropriations Act, HUD has identified the MID areas based on the best available data for all eligible affected areas. An explanation of where to find HUD’s allocation methodology is provided in Appendix A of this notice. To comply with requirements that all funds are expended in MID areas, Lake Charles and Baton Rouge, LA; Detroit and Dearborn, MI; Philadelphia, PA; Nashville-Davidson, TN; and Houston, Dallas, and Fort Worth, TX must use 100 percent of the total funds allocated to address unmet disaster needs or mitigation activities within the HUD identified MID areas identified in the last column in Table 2. All other grantees must use at least 80 percent of their allocations to address unmet disaster needs or mitigation activities in the HUD-identified MID areas, as identified in the last column of Table 2. These grantees may use the remaining 20 percent of their allocation to address unmet disaster needs or mitigation activities in those areas that the grantee determines are “most impacted and distressed” within an area that received a Presidential major disaster declaration identified by the Federal Emergency Management Agency (FEMA) disaster numbers listed in column two of Table 1. However, these grantees are not precluded from spending 100 percent of their allocation in the HUD-identified MID areas if they choose to do so. Detailed requirements related to MID areas are provided in section II.A.3. of the Consolidated Notice. In this notice, HUD has also provided tables that include the disaster numbers, grant amounts, and MID areas for CDBG–DR grants allocated from the 2022 Appropriations Act for disasters occurring in 2020, for reference.

Based on a review of the impacts from the eligible disasters, and estimates of unmet need, HUD made the following allocations for disasters occurring in 2021:

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TABLE 1 – ALLOCATIONS FOR UNMET NEEDS AND MITIGATION ACTIVITIES UNDER PUBLIC LAW 117-43 AND 117-180 FOR DISASTERS OCCURING IN 2021

Year	FEMA Disaster No.	State	Grantee	Allocation for Unmet Needs under the May 24, 2022 Notice from Pub. L. 117-43	CDBG-DR Mitigation Set-Aside amounts under the May 24, 2022 Notice from Pub. L. 117-43	Allocations for Unmet Needs under this notice from Pub. L. 117-180	CDBG-DR Mitigation Set-Aside for amounts under this notice from Pub. L. 117-180	Total allocated under this notice from Pub. L. 117-180	Total allocated under all notices from Pub. L. 117-43 and 117-180
2021	4610	California	State of California	\$12,835,000	\$1,926,000	\$8,389,000	\$1,258,000	\$9,647,000	\$24,408,000
2021	4634	Colorado	State of Colorado	\$6,448,000	\$967,000	\$4,214,000	\$632,000	\$4,846,000	\$12,261,000
2021	4595, 4630	Kentucky	State of Kentucky	\$65,176,000	\$9,777,000	\$42,594,000	\$6,389,000	\$48,983,000	\$123,936,000
2021	4606	Louisiana	Lake Charles	\$9,370,000	\$1,406,000	\$6,123,000	\$919,000	\$7,042,000	\$17,818,000
2021	4606	Louisiana	Baton Rouge	\$4,042,000	\$606,000	\$2,642,000	\$396,000	\$3,038,000	\$7,686,000
2021	4611, 4606	Louisiana	State of Louisiana	\$1,106,388,000	\$165,958,000	\$723,045,000	\$108,457,000	\$831,502,000	\$2,103,848,000
2021	4607	Michigan	Detroit	\$50,079,000	\$7,512,000	\$32,728,000	\$4,909,000	\$37,637,000	\$95,228,000
2021	4607	Michigan	Dearborn	\$14,202,000	\$2,130,000	\$9,281,000	\$1,392,000	\$10,673,000	\$27,005,000
2021	4607	Michigan	State of Michigan	\$10,463,000	\$1,570,000	\$6,838,000	\$1,026,000	\$7,864,000	\$19,897,000
2021	4626	Mississippi	State of Mississippi	\$7,310,000	\$1,096,000	\$4,777,000	\$717,000	\$5,494,000	\$13,900,000

Year	FEMA Disaster No.	State	Grantee	Allocation for Unmet Needs under the May 24, 2022 Notice from Pub. L. 117-43	CDBG-DR Mitigation Set-Aside amounts under the May 24, 2022 Notice from Pub. L. 117-43	Allocations for Unmet Needs under this notice from Pub. L. 117-180	CDBG-DR Mitigation Set-Aside for amounts under this notice from Pub. L. 117-180	Total allocated under this notice from Pub. L. 117-180	Total allocated under all notices from Pub. L. 117-43 and 117-180
2021	4617	North Carolina	State of North Carolina	\$6,935,000	\$1,040,000	\$4,531,000	\$680,000	\$5,211,000	\$13,186,000
2021	4614	New Jersey	State of New Jersey	\$198,562,000	\$29,784,000	\$129,764,000	\$19,465,000	\$149,229,000	\$377,575,000
2021	4615	New York	New York City	\$163,455,000	\$24,518,000	\$106,821,000	\$16,023,000	\$122,844,000	\$310,817,000
2021	4615	New York	State of New York	\$35,880,000	\$5,382,000	\$23,449,000	\$3,517,000	\$26,966,000	\$68,228,000
2021	4618	Pennsylvania	Philadelphia	\$85,827,000	\$12,874,000	\$56,090,000	\$8,413,000	\$64,503,000	\$163,204,000
2021	4618	Pennsylvania	State of Pennsylvania	\$20,132,000	\$3,020,000	\$13,157,000	\$1,973,000	\$15,130,000	\$38,282,000
2021	4601	Tennessee	Nashville-Davidson	\$4,479,000	\$672,000	\$2,928,000	\$439,000	\$3,367,000	\$8,518,000
2021	4609	Tennessee	State of Tennessee	\$22,089,000	\$3,314,000	\$14,437,000	\$2,165,000	\$16,602,000	\$42,005,000
2021	4586	Texas	Houston	\$26,344,000	\$3,952,000	\$17,217,000	\$2,582,000	\$19,799,000	\$50,095,000
2021	4586	Texas	Dallas	\$21,246,000	\$3,187,000	\$13,884,000	\$2,083,000	\$15,967,000	\$40,400,000
2021	4586	Texas	Fort Worth	\$14,447,000	\$2,167,000	\$9,442,000	\$1,416,000	\$10,858,000	\$27,472,000

Year	FEMA Disaster No.	State	Grantee	Allocation for Unmet Needs under the May 24, 2022 Notice from Pub. L. 117-43	CDBG-DR Mitigation Set-Aside amounts under the May 24, 2022 Notice from Pub. L. 117-43	Allocations for Unmet Needs under this notice from Pub. L. 117-180	CDBG-DR Mitigation Set-Aside for amounts under this notice from Pub. L. 117-180	Total allocated under this notice from Pub. L. 117-180	Total allocated under all notices from Pub. L. 117-43 and 117-180
2021	4586	Texas	State of Texas	\$22,945,000	\$3,442,000	\$14,996,000	\$2,249,000	\$17,245,000	\$43,632,000
2021	4635	Washington	State of Washington	\$16,210,000	\$2,431,000	\$10,593,000	\$1,589,000	\$12,182,000	\$30,823,000
			Totals	\$1,924,864,000	\$288,731,000	\$1,257,940,000	\$188,689,000	\$1,446,629,000	\$3,660,224,000

TABLE 2—MOST IMPACTED AND DISTRESSED AREAS FOR DISASTERS OCCURRING IN 2021

Grantee	Updated minimum amount under all notices from Public Law 117–43 and 117–180 that must be expended in the HUD-identified “most impacted and distressed” areas in column 3	“Most Impacted and Distressed” areas
State of California	\$19,526,400	Plumas County.
State of Colorado	9,808,800	80027 (Boulder County).
State of Kentucky	99,148,800	Graves and Hopkins Counties; 41339 (Breathitt County) and 42101 (Warren County).
Lake Charles, LA	17,818,000	Lake Charles, LA.
Baton Rouge, LA	7,686,000	Baton Rouge, LA.
State of Louisiana	1,683,078,400	Ascension, Assumption, Calcasieu, East Baton Rouge, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Mary, St. Tammany, Tangipahoa, Terrebonne, and Washington Parishes; 70764 & 70788 (Iberville Parish) and 70767 (West Baton Rouge Parish).
Detroit, MI	95,228,000	Detroit, MI.
Dearborn, MI	27,005,000	Dearborn, MI.
State of Michigan	15,917,600	Wayne County.
State of Mississippi	11,120,000	39563 (Jackson County).
State of North Carolina	10,548,800	28716 (Haywood County).
State of New Jersey	302,060,000	Bergen, Essex, Hudson, Middlesex, Passaic, Somerset, and Union Counties.
New York City, NY	248,653,600	Bronx, Queens, Kings, and Richmond County.
State of New York	54,582,400	Westchester County.
Philadelphia, PA	163,204,000	Philadelphia, PA.
State of Pennsylvania	30,625,600	Delaware and Montgomery Counties.
Nashville-Davidson, TN	8,518,000	Nashville-Davidson, TN.
State of Tennessee	33,604,000	Humphreys County.
Houston, TX	50,095,000	Houston, TX.
Dallas, TX	40,400,000	Dallas, TX.
Fort Worth, TX	27,472,000	Fort Worth, TX.
State of Texas	34,905,600	Dallas, Harris, and Tarrant Counties.
State of Washington	24,658,400	98295 (Whatcom County).

TABLE 3 (for reference) – ALLOCATIONS FOR UNMET NEEDS AND MITIGATION ACTIVITIES UNDER PUBLIC LAW 117-43 FOR DISASTERS OCCURING IN 2020

Year	FEMA Disaster No.	State	Grantee	Allocation for Unmet Needs under the February 2022 Notice from Pub. L. 117-43	CDBG-DR Mitigation Set-Aside amounts under the February 2022 Notice from Pub. L. 117-43	Allocation for Unmet Needs under the May 2022 Notice from Pub. L. 117-43	CDBG-DR Mitigation Set-Aside for amounts under the May 2022 Notice from Pub. L. 117-43	Total allocated under the May 2022 Notice from Pub. L. 117-43	Total allocated under all notices from Pub. L. 117-43
2020	4563, 4573	Alabama	State of Alabama	\$271,071,000	\$40,661,000	\$164,800,000	\$24,720,000	\$189,520,000	\$501,252,000
2020	4558, 4569	California	State of California	\$201,046,000	\$30,157,000	\$0	\$0	\$0	\$231,203,000
2020	4564	Florida	State of Florida	\$98,427,000	\$14,764,000	\$64,515,000	\$9,677,000	\$74,192,000	\$187,383,000
2020	4557	Iowa	State of Iowa	\$49,513,000	\$7,427,000	\$544,000	\$82,000	\$626,000	\$57,566,000
2020	4559, 4570	Louisiana	State of Louisiana	\$521,853,000	\$78,278,000	\$391,423,000	\$58,713,000	\$450,136,000	\$1,050,267,000
2020	4547	Michigan	State of Michigan	\$52,085,000	\$7,813,000	\$0	\$0	\$0	\$59,898,000
2020	4576	Mississippi	State of Mississippi	\$24,757,000	\$3,713,000	\$7,143,000	\$1,071,000	\$8,214,000	\$36,684,000
2020	4562	Oregon	State of Oregon	\$367,205,000	\$55,081,000	\$0	\$0	\$0	\$422,286,000
2020	4473, 4560	Puerto Rico	Commonwealth of Puerto Rico	\$155,794,000*	\$28,832,000	\$0	\$0	\$0	\$184,626,000
2020	4476, 4541	Tennessee	State of Tennessee	\$37,165,000	\$5,575,000	\$0	\$0	\$0	\$42,740,000
			Totals	\$1,778,916,000	\$272,301,000	\$628,425,000	\$94,263,000	\$722,688,000	\$2,773,905,000

*Puerto Rico was allocated \$36,424,000 from Pub. L. 116-20 (see 86 FR 569) for unmet needs related to one of the qualifying disasters listed in the first column (FEMA disaster no. 4473). The grantee's CDBG mitigation set-aside in the sixth column was calculated as 15 percent of the total estimate for unmet needs allocated for this disaster (which includes the portions of unmet need funded by Pub. L. 116-20 and by Pub. L. 117-43). The grantee's final allocation in the tenth column represents the total estimate for unmet needs for Puerto Rico's qualifying disasters under Pub. L. 117-43, including the additional amount for the CDBG mitigation set-aside.

TABLE 4 (FOR REFERENCE)—MOST IMPACTED AND DISTRESSED AREAS FOR DISASTERS OCCURRING IN 2020

Grantee	Updated minimum amount under all notices from Public Law 117–43 that must be expended in the HUD-identified “most impacted and distressed” areas in column 3	Updated “Most Impacted and Distressed” areas
State of Alabama	\$401,001,600	Baldwin, Mobile, and Escambia Counties; 36545 (Clarke County).
State of California	184,962,400	Butte, Napa, Santa Cruz, Los Angeles, and Siskiyou Counties; 95448 (Sonoma County), 95688 (Solano County), 93602 (Fresno County), 93664 (Fresno County), 94558 (Napa County), 94574 (Napa County), 95404 (Sonoma County), 95409 (Sonoma County), and 96047 (Shasta County).
State of Florida	149,906,400	Escambia and Santa Rosa Counties.
State of Iowa	46,052,800	Linn County.
State of Louisiana	840,213,600	Allen, Beauregard, Caddo, Calcasieu, Cameron, Jefferson Davis, Lafayette, Natchitoches, Ouachita, and Rapides Parishes; 70510 (Vermilion Parish); 70517 (St. Martin Parish), 70526 (Acadia Parish), 70570 (St. Landry Parish), 71446 (Vernon Parish), and 70578 (Acadia Parish).
State of Michigan	47,918,400	Midland and Saginaw Counties; 48612 (Gladwin County).
State of Mississippi	29,347,200	Harrison County; 39563 (Jackson County).
State of Oregon	337,828,800	Clackamas, Douglas, Jackson, Lane, Lincoln, and Marion Counties; 97358 (Linn County).
Commonwealth of Puerto Rico	147,700,800	Guanica, Ponce, and Yauco; 00624 (Penuelas Municipio), 00656 (Guayanilla Municipio), 00667 (Lajas Municipio), and 00680 (Mayaguez Municipio).
State of Tennessee	34,192,000	37208 (Davidson County), 38501 (Putnam County), and 37421 (Hamilton County).

II. Use of Funds

Funds for disasters occurring in 2021 announced in this notice are subject to the requirements of this Allocation Announcement Notice and the Consolidated Notice, included as Appendix B, as amended. All grantees receiving an allocation for 2021 disasters announced in this notice received an allocation announced in the notice published May 24, 2022 (87 FR 31636) (“May 2022 Notice”) that governs their initial allocations. Allocations announced in this notice are subject to the requirements of this Allocation Announcement Notice, and the Consolidated Notice, included as Appendix B, as amended. The requirements of the May 2022 Notice, as amended, which governs the first allocation for 2021 disasters, are also included in this notice. Therefore, grantees receiving funds for 2021 disasters can refer to this notice as a statement of requirements that apply to CDBG–DR awards for 2021 disasters. Although HUD makes amendments to the Consolidated Notice in this Allocation Announcement Notice to reflect the terms of the 2023 Appropriations Act, the Consolidated Notice provided in Appendix B remains unchanged from the notice published as Appendix B in the May 2022 Notice. Sections III.A.1, III.A.1.a, and III.A.1.b of this Allocation Announcement Notice include instructions for a grantee submitting an early action plan for program administrative costs and will

replace the alternative requirement in the Consolidated Notice at III.C.1 for purposes of accessing funds for program administrative costs prior to the Secretary’s certification.

To comply with the statutory requirement in the 2023 Appropriations Act, grantees shall not use CDBG–DR funds for activities reimbursable by or for which funds are made available by FEMA or the U.S. Army Corps of Engineers (USACE). Grantees must verify whether FEMA or USACE funds are available prior to awarding CDBG–DR funds to specific activities or beneficiaries. Grantees may use CDBG–DR funds as the non-Federal match as described in section II.C.3 of the Consolidated Notice.

II.A. Process for Accessing Funds Under the 2023 Appropriations Act (Pub. L. 117–180) for Disasters Occurring in 2021

Grantees may access allocations announced in this notice in one of two ways: a grantee may submit a substantial amendment to the Public Action Plan submitted in response to the May 2022 Notice or may submit one Public Action Plan that includes any combination of allocations announced in this notice, the February 3, 2022 notice (87 FR 6364) (“February 2022 Notice”), and the May 2022 Notice. Instructions and deadlines for both options are covered in the following paragraph. This combined administrative approach should ease grantee burden. If a grantee needs

additional time to submit either a substantial amendment to the Public Action Plan or a single Public Action Plan, the grantee can submit formal correspondence to HUD requesting an extension. Regardless of which option the grantee chooses, since the funds are allocated under different appropriations acts or for different disasters, HUD will make separate grants, and each grant will have separate financial controls.

II.A.1. Option 1—Single Public Action Plan. A grantee pursuing this option must include its allocation described in Table I together in a single Public Action Plan with any funds allocated under the 2022 Appropriations Act (under the May 2022 Notice or the February 2022 Notice) that have not been submitted to HUD in a Public Action Plan as of the applicability date of this notice (except those funds that will be included in an action plan for program administrative costs as described in section III.A.1.). The grantee must inform its HUD grant manager or CPD Representative within 30 days of the applicability date of this notice if it plans to exercise this option and submit one action plan that includes multiple allocations. Grantees pursuing this option must follow the requirements in section III.C.1 of the Consolidated Notice for that submission, which requires grantees to use the Public Action Plan in HUD’s Disaster Recovery Grant Reporting (DRGR) system to submit their action plan and submit within 120 days of the

applicability date of this notice. However, submission deadlines for this option are based on the applicability date of this notice.

II.A.2. Option 2—Substantial Amendment to an existing Public Action Plan. A grantee pursuing this option must submit a substantial amendment to its Public Action Plan describing the use of funds allocated under the 2022 Appropriations Act to include the allocations announced in this notice, the substantial amendment must be submitted no later than 120 days after the initial action plan is approved, in whole or in part, by HUD, or not later than 120 days after the applicability date of this notice, whichever is later. The substantial amendment must include the additional allocation of funds and address the requirements of this notice.

II.B. Financial Management and Grant Compliance Certification Requirements

Paragraph III.A.1.b of the Consolidated Notice outlines when a grantee may or may not rely on its prior submissions to meet the Financial Management and Grant Compliance Certification Requirements in the Consolidated Notice. The Consolidated Notice allows a grantee to rely on prior submissions “unless it has been more than three years since the executed grant agreement for the original CDBG–DR grant or a subsequent grant is equal to or greater than ten times the amount of the original CDBG–DR grant.” Additionally, paragraph III.A.2.b of the Consolidated Notice provides the same criteria for when a grantee may or may not rely on its previously submitted implementation plan. The Consolidated Notice allows a grantee to rely on a previously submitted implementation plan “unless it has been more than three years since the executed grant agreement for the original CDBG–DR grant or the subsequent grant is equal to or greater than ten times the amount of its original CDBG–DR grant.” No grantee receiving an allocation announcement under both this notice and the May 2022 Notice meets the three year or grant threshold criteria noted above.

Therefore, the grantees covered by this notice may rely on their prior submissions if previously provided in response to the Financial Management and Grant Compliance Certification Requirements and the implementation plan in the Consolidated Notice. HUD reminds grantees that it will continue to monitor all of the grantee’s submissions and updates made to policies and procedures and its capacity assessment during the normal course of business. The grantee must notify HUD of any

substantial changes made to these submissions.

In accordance with the 2023 Appropriations Act, grantees must spend an amount that is equal to 15 percent of their unmet need allocation, as outlined in Table 1, for mitigation activities as described in section IV.A.2. of this notice. Grantees must also incorporate mitigation measures into their recovery activities as required under section II.A.2 in the Consolidated Notice. Grantees must conduct or update the assessment of community impacts and unmet needs to inform the plan or substantial amendment and guide the development and prioritization of planned recovery activities, pursuant to section III.C.1.a of the Consolidated Notice. Additionally, with regard to the funds provided for mitigation activities, grantees must also prepare or update a mitigation needs assessment to inform their mitigation activities, as described in section IV.A.2.a of this notice.

II.C. Allocations of CDBG–DR Funds for Smaller Grants

Paragraph III.C.1.b of the Consolidated Notice requires that CDBG–DR action plans “demonstrate a reasonably proportionate allocation of resources relative to areas and categories (*i.e.*, housing, economic revitalization, and infrastructure) of greatest needs identified in the grantee’s impact and unmet needs assessment or provide an acceptable justification for a disproportional allocation.” Additionally, paragraph III.C.1.g of the Consolidated Notice requires grantees to “provide a budget for the full amount of the allocation that is reasonably proportionate to its unmet needs (or provide an acceptable justification for disproportional allocation) and is consistent with the requirements to integrate hazard mitigation measures into all its programs and projects.”

HUD recognizes that grantees receiving a relatively small allocation of funds for 2021 disasters in this notice may most effectively advance recovery by more narrowly targeting these limited recovery and mitigation resources. Accordingly, for grantees receiving an allocation of less than \$20 million for 2021 disaster(s) in this notice, HUD will consider the small size of the grant and HUD’s allocation methodology as acceptable justification for a grantee to propose a disproportional allocation when the grantee is allocating funds to address unmet affordable rental housing needs caused by or exacerbated by the disaster(s). Grantees exercising this option must continue to comply with

the applicable requirements of this notice and the Consolidated Notice, including the CDBG–DR mitigation set-aside requirement in section IV.A.2 of this notice.

III. Overview of Grant Process

III.A. Requirements Related to Administrative Funds

III.A.1. Action plan submittal for program administrative costs. The 2023 Appropriations Act allows grantees receiving an award under this notice to access funding for program administrative costs prior to the Secretary’s certification of financial controls and procurement processes, and adequate procedures for proper grant management. To implement this authority, the following alternative requirement will replace the alternative requirement in the Consolidated Notice at III.C.1.

If a grantee chooses to access funds for program administrative costs prior to the Secretary’s certification, it must first prepare an action plan describing its use of funds for program administrative costs, subject to the five percent cap on the use of grant funds for such costs. Instead of following requirements in section III.C.1 of the Consolidated Notice, which require grantees to use the Public Action Plan in HUD’s DRGR system to submit their action plans, grantees will follow a different process to access funds for program administrative costs prior to the Secretary’s certification.

As part of the process of accessing funds for these costs, grantees must submit to HUD an action plan describing their use of funds for program administrative costs. The action plan will be developed outside of DRGR and must include all proposed uses of funds for program administrative costs incurred prior to a final action plan being submitted and approved. The action plan for program administrative costs must also include the criteria for eligibility and the amount to be budgeted for that activity. If a grantee chooses to submit the action plan for program administrative costs, the grantee should calculate its need to cover program administrative costs over the life of the grant and consider how much of its available program administrative funds may be reasonably budgeted at this very early stage of its grant lifecycle.

III.A.1.a. Publication of the action plan for program administrative costs and opportunity for public comment. The grantee must publish the proposed action plan for program administrative costs, and substantial amendments to

the plan, for public comment. To permit a more streamlined process and ensure that grants for program administrative costs are awarded in a timely manner in order to allow grantees to more rapidly design and launch recovery activities, provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, 24 CFR 1003.604, 24 CFR 91.105(b) through (d), and 24 CFR 91.115(b) through (d), with respect to citizen participation requirements, are waived and replaced by the alternative requirements in section III.A.1 that apply only to action plans for program administrative costs and substantial amendments to these plans.

Additionally, for these action plans only, grantees are not subject to the Consolidated Notice action plan requirements in sections III.B.2.i, III.C.2, III.C.3, III.C.6, and III.D.1.a–c.

The manner of publication of the action plan for program administrative costs must include prominent posting on the grantee's official disaster recovery website and must afford residents, affected local governments, and other interested parties a reasonable opportunity to review the contents of the plan or substantial amendment. Subsequent to publication of the action plan or substantial amendment to that plan, the grantee must provide a reasonable time frame (no less than seven days) and multiple methods (including electronic submission) for receiving comments on the action plan or substantial amendment for program administrative costs. At a minimum, the topic of disaster recovery on the grantee's website, including the posted action plan or substantial amendment, must be navigable by interested parties from the grantee homepage and must link to the disaster recovery website as required by section III.D.1.e of the Consolidated Notice. The grantee's records must demonstrate that it has notified affected parties through electronic mailings, press releases, statements by public officials, media advertisements, public service announcements, and/or contacts with neighborhood organizations. Grantees are not required to hold any public hearings on the proposed action plan or substantial amendment for program administrative costs.

The grantee must consider all oral and written comments on the action plan or any substantial amendment. Any updates or changes made to the action plan in response to public comments should be clearly identified in the action plan. A summary of comments on the plan or amendment, and the grantee's response to each, must be included with the action plan or

substantial amendment. Grantee responses shall address the substance of the comment rather than merely acknowledge that the comment was received.

After the grantee responds to public comments, it will then submit its action plan or substantial amendment for program administrative costs (which includes Standard Form 424 (SF-424)) to HUD for approval. There is no due date for this plan as it may be submitted any time prior to the grantee's Public Action Plan. HUD will review the action plan or substantial amendment for program administrative costs within 15 days from date of receipt and determine whether to approve the action plan or substantial amendment to that plan per the criteria identified in this notice.

III.A.1.b. Certifications waiver and alternative requirement. Sections 104(b)(4), (c), and (m) of the HCDA (42 U.S.C. 5304(b)(4), (c), and (m)), sections 106(d)(2)(C) and (D) of the HCDA (42 U.S.C. 5306(d)(2)(C) and (D)), and section 106 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12706), and regulations at 24 CFR 91.225 and 91.325 are waived and replaced with the following alternative. Each grantee choosing to submit an action plan for program administrative costs must make the following certifications listed in section III.F.7 of the Consolidated Notice and include them with the submission of this plan: paragraphs b, c, d, g, i, j, k, l, p, and q. Additionally, HUD is waiving section 104(a)–(c) and (d)(1) of the HCDA (42 U.S.C. 5304), section 106(c)(1) and (d) of the HCDA (42 U.S.C. 5306), section 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4630), section 305 of the URA (42 U.S.C. 4655), and regulations at 24 CFR 91.225(a)(2), (6), and (7), 91.225(b)(7), 91.325(a)(2), (6), and (7), 49 CFR 24.4(a), and 24 CFR 42.325 only to the extent necessary to allow grantees to receive a portion of their allocation as a grant for program administrative costs before submitting other statutorily required certifications. Each grantee must make all certifications included in section III.F.7 of the Consolidated Notice and submit them to HUD when it submits its Public Action Plan in DRGR described in III.C.1.

III.A.1.c. Submission of the action plan for program administrative costs in DRGR. After HUD's approval of the action plan for program administrative costs, the grantee enters the activities from its approved action plan into the DRGR system if it has not previously done so and submits its DRGR action plan to HUD (funds can be drawn from

the line of credit only for activities that are established in the DRGR system). HUD provided additional guidance ("Fact Sheet") with screenshots and step-by-step instructions describing the submittal process for this DRGR action plan for program administrative costs. This process will allow a grantee to access funds for program administrative costs while the grantee begins developing its Public Action Plan in DRGR as provided in section III.C.1 of the Consolidated Notice.

If a grantee receiving funds under this notice has previously received approval of the action plan and DRGR action plan for program administrative costs under the 2022 Appropriations Act (as permitted by the February 2022 Notice or the May 2022 Notice), the grantee may submit an amendment to HUD of its action plan for program administrative costs to budget funds for additional administrative costs. HUD will make a separate grant of funds for administrative costs associated with grant funds under the 2023 Appropriations Act, since each grant is subject to a separate five percent cap on the total amount of grant funds that can be used for administrative costs. Grantees may do this by using the template provided on HUD's website at: https://www.hud.gov/program_offices/comm_planning/cdbg-dr/grantees. After HUD's approval of the amended action plan for program administrative costs and issuance of a grant agreement, the grantee will amend the previously approved DRGR action plan for program administrative costs to access or draw funds.

III.A.1.d. Incorporation of the action plan for program administrative costs into the Public Action Plan. The grantee shall describe the use of all grant funds for administrative costs in the Public Action Plan required by section III.C.1. Use of grant funds for administrative costs before approval of the Public Action Plan must be consistent with the action plan for administrative costs. Once the Public Action Plan is approved, the use of all grant funds must be consistent with the Public Action Plan. Upon HUD's approval of the Public Action Plan, the action plan for administrative costs shall only be relevant to administrative costs charged to the grant before the date of approval of the Public Action Plan.

III.A.2. Use of administrative funds across multiple grants. The 2023 Appropriations Act authorizes special treatment of grant administrative funds. Grantees that are receiving awards under this notice, and that have received CDBG-DR or Community Development Block Grant mitigation

(CDBG–MIT) grants in the past or in any future acts, may use eligible administrative funds (up to five percent of each grant award plus up to five percent of program income generated by the grant) appropriated by these acts for the cost of administering any CDBG–DR or CDBG–MIT grant without regard to the particular disaster appropriation from which such funds originated. If the grantee chooses to exercise this authority, the grantee must have appropriate financial controls to comply with the requirement that the amount of grant administration expenditures for each CDBG–DR or CDBG–MIT grant will not exceed five percent of the total grant award for each grant (plus five percent of program income generated by the grant), review and modify its financial management policies and procedures regarding the tracking and accounting of administration costs, as necessary, and address the adoption of this treatment of administrative costs in the applicable portions of its Financial Management and Grant Compliance submissions as referenced in section III.A.1 of the Consolidated Notice. Grantees are reminded that all uses of funds for program administrative activities must qualify as an eligible administration cost.

IV. Applicable Rules, Statutes, Waivers, and Alternative Requirements

The 2023 Appropriations Act authorizes the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary, or use by the recipient, of these funds, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment. This section of the notice and the Consolidated Notice describe rules, statutes, waivers, and alternative requirements that apply to allocations under this notice. For each waiver and alternative requirement in this notice and incorporated through the Consolidated Notice, the Secretary has determined that good cause exists, and the waiver or alternative requirement is not inconsistent with the overall purpose of title I of the HCDA. The waivers and alternative requirements provide flexibility in program design and implementation to support full and swift recovery following eligible disasters, while ensuring that statutory requirements are met.

Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their recovery and mitigation activities.

Grantees should work with the assigned CPD representative to request any additional waivers or alternative requirements from HUD headquarters. Waivers and alternative requirements described below apply to all grantees under this notice. Under the requirements of the Appropriations Act, waivers and alternative requirements are effective five days after they are published in the **Federal Register** or on the website of the Department.

IV.A. Grant Administration

IV.A.1. Duplication of Benefits (DOB). HUD published a **Federal Register** notice on June 20, 2019, titled “Updates to Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees” (84 FR 28836) (“2019 DOB Notice”), which revised the DOB requirements that apply to CDBG–DR grants for disasters declared between January 1, 2016 and December 31, 2021. To comply with the Stafford Act and the Appropriations Act, grantees must prevent the duplication of benefits and must have adequate policies and procedures for this purpose. Accordingly, grantees that received funds for disasters occurring in 2021 must follow all requirements in the 2019 DOB Notice and the requirements located in section IV.A of the Consolidated Notice.

IV.A.2. CDBG–DR mitigation set-aside. The 2023 Appropriations Act requires HUD to include in any allocation of CDBG–DR funds for unmet needs an additional amount of 15 percent for mitigation activities (“CDBG–DR mitigation set-aside”). Grantees should consult Table 1 for the amount allocated specifically for the CDBG–DR mitigation set-aside. For purposes of grants under this notice, mitigation activities are defined as those activities that increase resilience to disasters and reduce or eliminate the long-term risk of loss of life, injury, damage to and loss of property, and suffering and hardship, by lessening the impact of future disasters.

In the grantee’s action plan, it must identify how the proposed use of the CDBG–DR mitigation set-aside will: (1) meet the definition of mitigation activities; (2) address the current and future risks as identified in the grantee’s mitigation needs assessment in the MID areas; (3) be CDBG-eligible activities under title I of the HCDA or otherwise eligible pursuant to a waiver or alternative requirement; and (4) meet a national objective.

Unlike recovery activities where grantees must demonstrate that their activities “tie-back” to the specific

disaster and address a specific unmet recovery need for which the CDBG–DR funds were appropriated, activities funded by the CDBG–DR mitigation set-aside do not require such a “tie-back” to the specific qualified disaster that has served as the basis for the grantee’s allocation. Instead, grantees must demonstrate that activities funded by the CDBG–DR mitigation set-aside meet the provisions included as (1) through (4) in the prior paragraph, to be eligible. Grantees must report activities as a “MIT” activity type in DRGR so that HUD and the public can determine that the grantee has met the expenditure requirement for the CDBG–DR mitigation set-aside.

Grantees may also meet the requirement of the CDBG–DR mitigation set-aside by including eligible recovery activities that both address the impacts of the disaster (*i.e.*, have “tie-back” to the specific qualified disaster) and incorporate mitigation measures into the recovery activities. In section II.A.2.b of the Consolidated Notice, grantees are instructed to incorporate mitigation measures when carrying out activities to construct, reconstruct, or rehabilitate residential or non-residential structures with CDBG–DR funds as part of activities eligible under 42 U.S.C. 5305(a) (including activities authorized by waiver and alternative requirement). Additionally, in section II.A.2.c of the Consolidated Notice, grantees are required to establish resilience performance metrics for those activities.

If grantees wish to count those activities towards the grantee’s CDBG–DR mitigation set-aside, grantees must: (1) Document how those activities and the incorporated mitigation measures will meet the definition of mitigation, as provided above; and (2) Report those activities as a “MIT” activity type in DRGR so they are easily tracked.

IV.A.2.a. Mitigation needs assessment. In addition to the requirements prescribed in section III.C.1.a of the Consolidated Notice that grantees must develop an impact and unmet needs assessment, grantees receiving an award under this Allocation Announcement Notice must also include in their action plan a mitigation needs assessment to inform the activities funded by the CDBG–DR mitigation set-aside. Each grantee must assess the characteristics and impacts of current and future hazards identified through its recovery from the qualified disaster and any other Presidentially declared disaster. Mitigation solutions designed to be resilient only for threats and hazards related to a prior disaster can leave a community vulnerable to negative effects from future extreme

events related to other threats or hazards. When risks are identified among other vulnerabilities during the framing and design of mitigation projects, implementation of those projects can enhance protection and save lives, maximize the utility of scarce resources, and benefit the community long after the projects are complete.

Accordingly, each grantee receiving a CDBG–DR allocation under this notice must conduct a risk-based assessment to inform the use of its CDBG–DR mitigation set-aside considering identified current and future hazards. Grantees must assess their mitigation needs in a manner that effectively addresses risks to indispensable services that enable continuous operation of critical business and government functions and are critical to human health and safety or economic security. In the mitigation needs assessment, each grantee must cite data sources and must, at a minimum, use the risks identified in the current FEMA-approved state or local Hazard Mitigation Plan (HMP). If a jurisdiction is currently updating an expired HMP, the grantee’s agency administering the CDBG–DR funds must consult with the agency administering the HMP update to identify the risks that will be included in the assessment. Mitigation needs evolve over time and grantees are to amend the mitigation needs assessment and action plan as conditions change, additional mitigation needs are identified, and additional resources become available.

IV.A.2.b. Connection of programs and projects to the mitigation needs assessment. Grantees are required by section III.C.1.b of the Consolidated Notice to describe the connection between identified unmet needs and the allocation of CDBG–DR resources. In a similar fashion, the plan must provide a clear connection between a grantee’s mitigation needs assessment and its proposed activities in the MID areas funded by the CDBG–DR mitigation set-aside (or outside in connection to the MID areas as described in section II.A.3 of the Consolidated Notice). To maximize the impact of all available funds, grantees are encouraged to coordinate and align these funds with other projects funded with CDBG–DR and CDBG–MIT funds, as well as other disaster recovery activities funded by FEMA, USACE, the U.S. Forest Service, and other agencies as appropriate. Grantees are encouraged to fund planning activities that complement FEMA’s Building Resilient Infrastructure and Communities (BRIC) program and to upgrade mapping, data, and other capabilities to better understand evolving disaster risks.

IV.A.3. Interchangeability of disaster funds. The 2023 Appropriations Act gives the Secretary authority to authorize grantees that receive an award in this Allocation Announcement Notice and under prior or future appropriations to use those funds interchangeably and without limitation for the same activities related to unmet recovery needs in the MID areas resulting from a major disaster in the 2023 Appropriations Act or in prior or future appropriation acts, when the MID areas overlap and when the use of the funds will address unmet recovery needs of major disasters in the 2023 Appropriations Act or in any prior or future appropriation acts.

Based on this authority, the Secretary authorizes grantees receiving a CDBG–DR grant under the 2023 Appropriations Act and prior or future appropriation acts for activities authorized under title I of the HCDA for a specific qualifying disaster(s) to use these funds interchangeably and without limitation for the same activities in MID areas resulting from a major disaster in prior or future appropriation acts, as long as the MID areas overlap and the activities address unmet needs of both disasters.

Grantees are reminded that expanding the eligible beneficiaries of activities in an action plan funded by any prior or future acts to include those impacted by the specific qualifying disaster(s) in this notice requires the submission of a substantial action plan amendment in accordance with section III.C.6 of the Consolidated Notice. Additionally, all waivers and alternative requirements associated with a CDBG–DR grant apply to the use of the funds provided by that grant, regardless of which disaster the funded activity will address.

For example, if a grantee is receiving funds under this notice for a disaster occurring in 2021 and the MID areas for the 2021 disaster overlap with the MID areas for a disaster that occurred in 2017, the grantee may choose to use the funds allocated under this notice to address unmet needs of both the 2017 disaster and the 2021 disaster. In doing so, the grantee must follow the rules and requirements outlined in this notice. However, if the grantee chooses to use its CDBG–DR grant awarded due to a disaster that occurred in 2017 to address unmet needs of both that disaster and the 2021 disaster, the grantee must follow the rules and requirements outlined in the **Federal Register** notices applicable to its CDBG–DR grant for 2017 disasters.

IV.A.4. Assistance to utilities. The 2023 Appropriations Act provides that funds under that Act or the 2022 Appropriations Act “may be used by a

grantee to assist utilities as part of a disaster-related eligible activity under section 105(a) of the Housing and Community Development Act of 1974 (42 U.S.C. 5305(a)).”

Accordingly, paragraph III.G.3 of the Consolidated Notice does not apply to funds under the 2023 Appropriations Act or the 2022 Appropriations Act, and HUD is adding a modified alternative requirement that applies in lieu of paragraph III.G.3. For funds subject to the February 2022 Notice and the May 2022 Notice, HUD made this change through an online waiver, which can be viewed at https://www.hud.gov/sites/dfiles/CPD/documents/CDBG-DR/CDBG-DR-Private-Utility-Req-for-grants-Public-Law-117-43_final.pdf.

While it is possible that not every CDBG–DR assisted utility will serve predominantly low- and moderate-income (LMI) populations, HUD recognizes that LMI populations would benefit especially from the increased resilience and recovery of private utilities. HUD also recognizes that privately-owned, for-profit utilities have a means of obtaining private investment or otherwise recapturing costs from ratepayers. Therefore, HUD’s alternative requirement below includes basic safeguards that HUD has determined are necessary to ensure that costs comply with the certification to give maximum feasible priority to activities that benefit LMI persons and that costs are necessary and reasonable and do not duplicate other financial assistance. The modified alternative requirement also makes clear that assistance to utilities is subject to all other requirements that apply to the use of funds, consistent with the requirement in the 2023 Appropriations Act that funds must be for an “eligible activity under section 105(a).” If a grantee needs to submit a substantial amendment to add any activity based on these new alternative requirements, they must follow section III.C.6.a in the Consolidated Notice.

For grants made in response to 2021 disasters under the 2023 Appropriations Act, the following alternative requirement applies:

A grantee may assist private for-profit, non-profit, or publicly owned utilities as part of disaster-related activities that are eligible under section 105(a) of the HCDA, or otherwise made eligible through a waiver or alternative requirement, provided that the grantee complies with the following:

1. The funded activity must comply with applicable CDBG–DR requirements, including the requirements that the assisted activity will meet a national objective, the activity will address an unmet recovery

need or a risk identified in the grantee's mitigation needs assessment, and if the assistance is provided to a for-profit entity for an economic development project under section 105(a)(17), the grantee must first comply with the underwriting requirements in section II.D.6 of the Consolidated Notice.

2. Each grantee must carry out the grant consistent with the grantee's certification that "With respect to activities expected to be assisted with CDBG-DR funds, the action plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families."

To fortify compliance with the existing certification, if the grantee carries out activities that assist privately-owned, for-profit utilities, the grantee must prioritize assistance to for-profit utilities that will benefit areas where at least 51 percent of the residents are LMI persons and demonstrate how assisting the private, for-profit utility will benefit those areas.

3. The grantee must determine that the costs of the activity to assist a utility are necessary and reasonable and that they do not duplicate other financial assistance. To fortify these requirements and achieve a targeted use of funds and to safeguard against the potential over-subsidization when assistance is used to carry out activities that benefit private, for-profit utilities, the grantee must document that the level of assistance provided to a private, for-profit utility addresses only the actual identified needs of the utility. Additionally, the grantee must establish policies and procedures to ensure that the CDBG-DR funds that assist private, for-profit utilities reflect the actual identified financing needs of the assisted businesses by establishing a mix of financing terms (loan, forgivable loan, and/or grant) for each assisted private, for-profit utility, based on the business's financial capacity, in order to ensure that assistance is based on actual identified need.

IV.B. Modifications of the February 2022 Notice and the May 2022 Notice

IV.B.1. Reimbursement Requirements for Grants Under the 2023 Appropriations Act and Conforming Modifications of Requirements for the 2022 Appropriations Act. This section sets out requirements for 2021 disasters under the 2023 Appropriations Act and also modifies requirements for 2020 and 2021 disasters imposed by the February 2022 Notice and the May 2022 Notice. In paragraph III.F.5 of the Consolidated

Notice, HUD permits grantees to charge to grants the pre-award and pre-application costs of homeowners, renters, businesses, and other qualifying entities for eligible costs these applicants have incurred in response to an eligible disaster covered under a grantee's applicable Allocation Announcement Notice. In addition to other requirements, paragraph III.F.5 stipulates that grantees may charge the eligible pre-application costs to the grant only if (1) the person or private entity incurred the expenses within one year after the applicability date of the grantee's Allocation Announcement Notice (or within one year after the date of the disaster, whichever is later); and (2) the person or entity pays for the cost before the date on which the person or entity applies for CDBG-DR assistance.

Congress may enact multiple supplemental appropriations of CDBG-DR funds for disasters occurring in the same year and HUD may then publish multiple notices announcing CDBG-DR grants for the same disaster. For example, HUD announced CDBG-DR grants for disasters occurring in 2021 in the May 2022 Notice, based on the requirements of the 2022 Appropriations Act. Congress then appropriated additional funds for 2021 disasters in the 2023 Appropriations Act and this notice announces an additional \$1,446,629,000 for all of the remaining unmet needs for those qualifying 2021 disasters. Similarly, some 2020 disasters received two allocations across two Allocation Announcement Notices. In these circumstances, grantees may find it difficult to track expenses incurred within one year after the applicability date of the grantee's Allocation Announcement Notice, given that funds for disasters occurring in 2020 and 2021 are announced in different notices. To avoid confusion and to apply a uniform time frame to reimbursement of all pre-application costs for 2020 and 2021 disasters, the requirement in III.F.5.(1) in the February 2022 Notice, the May 2022 Notice, and this notice that states, "The person or private entity incurred the expenses within one year after the applicability date of the grantee's Allocation Announcement Notice (or within one year after the date of the disaster, whichever is later)" shall not apply, and instead, grantees shall comply with the following alternative: The person or private entity incurred the expenses within one year after the applicability date of the notice (either the February 2022 Notice or the May 2022 Notice) that announced the *initial* allocation of CDBG-DR funds (or within

one year after the date of the disaster, whichever is later).

V. Duration of Funding

The 2023 Appropriations Act makes the funds available for obligation by HUD until expended. HUD waives the provisions at 24 CFR 570.494 and 24 CFR 570.902 regarding timely distribution and expenditure of funds and establishes an alternative requirement providing that each grantee must expend 100 percent of its allocation within six years of the date HUD signs the grant agreement. HUD may extend the period of performance administratively, if good cause for such an extension exists at that time, as requested by the grantee, and approved by HUD. When the period of performance has ended, HUD will close out the grant and any remaining funds not expended by the grantee on appropriate programmatic purposes will be recaptured by HUD.

VI. Assistance Listing Numbers (Formerly Known as the CFDA Number)

The Assistance Listing Numbers (formerly known as the Catalog of Federal Domestic Assistance numbers) for the disaster recovery grants under this notice are as follows: 14.218; 14.228.

VII. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available online on HUD's CDBG-DR website at https://www.hud.gov/program_offices/comm_planning/cdbg-dr. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Adrienne Todman,
Deputy Secretary.

Appendix A

Allocation of CDBG–DR Funds to Most Impacted and Distressed Areas Due to Presidentially Declared Disasters Occurring in 2021

This notice announces the balance of funds calculated for qualifying 2021 disasters. Appendix A of the May 2022 Notice describes the methodology for calculating allocations that HUD made for unmet recovery and mitigation needs for 2021 disasters. HUD used the same allocation methodology for 2021 disasters receiving funds under the 2023 Appropriations Act and under the 2022 Appropriations Act. At the time of the allocations under the 2022 Appropriations Act, HUD had calculated total unmet recovery and mitigation needs for 2021 disasters as \$3,660,224,000. However, only \$2,213,595,000 was available under the 2022 Appropriations Act for 2021 disasters. This new allocation under the 2023 Appropriations Act fills the gap of \$1,446,629,000 (that is the calculated unmet recovery and mitigation needs of \$3,660,224,000 less the \$2,213,595,000 previously allocated).

Of the \$2 billion appropriated under the 2023 Appropriations Act, a future **Federal Register** notice will address the allocation of the remaining \$553,371,000 for disasters occurring in 2022.

Appendix B—The Consolidated Notice CDBG–DR Consolidated Notice Waivers and Alternative Requirements

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I. Waivers and Alternative Requirements

CDBG–DR grantees that are subject to this Consolidated Notice, as indicated in each **Federal Register** notice that announces allocations of the appropriated CDBG–DR funds (“Allocation Announcement Notice”), must comply with all waivers and alternative requirements in the Consolidated Notice, unless expressly made inapplicable (*e.g.*, a waiver that applies to states only does not apply to units of general local governments and Indian tribes). Except as described in applicable waivers and alternative requirements, the statutory and regulatory provisions governing the CDBG program (and for Indian tribes, the Indian CDBG program) shall apply to grantees receiving a CDBG–DR allocation. Statutory provisions (title I of the HCDA) that apply to all grantees can be found at 42 U.S.C. 5301 *et seq.* and regulatory requirements, which differ for each type of grantee, are described in each of the three paragraphs below.

Except as modified, the State CDBG program rules shall apply to state grantees receiving a CDBG–DR allocation. Applicable State CDBG program regulations are found at 24 CFR part 570, subpart I. For insular areas, HUD waives the provisions of 24 CFR part 570, subpart F and imposes the following alternative requirement: Insular areas shall administer their CDBG–DR allocations in accordance with the regulatory and statutory provisions governing the State CDBG program, as modified by the Consolidated Notice.

Except as modified, statutory and regulatory provisions governing the Entitlement CDBG Program shall apply to unit of general local government grantees (often referred to as local government grantees in appropriations acts). Applicable Entitlement CDBG Program regulations are found at 24 CFR part 570, as described in 570.1(a).

Except as modified, CDBG–DR grants made by HUD to Indian tribes shall be subject to the statutory provisions in title I of the HCDA that apply to Indian tribes and the regulations in 24 CFR part 1003 governing the Indian CDBG program, except those requirements in part 1003 related to the funding application and selection process.

References to the action plan in the above regulations shall refer to the action plan required by the Consolidated Notice and not to the consolidated plan action plan required by 24 CFR part 91. All references pertaining to timelines and/or deadlines are in terms of calendar days unless otherwise noted.

II. Eligible Activities

II.A. Clarification of Disaster-Related Activities

CDBG–DR funds are provided for necessary expenses for activities authorized under title I of the HCDA related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation of risk associated with activities carried out for these purposes, in the “most impacted and distressed” areas (identified by HUD or the grantee) resulting from a major disaster. All CDBG–DR funded activities must address an impact of the disaster for

which funding was allocated. Accordingly, each activity must: (1) address a direct or indirect impact from the disaster in a most impacted and distressed area; (2) be a CDBG-eligible activity (or be eligible under a waiver or alternative requirement); and (3) meet a national objective. When appropriations acts provide an additional allocation amount for mitigation of hazard risks that does not require a connection to the qualifying major disaster, requirements for the use of those funds will be included in the Allocation Announcement Notice.

II.A.1. *Documenting a Connection to the Disaster.* Grantees must maintain records that document how each funded activity addresses a direct or indirect impact from the disaster. Grantees may do this by linking activities to a disaster recovery need that is described in the impact and unmet needs assessment in the action plan (requirements for the assessment are addressed in section III.C.1.a.). Sufficient documentation of physical loss must include damage or rebuilding estimates, insurance loss reports, images, or similar information that documents damage caused by the disaster. Sufficient documentation for non-physical disaster-related impacts must clearly show how the activity addresses the disaster impact, *e.g.*, for economic development activities, data about job loss or businesses closing after the disaster or data showing how pre-disaster economic stressors were aggravated by the disaster; or for housing activities, a post-disaster housing analysis that describes the activities that are necessary to address the post-disaster housing needs.

II.A.2. *Resilience and hazard mitigation.* The Consolidated Notice will help to improve long-term community resilience by requiring grantees to fully incorporate mitigation measures that will protect the public, including members of protected classes, vulnerable populations, and underserved communities, from the risks identified by the grantee among other vulnerabilities. This approach will better ensure the revitalization of the community long after the recovery projects are complete.

Accordingly, HUD is adopting the following alternative requirement to section 105(a): Grantees may carry out the activities described in section 105(a), as modified by waivers and alternative requirements, to the extent that the activities comply with the following:

II.A.2.a. *Alignment with mitigation plans.* Grantees must ensure that the mitigation measures identified in their action plan will align with existing hazard mitigation plans submitted to the Federal Emergency Management Agency (FEMA) under section 322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5165) or other state, local, or tribal hazard mitigation plans.

II.A.2.b. *Mitigation measures.* Grantees must incorporate mitigation measures when carrying out activities to construct, reconstruct, or rehabilitate residential or non-residential structures with CDBG–DR funds as part of activities eligible under 42 U.S.C. 5305(a) (including activities authorized by waiver and alternative requirement). To meet this alternative requirement, grantees must

demonstrate that they have incorporated mitigation measures into CDBG–DR activities as a construction standard to create communities that are more resilient to the impacts of recurring natural disasters and the impacts of climate change. When determining which mitigation measures to incorporate, grantees should design and construct structures to withstand existing and future climate impacts expected to occur over the service life of the project.

II.A.2.c. Resilience performance metrics. Before carrying out CDBG–DR funded activities to construct, reconstruct, or rehabilitate residential or non-residential structures, the grantee must establish resilience performance metrics for the activity, including: (1) an estimate of the projected risk to the completed activity from natural hazards, including those hazards that are influenced by climate change (e.g., high winds destroying newly built homes), (2) identification of the mitigation measures that will address the projected risks (e.g., using building materials that are able to withstand high winds), and (3) an assessment of the benefit of the grantee’s measures through verifiable data (e.g., 10 newly built homes will withstand high winds up to 100 mph).

II.A.3. Most impacted and distressed (MID) areas. Funds must be used for costs related to unmet needs in the MID areas resulting from qualifying disasters. HUD allocates funds using the best available data that cover the eligible affected areas and identifies MID areas. Grantees are required to use 80 percent of all CDBG–DR funds to benefit the HUD-identified MID areas. The HUD-identified MID areas and the minimum dollar amount that must be spent to benefit those areas will be identified for each grantee in the applicable Allocation Announcement Notice. If a grantee seeks to add other areas to the HUD-identified MID area, the grantee must contact its CPD Representative or CPD Specialist and submit the request with a data-driven analysis that illustrates the basis for designating the additional area as most impacted and distressed as a result of the qualifying disaster.

Grantees may use up to five percent of the total grant award for grant administration. Therefore, HUD will include 80 percent of a grantee’s expenditures for grant administration in its determination that 80 percent of the total award has benefited the HUD-identified MID area. Expenditures for planning activities may also be counted towards the HUD-identified MID area requirement, if the grantee describes in its action plan how those planning activities benefit those areas.

HUD may identify an entire jurisdiction or a ZIP code as a MID area. If HUD designates a ZIP code as a MID area for the purposes of allocating funds, the grantee may expand program operations to the whole county or counties that overlap with the HUD designated ZIP code. A grantee must indicate the decision to expand eligibility to the whole county or counties in its action plan.

Grantees must determine where to use the remaining amount of the CDBG–DR grant, but that portion of the allocation may only be used to address unmet needs and that benefit those areas that the grantee determines are

most impacted and distressed (“grantee-identified MID areas”) within areas that received a presidential major disaster declaration identified by the disaster numbers listed in the applicable Allocation Announcement Notice. The grantee must use quantifiable and verifiable data in its analysis, as referenced in its action plan, to identify the MID areas where it will use the remaining amount of CDBG–DR funds.

Grantee expenditures for eligible unmet needs outside of the HUD-identified or grantee-identified MID areas are allowable, provided that the grantee can demonstrate how the expenditure of CDBG–DR funds outside of the MID areas will address unmet needs identified within the HUD-identified or grantee-identified MID area (e.g., upstream water retention projects to reduce downstream flooding in the HUD-identified MID area).

II.B. Housing Activities and Related Floodplain Issues

Grantees may use CDBG–DR funds for activities that may include, but are not limited to, new construction, reconstruction, and rehabilitation of single-family or multifamily housing, homeownership assistance, buyouts, and rental assistance. The broadening of eligible CDBG–DR activities related to housing under the HCDA is necessary following major disasters in which housing, including large numbers of affordable housing units, have been damaged or destroyed. The following waivers and alternative requirements will assist grantees in addressing the full range of unmet housing needs arising from a disaster.

II.B.1. New housing construction waiver and alternative requirement. 42 U.S.C. 5305(a) and 24 CFR 570.207(b)(3) are waived to the extent necessary to permit new housing construction, subject to the following alternative requirement. When a CDBG–DR grantee carries out a new housing construction activity, 24 CFR 570.202 shall apply and shall be read to extend to new construction in addition to rehabilitation assistance. Private individuals and entities must remain compliant with federal accessibility requirements as well as with the applicable site selection requirements of 24 CFR 1.4(b)(3) and 8.4(b)(5).

II.B.2. Construction standards for new construction, reconstruction, and rehabilitation. HUD is adopting an alternative requirement to require grantees to adhere to the applicable construction standards in II.B.2.a. through II.B.2.d. when carrying out activities to construct, reconstruct, or rehabilitate residential structures with CDBG–DR funds as part of activities eligible under 42 U.S.C. 5305(a) (including activities authorized by waiver and alternative requirement). For purposes of the Consolidated Notice, the terms “substantial damage” and “substantial improvement” shall be as defined in 44 CFR 59.1 unless otherwise noted.

II.B.2.a. Green and resilient building standard for new construction and reconstruction of housing. Grantees must meet the Green and Resilient Building Standard, as defined in this subparagraph, for: (i) all new construction and

reconstruction (i.e., demolishing a housing unit and rebuilding it on the same lot in substantially the same manner) of residential buildings and (ii) all rehabilitation activities of substantially damaged residential buildings, including changes to structural elements such as flooring systems, columns, or load-bearing interior or exterior walls.

The Green and Resilient Building Standard requires that all construction covered by the paragraph above and assisted with CDBG–DR funds meet an industry-recognized standard that has achieved certification under (i) Enterprise Green Communities; (ii) LEED (New Construction, Homes, Midrise, Existing Buildings Operations and Maintenance, or Neighborhood Development); (iii) ICC–700 National Green Building Standard Green+ Resilience; (iv) Living Building Challenge; or (v) any other equivalent comprehensive green building program acceptable to HUD. Additionally, all such covered construction must achieve a minimum energy efficiency standard, such as (i) ENERGY STAR (Certified Homes or Multifamily High-Rise); (ii) DOE Zero Energy Ready Home; (iii) EarthCraft House, EarthCraft Multifamily; (iv) Passive House Institute Passive Building or EnerPHit certification from the Passive House Institute US (PHIUS), International Passive House Association; (v) Greenpoint Rated New Home, Greenpoint Rated Existing Home (Whole House or Whole Building label); (vi) Earth Advantage New Homes; or (vii) any other equivalent energy efficiency standard acceptable to HUD. Grantees must identify, in each project file, which of these Green and Resilient Building Standards will be used for any building subject to this paragraph. However, grantees are not required to use the same standards for each project or building.

II.B.2.b. Standards for rehabilitation of nonsubstantially damaged residential buildings. For rehabilitation other than the rehabilitation of substantially damaged residential buildings described in section II.B.2.a. above, grantees must follow the guidelines specified in the HUD CPD Green Building Retrofit Checklist, available at <https://www.hud.gov/sites/dfiles/CPD/documents/CPD-Green-Building-Retrofit-Checklist.pdf>.

Grantees must apply these guidelines to the extent applicable for the rehabilitation work undertaken, for example, the use of mold resistant products when replacing surfaces such as drywall. Products and appliances replaced as part of the rehabilitation work, must be ENERGY STAR-labeled, WaterSense-labeled, or Federal Energy Management Program (FEMP)-designated products or appliances.

II.B.2.c. Elevation standards for new construction, reconstruction, and rehabilitation of substantial damage, or rehabilitation resulting in substantial improvements. The following elevation standards apply to new construction, rehabilitation of substantial damage, or rehabilitation resulting in substantial improvement of residential structures located in an area delineated as a special flood hazard area or equivalent in FEMA’s data sources. 24 CFR 55.2(b)(1) provides additional information on data sources, which apply to all floodplain designations.

All structures, defined at 44 CFR 59.1, designed principally for residential use, and located in the one percent annual chance (or 100-year) floodplain, that receive assistance for new construction, reconstruction, rehabilitation of substantial damage, or rehabilitation that results in substantial improvement, as defined at 24 CFR 55.2(b)(10), must be elevated with the lowest floor, including the basement, at least two feet above the one percent annual chance floodplain elevation (base flood elevation). Mixed-use structures with no dwelling units and no residents below two feet above base flood elevation, must be elevated or floodproofed, in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(3)(ii) or successor standard, up to at least two feet above base flood elevation.

All Critical Actions, as defined at 24 CFR 55.2(b)(3), within the 500-year (or 0.2 percent annual chance) floodplain must be elevated or floodproofed (in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(2)–(3) or successor standard) to the higher of the 500-year floodplain elevation or three feet above the 100-year floodplain elevation. If the 500-year floodplain is unavailable, and the Critical Action is in the 100-year floodplain, then the structure must be elevated or floodproofed (in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(2)–(3) or successor standard) at least three feet above the 100-year floodplain elevation. Critical Actions are defined as “any activity for which even a slight chance of flooding would be too great, because such flooding might result in loss of life, injury to persons or damage to property.” For example, Critical Actions include hospitals, nursing homes, emergency shelters, police stations, fire stations, and principal utility lines.

In addition to other requirements in this section, grantees must comply with applicable state, local, and tribal codes and standards for floodplain management, including elevation, setbacks, and cumulative substantial damage requirements. Grantees using CDBG–DR funds as the non-Federal match in a FEMA-funded project may apply the alternative requirement for the elevation of structures described in section III.F.6. Structures that are elevated must meet federal accessibility standards.

II.B.2.d. *Broadband infrastructure in housing.* Any substantial rehabilitation, as defined by 24 CFR 5.100, reconstruction, or new construction of a building with more than four rental units must include installation of broadband infrastructure, except where the grantee documents that: (i) the location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible; (ii) the cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity, or in an undue financial burden; or (iii) the structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

II.B.3. *Applicable affordability periods for new construction of affordable rental housing.* To meet the low- and moderate-income housing national objective, rental

housing assisted with CDBG–DR funds must be rented to low- and moderate-income (LMI) households at affordable rents, and a grantee must define “affordable rents” in its action plan. Because the waiver and alternative requirement in II.B.1. authorizes the use of grant funds for new housing construction, HUD is imposing the following alternative requirement to modify the low- and moderate-income housing national objective criteria in 24 CFR 570.208(a)(3) and 570.483(b)(3) for activities involving the new construction of affordable rental housing of five or more units. For activities that will construct five or more units, in addition to other applicable criteria in 24 CFR 570.208(a)(3) and 570.483(b)(3), in its action plan, a grantee must define the affordability standards, including “affordable rents,” the enforcement mechanisms, and applicable timeframes, that will apply to the new construction of affordable rental housing, *i.e.*, when the activity will result in construction of five or more units, the affordability requirements described in the action plan apply to the units that will be occupied by LMI households. The minimum timeframes and other related requirements acceptable for compliance with this alternative requirement are the HOME Investment Partnerships Program (HOME) requirements at 24 CFR 92.252(e), including the table listing the affordability periods at the end of 24 CFR 92.252(e). Therefore, the grantee must adopt and implement enforceable affordability standards that comply with or exceed requirements at 24 CFR 92.252(e)(1) for the new construction of affordable rental housing in structures containing five or more units.

II.B.4. *Affordability period for new construction of homes built for LMI households.* In addition to alternative requirements in II.B.1., the following alternative requirement applies to activities to construct new single-family units for homeownership that will meet the LMI housing national objective criteria. Grantees must establish affordability restrictions on all newly constructed single-family housing (for purposes of the Consolidated Notice, single-family housing is defined as four units or less), that, upon completion, will be purchased and occupied by LMI homeowners. The minimum affordability period acceptable for compliance are the HOME requirements at 24 CFR 92.254(a)(4). If a grantee applies other standards, the periods of affordability applied by a grantee must meet or exceed the applicable HOME requirements in 24 CFR 92.254(a)(4) and the table of affordability periods directly following that provision. Grantees shall establish resale or recapture requirements for housing funded pursuant to this paragraph and shall describe those requirements in the action plan or substantial amendment in which the activity is proposed. The resale or recapture requirements must clearly describe the terms of resale or recapture and the specific circumstances under which resale or recapture will be used. Affordability restrictions must be enforceable and imposed by recorded deed restrictions, covenants, or other similar mechanisms. The affordability restrictions, including the affordability period requirements in this paragraph do not

apply to housing units newly constructed or reconstructed for an owner-occupant to replace the owner-occupant’s home that was damaged by the disaster.

II.B.5. *Homeownership assistance waiver and alternative requirement.* 42 U.S.C. 5305(a)(24) is waived and replaced with the following alternative requirement:

“Provision of direct assistance to facilitate and expand homeownership among persons at or below 120 percent of area median income (except that such assistance shall not be considered a public service for purposes of 42 U.S.C. 5305(a)(8)) by using such assistance to—

(A) subsidize interest rates and mortgage principal amounts for homebuyers with incomes at or below 120 percent of area median income;

(B) finance the acquisition of housing by homebuyers with incomes at or below 120 percent of area median income that is occupied by the homebuyers;

(C) acquire guarantees for mortgage financing obtained by homebuyers with incomes at or below 120 percent of area median income from private lenders, meaning that if a private lender selected by the homebuyer offers a guarantee of the mortgage financing, the grantee may purchase the guarantee to ensure repayment in case of default by the homebuyer. This subparagraph allows the purchase of mortgage insurance by the household but not the direct issuance of mortgage insurance by the grantee;

(D) provide up to 100 percent of any down payment required from homebuyers with incomes at or below 120 percent of area median income; or

(E) pay reasonable closing costs (normally associated with the purchase of a home) incurred by homebuyers with incomes at or below 120 percent of area median income.”

While homeownership assistance, as described above, may be provided to households with incomes at or below 120 percent of the area median income, HUD will only consider those funds used for households with incomes at or below 80 percent of the area median income to qualify as meeting the LMI person benefit national objective.

II.B.6. *Limitation on emergency grant payments—interim mortgage assistance.* 42 U.S.C. 5305(a)(8), 24 CFR 570.201(e), 24 CFR 570.207(b)(4), and 24 CFR 1003.207(b)(4) are modified to extend interim mortgage assistance (IMA) to qualified individuals from three months to up to twenty months. IMA must be used in conjunction with a buyout program, or the rehabilitation or reconstruction of single-family housing, during which mortgage payments may be due but the home is not habitable. A grantee using this alternative requirement must document, in its policies and procedures, how it will determine that the amount of assistance to be provided is necessary and reasonable.

II.B.7. *Buyout activities.* CDBG–DR grantees may carry out property acquisition for a variety of purposes, but buyouts are a type of acquisition for the specific purpose of reducing the risk of property damage. HUD has determined that creating a new activity

and alternative requirement for buyouts is necessary for consistency with the application of other Federal resources commonly used for this type of activity. Therefore, HUD is waiving 42 U.S.C. 5305(a) and establishing an alternative requirement only to the extent necessary to create a new eligible activity for buyouts. The term “buyouts” means the acquisition of properties located in a floodway, floodplain, or other Disaster Risk Reduction Area that is intended to reduce risk from future hazards. Grantees can designate a Disaster Risk Reduction Area, as defined below.

Grantees carrying out buyout activities must establish an open space management plan or equivalent, if one has not already been established, before implementation. The plan must establish full transparency about the planned use of acquired properties post-buyout, or the process by which the planned use will be determined and enforced.

Buyout activities are subject to all requirements that apply to acquisition activities generally including but not limited to, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4601, *et seq.*) and its implementing regulations at 49 CFR part 24, subpart B, unless waived or modified by alternative requirements. Only acquisitions that meet the definition of a “buyout” are subject to the post-acquisition land use restrictions imposed by the alternative requirement (II.B.7.a. below). The key factor in determining whether the acquisition is a buyout is whether the intent of the purchase is to reduce risk of property damage from future flooding or other hazards in a floodway, floodplain, or a Disaster Risk Reduction Area. A grantee that will buyout properties in a Disaster Risk Reduction Area must establish criteria in its policies and procedures to designate an area as a Disaster Risk Reduction Area for the buyout, pursuant to the following requirements:

(1) the area has been impacted by the hazard that has been caused or exacerbated by the disaster for which the grantee received its CDBG–DR allocation;

(2) the hazard identified must be a predictable environmental threat to the safety and well-being of program beneficiaries, including members of protected classes, vulnerable populations, and underserved communities, as evidenced by the best available data (*e.g.*, FEMA Repetitive Loss Data, EPA’s Environmental Justice Screening and Mapping Tool, HHS’s climate change related guidance and data, etc.) and science (such as engineering and structural solutions propounded by FEMA, USACE, other federal agencies, etc.); and

(3) the area must be clearly delineated so that HUD and the public may easily determine which properties are located within the designated area.

Grantees may only redevelop an acquired property if the property is not acquired through a buyout program (*i.e.*, the purpose of acquisition was something other than risk reduction). When acquisitions are not acquired through a buyout program, the purchase price must be consistent with 2 CFR part 200, subpart E—Cost Principles (“cost principles”) and the pre-disaster fair market value may not be used.

II.B.7.a. *Buyout requirements:*

(i) Property to be acquired or accepted must be located within a floodway, floodplain, or Disaster Risk Reduction Area.

(ii) Any property acquired or accepted must be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, floodplain and wetlands management practices, or other disaster-risk reduction practices.

(iii) No new structure will be erected on property acquired or accepted under the buyout program other than:

(a) a public facility that is open on all sides and functionally related to a designated open space (*e.g.*, a park, campground, or outdoor recreation area);

(b) a restroom; or

(c) a flood control structure, provided that:

(1) the structure does not reduce valley storage, increase erosive velocities, or increase flood heights on the opposite bank, upstream, or downstream; and

(2) the local floodplain manager approves the structure, in writing, before commencement of construction of the structure.

(iv) After the purchase of a buyout property with CDBG–DR funds, the owner of the buyout property (including subsequent owners) is prohibited from making any applications to any Federal entity in perpetuity for additional disaster assistance for any purpose related to the property acquired through the CDBG–DR funded buyout, unless the assistance is for an allowed use as described in paragraph (ii) above. The entity acquiring the property may lease or sell it to adjacent property owners or other parties for compatible uses that comply with buyout requirements in return for a maintenance agreement.

(v) A deed restriction or covenant running with the property must require that the buyout property be dedicated and maintained for compatible uses that comply with buyout requirements in perpetuity.

(vi) Grantees must choose from one of two valuation methods (pre-disaster value or post-disaster value) for a buyout program (or a single buyout activity). The grantee must apply its valuation method for all buyouts carried out under the program. If the grantee determines the post-disaster value of a property is higher than the pre-disaster value, a grantee may provide exceptions to its established valuation method on a case-by-case basis. The grantee must describe the process for such exceptions and how it will analyze the circumstances to permit an exception in its buyout policies and procedures. Each grantee must adopt policies and procedures on how it will demonstrate that the amount of assistance for a buyout is necessary and reasonable.

(vii) All buyout activities must be classified using the “buyout” activity type in the Disaster Recovery and Grant Reporting (DRGR) system.

(viii) Any state grantee implementing a buyout program or activity must consult with local or tribal governments within the areas in which buyouts will occur.

II.B.8. *Safe housing incentives in disaster-affected communities.*

The limitation on eligible activities in section 42 U.S.C. 5305(a) is waived and HUD

is establishing the following alternative requirement to establish safe housing incentives as an eligible activity. A safe housing incentive is any incentive provided to encourage households to relocate to suitable housing in a lower risk area or in an area promoted by the community’s comprehensive recovery plan. Displaced persons must receive any relocation assistance to which they are entitled under other legal authorities, such as the URA, section 104(d) of the HCDA, or those described in the Consolidated Notice. The grantee may offer safe housing incentives in addition to the relocation assistance that is legally required.

Grantees must maintain documentation, at least at a programmatic level, describing how the grantee determined the amount of assistance for the incentive was necessary and reasonable, how the incentive meets a national objective, and that the incentives are in accordance with the grantee’s approved action plan and published program design(s). A grantee may require the safe housing incentive to be used for a particular purpose by the household receiving the assistance. However, this waiver does not permit a compensation program meaning that funds may not be provided to a beneficiary to compensate the beneficiary for an estimated or actual amount of loss from the declared disaster. Grantees are prohibited from offering housing incentives to a homeowner as an incentive to induce the homeowner to sell a second home, consistent with the prohibition and definition of second home in section II.B.12.

II.B.9. *National objectives for buyouts and safe housing incentives.*

Activities that assist LMI persons and meet the criteria for the national objectives described below, including in II.B.10., will be considered to benefit LMI persons unless there is substantial evidence to the contrary and will count towards the calculation of a grantee’s overall LMI benefit requirement as described in section III.F.2. The grantee shall appropriately ensure that activities that meet the criteria for any of the national objectives below do not benefit moderate-income persons to the exclusion of low-income persons.

When undertaking buyout activities, to demonstrate that a buyout meets the low- and moderate-income housing (LMH) national objective, grantees must meet all requirements of the HCDA, and applicable regulatory criteria described below. 42 U.S.C. 5305(c)(3) provides that any assisted activity that involves the acquisition of property to provide housing shall be considered to benefit LMI persons only to the extent such housing will, upon completion, be occupied by such persons. In addition, 24 CFR 570.483(b)(3), 24 CFR 570.208(a)(3), and 24 CFR 1003.208(c) apply the LMH national objective to an eligible activity carried out for the purpose of providing or improving permanent residential structures that, upon completion, will be occupied by LMI households.

A buyout program that merely pays homeowners to leave their existing homes does not guarantee that those homeowners will occupy a new residential structure.

Therefore, acquisition-only buyout programs cannot satisfy the LMH national objective criteria.

To meet a national objective that benefits a LMI person, buyout programs can be structured in one of the following ways:

(1) The buyout activity combines the acquisition of properties with another direct benefit—LMI housing activity, such as down payment assistance—that results in occupancy and otherwise meets the applicable LMH national objective criteria;

(2) The activity meets the low- and moderate-income area (LMA) benefit criteria and documents that the acquired properties will have a use that benefits all the residents in a particular area that is primarily residential, where at least 51 percent of the residents are LMI persons. Grantees covered by the “exception criteria” as described in section IV.C. of the Consolidated Notice may apply it to these activities. To satisfy LMA criteria, grantees must define the service area based on the end use of the buyout properties; or

(3) The program meets the criteria for the low- and moderate-income limited clientele (LMC) national objective by restricting buyout program eligibility to exclusively LMI persons and benefiting LMI sellers by acquiring their properties for more than current fair market value (in accordance with the valuation requirements in section II.B.7.a.(vi)).

II.B.10. For LMI Safe Housing Incentive (LMHI). The following alternative requirement establishes new LMI national objective criteria that apply to safe housing incentive (LMHI) activities that benefit LMI households. HUD has determined that providing CDBG–DR grantees with an additional method to demonstrate how safe housing incentive activities benefit LMI households will ensure that grantees and HUD can account for and assess the benefit that CDBG–DR assistance for these activities has on LMI households.

The LMHI national objective may be used when a grantee uses CDBG–DR funds to carry out a safe housing incentive activity that benefits one or more LMI persons. To meet the LMHI national objective, the incentive must be (a.) tied to the voluntary acquisition of housing (including buyouts) owned by a qualifying LMI household and made to induce a move outside of the affected floodplain or disaster risk reduction area to a lower-risk area or structure; or (b.) for the purpose of providing or improving residential structures that, upon completion, will be occupied by a qualifying LMI household and will be in a lower risk area.

II.B.11. Redevelopment of acquired properties. Although properties acquired through a buyout program may not be redeveloped, grantees may redevelop other acquired properties. For non-buyout acquisitions, HUD has not permitted the grantee to base acquisition cost on pre-disaster fair market value. The acquisition cost must comply with applicable cost principles and with the acquisition requirements at 49 CFR 24, Subpart B, as revised by the Consolidated Notice waivers and alternative requirements. In addition to the purchase price, grantees may opt to

provide optional relocation assistance, as allowable under Section 104 and 105 of the HCDA (42 U.S.C. 5304 and 42 U.S.C. 5305) and 24 CFR 570.606(d), and as expanded by section IV.F.5. of the Consolidated Notice, to the owner of a property that will be redeveloped if: (a.) the property is purchased by the grantee or subrecipient through voluntary acquisition; and (b.) the owner’s need for additional assistance is documented. Any optional relocation assistance must provide equal relocation assistance within each class of displaced persons, including but not limited to providing reasonable accommodation exceptions to persons with disabilities. See 24 CFR 570.606(d) for more information on optional relocation assistance. In addition, tenants displaced by these voluntary acquisitions may be eligible for URA relocation assistance. In carrying out acquisition activities, grantees must ensure they are in compliance with the long-term redevelopment plans of the community in which the acquisition and redevelopment is to occur.

II.B.12. Alternative requirement for housing rehabilitation—assistance for second homes. HUD is instituting an alternative requirement to the rehabilitation provisions at 42 U.S.C. 5305(a)(4) as follows: properties that served as second homes at the time of the disaster, or following the disaster, are not eligible for rehabilitation assistance or safe housing incentives. This prohibition does not apply to acquisitions that meet the definition of a buyout. A second home is defined for purposes of the Consolidated Notice as a home that is not the primary residence of the owner, a tenant, or any occupant at the time of the disaster or at the time of application for CDBG–DR assistance. Grantees can verify a primary residence using a variety of documentation including, but not limited to, voter registration cards, tax returns, homestead exemptions, driver’s licenses, and rental agreements. Acquisition of second homes at post-disaster fair market value is not prohibited.

II.C. Infrastructure (Public Facilities, Public Improvements), Match, and Elevation of Non-Residential Structures

HUD is adopting an alternative requirement to require grantees to adhere to the applicable construction standards and requirements in II.C.1., II.C.2. and II.C.4., which apply only to those eligible activities described in those paragraphs.

II.C.1. Infrastructure planning and design. All newly constructed infrastructure that is assisted with CDBG–DR funds must be designed and constructed to withstand extreme weather events and the impacts of climate change. To satisfy this requirement, the grantee must identify and implement resilience performance metrics as described in section II.A.2.

For purposes of this requirement, an infrastructure activity includes any activity or group of activities (including acquisition or site or other improvements), whether carried out on public or private land, that assists the development of the physical assets that are designed to provide or support services to the general public in the following sectors: Surface transportation, including

roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from renewable, nuclear, and hydro sources; electricity transmission; broadband; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; schools, hospitals, and housing shelters; and other sectors as may be determined by the Federal Permitting Improvement Steering Council. For purposes of this requirement, an activity that falls within this definition is an infrastructure activity regardless of whether it is carried out under sections 105(a)(2), 105(a)(4), 105(a)(14), another section of the HCDA, or a waiver or alternative requirement established by HUD. Action plan requirements related to infrastructure activities are found in section III.C.1.e. of the Consolidated Notice.

II.C.2. Elevation of nonresidential structure. Nonresidential structures, including infrastructure, assisted with CDBG–DR funds must be elevated to the standards described in this paragraph or floodproofed, in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(3)(ii) or successor standard, up to at least two feet above the 100-year (or one percent annual chance) floodplain. All Critical Actions, as defined at 24 CFR 55.2(b)(3), within the 500-year (or 0.2 percent annual chance) floodplain must be elevated or floodproofed (in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(2)–(3) or successor standard) to the higher of the 500-year floodplain elevation or three feet above the 100-year floodplain elevation. If the 500-year floodplain or elevation is unavailable, and the Critical Action is in the 100-year floodplain, then the structure must be elevated or floodproofed at least three feet above the 100-year floodplain elevation. Activities subject to elevation requirements must comply with applicable federal accessibility mandates.

In addition to the other requirements in this section, the grantee must comply with applicable state, local, and tribal codes and standards for floodplain management, including elevation, setbacks, and cumulative substantial damage requirements. Grantees using CDBG–DR funds as the non-Federal match in a FEMA-funded project may apply the alternative requirement for the elevation of structures described in section IV.D.5.

II.C.3. CDBG–DR funds as match. As provided by the HCDA, grant funds may be used to satisfy a match requirement, share, or contribution for any other Federal program when used to carry out an eligible CDBG–DR activity. This includes programs or activities administered by the FEMA or the U.S. Army Corps of Engineers (USACE). By law, (codified in the HCDA as a note to section 105(a)) only \$250,000 or less of CDBG–DR funds may be used for the non-Federal cost-share of any project funded by USACE. Appropriations acts prohibit the use of CDBG–DR funds for any activity reimbursable by, or for which funds are also made available by FEMA or USACE.

In response to a disaster, FEMA may implement, and grantees may elect to follow,

alternative procedures for FEMA's Public Assistance Program, as authorized pursuant to Section 428 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"). Like other projects, grantees may use CDBG-DR funds as a matching requirement, share, or contribution for Section 428 Public Assistance Projects. For all match activities, grantees must document that CDBG-DR funds have been used for the actual costs incurred for the assisted project and for costs that are eligible, meet a national objective, and meet other applicable CDBG requirements.

II.C.4. Requirements for flood control structures. Grantees that use CDBG-DR funds to assist flood control structures (*i.e.*, dams and levees) are prohibited from using CDBG-DR funds to enlarge a dam or levee beyond the original footprint of the structure that existed before the disaster event, without obtaining pre-approval from HUD and any Federal agencies that HUD determines are necessary based on their involvement or potential involvement with the levee or dam. Grantees that use CDBG-DR funds for levees and dams are required to: (1) register and maintain entries regarding such structures with the USACE National Levee Database or National Inventory of Dams; (2) ensure that the structure is admitted in the USACE PL 84-99 Program (Levee Rehabilitation and Inspection Program); (3) ensure the structure is accredited under the FEMA National Flood Insurance Program; (4) enter the exact location of the structure and the area served and protected by the structure into the DRGR system; and (5) maintain file documentation demonstrating that the grantee has conducted a risk assessment before funding the flood control structure and documentation that the investment includes risk reduction measures.

II.D. Economic Revitalization and Section 3 Requirements on Economic Opportunities

CDBG-DR funds can be used for CDBG-DR eligible activities related to economic revitalization. The attraction, retention, and return of businesses and jobs to a disaster-impacted area is critical to long-term recovery. Accordingly, for CDBG-DR purposes, economic revitalization may include any CDBG-DR eligible activity that demonstrably restores and improves the local economy through job creation and retention or by expanding access to goods and services. The most common CDBG-DR eligible activities to support economic revitalization are outlined in 24 CFR 570.203 and 570.204 and sections 105(a)(14), (15), and (17) of the HCDA.

Based on the U.S. Change Research Program's Fourth National Climate Assessment, climate-related natural hazards, extreme events, and natural disasters disproportionately affect LMI individuals who belong to underserved communities because they are less able to prepare for, respond to, and recover from the impacts of extreme events and natural hazards, or are members of communities that have experienced significant disinvestment and historic discrimination. Therefore, HUD is imposing the following alternative requirement: When funding activities under section 105(a) of the HCDA that support

economic revitalization, grantees must prioritize those underserved communities that have been impacted by the disaster and that were economically distressed before the disaster, as described further below in II.D.1.

The term "underserved communities" refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life. Underserved communities that were economically distressed before the disaster include, but are not limited to, those areas that were designated as a Promise Zone, Opportunity Zone, a Neighborhood Revitalization Strategy Area, a tribal area, or those areas that meet at least one of the distress criteria established for the designation of an investment area of Community Development Financial Institution at 12 CFR 1805.201(b)(3)(ii)(D).

Grantees undertaking an economic revitalization activity must maintain supporting documentation to demonstrate how the grantee has prioritized underserved communities for purposes of its activities that support economic revitalization, as described below in II.D.1.

II.D.1. Prioritizing economic revitalization assistance—alternative requirement. When funding activities outlined in 24 CFR 570.203 and 570.204 and sections 105(a)(14), (15), and (17) of the HCDA, HUD is instituting an alternative requirement in addition to the other requirements in these provisions to require grantees to prioritize assistance to disaster-impacted businesses that serve underserved communities and spur economic opportunity for underserved communities that were economically distressed before the disaster.

II.D.2. National objective documentation for activities that support economic revitalization. 24 CFR 570.208(a)(4)(i)&(ii), 24 CFR 570.483(b)(4)(i)&(ii), 24 CFR 570.506(b)(5)&(6), and 24 CFR 1003.208(d) are waived to allow the grantees under the Consolidated Notice to identify the LMI jobs benefit by documenting, for each person employed, the name of the business, type of job, and the annual wages or salary of the job. HUD will consider the person income-qualified if the annual wages or salary of the job is at or under the HUD-established income limit for a one-person family. This method replaces the standard CDBG requirement—in which grantees must review the annual wages or salary of a job in comparison to the person's total household income and size (*i.e.*, the number of persons). Thus, this method streamlines the documentation process by allowing the collection of wage data for each position created or retained from the assisted businesses, rather than from each individual household.

II.D.3. Public benefit for activities that support economic revitalization. When applicable, the public benefit provisions set standards for individual economic development activities (such as a single loan to a business) and for the aggregate of all economic development activities. Economic development activities support economic revitalization. Currently, public benefit

standards limit the amount of CDBG assistance per job retained or created, or the amount of CDBG assistance per LMI person to whom goods or services are provided by the activity. These dollar thresholds can impede recovery by limiting the amount of assistance the grantee may provide to a critical activity.

HUD waives the public benefit standards at 42 U.S.C. 5305(e)(3), 24 CFR 570.482(f)(1), (2), (3), (4)(i), (5), and (6), and 570.209(b)(1), (2), (3)(i), (4), and 24 CFR 1003.302(c) for all economic development activities. Paragraph (g) of 24 CFR 570.482 and paragraph (c) and (d) under 570.209 are also waived to the extent these provisions are related to public benefit. However, grantees that choose to take advantage of this waiver in lieu of complying with public benefit standards under the existing regulatory requirements shall be subject to the following condition: grantees shall collect and maintain documentation in the project file on the creation and retention of total jobs; the number of jobs within appropriate salary ranges, as determined by the grantee; the average amount of assistance provided per job, by activity or program; and the types of jobs. Additionally, grantees shall report the total number of jobs created and retained and the applicable national objective in the DRGR system.

II.D.4. Clarifying note on Section 3 worker eligibility and documentation requirements. Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) (Section 3) applies to CDBG-DR activities that are Section 3 projects, as defined at 24 CFR 75.3(a)(2). The purpose of Section 3 is to ensure that economic opportunities, most importantly employment, generated by certain HUD financial assistance shall be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing or residents of the community in which the Federal assistance is spent. CDBG-DR grantees are directed to HUD's guidance published in CPD Notice 2021-09, "Section 3 of the Housing and Urban Development Act of 1968, as amended by the Housing and Community Development Act of 1992, final rule requirements for CDBG, CDBG-CV, CDBG-DR, CDBG-Mitigation (CDBG-MIT), NSP, Section 108, and RHP projects," as amended (<https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-09cpdn.pdf>). All direct recipients of CDBG-DR funding must report Section 3 information through the DRGR system.

II.D.5. Waiver and modification of the job relocation clause to permit assistance to help a business return. CDBG requirements prevent program participants from providing assistance to a business to relocate from one labor market area to another if the relocation is likely to result in a significant loss of jobs in the labor market from which the business moved. This prohibition can be a critical barrier to reestablishing and rebuilding a displaced employment base after a major disaster. Therefore, 42 U.S.C. 5305(h), 24 CFR 570.210, 24 CFR 570.482(h), and 24 CFR 1003.209, are waived to allow a grantee to provide assistance to any business that was operating in the disaster-declared labor market area before the incident date of the

applicable disaster and has since moved, in whole or in part, from the affected area to another state or to another labor market area within the same state to continue business.

II.D.6. Underwriting. Notwithstanding section 105(e)(1) of the HCDA, no CDBG-DR funds may be provided to a for-profit entity for an economic development project under section 105(a)(17) of the HCDA unless such project has been evaluated and selected in accordance with guidelines developed by HUD pursuant to section 105(e)(2) of the HCDA for evaluating and selecting economic development projects. Grantees and their subrecipients are required to comply with the underwriting guidelines in Appendix A to 24 CFR part 570 if they are using grant funds to provide assistance to a for-profit entity for an economic development project under section 105(a)(17) of the HCDA. The underwriting guidelines are found at Appendix A of 24 CFR part 570.

II.D.7. Limitation on use of funds for eminent domain. CDBG-DR funds may not be used to support any Federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use. For purposes of this paragraph, public use shall not be construed to include economic development that primarily benefits private entities. The following shall be considered a public use for the purposes of eminent domain: any use of funds for (1) mass transit, railroad, airport, seaport, or highway projects; (2) utility projects that benefit or serve the general public, including energy related, communication-related, water related, and wastewater-related infrastructure; (3) other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government; and (4) projects for the removal of an immediate threat to public health and safety, including the removal of a brownfield as defined in the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118).

III. Grant Administration

III.A. Pre-Award Evaluation of Management and Oversight of Funds

III.A.1. Certification of financial controls and procurement processes, and adequate procedures for proper grant management. Appropriations acts require that the Secretary certify that the grantee has in place proficient financial controls and procurement processes and has established adequate procedures to prevent any duplication of benefits as defined by section 312 of the Stafford Act, 42 U.S.C. 5155, to ensure timely expenditure of funds, to maintain a comprehensive website regarding all disaster recovery activities assisted with these funds, and to detect and prevent waste, fraud, and abuse of funds.

III.A.1.a. Documentation requirements. To enable the Secretary to make this certification, each grantee must submit to HUD the certification documentation listed below. This information must be submitted within 60 days of the applicability date of the Allocation Announcement Notice, or with the grantee's submission of its action plan in

DRGR as described in section III.C.1, whichever date is earlier. If required by appropriations acts, grant agreements will not be executed until the Secretary has issued a certification for the grantee. For each of the items (1) through (6) below (collectively referred to as the "Financial Management and Grant Compliance Certification Requirements") the grantee must certify to the accuracy of its submission when submitting the Financial Management and Grant Compliance Certification Checklist (the "Certification Checklist"). The Certification Checklist is a document that incorporates all of the Financial Management and Grant Compliance Certification Requirements. Not all of the requirements in (1) through (6) below are appropriate or applicable to Indian tribes. Therefore, Indian tribes that receive an allocation directly from HUD may request an alternative method to document support for the Secretary's certification.

(1) Proficient financial management controls. A grantee has proficient financial management controls if each of the following criteria is satisfied:

(a) The grantee agency administering this grant submits its most recent single audit and consolidated annual financial report (CAFR), which in HUD's determination indicates that the grantee has no material weaknesses, deficiencies, or concerns that HUD considers to be relevant to the financial management of CDBG, CDBG-DR, or CDBG-MIT funds. If the single audit or CAFR identified weaknesses or deficiencies, the grantee must provide documentation satisfactory to HUD showing how those weaknesses have been removed or are being addressed. (b) The grantee has completed and submitted the certification documentation required in the applicable Certification Checklist. The grantee's documentation must demonstrate that the standards meet the requirements in the Consolidated Notice and the Certification Checklist.

(2) Each grantee must provide HUD its procurement processes for review, so HUD may evaluate the grantee's processes to determine that they are based on principles of full and open competition. A grantee's procurement processes must comply with the procurement requirements at section IV.B.

(a) A state grantee has proficient procurement processes if HUD determines that its processes uphold the principles of full and open competition and include an evaluation of the cost or price of the product or service, and if its procurement processes reflect that it:

- (i) adopted 2 CFR 200.318 through 200.327;
- (ii) follows its own state procurement policies and procedures and establishes requirements for procurement processes for local governments and subrecipients based on full and open competition pursuant to 24 CFR 570.489(g), and the requirements for the state, its local governments, and subrecipients include evaluation of the cost or price of the product or service; or
- (iii) adopted 2 CFR 200.317, meaning that it will follow its own state procurement processes and evaluate the cost or price of the product or service, but impose 2 CFR 200.318 through 200.327 on its subrecipients.

(b) A local government grantee has proficient procurement processes if the processes are consistent with the specific applicable procurement standards identified in 2 CFR 200.318 through 200.327. When the grantee provides a copy of its procurement processes, it must indicate the sections that incorporate these provisions.

(c) An Indian tribe grantee has proficient procurement processes if its procurement standards are consistent with procurement requirements in 2 CFR part 200 imposed by 24 CFR 1003.501, and additional procurement requirements in 1003.509(e) and 1003.510.

(3) Duplication of benefits. A grantee has adequate policies and procedures to prevent the duplication of benefits (DOB) if the grantee submits and identifies a uniform process that reflects the requirements in section IV.A of the Consolidated Notice, including:

(a) determining all disaster assistance received by the grantee or applicant and all reasonably identifiable financial assistance available to the grantee or applicant, as applicable, before committing funds or awarding assistance;

(b) determining a grantee's or an applicant's unmet need(s) for CDBG-DR assistance before committing funds or awarding assistance; and

(c) requiring beneficiaries to enter into a signed agreement to repay any duplicative assistance if they later receive additional assistance for the same purpose for which the CDBG-DR award was provided. The grantee must identify a method to monitor compliance with the agreement for a reasonable period (*i.e.*, a time period commensurate with risk) and must articulate this method in its policies and procedures, including the basis for the period during which the grantee will monitor compliance. This agreement must also include the following language: "Warning: Any person who knowingly makes a false claim or statement to HUD or causes another to do so may be subject to civil or criminal penalties under 18 U.S.C. 2, 287, 1001 and 31 U.S.C. 3729."

Policies and procedures of the grantee submitted to support the certification must provide that before the award of assistance, the grantee will use the best, most recent available data from FEMA, the Small Business Administration (SBA), insurers, and any other sources of local, state, and Federal sources of funding to prevent the duplication of benefits.

(4) Timely expenditures. A grantee has adequate policies and procedures to determine timely expenditures if it submits policies and procedures that indicate the following to HUD: how it will track and document expenditures of the grantee and its subrecipients (both actual and projected reported in performance reports); how it will account for and manage program income; how it will reprogram funds in a timely manner for activities that are stalled; and how it will project expenditures of all CDBG-DR funds within the period provided for in section V.A.

(5) Comprehensive disaster recovery website. A grantee has adequate policies and

procedures to maintain a comprehensive accessible website if it submits policies and procedures indicating to HUD that the grantee will have a separate web page dedicated to its disaster recovery activities assisted with CDBG-DR funds that includes the information described at section III.D.1.d.-e. The procedures must also indicate the frequency of website updates. At minimum, grantees must update their website quarterly.

(6) Procedures to detect and prevent fraud, waste, and abuse. A grantee has adequate procedures to detect and prevent fraud, waste, and abuse if it submits procedures that indicate:

(a) how the grantee will verify the accuracy of information provided by applicants;

(b) the criteria to be used to evaluate the capacity of potential subrecipients;

(c) the frequency with which the grantee will monitor other agencies of the grantee that will administer CDBG-DR funds, and how it will monitor subrecipients, contractors, and other program participants, and why monitoring is to be conducted and which items are to be monitored;

(d) it has or will hire an internal auditor that provides both programmatic and financial oversight of grantee activities, and has adopted policies that describes the auditor's role in detecting fraud, waste, and abuse, which policies must be submitted to HUD;

(e) (i) for states or grantees subject to the same requirements as states, a written standard of conduct and conflicts of interest policy that complies with the requirements of 24 CFR 570.489(g) and (h) and subparagraph III.A.1.a(2)(a) of the Consolidated Notice, which policy includes the process for promptly identifying and addressing such conflicts;

(ii) for units of general local government or grantees subject to the same requirements as units of general local government, a written standard of conduct and conflicts of interest policy that complies with 24 CFR 570.611 and 2 CFR 200.318, as applicable, which includes the process for promptly identifying and addressing such conflicts;

(iii) for Indian tribes, a written standard of conduct and conflicts of interest policy that complies with 24 CFR 1003.606, as applicable; and

(f) it assists in investigating and taking action when fraud occurs within the grantee's CDBG-DR activities and/or programs. All grantees receiving CDBG-DR funds for the first time shall attend and require subrecipients to attend fraud related training provided by HUD OIG, when offered, to assist in the proper management of CDBG-DR grant funds. Instances of fraud, waste, and abuse should be referred to the HUD OIG Fraud Hotline (phone: 1-800-347-3735 or email: hotline@hudoig.gov).

Following a disaster, property owners and renters are frequently the targets of persons fraudulently posing as government employees, creditors, mortgage servicers, insurance adjusters, and contractors. The grantee's procedures must address how the grantee will make CDBG-DR beneficiaries aware of the risks of contractor fraud and other potentially fraudulent activity that can

occur in communities recovering from a disaster. Grantees must provide CDBG-DR beneficiaries with information that raises awareness of possible fraudulent activity, how the fraud can be avoided, and what local or state agencies to contact to take action and protect the grantee and beneficiary investment. The grantee's procedures must address the steps it will take to assist a CDBG-DR beneficiary if the beneficiary experiences contractor or other fraud. If the beneficiary is eligible for additional assistance as a result of the fraudulent activity and the creation of remaining unmet need, the procedures must also address what steps the grantee will follow to provide the additional assistance.

III.A.1.b. *Relying on prior submissions—financial management and grant compliance certification requirements.* This section only applies once a grantee has received a CDBG-DR grant through an Allocation Announcement Notice that makes the Consolidated Notice applicable. After that original grant, if a CDBG-DR grantee is awarded a subsequent CDBG-DR grant, HUD will rely on the grantee's prior submissions provided in response to the Financial Management and Grant Compliance Certification Requirements in the Consolidated Notice. HUD will continue to monitor the grantee's submissions and updates made to policies and procedures during the normal course of business. The grantee must notify HUD of any substantial changes made to these submissions.

If a CDBG-DR grantee is awarded a subsequent CDBG-DR grant, and it has been more than three years since the executed grant agreement for the original CDBG-DR grant or a subsequent grant is equal to or greater than ten times the amount of the original CDBG-DR grant, grantees must update and resubmit the documentation required by paragraph III.A.1.a. with the completed Certification Checklist to enable the Secretary to certify that the grantee has in place proficient financial controls and procurement processes, and adequate procedures for proper grant management. However, the Secretary may require any CDBG-DR grantee to update and resubmit the documentation required by paragraph III.A.1.a., if there is good cause to require it.

III.A.2. *Implementation plan.* HUD requires each grantee to demonstrate that it has sufficient capacity to manage the CDBG-DR funds and the associated risks. Grantees must evidence their management capacity through their implementation plan submissions. These submissions must meet the criteria below and must be submitted within 120 days of the applicability date of the governing Allocation Announcement Notice or with the grantee's submission of its action plan, whichever is earlier, unless the grantee has requested, and HUD has approved an extension of the submission deadline.

III.A.2.a. To enable HUD to assess risk as described in 2 CFR 200.206, the grantee will submit an implementation plan to HUD. The implementation plan must describe the grantee's capacity to carry out the recovery and how it will address any capacity gaps. HUD will determine that the grantee has sufficient management capacity to adequately

reduce risk if the grantee submits implementation plan documentation that addresses (1) through (3) below:

(1) Capacity assessment. The grantee identifies the lead agency responsible for implementation of the CDBG-DR award and indicates that the head of that agency will report directly to the chief executive officer of the jurisdiction. The grantee has conducted an assessment of its capacity to carry out CDBG-DR recovery efforts and has developed a timeline with milestones describing when and how the grantee will address all capacity gaps that are identified. The assessment must include a list of any open CDBG-DR findings and an update on the corrective actions undertaken to address each finding.

(2) Staffing. The grantee must submit an organizational chart of its department or division and must also provide a table that clearly indicates which personnel or organizational unit will be responsible for each of the Financial Management and Grant Compliance Certification Requirements identified in section III.A.1.a. along with staff contact information, if available (*i.e.* personnel responsible for conducting DOB analysis, timely expenditure, website management, monitoring and compliance, and financial management). The grantee must also submit documentation demonstrating that it has assessed staff capacity and identified positions for the purpose of: case management in proportion to the applicant population; program managers who will be assigned responsibility for each primary recovery area; staff who have demonstrated experience in housing, infrastructure (as applicable), and economic revitalization (as applicable); staff responsible for procurement/contract management, regulations implementing Section 3 of the Housing and Urban Development Act of 1968, as amended (24 CFR part 75) (Section 3), fair housing compliance, and environmental compliance. An adequate plan must also demonstrate that the internal auditor and responsible audit staff report independently to the chief elected or executive officer or board of the governing body of any designated administering entity.

The grantee's implementation plan must describe how it will provide technical assistance for any personnel that are not employed by the grantee at the time of action plan submission, and to fill gaps in knowledge or technical expertise required for successful and timely recovery. State grantees must also include how it plans to provide technical assistance to subgrantees and subrecipients, including units of general local government.

(3) Internal and interagency coordination. The grantee's plan must describe how it will ensure effective communication between different departments and divisions within the grantee's organizational structure that are involved in CDBG-DR-funded recovery efforts, mitigation efforts, and environmental review requirements, as appropriate; between its lead agency and subrecipients responsible for implementing the grantee's action plan; and with other local and regional planning efforts to ensure consistency. The grantee's submissions must demonstrate how it will

consult with other relevant government agencies, including the State Hazard Mitigation Officer (SHMO), State or local Disaster Recovery Coordinator, floodplain administrator, and any other state and local emergency management agencies, such as public health and environmental protection agencies, that have primary responsibility for the administration of FEMA or USACE funds.

III.A.2.b. *Relying on prior submissions—Implementation plan.* This section only applies once a grantee has received a CDBG-DR grant through an Allocation Announcement Notice that makes the Consolidated Notice applicable. After that original grant, if a CDBG-DR grantee is awarded a subsequent CDBG-DR grant, HUD will rely on the grantee's implementation plan submitted for its original CDBG-DR grant unless it has been more than three years since the executed grant agreement for the original CDBG-DR grant or the subsequent grant is equal to or greater than ten times the amount of its original CDBG-DR grant.

If a CDBG-DR grantee is awarded a subsequent CDBG-DR grant, and it has been more than three years since the executed grant agreement for its original CDBG-DR grant or a subsequent grant is equal to or greater than ten times the amount of the original CDBG-DR grant, the grantee is to update and resubmit its implementation plan to reflect any changes to its capacity, staffing, and coordination.

III.B. Administration, Planning, and Financial Management

III.B.1. Grant administration and planning.

III.B.1.a. *Grantee responsibilities.* Each grantee shall administer its award in compliance with all applicable laws and regulations and shall be financially accountable for the use of all awarded funds. CDBG-DR grantees must comply with the recordkeeping requirements of 24 CFR 570.506 and 24 CFR 570.490, as amended by the Consolidated Notice waivers and alternative requirements. All grantees must maintain records of performance in DRGR, as described elsewhere in the Consolidated Notice.

III.B.1.b. *Grant administration cap.* Up to five percent of the grant (plus five percent of program income generated by the grant) can be used for administrative costs by the grantee, units of general local government, or subrecipients. Thus, the total of all costs classified as administrative for a CDBG-DR grant must be less than or equal to the five percent cap (plus five percent of program income generated by the grant). The cap for administrative costs is subject to the combined technical assistance and administrative cap for state grantees as discussed in section III.B.2.a.

III.B.1.c. *Use of funds for administrative costs across multiple grants.* The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (Pub. L. 116-20) authorized special treatment for eligible administrative costs for grantees that received awards under Public Laws 114-113, 114-223, 114-254, 115-31, 115-56, 115-123, 115-254, 116-20, or any future act. The Consolidated Notice permits grantees to use eligible administrative funds (up to five percent of

each grant award plus up to five percent of program income generated by the grant) for the cost of administering any of these grants awarded under the identified Public Laws (including future Acts) without regard to the particular disaster appropriation from which such funds originated. To exercise this authority, the grantee must ensure that it has appropriate financial controls to guarantee that the amount of grant administration expenditures for each of the aforementioned grants will not exceed five percent of the total grant award for each grant (plus five percent of program income generated by the grant). The grantee must review and modify any financial management policies and procedures regarding the tracking and accounting of administration costs as necessary.

III.B.1.d. *Planning expenditures cap.* Both state and local government grantees are limited to spending a maximum of fifteen percent of their total grant amount on planning costs. Planning costs subject to the 15 percent cap are those defined in 42 U.S.C. 5305(a)(12) and more broadly in 24 CFR 570.205.

III.B.2. State grantees only.

III.B.2.a. *Combined technical assistance and administrative cap (state grantees only).* The provisions of 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii), and 24 CFR 570.489(a)(2) shall not apply to the extent that they cap administration and technical assistance expenditures, limit a state's ability to charge a nominal application fee for grant applications for activities the state carries out directly, and require a dollar-for-dollar match of state funds for administrative costs exceeding \$100,000. 42 U.S.C. 5306(d)(5) and (6) are waived and replaced with the alternative requirement that the aggregate total for administrative and technical assistance expenditures must not exceed five percent of the grant, plus five percent of program income generated by the grant.

III.B.2.b. *Planning-only activities (state grantees only).* The State CDBG Program requires that, for planning-only grants, local government grant recipients must document that the use of funds meets a national objective. In the CDBG Entitlement Program, these more general planning activities are presumed to meet a national objective under the requirements at 24 CFR 570.208(d)(4). HUD notes that almost all effective recoveries in the past have relied on some form of area-wide or comprehensive planning activity to guide overall redevelopment independent of the ultimate source of implementation funds. To assist state grantees, HUD is waiving the requirements at 24 CFR 570.483(b)(5) and (c)(3), which limit the circumstances under which the planning activity can meet a low- and moderate-income or slum-and-bligh national objective. Instead, as an alternative requirement, 24 CFR 570.208(d)(4) applies to states when funding disaster recovery-assisted, planning-only grants, or when directly administering planning activities that guide disaster recovery. In addition, 42 U.S.C. 5305(a)(12) is waived to the extent necessary so the types of planning activities that states may fund or undertake are expanded to be consistent with those of CDBG Entitlement grantees identified at 24 CFR 570.205.

III.B.2.c. *Direct grant administration and means of carrying out eligible activities (state grantees only).* Requirements at 42 U.S.C. 5306(d) are waived to allow a state to use its disaster recovery grant allocation directly to carry out state-administered activities eligible under the Consolidated Notice, rather than distribute all funds to local governments. Pursuant to this waiver and alternative requirement, the standard at 24 CFR 570.480(c) and the provisions at 42 U.S.C. 5304(e)(2) will also include activities that the state carries out directly. Activities eligible under the Consolidated Notice may be carried out by a state, subject to state law and consistent with the requirement of 24 CFR 570.200(f), through its employees, through procurement contracts, or through assistance provided under agreements with subrecipients. State grantees continue to be responsible for civil rights, labor standards, and environmental protection requirements, for compliance with 24 CFR 570.489(g) and (h), and subparagraph III.A.1.a.(2)(a) of the Consolidated Notice relating to conflicts of interest, and for compliance with 24 CFR 570.489(m) relating to monitoring and management of subrecipients.

A state grantee may also carry out activities in tribal areas. A state must coordinate with the Indian tribe with jurisdiction over the tribal area when providing CDBG-DR assistance to beneficiaries in tribal areas. State grantees carrying out projects in tribal areas, either directly or through its employees, through procurement contracts, or through assistance provided under agreements with subrecipients, must obtain the consent of the Indian tribe with jurisdiction over the tribal area to allow the state grantee to carry out or to fund CDBG-DR projects in the area.

III.B.2.d. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties (state grantees only).* 42 U.S.C. 5302(a)(7) (definition of "nonentitlement area") and related provisions of 24 CFR part 570, including 24 CFR 570.480, are waived to permit state grantees to distribute CDBG-DR funds to units of local government and Indian tribes.

III.B.2.e. *Use of subrecipients (state grantees only).* Paragraph III.B.2.c. provides a waiver and alternative requirement that a state may carry out activities directly, including through assistance provided under agreements with subrecipients. Therefore, when states carry out activities directly through subrecipients, the following alternative requirements apply: the state is subject to the definition of subrecipients at 24 CFR 570.500(c) and must adhere to the requirements for agreements with subrecipients at 24 CFR 570.503. Additionally, 24 CFR 570.503(b)(4) is modified to require the subrecipient to comply with applicable uniform requirements, as described in 24 CFR 570.502, except that the subrecipient shall follow procurement requirements imposed by the state in accordance with subparagraph III.A.1.a.(2) of the Consolidated Notice. When 24 CFR 570.503 applies, notwithstanding 24 CFR 570.503(b)(5)(i), units of general local government that are subrecipients are

defined as recipients under 24 CFR part 58 and are therefore responsible entities that assume environmental review responsibilities, as described in III.F.5. Grantees are reminded that they are responsible for providing on-going oversight and monitoring of subrecipients and are ultimately responsible for subrecipient compliance with all CDBG–DR requirements.

III.B.2.f. *Recordkeeping (state grantees only)*. When a state carries out activities directly, 24 CFR 570.490(b) is waived and the following alternative provision shall apply: a state grantee shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the state's administration of CDBG–DR funds, under 24 CFR 570.493 and reviews and audits by the state under III.B.2.h. Consistent with applicable statutes, regulations, waivers and alternative requirements, and other Federal requirements, the content of records maintained by the state shall be sufficient to: (a) enable HUD to make the applicable determinations described at 24 CFR 570.493; (b) make compliance determinations for activities carried out directly by the state; and (c) show how activities funded are consistent with the descriptions of activities proposed for funding in the action plan and/or DRGR system. For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

III.B.2.g. *Change of use of real property (state grantees only)*. This alternative requirement conforms the change of use of real property rule to the waiver allowing a state to carry out activities directly. For purposes of these grants, all references to “unit of general local government” in 24 CFR 570.489(j), shall be read as “state, local governments, or Indian tribes (either as subrecipients or through a method of distribution), or other state subrecipient.”

III.B.2.h. *Responsibility for review and handling of noncompliance (state grantees only)*. This change is in conformance with the waiver allowing a state to carry out activities directly. 24 CFR 570.492 is waived, and the following alternative requirement applies for any state receiving a direct award: the state shall make reviews and audits, including on-site reviews of any local governments or Indian tribes (either as subrecipients or through a method of distribution) designated public agencies, and other subrecipients, as may be necessary or appropriate to meet the requirements of section 104(e)(2) of the HCDA, as amended, and as modified by the Consolidated Notice. In the case of noncompliance with these requirements, the state shall take such actions as may be appropriate to prevent a continuance of the deficiency, mitigate any adverse effects or consequences, and prevent a recurrence. The state shall establish remedies for noncompliance by any subrecipients, designated public agencies, or local governments.

III.B.2.i. *Consultation (state grantees only)*. Currently, the HCDA and regulations require a state grantee to consult with affected local governments in nonentitlement areas of the

state in determining the state's proposed method of distribution. HUD is waiving 42 U.S.C. 5306(d)(2)(C)(iv), 42 U.S.C. 5306(d)(2)(D), 24 CFR 91.325(b)(2), and 24 CFR 91.110, and imposing an alternative requirement that states receiving an allocation of CDBG–DR funds consult with all disaster-affected local governments (including any CDBG-entitlement grantees), Indian tribes, and any public housing authorities in determining the use of funds. This approach ensures that a state grantee sufficiently assesses the recovery needs of all areas affected by the disaster.

III.C. Action Plan for Disaster Recovery Waiver and Alternative Requirement

Requirements for CDBG actions plans, located at 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(a)(1), 42 U.S.C. 5306(d)(2)(C)(iii), 42 U.S.C. 12705(a)(2), and 24 CFR 91.220 and 91.320, are waived for CDBG–DR grants. Instead, grantees must submit to HUD an action plan for disaster recovery which will describe programs and activities that conform to applicable requirements as specified in the Consolidated Notice and the applicable Allocation Announcement Notice. HUD will monitor the grantee's actions and use of funds for consistency with the plan, as well as meeting the performance and timeliness objectives therein. The Secretary will disapprove all action plans that are substantially incomplete if it is determined that the plan does not satisfy all of the required elements identified in the Consolidated Notice and the applicable Allocation Announcement Notice.

III.C.1. *Action plan*. The grantee's action plan must identify the use of all funds—including criteria for eligibility and how the uses address long-term recovery needs, restoration of infrastructure and housing, economic revitalization, and the incorporation of mitigation measures in the MID areas. HUD created the Public Action Plan in DRGR which is a function that allows grantees to develop and submit their action plans for disaster recovery directly into DRGR. Grantees must use HUD's Public Action Plan in DRGR to develop all CDBG–DR action plans and substantial amendments submitted to HUD for approval. The Public Action Plan is different from the DRGR Action Plan, which is a comprehensive description of projects and activities in DRGR.

The grantee must describe the steps it will follow to make the action plan, substantial amendments, performance reports, and other relevant program materials available in a form accessible to persons with disabilities and those with limited English proficiency (LEP). All grantees must include sufficient information in its action plan so that all interested parties will be able to understand and comment on the action plan. The action plan (and subsequent amendments) must include a single chart or table that illustrates, at the most practical level, how all funds are budgeted (e.g., by program, subrecipient, grantee-administered activity, or other category). The grantee must certify, as required by section III.F.7., that activities to be undertaken with CDBG–DR funds are consistent with its action plan.

The action plan must contain:

III.C.1.a. *An impact and unmet needs assessment*. Each grantee must develop an impact and unmet needs assessment to understand the type and location of community needs and to target limited resources to those areas with the greatest need. CDBG–DR grantees must conduct an impact and unmet needs assessment to inform the use of the grant. Grantees must cite data sources in the impact and unmet needs assessment. At a minimum, the impact and unmet needs assessment must:

- Evaluate all aspects of recovery including housing (interim and permanent, owner and rental, single family and multifamily, affordable and market rate, and housing to meet the needs of persons who were experiencing homelessness pre-disaster), infrastructure, and economic revitalization needs, while also incorporating mitigation needs into activities that support recovery as required in section II.A.2.;

- Estimate unmet needs to ensure CDBG–DR funds meet needs that are not likely to be addressed by other sources of funds by accounting for the various forms of assistance available to, or likely to be available to, affected communities (e.g., projected FEMA funds) and individuals (e.g., estimated insurance) and, using the most recent available data, estimating the portion of need unlikely to be addressed by insurance proceeds, other Federal assistance, or any other funding sources;

- Assess whether public services (e.g., housing counseling, legal advice and representation, job training, mental health, and general health services) are necessary to complement activities intended to address housing, infrastructure, and economic revitalization and how those services would need to be made accessible to individuals with disabilities including, but not limited to, mobility, sensory, developmental, emotional, cognitive, and other impairments;

- Describe the extent to which expenditures for planning activities, including the determination of land use goals and policies, will benefit the HUD-identified MID areas, as described in section II.A.3.;

- Describe disaster impacts geographically by type at the lowest level practicable (e.g., county/parish level or lower if available for states, and neighborhood or census tract level for cities); and

- Take into account the costs and benefits of incorporating hazard mitigation measures to protect against the specific identified impacts of future extreme weather events and other natural hazards. This analysis should factor in historical and projected data on risk that incorporates best available science (e.g., the most recent National Climate Assessment).

Disaster recovery needs evolve over time and grantees must amend the impact and unmet needs assessment and action plan as additional needs are identified and additional resources become available. At a minimum, grantees must revisit and update the impact and unmet needs assessment when moving funds from one program to another through a substantial amendment.

III.C.1.b. *Connection of programs and projects to unmet needs*. The grantee must

describe the connection between identified unmet needs and the allocation of CDBG–DR resources. The plan must provide a clear connection between a grantee’s impact and unmet needs assessment and its proposed programs and projects in the MID areas (or outside in connection to the MID areas as described in section II.A.3). Such description must demonstrate a reasonably proportionate allocation of resources relative to areas and categories (*i.e.*, housing, economic revitalization, and infrastructure) of greatest needs identified in the grantee’s impact and unmet needs assessment or provide an acceptable justification for a disproportional allocation, while also incorporating hazard mitigation measures to reduce the impacts of recurring natural disasters and the long-term impacts of climate change. Grantee action plans may provide for the allocation of funds for administration and planning activities and for public service activities, subject to the caps on such activities as described in the Consolidated Notice.

III.C.1.c. *Public housing, affordable rental housing, and housing for vulnerable populations.* Each grantee must include a description of how it has analyzed, identified, and will address (with CDBG–DR or other sources) the disaster-related rehabilitation, reconstruction, and new construction needs in the MID-area of the types of housing described below. Specifically, a grantee must assess and describe how it will address unmet needs in the following types of housing, subject to the applicable HUD program requirements: public housing, affordable rental housing (including both subsidized and market rate affordable housing), and housing for vulnerable populations (See Section III.C.1.c.iii below), including emergency shelters and permanent housing for persons experiencing homelessness, in the areas affected by the disaster. Grantees must coordinate with local public housing authorities (PHA) in the MID areas to ensure that the grantee’s representation in the action plan reflects the input of those entities as well as coordinating with State Housing Finance agencies to make sure that all funding sources that are available and opportunities for leverage are noted in the action plan.

(i) *Public housing:* Describe unmet public housing needs of each disaster-impacted PHA within its jurisdiction, if applicable. The grantee must work directly with impacted PHAs in identifying necessary and reasonable costs and ensuring that adequate funding from all available sources is dedicated to addressing the unmet needs of damaged public housing (*e.g.*, FEMA, insurance, and funds available from programs administered by HUD’s Office of Public and Indian Housing).

(ii) *Affordable rental housing:* Describe unmet affordable rental housing needs for LMI households as a result of the disaster or exacerbated by the disaster, including private market units receiving project-based rental assistance or with tenants that participate in the Section 8 Housing Choice Voucher Program, and any other housing that is assisted under a HUD program in the MID areas. Identify funding to specifically address

these unmet needs for affordable rental housing to LMI households. If a grantee is proposing an allocation of CDBG–DR funds for affordable rental housing needs, the action plan must, at a minimum, meet the requirements described in II.B.3.

(iii) *Housing for vulnerable populations:* Describe how CDBG–DR or other funding sources available will promote housing for vulnerable populations, as defined in section III.C.1.d., in the MID area, including how it plans to address: (1) transitional housing, including emergency shelters and housing for persons experiencing homelessness, permanent supportive housing, and permanent housing needs of individuals and families (including subpopulations) that are experiencing or at risk of experiencing homelessness; (2) the prevention of low-income individuals and families with children (especially those with incomes below thirty percent of the area median) from becoming homeless; (3) the special needs of persons who are not experiencing homelessness but require supportive housing (*i.e.*, elderly, frail elderly, persons with disabilities (mental, physical, developmental, etc.), victims of domestic violence, persons with alcohol or other substance-use disorder, persons with HIV/AIDS and their families, and public housing residents, as identified in 24 CFR 91.315(e)).

III.C.1.d. *Fair housing, civil rights data, and advancing equity.*

The grantee must use its CDBG–DR funds in a manner that complies with its fair housing and nondiscrimination obligations, including title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, the Fair Housing Act, 42 U.S.C. 3601–19, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, and Section 109 of the HCDA, 42 U.S.C. 5309. To ensure that the activities performed in connection with the action plan will comply with these requirements, the grantee must provide an assessment of whether its planned use of CDBG–DR funds will have an unjustified discriminatory effect on or failure to benefit racial and ethnic minorities in proportion to their communities’ needs, particularly in racially and ethnically concentrated areas of poverty, and how it will address the recovery needs of impacted individuals with disabilities.

Grantees should also consider the impact of their planned use of CDBG–DR funds on other protected class groups under fair housing and civil rights laws, vulnerable populations, and other historically underserved communities. For purposes of the Consolidated Notice, HUD defines vulnerable populations as a group or community whose circumstances present barriers to obtaining or understanding information or accessing resources. In the action plan, grantees should identify those populations (*i.e.*, which protected class, vulnerable population, and historically underserved groups were considered) and how those groups can be expected to benefit from the activities set forth in the plan consistent with the civil rights requirements set forth above.

To perform such an assessment, grantees must include data for the HUD-identified and

grantee-identified MID areas that identifies the following information, as it is available:

- Racial and ethnic make-up of the population, including relevant sub-populations depending on activities and programs outlined in the plan (this would include renters and homeowners if eligibility is dependent on housing tenure) and the specific sub-geographies in the MID areas in which those programs and activities will be carried out;
- LEP populations, including number and percentage of each identified group;
- Number and percentage of persons with disabilities;
- Number and percentage of persons belonging to Federally protected classes under the Fair Housing Act (race, color, national origin, religion, sex—which includes sexual orientation and gender identity—familial status, and disability) and other vulnerable populations as determined by the grantee;
- Indigenous populations and tribal communities, including number and percentage of each identified group;
- Racially and ethnically concentrated areas and concentrated areas of poverty; and
- Historically distressed and underserved communities;

Grantees must explain how the use of funds will reduce barriers that individuals may face when enrolling in and accessing CDBG–DR assistance, for example, barriers imposed by a lack of outreach to their community or by the lack of information in non-English languages or accessible formats for individuals with different types of disabilities.

Grantees are strongly encouraged to include examples of how their proposed allocations, selection criteria, and other actions can be expected to advance equity for protected class groups. Grantees are strongly encouraged to explain and provide examples of how their actions can be expected to advance the following objectives:

- Equitably benefit protected class groups in the MID areas, including racial and ethnic minorities, and sub geographies in the MID areas in which residents belonging to such groups are concentrated;
- To the extent consistent with purposes and uses of CDBG–DR funds, overcome prior disinvestment in infrastructure and public services for protected class groups, and areas in which residents belonging to such groups are concentrated, when addressing unmet needs;
- Enhance for individuals with disabilities in the MID areas (a) the accessibility of disaster preparedness, resilience, or recovery services, including the accessibility of evacuation services and shelters; (b) the provision of critical disaster-related information in accessible formats; and/or (c) the availability of integrated, accessible housing and supportive services.

Grantees must identify the proximity of natural and environmental hazards (*e.g.*, industrial corridors, sewage treatment facilities, waterways, EPA superfund sites, brownfields, etc.) to affected populations in the MID area, including members of protected classes, vulnerable populations, and underserved communities and explore

how CDBG-DR activities may mitigate environmental concerns and increase resilience among these populations to protect against the effects of extreme weather events and other natural hazards.

Grantees must also describe how their use of CDBG-DR funds is consistent with their obligation to affirmatively further fair housing. HUD regulations at 24 CFR 5.151 provide that affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

State and local government grantees must submit a certification to AFFH in accordance with 24 CFR 5.150, et. seq. CDBG-DR grantees must also comply with the recordkeeping requirements of 24 CFR 570.506 and 24 CFR 570.490(b), as amended by the Consolidated Notice.

III.C.1.e. *Infrastructure*. In its action plan, each grantee must include a description of how it plans to meet the requirements of the Consolidated Notice, including how it will: promote sound, sustainable long-term recovery planning as described in this section; adhere to the elevation requirements established in section II.C.2.; and coordinate with local and regional planning efforts as described in section III.B.2.i and III.D.1.a. All infrastructure investments must be designed and constructed to withstand chronic stresses and extreme events by identifying and implementing resilience performance metrics as described in section II.A.2.c.

If a grantee is allocating funds for infrastructure, its description must include:

(1) How it will address the construction or rehabilitation of disaster-related systems (e.g., storm water management systems) or other disaster-related community-based mitigation systems (e.g., using FEMA's community lifelines). State grantees carrying out infrastructure activities must work with units of general local government and Indian tribes in the MID areas to identify the unmet needs and associated costs of needed disaster-related infrastructure improvements;

(2) How mitigation measures and strategies to reduce natural hazard risks, including climate-related risks, will be integrated into rebuilding activities;

(3) The extent to which CDBG-DR funded infrastructure activities will achieve objectives outlined in regionally or locally established plans and policies that are designed to reduce future risk to the jurisdiction;

(4) How the grantee will evaluate the costs and benefits in selecting infrastructure projects to assist with CDBG-DR funds;

(5) How the grantee will align infrastructure investments with other

planned federal, state, or local capital improvements and infrastructure development efforts, and will work to foster the potential for additional infrastructure funding from multiple sources, including state and local capital improvement projects in planning, and the potential for private investment;

(6) How the grantee will employ adaptable and reliable technologies to prevent premature obsolescence of infrastructure; and

(7) How the grantee will invest in restoration of infrastructure and related long-term recovery needs within historically underserved communities that lacked adequate investments in housing, transportation, water, and wastewater infrastructure prior to the disaster.

III.C.1.f. *Minimize Displacement*. A description of how the grantee plans to minimize displacement of persons or entities, and assist any persons or entities displaced, and ensure accessibility needs of displaced persons with disabilities. Specifically, grantees must detail how they will meet the Residential Anti-displacement and Relocation Assistance Plan (RARAP) requirements in section IV.F.7. Grantees must indicate to HUD whether they will be amending an existing RARAP or creating a new RARAP specific to CDBG-DR. Grantees must meet the requirements related to the RARAP prior to implementing any activity with CDBG-DR grant funds, such as buyouts and other disaster recovery activities. Grantees must seek to minimize displacement or adverse impacts from displacement, consistent with the requirements of Section IV.F of the Consolidated Notice, Section 104(d) of the HCDA (42 U.S.C. 5304(d)) and implementing regulations at 24 CFR part 42, and 24 CFR 570.488 or 24 CFR 570.606, as applicable. Grantees must describe how they will plan and budget for relocation activities in the action plan.

III.C.1.g. *Allocation and award caps*. The grantee must provide a budget for the full amount of the allocation that is reasonably proportionate to its unmet needs (or provide an acceptable justification for disproportional allocation) and is consistent with the requirements to integrate hazard mitigation measures into all its programs and projects. The grantee shall provide a description of each disaster recovery program or activity to be funded, including the CDBG-DR eligible activities and national objectives associated with each program and the eligibility criteria for assistance. The grantee shall also describe the maximum amount of assistance (i.e., award cap) available to a beneficiary under each of the grantee's disaster recovery programs. A grantee may find it necessary to provide exceptions on a case-by-case basis to the maximum amount of assistance and must describe the process it will use to make such exceptions in its action plan. At a minimum, each grantee must adopt policies and procedures that communicate how it will analyze the circumstances under which an exception is needed and how it will demonstrate that the amount of assistance is necessary and reasonable. Each grantee must also indicate in its action plan that it will make exceptions to the maximum award

amounts when necessary, to comply with federal accessibility standards or to reasonably accommodate a person with disabilities.

III.C.1.h. *Cost controls and warranties*. The grantee must provide a description of the standards to be established for construction contractors performing work in the jurisdiction and the mechanisms to be used by the grantee to assist beneficiaries in responding to contractor fraud, poor quality work, and associated issues. Grantees must require a warranty period post-construction with a formal notification to beneficiaries on a periodic basis (e.g., 6 months and one month before expiration date of the warranty). Each grantee must also describe its controls for assuring that construction costs are reasonable and consistent with market costs at the time and place of construction.

III.C.1.i. *Resilience planning*. Resilience is defined as a community's ability to minimize damage and recover quickly from extreme events and changing conditions, including natural hazard risks. At a minimum, the grantee's action plan must contain a description of how the grantee will: (a) emphasize high quality design, durability, energy efficiency, sustainability, and mold resistance; (b) support adoption and enforcement of modern and/or resilient building codes that mitigate against natural hazard risks, including climate-related risks (e.g., sea level rise, high winds, storm surge, flooding, volcanic eruption, and wildfire risk, where appropriate and as may be identified in the jurisdiction's rating and identified weaknesses (if any) in building code adoption using FEMA's Nationwide Building Code Adoption Tracking (BCAT) portal, available at <https://www.fema.gov/emergency-managers/risk-management/building-science/bcat>), and provide for accessible building codes and standards, as applicable; (c) establish and support recovery efforts by funding feasible, cost-effective measures that will make communities more resilient against a future disaster; (d) make land-use decisions that reflect responsible and safe standards to reduce future natural hazard risks, e.g., by adopting or amending an open space management plan that reflects responsible floodplain and wetland management and takes into account continued sea level rise, if applicable, and (e) increase awareness of the hazards in their communities (including for members of protected classes, vulnerable populations, and underserved communities) through outreach to the MID areas.

While the purpose of CDBG-DR funds is to recover from a Presidentially declared disaster, integrating hazard mitigation and resilience planning with recovery efforts will promote a more resilient and sustainable long-term recovery. The action plan must include a description of how the grantee will promote sound, sustainable long-term recovery planning informed by a post-disaster evaluation of hazard risk, including climate-related natural hazards and the creation of resilience performance metrics as described in paragraph II.A.2.c. of the Consolidated Notice. This information should be based on the history of FEMA and other federally-funded disaster mitigation

efforts and, as appropriate, take into account projected increases in sea level, the frequency and intensity of extreme weather events, and worsening wildfires. Grantees must use the FEMA-approved Hazard Mitigation Plan (HMP), Community Wildfire Protection Plan (CWPP), or other resilience plans to inform the evaluation, and it should be referenced in the action plan.

III.C.2. Additional action plan requirements for states. For state grantees, the action plan must describe how the grantee will distribute grant funds, either through specific programs and projects the grantee will carry out directly (through employees, contractors, or through subrecipients), or through a method of distribution of funds to local governments and Indian tribes (as permitted by III.B.2.d.). The grantee shall describe how the method of distribution to local governments or Indian tribes, or programs/projects carried out directly, will result in long-term recovery from specific impacts of the disaster.

All states must include in their action plan the information outlined in (1) through (7) below (in addition to other information required by section III.C.). For states using a method of distribution, if some required information is unknown when the grantee is submitting its action plan to HUD (e.g., the list of programs or activities required by III.C.1.g. or the projected use of CDBG-DR funds by responsible entity as required by subparagraph (5) below), the grantee must update the action plan through a substantial amendment once the information is known. If necessary to comply with a statutory requirement that a grantee shall submit a plan detailing the proposed use of all funds prior to HUD's obligation of grant funds, HUD may obligate only a portion of grant funds until the substantial amendment providing the required information is submitted and approved by HUD.

(1) How the impact and unmet needs assessment informs funding determinations, including the rationale behind the decision(s) to provide funds to most impacted and distressed areas.

(2) When funds are subgranted to local governments or Indian tribes (either as subrecipients or through a method of distribution), all criteria used to allocate and award the funds including the relative importance of each criterion (including any priorities). If the criteria are unknown when the grantee is submitting the initial action plan to HUD, the grantee must update the action plan through a substantial amendment once the information is known. The substantial amendment must be submitted and approved before distributing the funds to a local government or Indian tribe.

(3) How the distribution and selection criteria will address disaster-related unmet needs in a manner that does not have an unjustified discriminatory effect based on race or other protected class and ensure the participation of minority residents and those belonging to other protected class groups in the MID areas. Such description should include an assessment of who may be expected to benefit, the timing of who will be prioritized, and the amount or proportion of benefits expected to be received by

different communities or groups (e.g., the proportion of benefits going to different locations within the MID or to homeowners versus renters).

(4) The threshold factors and recipient or beneficiary grant size limits that are to be applied.

(5) The projected uses for the CDBG-DR funds, by responsible entity, activity, and geographic area.

(6) For each proposed program and/or activity, its respective CDBG activity eligibility category (or categories), national objective(s), and what disaster-related impact is addressed, as described in section II.A.1.

(7) When applications are solicited for programs carried out directly, all criteria used to select applications for funding, including the relative importance of each criterion, and any eligibility requirements. If the criteria are unknown when the grantee is submitting the initial action plan to HUD, the grantee must update the action plan through a substantial amendment once the information is known. The substantial amendment must be submitted and approved before selecting applications.

III.C.3. Additional action plan requirements for local governments. For local governments grantees, the action plan shall describe specific programs and/or activities they will carry out. The action plan must also describe:

(1) How the impact and unmet needs assessment informs funding determinations, including the rationale behind the decision(s) to provide funds to most impacted and distressed areas.

(2) All criteria used to select applications (including any priorities), including the relative importance of each criterion, and any eligibility requirements. If the criteria are unknown when the grantee is submitting the initial action plan to HUD, the grantee must update the action plan through a substantial amendment once the information is known. The substantial amendment must be submitted and approved before selecting applications.

(3) How the distribution and selection criteria will address disaster-related unmet needs in a manner that does not have an unjustified discriminatory effect and ensures the participation of minority residents and those belonging to other protected class groups in the MID areas, including with regards to who may benefit, the timing of who will be prioritized, and the amount or proportion of benefits expected to be received by different communities or groups (e.g., the proportion of benefits going to different locations within the MID or to homeowners versus renters).

(4) The threshold factors and grant size limits that are to be applied.

(5) The projected uses for the CDBG-DR funds, by responsible entity, activity, and geographic area.

(6) For each proposed program and/or activity, its respective CDBG activity eligibility category (or categories), national objective(s), and what disaster-related impact is addressed, as described in section II.A.1. of the Consolidated Notice.

III.C.4. Waiver of 45-day review period for CDBG-DR action plans to 60 days. HUD may

disapprove an action plan or substantial action plan amendment if it is incomplete. HUD works with grantees to resolve or provide additional information during the review period to avoid the need to disapprove an action plan or substantial action plan amendments. There are several issues related to the action plan as submitted that can be fully resolved via further discussion and revision during an extended review period, rather than through HUD disapproval of the plan, which in turn would require grantees to take additional time to revise and resubmit their respective plan. Therefore, the Secretary has determined that good cause exists and waives 24 CFR 91.500(a) to extend HUD's action plan review period from 45 days to 60 days.

The action plan (including SF-424 and certifications) must be submitted to HUD for review and approval using DRGR. By submitting required standard forms (that must be submitted with the action plan), the grantee is providing assurances that it will comply with statutory requirements, including, but not limited to civil rights requirements. Applicants and recipients are required to submit assurances of compliance with federal civil rights requirements. A grantee will use DRGR's upload function to include the SF 424 (including SF 424B and SF 424D, as applicable) and certifications with its action plan. Grantees receiving an allocation are required to submit an action plan within 120 days of the applicability date of the Allocation Announcement Notice, unless the grantee has requested, and HUD has approved an extension of the submission deadline. HUD will then review each action plan within 60 days from the date of receipt.

During its review, HUD typically provides grantees with comments on the submitted plan to avoid the need to disapprove an action plan and offers a grantee the opportunity to make updates to the action plan during the first forty-five days of HUD's initial sixty-day review period. If a grantee wants to make updates to the action plan, HUD will reject the Public Action Plan in DRGR to return the plan to the grantee. Then, once the grantee resubmits the plan, HUD reviews the revised plan within the initial sixty-day period. HUD is establishing an alternative process that offers a grantee the option to voluntarily provide a revised action plan, updated to respond to HUD's comments, no later than day forty-five in HUD's sixty-day review. A grantee is not required to participate in the revisions of the action plan during this time, but with the understanding that an action plan may be determined to be substantially incomplete. The Secretary may disapprove an action plan as substantially incomplete if HUD determines that the action plan does not meet the requirements of the Consolidated Notice and the applicable Allocation Announcement Notice.

III.C.5. Obligation and expenditure of funds. Once HUD approves the action plan and approves certifications if required by appropriations acts, it will then sign a grant agreement obligating allocated funds to the grantee. The grantee will continue the action plan process in DRGR to draw funds (see section V.C.1.).

The grantee must meet the applicable environmental requirements before the use or commitment of funds for each activity. After the Responsible Entity (1) completes environmental review(s) pursuant to 24 CFR part 58 and receives from HUD an approved Request for Release of Funds and certification (as applicable), or (2) adopts another Federal agency's environmental review, approval, or permit and receives from HUD (or the state) an approved Request for Release of Funds and certification (as applicable), the grantee may draw down funds from the line of credit for an activity. The disbursement of grant funds must begin no later than 180 calendar days after HUD executes a grant agreement with the grantee. Failure to draw funds within this timeframe may result in HUD's review of the grantee's certification of its financial controls, procurement processes, and capacity, and may result in the imposition of any corrective actions deemed appropriate by HUD pursuant to 24 CFR 570.495, 24 CFR 570.910, or 24 CFR 1003.701.

III.C.6. Amending the action plan. The grantee must amend its action plan to update its needs assessment, modify or create new activities, or reprogram funds, as necessary, in the DRGR system. Each amendment must be published on the grantee's official website and describe the changes within the context of the entire action plan. A grantee's current version of its entire action plan must be accessible for viewing as a single document at any given point in time, rather than require the public or HUD to view and cross-reference changes among multiple amendments. HUD's DRGR system will include the capabilities necessary for a grantee to sufficiently identify the changes for each amendment. When a grantee has finished amending the content in the Public Action Plan, the grantee will click "Submit Plan" in the DRGR system. The DRGR system will prompt the grantee to select the "Public Action Plan" and identify the amendment type (substantial or nonsubstantial). The grantee will complete this cover page to describe each amendment. At a minimum, the grantee must: (1) identify exactly what content is being added, deleted, or changed; (2) clearly illustrate where funds are coming from and where they are moving to; and (3) include a revised budget allocation table that reflects the entirety of all funds, as amended.

III.C.6.a. Substantial amendment. In its action plan, each grantee must specify criteria for determining what changes in the grantee's plan constitute a substantial amendment to the plan. At a minimum, the following modifications will constitute a substantial amendment: a change in program benefit or eligibility criteria; the addition or deletion of an activity; a proposed reduction in the overall benefit requirement, as outlined in III.F.2.; or the allocation or reallocation of a monetary threshold specified by the grantee in their action plan. For all substantial amendments, the grantee must follow the same procedures required for the preparation and submission of an action plan for disaster recovery, with the exception of the public hearing requirements described in section III.D.1.b. and the consultation requirements described in section III.D.1.a.,

which are not required for substantial amendments. A substantial action plan amendment shall require a 30-day public comment period.

III.C.6.b. Nonsubstantial amendment. The grantee must notify HUD, but is not required to seek public comment, when it makes any plan amendment that is not substantial. Although nonsubstantial amendments do not require HUD's approval to become effective, the DRGR system must approve the amendment to change the status of the Public Action Plan to "reviewed and approved." The DRGR system will automatically approve the amendment by the fifth day, if not completed by HUD sooner.

III.C.7. Projection of expenditures and outcomes. Each grantee must submit projected expenditures and outcomes with the action plan. The projections must be based on each quarter's expected performance—beginning with the first quarter funds are available to the grantee and continuing each quarter until all funds are expended. The grantee will use DRGR's upload feature to include projections and accomplishments for each program created.

III.D. Citizen Participation Requirements

III.D.1. Citizen participation waiver and alternative requirement. To permit a more streamlined process and ensure disaster recovery grants are awarded in a timely manner, provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, 24 CFR 1003.604, 24 CFR 91.105(b) through (d), and 24 CFR 91.115(b) through (d), with respect to citizen participation requirements, are waived and replaced by the alternative requirements in this section. The streamlined requirements require the grantee to include public hearings on the proposed action plan and provide a reasonable opportunity (at least 30 days) for citizen comment.

The grantee must follow a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.115 or 91.105 (except as provided for in notices providing waivers and alternative requirements). Each local government receiving assistance from a state grantee must follow a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in notices providing waivers and alternative requirements).

In addition to the requirements above, the streamlined citizen participation alternative requirements for CDBG-DR grants are as follows:

III.D.1.a. Requirement for consultation during plan preparation. All grantees must consult with states, Indian tribes, local governments, Federal partners, nongovernmental organizations, the private sector, and other stakeholders and affected parties in the surrounding geographic area, including organizations that advocate on behalf of members of protected classes, vulnerable populations, and underserved communities impacted by the disaster, to ensure consistency of the action plan with applicable regional redevelopment plans. A grantee must consult with other relevant government agencies, including state and local emergency management agencies that have primary responsibility for the administration of FEMA funds, if applicable.

III.D.1.b. Publication of the action plan and opportunity for public comment. Following the creation of the action plan or substantial amendment in DRGR and before the grantee submits the action plan or substantial amendment to HUD, the grantee must publish the proposed plan or amendment for public comment. The manner of publication must include prominent posting on the grantee's official disaster recovery website and must afford citizens, affected local governments, and other interested parties a reasonable opportunity to review the plan or substantial amendment. Grantees shall consider if there are potential barriers that may limit or prohibit vulnerable populations or underserved communities and individuals affected by the disaster from providing public comment on the grantee's action plan or substantial amendment. If the grantee identifies barriers that may limit or prohibit equitable participation, the grantee must take reasonable measures to increase coordination, communication, affirmative marketing, targeted outreach, and engagement with underserved communities and individuals, including persons with disabilities and persons with LEP.

At a minimum, the topic of disaster recovery on the grantee's website must be navigable by all interested parties from the grantee homepage and must link to the disaster recovery website required by section III.D.1.e. The grantee's records must demonstrate that it has notified affected citizens through electronic mailings, press releases, statements by public officials, media advertisements, public service announcements, and/or contacts with neighborhood organizations.

Additionally, the CDBG-DR grantee must convene at least one public hearing on the proposed action plan after it has published on its website to solicit public comment and before submittal of the action plan to HUD. If the grantee holds more than one public hearing, it must hold each hearing in a different location within the MID area in locations that the grantee determines will promote geographic balance and maximum accessibility. The minimum number of public hearings a grantee must convene on the action plan to obtain interested parties' views and to respond to comments and questions shall be determined by the amount of the grantee's CDBG-DR allocation: (1) CDBG-DR grantees with allocations under \$500 million are required to hold at least one public hearing in a HUD-identified MID area; and (2) CDBG-DR grantees with allocations over \$500 million or more shall convene at least two public hearings in HUD-identified MID areas.

Grantees may convene public hearings virtually (alone, or in concert with an in-person hearing). All in-person hearings must be held in facilities that are physically accessible to persons with disabilities. HUD's implementing regulations for Section 504 of the Rehabilitation Act (24 CFR part 8, subpart C) provide that where physical accessibility is not achievable, grantees must give priority to alternative methods of product or information delivery that offer programs and activities to qualified individuals with disabilities in the most integrated setting

appropriate. When conducting a virtual hearing, the grantee must allow questions in real time, with answers coming directly from the grantee representatives to all “attendees.”

For both virtual and in person hearings, grantees must update their citizen participation plans to provide that hearings be held at times and locations convenient to potential and actual beneficiaries, with accommodation for persons with disabilities and appropriate auxiliary aids and services to ensure effective communication, and specify how they will meet these requirements. See 24 CFR 8.6 for HUD’s regulations about effective communication. Grantees must also provide meaningful access for individuals with LEP at both in-person and virtual hearings. In their citizen participation plan, state and local government grantees shall identify how the needs of non-English speaking residents will be met in the case of virtual and in-person public hearings where a significant number of non-English speaking residents can be reasonably expected to participate. In addition, for both virtual or in-person hearings, the grantee shall provide reasonable notification and access for citizens in accordance with the grantee’s certifications at III.F.7.g., timely responses to all citizen questions and issues, and public access to all questions and responses.

III.D.1.c. *Consideration of public comments.* The grantee must provide a reasonable time frame (no less than 30 days) and method(s) (including electronic submission) for receiving comments on the action plan or substantial amendment. The grantee must consider all oral and written comments on the action plan or any substantial amendment. Any updates or changes made to the action plan in response to public comments should be clearly identified in the action plan. A summary of comments on the plan or amendment, and the grantee’s response to each, must be included (e.g., uploaded) in DRGR with the action plan or substantial amendment. Grantee responses shall address the substance of the comment rather than merely acknowledge that the comment was received.

III.D.1.d. *Availability and accessibility of documents.* The grantee must make the action plan, any substantial amendments, vital documents, and all performance reports available to the public on its website. See the following guidance for more information on vital documents: https://www.lep.gov/guidance/HUD_guidance_Jan07.pdf. In addition, the grantee must make these documents available in a form accessible to persons with disabilities and those with LEP. Grantees must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons, including members of protected classes, vulnerable populations, and individuals from underserved communities. In their citizen participation plan, state and local government grantees shall describe their procedures for assessing their language needs and identify any need for translation of notices and other vital documents. At a minimum, the citizen participation plan shall require that the state or local government grantee take reasonable steps to provide language assistance to ensure meaningful access to participation by

non-English-speaking residents of the grantee’s jurisdiction.

III.D.1.e. *Public website.* The grantee must maintain a public website that permits individuals and entities awaiting assistance and the general public to see how all grant funds are used and administered. The website must include copies of all relevant procurement documents and, except as noted in the next paragraph, all grantee administrative contracts, details of ongoing procurement processes, and action plans and amendments. The public website must be accessible to persons with disabilities and individuals with LEP.

To meet this requirement, each grantee must make the following items available on its website: the action plan created using DRGR (including all amendments); each performance report (as created using the DRGR system); citizen participation plan; procurement policies and procedures; all contracts, as defined in 2 CFR 200.22, that will be paid with CDBG–DR funds (including, but not limited to, subrecipients’ contracts); and a summary including the description and status of services or goods currently being procured by the grantee or the subrecipient (e.g., phase of the procurement, requirements for proposals, etc.). Contracts and procurement actions that do not exceed the micro-purchase threshold, as defined in 2 CFR 200.1, are not required to be posted to a grantee’s website.

III.D.1.f. *Application status.* The grantee must provide multiple methods of communication, such as websites, toll-free numbers, TTY and relay services, email address, fax number, or other means to provide applicants for recovery assistance with timely information to determine the status of their application.

III.D.1.g. *Citizen complaints.* The grantee will provide a timely written response to every citizen complaint. The grantee response must be provided within fifteen working days of the receipt of the complaint, or the grantee must document why additional time for the response was required. Complaints regarding fraud, waste, or abuse of government funds should be forwarded to the HUD OIG Fraud Hotline (phone: 1–800–347–3735 or email: hotline@hud.oig.gov).

III.D.1.h. *General requirements.* For plan publication, the comprehensive disaster recovery website and vital documents must ensure effective communication for individuals with disabilities, as required by 24 CFR 8.6 and the Americans with Disabilities Act, as applicable. In addition to ensuring the accessibility of the comprehensive disaster recovery website and vital documents, this obligation includes the requirement to provide auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities, which may take the form of the furnishing of the above referenced materials in alternative formats (24 CFR 8.6(a)(1)). When required by III.D.1.d., grantees must take reasonable steps to ensure meaningful access for individuals with LEP.

III.E. Program Income

III.E.1. *Program income waiver and alternative requirement.* For state and unit of

general local government grantees, HUD is waiving all applicable program income rules at 42 U.S.C. 5304(j), 24 CFR 570.489(e), 24 CFR 570.500, and 24 CFR 570.504 and providing the alternative requirement described below. Program income earned by Indian tribes that receive an allocation from HUD will be governed by the regulations at 24 CFR 1003.503 until grant closeout and not by the waivers and alternative requirements in this Consolidated Notice. Program income earned by Indian tribes that are subrecipients of state grantees or local government grantees will be subject to the program income requirements for subrecipients of those grantees.

III.E.1.a. *Definition of program income.* “Program income” is defined as gross income generated from the use of CDBG–DR funds, except as provided in III.E.1.b., and received by a state, local government, Indian tribe receiving funds from a grantee, or their subrecipients. When income is generated by an activity that is only partially assisted with CDBG–DR funds, the income shall be prorated to reflect the percentage of CDBG–DR funds used (e.g., a single loan supported by CDBG–DR funds and other funds, or a single parcel of land purchased with CDBG–DR funds and other funds). If CDBG funds are used with CDBG–DR funds on an activity, any income earned on the CDBG portion would not be subject to the waiver and alternative requirement in the Consolidated Notice.

Program income includes, but is not limited to, the following:

(i) Proceeds from the disposition by sale or long-term lease of real property purchased or improved with CDBG–DR funds.

(ii) Proceeds from the disposition of equipment purchased with CDBG–DR funds.

(iii) Gross income from the use or rental of real or personal property acquired by a state, local government, or subrecipient thereof with CDBG–DR funds, less costs incidental to generation of the income.

(iv) Gross income from the use or rental of real property owned by a state, local government, or subrecipient thereof, that was constructed or improved with CDBG–DR funds, less costs incidental to generation of the income.

(v) Payments of principal and interest on loans made using CDBG–DR funds.

(vi) Proceeds from the sale of loans made with CDBG–DR funds.

(vii) Proceeds from the sale of obligations secured by loans made with CDBG–DR funds.

(viii) Interest earned on program income pending disposition of the income, including interest earned on funds held in a revolving fund account.

(ix) Funds collected through special assessments made against nonresidential properties and properties owned and occupied by non-LMI households, where the special assessments are used to recover all or part of the CDBG–DR portion of a public improvement.

(x) Gross income paid to a state, local government, or subrecipient thereof, from the ownership interest in a for-profit entity in which the income is in return for the provision of CDBG–DR assistance.

III.E.1.b. *Program income—does not include:*

(i) The total amount of funds that is less than \$35,000 received in a single year and retained by a state, local government, or a subrecipient thereof.

(ii) Amounts generated by activities eligible under section 105(a)(15) of the HCDA and carried out by an entity under the authority of section 105(a)(15) of the HCDA.

III.E.1.c. *Retention of program income.* State grantees may permit a local government that receives or will receive program income to retain the program income but are not required to do so.

III.E.1.d. *Program income—use, close out, and transfer.*

(i) Program income received (and retained, if applicable) before or after closeout of the grant that generated the program income, and used to continue disaster recovery activities, is treated as additional CDBG–DR funds subject to the requirements of the Consolidated Notice and must be used in accordance with the grantee’s action plan for disaster recovery. To the maximum extent feasible, program income shall be used or distributed before additional withdrawals from the U.S. Treasury are made, except as provided in III.E.1.e. below.

(ii) In addition to the alternative requirements dealing with program income required above, the following rules apply:

(1) A state or local government grantee may transfer program income to its annual CDBG program before closeout of the grant that generated the program income. In addition, state grantees may transfer program income before closeout to any annual CDBG-funded activities carried out by a local government within the state.

(2) Program income received by a grantee, or received and retained by a subrecipient, after closeout of the grant that generated the program income, may also be transferred to a grantee’s annual CDBG award.

(3) In all cases, any program income received that is not used to continue the disaster recovery activity will not be subject to the waivers and alternative requirements of the Consolidated Notice. Rather, those funds will be subject to the state or local government grantee’s regular CDBG program rules. Any other transfer of program income not specifically addressed in the Consolidated Notice may be carried out if the grantee first seeks and then receives HUD’s approval.

III.E.1.e. *Revolving funds.* State and local government grantees may establish revolving funds to carry out specific, identified activities. State grantees may also establish a revolving fund to distribute funds to local governments or tribes to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to carry out specific activities. These activities must generate payments used to support similar activities going forward. These payments to the revolving fund are program income and must be substantially disbursed from the revolving fund before additional grant funds are drawn from the U.S. Treasury for payments that could be funded from the revolving fund. Such program income is not required to be disbursed for nonrevolving

fund activities. A revolving fund established by a CDBG–DR grantee shall not be directly funded or capitalized with CDBG–DR grant funds, pursuant to 24 CFR 570.489(f)(3).

III.F. Other General Waivers and Alternative Requirements

III.F.1. *Consolidated Plan waiver.* HUD is temporarily waiving the requirement for consistency with the consolidated plan (requirements at 42 U.S.C. 12706, 24 CFR 91.225(a)(5), and 24 CFR 91.325(a)(5)), because the effects of a major disaster alter a grantee’s priorities for meeting housing, employment, and infrastructure needs. In conjunction, 42 U.S.C. 5304(e) is also waived, to the extent that it would require HUD to annually review grantee performance under the consistency criteria. These waivers apply only for 24 months after the applicability date of the grantee’s applicable Allocation Announcement Notice. If the grantee is not scheduled to submit a new three-to five-year consolidated plan within the next two years, the grantee must update its existing three-to five-year consolidated plan to reflect disaster-related needs no later than 24 months after the applicability date of the grantee’s applicable Allocation Announcement Notice.

III.F.2. *Overall benefit requirement.* The primary objective of the HCDA is the “development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income” (42 U.S.C. 5301(c)). Consistent with the HCDA, this notice requires grantees to comply with the overall benefit requirements in the HCDA and 24 CFR 570.484, 24 CFR 570.200(a)(3), and 24 CFR 1003.208, which require that 70 percent of funds be used for activities that benefit LMI persons. For purposes of a CDBG–DR grant, HUD is establishing an alternative requirement that the overall benefit test shall apply only to the grant of CDBG–DR funds described in the Allocation Announcement Notice and related program income.

A grantee may seek to reduce the overall benefit requirement below 70 percent of the total grant, but must submit a substantial amendment as provided in section III.C.6.a. in the Consolidated Notice, and provide a justification that, at a minimum: (a) identifies the planned activities that meet the needs of its LMI population; (b) describes proposed activities and programs that will be affected by the alternative requirement, including their proposed location(s) and role(s) in the grantee’s long-term disaster recovery plan; (c) describes how the activities/programs identified in (b) prevent the grantee from meeting the 70 percent requirement; (d) demonstrates that LMI persons’ disaster-related needs have been sufficiently met and that the needs of non-LMI persons or areas are disproportionately greater, and that the jurisdiction lacks other resources to serve non-LMI persons; and (e) demonstrates a compelling need for HUD to lower the percentage of the grant that must benefit low- and moderate-income persons.

III.F.3. *Use of the urgent need national objective.* Because HUD provides CDBG–DR funds only to grantees with documented

disaster-related impacts and each grantee is limited to spending funds only for the benefit of areas that received a Presidential disaster declaration, the Secretary finds good cause to waive the urgent need national objective criteria in section 104(b)(3) of the HCDA and to establish the following alternative requirement for any CDBG–DR grantee using the urgent need national objective for a period of 36 months after the applicability date of the grantee’s Allocation Announcement Notice.

Pursuant to this alternative requirement, grantees that use the urgent need national objective must: (1) describe in the impact and unmet needs assessment why specific needs have a particular urgency, including how the existing conditions pose a serious and immediate threat to the health or welfare of the community; (2) identify each program or activity in the action plan that will use the urgent need national objective—either through its initial action plan submission or through a substantial amendment submitted by the grantee within 36 months of the applicability date of the grantee’s Allocation Announcement Notice; and (3) document how each program and/or activity funded under the urgent need national objective in the action plan responds to the urgency, type, scale, and location of the disaster-related impact as described in the grantee’s impact and unmet needs assessment.

The grantee’s action plan must address all three criteria described above to use the alternative urgent need national objective for the program and/or activity. This alternative urgent need national objective is in effect for a period of 36 months following the applicability date of the grantee’s Allocation Announcement Notice. After 36 months, the grantee will be required to follow the criteria established in section 104(b)(3) of the HCDA and its implementing regulations in 24 CFR part 570 when using the urgent need national objective for any new programs and/or activities added to an action plan.

III.F.4. *Reimbursement of disaster recovery expenses by a grantee or subrecipient.* The provisions of 24 CFR 570.489(b) are applied to permit a state grantee to charge to the grant otherwise allowable costs incurred by the grantee, its recipients or subrecipients (including Indian tribes and PHAs) on or after the incident date of the covered disaster. A local government grantee is subject to the provisions of 24 CFR 570.200(h) but may reimburse itself or its subrecipients for otherwise allowable costs incurred on or after the incident date of the covered disaster. Section 570.200(h)(1)(i) is waived to the extent that it requires pre-agreement activities to be included in the local government’s consolidated plan. As an alternative requirement, grantees must include any pre-agreement activities in their action plans, including any costs of eligible activities that were funded with short-term loans (e.g., bridge loans) and that the grantee intends to reimburse or otherwise charge to the grant, consistent with applicable program requirements.

III.F.5. *Reimbursement of pre-application costs of homeowners, renters, businesses, and other qualifying entities.* Grantees are permitted to charge to grants the pre-award

and pre-application costs of homeowners, renters, businesses, and other qualifying entities for eligible costs these applicants have incurred in response to an eligible disaster covered under a grantees' applicable Allocation Announcement Notice. For purposes of the Consolidated Notice, pre-application costs are costs incurred by an applicant to CDBG-DR funded programs before the time of application to a grantee or subrecipient, which may be before (pre-award) or after the grantee signs its CDBG-DR grant agreement. In addition to the terms described in the remainder of the Consolidated Notice, grantees may only charge costs to the grant that meet the following requirements:

- Grantees may only charge the costs for rehabilitation, demolition, and reconstruction of single family, multifamily, and nonresidential buildings, including commercial properties, owned by private individuals and entities, incurred before the owner applies to a CDBG-DR grantee, recipient, or subrecipient for CDBG-DR assistance;
- For rehabilitation and reconstruction costs, grantees may only charge costs for activities completed within the same footprint of the damaged structure, sidewalk, driveway, parking lot, or other developed area;
- As required by 2 CFR 200.403(g), costs must be adequately documented; and
- Grantees must complete a duplication of benefits check before providing assistance pursuant to section IV.A. in the Consolidated Notice.

Grantees are required to ensure that all costs charged to a CDBG-DR grant are necessary expenses related to authorized recovery purposes. Grantees may charge to CDBG-DR grants the eligible pre-application costs of individuals and private entities related to single family, multifamily, and nonresidential buildings, only if: (1) the person or private entity incurred the expenses within one year after the applicability date of the grantee's Allocation Announcement Notice (or within one year after the date of the disaster, whichever is later); and (2) the person or entity pays for the cost before the date on which the person or entity applies for CDBG-DR assistance. Exempt activities as defined at 24 CFR 58.34, but not including 24 CFR 58.34(a)(12), and categorical exclusions as defined at 24 CFR 58.35(b) are not subject to the time limit on pre-application costs outlined above. Actions that convert or potentially convert to exempt under 24 CFR 58.34(a)(12) remain subject to the reimbursement requirements provided herein. If a grantee cannot meet all requirements at 24 CFR part 58, the pre-application costs cannot be reimbursed with CDBG-DR or other HUD funds.

Grantees must comply with the necessary and reasonable cost principles for state, local, and Indian tribal governments (described at 2 CFR 200.403). Grantees must incorporate into their policies and procedures the basis for determining that the assistance provided under the terms of this provision is necessary and reasonable.

A grantee may not charge such pre-award or pre-application costs to grants if the

grantee cannot meet all requirements at 24 CFR part 58. Under CDBG-DR authorizing legislation and HUD's environmental regulations in 24 CFR part 58, the CDBG-DR "recipient" (as defined in 24 CFR part 58.2(a)(5), which differs from the definition in 2 CFR part 200) is the responsible entity that assumes the responsibility for completing environmental reviews under Federal laws and authorities. The responsible entity assumes all legal liability for the application, compliance, and enforcement of these requirements. Pre-award costs are also allowable when CDBG-DR assistance is provided for the rehabilitation, demolition, or reconstruction of government buildings, public facilities, and infrastructure. However, in such instances, the environmental review must occur before the underlying activity (e.g., rehabilitation of a government building) begins.

Grantees are also required to consult with the State Historic Preservation Officer, Fish and Wildlife Service, and National Marine Fisheries Service, to obtain formal agreements for compliance with section 106 of the National Historic Preservation Act (54 U.S.C. 306108) and section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) when designing a reimbursement program.

All grantees must follow all cross-cutting requirements, as applicable, for all CDBG-DR funded activities including but not limited to the environmental requirements above, the Davis Bacon Act, Civil Rights Requirements, HUD's Lead Safe Housing Rule, and the URA.

III.F.6. Alternative requirement for the elevation of structures when using CDBG-DR funds as the non-Federal match in a FEMA-funded project. Currently, CDBG-DR grantees using FEMA and CDBG-DR funds on the same activity have encountered challenges in certain circumstances in reconciling CDBG-DR elevation requirements and those established by FEMA. FEMA regulations at 44 CFR 9.11(d)(3)(i) and (ii) prohibit new construction or substantial improvements to a structure unless the lowest floor of the structure is at or above the level of the base flood and, for Critical Actions, at or above the level of the 500-year flood. However, 44 CFR 9.11(d)(3)(iii) allows for an alternative to elevation to the 100- or 500-year flood level, subject to FEMA approval, which would provide for improvements that would ensure the substantial impermeability of the structure below flood level. While FEMA may change its standards for elevation in the future, as long as the CDBG-DR grantee is following a FEMA-approved flood standard this waiver and alternative requirement will continue to apply.

FEMA funded projects generally commence well in advance of the availability of CDBG-DR funds and when CDBG-DR funds are used as match for a FEMA project that is underway, the alignment of HUD's elevation standards with any alternative standard allowed by FEMA may not be feasible and may not be cost reasonable. For these reasons, the Secretary finds good cause to establish an alternative requirement for the use of an alternative, FEMA-approved flood standard instead of the elevation requirements established in section II.B.2.c. and II.C.2. of the Consolidated Notice.

The alternative requirements apply when: (a) CDBG-DR funds are used as the non-Federal match for FEMA assistance; (b) the FEMA-assisted activity, for which CDBG-DR funds will be used as match, commenced before HUD's obligation of CDBG-DR funds to the grantee; and (c) the grantee has determined and demonstrated with records in the activity file that implementation costs of the required CDBG-DR elevation or flood proofing requirements are not reasonable costs, as that term is defined in the applicable cost principles at 2 CFR 200.404.

III.F.7. Certifications waiver and alternative requirement. Sections 104(b)(4), (c), and (m) of the HCDA (42 U.S.C. 5304(b)(4), (c) & (m)), sections 106(d)(2)(C) & (D) of the HCDA (42 U.S.C. 5306(d)(2)(C) & (D)), and section 106 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12706), and regulations at 24 CFR 91.225 and 91.325 are waived and replaced with the following alternative. Each grantee receiving an allocation under an Allocation Announcement Notice must make the following certifications with its action plan:

- a. The grantee certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan (RARAP) in connection with any activity assisted with CDBG-DR grant funds that fulfills the requirements of Section 104(d), 24 CFR part 42, and 24 CFR part 570, as amended by waivers and alternative requirements.

- b. The grantee certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by part 87.

- c. The grantee certifies that the action plan for disaster recovery is authorized under state and local law (as applicable) and that the grantee, and any entity or entities designated by the grantee, and any contractor, subrecipient, or designated public agency carrying out an activity with CDBG-DR funds, possess(es) the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations as modified by waivers and alternative requirements.

- d. The grantee certifies that activities to be undertaken with CDBG-DR funds are consistent with its action plan.

- e. The grantee certifies that it will comply with the acquisition and relocation requirements of the URA, as amended, and implementing regulations at 49 CFR part 24, as such requirements may be modified by waivers or alternative requirements.

- f. The grantee certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and implementing regulations at 24 CFR part 75.

- g. The grantee certifies that it is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.115 or 91.105 (except as provided for in waivers and alternative requirements). Also, each local government receiving assistance from a state grantee must follow a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in waivers and alternative requirements).

h. State grantee certifies that it has consulted with all disaster-affected local governments (including any CDBG-entitlement grantees), Indian tribes, and any local public housing authorities in determining the use of funds, including the method of distribution of funding, or activities carried out directly by the state.

i. The grantee certifies that it is complying with each of the following criteria:

(1) Funds will be used solely for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation in the most impacted and distressed areas for which the President declared a major disaster pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*).

(2) With respect to activities expected to be assisted with CDBG-DR funds, the action plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families.

(3) The aggregate use of CDBG-DR funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 70 percent (or another percentage permitted by HUD in a waiver) of the grant amount is expended for activities that benefit such persons.

(4) The grantee will not attempt to recover any capital costs of public improvements assisted with CDBG-DR grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless: (a) disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under this title; or (b) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (a).

j. State and local government grantees certify that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601-3619), and implementing regulations, and that it will affirmatively further fair housing. An Indian tribe grantee certifies that the grant will be conducted and administered in conformity with the Indian Civil Rights Act.

k. The grantee certifies that it has adopted and is enforcing the following policies, and, in addition, state grantees must certify that they will require local governments that receive their grant funds to certify that they have adopted and are enforcing:

(1) A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations; and

(2) A policy of enforcing applicable state and local laws against physically barring

entrance to or exit from a facility or location that is the subject of such nonviolent civil rights demonstrations within its jurisdiction.

l. The grantee certifies that it (and any subrecipient or administering entity) currently has or will develop and maintain the capacity to carry out disaster recovery activities in a timely manner and that the grantee has reviewed the requirements applicable to the use of grant funds.

m. The grantee certifies to the accuracy of its Financial Management and Grant Compliance Certification Requirements, or other recent certification submission, if approved by HUD, and related supporting documentation as provided in section III.A.1. of the Consolidated Notice and the grantee's implementation plan and related submissions to HUD as provided in section III.A.2. of the Consolidated Notice.

n. The grantee certifies that it will not use CDBG-DR funds for any activity in an area identified as flood prone for land use or hazard mitigation planning purposes by the state, local, or tribal government or delineated as a Special Flood Hazard Area (or 100-year floodplain) in FEMA's most current flood advisory maps, unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain, in accordance with Executive Order 11988 and 24 CFR part 55. The relevant data source for this provision is the state, local, and tribal government land use regulations and hazard mitigation plans and the latest-issued FEMA data or guidance, which includes advisory data (such as Advisory Base Flood Elevations) or preliminary and final Flood Insurance Rate Maps.

o. The grantee certifies that its activities concerning lead-based paint will comply with the requirements of 24 CFR part 35, subparts A, B, J, K, and R.

p. The grantee certifies that it will comply with environmental requirements at 24 CFR part 58.

q. The grantee certifies that it will comply with the provisions of title I of the HCDA and with other applicable laws.

Warning: Any person who knowingly makes a false claim or statement to HUD may be subject to civil or criminal penalties under 18 U.S.C. 287, 1001, and 31 U.S.C. 3729.

III.G. Ineligible Activities in CDBG-DR

Any activity that is not authorized under Section 105(a) of the HCDA is ineligible to be assisted with CDBG-DR funds, unless explicitly allowed by waiver and alternative requirement in the Consolidated Notice. Additionally, the uses described below are explicitly prohibited.

III.G.1. Prohibition on compensation.

Grantees shall not use CDBG-DR funds to provide compensation to beneficiaries for losses stemming from disaster related impacts. Grantees may, however, reimburse disaster-impacted beneficiaries based on the pre-application costs incurred by the beneficiary to complete an eligible activity. Reimbursement of beneficiaries for eligible activity costs are subject to the requirements established in section III.F.5. of the Consolidated Notice.

III.G.2. Prohibition on forced mortgage payoff. A forced mortgage payoff occurs

when homeowners with an outstanding mortgage balance are required, under the terms of their loan agreement, to repay the balance of the mortgage loan before using assistance to rehabilitate or reconstruct their homes. CDBG-DR funds, however, shall not be used for a forced mortgage payoff. The ineligibility of a forced mortgage payoff with CDBG-DR funds does not affect HUD's longstanding guidance that when other non-CDBG disaster assistance is taken by lenders for a forced mortgage payoff, those funds are not considered to be available to the homeowner and do not constitute a duplication of benefits for the purpose of housing rehabilitation or reconstruction.

III.G.3. Prohibiting assistance to private utilities. HUD is adopting the following alternative requirement to section 105(a) and prohibiting the use of CDBG-DR funds to assist a privately-owned utility for any purpose.

IV. Other Program Requirements

IV.A. Duplication of Benefits

The grantee must comply with section 312 of the Stafford Act, as amended, which prohibits any person, business concern, or other entity from receiving financial assistance with respect to any part of a loss resulting from a major disaster for which such person, business concern, or other entity has received financial assistance under any other program or from insurance or any other source. To comply with section 312, a person or entity may receive financial assistance only to the extent that the person or entity has a disaster recovery need that has not been fully met. Grantees must also establish policies and procedures to provide for the repayment of a CDBG-DR award when assistance is subsequently provided for that same purpose from any other source. Grantees may be subject to additional DOB requirements described in a separate notice. The applicable Allocation Announcement Notice will describe any additional requirements, as applicable.

Subsidized loans are financial assistance and therefore can duplicate financial assistance provided from another source unless an exception in IV.A.1. applies.

IV.A.1. Exceptions when subsidized loans are not a duplication. When an exception described in paragraphs IV.A.1.a. or IV.A.1.b. applies, documentation required by those paragraphs must be maintained by the grantee. Without this documentation, any approved but undisbursed portion of a subsidized loan must be included in the grantee's calculation of the total assistance amount unless another exception applies. For cancelled SBA loans, the grantee must notify the SBA that the applicant has agreed to not take any actions to reinstate the cancelled loan or draw any additional undisbursed loan amounts.

IV.A.1.a. Short-term subsidized loans for costs later reimbursed with CDBG-DR. CDBG-DR funds may be used to reimburse pre-award costs of the grantee or subrecipient for eligible activities on or after the date of the disaster. If the grantee or subrecipient obtained a subsidized short-term loan to pay for eligible costs before CDBG-DR funds became available (for example, a low-interest

loan from a local tax increment financing fund), the reimbursement of the costs paid by the loan does not create a duplication.

IV.A.1.b. Declined or cancelled subsidized loans. The amount of a subsidized loan that is declined or cancelled is not a DOB. To exclude declined or cancelled loan amounts from the DOB calculation, the grantee must document that all or a portion of the subsidized loan is cancelled or declined.

(i) Declined SBA Loans: Declined loan amounts are loan amounts that were approved or offered by a lender in response to a loan application, but were turned down by the applicant, meaning the applicant never signed loan documents to receive the loan proceeds.

CDBG–DR grantees shall not treat declined subsidized loans, including declined SBA loans, as a DOB (but are not prohibited from considering declined subsidized loans for other reasons, such as underwriting). A grantee is only required to document declined loans if information available to the grantee (e.g., the data the grantee receives from FEMA, SBA, or other sources) indicates that the applicant received an offer for subsidized loan assistance, and the grantee is unable to determine from that available information that the applicant declined the loan. If the grantee is aware that the applicant received an offer of loan assistance and cannot ascertain from available data that the applicant declined the loan, the grantee must obtain a written certification from the applicant that the applicant did not accept the subsidized loan by signing loan documents and did not receive the loan.

(ii) Cancelled Loans: Cancelled loans are loans (or portions of loans) that were initially accepted, but for a variety of reasons, all or a portion of the loan amount was not disbursed and is no longer available to the applicant.

The cancelled loan amount is the amount that is no longer available. The loan cancellation may be due to default of the borrower, agreement by both parties to cancel the undisbursed portion of the loan, or expiration of the term for which the loan was available for disbursement. The following documentation is sufficient to demonstrate that any undisbursed portion of an accepted subsidized loan is cancelled and no longer available: (a) A written communication from the lender confirming that the loan has been cancelled and undisbursed amounts are no longer available to the applicant; or (b) a legally binding agreement between the CDBG–DR grantee (or local government, Indian tribe, or subrecipient administering the CDBG–DR assistance) and the applicant that indicates that the period of availability of the loan has passed and the applicant agrees not to take actions to reinstate the loan or draw any additional undisbursed loan amounts.

IV.B. Procurement

For a grantee to have proficient procurement processes, a grantee must: indicate the procurement standards that apply to its use of CDBG–DR funds; indicate the procurement standards for subrecipients or local governments as applicable; comply with the standards it certified to HUD that it

follows (and update the certification submissions when substantial changes are made); post the required documentation to the official website as described below; and include periods of performance and date of completion in all CDBG–DR contracts.

State grantees must comply with the procurement requirements at 24 CFR 570.489(g) and the following alternative requirements: The grantee must evaluate the cost or price of the product or service being procured. State grantees shall establish requirements for procurement processes for local governments and subrecipients based on full and open competition consistent with the requirements of 24 CFR 570.489(g), and shall require a local government or subrecipient to evaluate the cost or price of the product or service being procured with CDBG–DR funds. Additionally, if the state agency designated as the administering agency chooses to provide funding to another state agency, the administering agency must specify in its procurement processes whether the agency implementing the CDBG–DR activity must follow the procurement processes that the administering agency is subject to, or whether the agency must follow the same processes to which other local governments and subrecipients are subject, or its own procurement processes.

A grantee shall administer CDBG–DR grant funds in accordance with all applicable laws and regulations. As an alternative requirement, grantees may not delegate, by contract, or otherwise, the responsibility for administering such grant funds.

HUD is establishing an additional alternative requirement for all contracts with contractors used to provide goods and services, as follows:

1. The grantee (or procuring entity) is required to clearly state the period of performance or date of completion in all contracts;

2. The grantee (or procuring entity) must incorporate performance requirements and liquidated damages into each procured contract. Contracts that describe work performed by general management consulting services need not adhere to the requirement on liquidated damages but must incorporate performance requirements; and

3. The grantee (or procuring entity) may contract for administrative support, in compliance with 2 CFR 200.459, but may not delegate or contract to any other party any inherently governmental responsibilities related to oversight of the grant, including policy development, fair housing and civil rights compliance, and financial management.

IV.C. Use of the “Upper Quartile” or “Exception Criteria”

The LMA benefit requirement is modified when fewer than one quarter of the populated-block groups in its jurisdictions contain 51 percent or more LMI persons. In such a community, activities must serve an area that contains a percentage of LMI residents that is within the upper quartile of all census-block groups within its jurisdiction in terms of the degree of concentration of LMI residents. HUD determines the lowest proportion a grantee

may use to qualify an area for this purpose and advises the grantee, accordingly. The “exception criteria” applies to CDBG–DR funded activities in jurisdictions covered by such criteria, including jurisdictions that receive disaster recovery funds from a state. Disaster recovery grantees are required to use the most recent data available in implementing the exception criteria (<https://www.hudexchange.info/programs/acs-low-mod-summary-data/acs-low-mod-summary-data-exception-grantees/>).

IV.D. Environmental Requirements

IV.D.1. Clarifying note on the process for environmental release of funds when a state carries out activities directly. For CDBG–DR grants, HUD allows state grantees to carry out activities directly and to distribute funds to subrecipients. Per 24 CFR 58.4(b)(1), when a state carries out activities directly (including through subrecipients that are not units of general local government), the state must submit the Certification and Request for Release of Funds to HUD for approval.

IV.D.2. Adoption of another agency’s environmental review. Appropriations acts allow recipients of funds that use such funds to supplement Federal assistance provided under section 402, 403, 404, 406, 407, 408(c)(4), or 502 of the Stafford Act to adopt, without review or public comment, any environmental review, approval, or permit performed by a Federal agency. Such adoption shall satisfy the responsibilities of the recipient with respect to such environmental review, approval, or permit.

This provision allows the recipient of supplemental assistance to adopt another Federal agency’s review where the HUD assistance supplements the Stafford Act, and the other Federal agency performed an environmental review for assistance under section 402, 403, 404, 406, 407, or 502 of the Stafford Act.

The other agency’s environmental review must cover all project activities funded by the HUD recipient for each project. The grantee is only required to supplement the other agency’s environmental review to comply with HUD regulations (e.g., publication or posting requirements for Notice of Finding of No Significant Impact (FONSI), Notice of Intent to Request Release of Funds (NOI–RROF), concurrent or combined notices, or HUD approval period for objections) if the activity is modified so the other agency’s environmental review no longer covers the activity. The recipient’s environmental review obligations are considered complete when adopting another agency’s environmental review. To be adequate:

1. The grantee must obtain a completed electronic or paper copy of the Federal agency’s review and retain a copy in its environmental records.

2. The grantee must notify HUD on the Request for Release of Funds (RROF) Form 7015.15 (or the state, if the state is acting as HUD under 24 CFR 58.18) that another agency review is being used. The grantee must include the name of the other Federal agency, the name of the project, and the date of the project’s review as prepared by the other Federal agency.

When permitted by the applicable appropriations acts, and notwithstanding 42 U.S.C. 5304(g)(2), the Secretary or a state may, upon receipt of a Request for Release of Funds and Certification, immediately approve the release of funds for an activity or project assisted with CDBG–DR funds if the recipient has adopted an environmental review, approval, or permit under this section, or if the activity or project is categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA).

IV.D.3. *Historic preservation reviews.* The responsible entity must comply with section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. Section 306108). Early coordination under section 106 is important to the recovery process and required by 24 CFR 58.5(a).

IV.D.4. *Tiered environmental reviews.* Tiering, as described at 40 CFR 1508.1(ff) and 24 CFR 58.15, is a means of making the environmental review process more efficient by allowing parties to “eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review” (40 CFR 1501.11(a)). Tiering is appropriate when a responsible entity is evaluating a single-family housing program with similar activities within a defined local geographic area and timeframe (*e.g.*, rehabilitating single-family homes within a city district or county over the course of one to five years) but where the specific sites and activities are not yet known. Public notice and the Request for Release of Funds (HUD-Form 7015.15) are processed at a broad-level, eliminating the need for publication at the site-specific level. However, funds cannot be spent or committed on a specific site or activity until the site-specific review has been completed and approved.

IV.E. Flood Insurance Requirements

Grantees, recipients, and subrecipients must implement procedures and mechanisms to ensure that assisted property owners comply with all flood insurance requirements, including the purchase and notification requirements described below, before providing assistance.

IV.E.1. *Flood insurance purchase requirements.* When grantees use CDBG–DR funds to rehabilitate or reconstruct existing residential buildings in a Special Flood Hazard Area (or 100-year floodplain), the grantee must comply with applicable Federal, state, local, and tribal laws and regulations related to both flood insurance and floodplain management. The grantee must comply with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a) which mandates the purchase of flood insurance protection for any HUD-assisted property within a Special Flood Hazard Area. Therefore, a HUD-assisted homeowner for a property located in a Special Flood Hazard Area must obtain and maintain flood insurance in the amount and duration prescribed by FEMA’s National Flood Insurance Program.

IV.E.2. *Federal assistance to owners remaining in a floodplain.*

IV.E.2.a. *Prohibition on flood disaster assistance for failure to obtain and maintain flood insurance.* Grantees must comply with section 582 of the National Flood Insurance Reform Act of 1994, as amended, (42 U.S.C. 5154a), which prohibits flood disaster assistance in certain circumstances. No Federal disaster relief assistance made available in a flood disaster area may be used to make a payment (including any loan assistance payment) to a person for “repair, replacement, or restoration” for damage to any personal, residential, or commercial property if that person at any time has received Federal flood disaster assistance that was conditioned on the person first having obtained flood insurance under applicable Federal law and the person has subsequently failed to obtain and maintain flood insurance as required under applicable Federal law on such property.

A grantee may not provide disaster assistance for the repair, replacement, or restoration of a property to a person who has failed to satisfy the Federal requirement to obtain and maintain flood insurance and must implement a process to verify and monitor for compliance with section 582 and the requirement to obtain and maintain flood insurance. Grantees are reminded that CDBG–DR funds may be used to assist beneficiaries in the purchase of flood insurance to comply with this requirement, subject to the requirements of cost reasonableness and other federal cost principles.

IV.E.2.b. *Prohibition on flood disaster assistance for households above 120 percent of AMI for failure to obtain flood insurance.* When a homeowner located in the floodplain allows their flood insurance policy to lapse, it is assumed that the homeowner is unable to afford insurance and/or is accepting responsibility for future flood damage to the home. Higher income homeowners who reside in a floodplain, but who failed to secure or decided to not maintain their flood insurance, should not be assisted at the expense of lower income households. To ensure that adequate recovery resources are available to assist lower income homeowners who reside in a floodplain but who are unlikely to be able to afford flood insurance, the Secretary finds good cause to establish an alternative requirement.

The alternative requirement to 42 U.S.C. 5305(a)(4) is as follows: Grantees receiving CDBG–DR funds are prohibited from providing CDBG–DR assistance for the rehabilitation/reconstruction of a house, if (i) the combined household income is greater than either 120 percent of AMI or the national median, (ii) the property was located in a floodplain at the time of the disaster, and (iii) the property owner did not obtain flood insurance on the damaged property, even when the property owner was not required to obtain and maintain such insurance.

IV.E.2.c. *Responsibility to inform property owners to obtain and maintain flood insurance.* Section 582 of the National Flood Insurance Reform Act of 1994, as amended, (42 U.S.C. 5154a) is a statutory requirement that property owners receiving disaster assistance that triggers the flood insurance purchase requirement have a statutory

responsibility to notify any transferee of the requirement to obtain and maintain flood insurance and to maintain such written notification in the documents evidencing the transfer of the property, and that the transferring owner may be liable if he or she fails to do so. A grantee or subrecipient receiving CDBG–DR funds must notify property owners of their responsibilities under section 582.

IV.F. URA, Section 104(d), and Related CDBG Program Requirements

Activities and projects undertaken with CDBG–DR funds may be subject to the URA, section 104(d) of the HCDA (42 U.S.C. 5304(d)), and CDBG program requirements related to displacement, relocation, acquisition, and replacement of housing, except as modified by waivers and alternative requirements provided in this notice. The implementing regulations for the URA are at 49 CFR part 24. The regulations implementing section 104(d) are at 24 CFR part 42. The regulations for applicable CDBG program requirements are at 24 CFR 570.488 and 24 CFR 570.606. HUD is waiving or providing alternative requirements in this section for the purpose of promoting the availability of decent, safe, and sanitary housing with respect to the use of CDBG–DR funds allocated under the Consolidated Notice.

IV.F.1. *Section 104(d) one-for-one replacement of lower-income dwelling units.* One-for-one replacement requirements at section 104(d)(2)(A)(i) and (ii) and 104(d)(3) of the HCDA and 24 CFR 42.375 are waived for owner-occupied lower-income dwelling units that are damaged by the disaster and not suitable for rehabilitation. The section 104(d) one-for-one replacement housing requirements apply to occupied and vacant occupiable lower-income dwelling units demolished or converted in connection with a CDBG assisted activity. This waiver exempts all disaster-damaged owner-occupied lower-income dwelling units that meet the grantee’s definition of “not suitable for rehabilitation,” from the one-for-one replacement housing requirements of 24 CFR 42.375. Before carrying out activities that may be subject to the one-for-one replacement housing requirements, the grantee must define “not suitable for rehabilitation” in its action plan or in policies/procedures governing these activities. Grantees are reminded that tenant-occupied and vacant occupiable lower-income dwelling units demolished or converted to another use other than lower-income housing in connection with a CDBG–DR assisted activity are generally subject to one-for-one replacement requirements at 24 CFR 42.375 and that these provisions are not waived.

HUD is waiving the section 104(d) one-for-one replacement requirement for owner-occupied lower-income dwelling units that are damaged by the disaster and not suitable for rehabilitation because the one-for-one replacement requirements do not account for the large, sudden changes that a major disaster may cause to the local housing stock, population, or economy. Disaster-damaged housing structures that are not suitable for

rehabilitation can pose a threat to public health and safety and to economic revitalization. Prior to the implementation of this waiver and alternative requirement, grantees must reassess post-disaster population and housing needs to determine the appropriate type and amount of lower-income dwelling units (both rental and owner-occupied units) to rehabilitate and/or reconstruct. Grantees should note that the demolition and/or disposition of public housing units continue to be subject to section 18 of the United States Housing Act of 1937, as amended, and 24 CFR part 970.

IV.F.2. Section 104(d) relocation assistance. The relocation assistance requirements at section 104(d)(2)(A)(iii) and (B) of the HCDA and 24 CFR 42.350, are waived to the extent that an eligible displaced person, as defined under 24 CFR 42.305 of the section 104(d) implementing regulations, may choose to receive either assistance under the URA and implementing regulations at 49 CFR part 24, or assistance under section 104(d) and implementing regulations at 24 CFR 42.350. This waiver does not impact a person's eligibility as a displaced person under section 104(d), it merely limits the amounts and types of relocation assistance that a section 104(d) eligible displaced person is eligible to receive. A section 104(d) eligible displaced person is eligible to receive the amounts and types of assistance for displaced persons under the URA, as may be modified by the waivers and alternative requirements in this notice for activities related to disaster recovery. Without this waiver, disparities exist in relocation assistance associated with activities typically funded by HUD and FEMA (e.g., buyouts and relocation). Both FEMA and CDBG funds are subject to the requirements of the URA; however, CDBG funds are subject to section 104(d), while FEMA funds are not. This limited waiver of the section 104(d) relocation assistance requirements assures uniform and equitable treatment for individuals eligible to receive benefits under Section 104(d) by establishing that all forms of relocation assistance to those individuals must be in the amounts and for the types of assistance provided to displaced persons under URA requirements.

IV.F.3. URA replacement housing payments for tenants. The requirements of sections 204 and 205 of the URA (42 U.S.C. 4624 and 42 U.S.C. 4625), and 49 CFR 24.2(a)(6)(vii), 24.2(a)(6)(ix), and 24.402(b) are waived to the extent necessary to permit a grantee to meet all or a portion of a grantee's replacement housing payment obligation to a displaced tenant by offering rental housing through a rental housing program subsidy (to include, but not limited to, a housing choice voucher), provided that comparable replacement dwellings are made available to the tenant in accordance with 49 CFR 24.204(a) where the owner is willing to participate in the program and the period of authorized assistance is at least 42 months. This waiver and alternative requirement is subject to the following: if assistance is provided through a HUD program, it is subject to the applicable HUD program requirements, including the requirement that the tenant must be eligible for the rental

housing program. Failure to grant this waiver would impede disaster recovery whenever rental program subsidies are available but funds for cash replacement housing payments are limited and such payments are required by the URA to be based on a 42-month term.

IV.F.4. URA voluntary acquisition—homebuyer primary residence purchase. Grantees may implement disaster recovery program activities that provide financial assistance to eligible homebuyers to purchase and occupy residential properties as their primary residence. Such purchases are generally considered voluntary acquisitions under the URA and subject to the URA regulatory requirements at 49 CFR 24.101(b)(2). For CDBG-DR, 49 CFR 24.101(b)(2) is waived to the extent that it applies to a homebuyer, who does not have the power of eminent domain, and uses CDBG-DR funds in connection with the voluntary purchase and occupancy of a home the homebuyer intends to make their primary residence. This waiver is necessary to reduce burdensome administrative requirements for homebuyers following a disaster. Tenants displaced by these voluntary acquisitions may be eligible for relocation assistance.

IV.F.5. CDBG displacement, relocation, acquisition, and replacement housing program regulations—Optional relocation assistance. The regulations at 24 CFR 570.606(d) are waived to the extent that they require optional relocation policies to be established at the grantee level. Unlike with the regular CDBG program, states may carry out disaster recovery activities directly or through subrecipients, but 24 CFR 570.606(d) does not account for this distinction. This waiver makes clear that grantees receiving CDBG-DR funds may establish optional relocation policies or permit their subrecipients to establish separate optional relocation policies. The written policy must: be available to the public, describe the relocation assistance that the grantee, state recipient (i.e., a local government receiving a subgrant from the state through a method of distribution), or subrecipient (as applicable) has elected to provide, and provide for equal relocation assistance within each class of displaced persons according to 24 CFR 570.606(d). This waiver is intended to provide states with maximum flexibility in developing optional relocation policies with CDBG-DR funds.

IV.F.6. Waiver of Section 414 of the Stafford Act. Section 414 of the Stafford Act (42 U.S.C. 5181) provides that “Notwithstanding any other provision of law, no person otherwise eligible for any kind of replacement housing payment under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646) [42 U.S.C. 4601 *et seq.*] [“URA”] shall be denied such eligibility as a result of his being unable, because of a major disaster as determined by the President, to meet the occupancy requirements set by [the URA].” Accordingly, homeowner occupants and tenants displaced from their homes as a result of the identified disasters and who would have otherwise been displaced as a direct result of any acquisition, rehabilitation, or demolition of real property

for a federally funded program or project may become eligible for a replacement housing payment notwithstanding their inability to meet occupancy requirements prescribed in the URA. Section 414 of the Stafford Act and its implementing regulation at 49 CFR 24.403(d)(1) are waived to the extent that they would apply to real property acquisition, rehabilitation, or demolition of real property for a CDBG-DR funded project commencing more than one year after the date of the latest applicable Presidentially declared disaster undertaken by the grantees, or subrecipients, provided that the project was not planned, approved, or otherwise underway before the disaster.

For purposes of this waiver, a CDBG-DR funded project shall be determined to have commenced on the earliest of: (1) the date of an approved Request for Release of Funds and certification; (2) the date of completion of the site-specific review when a program utilizes Tiering; or (3) the date of sign-off by the approving official when a project converts to exempt under 24 CFR 58.34(a)(12).

The waiver will simplify the administration of the disaster recovery process and reduce the administrative burden associated with the implementation of Stafford Act Section 414 requirements for projects commencing more than one year after the date of the Presidentially declared disaster considering most of such persons displaced by the disaster will have returned to their dwellings or found another place of permanent residence.

This waiver does not apply with respect to persons that meet the occupancy requirements to receive a replacement housing payment under the URA nor does it apply to persons displaced or relocated temporarily by other HUD-funded programs or projects. Such persons' eligibility for relocation assistance and payments under the URA is not impacted by this waiver.

IV.F.7. RARAP Section 104(d). CDBG-DR grantees must certify that they have in effect and are following a RARAP as required by section 104(d)(1) and (2) of the HCDA and 24 CFR 42.325. In addition to the requirements in 24 CFR 42.325 and 24 CFR 570.488 or 24 CFR 570.606(c), as applicable, HUD is specifying the following alternative requirements:

Grantees who are following an existing RARAP for CDBG purposes must either: (1) amend their existing RARAP; or (2) create a separate RARAP for CDBG-DR purposes, to reflect the following requirements and applicable waivers and alternative requirements as modified by the Consolidated Notice.

Grantees who do not have an existing RARAP in place because they do not manage CDBG programs must create a separate RARAP for CDBG-DR purposes, to reflect the following CDBG-DR requirements and applicable waivers and alternative requirements as modified by the Consolidated Notice.

(1) RARAP requirements for CDBG-DR. As each grantee establishes and supports feasible and cost-effective recovery efforts to make communities more resilient against future disasters, the CDBG-DR RARAP must

describe how the grantee plans to minimize displacement of members of families and individuals from their homes and neighborhoods as a result of any CDBG–DR assisted activities, including disaster recovery activities where displacement can be prevented (e.g., housing rehabilitation programs). Across disaster recovery activities—such as buyouts and other eligible acquisition activities, where minimizing displacement is not reasonable, feasible, or cost-efficient and would not help prevent future or repetitive loss—the grantee must describe how it plans to minimize the adverse impacts of displacement.

The description shall focus on proposed disaster recovery activities that may directly or indirectly result in displacement and the assistance that shall be required for those displaced. This description must focus on relocation assistance under the URA and its implementing regulations at 49 CFR part 24, Section 104(d) and implementing regulations at 24 CFR part 42 (to the extent applicable), 24 CFR 570.488 and/or 24 CFR 570.606, and relocation assistance pursuant to this section of the Consolidated Notice, as well as any other assistance being made available to displaced persons. The CDBG–DR RARAP must include a description of how the grantee will plan programs or projects in such a manner that recognizes the substantial challenges experienced by displaced individuals, families, businesses, farms, and nonprofit organizations and develop solutions to minimize displacement or the adverse impacts of displacement especially among vulnerable populations. The description must be scoped to the complexity and nature of the anticipated displacing activities, including the evaluation of the grantee's available resources to carry out timely and orderly relocations in compliance with all applicable relocation requirements.

V. Performance Reviews

Under 42 U.S.C. 5304(e) and 24 CFR 1003.506(a), the Secretary shall, at least on an annual basis, make such reviews and audits as may be necessary or appropriate to determine whether the grantee has carried out its activities in a timely manner (consistent process to meet its expenditure requirement), whether the grantee's activities and certifications are carried out in accordance with the requirements and the primary objectives of the HCDA and other applicable laws, and whether the grantee has the continuing capacity to carry out those activities in a timely manner.

V.A. Timely Distribution and Expenditure of Funds

HUD waives the provisions at 24 CFR 570.494 and 24 CFR 570.902 regarding timely distribution and expenditure of funds, and establishes an alternative requirement providing that each grantee must expend 100 percent of its allocation within six years of the date HUD signs the grant agreement. HUD may extend the period of performance administratively, if good cause for such an extension exists at that time, as requested by the grantee, and approved by HUD. When the period of performance has ended, HUD will close out the grant and any remaining funds

not expended by the grantee on appropriate programmatic purposes will be recaptured by HUD.

V.B. Review of Continuing Capacity

Upon a determination by HUD that the grantee has not carried out its CDBG–DR activities and certifications in accordance with the requirements in the Consolidated Notice, HUD will undertake a further review to determine if the grantee has the continuing capacity to carry out its activities in a timely manner. In making this determination, HUD will consider the nature and extent of the recipient's performance deficiencies, the actions taken by the recipient to address the deficiencies, and the success or likely success of such actions. HUD may then apply the following corrective and remedial actions as appropriate:

V.B.1. *Corrective and remedial actions.* To effectively administer the CDBG–DR program in a manner that facilitates recovery, particularly the alternative requirements permitting states to act directly to carry out eligible activities, HUD is waiving 42 U.S.C. 5304(e) to the extent necessary to establish the following alternative requirement: HUD may undertake corrective and remedial actions for states in accordance with the authorities for CDBG Entitlement grantees in subpart O (including corrective and remedial actions in 24 CFR 570.910, 570.911, and 570.913) or under subpart I of the CDBG regulations at 24 CFR part 570. In response to a deficiency, HUD may issue a warning letter followed by a corrective action plan that may include a management plan which assigns responsibility for further administration of the grant to specific entities or persons. Failure to comply with a corrective action may result in the termination, reduction, or limitation of payments to grantees receiving CDBG–DR funds.

V.B.2. *Reduction, withdrawal, or adjustment of a grant, or other appropriate action.* Before a reduction, withdrawal, or adjustment of a CDBG–DR grant, or other actions taken pursuant to this section, the recipient shall be notified of the proposed action and be given an opportunity for an informal consultation. Consistent with the procedures described in the Consolidated Notice, HUD may adjust, reduce, or withdraw the CDBG–DR grant (except funds that have been expended for eligible, approved activities) or take other actions as appropriate.

V.B.3. *Additional criteria and specific conditions to mitigate risk.* To ensure effective grantee implementation of the financial controls, procurement processes, and other procedures that are the subject of the certification by the Secretary, HUD has and may continue to establish specific criteria and conditions for each grant award as provided for at 2 CFR 200.206 and 200.208, respectively, to mitigate the risk of the grant. The Secretary shall specify any such criteria and the resulting conditions in the grant conditions governing the award. These criteria may include, but need not be limited to, a consideration of the internal control framework established by the grantee to ensure compliant implementation of its

financial controls, procurement processes and payment of funds to eligible entities, as well as the grantee's risk management strategy for information technology systems established to implement CDBG–DR funded programs. Additionally, the Secretary may amend the grant conditions to mitigate risk of a grant award at any point at which the Secretary determines a condition to be required to protect the Federal financial interest or to advance recovery.

V.C. Grantee Reporting Requirements in the DRGR System

V.C.1. *DRGR-related waivers and alternative requirements.* The Consolidated Notice waives the requirements for submission of a performance report pursuant to 42 U.S.C. 12708(a), 24 CFR 91.520, and annual status and evaluation reports that are due each fiscal year under 24 CFR 1003.506(a). Alternatively, HUD is requiring that grantees enter information in the DRGR system on a quarterly basis through the performance reports. The information in DRGR and the performance reports must contain sufficient detail to permit HUD's review of grantee performance and to enable remote review of grantee data to allow HUD to assess compliance and risk.

At a minimum, each grantee must:

a. Enter its action plan and amendments as described in III.C.1, including performance measures, into the Public Action Plan in DRGR;

b. Enter activities into the DRGR Action Plan at a level of detail sufficient to allow HUD to determine grantee compliance (when the activity type, national objective, and the organization that will be responsible for the activity is known);

c. Categorize activities in DRGR under a "project";

d. Enter into the DRGR system summary information on grantees' monitoring visits and reports, audits, and technical assistance it conducts as part of its oversight of its disaster recovery programs;

e. Use the DRGR system to draw grant funds for each activity;

f. Use the DRGR system to track program income receipts, disbursements, revolving loan funds, and leveraged funds (if applicable);

g. Submit a performance report through the DRGR system no later than 30 days following the end of each calendar quarter. For all activities, the address of each CDBG–DR assisted property must be recorded in the performance report; and

h. Publish a version of the performance report that omits personally identifiable information reported in the performance reports submitted to HUD on the grantee's official website within three days of submission to HUD, or in the event a performance report is rejected by HUD, publish the revised version, as approved by HUD, within three days of HUD approval.

The grantee's first performance report is due after the first full quarter after HUD signs the grant agreement. Performance reports must be submitted on a quarterly basis until all funds have been expended and all expenditures and accomplishments have been reported. If a satisfactory report is not

submitted in a timely manner, HUD may suspend access to CDBG-DR funds until a satisfactory report is submitted, or may

withdraw and reallocate funding if HUD determines, after notice and opportunity for

a hearing, that the jurisdiction did not submit a satisfactory report.

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Part V

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedure for Dishwashers; Final Rule

DEPARTMENT OF ENERGY**10 CFR Parts 429 and 430****[EERE-2016-BT-TP-0012]****RIN 1904-AD96****Energy Conservation Program: Test Procedure for Dishwashers**

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (“DOE”) is amending the current test procedures for dishwashers, adopting a new test procedure appendix, incorporating by reference Association of Home Appliance Manufacturers (“AHAM”) standards—AHAM DW-1-2020 and DW-2-2020—and applying certain provisions of the industry standards to the test procedures appendices. The amendments to the current appendix establish requirements for water hardness, relative humidity, and loading pattern; update requirements for ambient temperature, detergent dosage, and standby power measurement; and include testing approaches from published dishwasher waivers. The new test procedure appendix additionally includes provisions for a minimum cleaning index threshold to validate the selected test cycle and updated annual number of cycles and low-power mode hours for the calculation of annual energy consumption.

DATES: The effective date of this rule is February 17, 2023. The amendments to appendix C1 will be mandatory for product testing starting July 17, 2023. Manufacturers will be required to use the amended test procedure at appendix C1 until the compliance date of any final rule establishing amended energy conservation standards based on the newly established test procedure at appendix C2. At such time, manufacturers will be required to begin using the newly established test procedure at appendix C2. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on February 17, 2023.

ADDRESSES: The docket, which includes Federal Register notices, webinar attendee lists and transcripts, 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, not all documents listed in the index may be publicly available,

such as those containing information that is exempt from public disclosure.

A link to the docket web page can be found at www.regulations.gov/docket/EERE-2016-BT-TP-0012. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287-1445 or by email: ApplianceStandardsQuestions@ee.doe.gov.

FOR FURTHER INFORMATION CONTACT: Dr. Carl Shapiro, 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) 287-5649. Email:

ApplianceStandardsQuestions@ee.doe.gov.

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 586-2588. Email: Amelia.Whiting@hq.doe.gov.

SUPPLEMENTARY INFORMATION: DOE maintains and updates a previously approved incorporation by reference and incorporates by reference the following industry standards into title 10 of the Code of Federal Regulations (“CFR”) part 430:

AHAM DW-1-2020, “Uniform Test Method for Measuring the Energy Consumption of Dishwashers”, (copyright 2020).

AHAM DW-2-2020, “Household Electric Dishwashers”, (copyright 2020).

Copies of AHAM DW-1-2020 and AHAM DW-2-2020 can be obtained from Association of Home Appliance Manufacturers, 1111 19th Street NW, Suite 402, Washington, DC 20036; or by going to AHAM’s online store at www.aham.org/AHAM/AuxStore.

IEC 62301 (“IEC 62301 Ed. 2.0”), “Household electrical appliances—Measurement of standby power,” (Edition 2.0, 2011-01).

A copy of IEC 62301 Ed. 2.0 can be obtained from the International Electrotechnical Commission (“IEC”), 3 Rue de Varembe, Case Postale 131, 1211 Geneva 20, Switzerland; +41 22 919 02 11, <https://webstore.iec.ch/>.

For a further discussion of these standards, see section IV.N of this document.

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 V. Approval of the Office of the Secretary

I. Authority and Background

Dishwashers are included in the list of “covered products” for which the U.S. Department of Energy (“DOE”) is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292(a)(6)) DOE’s test procedure for dishwashers is currently prescribed at 10 CFR 430.23(c) and appendix C1 to subpart B of part 430 (“appendix C1”). The following sections discuss DOE’s authority to establish test procedures for dishwashers and relevant background information regarding DOE’s consideration of test procedures for this product.

A. Authority

The Energy Policy and Conservation Act, as amended (“EPCA”),¹ authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B² of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. These products include dishwashers, the subject of this document. (42 U.S.C. 6292(a)(6))

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The 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 under EPCA (42 U.S.C. 6295(s)), and (2) making other representations about the efficiency of those products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

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), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

² For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle (as determined by the Secretary) or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

EPCA also requires that, at least once every 7 years, DOE evaluate test procedures for each type of covered product, including dishwashers, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures to not be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)) If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedures. (42 U.S.C. 6293(b)(1)(A)(ii))

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, 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.*) Any such amendment must consider the most current versions of the International Electrotechnical Commission (“IEC”) Standard 62301³ and IEC Standard 62087⁴ as applicable. (42 U.S.C. 6295(gg)(2)(A))

DOE is publishing this final rule in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A))

B. Background

DOE most recently amended its dishwasher test procedures in a final rule published October 31, 2012, that established a new test procedure at appendix C1. 77 FR 65942 (“October 2012 Final Rule”). (For additional information on the history of test procedure rulemaking for dishwashers, please see the October 2012 Final Rule.) Appendix C1 follows the same general procedures as those included in the previously established appendix (*i.e.*, “appendix C”), with updates to: (1) revise the provisions for measuring energy consumption in standby mode or off mode; (2) add requirements for dishwashers with water softeners to account for regeneration cycles; (3) require an additional preconditioning cycle; (4) include clarifications regarding certain definitions, test conditions, and test setup; and (5) replace obsolete test load items and soils. 77 FR 65942, 65982–65987. Appendix C1 is currently required to demonstrate compliance with DOE’s energy conservation standards for dishwashers at 10 CFR 430.32(f).

The current version of the DOE test procedure includes provisions for determining estimated annual energy use (“EAEU”) in kilowatt-hours per year (“kWh/year”), estimated annual operating cost (“EAOC”) in dollars per year, and water consumption in gallons

³ IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

⁴ IEC 62087, *Audio, video and related equipment—Methods of measurement for power consumption* (Edition 1.0, Parts 1–6: 2015, Part 7: 2018).

per cycle (“gal/cycle”). 10 CFR 430.23(c). On December 13, 2016, DOE published a final determination (“December 2016 Final Determination”) regarding the energy conservation standards for dishwashers in which DOE removed appendix C, which was applicable only to dishwashers manufactured before May 30, 2013. See 81 FR 90072, 90073.

On August 20, 2019, DOE published a request for information (“August 2019 RFI”) seeking comments on the existing test procedure for dishwashers. 84 FR 43071. In the August 2019 RFI, DOE requested comments, information, and data about a number of issues, including

cycle selections, cycle options, test load items, soils, annual number of cycles, loading pattern, detergent, rinse aid, water hardness, standby testing, room ambient conditions, incorporating requirements from existing waivers for testing dishwashers, repeatability and reproducibility of the test procedure, and efficiency metrics. *Id.*

On December 22, 2021, DOE published a notice of proposed rulemaking (“December 2021 NOPR”) that proposed to amend appendix C1, adopt a new test in appendix C2, incorporate by reference AHAM standards—AHAM DW–1–2020, “Uniform Test Method for Measuring

the Energy Consumption of Dishwashers” (“AHAM DW–1–2020”) and AHAM DW–2–2020, “Household Electric Dishwashers” (“AHAM DW–2–2020”)—and apply certain provisions of the industry standards to the test procedures appendices, and include provisions for a minimum cleaning index threshold to validate the selected test cycle. 86 FR 72738. DOE requested comments from interested parties on the proposal. *Id.* DOE received comments in response to the December 2021 NOPR from the interested parties listed in Table I.1.

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS IN RESPONSE TO THE DECEMBER 2021 NOPR

Commenter(s)	Reference in this final rule	Comment No. in the docket	Commenter type
Association of Home Appliance Manufacturers	AHAM	5 17, 26 19	Trade Association. Utilities.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison; collectively, the California Investor-Owned Utilities.	CA IOUs		
GE Appliances, a Haier company	GEA	20	Manufacturer.
Appliance Standards Awareness Project, National Consumer Law Center, on behalf of its low-income clients, and Natural Resources Defense Council.	Joint Commenters	18	Efficiency Organizations.
Samsung Electronics America, Inc	Samsung	21	Manufacturer.
Whirlpool Corporation	Whirlpool	16	Manufacturer.

DOE also received feedback from AHAM during an *ex parte* meeting held on October 19, 2022 (“October 2022 *ex parte* meeting”). (AHAM, No. 27)

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.⁶ To the extent that interested parties have provided written comments that are substantively consistent with any oral comments provided during the February 3, 2022, public meeting (hereafter referred to as the “December 2021 NOPR public meeting”), DOE cites the written comments throughout this final rule. Any oral comments provided during the webinar that are not substantively addressed by written comments are summarized and cited separately throughout this final rule.

II. Synopsis of the Final Rule

In this final rule, DOE incorporates by reference into 10 CFR part 430 the new industry standards AHAM DW–1–2020 and AHAM DW–2–2020. Specifically, this final rule amends the dishwasher test procedure to:

(1) Incorporate by reference AHAM DW–1–2020 into 10 CFR part 430 and

apply certain provisions of the industry standards to appendix C1, including the following:

- a. Add the water hardness specification in section 2.11 of AHAM DW–1–2020;
- b. Add the relative humidity specification in section 2.5.1 of AHAM DW–1–2020 and the associated tolerance for the measurement instrument in Section 3.7 of AHAM DW–1–2020;
- c. Update the active mode ambient temperature as specified in section 2.5.1 of AHAM DW–1–2020;
- d. Update the loading pattern requirement by applying the direction specified in section 2.6 of AHAM DW–1–2020;
- e. Update the specifications for detergent usage consistent with section 2.10 of AHAM DW–1–2020. This includes changing the type of detergent used and the calculation of detergent dosage to be used for the prewash and main wash cycles of dishwashers other than water re-use system dishwashers;
- f. Add specific dishwasher door configuration requirements during standby mode testing by incorporating the specifications in section 4.2 of

AHAM DW–1–2020 and update the annual combined low-power mode hours based on cycle duration; and g. Incorporate the requirements from AHAM DW–1–2020 for the test methods pertaining to two granted waivers for dishwashers with specific design features.

(2) Establish new appendix C2, which would generally require testing as in appendix C1, with the following additional updates:

- a. Specify provisions for scoring the test load and calculating a per-cycle cleaning index metric as specified in AHAM DW–2–2020 and establish a minimum cleaning index threshold of 70 as a condition for a test cycle to be valid.
- b. Update number of annual cycles and low-power mode hours used for calculating the estimated annual energy use as specified in Section 5 of AHAM DW–1–2020.

For both appendix C1 and new appendix C2, this final rule additionally adds provisions to incorporate the test methods specified in a waiver for testing a basic model of dishwasher that does not hook up to a water supply line, but has a manually filled, built-in water

⁵ AHAM’s supplemental comment (No. 26) was received 192 days after the comment submission deadline. DOE generally will not consider late-filed comments, but may exercise its discretion to do so where necessary and appropriate. In this case, DOE is considering AHAM’s comment because its

tardiness has not disrupted DOE’s consideration of this matter and because the comment regards a subject important to this matter.

⁶ The parenthetical reference provides a reference for information located in the docket of DOE’s rulemaking to develop test procedures for

dishwashers. (Docket No. EERE–2016–BT–TP–0012, which is maintained at www.regulations.gov.) The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

tank and in a waiver for basic models of dishwashers that are installed in-sink (as opposed to built-in to the cabinetry or placed on countertops). The adopted amendments are summarized in Table II.1 compared to the test procedure provision prior to the amendment, as well as the reason for the adopted change.

TABLE II.1—SUMMARY OF CHANGES IN THE AMENDED TEST PROCEDURE

DOE test procedure prior to amendment	Amended test procedure	Applicable test procedure	Attribution
References provisions of ANSI/AHAM DW–1–2010 for some aspects of the test procedure.	References provisions of AHAM DW–1–2020 newly incorporated into 10 CFR part 430, with limited modifications.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Does not specify a water hardness requirement.	Adds water hardness requirement to be consistent with AHAM DW–1–2020, which specifies 0 to 85 parts per million of calcium carbonate.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Does not specify any range for relative humidity.	Adds a relative humidity (“RH”) requirement consistent with AHAM DW–1–2020, which specifies 35 percent ± 15 percent.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Does not specify any instrumentation for measuring relative humidity.	References the instrumentation requirements from AHAM DW–1–2020 for measuring relative humidity.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Specifies that the ambient temperature must be maintained at 75 °F ±5 °F.	References the ambient temperature requirement from AHAM DW–1–2020, including maintaining it at a target temperature of 75 °F.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Does not specify a loading pattern	References the loading pattern from AHAM DW–1–2020, which specifies the same loading requirements as the ENERGY STAR Cleaning Performance Test Method.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
References the detergent type and detergent dosing requirements from ANSI/AHAM DW–1–2010, which specifies Cascade with the Grease Fighting Power of Dawn as the detergent and dosing requirements based on water volumes in the prewash and main wash cycles.	References the detergent type and detergent dosing requirements from AHAM DW–1–2020, which references AHAM DW–2–2020 and specifies Cascade Complete Powder detergent and dosing requirements based on number of place settings.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Uses 215 annual cycles for calculating annual energy use.	Reduces the annual number of cycles to 184 for calculating annual energy use.	Appendix C2	Improve representativeness.
Does not specify whether the dishwasher door should be open or closed during standby mode testing.	References the requirement from AHAM DW–1–2020, which specifies that the door must be opened at the end of an active cycle and closed immediately prior to standby power measurement.	Appendix C1 and appendix C2.	Harmonize with industry standard and practice.
Uses 8,465 hours to calculate combined low-power mode energy consumption for dishwashers that do not have a fan-only mode.	References the requirement from AHAM DW–1–2020 to use the measured cycle duration to calculate combined low-power mode hours.	Appendix C2	Harmonize with industry standard and practice.
Does not include a method to test dishwashers operating on 208-volt power supply.	Adds a test method from AHAM DW–1–2020 to test dishwashers intended for a 208-volt power supply.	Appendix C1 and appendix C2.	Response to waiver and harmonize with industry standard and practice.
Does not include a method to test dishwashers with a water re-use system that uses water recovered from prior use.	Adds a test method from AHAM DW–1–2020 for dishwashers with a water re-use system.	Appendix C1 and appendix C2.	Response to waiver and harmonize with industry standard and practice.
Specifies installation instructions and test provisions only for dishwashers that connect to a water supply line.	Specifies installation instructions and test provisions for dishwashers that do not connect to a water supply line, but instead have a built-in water tank.	Appendix C1 and appendix C2.	Response to waiver.
Specifies installation instructions only for under-counter and under-sink dishwashers.	Specifies installation instructions for “in-sink” dishwashers.	Appendix C1 and appendix C2.	Response to waiver.
Requires placing detergent within a main wash detergent compartment.	Specifies detergent placement instructions for dishwashers that do not have a main wash detergent compartment.	Appendix C1 and appendix C2.	Response to waiver.
Does not specify a minimum cleaning index threshold to validate a test cycle.	Requires measurement of a per-cycle cleaning index based on section 5.12.3.1 of AHAM DW–2–2020 (<i>i.e.</i> , reflecting soil particles only), and establishes a threshold value of 70 as a condition for a test cycle to be valid.	Appendix C2	Ensure the test procedure produces test results which measure energy and water use during a representative average use cycle.

DOE has determined that the amendments adopted in this final rule would not require DOE to amend the energy and water conservation standards for dishwashers. The additional amendments specified in the

newly established appendix C2 would alter the calculated energy consumption of dishwashers as discussed further in each relevant section of this final rule. However, testing in accordance with appendix C2 would not be required

until such time as compliance is required with any amended energy conservation standards based on appendix C2. Discussion of DOE’s actions are addressed in detail in section III of this document.

The effective date for the amended test procedures adopted in this final rule is 30 days after publication of this document in the **Federal Register**. Representations of energy use or energy efficiency must be based on testing in accordance with the amended test procedure in appendix C1 beginning 180 days after the publication of this final rule.

III. Discussion

In the December 2021 NOPR, DOE requested stakeholder feedback on several topics including test setup, test cycles, energy and water consumption test methods, cleaning performance, and standby mode test method. 86 FR 72738. In the following sections, DOE addresses the topics on which it requested feedback in the December 2021 NOPR, summarizes stakeholder comments received, responds to these comments, and finalizes the test procedure based on comments and DOE's analyses.

A. General Comments

AHAM commented that it supported DOE in its efforts to save energy and ensure a national marketplace through the Appliance Standards Program. AHAM stated that repeatable and reproducible test procedures that are representative of average consumer use, but not unduly burdensome to conduct, are an integral part of the standards program. (AHAM, No. 17 at p. 1) AHAM also commented that it supported DOE's decision to incorporate by reference AHAM DW-1-2020 into the dishwasher test procedure at 10 CFR part 430. (AHAM, No. 17 at pp. 1-2) The CA IOUs commented that they support several changes DOE has made to improve representativeness of the test procedure regarding water hardness, relative humidity, and loading pattern. (CA IOUs, No. 19 at p. 4)

GEA commented that it supported comments submitted by AHAM. (GEA, No. 20 at p. 2) Whirlpool commented that it supported many of DOE's proposals from the December 2021 NOPR, which largely harmonize with existing industry standards. (Whirlpool, No. 16 at p. 3)

AHAM also commented that the 60-day December 2021 NOPR comment period and the comment period for the preliminary analysis evaluating amended energy conservation standards for dishwashers that DOE published on January 24, 2022 ("January 2022 Preliminary Analysis;" 87 FR 3450)⁷

overlapped by 30 days and that DOE should have first considered stakeholder comments on the major changes proposed in the December 2021 NOPR, particularly in light of the scant data DOE provided on the docket to support the inclusion of a cleaning performance requirement or the performance threshold chosen in the test procedure, before proceeding with the energy conservation standard itself. (AHAM, No. 17 at p. 18)

AHAM commented that it recognized and supported DOE's interest in moving rulemakings forward, especially rules such as the dishwasher energy conservation standards and test procedure, which have missed statutory deadlines, but DOE should have released the test procedure proposal before conducting its preliminary analysis. AHAM suggested that this would have provided both commenters and DOE more time to understand the impact of a proposed test on potential standards while allowing the rulemaking process to move along more swiftly. (AHAM, No. 17 at pp. 18-19) AHAM commented that DOE's desire to move quickly on the standards and test procedure rulemakings was disingenuous, given that it had missed statutory deadlines before and diminished the value of early stakeholder engagement, which is problematic given the significance of the proposal. (AHAM, No. 17 at p. 19)

In response to AHAM's comment regarding the publication of the December 2021 NOPR and the January 2022 Preliminary Analysis, neither the prior version nor the current version of DOE's "Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment" ("Process Rule") specify that a final amended test procedure will be issued prior to issuing standards pre-NOPR rulemaking documents (*e.g.*, a standards preliminary analysis). *See* 10 CFR part 430, subpart C, appendix A (Jan. 1, 2020 edition); 86 FR 70892, 70928 (Dec. 13, 2021). Additionally at the time the January 2022 Preliminary Analysis was published, the current version of the Process Rule was in effect and it generally provides that new test procedures and amended test procedures that impact measured energy use or efficiency will be finalized at least 180 days prior to the close of the comment period for a NOPR proposing

new or amended energy conservation standards. 86 FR 70892, 70928. DOE will continue to conduct additional analyses based on this finalized test procedure before proposing any new energy conservation standards, and stakeholders will be provided an opportunity to comment on any updated analysis as part of any proposal published regarding amended standards.

B. Scope of Applicability

This rulemaking applies to dishwashers. A dishwasher is a cabinet-like appliance, which with the aid of water and detergent, washes, rinses, and dries (when a drying process is included) dishware, glassware, eating utensils, and most cooking utensils by chemical, mechanical, and/or electrical means and discharges to the plumbing drainage system. 10 CFR 430.2. DOE is not amending the scope of the dishwasher test procedure.

C. Updates to Industry Standards

The current dishwasher test procedure at appendix C1 references the AHAM industry standard, ANSI/AHAM DW-1-2010, for certain provisions of the DOE test procedure. ANSI/AHAM DW-1-2010 includes test methods to determine dishwasher cleaning performance and energy and water consumption among other tests. ANSI/AHAM DW-1-2010 was superseded by AHAM DW-1-2019, which contains updates pertaining to the number of place settings, detergent dosage, *etc.* and includes test methods for evaluating cleaning performance, but does not include the measurements of energy and water consumption that were previously included in ANSI/AHAM DW-1-2010. AHAM DW-1-2019 was further superseded by AHAM DW-2-2020,⁸ which also includes test methods for evaluating cleaning performance but does not include test methods for determining energy and water consumption. Additionally, AHAM published AHAM DW-1-2020, which is an industry test procedure for determining the energy and water consumption of dishwashers and updates the relevant energy and water consumption test method provisions that were previously specified in ANSI/AHAM DW-1-2010. The following paragraphs provide an overview of the two most recently published standards, AHAM DW-1-2020 and AHAM DW-2-2020.

⁸ AHAM updated its numbering scheme for dishwasher standards, wherein DW-2 measures cleaning performance, whereas DW-1 measures energy and water consumption.

⁷ The Notification of a Webinar and Availability of the Preliminary Technical Support Document for energy conservation standards for dishwashers,

along with the Preliminary Technical Support Document, are available at www.regulations.gov/docket/EERE-2019-BT-STD-0039.

AHAM DW-1-2020 specifies definitions, testing conditions, instrumentation, test cycle and measurements, and calculations for energy and water consumption of dishwashers. AHAM DW-1-2020 also references the IEC Standard 62301, “Household electrical appliances—Measurement of standby power”, Edition 2.0, 2011-01 (“IEC 62301 Ed. 2.0”) for measuring standby mode and off mode power consumption. AHAM DW-1-2020 was developed by AHAM based upon the current appendix C1 and references, as applicable, AHAM DW-2-2020 in each instance, where appendix C1 currently references ANSI/AHAM DW-1-2010.⁹

AHAM DW-2-2020 supersedes the AHAM DW-1-2019 industry standard, which superseded ANSI/AHAM DW-1-2010. AHAM included minor changes and illustrations to improve consistency throughout the document, to reflect the latest representative items used for testing, and to eliminate ambiguity in test preparation. In the December 2021 NOPR, DOE proposed to reference relevant sections of AHAM DW-2-2020, which includes setup, measurement, and calculation instructions for evaluating dishwasher cleaning performance, for its proposal to specify a per-cycle cleaning index threshold as a condition for a valid test cycle. 86 FR 72738, 72743.

In the December 2021 NOPR, DOE proposed to incorporate by reference into 10 CFR part 430 the currently applicable industry test procedure for dishwashers, AHAM DW-1-2020. *Id.* DOE also proposed to update the industry standard incorporated by reference in 10 CFR part 430 from ANSI/AHAM DW-1-2010 to AHAM DW-2-2020. *Id.* In addition, DOE proposed to reference in appendix C1 and the new appendix C2 specific provisions of AHAM DW-1-2020 and AHAM DW-2-2020, with modifications, to clarify provisions where the applicable industry consensus standards would not produce test results that are representative of the energy and water use of certain products. *Id.* DOE requested comment on its proposal to incorporate by reference into 10 CFR part 430 the most recent version of the industry standard for dishwasher energy and water use measurement, AHAM DW-1-2020, as well as the industry performance standard, AHAM DW-2-2020, both with modifications. *Id.* DOE sought

comment on its preliminary conclusion that the proposed modifications to the industry standards are necessary so that the DOE test method satisfies the requirements of EPCA. *Id.*

DOE did not receive any comments on the industry standards incorporated by reference, except as discussed in section III.A of this final rule. Accordingly, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to incorporate by reference into 10 CFR part 430 the most recent version of the industry standard for dishwasher energy and water use measurement, AHAM DW-1-2020, as well as the industry performance standard, AHAM DW-2-2020, both with modifications.

D. Metrics

DOE’s dishwasher test procedures in 10 CFR 430.23(c) and appendix C1 provide results for dishwasher EAEU in kWh/year and water consumption in gal/cycle.

In the December 2021 NOPR, DOE summarized comments it received in response to the August 2019 RFI regarding an energy and water use metric on a per-place setting basis. 86 FR 72738, 72743. Most commenters opposed such a metric, claiming that no correlation exists between capacity and energy or water use, a per-place setting metric would be confusing for consumers, and it would be dependent on a claimed value of place setting capacity. *Id.* In the NOPR, DOE proposed to maintain the current metrics used for measuring dishwasher energy and water consumption. 86 FR 72738, 72743.

DOE did not receive any additional comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to maintain the current efficiency metrics in appendix C1 and the new appendix C2.

E. Test Setup

1. Water Hardness

The currently applicable appendix C1 does not currently specify any water hardness requirement for testing.

To reduce potential variability across testing facilities, DOE proposed in the December 2021 NOPR to incorporate the water hardness requirements in section 2.11 of AHAM DW-1-2020, which specifies a maximum water hardness of 85 parts per million (“ppm”) of CaCO₃. 86 FR 72738, 72743. DOE stated in the December 2021 NOPR that certain manufacturers may already be testing their dishwashers according to these water hardness specifications because this water hardness requirement is specified in the ENERGY STAR Test

Method for Determining Residential Dishwasher Cleaning Performance (“ENERGY STAR Cleaning Performance Test Method”). *Id.* at 86 FR 72744. DOE explained that AHAM had commented that it expected laboratories already have the capability to control water hardness to within these specifications. *Id.* Furthermore, in the December 2021 NOPR, DOE noted that nine dishwasher brands are included in the ENERGY STAR’s Most Efficient database,¹⁰ and that manufacturers of these models must report cleaning performance as measured by the ENERGY STAR Cleaning Performance Test Method. *Id.* DOE stated in the December 2021 NOPR that it did not expect this proposal to be unduly burdensome or impact the rated energy and water use of dishwashers. *Id.*

Additionally, as described further in section III.H of this document, in the December 2021 NOPR, DOE proposed to specify a minimum cleaning index threshold as a condition for a valid test cycle, which may also be impacted by water hardness. *Id.* DOE requested comment on its proposal to require use of the water hardness requirements from section 2.11 of AHAM DW-1-2020. *Id.*

The Joint Commenters stated that they supported DOE’s proposal to incorporate a water hardness specification consistent with AHAM DW-1-2020. The Joint Commenters agreed that the requirement would add clarity to the test procedure and help reduce potential variability across testing facilities. (Joint Commenters, No. 18 at p. 1)

DOE has more recently observed that 12 dishwasher brands are now included in the ENERGY STAR’s Most Efficient database, indicating that many manufacturers are already meeting the specified water hardness requirement and have the capability to meet these requirements.¹¹ Additionally, while DOE is establishing a cleaning performance threshold only in the new appendix C2 (as discussed in section III.H of this document), since the water hardness requirement is expected to support reproducibility of results without increasing test burden for testing facilities, DOE is finalizing its proposal to require use of the water hardness requirements from section 2.11 of AHAM DW-1-2020 in both appendix

¹⁰ ENERGY STAR Most Efficient database. Available at www.energystar.gov/most-efficient/energy-certified-dishwashers. Last accessed July 6, 2022.

¹¹ The ENERGY STAR Program recently also finalized the ENERGY STAR V. 7.0 Specification for dishwashers, which includes a cleaning performance requirement for any dishwasher seeking the ENERGY STAR label. This specification does not go into effect until July 19, 2023. See ENERGY STAR Version 7.0 Residential Dishwasher Final Specification Cover Letter.

⁹ The current references to ANSI/AHAM DW-1-2010 specify place settings, serving pieces, soiling procedures, loading procedures, and detergent specifications—all of which are now specified in AHAM DW-2-2020.

C1 and the new appendix C2, consistent with the December 2021 NOPR.

2. Relative Humidity

The currently applicable appendix C1 does not specify an ambient relative humidity for testing.

In the December 2021 NOPR, DOE proposed amending appendix C1 to include the relative humidity requirement of AHAM DW–1–2020, which specifies in Section 2.5.1 that an ambient relative humidity condition of 35 percent \pm 15 percent must be maintained in the testing room throughout the soiling application and 2-hour air dry period. 86 FR 72738, 72744. DOE also proposed to include this same requirement in the new appendix C2. *Id.*

DOE's testing experience suggests that ambient relative humidity could potentially impact the adherence of the applied soils to the test load during the 2-hour air-dry period specified in AHAM DW–2–2020 (which is the same as that specified in ANSI/AHAM DW–1–2010 and AHAM DW–1–2019). 86 FR 72738, 72744. The adherence of the applied soil loads to the dishware could impact the amount of energy and water required to remove those soils for soil-sensing dishwashers, which constitute a significant percentage of dishwashers on the market. *Id.* Further, adherence of the applied soil loads could impact cleaning performance, which in turn could impact the determination of the validity of each test cycle.¹² *Id.* Establishing a relative humidity requirement would limit any such potential variation and increase repeatability and reproducibility of test results. *Id.* As discussed, the proposed relative humidity requirement is the same as the requirement in AHAM dishwasher standards, indicating that this reflects current industry practice. *Id.* As such, DOE stated in the December 2021 NOPR that it does not expect this requirement to increase test burden as compared to current industry practice. *Id.*

In conjunction with this proposed relative humidity test condition, in the December 2021 NOPR, DOE also proposed to include the relative humidity measuring device requirement specified in section 3.7 of AHAM DW–1–2020, which states that relative humidity measurement equipment must have a resolution of at least 1 percent relative humidity, and an accuracy of at least \pm 6 percent relative humidity over the temperature range of 75 degrees Fahrenheit (“°F”) \pm 5 °F. 86 FR 72738, 72744.

DOE stated in the December 2021 NOPR that it had compared this proposed requirement to the relative humidity measuring device requirements currently specified in other DOE test procedures. 86 FR 72738, 72744. The Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers at 10 CFR part 430, subpart B, appendix D1 and appendix D2; appendix E (Water Heaters); appendix H (Television Sets); appendix M and appendix M1 (Central Air Conditioners and Heat Pumps); appendix O (Vented Home Heating Equipment); appendix U (Ceiling Fans); appendix X1 (Dehumidifiers); and appendix AA (Furnace Fans) all require the use of a measuring device with a specified error tolerance to measure relative humidity. These appendices specify tolerances for the relative humidity measuring device ranging from 0.7 percent to 5 percent relative humidity. Therefore, DOE stated in the December 2021 NOPR that its proposal specifying a maximum error of no greater than \pm 6 percent relative humidity to ensure accurate measurement of relative humidity, while testing should not cause undue burden, since testing facilities that test other covered consumer products or equipment that require control of the ambient relative humidity already have the capability to meet the proposed requirement. *Id.*

In the December 2021 NOPR, DOE requested comment on its proposal to reference AHAM DW–1–2020 for the relative humidity and associated instrumentation requirements, which specifies a relative humidity test condition of 35 percent \pm 15 percent, and a resolution of at least 1 percent relative humidity and an accuracy of at least \pm 6 percent relative humidity over the temperature range of 75 °F \pm 5 °F for the relative humidity measuring device. *Id.* at 86 FR 72744–72745. DOE also requested data regarding the impact of relative humidity on dishwasher energy and water usage. *Id.* at 86 FR 72744.

DOE did not receive any comments on this topic. Based on the reasons already discussed in this section, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to reference AHAM DW–1–2020 for the relative humidity and associated instrumentation requirements in appendix C1 and the new appendix C2.

3. Ambient Temperature

Section 2.5.1 of the currently applicable appendix C1 specifies an ambient temperature of 75 °F \pm 5 °F for active mode testing.

Section 2.5.1 of AHAM DW–1–2020 specifies an ambient temperature of 75 °F \pm 5 °F and further specifies a target temperature of 75 °F. In the December 2021 NOPR, DOE proposed to reference these ambient temperature requirements in AHAM DW–1–2020 in appendix C1 and the new appendix C2. 86 FR 72738, 72745. DOE stated that this proposed amendment would improve repeatability and reproducibility of results, while minimizing additional test burden, and that as the amendment is consistent with the industry standard, it reflects current industry practice. *Id.* Additionally, this amendment is consistent with the approach used to specify ambient temperature in the clothes washer test procedure at appendix J2. *Id.*

DOE requested input on its proposal to specify a target nominal ambient temperature of 75 °F for active mode testing, as referenced from AHAM DW–1–2020. 86 FR 72738, 72745.

The CA IOUs recommended that DOE would be able to more effectively accomplish its goal of improving repeatability and reproducibility of the test method by specifying an average temperature tolerance to the ambient temperature condition in addition to the existing 75 \pm 5 °F minimum and maximum ambient temperature tolerance, rather than use ambiguous language of a “target temperature.” (CA IOUs, No. 19 at pp. 3–4)

DOE understands the CA IOUs' concern but notes that the intent of the ambient temperature requirement has always been to conduct the test at 75 °F, or as close to it as feasible, to the extent possible. The goal of adding “target temperature” in the requirement is to emphasize this point. Additionally, DOE does not have data to determine the appropriate tolerance for the average temperature that would ensure that the temperature stays as close to 75 °F as possible.

For the reasons stated above, DOE is finalizing its proposal, consistent with the December 2021 NOPR, specifying a target nominal ambient temperature of 75 °F for active mode testing, as referenced from AHAM DW–1–2020, in appendix C1 and the new appendix C2.

4. 208-Volt Power

On April 10, 2017, DOE published a Decision and Order granting Miele, Inc. (“Miele”) a test procedure waiver (“Miele waiver”) for testing a specified basic model intended for a 208-volt power supply rather than the 115 volts or 240 volts specified in the currently applicable appendix C1. 82 FR 17227

¹² See section III.H of this document for more details.

(Case No. DW-12).¹³ Miele is required to test the basic model specified in the Miele waiver using appendix C1, except that it must maintain the electrical supply to the dishwasher at 208 volts \pm 2 percent and within 1 percent of its nameplate frequency as specified by the manufacturer; and maintain a continuous electrical supply to the unit throughout testing, including the preconditioning cycles, specified in section 2.9 of appendix C1, and in between all test cycles. *Id.* at 82 FR 17228-17229.

Subsequently, AHAM published the AHAM DW-1-2020 standard, which includes provisions in section 2.2.2 for testing dishwashers that operate with an electrical supply of 208 volts that is comparable to the Miele waiver.

As soon as practicable after the granting of any waiver, DOE is required to publish in the **Federal Register** a NOPR to amend its regulations so as to eliminate any need for the continuation of such waiver. 10 CFR 430.27(l). As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. *Id.* Since AHAM DW-1-2020 includes the language from the Miele waiver, DOE proposed in the December 2021 NOPR to reference these requirements in appendix C1 and the new appendix C2 for dishwashers that operate at 208 volts. 86 FR 72738, 72745.

In the December 2021 NOPR, DOE requested comment on its proposal to reference in appendix C1 and the new appendix C2 the testing provisions from AHAM DW-1-2020 to address the Miele waiver for dishwashers that operate at 208 volts. *Id.*

DOE did not receive any comments on this topic. DOE is finalizing its proposal, consistent with the December 2021 NOPR, to reference in appendix C1 and the new appendix C2 the testing provisions from AHAM DW-1-2020 to address the Miele waiver for dishwashers that operate at 208 volts.

5. Built-In Water Reservoir

DOE published a Decision and Order on December 9, 2020 (“December 2020 Decision and Order”), granting CNA International Inc. (“CNA”) a test procedure waiver (“CNA waiver”) for a basic model of a compact dishwasher that does not connect to a water supply line and instead has a built-in reservoir that must be manually filled with water. 85 FR 79171 (Case No. 2020-008).¹⁴ In

the December 2021 NOPR, DOE proposed amendments regarding the specific design characteristics addressed in the CNA waiver, generalized to be applicable to any future dishwasher models with this design characteristic, so as to eliminate any need for the continuation of this waiver. 86 FR 72738, 72745.

Specifically, DOE proposed the following provisions in appendix C1 and the new appendix C2 for testing such models:

(1) Refer to the full reservoir capacity as reported by the manufacturer (rather than specifying the full capacity as 5 liters);

(2) Require following any sequence of events specified in the manufacturer instructions (rather than specifying the particular sequence of events required for the basic model subject to the CNA waiver);

(3) Use the prewash fill water volume (if any) and main wash water fill volume as reported by the manufacturer (rather than specifying a main wash fill water volume of 1.5 liters);

(4) Water consumption for each test cycle is the value reported by the manufacturer (rather than specifying the water consumption as 4.8 liters).

86 FR 72738, 72746.

In the December 2021 NOPR, DOE requested comment on its proposal to incorporate the requirements of the CNA waiver for any dishwasher with a built-in reservoir. *Id.* In particular, DOE requested stakeholder feedback on using the detergent dosage requirement based on number of place settings rather than main wash water volume in the new appendix C2, for dishwashers with built-in reservoirs. *Id.*

DOE did not receive any comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to incorporate the requirements of the CNA waiver for any dishwasher with a built-in reservoir in appendix C1 and the new appendix C2.

6. In-Sink Installation

On October 15, 2020, FOTILE Kitchen Ware Co. Ltd. (“FOTILE”) filed a petition for waiver and interim waiver seeking a waiver from the installation requirements specified in the currently applicable appendix C1, which pertain to under-counter or under-sink dishwashers. 86 FR 26712, 26713.

In granting FOTILE an interim waiver on February 8, 2021, DOE noted that FOTILE’s alternate test procedure specified a test enclosure that differed from the installation instructions provided in the operation manual. 86 FR 8548, 8549. Specifically, the alternate test procedure retained a requirement that the enclosure be brought into the closest contact with the appliance that the configuration of the

dishwasher allows. In the case of FOTILE’s basic models, this would include close contact between the bottom of the enclosure and the underside of the in-sink dishwasher. In the FOTILE interim waiver notice, DOE noted that because the height of the product is 21 5/16 inches (541 millimeters (“mm”)), placing the bottom part of the enclosure as close as possible to the bottom of the compact in-sink dishwasher would conflict with the installation instructions in the operation manual, which specify a minimum enclosure height of 35 7/16 inches (900 mm). *Id.* This may potentially result in differing heat losses from the dishwasher that could impact energy consumption during the cycle. *Id.* In the interim waiver notice, DOE further noted that specifying the enclosure would be consistent with the manufacturer installation instructions and would provide results that are more representative of average use and requested comment on this topic. 86 FR 8548, 8551.

On May 17, 2021, DOE published a Decision and Order granting FOTILE the waiver (“FOTILE waiver”). 86 FR 26712, 26715-26716 (Case No. 2020-020).¹⁵ Specifically, according to the published FOTILE waiver, FOTILE is required to test compact in-sink dishwashers using the currently applicable appendix C1 with modifications to install these dishwasher basic models from the top of a rectangular enclosure (as opposed to the front). *Id.* at 86 FR 26713. DOE also specified the use of the installation requirements that were proposed in the alternate test procedure in the FOTILE interim waiver, with modifications to the provisions pertaining to the enclosure in which the dishwasher is tested. *Id.* at 86 FR 26714-26715.

On July 22, 2021, DOE published a notification of extension of waiver granting a waiver to additional in-sink FOTILE basic model dishwashers. 86 FR 38700 (Case No. 2021-005).

In the December 2021 NOPR, DOE proposed to incorporate into appendix C1 and the new appendix C2 the alternate test procedures in the FOTILE waiver, such that the installation requirements would be applicable for any in-sink dishwasher. 86 FR 72738, 72746. Specifically, DOE proposed that the requirements pertaining to the rectangular enclosure for under-counter or under-sink dishwashers that are specified in section 2.1 of AHAM DW-1-2020 would not be applicable to in-

¹³ All materials regarding the Miele waiver are available in docket EERE-2016-BT-WAV-0039 at www.regulations.gov.

¹⁴ All materials regarding the CNA waiver are available in docket EERE-2020-BT-WAV-0024 at www.regulations.gov.

¹⁵ All materials regarding the FOTILE waiver are available in docket EERE-2020-BT-WAV-0035 at www.regulations.gov.

sink dishwashers. *Id.* For such dishwashers, DOE proposed that the rectangular enclosure must consist of a front, a back, two sides, and a bottom. *Id.* The front, back, and sides of the enclosure must be brought into the closest contact with the appliance that the dishwasher configuration allows. DOE additionally proposed that the height of the enclosure must be as specified in the manufacturer's instructions for installation height. *Id.* If no instructions are provided, DOE proposed that the enclosure height must be 36 inches, since this is the typical height of kitchen cabinetry with counters attached, which is where such a dishwasher would be installed. *Id.* DOE also proposed that the dishwasher must be installed from the top and mounted to the edges of the enclosure. *Id.*

In the December 2021 NOPR, DOE requested comment on its proposal to incorporate into appendix C1 and the new appendix C2 the installation requirements for in-sink dishwashers from the FOTILE waiver. *Id.*

DOE did not receive any comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to incorporate into appendix C1 and the new appendix C2 the installation requirements for in-sink dishwashers from the FOTILE waiver.

7. Absence of Main Detergent Compartment

In addition to seeking a waiver for the installation requirements for in-sink dishwashers, the basic models for which FOTILE sought a waiver do not have a main detergent compartment. 86 FR 26712, 26713. Specifically, according to the published FOTILE waiver, FOTILE is required to test compact in-sink dishwashers placing the detergent directly into the washing chamber. *Id.* at 86 FR 26715. In the December 2021 NOPR, DOE proposed to incorporate the provisions for detergent placement specified in the FOTILE waiver into both appendix C1 and the new appendix C2, generalizing this provision such that it would be applicable to any dishwasher that does not have a detergent compartment. 86 FR 72738, 72746.

In the December 2021 NOPR, DOE requested comment on its proposal that the detergent must be placed directly into the dishwasher chamber for any dishwasher that does not have a prewash or main wash detergent compartment. *Id.* at 86 FR 72746–72747.

AHAM commented that the language pertaining to the detergent amount and placement in the FOTILE waiver was broad and would conflict with the

detergent placement provisions of the current DOE dishwasher test procedure. (AHAM, No. 17 at p. 17) AHAM stated the following concerns: (1) the proposed requirement was too prescriptive in specifying that the detergent be placed directly in the “wash chamber” and eliminated the possibility for the manufacturer to specify an alternate location, which is allowed in the current test procedure; (2) the term “main wash compartment,” as found in section 2.10 of the current test procedure, is not defined and could be interpreted as being synonymous with “wash chamber”; and (3) the proposed language removed reference to section 2.10.1 of appendix C1, thus eliminating the option of adding prewash detergent in another location as may be specified by the manufacturer. (*Id.*)

AHAM proposed adding the phrase “or other location recommended by the manufacturer,” as currently specified in section 2.10 of appendix C1, which would be in line with AHAM's view of the current test procedure's intent and leave open the possibility of alternative designs for this dishwasher type and others that may follow. (AHAM, No. 17 at pp. 17–18)

AHAM suggested that DOE should update the language in section 2.10 of appendix C1 to remove the following language proposed in the December 2021 NOPR, “For compact in-sink dishwashers with a combination sink that have neither prewash program nor a main detergent compartment, determine the amount of main wash detergent (in grams) to be added directly into the washing chamber according to section 2.10.2 of this appendix” and instead add the phrase, “or other location recommended by the manufacturer” following the words “main wash compartment” in the clause. (*Id.*)

DOE's intent with the requirement specified in the FOTILE waiver as well as the December 2021 NOPR was to require that, should the dishwasher not have a main wash detergent compartment and the manufacturer does not specify a location for the placement of the detergent, the detergent must be placed directly into the washing chamber. To clarify this instruction, in this final rule, DOE is updating the language in section 2.6 of appendix C1 and the new appendix C2 regarding placement of the detergent to note that if no main wash compartment is provided and no location is recommended by the manufacturer for the main wash detergent, the main wash detergent must be placed directly into the dishwasher chamber.

8. Water Meter

Section 3.3 in Appendix C1 specifies that the water meter must have a resolution of no larger than 0.1 gallons and a maximum error no greater than ± 1.5 percent of the measured flow rate for all water temperatures encountered in the test cycle. These same requirements are also specified in section 3.3 of AHAM DW–1–2020, and DOE did not propose any changes to these requirements in the December 2021 NOPR.

AHAM commented that the proposed allowances for resolution and flow rate error for the water meter are too large and have the potential to introduce uncertainty in the measurement, negatively impacting repeatability and reproducibility. (AHAM, No. 17 at p. 16) AHAM stated that manufacturers often account for this by introducing additional margin in their per-cycle water usage. (*Id.*) AHAM provided an example that for a dishwasher approaching the current DOE standard for water consumption of 5.0 gallons per cycle, a resolution of 0.1 would introduce an error of ± 2.0 percent, increasing to ± 2.9 percent for dishwashers at the ENERGY STAR V. 6.0 level of 3.5 gallons per cycle. (*Id.*) AHAM explained that adding in a maximum of ± 1.5 percent error of the measured flow rate, a root mean square uncertainty calculation would yield a measurement uncertainty of ± 2.5 percent for a unit using 5.0 gallons per cycle and ± 3.3 percent for a unit using 3.5 gallons per cycle. (*Id.*) Accordingly, AHAM recommended revising the test procedure specification for the water meter to specify a minimum resolution of 0.01 gallons and a maximum flow rate measurement error of ± 0.5 percent. AHAM stated that the technology was widely available to meet these tolerances and that these specifications would further enhance repeatability and reproducibility. (*Id.*)

As discussed in a final rule to establish new and amended clothes washers test procedures, DOE noted that most, if not all, third-party laboratories already have water meters with more precise resolution. 87 FR 33316, 33324–33325 (June 1, 2022). Additionally, DOE estimated the cost of a water meter that provides a resolution of 0.01 gallons, including associated hardware, to be around \$600 for each device. *Id.* However, DOE did not discuss water meter resolution in the December 2021 NOPR and has not provided stakeholders an opportunity to provide feedback on this topic. Therefore, DOE is not changing the water meter resolution requirements at this time.

DOE will consider AHAM's comment in a future rulemaking. Additionally, DOE notes that manufacturers and laboratories that already have water meters with a resolution of 0.01 gallons, could use such water meters when testing dishwashers according to the currently applicable appendix C1 as well as the amended appendix C1 and new appendix C2.

F. Test Cycle Amendments

1. Cycle Selections

In the December 2021 NOPR, DOE proposed to continue using the normal cycle for dishwasher testing, unless the normal cycle did not meet a specified cleaning index threshold at any soil load, in which scenario DOE proposed that the most energy-intensive cycle be tested and used for certification purposes at that soil load (see section III.H of this document for further detail). 86 FR 72738, 72747. In the December 2021 NOPR, DOE stated that this alternative approach would better represent an average use cycle by capturing those consumers that may select other cycle types for washing dishes if the cleaning performance of the normal cycle did not meet their expectations, because higher energy use provides increased thermal and mechanical action for removing soils, thus correlating generally with improved cleaning performance. *Id.* DOE also did not propose to add any additional cycle options to the tested normal cycle. *Id.*

Whirlpool commented that since the normal cycle is still overwhelmingly the cycle type most used by consumers, the current test method is already representative of typical consumer usage and it would be inappropriate to possibly mandate that the most energy-intensive cycle be used for testing and certification. (Whirlpool, No. 16 at p. 4)

Whirlpool commented that consumers consider their dishes/items, soil level, fullness of the dishwasher, efficiency, type of soils, past experiences, and cycle time when considering which cycle types and options to run. (Whirlpool, No. 16 at pp. 4–5) Whirlpool also commented that consumers running a load of heavily-soiled dishes with hard-to-clean soils may be likely to select a more energy-intensive cycle than the normal cycle. Whirlpool additionally commented that it does not recommend these possible more energy-intensive cycles for consumers for daily, typical, or regular use for normally soiled dishes. (*Id.*)

DOE proposed in the December 2021 NOPR to maintain the use of the normal cycle for testing dishwashers. The most

energy-intensive cycle was proposed only if the normal cycle did not meet the proposed cleaning index threshold, which would indicate that the normal cycle was not providing a consumer-acceptable level of cleaning performance (*i.e.*, the normal cycle was not a representative average use cycle). For such dishwashers, DOE expects that consumers would use a more energy-intensive cycle type, since increased energy and/or water use would likely improve cleaning performance. Therefore, to ensure that the dishwasher test procedures are reasonably designed to produce test results which measure energy use during a representative average use cycle and are not unduly burdensome to conduct, in accordance with EPCA (42 U.S.C. 6293(b)(3)), the normal cycle must be the cycle type used for testing, unless it does not meet the minimum cleaning index threshold specified in the new appendix C2 at a particular soil level, in which case the most energy-intensive cycle shall be used for testing and certification purposes.

For the reasons stated above, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to maintain the dishwasher test cycle selections and cycle options to the tested normal cycle, except with regard to validating the test cycle type pursuant to the minimum cleaning index included in the new appendix C2. See section III.H of this final rule for further discussion regarding cleaning performance.

2. Drying Energy Measurement

Section 5.3 of appendix C1 specifies a methodology for determining the “drying energy” consumption of a dishwasher. Dishwashers typically incorporate technologies to assist with drying the dishes after completion of the rinse portion of the cycle. Some dishwashers use an exposed resistance heater to heat the air inside the washing chamber after the final rinse to evaporate the water from the dishware. Other dishwasher models, however, do not use a resistance heater to heat the air, but instead achieve drying by raising the temperature of the final rinse water. The heated rinse water evaporates more quickly from the dishes after completion of the rinse portion of the cycle.

Section 1.14 of appendix C1 defines “power-dry feature” as the introduction of electrically generated heat into the washing chamber for the purpose of improving the drying performance of the dishwasher. Further, the definition of “normal cycle” in section 1.12 of appendix C1 specifically includes the power-dry feature as part of the normal

cycle. Section 5.3 of appendix C1 specifies a methodology for calculating the energy consumed by the power-dry feature *after the termination of the last rinse option (emphasis added)*. Half of this drying energy is subtracted from the total dishwasher energy calculations of EAOC and EAEU at 10 CFR 430.23(c)(1) and (2), respectively.¹⁶

Because the application of section 5.3 is limited to drying energy consumed only after the termination of the last rinse option, it would not be applicable to the drying energy use of a dishwasher that employs heated rinse technology, since such energy is consumed as part of the final rinse rather than after the final rinse. Rather, the energy use associated with the heated rinse would be captured as part of the normal cycle machine energy consumption. As a result, the energy use associated with heated rinse drying technology would be factored into EAOC and EAEU in its entirety, rather than only by half, as described for units with conventional power-dry technology that occurs after the final rinse.

In the December 2021 NOPR, DOE summarized comments it received in response to the August 2019 RFI regarding the drying energy for a dishwasher that employs heated rinse. 86 FR 72738, 72747–72748.

Commenters opposed the addition of cycle options, including a power-dry option. However, as noted in the December 2021 NOPR, appendix C1 already requires testing of a power-dry cycle option, if available. 86 FR 72738, 72748. Accordingly, DOE did not propose any changes to the measurement of drying energy to accommodate units that use heated rinse to achieve drying. *Id.* DOE stated that the current measurement of drying energy consumption is dependent upon a clearly identifiable boundary between the conclusion of the final rinse and the activation of electrically generated heat into the washing chamber. *Id.* For units that use heated rinse to achieve drying, DOE initially determined in the December 2021 NOPR that it would be burdensome to isolate the energy specifically attributable to raising the temperature of the final rinse, since such energy use would be embedded within the total energy use measured during that portion of the cycle; *i.e.*, it would not be possible to determine the “drying energy” without, for example, sub-metering the electrical energy use of the internal water heater. *Id.* For these reasons, DOE did not propose any

¹⁶ This reflects consumer use of the power-dry feature for 50 percent (*i.e.*, half) of dishwasher cycles.

changes to the existing requirements for measuring drying energy in the December 2021 NOPR. *Id.*

DOE did not receive any comments on this topic and is maintaining the existing requirements for measuring drying energy.

3. Annual Number of Cycles

Section 5.7 of the currently applicable appendix C1 calculates combined low-power mode energy consumption, which factors into the EAEU calculation, using 215 annual cycles. DOE established the 215-cycle value in a final rule published on August 29, 2003, relying on data from several sources on consumer dishwasher usage behavior, including the 1997 version of the Residential Energy Consumption Survey (“RECS”), several consumer dishwasher manufacturers, detergent manufacturers, energy and consumer interest groups, independent researchers, and government agencies. 68 FR 51887, 51889–51890.

In the December 2021 NOPR, DOE proposed to update the current annual cycles estimate to reflect more recent trends in dishwasher usage. 86 FR 72738, 72748. DOE’s analysis of 2015 RECS data indicates annual use of 185 cycles.¹⁷ AHAM also specifies a value of 184 cycles per year in AHAM DW–1–2020 based on industry consensus. DOE thus proposed in the December 2021 NOPR to amend the current annual number of cycles estimate from 215 to 184 cycles, through reference to AHAM DW–1–2020. *Id.* at 86 FR 72748–72749. The proposed value closely aligns with DOE’s analysis of 2015 RECS data. In the December 2021 NOPR, DOE initially determined that the 2015 RECS is a suitable source for updating the annual number of cycles estimate because (1) it is the most recent RECS edition available, (2) RECS is nationally representative for all U.S. households, and (3) it provides direct survey data on the typical number of dishwasher cycles run by consumers each week, rather

than providing binned response options. *Id.* at 86 FR 72749.

The proposal to update the annual cycle value for calculating EAEU, if finalized, would change the certified and reported EAEU values. DOE also noted in the December 2021 NOPR that the existing energy conservation standards are based on the EAEU as determined under the current test procedure. *Id.* As such, DOE noted that the use of the 184 cycles-per-year value would be in conjunction with any future amended energy conservation standards for dishwashers that account for the updated annual cycle value. Accordingly, in the December 2021 NOPR, DOE proposed to specify this requirement in the new appendix C2. *Id.* Manufacturers would be required to use the results of testing under the new appendix C2 to determine compliance with any future amended energy conservation standards.

DOE requested input on its proposal to update the estimated number of annual cycles from 215 to 184 cycles per year for future calculations of EAEU. *Id.* DOE also requested comment on its approach to propose a new appendix C2 with the updated annual number of cycles, the use of which would be required for compliance with any amended energy conservation standards. *Id.*

DOE did not receive any comments on this topic. DOE notes that RECS 2020 microdata was released in July 2022, from which DOE estimated that the number of annual dishwasher cycles increased to 196.5 cycles per year.¹⁸ DOE does not have sufficient information to determine whether this value, obtained from surveys of consumers during the coronavirus-19 pandemic, is representative of overall average consumer use of dishwashers as compared to the estimate of 184 cycles per year proposed in the December 2021 NOPR, due to potentially different usage patterns of dishwashers by consumers during the coronavirus-19 pandemic. Accordingly, DOE is finalizing its

proposal, consistent with the December 2021 NOPR, to update the number of annual cycles from 215 to 184 cycles per year for future calculations of EAEU in the new appendix C2 and to require the use of the new appendix C2 with the updated annual number of cycles for compliance with any amended energy conservation standards.

G. Energy and Water Consumption Test Methods

1. Test Load Items

The current test load and test load items are specified in sections 2.6 and 2.7 of appendix C1. Non-soil-sensing dishwashers are tested with six serving pieces plus eight place settings, or six serving pieces plus the number of place settings equal to the capacity of the dishwasher if the latter is less than eight place settings. Soil-sensing compact and soil-sensing standard dishwashers are tested with four place settings and eight place settings, respectively, along with six serving pieces each.

In the December 2021 NOPR and in response to comments received on the August 2019 RFI, DOE noted that no data has been presented that would justify changing the test load items at that time. 86 FR 72738, 72749. Although no data was presented regarding the use of plastic items, DOE stated in the December 2021 NOPR that it recognizes that the minimal thermal mass of plastic test load items would likely result in little, if any, change to the energy and water consumption. *Id.*

DOE stated in the December 2021 NOPR that it observed that some of the test load items specified in the currently applicable appendix C1 differ from the items specified in section 3.4 of AHAM DW–2–2020, which is also referenced by section 2.7.1 of AHAM DW–1–2020. *Id.* As presented in the December 2021 NOPR, the test load items as stated in the current appendix C1 and AHAM DW–2–2020 are shown in Table III.1. *Id.* at 86 FR 72749–72750.

TABLE III.1—TEST LOAD ITEMS IN THE CURRENTLY APPLICABLE APPENDIX C1 AND AHAM DW–2–2020

Item	Appendix C1			AHAM DW–2–2020	
	Company/designation	Description	Alternate	Company/designation	Size
Dinner Plate	Corning Comcor®/ Corelle® #6003893.	10 inch Dinner Plate .....	.....	Corelle® #5256294	10 inch (25.4cm).
Bread and Butter Plate	Corning Comcor®/ Corelle® #6003887.	6.75 inch Bread & Butter	Arzberg #8500217100 or 2000–00001–0217–1.	Corelle® #5256286	6.7 inch (17.0cm).
Fruit Bowl	Corning Comcor®/ Corelle® #6003899.	10 oz. Dessert Bowl	Arzberg #3820513100	Corelle® #5256297	10 oz. (296mL).

¹⁷ In the 2015 RECS, the Energy Information Administration (“EIA”) collected the number of times per week that households used their dishwasher as point values rather than ranges as EIA had done in previous surveys. For households

using their dishwashers, multiplying weekly usage by number of weeks in the year results in annual usage rates. A weighted average of annual usage employs the household weight and produces a nationally weighted annual usage value.

¹⁸ 2020 RECS Survey Data. Available at: www.eia.gov/consumption/residential/data/2020/index.php?view=microdata.

TABLE III.1—TEST LOAD ITEMS IN THE CURRENTLY APPLICABLE APPENDIX C1 AND AHAM DW–2–2020—Continued

Item	Appendix C1			AHAM DW–2–2020	
	Company/designation	Description	Alternate	Company/designation	Size
Cup	Corning Comcor®/ Corelle® #6014162.	8 oz. Ceramic Cup	Arzberg #1382–00001– 4732.	Arzberg #1382–00001– 4732.	7 oz. (207mL).
Saucer	Corning Comcor®/ Corelle® #6010972.	6 inch Saucer	Arzberg #1382–00001– 4731.	Arzberg #1382–00001– 4731.	5.5 inch (14.0cm).
Serving Bowl	Corning Comcor®/ Corelle® #6003911.	1 qt. Serving Bowl .....	.....	Corelle® #5256304	1 qt. (950mL).
Platter	Corning Comcor®/ Corelle® #6011655.	9.5 inch Oval Platter .....	.....	Corelle® #6011655 OR ALTERNATE Corelle® #5256290.	Oval—9.5 inch by 7.5 inch (24.1cm by 19.1cm). Round—8.5 inch (21.6cm).
Glass—Iced Tea	Libbey #551HT .....	.....	.....	Libbey #551HT	12.5 oz.
Flatware—Knife	Oneida®—Accent 2619KPVF.	.....	WMF—Gastro 0800 12.0803.6047.	WMF 12.0803.6047.	
Flatware—Dinner Fork	Oneida®—Accent 2619FRSF.	.....	WMF—Signum 1900 12.1905.6040.	WMF 12.1905.6040.	
Flatware—Salad Fork	Oneida®—Accent 2619FSLF.	.....	WMF—Signum 1900 12.1964.6040.	WMF 12.1964.6040.	
Flatware—Teaspoon	Oneida®—Accent 2619STSF.	.....	WMF—Signum 1900 12.1910.6040.	WMF 12.1910.6040.	
Flatware—Serving Fork	Oneida®—Flight 2865FCM.	.....	WMF—Signum 1900 12.1902.6040.	WMF 12.1902.6040.	
Flatware—Serving Spoon	Oneida®—Accent 2619STBF.	.....	WMF—Signum 1900 12.1904.6040.	WMF 12.1904.6040.	

For the cup, saucer, and flatware items, the alternate options listed in the currently applicable appendix C1 are the primary options specified in AHAM DW–2–2020. The iced tea glass is the only item that is the same for both test procedures. The remaining items specify Corelle® as the manufacturer for both appendix C1 and AHAM DW–2–2020, but these items have new model numbers in AHAM DW–2–2020. DOE stated in the December 2021 NOPR that it understands that the Corelle® model numbers listed in the currently applicable appendix C1 are no longer in production, and the model numbers listed in AHAM DW–2–2020 are the newer editions for these out-of-production items. *Id.* at 86 FR 72750. Additionally, AHAM DW–2–2020 contains an alternative selection only for the serving platter. For the other test load items, AHAM DW–2–2020 provides instructions to contact AHAM for assistance to identify suitable alternatives.

As illustrated in Table III.1, AHAM DW–2–2020, which is referenced in AHAM DW–1–2020, includes newer model numbers of the test load items as compared to the currently applicable appendix C1. Therefore, in the December 2021 NOPR, DOE proposed to reference section 2.7.1 of AHAM DW–1–2020, which specifies that the test load must be as stated in section 3.4 of AHAM DW–2–2020. *Id.* Specifically, DOE proposed to apply the provisions of section 3.4 of AHAM DW–2–2020 to appendices C1 and C2, excluding the Note accompanying section 3.4 regarding AHAM assistance with determining alternatives. *Id.*

In the December 2021 NOPR, DOE also proposed to continue including the test load items specified in the currently applicable appendix C1 as alternate options, so that test laboratories can continue using the existing test load if they already have these items. *Id.* This proposal would be applicable to both appendix C1 and the new appendix C2. Pursuant to EPCA requirements, this approach would not impose an undue burden, but rather minimize test burden as it would not require manufacturers and/or test laboratories to procure new items if they already have the existing test load items.

DOE requested comment on specifying that the test load items be as specified in AHAM DW–1–2020 (which references section 3.4 of AHAM DW–2–2020), while additionally retaining, as an alternative, the current test load specifications in appendix C1 and the new appendix C2. *Id.*

DOE did not receive any comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to specify that the test load items be as specified in AHAM DW–1–2020 (which references section 3.4 of AHAM DW–2–2020), while additionally retaining, as an alternative, the current test load specifications in appendix C1 and the new appendix C2.

2. Soils

As stated in the December 2021 NOPR, the soil load specified in the currently applicable appendix C1 has been developed by DOE to produce a measure of energy and water use of soil-sensing dishwashers in a representative usage cycle. 86 FR 72738, 72751. DOE

also stated that DOE did not have data on the operation of a soil-sensing function that would suggest that a field use factor to adjust testing results would be appropriate and therefore, DOE did not propose a field use factor for appendix C1 or the proposed new appendix C2 in the December 2021 NOPR. *Id.* DOE additionally requested feedback and data regarding soiling level and whether there have been changes to consumers’ pre-rinsing behavior. *Id.* DOE also sought information regarding the impact of different soil levels on energy and water use in dishwashers currently on the market. *Id.*

Section 2.7.4 of the currently applicable appendix C1 states that the soils shall be as specified in section 5.4 of ANSI/AHAM DW–1–2010, except for the following substitutions:

- *Margarine.* The margarine shall be Fleischmann’s Original stick margarine.
- *Coffee.* The coffee shall be Folgers Classic Decaf.

Additionally, section 2.7.5 of the currently applicable appendix C1 states that soils shall be prepared according to section 5.5 of ANSI/AHAM DW–1–2010, with the following additional specifications:

- *Milk.* The nonfat dry milk shall be reconstituted before mixing with the oatmeal and potatoes. It shall be reconstituted with water by mixing 2/3 cup of nonfat dry milk with 2 cups of water until well mixed. The reconstituted milk may be stored for use over the course of 1 day.
- *Instant mashed potatoes.* The potato mixture shall be applied within 30 minutes of preparation.

• *Ground beef.* The 1-pound packages of ground beef shall be stored frozen for no more than 6 months.

In the December 2021 NOPR, DOE noted that Table 3 in section 5.4 of AHAM DW-2-2020 specifies Fleischmann's™ Original Stick margarine and Folgers™ Classic Decaf coffee, consistent with DOE's substitutions in section 2.7.4 of the currently applicable appendix C1. *Id.* These AHAM DW-2-2020 soiling specifications are also referenced in section 2.7.4 of AHAM DW-1-2020. Therefore, in the December 2021 NOPR, DOE proposed to remove the substitution for margarine and coffee from regulatory text in appendix C1 and apply the soiling requirements in section 2.7.4 of AHAM DW-1-2020 instead. *Id.*

Additionally, section 2.7.5 of AHAM DW-1-2020 includes the additional soil preparation requirements for milk, instant mashed potatoes, and ground beef, which are currently specified in appendix C1. Therefore, in the December 2021 NOPR, DOE proposed to remove the additional soil preparation specifications from section 2.7.5 in appendix C1 and apply the requirements in section 2.7.5 of AHAM DW-1-2020 instead. *Id.*

DOE requested comment on its proposal to remove the soil substitution and soil preparation requirements from sections 2.7.4 and 2.7.5 of appendix C1 and apply these same requirements from AHAM DW-1-2020 instead. *Id.* DOE particularly requested data and information on how the proposed soil composition would affect energy and water use in current dishwashers. *Id.*

Samsung commented that pre-rinsing drastically increases the water and energy use beyond what the test procedure measures today and cited a Lawrence Berkeley National Laboratory ("LBNL") survey which indicated that 55 percent of consumers pre-rinse dishes.¹⁹ (Samsung, No. 21 at p. 3)

Samsung commented that it believes the consumer advocacy by dishwasher manufacturers, consumer advocates, detergent manufacturers, and the Environmental Protection Agency to educate consumers against pre-rinsing would only be successful if consumers believe their dishwasher will provide satisfactory cleaning without pre-rinsing. (*Id.*; Samsung, Public Meeting Transcript, No. 22 at p. 7) To that end, Samsung recommended that DOE consider updating soil loads that do not

assume pre-rinsing by introducing heavier test soil loads that match the best practice of scraping foods off the plates rather than the soil levels one would find after pre-rinsing dishes with water. (*Id.*)

During the December 2021 NOPR public meeting, the CA IOUs commented that the soil loads used for the DOE test procedure should be representative. The CA IOUs further commented that the soil loads should be more representative of scraping compared to pre-rinsing as it would be more beneficial from energy and water savings perspective. (CA IOUs, Public Meeting Transcript, No. 22 at pp. 43-44) In written comments, the CA IOUs commented that the soil loads as defined by AHAM DW-2-2020 do not align with the definition of a "normal cycle" as being recommended for typical use with a "full load of normally soiled dishes," because they do not believe a normally soiled load of dishes is at most half soiled (as is implied by the soil level of "heavy" load in AHAM DW-2-2020) and the medium and light soil loads include a majority of clean dishes. (CA IOUs, No. 19 at p. 2) The CA IOUs commented that DOE should therefore consider increasing the number of tableware that are soiled as part of the cleaning performance test. (*Id.*)

The soil loads specified in the currently applicable appendix C1, which are the same as the soil loads specified in AHAM DW-2-2020, have been developed by DOE to produce a measure of energy and water use of soil-sensing dishwashers in a representative usage cycle. While the soils are only applied to some of the place settings at each soil load, these soils represent the total quantities of soils that would enter a dishwasher for a fully soiled load of dishes at the various soil levels. DOE does not have, nor did commenters submit, any specific information about the types of soils that would be used to reflect pre-rinsing, or lack thereof, or the consumer relevance of such soils. Absent such data, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to remove the additional soil preparation specifications from section 2.7.5 in appendix C1 and apply the requirements in section 2.7.5 of AHAM DW-1-2020 instead. DOE is also finalizing its proposal, consistent with the December 2021 NOPR, to remove the soil substitution and soil preparation requirements from sections 2.7.4 and 2.7.5 of appendix C1 and apply these same requirements from AHAM DW-1-2020 instead. Finally, the new appendix C2 mirrors the language in the amended appendix C1.

3. Loading Pattern

Section 2.6 of the currently applicable appendix C1 references section 5.8 of ANSI/AHAM DW-1-2010 for loading the dishwasher prior to running active mode tests, which requires loading in accordance with the manufacturer's recommendation.

In the December 2021 NOPR, DOE recognized that the positioning of soiled test load items in relation to unsoiled ones could impact the rate at which soils are removed from the test load items, and therefore also impact soil sensor responses. 86 FR 72738, 72751. This could lead to variation in energy and water consumption. Specifying a loading pattern requirement would improve the repeatability of the testing procedure and reproducibility of results across both individual tests and testing facilities. AHAM has included the loading pattern requirements specified in the ENERGY STAR Cleaning Performance Test Method in section 2.6.3.4 of AHAM DW-1-2020. These requirements are applicable to soil-sensing dishwashers that are tested with both clean and soiled place settings. In the December 2021 NOPR, DOE proposed to apply these AHAM DW-1-2020 loading requirements to appendix C1 and the new appendix C2 to reduce potential variation in the test procedure. *Id.* Additionally, DOE proposed that these loading requirements would apply to both soil-sensing and non-soil-sensing dishwashers as non-soil-sensing dishwashers would be required to use soil loads for testing under the proposed cleaning index threshold (discussed in section III.H of this document). *Id.* DOE requested input on its proposal to use the loading requirements specified in section 2.6.3.4 of AHAM DW-1-2020. *Id.*

AHAM commented that DOE had no data to support that specifying a loading pattern requirement would improve the repeatability of the test procedure and reproducibility of the results, especially as it pertains to determining the cleaning performance of dishwashers. (AHAM, No. 17 at p. 10)

The Joint Commenters stated that they supported the proposal to include the loading pattern requirements specified in AHAM DW-1-2020, explaining that the current lack of specificity with regards to loading pattern can impact repeatability and reproducibility of test results. (Joint Commenters, No. 18 at pp. 1-2)

The ENERGY STAR Cleaning Performance Test Method specifies the same loading pattern that DOE proposed in the December 2021 NOPR. During development of the ENERGY STAR

¹⁹ "Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and Consumer Preferences." Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

Cleaning Performance Test Method, DOE noted that the loading pattern had minimal effect on cleaning performance; however, DOE specified loading patterns that distribute the soils throughout the dishwasher as evenly as possible to ensure consistency from test laboratory to test laboratory.²⁰ In the absence of any additional data, DOE maintains that given that the test load does not include all soiled items (*i.e.*, only some of the place settings are soiled while others are clean), the placement of the soiled items may impact soil sensor response or the cleaning index, especially if a given unit does not uniformly clean all items within the wash chamber. Therefore, specifying the placement of the clean and soiled items for each test would ensure that the test is run consistently each time.

For the reasons stated previously, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to use the loading requirements specified in section 2.6.3.4 of AHAM DW-1-2020 in appendix C1 and the new appendix C2.

4. Preconditioning Cycles

Section 2.9 of the currently applicable appendix C1 requires manufacturers to precondition the dishwasher by running the normal cycle twice with no load after the testing conditions are established. The prewash fill water volume, if any, and the main wash fill water volume are measured during the second preconditioning cycle to calculate the detergent amounts to be used during the energy and water consumption tests. The prescribed procedure ensures an accurate calculation of detergent dosing, priming of the water lines and sump area of the pump, successful sensor calibration, and machine cleaning without adding significant test burdens.

In the December 2021 NOPR, DOE did not propose to modify the requirement for two preconditioning cycles currently in appendix C1, and proposed to apply this requirement to the new appendix C2.

DOE did not receive any comments on this topic and is maintaining the requirement for two preconditioning cycles currently in appendix C1 and is applying this requirement to the new appendix C2.

²⁰ ENERGY STAR® Program Requirements. Product Specification for Residential Dishwashers. Draft 1 Test Method for Determining Residential Dishwasher Cleaning Performance. Rev. Feb.-2012. www.energystar.gov/sites/default/files/specs//Draft_1_Test_Method_Dishwasher_Cleaning_Performance.pdf.

5. Detergent

Section 2.10 of appendix C1 specifies using Cascade with the Grease Fighting Power of Dawn powder as the detergent formulation. This section also provides the method to calculate the detergent quantities to be added to the prewash (if available) and main wash compartments, which is based on the prewash (if available) and main-wash water volumes, respectively.

The powder detergent currently specified in appendix C1—Cascade with the Grease Fighting Power of Dawn—is no longer commercially available. Instead, a new powder detergent, Cascade Complete Powder, which has a slightly different formulation²¹ from Cascade with the Grease Fighting Power of Dawn, is now available on the market. AHAM has updated AHAM DW-2-2020 to reference this new detergent for testing purposes. AHAM DW-1-2020 references AHAM DW-2-2020 for detergent formulation as well as dosage.

In addition to a change in the detergent to be used for testing, both AHAM DW-1-2020 and AHAM DW-2-2020 also specify new dosage requirements in comparison to the current requirements of appendix C1.²² Section 4.1 of AHAM DW-2-2020 specifies the detergent dosage as 1.8 grams per place setting in the main compartment of the detergent dispenser and 1.8 grams per place setting in the prewash compartment of the detergent dispenser or other location. Section 2.10.1 of AHAM DW-1-2020 further specifies to use half the quantity of detergent that is specified in section 4.1 of AHAM DW-2-2020 for both prewash and main wash detergent for the energy and water consumption tests. Prewash detergent is specified only for those units if it is recommended by the manufacturer's instructions for conditions that are consistent with the test procedure. This includes, but is not limited to, manufacturer instructions that recommend the use of prewash detergent for the normal cycle, normally

²¹ DOE participated in AHAM's task force for the development of AHAM DW-1-2020. Stakeholders mentioned during the AHAM task force calls that they were informed by the detergent manufacturer that the only difference between Cascade with the Grease Fighting Power of Dawn and Cascade Complete Powder is related to the enzymes used in the detergent. DOE was not able to verify this information independently because the ingredient list for Cascade with the Grease Fighting Power of Dawn is not available on product packaging (or online).

²² As discussed, the detergent dosage for the currently applicable appendix C1 is based on measurements of the prewash fill water volume, if any, and the main wash fill water volume measured during the second preconditioning cycle.

soiled loads, or for water hardness between 0 and 85 ppm. Additionally, if manufacturer instructions lead to the use of the prewash detergent requirements, the prewash detergent is placed as instructed by the manufacturer or, if no instructions are provided, the prewash detergent is placed on the inner door near the detergent cup.

In the December 2021 NOPR, DOE presented preliminary data comparing the energy and water use of four dishwashers when tested according to the current detergent and dosing method and the new detergent and dosing method. 86 FR 72738, 72752–72753. In the December 2021 NOPR, DOE noted that given the small sample size of only four test units, DOE believed that additional testing would be required to determine whether the observed variation in results is due to the change in detergent and dosage, or whether it could be attributed to unrelated differences in the sensor response of these soil-sensing dishwashers, or other factors. *Id.*

Given the uncertainty about whether the new detergent and dosing requirements would impact the energy and water consumption of dishwashers, in the December 2021 NOPR, DOE proposed that both the current detergent and dosage requirements as well as the new detergent and new dosage requirements would be allowable to use for testing according to appendix C1. *Id.* at 86 FR 72753. By maintaining the use of the current detergent and dosing requirements, manufacturers would not be required to re-test currently certified dishwashers. Because DOE proposed the detergent type and dosage specifications in AHAM DW-1-2020 in addition to the current requirements, this proposal would not require the re-rating or recertification of dishwashers currently on the market. Additionally, permitting the optional use of the detergent and dosing specifications in AHAM DW-1-2020 would avoid the need for manufacturers to request test procedure waivers should the currently required detergent become unavailable and would harmonize with current industry practice.

For the new appendix C2, which would be required at the time compliance is required with updated energy and water conservation standards, DOE proposed in the December 2021 NOPR to specify only the new detergent and dosage requirements from AHAM DW-1-2020. *Id.*

The current dosage requirements specify detergent dosage based on water volume, which requires distinguishing the water used in the prewash from the

water used in the main wash. In the December 2021 NOPR, DOE stated that it has observed, and stakeholders have also expressed, that uncertainty in differentiating the prewash and main-wash cycles to estimate detergent dosage could be a potential source of test variation. *Id.* As stated, the new detergent dosage is based on the number of place settings, rather than measurement of prewash and main-wash water volumes, potentially providing more consistent dosing. More consistent dosing would improve the repeatability and reproducibility of the results. Additionally, the new dosage would reduce test burden, since it would eliminate the need to identify, isolate, and calculate the prewash and main-wash water volumes.

DOE requested comment on its proposal to adopt in appendix C1 the new detergent and new dosage requirements as specified in AHAM DW-1-2020, while also retaining the current detergent and dosage requirements in appendix C1. *Id.* The use of either set of detergent requirements would be allowable for testing under appendix C1. DOE also requested comment on the detergent currently being used by manufacturers and test laboratories for testing and certification of dishwashers. *Id.*

DOE stated that if stakeholder comments indicate that the currently specified detergent, Cascade with the Grease Fighting Power of Dawn, is no longer being used by manufacturers, DOE may instead consider including only the new detergent, Cascade Complete Powder, and dosage requirements from AHAM DW-1-2020 in appendix C1, rather than allowing both the current and new detergent and dosage requirements. *Id.* DOE also welcomed comments and data on the impact of the new detergent and dosage on energy and water use. *Id.*

DOE did not receive any written comments in response to this topic. During the December 2021 NOPR public meeting, Fisher & Paykel noted that AHAM DW-2-2020 specifies 1.8 grams of detergent per place setting, but AHAM DW-1-2020 specifies to use half of that quantity for the energy and water consumption tests. Fisher & Paykel additionally noted that cleaning performance would also be evaluated using half the quantity of detergent that is specified in AHAM DW-2-2020 (the standard that specifies the cleaning performance test method). Fisher & Paykel stated that DOE's proposal would require meeting the proposed cleaning index threshold using only half as much detergent. (Fisher & Paykel,

Public Meeting Transcript, No. 22 at p. 56)

DOE notes that while AHAM DW-1-2020 specifies half the quantity of detergent compared to AHAM DW-2-2020, the number of soiled place settings are also fewer when testing is conducted according to AHAM DW-1-2020 compared to AHAM DW-2-2020. Specifically, AHAM DW-2-2020 requires eight place settings to be soiled when conducting the test, while sections 2.6.3.1, 2.6.3.2, and 2.6.3.3 of AHAM DW-1-2020 require four, two, and one place settings to be soiled for the heavy, medium, and light soil loads, respectively. Additionally, DOE's goal in specifying the cleaning performance threshold is to evaluate cleaning performance on the same cycles that are used to evaluate energy and water use. Therefore, DOE believes it is appropriate to use the same amount of detergent to evaluate cleaning performance as is used to determine energy and water use.

In this final rule, DOE finalizes its proposal, consistent with the December 2021 NOPR, to adopt in appendix C1 the new detergent and new dosage requirements as specified in AHAM DW-1-2020, while also retaining the current detergent and dosage requirements in appendix C1. Additionally, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to adopt in the new appendix C2 only the new detergent and new dosage requirements as specified in AHAM DW-1-2020.

6. Rinse Aid

Section 2.1 of the currently applicable appendix C1 requires that testing be conducted without the use of rinse aid, and that any rinse aid reservoirs remain empty for testing. In the December 2021 NOPR, DOE maintained its conclusions from past rulemakings that the test procedure should preclude the use of rinse aid, and that the rinse aid container should remain empty during testing. 86 FR 72738, 72754. Adding a rinse aid requirement would increase test burden without information indicating that it would improve the representativeness of the test results, and it could potentially cause variation in test results. For these reasons, DOE did not propose a rinse aid requirement in appendix C1 or the new appendix C2, which is consistent with the specifications in AHAM DW-1-2020 that DOE proposed to reference in the December 2021 NOPR. *Id.*

During the December 2021 NOPR public meeting, Electrolux questioned if cleaning performance would be evaluated for soils only, without

evaluating spots, streaks, and rack contact marks, due to the lack of the use of rinse aid during the energy and water consumption tests. (Electrolux, Public Meeting Transcript, No. 22 at p. 19) AHAM commented that if DOE moves forward with a cleaning performance metric, DOE should evaluate either the use of rinse aid to decrease variation in scoring or running the energy test without rinse aid and adjusting the scoring to only score soils and not spots or streaks on glassware. (AHAM, No. 17 at p. 15) During the October 2022 *ex parte* meeting, AHAM commented that DOE's test procedure should not include the use of rinse aid and the test load should be score based only on soil particles, without including scores for spots or streaks. (AHAM, No. 27 at p. 40)

Whirlpool stated that if DOE finalizes its proposals to include a minimum cleaning index requirement, Whirlpool recommended that rinse aid be a requirement. Whirlpool explained that the use of rinse aid improves repeatability and lowers variation in a dishwasher performance test, including making glasses and silverware easier to accurately score. (Whirlpool, No. 16 at p. 10; see also Whirlpool, No. 16 at p. 4) Whirlpool also commented that it would assist DOE in determining the appropriate amount of rinse aid to specify in the test procedure. (Whirlpool, No. 16 at p. 10)

Whirlpool also commented that if DOE does not finalize the test procedure with a cleaning index requirement, Whirlpool maintains its existing position that rinse aid is not needed in a test that only assesses energy and water consumption, since rinse aid does not impact energy and water use. (*Id.*)

DOE recognizes that the use of rinse aid, or lack thereof, can impact the scoring of spots or streaks on glassware. Given DOE is not specifying the use of rinse aid, as discussed in section III.H of this document, DOE has updated the cleaning index calculation to score only soils and not include the scores of spots, streaks, or rack contact marks on the glassware because, as noted by commenters, the lack of use of rinse aid would impact the scores of spots, streaks, and rack contact marks.

This final rule does not require the use of rinse aid in appendix C1 or the new appendix C2, consistent with the specifications in AHAM DW-1-2020 and the currently applicable DOE test procedure.

7. Water Softener Regeneration Cycles

In the October 2012 Final Rule, DOE adopted a method for measuring the energy consumed during regeneration

cycles for water softeners built into certain residential dishwashers. 77 FR 65942, 65960. The adopted approach relies on manufacturer-reported values for the energy and water use for each regeneration cycle and the number of annual regeneration cycles. *Id.* The current calculations for water softener regeneration cycles are provided in sections 5.1.3, 5.4.3, 5.5.1.2, 5.5.2.2, 5.6.1.2, and 5.6.2.2 of appendix C1. In response to the August 2019 RFI, DOE did not receive any comment regarding the energy and water use during water softener regeneration cycles, and thus did not propose any changes in the December 2021 NOPR with regards to water softener regeneration cycles, aside from maintaining the associated definitions and calculations specified in AHAM DW–1–2020. 86 FR 72738, 72754.

AHAM commented that dishwashers with built-in water softeners should be tested in the as-shipped condition, where the default typically is that the water softeners are turned off, rather than tested with the water softener activated since it does not expect consumers to use the water softener function often due to the high prevalence of home water softeners in the United States. (AHAM, No. 17 at p. 15) AHAM commented that it does not believe this will have a statistically significant impact on energy usage. (*Id.*) Whirlpool commented that it supported AHAM's position on the technical issues concerning built-in water softener dishwashers. (Whirlpool, No. 16 at p. 2)

AHAM has not submitted any data to support its claim that dishwashers with water softeners typically have the water softener turned off. DOE notes that the current test procedure accounts for the additional energy and water use associated with water softener regeneration cycles as a manufacturer-reported value that is added to the tested values for the calculation of EAEU, EAOC, and water consumption. In the June 2011 BSH Corporation ("BSH") Decision and Order, BSH included a 50-percent deduction in energy and water based on an estimate that at least 50 percent of homes already have a water softening system. 76 FR 38144, 38145. In this Decision and Order, DOE noted that BSH submitted no data to support this claim. *Id.* DOE further stated that to maintain the same methodology used in a similar waiver granted to Whirlpool, DOE was not including the 50-percent deduction in its final waiver for BSH. *Id.* In the absence of additional data, DOE's position remains the same as that stated in the June 2011 BSH Decision and Order.

Accordingly, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to maintain the associated definitions and calculations specified in AHAM DW–1–2020 for water softener regeneration cycles.

8. Water Re-Use System

On November 1, 2013, DOE published a Decision and Order ("November 2013 Decision and Order") granting Whirlpool a test procedure waiver ("Whirlpool waiver") for testing specified basic models equipped with a "water use system," in which water from the final rinse cycle is stored for use in the subsequent cycle, with periodic draining ("drain out") and cleaning ("clean out") events. 78 FR 65629 (Case No. DW–11).²³ Whirlpool is required to test the basic model specified in the November 2013 Decision and Order using appendix C1, with the following modifications:

(1) "Water use system" water and energy consumption shall be accounted for during dishwasher water and energy measurement and reporting, subject to the following:

a. For "drain out" events, constant values of 0.072 gallons per cycle and 2.6 kWh/year shall be added to values measured by appendix C1.

b. For "clean out" events, constant values of 0.071 gallons per cycle and 10.3 kWh/year shall also be added to values measured by appendix C1.

c. To calculate the detergent quantity for testing, a constant value of 0.91 gallons for the water fill amount shall be used, representing both saved water fill and house supply water fill.

d. If a "drain out" or "clean out" event occurs during testing, any results from that use of the test procedure shall be disregarded. Disconnect and reconnect power to the dishwasher, then restart the test procedure.

(2) To detect a "drain out" event, measure the water volume supplied during the first fill. A cycle shall be considered to have a "drain out" event if the first fill uses approximately 1 gallon from the water supply. Without a "drain out" event, the first fill would use approximately 0.11 gallons from the water supply.

(3) To detect a "clean out" event, monitor the temperature of the sump water using an additional temperature measuring device. The device shall be placed inside the sump in an area such that the device will always be submerged in water and will not interfere with the operation of the dishwasher. A cycle shall be considered to have a "clean out" event if the temperature of the sump water during wash and rinse portions of the cycle reaches 150 °F. Without a "clean out" event, the highest sump water temperatures would reach approximately 140 °F.

78 FR 65629, 65631.

²³ All materials regarding the Whirlpool waiver are available in docket EERE–2013–BT–WAV–0042 at www.regulations.gov.

Subsequently, AHAM published the AHAM DW–1–2020 standard, which includes provisions for testing water re-use system dishwashers. Specifically, sections 1.3, 1.9, and 1.29 of AHAM DW–1–2020 include definitions for a clean out event, drain out event, and water re-use system dishwasher, respectively. These definitions are consistent with those specified in the November 2013 Decision and Order. AHAM DW–1–2020 also specifies the detergent dosing requirements, methods to measure the energy and water consumption of water re-use system dishwashers, including detection of drain out and clean out events, and calculations for energy and water consumption. Sections 2.10.2, 4.1.3, 5.1.4, 5.1.5, 5.4.4, 5.4.5, 5.5.1.3, 5.5.1.4, 5.5.2.3, 5.5.2.4, 5.6.1.3, 5.6.1.4, 5.6.2.3, and 5.6.2.4 of AHAM DW–1–2020. All of these requirements are consistent with the alternate test procedure specified in the November 2013 Decision and Order granting the waiver to Whirlpool for water re-use systems, except for the specified water energy consumption equations in sections 5.6.1.3, 5.6.1.4, 5.6.2.3, and 5.6.2.4, which use an incorrect constant.²⁴

As soon as practicable after the granting of any waiver, DOE is required to publish in the **Federal Register** a NOPR to amend its regulations so as to eliminate any need for the continuation of such waiver. 10 CFR 430.27(l). As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. *Id.* Since AHAM DW–1–2020 includes the language from the Whirlpool waiver, in the December 2021 NOPR, DOE proposed to reference these requirements in appendix C1 and the new appendix C2, with added modifications to the equations in sections 5.6.1.3, 5.6.1.4, 5.6.2.3, and 5.6.2.4 of AHAM DW–1–2020. 86 FR 72738, 72754.

DOE requested comment on its proposal to reference in appendix C1 and the new appendix C2 the testing provisions from AHAM DW–1–2020 to address the Whirlpool waiver for water re-use system dishwashers. *Id.*

DOE did not receive any comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to reference in appendix C1 and the new appendix C2 the testing provisions from AHAM DW–1–2020 to address the Whirlpool waiver for water re-use system dishwashers.

²⁴ The equations in the noted sections improperly use the constant $K = \text{specified heat of water in kWh per gal per } ^\circ\text{F}$, instead of C/e , where $C = \text{specific heat of water in Btus per gal per } ^\circ\text{F}$, and $e = \text{nominal gas or oil water heater recovery efficiency}$.

9. Water Heater Efficiency

Section 5 of appendix C1 specifies the calculations of derived results from test measurements, including machine energy consumption, fan-only mode energy consumption, drying energy consumption, water consumption, and water energy consumption. For water energy consumption, DOE specifies different equations based on whether an electric water heater is used, or a gas-heated or oil-heated water heater is used. For electric water heaters, appendix C1 assumes a 100 percent efficiency,²⁵ while for gas/oil water heaters, appendix C1 specifies the calculation assuming a 75 percent efficiency. DOE did not propose any changes to this requirement in the December 2021 NOPR.

The Joint Commenters recommended that DOE amend assumptions for water heater efficiencies to better reflect real-world water heater efficiencies, as they would improve representativeness of the test procedure and more accurately reflect the relative contribution of water heating energy use to the total dishwasher energy use. (Joint Commenters, No. 18 at p. 3) The Joint Commenters stated that the efficiency assumptions in the test procedure are higher than those found in the existing housing stock and underestimate the energy use associated with water heating and estimated that the shipment-weighted efficiencies for new water heaters are 92 percent for electric water heaters and 62 percent for gas water heaters. (*Id.*)

As discussed in the clothes washer test procedure final rule published on June 1, 2022, (*See* 87 FR 33316, 33355–33356), based on the values presented, DOE interprets the Joint Commenters statement as referring to a value of uniform energy factor (“UEF”). DOE notes that UEF is a measure of efficiency based in part on a 24-hour simulated use test that measures both energy use associated with recovery periods (*i.e.*, the energy embedded within each water draw) and energy losses during the time in which water is not being withdrawn from the water heater (*i.e.*, standby energy losses), and incorporates simulated household water draw patterns. In a residential household, numerous appliances draw hot water

from the water heater, in addition to dishwashers. Given the number of factors not directly related to dishwasher usage that factor into the UEF metric, DOE has determined that it would not be appropriate to use UEF as the basis for determining an estimate of water heating energy in the dishwashers test procedure. The appropriate water heater efficiency metric to use for dishwashers is the recovery efficiency, which represents the ratio of energy delivered to the water to the energy content of the fuel consumed by the water heater. *Id.* Based on a qualitative evaluation of the electric and gas water heater efficiencies in its public Compliance Certification Management System (“CCMS”) database,²⁶ DOE determines that the efficiencies listed in the current dishwasher test procedure are appropriate. Additionally, DOE did not discuss water heater efficiencies in the December 2021 NOPR and has not provided stakeholders an opportunity to provide feedback on this topic. DOE will revisit the Joint Commenters’ comments in a future rulemaking.

Therefore, DOE is not making any changes to the water heater efficiency in the dishwasher test procedures at appendix C1 and the new appendix C2.

H. Cleaning Performance

EPCA requires DOE to establish test procedures that are reasonably designed to produce test results that measure energy efficiency, energy use, water use (for certain products), or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary, and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE’s test procedure for dishwashers identifies the “normal cycle” as the cycle type representative of consumer use, defines the term “normal cycle,” and requires testing using the “normal cycle.” Compliance with the applicable standards is determined based on the measured energy and water use of the “normal cycle.” 10 CFR 430.23(c) and 10 CFR 430 subpart B appendix C1. The “normal cycle” is defined as the cycle type, including washing and drying temperature options, recommended in the manufacturer’s instructions for daily, regular, or typical use to completely wash a full load of normally soiled dishes including the power-dry feature. If no cycle or more than one cycle is recommended in the

manufacturer’s instructions for daily, regular, or typical use to completely wash a full load of normally soiled dishes, the most energy-intensive of these cycles shall be considered the normal cycle. In the absence of a manufacturer recommendation on washing and drying temperature options, the highest energy consumption options must be selected. Section 1.12 of appendix C1. The currently applicable test procedure in appendix C1 does not define what constitutes “completely wash[ing]” a full load of normally soiled dishes (*i.e.*, the cleaning performance).

For dishwashers, the cleaning performance at the completion of a cycle influences how a consumer uses the product. If the cleanliness of the dishware after completion of a cleaning cycle does not meet consumer expectations, consumers may alter their use of the dishwasher. For example, consumers may alter the use of the product by selecting a different cycle type that consumes more energy and water to provide a higher level of cleaning, operating the selected cycle type multiple times, or prewashing the dishware, flatware, and glassware before loading into the dishwasher to achieve an acceptable level of cleaning. In the December 2021 NOPR, DOE summarized a comment received from Samsung in response to the August 2019 RFI in which Samsung stated that consumers unsatisfied with the cleaning performance of the “normal cycle” may opt to select a different mode that could result in increased energy consumption. (Samsung, No. 9 at p. 3) DOE also asserted in the December 2021 NOPR that it is possible that dishwashers exist on the market that are currently tested by manufacturers using a “normal cycle” that does not “completely wash” dishes. 86 FR 72738, 72755.

In general, a consumer-acceptable level of cleaning performance (*i.e.*, a representative average use cycle) can be easier to achieve through the use of higher amounts of energy and water use during the dishwasher cycle.²⁷ Conversely, maintaining acceptable cleaning performance can be more difficult as energy and water levels are reduced.²⁸ Improving one aspect of

²⁷ Higher energy use may provide increased thermal and mechanical action for removing soils. Similarly, higher water use may provide better rinsing performance by reducing the amount of soil re-deposition on the dishware.

²⁸ In the December 2014 NOPR that proposed amended energy and water use standards for dishwashers, DOE noted that cleaning performance could be maintained up to Efficiency Level 3, which was defined as 234 kWh/year and 3.1 gal/cycle. 79 FR 76141, 76165 (Dec. 19, 2014). In the December 2016 Final Determination, DOE

²⁵ Section 5.5 of appendix C1 specifies the calculations for water energy consumption for dishwashers using electrically heated water. The equations specified in this section do not include a constant for the water heater recovery efficiency (as specified in section 5.6 for gas or oil-heated water), which indicates that the calculations for water energy consumption for dishwashers using electric water heaters assume a 100-percent water heater efficiency.

²⁶ U.S. Department of Energy Compliance Certification Database, available at www.regulations.doe.gov/certification-data. Last accessed July 8, 2022.

dishwasher performance, such as reducing energy and/or water use as a result of energy conservation standards, may require a trade-off with one or more other aspects of performance, such as cleaning performance. DOE stated in the December 2021 NOPR that it expects, however, that consumers maintain the same expectations of cleaning performance regardless of the efficiency of the dishwasher. *Id.* at 86 FR 72755. As the dishwasher market continuously evolves to higher levels of efficiency—either as a result of mandatory minimum standards or in response to voluntary programs such as ENERGY STAR—it becomes increasingly more important that DOE ensures that its test procedure continues to reflect representative use. As such, the normal cycle that is used to test the dishwasher for energy and water performance must be one that provides a consumer-acceptable level of cleaning performance, even as efficiency increases.

In order for DOE's test procedure to more accurately and fully test dishwashers during a representative average use cycle, DOE stated in the December 2021 NOPR that it believes that amending the test procedure to define what constitutes completely washing a full load of normally soiled dishes (*i.e.*, the cleaning performance) will better represent consumer use of the product. *Id.* at 86 FR 72755. As such, in the December 2021 NOPR, DOE proposed additional direction for selecting the appropriate test cycle type, *i.e.*, for determining whether the cycle “can completely wash a full load of normally soiled dishes.” *Id.* DOE proposed to include a cleaning index methodology and minimum threshold to validate the selection of the test cycle in appendix C1 and the new appendix C2.²⁹ *Id.*

DOE received several comments on its proposal to include a cleaning performance test and minimum cleaning index threshold as a condition for a valid test cycle. General comments, including whether to adopt these

additionally noted that manufacturers generally indicated that by using all available design options to improve efficiency, it would likely be able to maintain performance with a maximum energy consumption between 250 and 260 kWh/year and water consumption at 3.1 gal/cycle. 81 FR 90072, 90082.

²⁹This approach is analogous to the one used for clothes dryers, in which the DOE test procedure at appendix D2 defines a threshold dryness level for automatic cycle termination of clothes dryers as a condition for the test cycle to be valid. Specifically, Section 3.3.2 of appendix D2 specifies that if the final moisture content after completion of the drying cycle is greater than 2 percent, the test shall be invalid and a new run shall be conducted using the highest dryness level setting.

provisions in the currently applicable test procedure at appendix C1 or in the new appendix C2, are summarized in the following section and topic-specific comments are addressed in subsequent sections.

1. General Comments

Samsung, ASAP, the Joint Commenters, and the CA IOUs supported the inclusion of a cleaning performance test method and minimum cleaning index threshold. (Samsung, No. 21 at p. 2; Public Meeting Transcript, No. 22 at p. 7; ASAP, Public Meeting Transcript, No. 22 at pp. 21–22; Joint Commenters, No. 18 at p. 2; CA IOUs, Public Meeting Transcript, No. 22 at p. 43; CA IOUs, No. 19 at pp. 1–2) AHAM, Whirlpool, and GEA opposed the inclusion of a cleaning performance test method and minimum cleaning index threshold. (AHAM, No. 17 at p. 2; Whirlpool, No. 16 at p. 2; GEA, No. 20 at p. 2)

Samsung commented that it agreed with DOE's position that the cleaning performance requirements would help define what constitutes completely washing a full load of normally soiled dishes (*i.e.*, the cleaning performance), which would allow the test cycle type to better represent consumer use of the product. (Samsung, No. 21 at p. 2) The CA IOUs commented that they supported the cleaning performance test method, stating that it would provide base-level cleanliness performance assurances that have the potential to increase representative use of the expected “normal” cycle, reduce pre-rinsing of dishes, and increase the overall consumer use of dishwashers. (CA IOUs, No. 19 at pp. 1–2) ASAP commented that consumers often shift from the normal cycle to an alternate cycle type with better cleaning performance, which would result in increased energy consumption; therefore, adopting a minimum cleaning index threshold would help ensure representativeness of the normal cycle and would better meet consumer expectations of cleaning performance. (ASAP, Public Meeting Transcript, No. 22 at pp. 21–22) The CA IOUs commented that it would be helpful to consumers in their energy and water use savings by assuring that there is satisfaction with the normal cycle. (CA IOUs, Public Meeting Transcript, No. 22 at p. 43) The Joint Commenters stated that a cleaning performance requirement will result in tested cycle types that are more representative of energy and water consumption during consumer use. (Joint Commenters, No. 18 at p. 2) DOE appreciates stakeholder support for the inclusion of the cleaning index

threshold and agrees that specifying such a threshold will ensure that the rated energy and water consumption of dishwashers is representative for completely washing a full load of normally soiled dishes with a consumer-acceptable level of cleaning.

AHAM and Whirlpool commented that should DOE move ahead with a performance metric in the test procedure, they urged that compliance with the cleaning performance threshold should be required only with amended standards. (AHAM, No. 17 at p. 13; AHAM, No. 27 at p. 3; Whirlpool, No. 16 at p. 4) During the December 2021 NOPR public meeting, AHAM commented that the inclusion of a cleaning performance metric would intrinsically change test results and sought clarity on why DOE was including the cleaning performance metric in appendix C1. (AHAM, Public Meeting Transcript, No. 22 at p. 33) During the October 2022 *ex parte* meeting, AHAM reiterated its opposition to include cleaning performance requirements in appendix C1, stating that the cleaning performance would impact measured efficiency. (AHAM, No. 27 at p. 3) AHAM commented that DOE could not produce data on whether including cleaning performance requirements in appendix C1 would impact measured energy or provide any data on why it made the proposal to include the performance requirements in appendix C1, rather than including it in the proposed new appendix C2 and applying it when compliance with possible amended standards is required. (AHAM, No. 17 at pp. 13–14)

AHAM stated that the requirements potentially violate the investment and associated recovery assumptions underlying the manufacturer impact analysis that DOE presented in its preliminary technical support document on possible amended energy conservation standards. (*Id.* at p. 13) AHAM further commented that, based on DOE's data, about 18 percent of models would need to be tested using the most energy-intensive cycle³⁰ and the response of granting a waiver for products that fail to meet the cleaning index threshold on the most energy-intensive cycle would completely diminish the point of the requirement. (*Id.*) AHAM also referenced DOE's test data from the January 2022 Preliminary

³⁰As discussed further in section III.H.4 of this document, DOE proposed in the December 2021 NOPR that if a dishwasher failed to achieve the minimum cleaning index threshold for a given soil load on the normal cycle, the unit would be re-tested at the same soil load using the most energy-intensive cycle. 86 FR 72738, 72747, 727560 72759.

Analysis and stated that most models currently on the market are at Efficiency Level (“EL”) 1 (which is the ENERGY STAR V. 6.0 level) and at that level, the majority of products would need to be re-tested using the most energy-intensive cycle for the heavy and/or medium soil load. AHAM additionally stated that for the 33 percent of models in DOE’s data set that would require re-testing at the heavy soil load, it is possible that these products may not meet the current energy conservation standards or that some models currently meeting the ENERGY STAR criteria may no longer meet the baseline after being re-tested using the most energy-intensive cycle. (*Id.*)

Whirlpool commented that if DOE’s proposal for the minimum cleaning index goes into effect with an amended appendix C1 test procedure, it would create a tremendous burden on manufacturers by potentially requiring them to re-test all models for compliance with the minimum cleaning index requirement and potentially redesign cycle types to continue to sell into the U.S. market, all within a 6-month window. (Whirlpool, No. 16 at p. 9; Whirlpool, Public Meeting Transcript, No. 22 at pp. 34–35) Whirlpool commented that it is impractical and overly burdensome to require manufacturers to re-test all their models in such a short window, particularly when manufacturers and test laboratories have other ongoing, competing laboratory needs. (Whirlpool, No. 16 at p. 9) Whirlpool stated that product redesigns are likely to occur as a result of this cleaning performance proposal. (*Id.*) Whirlpool commented that redesigning a product can take many months or years and would be a huge disruption in the market, and due to the stated flaws in the cleaning index, it was not even certain whether redesigning a dishwasher model to be compliant with the proposed cleaning index would lead to more consumer satisfaction. (*Id.*)

DOE understands from the comments that manufacturers are identifying basic models currently on the market that may require re-testing as a result of the inclusion of cleaning performance testing because the basic models may not meet the cleaning performance threshold on the normal cycle at all soil loads. Therefore, although DOE proposed to include the cleaning performance threshold in both appendix C1 and the proposed new appendix C2 in the December 2021 NOPR, DOE is finalizing these amendments only in the new appendix C2, which will be required for use to determine compliance with amended standards.

AHAM commented that while it agreed with DOE that dishwasher performance is a concern, it could not support DOE’s proposal to include a performance metric in the test procedure without DOE providing data and information to address the significant concerns AHAM raised in its comments. (AHAM, No. 17 at p. 2) AHAM commented that it agreed that performance needs to be maintained for the consumer, but that the cleaning performance test would drive the opposite result by forcing manufacturers to focus on only one aspect of cleaning performance to the detriment of other important performance functionalities. (AHAM, No. 26 at p. 5)

AHAM commented that EPCA authorizes DOE to develop test procedures that measure only energy efficiency, energy use, water use, or estimated annual operating cost, and that EPCA does not authorize DOE to develop test procedures that measure product performance. (AHAM, No. 17 at p. 3) AHAM commented that DOE had not produced sufficient information or data to show that its proposed cleaning performance requirement meets EPCA’s requirements. (AHAM, No. 17 at p. 3)

As discussed, EPCA requires that any test procedures prescribed or amended shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product *during a representative average use cycle or period of use* [emphasis added] and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) As discussed in the December 2021 NOPR, the cleaning performance at the completion of a cycle type influences how a consumer uses a dishwasher. 86 FR 72738, 72755. If the cleanliness of the dishware after completion of a cleaning cycle does not meet consumer expectations, consumers may alter their use of the dishwasher. *Id.* Indeed, comments received from Samsung expressed concern that consumers unsatisfied with the cleaning performance of the normal cycle may opt to select a different mode that could result in increased energy consumption. *Id.* As discussed further in section III.H.3 of this document, DOE notes that cycle selection data indicates consumer use of cycle types other than the normal cycle and LBNL’s survey on dishwasher characteristics, usages, and consumer preferences³¹ found that that 17 percent of the respondents “sometimes” re-run

their dishwasher due to inadequate cleaning. Amending the test procedure to define what constitutes completely washing a full load of normally soiled dishes (*i.e.*, establishing a cleaning performance threshold) will ensure that the test procedure produces test results that measure energy and water use during a representative average use cycle or period of use.

AHAM asserted that DOE has not provided sufficient support for its proposals, that the proposal to include a cleaning performance method and to establish a minimum cleaning index threshold was not based on data and, therefore, was arbitrary and capricious under the Administrative Procedure Act (“APA”)³² and did not meet the requirements of the Data Quality Act.³³ (AHAM, No. 17 at pp. 3, 4–5, 7, 8, 10; AHAM, No. 26 at p. 4) Similarly, GEA asserted that EPCA, the APA, and the Data Quality Act require that DOE’s regulations be properly supported by relevant data, but that DOE did not have relevant data to support its proposed cleaning metric. GEA argued that the issue in this rulemaking is not the quality or sufficiency of the data, or how the data is interpreted, but the very existence of the data. (GEA, No. 20 at p. 2)

DOE has met the APA’s requirements, as DOE has explained in the December 2021 NOPR and throughout this final rule discussion its justification for including a cleaning performance measurement and for establishing a minimum cleaning index threshold to define what constitutes completely washing a full load of normally soiled dishes. As discussed in detail in the following sections, DOE has presented the details of the analysis performed by DOE, which builds upon comprehensive investigation and analysis of dishwasher cleaning performance conducted by DOE over the course of the development of the ENERGY STAR Cleaning Performance Test Method and previous dishwasher energy conservation standards rulemakings, and using the best available data that DOE has to establish the specific cleaning index threshold that aligns with consumer expectations for completely washing a full load of normally soiled dishes.

AHAM also commented that DOE’s published data are not transparent and requested that DOE provide its full data set including generic model identifiers to allow commenters to fully evaluate

³² Public Law 79–404 (June 11, 1946).

³¹ “Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and Consumer Preferences.” Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

³³ Public Law 106–554 (Dec. 21, 2000). AHAM did not provide any details as to which specific requirements of the Data Quality Act it believes the proposals in the December 2021 NOPR did not satisfy.

DOE's test data. AHAM asserted that DOE's failure to provide that data is not consistent with the requirements under the Data Quality Act and other applicable statutory provisions. (AHAM, No. 17 at p. 12)

In the December 2021 NOPR, DOE presented the results of its test data aggregated to a level appropriate for determining a cleaning index threshold that most closely corresponded to consumer cycle selection data. As discussed further in section III.H.3 of this document, DOE presented graphs in the December 2021 NOPR showing the total percentage of each of the soil test cycles that met the threshold at each potential threshold level among all the units in the test sample. 86 FR 72738, 72757. This aggregated data informed the selection of the proposed cleaning index threshold. *Id.* Presenting model-level data would not have provided insights into the selection of an appropriate cleaning performance index. Further, DOE has complied with DOE's guidelines for implementing the Data Quality Act that ensure the quality, objectivity, utility, and integrity of the data presented in this document.³⁴

AHAM commented that in order to establish or amend representative average use cycles or periods of use, DOE must have national, statistically significant, field use data on consumer use, and that without such data, it is impossible and inappropriate for DOE to determine or change the average use cycle in a test procedure. (AHAM, No. 17 at p. 2) AHAM stated that the current dishwasher test procedure is based on consumer use studies, and that changing the test would require showing that something has changed with regard to consumer behavior or that more accurate consumer use study data are available. (*Id.*)

As DOE discussed in the December 2021 NOPR, it has become increasingly more important that DOE ensure that its test procedure continues to reflect representative use as the dishwasher market continuously evolves to higher levels of efficiency. 86 FR 72738, 72755. DOE notes that it did not propose to change the cycle type used for testing (*i.e.*, the normal cycle), but rather to ensure that the cycle type tested as the normal cycle produces results that are representative of consumer use. As discussed in the December 2021 NOPR and further in section III.H.3 of this document, DOE determined the proposed cleaning performance

threshold based on confidential consumer cycle selection data provided by industry. *Id.* at 72756. DOE believes this data to be nationally representative and based on field use data and/or consumer survey data. This final rule also presents an analysis of consumer usage data based on a survey report published October 28, 2021, by LBNL,³⁵ which further supports the cleaning index threshold value defined in this final rule (see section III.H.3 of this document).

AHAM also commented that DOE's rationale for adopting a minimum cleaning index threshold did not establish a direct connection to the product's energy use or energy efficiency; rather, it tied the threshold to avoiding certain consumer behavior in cases of what DOE deemed to be unacceptable performance. (AHAM, No. 17 at p. 4) AHAM asserted that EPCA does not permit this approach for incorporating performance criteria. (*Id.*)

DOE is adopting a minimum cleaning index threshold to define what constitutes "completely wash[ing]" a full load of normally soiled dishes so as to better represent consumer use of the product (*i.e.*, to produce test results that are more representative of an average consumer use cycle), as discussed in the December 2021 NOPR. 86 FR 72738, 72755. As discussed in the December 2021 NOPR and summarized earlier in this section, a consumer-acceptable level of cleaning performance can be easier to achieve through the use of higher amounts of energy and water use during the dishwasher cycle type (*i.e.*, the amount of energy or water use of a dishwasher can directly affect the level of cleaning performance). Conversely, reducing energy and water consumption may negatively impact cleaning performance to a level that is not consumer-acceptable.³⁶

³⁵ "Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and Consumer Preferences." Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

³⁶ During the previous standards rulemaking, AHAM and a group of its members presented data from two sets of manufacturer testing: one set consistent of a modified DOE sensor heavy soil load tested in dishwashers reprogrammed to match three energy and water use levels (307 kWh/year and 4.1 gal/cycle, 255 kWh/year and 3.1 gal/cycle, and 234 kWh/year and 3.1 gal/cycle and another set consisting of two dishwashers that were each loaded with ten place settings soiled with a modified ANSI/AHAM DW-1-2010 soil load, with each dishwasher programmed to match two energy and water use levels (307 kWh/year and 5.0 gal/cycle and 234 kWh/year and 3.1 gal/cycle). 81 FR 90072, 90082-90083. Based on the results of these tests, AHAM commented that any standards at the lower energy and water consumption levels (*i.e.*, 234-255 kWh/year and 3.1 gal/cycle) would result in worse cleaning performance than products that were then on the market could achieve. *Id.*

AHAM commented that it recognized that unacceptable performance may drive consumers toward less energy efficient behavior, but asserted that there are other ways of ensuring that performance is maintained for the consumer that DOE must consider during the standards development process. (AHAM, No. 17 at p. 4) DOE believes AHAM is referring to EPCA's criteria for prescribing amended standards; specifically, that DOE must consider any lessening of the utility or performance of the covered products likely to result from the imposition of the standard. (42 U.S.C.

6295(o)(2)(B)(i)(IV)) In accordance with this provision, DOE has explicitly addressed consumer utility concerns related to cleaning performance in previous rulemakings addressing dishwasher energy conservation standards, as well as in the January 2022 Preliminary Analysis. (See 77 FR 31918, 31956-31957; 81 FR 90072, 90082-83; 87 FR 3450³⁷). In each of these rulemakings, DOE has presented analysis and findings regarding the impacts of cleaning performance on the ability for manufacturers to offer dishwashers that comply with energy conservation standards at the considered efficiency levels. In DOE's conclusions regarding the economic justification of potentially higher standards, DOE did not establish more stringent standards that would require manufacturers to compromise cleaning performance in order for dishwasher models to demonstrate compliance, thereby fulfilling the consideration required under 42 U.S.C. 6295(o)(2)(B)(i)(IV). *Id.* Although not necessitated by the current energy conservation standards, manufacturers may choose to achieve compliance or further reductions in energy and water use through the use of control strategies and design approaches that reduce cleaning performance.³⁸

In response to AHAM's comment that unacceptable cleaning may drive consumers toward less efficient behavior, DOE is ensuring test results that are representative of an average use cycle, in accordance with the requirements of 42 U.S.C. 6295(o)(2)(B)(i)(IV) of EPCA, by establishing a minimum cleaning performance threshold in the new appendix C2. Establishing a cleaning

³⁷ See chapter 5 of the Preliminary Technical Support Document, available at www.regulations.gov/docket/EERE-2019-BT-STD-0039.

³⁸ For example, manufacturers may reduce wash or rinse temperatures and/or reduce fill volumes for wash or rinse portions of the test cycle without implementing any additional design options.

³⁴ See the discussion of the Data Quality Act in the December 2021 NOPR. 86 FR 72738, 72767; see also www.energy.gov/sites/prod/files/cioprod/documents/finalinfoqualityguidelines03072011.pdf.

index threshold as part of the new appendix C2 ensures that energy and water savings are being realized for products that comply with any future new or amended energy conservation standards for dishwashers.

AHAM commented that DOE's proposal, which focuses only on cleaning performance using a metric that does not adequately measure or represent consumer satisfaction, was more likely to drive negative, unintended consequences for consumers relating to overall dishwasher performance. (AHAM, No. 17 at pp. 4–5) AHAM commented that cleaning performance is a function of washing temperature, length of washing cycle, type and amount of detergent applied, and mechanics (*i.e.*, power), such that if DOE wanted to reduce energy and water use and maintain cleaning performance, it is likely that cycle time could reach a level unacceptable to consumers or that other elements of performance could be impacted. (AHAM, No. 17 at p. 5) AHAM commented not all elements of wash performance can be altered and maintain product functionality; for example, since the water must be warm enough to activate the detergent and remove fatty soils, manufacturers have few options to consider other than lengthening cycles, reducing drying performance or eliminating drying altogether, or increasing the noise level of the dishwasher to allow for greater power, in order to maintain cleaning performance while also meeting more stringent standards. (*Id.*)

AHAM further commented that a performance threshold that addresses only a single performance attribute is not consumer relevant because it ignores the fact that the dishwasher is a holistic system. AHAM stated that by requiring energy and water levels and a cleaning performance level, DOE could essentially force manufacturers into designing dishwashers that satisfy DOE's test procedure requirements, but do not satisfy consumers not only on the factors that are not addressed, but also with regard to the cleaning performance itself because, according to AHAM, DOE had failed to demonstrate that the cleaning index threshold it had selected correlated to consumer satisfaction. (*Id.*)

DOE testing indicates that a wide range of dishwashers are currently available on the market that achieve the proposed cleaning index threshold (which is equivalent to the cleaning index threshold finalized in this document) on each soil load tested as part of the normal cycle. In particular, such models are available at the DOE minimum standard level, the ENERGY

STAR V. 6.0 standard level, and the current ENERGY STAR Most Efficient level (which is also the ENERGY STAR V. 7.0 level that goes into effect in July 2023). Based on this wide range of dishwashers currently available on the market, DOE has concluded that the finalized cleaning performance threshold, as discussed in section III.H.3 of this document, will not result in dishwasher performance that is unacceptable to consumers or that would result in detrimental impacts to other consumer-relevant elements of performance. Furthermore, the discussion in section III.H. 3 of this document demonstrates that the cleaning index threshold correlates to consumer satisfaction of dishwasher performance. DOE expects that this final rule will have positive effects for consumers by ensuring that the rated energy and water use of dishwashers is based on a test cycle type that completely washes a full load of normally soiled dishes.

Whirlpool commented that it supported positions presented by AHAM, specifically noting that the proposal to include a minimum cleaning performance threshold score was unsubstantiated and not consumer relevant. (Whirlpool, No. 16 at p. 2) Whirlpool commented that it was pleased to see DOE sought to maintain performance and consumer satisfaction of dishwashers, but that the need to do so should serve as a signal that standards should not be amended further. (Whirlpool, No. 16 at p. 3)

As discussed, by establishing a minimum cleaning performance threshold in the new appendix C2, DOE is ensuring test results that are representative of an average use cycle. Establishing a cleaning index threshold as part of the new appendix C2 ensures that energy and water savings are being realized for products that comply with any future new or amended energy conservation standards for dishwashers. DOE will evaluate concerns regarding the impact of new or amended energy conservation standards on performance and consumer satisfaction within the energy conservation standards rulemaking process.

Whirlpool commented that DOE should not finalize the dishwasher test procedure with a minimum cleaning index threshold given the excessive burden caused by testing and potentially redesigning models and potential certification, verification, and enforcement risks associated with the requirement. (Whirlpool, No. 16 at p. 3) Whirlpool stated that DOE's approach to specify a cleaning index threshold as a way to address consumer satisfaction

with dishwasher cleaning performance was misplaced. (Whirlpool, No. 16 at p. 10) Whirlpool stated that the proposed test procedure is variable, and that it would lead to enormous manufacturer burden, competitive harm, and possible verification failures. (*Id.*)

In the December 2021 NOPR, DOE quantified the additional test burden expected to result from its proposal. 86 FR 72738, 72763–72764. Specifically, in the NOPR, DOE estimated that the cost to test a soil-sensing dishwasher to be approximately \$2,330 per basic model and that for a non-soil-sensing dishwasher to be approximately \$790 per basic model, which included the cost for the additional 1 hour per soil load that DOE estimated as the additional time required to score a load at the end of the cycle and calculate the cleaning index. 86 FR 72738, 72763. Section III.L.1 of document presents DOE's finalized estimates of the expected costs associated with these amendments. However, while DOE proposed to include these amendments in both appendix C1 and the proposed new appendix C2 in the December 2021 NOPR, DOE now is only including these amendments in the new appendix C2, which will reduce the immediate burden incurred by manufacturers. Appendix C2 will be required only for use to determine compliance with any future new or amended standards for dishwashers.

As stated, DOE is introducing the cleaning performance requirement to ensure the test results are representative of an average consumer use cycle, but the cleaning performance requirement is only being included as part of the new appendix C2 and will only pertain to any future new or amended energy conservation standards for dishwashers. DOE testing indicates that a wide range of dishwashers are currently available on the market that achieve the proposed cleaning index threshold (which is equivalent to the cleaning index threshold finalized in this document) on each soil load tested as part of the normal cycle. In particular, such models are available from multiple manufacturers at the DOE minimum standard level, the ENERGY STAR V. 6.0 level, and the current ENERGY STAR Most Efficient level (which is the same as the ENERGY STAR V. 7.0 level that goes into effect in July 2023). Therefore, DOE has determined that the cleaning performance threshold will not introduce competitive harm and that dishwashers achieving this threshold are capable of meeting the existing DOE energy and water conservation standards (as well as more efficient performance levels).

The following sections discuss DOE's proposal in the December 2021 NOPR, additional comments received in response to the proposals, and DOE's response and final requirements for cleaning performance.

2. Cleaning Performance Test Method

In the December 2021 NOPR, DOE proposed to adopt a cleaning performance test method that would help determine if a dishwasher, when tested according to the DOE test procedure, "completely washes a normally soiled load of dishes," according to the representative consumer use. 86 FR 72738, 72755. Specifically, DOE proposed to include the cleaning performance evaluation setup, procedures, and calculations that are specified in the ENERGY STAR Cleaning Performance Test Method, which references ANSI/AHAM DW-1-2010, in appendix C1 and the new appendix C2. *Id.*

The ENERGY STAR Cleaning Performance Test Method specifies a procedure to determine cleaning performance at the same test loads described in the DOE test procedure. For soil-sensing dishwashers, cleaning performance is evaluated on the same cycles that are used to determine energy and water consumption (*i.e.*, the heavy, medium, and light soil loads). (ENERGY STAR Cleaning Performance Test Method section 5.1.B) For non-soil-sensing dishwashers, cleaning performance is evaluated on three additional cycles at the heavy, medium, and light soil loads that are run immediately after the clean-load cycle that is used to determine energy and water consumption. (ENERGY STAR Cleaning Performance Test Method section 5.1.C) Each test load item is quantitatively evaluated for cleanliness under prescribed lighting conditions referenced from ANSI/AHAM DW-1-2010. (ENERGY STAR Cleaning Performance Test Method section 4.B) Additionally, section 5.2 of the ENERGY STAR Cleaning Performance Test Method specifies criteria to score the load; it references section 5.10 of ANSI/AHAM DW-1-2010, which specifies the following requirements:

- Each test load item receives a score based on the number and size of soil particles that remain on the item following the termination of a test cycle type.
- Glassware items are additionally evaluated for the number and size of remaining spots, streaks, and rack contact marks.
- A score of 0 indicates a completely clean test load item, and a single test

load item cannot exceed a cumulative score of 9.

- The number of test items that receive each score is counted (*i.e.*, number of items in the test load that receive a score of 0, 1, 2, . . . , 9) and the weighted average of these counts is subtracted from 100 to produce a final cleaning index for the test cycle.

- A score of 100 indicates perfect cleaning performance.

Accordingly, in the December 2021 NOPR, DOE proposed to include the requirements specified in sections 4(B), 5.2, and 5.3 of the ENERGY STAR Cleaning Performance Test Method, as follows:

Section 4(B) of the ENERGY STAR Cleaning Performance Test Method establishes the lighting requirements for the evaluation room for scoring the test load, as specified in ANSI/AHAM DW-1-2010. These same lighting requirements are also specified in section 5.10 of AHAM DW-2-2020; therefore, DOE proposed to reference section 5.10 of AHAM DW-2-2020 to specify the lighting requirements for the evaluation room. 86 FR 72738, 72756.

Section 5.2 of the ENERGY STAR Cleaning Performance Test Method establishes the scoring procedure to evaluate each dishware item in the test load after completion of the test cycle, as specified in ANSI/AHAM DW-1-2010. The scoring method is also specified in section 5.10.1 of AHAM DW-2-2020; therefore, DOE proposed to reference the scoring requirements specified in AHAM DW-2-2020. *Id.*

Section 5.3 of the ENERGY STAR Cleaning Performance Test Method specifies the equation for calculating a cleaning index for each test cycle, which is also specified in section 5.12.3.2 of AHAM DW-2-2020; therefore, DOE proposed to reference the calculation of cleaning index for each test cycle from AHAM DW-2-2020. *Id.*

In the December 2021 NOPR, DOE noted that the calculation to determine per-cycle cleaning index is based on the individual score of each item such that dishware and flatware are scored based on soil particles, while glassware is scored based on soil particles as well as spots, streaks, and rack contact marks. *Id.* DOE further noted that AHAM DW-2-2020 provides two separate equations for calculating the total cleaning index for one test run. *Id.* The equation in section 5.12.3.1 of AHAM DW-2-2020 specifies a soil-only cleaning index, which is calculated using the scores of each test load item (including glassware) based only on soil particles. Section 5.12.3.2 of AHAM DW-2-2020 uses the same equation as that in the

ENERGY STAR Cleaning Performance Test Method (and ANSI/AHAM DW-1-2010) and defines the total cleaning index calculation using the scores of dishware and flatware based on soil particles and glassware based on soil particles as well as spots, streaks, and rack contact marks. DOE proposed to reference section 5.12.3.2 of AHAM DW-2-2020 to calculate the total cleaning index of a cycle type because DOE stated that it expects that consumers would evaluate the cleanliness of their load items at the completion of a cycle type. *Id.* DOE requested feedback on whether it should consider referencing section 5.12.3.1 of AHAM DW-2-2020 instead, which would calculate the cleaning index based on soil particles only. *Id.* DOE stated that if it were to calculate the cleaning index using soil particles only, it would reevaluate the per-cycle cleaning index threshold value [discussed further in section III.H.3 of this document] to reflect this change. *Id.* DOE requested stakeholder feedback on an appropriate threshold to consider. *Id.*

DOE also requested feedback on the proposed methodology to test, score, and calculate a cleaning index to validate the tested cycle and sought comment on whether other methodologies should be considered for validating the cleaning performance of the tested cycle. *Id.*

DOE requested feedback on whether it should consider referencing section 5.12.3.1 of AHAM DW-2-2020 to measure cleaning performance, which would calculate the cleaning index based on soil particles only. *Id.* DOE noted that if it were to calculate cleaning index using soil particles only, it would reevaluate the per-cycle cleaning index threshold value to reflect this change. *Id.*

As discussed in section III.G.6 of this document, stakeholders commented that if DOE does not specify the use of rinse aid, the cleaning index should be calculated based on soil particles only, without including spots, streaks, or rack contact marks. (Electrolux, Public Meeting Transcript, No. 22 at p. 19; AHAM, No. 17 at p. 15³⁹) During the October 2022 *ex parte* meeting, AHAM commented that while it supported calculating cleaning indices based on soil particles only, it did not support

³⁹ AHAM provided the same recommendation to DOE during the October 2022 *ex parte* meeting and included the meeting materials in an attachment to its memorandum summarizing the meeting. Specifically, AHAM's recommendation regarding the determination of the cleaning index in the absence of a specification for the use of rinse aid may be found in the October 2022 *ex parte* memorandum at (AHAM, No. 27 at p. 40).

raising the cleaning index threshold score of 65 much or at all as a result of this change to alleviate some burden and reduce false findings of noncompliance. (AHAM, No. 27 at pp. 2–3)

Given that DOE is not specifying the use of rinse aid in the new appendix C2, DOE has reevaluated the requirement to score glassware and calculate the cleaning index based on soil particles only, which is discussed in section III.H.3 of this document. Accordingly, DOE has updated its reference, in the new appendix C2, to section 5.10.1.1 of AHAM DW–2–2020 to score items based on soil particles and section 5.12.3.1 of AHAM DW–2–2020 to measure cleaning performance.

AHAM referenced EPCA's requirement that new and amended test procedures be *reasonably designed* [emphasis added] to produce test results that measure energy efficiency, energy use, water use, or estimated annual operating cost of covered products or equipment during a representative average use cycle or period of use, while also not be unduly burdensome to conduct; and commented that a test cannot be considered reasonably designed if it is not accurate, repeatable, and reproducible. (AHAM, No. 17 at p. 3; AHAM No. 26 at p. 1) AHAM further stated that the cleaning performance test was too variable to be used for mandatory criteria. (AHAM, No. 26 at p. 1) AHAM commented that AHAM DW–2–2020 was designed for companies to use in their product development efforts, and that it was not designed to be used as a regulatory tool. AHAM stated that AHAM DW–2–2020 does not require the same precision in repeatability and reproducibility as a mandatory performance threshold does, and that that the AHAM DW–2–2020 test method does not claim to replicate consumer interaction with dishwashers, such as how they load it, how much soil is on the dishes, how many dishes are in the dishwasher, the amount and type of detergent used, whether rinse aid is used, *etc.*; rather it was intended to assess redeposition. (AHAM, No. 17 at p. 6)

AHAM commented that the proposed test procedure, which is based on the ENERGY STAR Cleaning Performance Test Method (which is based on AHAM DW–2–2020 and uses DW–2–2020's scoring method) continues to be too variable to be used for mandatory criteria and referenced comments made in response to the EPA's ENERGY STAR Program. (AHAM, No. 17 at p. 8; AHAM, Public Meeting Transcript, No. 22 at pp. 29–30)

AHAM additionally commented that it conducted round robin testing in 2018 across seven test laboratories on non-soil-sensing units and determined a within-laboratory standard deviation of 7.7 points. AHAM commented that these results indicate that the test is not sufficiently repeatable or reproducible to be used as a mandatory regulatory test procedure. (AHAM, No. 17 at pp. 8–9) AHAM further claimed that there is such a high standard deviation of test runs that it is possible that the same dishwasher model may pass one test and fail on another test, even within the same laboratory. (AHAM, No. 17 at p. 10) Similarly, Whirlpool commented that due to the extreme variation between test laboratories, it is likely that the same model may receive different scores at different laboratories. (Whirlpool, No. 16 p. 8) Whirlpool commented that a dishwasher could potentially receive a passing score at one manufacturer's laboratory, while another manufacturer's laboratory may produce a failing score, leading to competitive harm between manufacturers. (*Id.*) Whirlpool also stated that there could be a difference of up to 6 to 8 points in scoring even among experienced technicians in a single laboratory, and a single technician may grade the exact same item differently between runs. (Whirlpool, No. 16 at pp. 4, 10)

AHAM commented that results from round robin testing that it conducted in 2013 are more relevant to DOE's proposed test procedure because the 2018 round robin included more soiled dishes in the load than DOE's proposed test procedure. AHAM stated that the 2013 round robin evaluated variation under the same or very similar conditions to DOE's current proposal. (AHAM, No. 26 at p. 2) AHAM stated that the 2013 round robin, which was used to evaluate the ENERGY STAR performance test and DOE's proposed test procedure is based on that, included two units at six laboratories and each unit was tested two times by two technicians. (AHAM, No. 26 at p. 3) AHAM commented that for a soil-sensing unit, the standard deviation was as high as 6.8 percent, meaning whether a unit passes or fails DOE's proposed criteria depends significantly on who is doing the grading. (*Id.*) AHAM further commented that DOE's proposed test procedure focuses only on one aspect of performance (*i.e.*, cleaning) and ignores others (*i.e.*, drying effectiveness, cycle length, and noise), which could frustrate consumers and drive them away from dishwasher use, thus increasing energy and water use. (AHAM, No. 26 at p. 4)

Whirlpool commented that DOE has not addressed or resolved these longstanding issues with repeatability and reproducibility of the AHAM DW–2 test method, and stated that AHAM has documented the huge amount of variation that exists within a laboratory and lab-to-lab with this AHAM performance test. (Whirlpool, No. 16 at p. 8) Whirlpool and AHAM stated that DOE has not presented data to demonstrate the proposed test is repeatable or reproducible. (Whirlpool, No. 16 at p. 8; AHAM, No. 17 at p. 10) AHAM commented that its own data demonstrated that the test was not sufficiently repeatable or reproducible to provide accurate results and that DOE should not adopt it on this basis alone. (AHAM, No. 17 at p. 10)

Conversely, Samsung commented that it supported DOE's proposal to adopt the ENERGY STAR Cleaning Performance Test Method and use of AHAM DW–2–2020 to determine the cleaning index for the test cycle. (Samsung, No. 21 at p. 2) Samsung stated that this test method is subject to variability, but that it is the best option available to measure cleaning performance, and that the minimum threshold score level could be set to accommodate this variability. (*Id.*)

The CA IOUs commented that manufacturers were familiar with the ENERGY STAR Cleaning Performance Test Method and 117 dishwasher models across 12 brands meet the cleaning index of 70 that is required for all three test loads to qualify for the ENERGY STAR Most Efficient product designation. (CA IOUs, No. 19 at p. 2)

Based on an evaluation of currently available industry standards, DOE believes the AHAM DW–2–2020 standard is the best standard available for testing U.S. dishwasher models. To the extent that industry were to update its test method to evaluate other aspects of dishwasher performance, DOE will consider whether to adopt such standards for the DOE test procedure.

Additionally, during the development of the ENERGY STAR Cleaning Performance Test Method, DOE had presented data and noted that the “test method is reproducible as long as the unit under test operates consistently.”⁴⁰ That is, cleaning performance was generally reflective of the energy and water used by a soil-sensing dishwasher; if the turbidity sensor of soil-sensing dishwashers triggered

⁴⁰ ENERGY STAR® Residential Dishwasher Cleaning Performance Draft 2 Test Method Stakeholder Webinar, October 16, 2012, Page 18. Available at www.energystar.gov/sites/default/files/specs//Draft%20%20Test%20Method%20Dishwasher%20Cleanability%20Webinar_0.pdf.

different machine responses (*i.e.*, it is inconsistent) resulting in differing amounts of water or energy used for test cycles at a given soil level, there would be larger associated variation in the cleaning indices among these cycles.

DOE notes that AHAM's comment did not specify key information that would help DOE evaluate AHAM's claims. For instance, with regard to the 2018 round-robin test data that AHAM provided as the basis for its conclusion that the cleaning performance test demonstrates significant variability in test results, AHAM did not specify which test method and cycle type was selected for testing. Section 5.2 of ANSI/AHAM DW-1-2010 specifies ten soiled place settings, while section 5.2 of AHAM DW-1-2019 and AHAM DW-2-2020

specify eight soiled place settings. Using either test method, the number of soiled place settings is higher compared to the DOE test procedure which requires a maximum of four (out of eight) soiled place settings for the heavy soil load. The medium and light soil loads have two and one soiled place setting, respectively. It is important to know the number of soiled place settings because DOE has observed that variation in the cleaning index increases as the number of soiled place settings increase. Figure III-1 shows the average standard deviation of the cleaning index at the heavy, medium, and light soil loads (depicted as four, two, and one soiled place setting, respectively) for the repeatability and reproducibility testing

that DOE conducted on non-soil-sensing dishwashers during development of the ENERGY STAR Cleaning Performance Test Method. The figure also shows the standard deviation reported by AHAM as part of its round robin testing on non-soil-sensing dishwashers; for the purposes of this graph, DOE assumed that AHAM soiled eight place settings during round robin testing. As seen in the graph, the average standard deviation of the cleaning index tends to increase as the number of soiled place settings increase, which indicates that the expected standard deviation for the soils specified in the DOE test procedure would be significantly smaller than the 7.7 points indicated by AHAM.

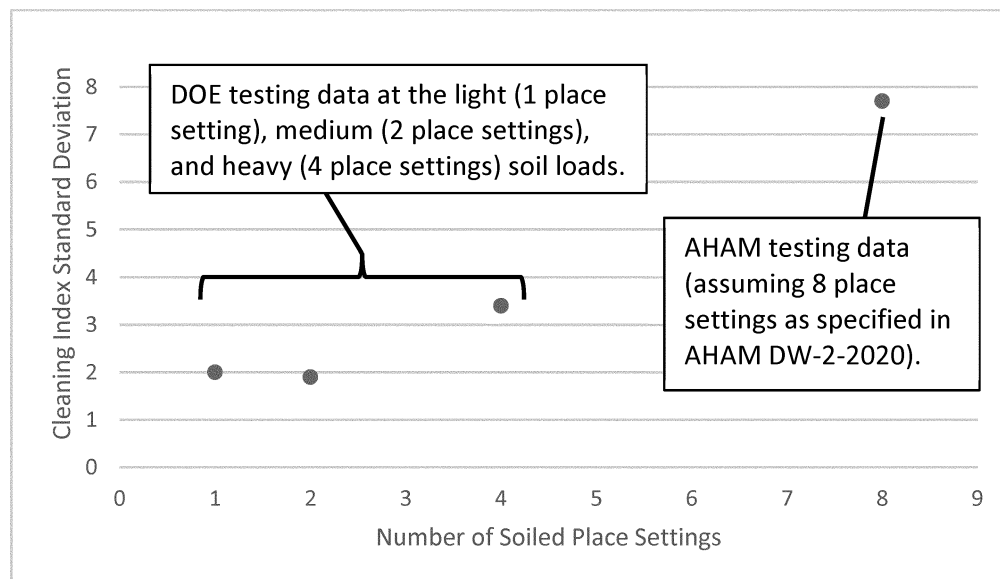


Figure III-1 Average Standard Deviation of the Cleaning Index at Different Soil Loads, Represented by the Number of Soiled Place Settings.

DOE also evaluated AHAM's 2013 round robin data discussed in AHAM's late comment. (See AHAM, No. 26 at p. 2) DOE notes that the test procedure in this final rule specifies additional test setup and instrumentation requirements compared to the ENERGY STAR Cleaning Performance Test Method (which was the basis for AHAM's 2013 round robin) to limit variability. These include specifying a relative humidity requirement along with relative humidity measuring device requirement; explicitly stating the target temperature at which the test should be conducted; specifying a new detergent dosing methodology, which is based on number of place settings rather than prewash and main wash fill water

volumes, and hence, less prone to the uncertainty associated with differentiating the prewash and main wash cycles; and, specifying that cleaning indices must be calculated without scoring for spots, streaks, and rack contact marks on glassware given that rinse aid is not used during the test.

DOE acknowledges that while AHAM's 2013 round robin data shows that the standard deviation for a soil-sensing unit was *as high as 6.8*, the *average within-laboratory (i.e., repeatability) cleaning index standard deviation was 2.05*, while the average between-laboratories (*i.e., reproducibility) cleaning index standard deviation was 3.35*. For some of the tests with high within-laboratory variation (including the unit that had the highest standard deviation of 6.8), DOE observed that the energy or water use were different between two tests at the

same laboratory, which also impacted the cleaning indices. That is, if a unit's soil-sensors trigger a different response to the soil load, which changes the energy or water use at the same soil load, then the cleaning index varies accordingly. DOE also observed that for all but one test laboratory, the average difference in cleaning indices between two technicians for the same test was 1.24. These results indicate that repeatable and reproducible results for cleaning performance are already achievable with currently experienced laboratory technicians as long as the sensor response of test units is consistent. As discussed, the additional test procedure requirements incorporated in this final rule would further limit variability in testing.

AHAM commented that variation in the proposed performance metric can only be reduced to a certain point due

to potential human error (*i.e.*, a human soils and scores the test load, which would make the result inherently subjective). AHAM asserted that while technician training can help reduce variation, the training would be burdensome to conduct and may not sufficiently reduce variation, especially lab-to-lab. (AHAM, No. 17 at p.10) AHAM commented that it is focused on reproducibility because of the consequences for units that may pass in one laboratory and fail in another, which could lead to non-compliance and costly fines. (*Id.*) Similarly, Whirlpool contends that the unreasonable variation is due to the human factor of the test. (Whirlpool, No. 16 at p. 8) During the October 2022 *ex parte* meeting, AHAM recommended that DOE, together with AHAM and other stakeholders as DOE deems appropriate or necessary, develop a process to qualify laboratories to conduct the DOE test procedure. AHAM stated that a process for qualifying laboratories and technicians, would help accomplish the goal that technicians are trained and skilled and laboratories, including manufacturer laboratories, have a common understanding for scoring. AHAM stated that it has a process for qualifying laboratories as part of its air cleaner certification program, which has been successful in reducing variation, which could be used as a starting point. (AHAM, No. 27 at pp. 3–4) As it has for other newly adopted test procedures (*e.g.*, the conventional cooking tops test procedure), DOE considers individual requests for assisting testing laboratories in gaining familiarity with test conduct. DOE also notes that many manufacturers have already gained experience with soiling and scoring test loads through participation in the ENERGY STAR Most Efficient dishwashers program, which includes a reporting requirement for cleaning performance.

AHAM commented that the cleaning performance test is subject to high variation and that verification and enforcement would be virtually impossible. (AHAM, No. 17 at p. 13) AHAM commented that if DOE continues with the proposal to include a cleaning performance test method, it should allow for a wide tolerance of scores to address the subjectivity and lack of reproducibility of the test. (*Id.*) AHAM commented that due to the high variation in the cleaning performance test, it would be virtually impossible to conduct enforcement of cleaning scores and it is likely that there would be false findings of both compliance and non-

compliance with DOE's proposed cleaning performance requirements. (AHAM, No. 26 at p. 4) During the October 2022 *ex parte* meeting, AHAM proposed that DOE's enforcement policy should be similar to other products such as refrigerator/freezers. Specifically, AHAM commented that if DOE's test results are within 14 percent of the proposed cleaning index threshold of 65, DOE will use the normal cycle for the assessment/enforcement test. Otherwise, if the tested score is not within that range, DOE would follow the test's requirements for when the score of 65 is not achieved. AHAM stated that its proposal is based on the data it provided in the comments in response to the December 2021 NOPR, wherein AHAM stated that the standard deviation can be as high as 7 and the 14 percent tolerance represents a 95-percent confidence interval defined by two times the standard deviation. (AHAM, No. 27 at p. 3) Samsung also stated that there was precedent for a minimum performance threshold requirement for test validity, citing the threshold dryness level for automatic termination of clothes dryers as a condition for a test cycle to be valid. (*Id.*) Further, Samsung stated that it believes that DOE has the authority to require that valid energy tests must reflect at least a minimum functionality and cleaning performance under EPCA to ensure representativeness of the test cycle. (*Id.*)

DOE notes that its specified cleaning index threshold does not include any additional tolerance because the specified value represents a minimum threshold that DOE's analysis has indicated is indicative of a consumer-accepted level of cleaning performance. This approach is also consistent with the test procedure for clothes dryers tested according to appendix D2, which specifies a threshold dryness level for automatic cycle termination as a condition for a valid test cycle. Section 3.3.2 of 10 CFR appendix D2 to subpart B of part 430.

Regarding AHAM's reference to enforcement provisions for refrigerators and freezers, DOE notes that those provisions specify tolerances to determine the validity of certified refrigerated volumes based on the average of individual test measurements. 10 CFR 429.134(b). Refrigerated volume is the basis for determining the product class and corresponding energy conservation standard for a given basic model of refrigerator, refrigerator-freezer, or freezer. Thus, the refrigerated volume measurement and its associated tolerance is not analogous to the

cleaning index threshold established by this final rule for dishwashers.

GEA commented that any DOE test procedure must statutorily be repeatable and reproducible per 42 U.S.C. 6293(b)(3) in EPCA and any test procedure that fails to satisfy these two fundamental engineering principles cannot be said to produce test results that actually measure energy use as required by EPCA. (GEA, No. 20 at p. 2) GEA commented that DOE had not demonstrated that the cleaning performance test method meets EPCA's requirements. GEA contends that DOE admitted in the public meeting that it lacks any data on the reproducibility of the proposed cleaning metric. GEA stated that data provided by AHAM and its members demonstrated poor reproducibility results for the test procedure. (*Id.*) GEA commented that the lack of data regarding repeatability and reproducibility undermined the credibility and effectiveness of any enforcement action DOE may take. GEA suggested that if DOE attempts to assert a penalty for a product that is alleged to have failed to complete a valid test as a result of the cleaning performance metric, the validity of the test procedure and the validity of the cleaning performance evaluation will be challenged. (*Id.*) Relatedly, Whirlpool reiterated that it is not acceptable for DOE to verify and enforce a requirement with such extreme variation, especially when there could be a large monetary penalty for noncompliance for individual manufacturers. Whirlpool also noted that the proposal to include the cleaning performance test and cleaning index threshold would cause an enormous disruption to the marketplace. (Whirlpool, No. 16 at pp. 9–10) GEA commented that AHAM DW–2–2020 was not designed for and is not appropriate to be used as a test procedure for a regulatory enforcement program. GEA stated that even if AHAM DW–2–2020 was fully incorporated into the DOE test procedure, GEA would oppose the incorporation because the test was not designed for and does not provide the low level of variability which is required for a test used in a regulatory enforcement program. Further, GEA explained that AHAM DW–2–2020 does not contain a prescriptive threshold. (GEA, No. 20 at p. 3) Whirlpool claimed that DOE lacked the adequate justification necessary to make cleaning performance a mandatory regulatory performance requirement and that the proposal contained unsolved repeatability and reproducibility issues. (Whirlpool, No. 16 at p. 3)

As mentioned previously in this document, DOE's analysis indicates that repeatable and reproducible results for cleaning performance are achievable as long as the sensor response of test units is consistent. Additionally, the amendments to appendix C1, which are also specified in the new appendix C2, are intended to further limit variability in testing. Further, to mitigate the potential impact to the marketplace, DOE is specifying cleaning performance requirements only in the new appendix C2, which would go into effect only when compliance is required with any amended standards.

AHAM commented that DOE's proposed metric ignored all performance aspects other than cleaning performance and that DOE did not appear to have made an effort to determine the consumer relevance of the other performance attributes that may be impacted. (AHAM, No. 17 at p. 5) AHAM also commented that DOE had not addressed how grease and detergent buildup over time may impact the proposed minimum cleaning index threshold. (AHAM, No. 17 at p. 6; AHAM, Public Meeting Transcript, No. 22 at p. 30) AHAM commented that DOE's proposed cleaning performance test focuses only on whether or not the soils are removed from the dishware and not redeposited. AHAM reiterated its earlier comment that the cleaning performance test does not address grease or detergent buildup over time, stating that this is a significant issue when consumers pre-rinse because the detergent has less to attach itself to and, as a result, there is more soil left on the dishes when the cycle ends. (AHAM, No. 26 at p. 5)

DOE agrees with AHAM that the test procedure proposed in the December 2021 NOPR evaluates the cleaning index on the basis of soils remaining on the test load items at the conclusion of the test cycle, including particles that are redeposited as well as those that are not removed in the first place. Regarding AHAM's concern that the test procedure does not account for grease buildup over time, DOE notes that the cleaning index threshold was determined based on analysis of consumer usage of dishwashers over time, and thus already factors in the presence of grease buildup in determining a consumer-accepted level of cleaning performance.

Accordingly, consistent with the December 2021 NOPR, DOE is finalizing in the new appendix C2 its proposal to test, score, and calculate a cleaning index to validate the tested dishwasher cycle type. DOE is referencing AHAM DW-2-2020 for the lighting requirements, scoring method, and

equation for calculating a cleaning index for each test cycle.

3. Cleaning Index Threshold Value

In the December 2021 NOPR, DOE proposed to provide direction in the test procedure as to what constitutes whether a cycle type under test can completely wash a full load of normally soiled dishes by establishing a minimum cleaning index threshold as a condition for each individual test cycle to be valid. 86 FR 72738, 72756. The threshold is intended to represent a level of cleaning such that if the dishwasher did not meet this threshold after operating in the "normal cycle," the consumer would be expected to operate the dishwasher using a more energy-intensive cycle than the "normal cycle." Specifically, DOE proposed that if the normal cycle at a particular soil level (*i.e.*, heavy, medium, or light) does not achieve the defined cleaning index threshold, that soil level (*i.e.*, heavy, medium, or light) would need to be re-tested using the most energy-intensive cycle (to be determined using the methodology discussed in section III.H.4 of this document) that achieves the defined cleaning index threshold. *Id.* The data from the most energy-intensive cycle would be used to represent that soil level in the downstream calculations.

To determine an appropriate threshold value, DOE aggregated confidential consumer cycle selection data provided by industry for the December 2021 NOPR and considered past consumer comments and test data collected in support of the short cycle product class rulemaking that was published on October 30, 2020 ("October 2020 Final Rule" *See* 85 FR 68723).⁴¹ *Id.*

In the December 2021 NOPR, DOE stated that it understands general consumer satisfaction as a fundamental characteristic of a functioning market, and that consumers are largely satisfied with the performance of dishwashers currently on the market. *Id.* However, based on comments DOE received from Samsung in response to the August 2019 RFI as well as qualitative comments that DOE received during the rulemaking that culminated in the October 2020 Final Rule, DOE recognized that the cleaning performance of the normal cycle may not always meet consumer expectations of cleaning performance. (*See* for example: Toronto, EERE-2018-BT-STD-0005, No. 2304 at p. 1; Carley, EERE-2018-BT-STD-0005, No. 2950 at

p. 1; Bruggeman, EERE-2018-BT-STD-0005, No. 3038 at p. 1; *etc.*) *Id.* at 86 FR 72756-72757. Further, confidential data submitted by manufacturers indicate, in the aggregate, that roughly 25 to 45 percent of all dishwasher cycles are conducted on a cycle type other than the normal cycle. DOE recognized that among these other selected cycle types, some would be expected to be less energy-intensive than the normal cycle (*e.g.*, a glassware cycle type), while others would be expected to be more energy-intensive than the normal cycle (*e.g.*, a pots and pans cycle type). *Id.* at 86 FR 72757. The data provided by manufacturers do not indicate which cycle types comprise the percentage of cycles not conducted on the normal cycle. In lieu of additional details regarding the dataset, DOE proceeded under the assumption that either option (alternatively selecting a more energy-intensive or less energy-intensive cycle) is equally as likely. *Id.* Accordingly, DOE estimated that one-half (*i.e.*, 12 to 23 percent) of cycles not conducted on the normal cycle are instead conducted on a cycle that is more energy-intensive than the normal cycle. *Id.*

In the December 2021 NOPR, DOE stated that since it expects that consumers unsatisfied with the cleaning performance of the normal cycle would select alternate cycle types that are more energy-intensive to achieve better cleaning results, the cycle selection data serve as a reasonable proxy for consumer acceptance of the cleaning performance of the normal cycle. *Id.* To identify an appropriate cleaning index threshold, DOE sought to select a cleaning index value that aligned with the cycle selection data. *Id.* That is, DOE sought to identify the cleaning index value that was achieved between 77 to 88 percent of the time when a dishwasher was operated on the normal cycle, indicating that the remaining 12 to 23 percent of the time the cleaning performance on the normal cycle would be worse and thus would result in consumers selecting more energy-intensive cycles. *Id.* DOE evaluated the cleaning indices measured for the heavy, medium, and light soil load cycles as defined in the DOE dishwasher test procedure, using the market-representative dishwasher test sample from the October 2020 Final Rule.⁴² *Id.* Using these data, DOE plotted the rate at which test cycles would meet or exceed different cleaning

⁴¹ See Dishwasher NODA Test Data (5-21-20), available at www.regulations.gov/document/EERE2018-BT-STD-0005-3213.

⁴² The test sample consisted of 31 units spanning 13 brands. The units selected for testing represented over 95 percent of dishwasher manufacturers and were broadly representative of the current dishwasher market. 85 FR 68723, 68724.

index values (in increments of 5 on the Cleaning Index scale). *Id.*

In determining a threshold, DOE sought to establish a level that ensures the tested cycle type produces test results that measure energy use and water use of the dishwasher during a representative average use cycle. *Id.* Establishing a threshold level that is “too high” would indicate that a substantial number of dishwasher cycles performed by consumers do not meet consumer expectations for cleaning performance on the normal cycle, which would not appropriately reflect general consumer usage of the normal cycle. Whereas, establishing a threshold that is “too low” would not appropriately reflect the percentage of cycles for which consumers are likely to select a more energy-intensive cycle to achieve better cleaning performance than can be achieved on the normal cycle. DOE used test data and consumer usage weighting factors specified in appendix C1 (and intended to be retained in appendix C1 and specified in the proposed new appendix C2) for the heavy (0.05), medium (0.33), and light (0.62) soil loads to calculate the percentage of cycles that would not meet the threshold on the normal cycle. *Id.* at 86 FR 72758. DOE plotted the percentage of cycles that would not meet the threshold on the normal cycle, along with the range for the percentage of cycles that would operate on a more energy-intensive cycle than the normal cycle as estimated from industry data. *Id.* Based on the results of its analysis, DOE proposed establishing a minimum cleaning index of 65 as the threshold level for a test cycle to be valid. *Id.*

DOE proposed to specify the same cleaning index threshold value for all tested soil loads because it did not have information to suggest that consumer expectations for the cleaning performance of the load at the end of the cycle differ based on the initial soil load of the dishware. *Id.* at 86 FR 72759.

DOE requested feedback on the proposed cleaning index threshold value of 65 for each test cycle or whether it should consider a threshold value of 70 instead. *Id.*

DOE requested additional data on consumer dishwasher cycle type selections. *Id.* In particular, DOE requested data indicating the frequency with which consumers select the normal cycle; and, for cycles not conducted on the normal cycle, the frequency with which a more energy-intensive cycle is selected. *Id.*

DOE also requested additional data on how frequently consumers are dissatisfied with the cleaning performance of the normal cycle as well

as the actions, and the frequency of each action, that consumers would take if the load is not satisfactorily clean. *Id.*

AHAM commented that DOE did not provide any data or consumer research to show that a cleaning index of 65 is consumer relevant or that 65 is the “tipping point” between “good” and “poor” dishwasher performance. AHAM stated that DOE has not done consumer research to show that a cleaning index of 65 reflects consumer expectations of cleaning performance. (AHAM, No. 17 at p. 6; AHAM, Public Meeting Transcript, No. 22 at pp. 21–22; AHAM No. 26 at p. 5) During the December 2021 NOPR public meeting, AHAM commented that it had provided comments in the past stating that the ENERGY STAR Most Efficient cleaning index threshold of 70 is not based on any consumer data demonstrating correlation or satisfaction. (AHAM, Public Meeting Transcript, No. 22 at pp. 24–25) Further, AHAM commented that DOE had not presented any consumer data to demonstrate that its proposed test and/or threshold are relevant to the consumer or correlate to consumer satisfaction. (AHAM, No. 17 at p. 4; AHAM, No. 26 at p. 5) AHAM commented that without this data, DOE’s proposal is arbitrary and capricious and does not satisfy the Data Quality Act. (*Id.*)

Whirlpool stated that DOE did not justify the development of the cleaning index with an acceptable level of data nor demonstrated that a score of 65 will lead to consumer satisfaction and prevent consumers from using more energy- and water-intensive cycles. (Whirlpool, No. 16 at p. 3) Whirlpool stated that DOE had not provided any data or justification to indicate that 65 was the right threshold for a minimum cleaning index. (Whirlpool, No. 16 at p. 8)

Conversely, the Joint Commenters stated that a minimum cleaning index threshold of 65 was reasonable, based on the data available to DOE. (Joint Commenters, No. 18 at p. 2) Samsung commented that it supported DOE’s proposed cleaning index threshold value of 65 and the approach DOE took to determine this value, given that no known study exists showing direct correlation between the cleaning index and customer acceptance. (Samsung, No. 21 at p. 2) Samsung additionally commented that DOE’s approach was substantiated by the 2021 LBNL survey,⁴³ which indicated 17 percent of

respondents sometimes re-run their dishwasher due to inadequate cleaning. Samsung explained that of the 17 percent of respondents that re-run their dishwasher “sometimes,” over half, 56 percent, reported that they re-run their dishwasher between one and three times per week. (Samsung, No. 21 at pp. 2–3)

AHAM also commented that the only data that DOE’s proposal is based on is manufacturer data indicating that 24 to 46 percent of selected cycle types are not the normal cycle and are instead done on another cycle type along with an unproven assumption that the only reason a consumer might use a cycle type other than the normal cycle is because the consumer is not satisfied with the normal cycle’s performance. (AHAM, No. 17 at p. 6) AHAM stated that DOE’s assumption that consumers select a more energy-intensive cycle 50 percent of the time when they do not select the normal cycle did not have any basis. AHAM commented that it does not agree that cycle selection data serves as a proxy for consumer acceptance of normal cycle cleaning performance and DOE has presented no data upon which to base the accuracy or reasonableness of that assumption. AHAM stated that DOE has no data and without it, DOE’s proposal did not meet the requirements of the APA or the Data Quality Act. (AHAM, No. 17 at p. 7)

Whirlpool reiterated that the proposed minimum cleaning index is built on flawed data and contain numerous layered assumptions. (Whirlpool, No. 16 at p. 4) Whirlpool commented that it is a big assumption that half of the cycle types use more energy/water than the normal cycle, and half use less. Whirlpool stated that there is no justification for such an assumption, and DOE cannot use consumer selection of other non-normal cycles as any proxy for consumer satisfaction in the normal cycle. (*Id.*) Whirlpool commented that the proposed industry cleaning performance test would need to correlate strongly with consumer satisfaction to be justified, but its data indicate otherwise and due to the significant variation in actual consumer usage patterns, there is doubt over whether such a metric that accurately represents consumer cleaning performance satisfaction could ever exist. (Whirlpool, No. 16 at pp. 7–8)

DOE notes that its goal in establishing a minimum cleaning index threshold is to ensure that testing is representative of consumer use and does not prevent consumers from using more energy-intensive cycles. DOE also notes that while it may not have data that shows a direct correlation between various

⁴³ “Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and Consumer Preferences.” Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

cleaning indices and consumer satisfaction at each respective cleaning index threshold, DOE evaluated consumer satisfaction of the cleaning performance of a dishwasher by analyzing cleaning performance data with the frequency at which consumers are likely to use a more energy-intensive cycle. DOE proxied the use of more energy-intensive cycles as dissatisfaction with performance when using the normal cycle.⁴⁴ Based on this relationship, DOE estimated that consumers are likely to run a more energy-intensive cycle between 12 and 23 percent of the time. This estimate is based on the assumption that consumers select a more energy-intensive cycle 50 percent of the time when they do not select the normal cycle. DOE's estimate that consumers select a more energy-intensive cycle between 12 and 23 percent of the time is further validated based on results from LBNL's survey on dishwasher characteristics, usages, and consumer preferences.⁴⁵ The sample methodology for this survey was designed to be as reflective of the U.S. population (in terms of demographics such as age, income, *etc.*) of recent purchasers of dishwashers as possible (see section 2.4 of the LBNL report). The LBNL report states that 17 percent of the respondents indicated that they "sometimes" re-run their dishwasher due to inadequate cleaning, and DOE estimates that these cycles represent up to 75 percent⁴⁶ of their weekly dishwasher cycles. In other words, consumers on average may re-run their dishwasher due to inadequate cleaning up to 13 percent of the time (17 percent of consumers times 75 percent of usage cycles). DOE expects the percentage of cycles that are represented by proxy by a more energy-intensive cycle to be somewhat greater than the maximum reported 13 percent because these consumers may also take other more energy-intensive actions besides re-running the cycle, such as handwashing or pre-rinsing, for additional weekly cycles that fail to achieve adequate cleaning. All of the cycles which fail to achieve adequate cleaning, including up to 13 percent of cycles that are re-run and additional cycles for which

consumers take other more energy-intensive actions, are represented in aggregate by DOE's estimate of the 12 to 23 percent range.

GEA commented that DOE did not have any data to support that its proposed cleaning index threshold of 65 is relevant to consumers or representative of consumer cleaning performance satisfaction. (GEA, No. 20 at p. 3) GEA commented that if DOE did not have any evidence that the cleaning index threshold is relevant to consumers, then DOE could not have confidence that continued performance is ensured in the face of ever-increasing energy conservation standards. (*Id.*) GEA stated that DOE's minimum cleaning index value is arbitrary and is not connected to consumer preference as the vast majority of consumers are satisfied with the performance of their dishwashers. (*Id.*) DOE's analysis of the available data indicates that a majority of test cycle types would meet the proposed cleaning index, aligning with GEA's comment that the vast majority of consumers are satisfied with their dishwasher cleaning performance.

Whirlpool commented that even with adequate data that showed that the most energy-intensive cycle is consumer-representative, it does not believe that DOE could move forward with the proposal, citing little correlation between scores from the AHAM DW-2 performance test and actual consumer satisfaction data. (Whirlpool, No. 16 at p. 6) Whirlpool cited a study it conducted in which it charted consumer satisfaction data gathered with proprietary algorithms versus AHAM DW-2-2020 cleaning indices and found poor correlation between the AHAM cleaning indices and consumer satisfaction. (*Id.* at pp. 6-7) While DOE appreciates the data provided by Whirlpool, DOE would require additional information regarding how Whirlpool quantified consumer wash sentiment. Based on the data available at this time, DOE believes that the cleaning performance threshold provides a reasonable proxy for when consumers are likely to be dissatisfied with performance on the normal cycle.

Therefore, DOE's approach and methodology to determine the appropriate cleaning index threshold at which consumers are likely to re-run their dishwasher cycle is reasonable and DOE has used this same approach to determine its cleaning index threshold. As noted in section III.H.2 of this document, DOE is specifying that the cleaning index be calculated using soil particles only and the scores associated with spots, streaks, and rack contact marks on glassware items should be excluded when calculating the cleaning index. Accordingly, DOE re-ran its analysis to calculate cleaning indices for each tested unit without the scores of spots, streaks, and rack contact marks included. This resulted in an increase in cleaning indices for all units at all cycles. DOE used these cleaning indices for each unit and plotted the rate at which test cycles would meet or exceed different cleaning index values (in increments of 5 on the Cleaning Index scale). Figure III-2 shows the percentage of each of the soil test cycles that meet the threshold at each potential threshold level among all the units in the test sample. DOE then used these data and the consumer usage weighting factors specified in appendix C1 (and the new appendix C2) for the heavy (0.05), medium (0.33), and light (0.62) soil loads to calculate the percentage of cycles that would not meet the threshold on the normal cycle. The percentage of cycles that that would not meet the threshold on the normal cycle is shown in Figure III-3, along with the range for the percentage of cycles that would operate on a more energy-intensive cycle than the normal cycle as estimated from industry data and LBNL's survey data. Based on these results, DOE observes that a cleaning index of 70, calculated using only soil particles and excluding spots, streaks, and rack contact marks, is equivalent to the cleaning index threshold of 65 that it proposed in the December 2021 NOPR. Accordingly, in this final rule, DOE is finalizing a cleaning index threshold of 70 in the new appendix C2, calculated using only soil particles and excluding spots, streaks, and rack contact marks.

⁴⁴ DOE used a similar correlation in the clothes dryer test procedure at appendix D2, wherein DOE determined that 5-percent final remaining moisture content ("RMC") of a real-world load is the maximum consumer-accepted final moisture level, and implemented a threshold value of final RMC in the test procedure for clothes dryers with automatic cycle termination to ensure the tested cycle produces energy use results that are representative. Because the test cloth used to test clothes dryers according to appendix D2 is uniform, for purposes of repeatability and reproducibility, it dries faster and more uniformly than a real-world load of

varying weights, composition, and size. Therefore, DOE specified a 2-percent final RMC threshold for clothes dryers with automatic cycle termination when testing with the DOE test cloth as a proxy for the 5-percent maximum consumer-accepted final RMC in real-world loads, because testing to 5-percent final RMC with the DOE test cloth would produce energy use results that were too low to represent actual consumer behavior. 78 FR 49608, 49613-49614.

⁴⁵ "Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and

Consumer Preferences." Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

⁴⁶ The LBNL report states that, of the respondents that reported they "sometimes" re-run their dishwasher, "over half (56 percent) of respondents reported that they re-run their dishwasher between 1 and 3 times per week." DOE calculated 184 annual cycles to be 4 cycles per week. If consumers are re-running their cycles up to 3 times per week, that would be 75 percent of their total cycles run ($\frac{3}{4} = 0.75$).

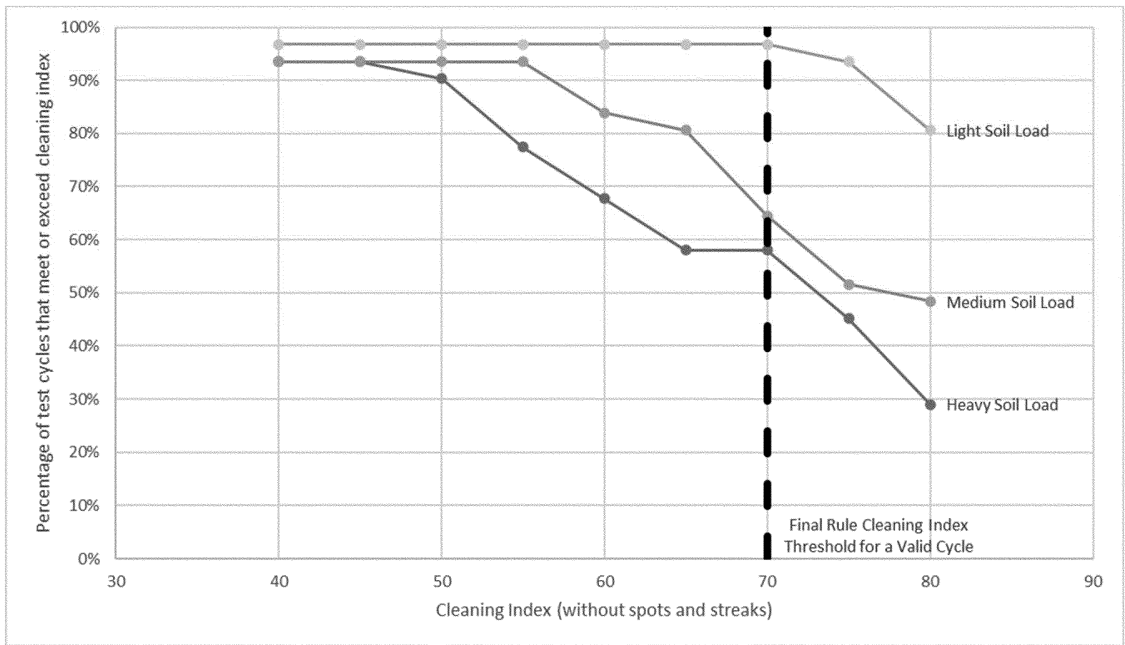


Figure III-2 Percentage of Heavy, Medium, and Light Soil Test Cycles When Tested on the Normal Cycle, That Meet or Exceed Cleaning Index

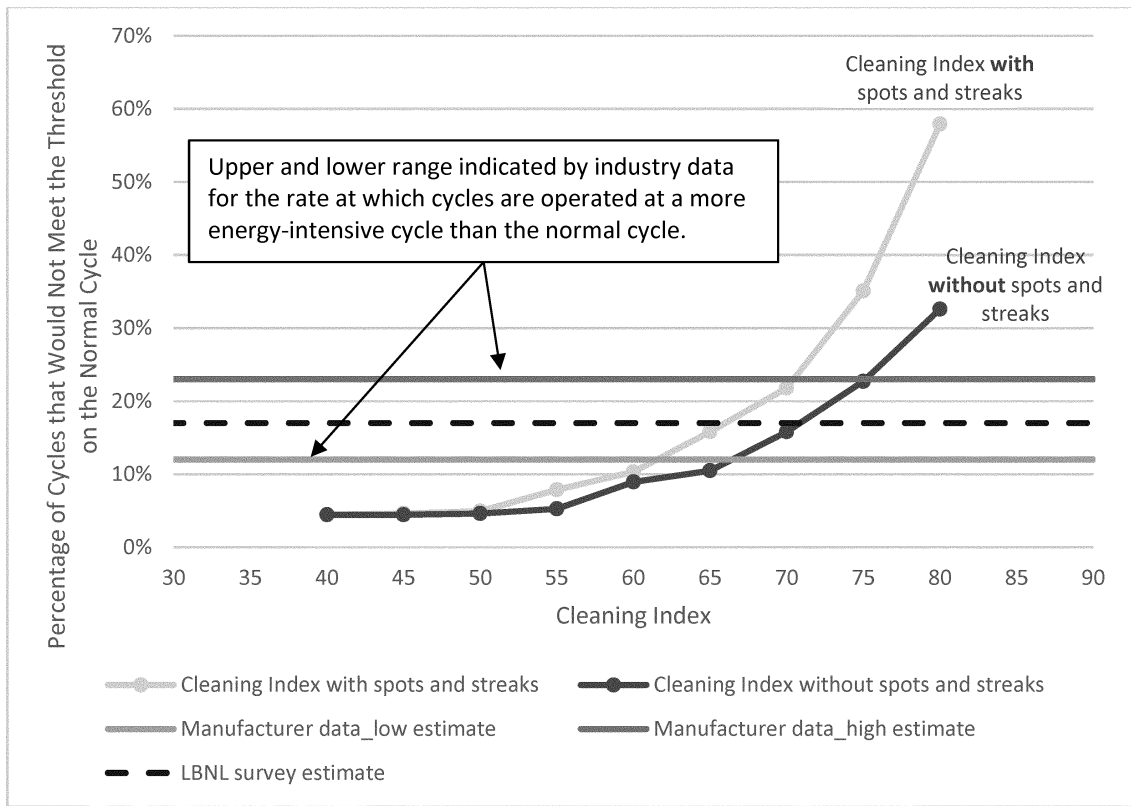


Figure III-3 Percentage of Cycles That Would Not Meet the Threshold on the Normal Cycle at Each Cleaning Index Threshold

At a cleaning index of 65, the percentage of test cycles at each soil level that would achieve the minimum cleaning index threshold is 97 percent for lightly soiled loads, 81 percent for medium soiled loads, and 58 percent for heavily soiled loads. On a weighted-average basis, the measured normal test cycles would reach the threshold cleaning index of 65 approximately 90 percent of the time (*i.e.*, 10 percent of cycles would not meet the threshold, as shown in Figure III–3).⁴⁷ For comparison, at a cleaning index of 70, the percentage of test cycles at each soil level that would achieve the minimum cleaning index threshold is 97 percent for lightly soiled loads, 65 percent for medium soiled loads, and 58 percent for heavily soiled loads. On a weighted-average basis, the measured normal test cycles would reach the threshold cleaning index of 70 approximately 84 percent of the time (*i.e.*, 16 percent of cycles would not meet the threshold, as shown in Figure III–3). At a cleaning index of 75, the percentage of test cycles at each soil level that would achieve the minimum cleaning index threshold is 94 percent for lightly soiled loads, 52 percent for medium soiled loads, and 45 percent for heavily soiled loads. On a weighted-average basis, the measured normal test cycles would reach the threshold cleaning index of 75 approximately 77 percent of the time (*i.e.*, 23 percent of cycles would not meet the threshold, as shown in Figure III–3). The 16-percent rate—representing the overall percentage of cycles that would not meet the threshold on the normal cycle—at a cleaning index threshold of 70—would align with DOE’s estimate of roughly 12 to 23 percent of cycles being operated using a more energy-intensive cycle than the normal cycle as well as LBNL’s survey data, which noted that about 17 percent of consumers sometimes re-run their dishwasher due to inadequate cleaning. On the other hand, at a cleaning index threshold of 65, only 10 percent of cycles would be operated using a more energy-intensive cycle, which falls outside the 12 to 23 percent range that DOE has estimated for the percentage of cycles that are likely to be operated on a more energy-intensive cycle and at a cleaning index threshold of 75, 23 percent of cycles would be operated using a more energy-intensive cycle, which is exactly at the upper limit of

⁴⁷ DOE estimates the overall rate as a weighted average of the rate at each soil load times the frequency of consumer usage of each soil load; *i.e.*, (97 percent lightly soiled × 0.62) + (81 percent × 0.33) + (58 percent × 0.05) = 90 percent overall rate that meets a threshold of 65. Therefore, 10 percent of cycles would not meet the threshold of 65.

the range estimated by DOE. Therefore, DOE is establishing a cleaning index of 70 in appendix C2 to determine a valid test cycle.

4. Validation of the Test Cycle

Similar to the ENERGY STAR Cleaning Performance Test Method, in the December 2021 NOPR, DOE proposed that the cleaning index of the test cycles be determined for the same test cycle types required for the energy and water tests for both soil-sensing and non-soil-sensing dishwashers. 86 FR 72738, 72759. However, in the December 2021 NOPR, DOE proposed a slightly different test method for both soil-sensing and non-soil-sensing dishwashers, compared to the ENERGY STAR Cleaning Performance Test Method. Specifically, for soil-sensing dishwashers, DOE proposed that if the normal cycle did not meet the proposed cleaning index threshold, it would be re-run at the most energy-intensive cycle that could meet the proposed threshold. DOE also proposed that the filter should be cleaned prior to testing the soil level at the most energy-intensive cycle. For non-soil-sensing dishwashers, DOE proposed in the December 2021 NOPR that these dishwashers be tested using the heavy soil load (as opposed to the clean test load). If the dishwasher met the proposed cleaning index threshold using the heavy soil load, no additional tests were proposed. If the dishwasher did not meet the proposed cleaning index threshold using the heavy soil load, DOE proposed that the unit be tested using the most energy-intensive cycle that met the proposed threshold as well as the medium soil load using the normal cycle. This process would be repeated for the light soil load, if the medium soil load did not meet the proposed threshold. Additionally, for compact dishwashers with less than four place settings, DOE proposed the number of place settings that should be soiled at the heavy, medium, and light soil loads. *Id.* DOE also presented alternate approaches to re-testing at the most energy intensive cycle, such as applying an “adder” or multiplicative factor to the energy and water consumption values for any test cycles that do not achieve the defined cleaning index threshold. *Id.*

Based on this proposal, DOE sought comments on several topics in the December 2021 NOPR including its proposed approach for soil-sensing dishwashers, non-soil-sensing dishwashers, and compact dishwashers, cleaning the filter prior to testing at the most energy intensive cycle, and other potential methods to validate that the

measured dishwasher energy and water consumption is representative of consumer use. *Id.* DOE also requested comments and data on cycle types that would be selected under the proposed test procedure, and the extent to which manufacturers would need to redefine the normal cycle to meet the proposed cleaning index threshold or if the proposal would result in an altered measured energy use for dishwashers that are currently minimally compliant. *Id.*

AHAM commented that it analyzed the notice of data availability (“NODA”) data published by DOE and found that over a third of products would need to re-test the heavy soil level on the most energy-intensive cycle, and for products at the ENERGY STAR V. 6.0 level, which is a significant number of models, 73 percent of models would need to re-test on the most energy-intensive cycle for the heavy soil load and 60 percent would need to re-test for the medium soil load. AHAM commented that it assumed 1 sigma for test variation (*i.e.*, 7 points) based on the test variation determined by AHAM and discussed elsewhere in this document. (AHAM, No. 17 at pp. 11–12) AHAM further stated that it could be possible that some of the current ENERGY STAR V. 6.0 certified units may not even meet the DOE maximum energy consumption standard when re-tested at the most energy-intensive cycle. (AHAM, No. 17 at p. 14)

GEA referenced data provided in AHAM’s comments to state that at least 75 percent of the units currently at EL 1 would not be able to meet DOE’s proposed cleaning index threshold, and at least 30 percent of dishwashers meeting the current DOE minimum standard would fail to complete the four-place setting test (*i.e.*, the heavy soil load) at a cleaning index threshold of 65. (GEA, No. 20 at p. 3)

DOE notes that when estimating the number of cycles that would need to be retested on the most energy-intensive cycle, AHAM and GEA’s analysis for the number of dishwashers in DOE’s test sample not meeting the cleaning index threshold proposed in the December 2021 NOPR includes cycles that scored within 1 sigma higher than the proposed cleaning index threshold of 65 along with those that scored below 65. That is, cycles that met or exceeded the proposed cleaning index threshold, but scored less than 65 + 1 sigma, were included in the count of cycles that would need to be retested. However, as discussed in section III.H.2 of this document, DOE did not propose, nor is it specifying in this final rule, a tolerance on the cleaning index value.

Including cycles that scored within 1 sigma higher than the proposed cleaning index threshold of 65 in the count of cycles that would need to be retested because they did not meet the threshold value inaccurately represents the data presented by DOE in the December 2021 NOPR. DOE also notes that, while its data show some test cycles that did not meet the specified cleaning index threshold, it determined that the percentage of such cycles, when weighted by the prevalence of consumers choosing each soil load as represented by the weighting factors in appendix C1 and the new appendix C2, is equivalent to the percentage of estimated cycles that are re-run or run by consumers at a more energy-intensive cycle. For the cycles that cannot meet the specified cleaning index threshold, DOE understands that these cycle types likely cannot “completely wash a full load of normally soiled dishes,” *i.e.*, the cycle type(s) are not representative of average consumer use and, therefore, it would not be appropriate to test these cycle types to represent energy and water consumption. DOE also notes that many manufacturers are already evaluating the cleaning performance of their dishwasher basic models to meet the ENERGY STAR Most Efficient requirements.

AHAM commented that EPCA does not contemplate or require test procedures to measure every possible cycle, combination of options, or use pattern, but requires test procedures measure only a “representative average use cycle or period of use.” (42 U.S.C. 6293(b)(3)) (AHAM, No. 17 at p. 2) DOE agrees and notes that the inclusion of the cleaning performance test will not require testing of every possible cycle. Instead, it will ensure that representations made using the test procedure are representative of average consumer use, as required by EPCA.

During the December 2021 NOPR public meeting, AHAM questioned if DOE had any data to show that consumers would select a more energy-intensive cycle because they are not satisfied with cleaning performance. AHAM commented that consumers could select a more energy-intensive cycle for other reasons (*e.g.*, they want to wash pots and pans). (AHAM, Public Meeting Transcript, No. 22 at p. 23) AHAM commented that manufacturers provide other cycle types on the dishwasher to address specific consumer needs, so consumers may select cycle types other than the normal cycle for reasons other than dissatisfaction with normal cycle cleaning performance. (AHAM, No. 17

at p. 7) AHAM questioned whether a dishwasher model could be sold or certified if it does not meet the cleaning index threshold on the most energy-intensive cycle. (AHAM, Public Meeting Transcript, No. 22 at p. 39) During the October 2022 *ex parte* meeting, AHAM commented that the “most” energy-intensive cycle will almost never meet the proposed standards because it will likely be one that uses high heat to provide specific consumer utility such as, for example, sanitization or cleaning of pots and pans. (AHAM, No. 27 at p. 2) Instead, AHAM recommended that the test procedure be set up such that if the tested cycle type does not meet the cleaning index threshold requirement, it is tested at the “next more” energy-intensive cycle type that meets the cleaning performance threshold. AHAM acknowledged that this approach would not decrease test burden, but noted that this approach would not have the unintended consequence of eliminating cycle types that rely on high heat to provide consumer utility. AHAM stated that this approach would allow manufacturers to provide consumers with incremental levels of energy and cleanliness. (*Id.*)

During the December 2021 NOPR public meeting, Whirlpool questioned if there were any data to indicate that the most energy-intensive cycles are for daily, regular, typical use to completely wash a full load of normally soiled dishes. (Whirlpool, Public Meeting Transcript, No. 22 at p. 18) Whirlpool commented that while its products all have a normal cycle intended for daily, regular, or typical use to completely wash a full load of normally soiled dishes, consumers may have specialty cycle type needs or use cases for dishwashers beyond daily, regular, or typical use for normally soiled dishes. (Whirlpool, No. 16 at p. 4) Whirlpool claimed that manufacturers may make non-normal cycle types more efficient in case they are tested as the most energy-intensive in the event that a dishwasher does not meet the cleaning index threshold. (Whirlpool, No. 16 at p. 9) Whirlpool commented that these cycle types provide specialty purposes for consumers and are not recommended for daily, typical, or regular use to completely wash a full load of normally soiled dishes. (*Id.*) Whirlpool commented that consumers would accept higher energy and water consumption to clean hard to remove soils on pots and pans. (*Id.*) Whirlpool commented that if manufacturers redesign cycle types to be more efficient, consumers may not get the performance that they desire and may

resort to other more energy-intensive options to compensate for worse performance, such as handwashing items that may have been previously washed in the dishwasher, using cycle options that increase energy and/or water consumption, running the dishwasher multiple times, *etc.*, which could lead to lost energy savings. (*Id.*)

DOE notes that the inclusion of the cleaning performance test and minimum cleaning index threshold is to ensure that the tested cycle type is representative of average consumer use. To the extent that the normal cycle can meet the specified cleaning index threshold, it would be representative of average consumer use and testing would not be required on any additional cycles. However, if the normal cycle cannot meet the specified cleaning index threshold, this cycle is likely not representative of average consumer use and consumers would likely use a more energy-intensive cycle to achieve their desired cleaning performance as cleaning performance is expected to improve with increased energy and water use. As noted previously, this aligns with survey data presented by LBNL in its report, wherein 17 percent of consumers stated they sometimes re-run their dishwasher due to inadequate cleaning. To the extent that manufacturers design the normal cycle to be representative of average consumer use with respect to cleaning performance, additional cycle types provided for specialty reasons would continue to be non-regulated and would not be considered in the measurement of energy and water consumption. Additionally, DOE’s requirement that the most energy-intensive cycle be selected for testing, rather than a more energy-intensive cycle that meets the cleaning index threshold, aligns with the definition of normal cycle, which specifies, in part, that if no cycle or more than one cycle is recommended for daily, regular, or typical use to completely wash a full load of normally soiled dishes, the most energy-intensive cycle is considered the normal cycle. Section 1.12 of appendix C1. This requirement also harmonizes with the approach DOE has taken for other test procedures in which a threshold level for validity is defined (*e.g.*, the dryness level setting for clothes dryers with automatic cycle termination in the DOE clothes dryer test procedure at appendix D2, wherein if the final moisture content after completion of the drying cycle is greater than 2 percent, the test is considered invalid and a new run is conducted using the highest dryness level setting.) Section 3.3.2 of 10 CFR

appendix D2 to subpart B of part 430. Further, given that the dishwasher cleaning performance requirement is included only in appendix C2, which will not go into effect until the compliance date of any future amended energy conservation standards, manufacturers will have sufficient time to redesign the normal cycle, if needed, to ensure it meets the specified cleaning index threshold and avoid the need for additional testing with the most energy-intensive cycle.

AHAM commented that even if consumers were equally likely to select a more energy-intensive cycle as they were to select a less energy-intensive cycle, the decision to measure cleaning performance on the most energy-intensive cycle was still unjustified because there is no evidence that if a consumer selects a more energy-intensive cycle to achieve better performance that they would most often or always use that single cycle to get better performance. (AHAM, No. 17 at p. 7)

Whirlpool commented that there are many different potential responses if a consumer was not satisfied with cleaning performance of the dishwasher, including handwashing and prerinsing more, using more or different detergent, high temperature wash and rinse options, running the dishwasher twice, or selecting a different cycle type, and DOE ultimately did not present any data to show that consumers would most likely turn to the most energy-intensive cycle if they are unsatisfied with the performance of their dishwasher. (Whirlpool, No. 16 at p. 6)

DOE does not disagree that consumers that are dissatisfied with the cleaning performance of their dishwasher on the normal cycle may turn to other behaviors that improve cleaning of the dishware, including the example behaviors described by Whirlpool. Indeed, as noted in the LBNL report, 55 percent of respondents indicated that they typically pre-rinse dishes before loading them in the dishwasher.⁴⁸ In the event a dishwasher is unable to adequately clean a load of dishes on the normal cycle, DOE expects consumers to take one or more energy-intensive actions since using more water or energy would generally help improve dishwasher cleaning performance, consistent with Whirlpool's comment: pre-washing; hand-washing dishes following a normal cycle; re-washing dishes on a normal cycle; re-washing

dishes on a more-intensive cycle. DOE lacks data adequate to predict exactly how many consumers will elect one or more of those energy-intensive actions. In the absence of such data, DOE believes that testing on the most energy-intensive cycle provides the best available heuristic for the behavior of a consumer dissatisfied by the cleaning performance on the normal cycle.

When promulgating dishwasher test procedures, DOE must comport with the EPCA requirement that the test procedures produce measures of energy and water consumption representative of an average use cycle or period of use and not be unduly burdensome to conduct. DOE concludes that, given the array of possible alternative consumer behaviors when a dishwasher does not achieve acceptable cleaning performance, testing that soil load just once more on the most energy-intensive cycle is the most representative, least burdensome proxy that accounts for the additional energy and water consumption that would be incurred.

AHAM commented that DOE had failed to adequately consider what happens if a product fails to meet a cleaning index score of 65 on a test cycle, if scores are to be averaged to meet the 65 threshold, and if so, how many test cycles can be averaged in that process. AHAM recommended that DOE should not proceed with its proposal to include a performance metric until it has addressed these concerns. (AHAM, No. 17 at pp. 12–13) During the October 2022 *ex-parte* meeting, AHAM recommended that DOE should use the average cleaning index of each soil level across all tested units. (AHAM, No. 27 at p. 2) AHAM commented that this is the method used by the ENERGY STAR Program and it is a better method because it would recognize that there is significant test variation. (*Id.*)

Regarding AHAM's comment that DOE failed to adequately consider what happens if a product fails to meet a cleaning index score of 65 on a test cycle, DOE explicitly described in the December 2021 NOPR the implications if a product fails to meet a cleaning index score of 65. Specifically, DOE explained that if a test cycle at a particular soil level does not achieve the defined cleaning index threshold, that soil level would need to be re-tested using the most energy-intensive cycle that achieves a cleaning index threshold of 65 or greater. 86 FR 72738, 72759. For the soil level under consideration, the test results from the most energy-intensive valid cycle that achieves a cleaning index threshold of 65 or greater would be used in the calculation of EAOC, EAEU, and per-cycle water

consumption. *Id.* As discussed, DOE is finalizing a cleaning index threshold of 70 in this document, calculated using only soil particles and excluding spots, streaks, and rack contact marks. If a test cycle at a particular soil level does not achieve the defined cleaning index threshold, that soil level would need to be re-tested using the most energy-intensive cycle that achieves a cleaning index threshold of 70 or greater. DOE notes that if a test cycle at a particular soil level fails to achieve a cleaning index threshold of 70 or greater on any cycle type available on the dishwasher, the measured energy and water consumption of the dishwasher at that soil level would not reflect a representative average use cycle, since it would not have washed the dishware to a consumer-accepted level of cleaning performance. Such test results may not be used for certification of compliance with energy conservation standards.

Regarding AHAM's comment that DOE failed to adequately consider if scores are to be averaged to meet the 65 threshold, and if so, how many test cycles can be averaged in that process, DOE explicitly stated in the December 2021 NOPR how scores are to be calculated. Specifically, DOE proposed that *each* [emphasis added] of the sensor heavy, medium, and light response test cycles would be required to achieve a cleaning index of 65 or greater to constitute a valid cycle. 86 FR 72738, 72759. In other words, scores are not averaged to meet the defined cleaning index threshold; rather, each individual soil response test cycle must achieve the defined cleaning index. DOE notes that, unlike for the ENERGY STAR Cleaning Performance Test Method, it is technically infeasible in the test procedure DOE proposed in the December 2021 NOPR to average the cleaning index at each soil level for the test sample because the proposed DOE test procedure is specified for a single test unit, and must produce a representative measure of energy use for each dishwasher that is tested. For each tested unit, the proposed test procedure requires that the test be conducted sequentially, starting at the heavy soil load, followed by the medium and light soil loads, with cleaning performance evaluated at each soil load. To proceed to the next soil load test (*e.g.*, from heavy soil load to medium soil load), a given soil load (*i.e.*, heavy soil load) would be required to be tested at the normal cycle or the most energy-intensive cycle type if the normal cycle does not meet the specified cleaning index threshold. That is, a given unit's test cannot proceed until each soil load

⁴⁸ "Dishwashers in the Residential Sector: A Survey of Product Characteristics, Usage, and Consumer Preferences." Section 4.3.2.1. Available at www.osti.gov/biblio/1827934. Last accessed July 6, 2022.

meets the cleaning index threshold. It is not feasible to hinge the determination of which cycle type must be tested for each soil load on an average value of multiple test units. Accordingly, this final rule maintains the requirements from the December 2021 NOPR that each tested cycle is required to achieve the specified cleaning index threshold to constitute a valid cycle.

AHAM commented that DOE had not considered potential secondary effects, such as impacts to minimally compliant products, recertification requirements for products that do not meet the cleaning index threshold, and labeling impacts. (AHAM, No. 17 at p. 13)

DOE's test sample included two units that just meet current energy conservation standards, and both of these units met or exceeded the cleaning index threshold for all soil loads, including for the heavy soil load test cycle. Because better cleaning performance is typically easier to achieve with higher energy and water consumption, and minimally compliant dishwashers are those that use relatively more energy and water, DOE concludes that minimally compliant products are capable of meeting the cleaning index threshold requirements. Additionally, DOE is finalizing the cleaning performance requirements in the new appendix C2, which will only take effect with any future amended standards, so there will not be any direct impacts on minimally compliant products, recertification requirements, or labeling.

Additionally, DOE is not amending the certification or reporting requirements for dishwashers in this final rule to require reporting of the cleaning index when the use of the new appendix C2 is required. Instead, DOE may consider proposals to amend the certification and reporting requirements for dishwashers under a separate rulemaking regarding appliance and equipment certification.

AHAM commented that if the performance metric is included in the final test procedure, DOE should determine what occurs when a machine has an anomalous cycle as DOE has done this for other products. (AHAM, No. 17 at p. 15) Whirlpool commented that it supported AHAM's position on anomalous cycles. (Whirlpool, No. 16 at p. 2) From testing, DOE has observed that dishwashers typically do not have "anomalous cycles." For dishwashers that may have increased energy or water use for some cycles but not others, DOE's testing experience has indicated that "anomalous behavior" typically occurs in response to the machine's sensor response. That is, the dishwasher operation is not anomalous, but accurate

in terms of how the unit's sensor is likely designed to respond. Accordingly, DOE is not providing any additional requirements for what stakeholders are referring to as "anomalous cycles."

AHAM commented that the proposed cleaning performance requirement adds test burden with respect to dishwashers that do not have soil sensors. (AHAM, No. 17 at p. 12) AHAM commented that currently, testing of non-soil-sensing dishwashers does not require soiled dishes for a test run. (*Id.*) AHAM commented that DOE's proposal adds the extra burden of adding soils to dishwashers that do not have soil sensors. AHAM commented that with this proposal, testing with the three soil levels—heavy, medium, and light—the number of tests for non-soil-sensing dishwashers could increase up to threefold. (*Id.*)

DOE recognizes that there would be an increase in test burden for testing non-soil-sensing dishwashers. However, as stated in the December 2021 NOPR, non-soil-sensing dishwashers would not be tested *a priori* at all three soil levels. Rather, to mitigate the burden associated with testing non-soil-sensing dishwashers using a soiled load, DOE proposed in the December 2021 NOPR, and is specifying the same requirement in this final rule, that non-soil-sensing dishwashers must first be tested using only the heavy soil load. If the test with the heavy soil load is representative of average consumer use (*i.e.*, it meets a cleaning index threshold of 70), no additional tests are required. 87 FR 72738, 72759. This approach is less burdensome than requiring that all three soil levels be tested, as specified in the ENERGY STAR Cleaning Performance Test Method, regardless of how the dishwasher performs at each soil level. Section III.L.1 of this document estimates the increase in testing costs for non-soil-sensing dishwashers.

The following paragraphs discuss specific details regarding the implementation of the cleaning performance test for soil-sensing and non-soil-sensing dishwashers, respectively, including compact dishwashers with a capacity of less than four place settings.

For soil-sensing dishwashers, section 2.6.3 of the currently applicable appendix C1 specifies that the normal cycle shall be tested first for the sensor heavy response, then for the sensor medium response, and finally for the sensor light response, using a defined combination of soiled and clean test load items for each test cycle. DOE specifies maintaining this test sequence, which is also specified in section 2.6.3 of AHAM DW-1-2020, in both the

amended appendix C1 and the new appendix C2. Additionally, in the new appendix C2, each of the sensor heavy, medium, and light response test cycles would be required to achieve a cleaning index of 70 or greater to constitute a valid cycle. If a test cycle at a particular soil level does not achieve the defined cleaning index threshold, that soil level would need to be re-tested using the most energy-intensive cycle that achieves a cleaning index threshold of 70 or greater. For the soil level under consideration, the test results from the most energy-intensive valid cycle that achieves a cleaning index threshold of 70 or greater would be used in the calculation of EAO, EAEU, and per-cycle water consumption. In the event that a test cycle at a particular soil level does not achieve the defined cleaning index threshold, the filter should be cleaned prior to testing the soil level at the most energy-intensive cycle that achieves a cleaning index of 70 or greater. Cleaning the filter before transitioning from the normal cycle to the specified most energy-intensive cycle at a given soil load would ensure that residual particles from the normal cycle test run do not impact the cleaning performance evaluation for that most energy-intensive cycle. It would also promote repeatability and reproducibility of the test results when testing according to these amendments (in which the sequence of test cycles may require switching from the normal cycle to a different cycle type).

Non-soil-sensing dishwashers are tested with a clean (*i.e.*, unsoiled) test load according to the requirements in the currently applicable appendix C1, and this approach is maintained under the amended appendix C1. For the new appendix C2, which specifies the threshold cleaning index requirement, DOE specifies that non-soil-sensing dishwashers must be tested instead with a soiled load. Specifically, for non-soil-sensing dishwashers, DOE specifies incorporating the same procedure for evaluating the validity of the normal cycle and, if necessary, testing the most energy-intensive cycle that achieves a cleaning index threshold of 70 or greater, as specified for soil-sensing dishwashers. The same equations specified for soil-sensing dishwashers in section 5 of the currently applicable appendix C1, Calculations of Derived Results from Test Measurements, would apply to non-soil-sensing dishwashers in the new appendix C2. The test procedure specifies testing the heavy, medium, and light soil levels, in that sequence. Since non-soil-sensing dishwashers consume a fixed amount of

water and energy independent of the amount of soil present in the test load, it is assumed that if the normal cycle obtains a cleaning index of 70 or greater at a given soil load (e.g., for the sensor heavy response test), that the normal cycle would also achieve the cleaning index threshold for any lesser soil loads (e.g., the sensor medium and sensor light response tests). Therefore, if a tested soil load for a non-soil-sensing dishwasher meets the defined threshold criteria when tested on the normal cycle, no additional testing would be required of cycles with lesser soil loads. If a non-soil-sensing dishwasher is not tested at a certain soil load because the preceding heavier soil load(s) meets the cleaning index threshold on the normal cycle, the energy and water consumption values of the preceding soil load would be used to calculate the weighted-average energy and water consumption values. For example, if the sensor medium response and sensor light response tests on the normal cycle are not conducted, the values of the sensor heavy response test on the normal cycle would be used for all three soil loads; whereas, if only the sensor light response test is not conducted, the values of the sensor medium response test on the normal cycle would be used for the sensor medium and the sensor light response tests.

Further, in the December 2021 NOPR, DOE noted that compact dishwashers that are non-soil-sensing are currently tested at the manufacturer-stated capacity, if the capacity of the dishwasher is less than eight place settings. 86 FR 72738, 72760. Under the proposal to test non-soil-sensing dishwashers with a soiled load, the instructions specify that compact dishwashers must be tested using four place settings plus six serving pieces, and that some of the place settings are soiled for the different soiled loads. However, DOE stated that it is aware that the rated capacity of some compact, non-soil-sensing dishwashers is less than four place settings (e.g., the basic models for which CNA and FOTILE submitted waiver petitions and discussed in sections III.E.5 and III.E.6, respectively, of this document). *Id.* For such dishwashers, as well as any soil-sensing compact dishwashers that have a rated capacity of less than four place settings, DOE specified the following requirements for soiling the test load:

- *Heavy soil load:* Soil two-thirds of the place settings, excluding flatware and serving pieces (rounded up to the nearest integer) or one place setting, whichever is greater;
- *Medium soil load:* Soil one-quarter of the place settings, excluding flatware

and serving pieces (rounded up to the nearest integer) or one place setting, whichever is smaller;

- *Light soil load:* Soil one-quarter of the place settings, excluding flatware and serving pieces (rounded up to the nearest integer) or one place setting, whichever is smaller, using half the quantity of soils specified for one place setting. *Id.*

DOE did not receive any comments in response to its proposed requirements for soiling compact dishwashers with a capacity of less than four place settings. Accordingly, DOE is adopting the aforementioned soiling requirements for compact dishwashers with a capacity of less than four place settings in the new appendix C2. For the amended appendix C1, the number of place settings and soiling requirements for compact dishwashers is the same as specified in the currently applicable appendix C1.

5. Determining the Most Energy-Intensive Cycle

In the December 2021 NOPR, DOE proposed instructions for determining the most energy-intensive cycle that could achieve the proposed cleaning index threshold, to be conducted only if the normal cycle of a given unit could not achieve the threshold. 86 FR 72738, 72760. DOE proposed that the most energy-intensive cycle would be determined by conducting a single test cycle with a clean test load for each available cycle type (e.g., Normal, Heavy Duty, Pots and Pans, etc.). *Id.*

DOE also proposed that prior to running the clean load test to determine the most energy-intensive cycle, the dishwasher filter should be cleaned so that soil particles from any previous tests does not affect the determination of the most energy-intensive cycle. *Id.*

DOE requested feedback on its proposed methodology for determining the most energy-intensive cycle. *Id.* DOE also requested feedback on whether it should consider determination of the most energy-intensive cycle for sensor response test cycles using the respective soil load. *Id.*

GEA commented that DOE's proposal which requires that, if a machine fails to achieve a minimum cleaning index threshold, the filter must be washed prior to running subsequent cycles is not adequate to return the dishwasher to its pre-tested condition. GEA suggested that in addition to cleaning the filter, the unit under test should be run through a complete normal cycle without dishes, soil, or detergent. Finally, the filter should then be cleaned a second time before the test process proceeds with additional test

runs. GEA explained that these steps provide increased assurance that results from one test do not influence the results of a subsequent test. (GEA, No. 20 at p. 4)

DOE notes that cleaning the filter in between different test series is consistent with other industry standards. The IEC standard, for example, specifies cleaning only the filter when conducting cleaning performance tests. Additionally, requiring running an additional test cycle type and cleaning the filter a second time would add additional test burden that may not be necessary in terms of cleaning out the dishwasher unit.

AHAM commented that the process to determine the most energy-intensive cycle is unduly burdensome, since the proposal requires running several cycle types with a clean load to identify the most energy-intensive cycle, and then run another cycle with a soiled load because scoring of cleaning takes place after the energy test. (AHAM, No. 17 at p. 11) AHAM further stated that the additional burden associated with determining the most energy-intensive cycle is likely to apply to most models and makes the test procedure unduly burdensome to conduct. (AHAM, No. 17 at p. 12)

DOE notes that while the procedure to determine the most energy-intensive cycle type would add burden, DOE's considered approach is less burdensome than other alternative approaches that would require running each available test cycle type with a soiled load. DOE additionally clarifies that it expects manufacturers to know the most energy-intensive cycle type for their basic models and as such does not expect manufacturers to need to test each cycle type with a clean load to determine the most energy-intensive cycle as part of testing to determine compliance with any future standards. The procedure that DOE proposed to determine the most energy-intensive cycle type would be conducted only if the most energy-intensive cycle is unknown and is the approach that DOE would use during enforcement testing, should any such testing be conducted. DOE has clarified its intent in the regulatory text in the new appendix C2 and in a new section in 10 CFR part 429.134.

DOE is finalizing its proposal, in the new appendix C2, with minor updates discussed in the preceding paragraph, to determine the most energy-intensive cycle that can achieve a cleaning index threshold of 70 through testing with a clean load, should the normal cycle at a specific soil load be unable to achieve this threshold.

I. Standby Mode Test Method

1. Standby Power Measurement

Section 4.2 of appendix C1 provides instructions for measuring standby mode and off mode power. These instructions do not currently specify if the dishwasher door is to be open or closed when testing in standby mode and off mode.

For the December 2021 NOPR, DOE reviewed recent models from different manufacturers and observed that some newer models have LED lights inside the dishwasher tub as well as other indicators either on the door or on the electronic control panel that illuminate when the dishwasher door is open. 86 FR 72738, 72761. Additional energy use by any such lights and/or indicators could affect the standby power consumption and the resulting EAEU measurement; for example, a 1-watt increase in the standby power consumption could impact the EAEU by up to 5 percent, *i.e.*, conducting standby mode testing with the dishwasher door open as compared to testing with the door closed could result impact test results for EAEU by up to 5 percent if the lights consumed an additional 1 watt of power. *Id.*

Section 4.2 of the AHAM DW-1-2020 standard also includes specific instructions for the door orientation during standby mode testing. It specifies that the standby mode test must be conducted after completing the last active mode test as part of the energy test sequence. Thereafter, the dishwasher door must be opened and immediately closed without changing the control panel settings used for the active mode wash cycle and without disconnecting the electrical supply to the dishwasher. Once the door is closed, the standby mode and off mode measurements should begin.

In the December 2021 NOPR, DOE proposed to reference this requirement from AHAM DW-1-2020 regarding opening and closing the door prior to starting the standby mode and off mode tests. *Id.* DOE initially concluded that performing standby mode and off mode testing with the door closed is likely to be most representative of average consumer use, while also providing a representative measurement, in particular noting CEC's comment in response to the August 2019 RFI that most consumers will keep the dishwasher door closed to prevent disruption of foot traffic patterns in their kitchen.⁴⁹ *Id.*

⁴⁹In response to the August 2019 RFI, CEC commented that, "intuitively, most consumers will keep the dishwasher door closed to prevent

Based on DOE's interactions with test laboratories, dishwashers are already tested with the door closed in standby mode. *Id.* Therefore, DOE stated in the December 2021 NOPR that it does not expect any increase in costs to manufacturers from this proposed update were it made final. *Id.* DOE requested input on its proposal to apply the standby mode and off mode test requirements from section 4.2 of AHAM DW-1-2020 to appendix C1 and the new appendix C2. *Id.*

AHAM commented that it agrees with DOE's proposal to specify that the door be opened and closed "immediately" for standby testing, but that DOE provide additional language to require a minimum time for door opening at the end of the test cycle. (AHAM, No. 17 at pp. 15-16) AHAM suggested a minimum door opening time of 10 seconds after completion of the cycle. (*Id.*) During the December 2021 NOPR public meeting, Whirlpool commented that some dishwashers may have "cycle-finish" behavior if the door is opened and closed immediately compared to if it is opened for a slightly longer period of time, which would represent a consumer unloading the dishwasher and closing the door after unloading. (Whirlpool, Public Meeting Transcript, No. 22 at pp. 54-55) In written comments, Whirlpool commented that it supported AHAM's position on door opening at the end of the cycle for standby mode power measurement. (Whirlpool, No. 16 at p. 2)

The Joint Commenters commented that they agree with the approach that DOE is proposing to use for standby mode and off mode testing as it will help improve reproducibility of the test procedure by ensuring that all manufacturers are testing standby mode and off mode power in a consistent manner. (Joint Commenters, No. 18 at p. 2)

DOE notes that the intent of its proposal in the December 2021 NOPR was that the dishwasher is in-fact in standby mode when the standby mode test is conducted. However, DOE does not have any data, and AHAM did not provide any additional data, to determine if 10 seconds is sufficient to ensure that the dishwasher transitions from active mode to standby mode. Accordingly, while DOE is not including any clarification in appendix C1 and the new appendix C2 regarding the length of time the door should remain open, DOE notes that the intent of this requirement is to ensure that the dishwasher door is opened for a

disruption of foot traffic patterns in their kitchen." (CEC, No. 6 at p. 2)

sufficient period of time such that the dishwasher enters a lower-power state before it is shut, and standby power is measured.

2. Annual Combined Low-Power Mode Energy Consumption Calculation

Section 5.7 of appendix C1 specifies the method to calculate the annual combined low-power mode energy consumption. The combined low-power mode energy consumption includes the power consumption in inactive mode⁵⁰ and off mode,⁵¹ depending on whether a unit can enter both of these modes or only one of these modes. To calculate the annual low-power mode energy consumption, section 5.7 of appendix C1 currently assigns 8,465 hours annually to low-power modes for units that do not have a fan-only mode. For units that have a fan-only mode, the annual hours assigned to low-power modes are calculated for each individual unit based on the tested duration in active mode and fan-only mode. Section 5.7 of appendix C1. That is, the combined low-power annual hours for all available modes other than active mode, S_{LP} , is calculated as:

$$S_{LP} = [H - \{N \times (L + L_F)\}] \text{ for dishwashers capable of operating in fan-only mode; otherwise, } S_{LP} = 8,465$$

Where,

H = the total number of hours per year = 8,766 hours per year,

N = the representative average dishwasher use of 215 cycles per year,

L = the average of the duration of the normal cycle and truncated normal cycle, for non-soil-sensing dishwashers with a truncated normal cycle; the duration of the normal cycle, for non-soil-sensing dishwashers without a truncated normal cycle; the average duration of the sensor light response, truncated sensor light response, sensor medium response, truncated sensor medium response, sensor heavy response, and truncated sensor heavy response, for soil-sensing dishwashers with a truncated cycle option; the average duration of the sensor light response, sensor medium response, and sensor heavy response, for soil-sensing dishwashers without a truncated cycle option, and

L_F = the duration of the fan-only mode for the normal cycle for non-soil-sensing

⁵⁰*Inactive mode* means a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display. Section 1.10 of appendix C1.

⁵¹*Off mode* means a mode in which the dishwasher is connected to a main power source and is not providing any active mode or standby mode function, and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the classification of an off mode. Section 1.15 of appendix C1.

dishwashers; the average duration of the fan-only mode for sensor light response, sensor medium response, and sensor heavy response for soil-sensing dishwashers. Section 5.7, appendix C1.

Section 5.7 of AHAM DW-1-2020 updated this calculation such that the combined low-power annual hours, S_{LP} , is a calculated value for all units. That is, dishwashers that do not have a fan-only mode would use the same equation to calculate S_{LP} as dishwashers that do have a fan-only mode. The only difference in calculation of S_{LP} for units without a fan-only mode is that L_F would be equal to 0 for such units.

In the December 2021 NOPR, DOE proposed to reference the annual low-power mode energy consumption calculation specified in section 5.7 of AHAM DW-1-2020, which would also include the updated calculation method for combined low-power annual hours, S_{LP} . 86 FR 72738, 72762. This approach would change the hours assigned to low-power mode from 8,465 hours for dishwashers that do not have a fan-only mode to a value that is dependent on the duration of the normal cycle. Calculating the annual low-power mode energy consumption utilizing the measured active mode duration for each individual unit rather than assigning a constant value across all units would provide a more representative result.

In the December 2021 NOPR, DOE stated that the proposed change to the combined low-power annual hours would potentially impact the measured EAEU. *Id.* DOE also noted that the current energy conservation standard was developed using the method for determining the combined low-power annual hours specified in appendix C1. *Id.* As such, in the December 2021 NOPR, DOE proposed that, if this proposal were adopted, this change would go into effect in conjunction with any amended energy conservation standards for dishwashers. *Id.* Accordingly, DOE proposed that the updated calculation of annual low-power mode energy consumption be included only in the new appendix C2. *Id.* Appendix C1 would continue using the current method for calculating the annual low-power mode energy consumption. DOE requested comment on its proposal to use the updated combined low-power annual hours, specified in Section 5.7 of AHAM DW-1-2020, for the calculation of annual combined low-power mode energy consumption in the new appendix C2. *Id.*

DOE did not receive any comments on this topic and is finalizing its proposal, consistent with the December 2021 NOPR, to use the updated combined

low-power annual hours, specified in section 5.7 of AHAM DW-1-2020, for the calculation of annual combined low-power mode energy consumption in the new appendix C2.

J. Network Mode

Appendix C1 currently does not address “network mode” power consumption. In the December 2021 NOPR, DOE stated that it is aware of dishwashers with network capabilities that are currently on the market. 86 FR 72738, 72762. However, DOE stated that it did not have sufficient data at the time of publication of the December 2021 NOPR regarding the energy use and consumer use patterns associated with such capabilities to evaluate potential test procedure provisions related to network capabilities. *Id.* Therefore, in the December 2021 NOPR, DOE proposed that all network functions must be disabled during testing. *Id.* Specifically, DOE proposed to include a requirement in appendix C1 and the new appendix C2 that for dishwashers, which can communicate through a network (*e.g.*, Bluetooth® or internet connection), all network functions must be disabled, if it is possible to disable it by means provided in the manufacturer’s user manual, for the duration of testing. *Id.* If the manufacturer instructions provided in the user manual do not provide for disabling a connected function, the standby power test procedure is conducted with the connected function in the “as-shipped” condition. DOE sought comment on its proposal to require the disablement of all network functions throughout the duration of testing. *Id.* DOE sought the following information regarding connected dishwashers that could inform future test procedure considerations.

DOE requested feedback on connected dishwashers currently on the market. *Id.* Specifically, DOE requested input on the types of features or functionality enabled by connected dishwashers that exist on the market or that are under development. *Id.*

DOE requested data on the percentage of users purchasing connected dishwashers, and, for those users, the percentage of the time when the connected functionality of the dishwashers is used. *Id.* DOE requested data on the amount of additional or reduced energy use of connected dishwashers. *Id.*

DOE requested data on the pattern of additional or reduced energy use of connected dishwashers; for example, whether it is constant, periodic, or triggered by the user. *Id.* DOE requested information on any existing testing

protocols that account for connected features of dishwashers, as well as any testing protocols that may be under development within the industry. *Id.*

The CA IOUs recommended that DOE test dishwashers in the as-shipped configuration, rather than disabling network functions as there is no evidence to suggest that consumers actively disable these functions. (CA IOUs, No. 19 at p. 2; CA IOUs, Public Meeting Transcript, No. 22 at p. 69) During the December 2021 NOPR public meeting, ASAP echoed the comments provided by the CA IOUs. (ASAP, Public Meeting Transcript, No. 22 at pp. 69–70)

The CA IOUs referenced a PG&E survey in which 96 percent of consumers with a smart clothes washer as well as 96 percent of consumers with a smart microwave oven reported that they do not make an attempt to disable Wi-Fi or smart application functions. (CA IOUs, No. 19 at pp. 2–3) The CA IOUs commented that even though these are different products, there was no reason to believe the trends would be different for other household appliances and reiterated that DOE should require testing with network functions set in their as-shipped conditions. *Id.*

The Joint Commenters urged DOE to require that all dishwashers be tested with network functions in the “as-shipped” condition, instead of DOE’s position that all network functions be disabled prior to testing. (Joint Commenters, No. 18 at pp. 2–3) The Joint Commenters expressed concern that DOE’s proposal would allow many dishwashers to be tested with network functions disabled even though those functions may be unlikely to be disabled in the field. Specifically, the Joint Commenters stated that if a dishwasher with connected features is shipped with those features enabled, they believe it is unlikely that most consumers will disable those features. The Joint Commenters suggested that DOE require all dishwashers be tested “as shipped” regardless of whether the user manual provides instructions for disabling the network functions. (Joint Commenters, No. 18 at p. 3)

As discussed, DOE is aware of a number of dishwashers on the market with varying implementations of connected functionality. DOE has observed different implementations of connected features across different brands, and the design and operation of these features is continuously evolving. Accordingly, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to disable all network functions during testing. Specifically, DOE is finalizing its proposal to include

a requirement in appendix C1 and the new appendix C2 that for dishwashers which can communicate through a network (e.g., Bluetooth® or internet connection), all network functions must be disabled, if it is possible to disable it by means provided in the manufacturer's user manual, for the duration of testing.

K. Test Cycle Duration and Updates to 10 CFR 430.32

In the December 2021 NOPR, DOE proposed to specify a method for determining cycle duration in section 5.3 of appendix C1 and the new appendix C2. 86 FR 72738, 72763. DOE proposed that the test duration be calculated as the weighted average of the sensor heavy response, sensor medium response, and sensor light response tests for all dishwashers (i.e., both soil-sensing and non-soil-sensing dishwashers). *Id.* At the time of issuance of the December 2021 NOPR, there were three product classes for dishwashers: standard dishwashers, compact dishwashers, and standard dishwashers with a cycle duration of 60 minutes or less. Since publication of the December 2021 NOPR, DOE has rescinded the standard dishwashers with a cycle duration of 60 minutes or less product class. See 87 FR 2673. At the time DOE proposed the calculation of test duration, it was to aid in the determination of cycle duration, which would have been used to determine the appropriate product class for a given unit.

In the December 2021 NOPR, DOE also proposed to incorporate by reference AHAM DW-1-2020 in its entirety into 10 CFR part 430, and amend 10 CFR 430.32(f)(1)(iii) to remove the existing reference to appendix C1, and instead reference AHAM DW-1-2020 for the definition of "normal cycle." *Id.* Additionally, DOE proposed to update the references to AHAM DW-1 in the standard size dishwasher and compact size dishwasher descriptions in 10 CFR 430.32. *Id.*

DOE requested comment on the proposal to update the standard size dishwasher, compact size dishwasher, and standard size dishwasher with a "normal" cycle time of 60 minutes or less descriptions at 10 CFR 430.32(f)(1)(i)-(iii). *Id.* DOE also requested comment on the proposal to explicitly provide the method for determining cycle duration in appendices C1 and C2.

The CA IOUs commented that while they support DOE's proposal to include a cleaning performance test method and cleaning index threshold, they were

concerned that this may inadvertently impact customer dissatisfaction elsewhere, such as cycle time performance. (CA IOUs, No. 19 at p. 3) The CA IOUs therefore reiterated their support for both measurement of cycle time and disclosure of cycle time to allow consumers to better understand these tradeoffs and prioritize their needs regarding cycle time and energy performance. *Id.* The CA IOUs commented in support of DOE's decision to add measurement of cycle time to the test procedure and asked DOE to consider public disclosure and reporting of cycle time, since consumers may be interested in this data. *Id.*

DOE notes that because the standard size dishwasher with a normal cycle time of 60 minutes or less product class was revoked in a final rule published in January 2022 (87 FR 2673), the cycle duration calculation as provided in section 5.3 of appendix C1 and appendix C2 of the December 2021 NOPR is not relevant. Instead, the cycle duration calculation as part of the low-power mode energy consumption calculation would be more relevant for determining dishwasher cycle duration because this calculation is used to determine the annual low-power mode hours and active mode hours. As discussed in section III.I.2 of this document, cycle duration is calculated as the simple average of the sensor heavy, medium, and light response cycles and, for dishwashers with a heated dry option, the duration of the truncated sensor heavy, medium, and light response cycles is also included in the cycle duration calculation. While DOE is not including any reporting requirements in this document, it could consider including a reporting requirement for S_{LP} , which is the combined low-power annual hours and is a calculated value when determining low-power mode energy consumption, in a future certification rulemaking. The cycle duration could then be determined from S_{LP} by subtracting S_{LP} from 8,766 annual hours and dividing by the annual dishwasher cycles (184 cycles per year when testing according to the new appendix C2).

Accordingly, DOE is removing the cycle duration calculation that it proposed in the December 2021 NOPR. Additionally, DOE did not receive any comments on its proposal to update the reference in 10 CFR 430.32 to AHAM DW-1-2020. Therefore, DOE is finalizing its proposal, consistent with the December 2021 NOPR, to update the standard size dishwasher and compact size dishwasher descriptions at 10 CFR 430.32(f)(1)(i)-(iii).

L. Test Procedure Costs and Harmonization

1. Test Procedure Costs and Impact

In this document, DOE amends the existing test procedure for dishwashers at appendix C1 and adopts a new test procedure at appendix C2. The amendments to appendix C1 establish requirements for water hardness, relative humidity, and loading pattern; update requirements for ambient temperature, detergent dosage, and standby power measurement; and include testing approaches from published waivers for dishwashers. The new appendix C2 additionally includes provisions for evaluating cleaning performance and establishing a minimum per-cycle cleaning index threshold as a condition for a valid test, and updated annual number of cycles and low-power mode hours for the calculation of energy consumption.

The amendments to appendix C1 establish new requirements for water hardness and relative humidity and update the requirements for ambient temperature. DOE does not expect these requirements to increase test burden as compared to current industry practice because it expects that laboratories already control water hardness, relative humidity, and ambient temperature to within the proposed specifications, as indicated by manufacturer comments supporting these amendments, as well as general industry acceptance for these requirements as they pertain to dishwashers and other appliances.

DOE is also establishing in appendix C1 a new requirement for loading soiled dishes. DOE does not expect this requirement to change the rated energy and water use because the thermal mass inside the dishwasher chamber will be the same, regardless of how the dishes are loaded in the unit. DOE also does not expect this requirement to increase the cost of conducting the test procedure as compared to the current test procedure based on the large number of brands currently participating in the ENERGY STAR qualification and Most Efficient programs (which require the loading pattern specified in this document).

Further, DOE is also establishing a new detergent type and approach for calculating the detergent dosage in appendix C1. However, DOE is also retaining the current detergent type and dosing requirement. As such, DOE does not expect this requirement to increase test burden as compared to current industry practice. *Id.*

DOE further specifies in appendix C1 that standby mode power consumption be measured with the door closed.

Based on DOE's interactions with test laboratories, dishwashers are already tested with the door closed in standby mode. Therefore, DOE does not expect any increase in costs to manufacturers from this update.

The amendments to appendix C1 will not impact the representations of dishwasher energy and water use. Manufacturers will be able to rely on data generated under the test procedure in effect prior to the adoption of the amended appendix C1. As such, retesting of dishwashers will not be required solely as a result of DOE's adoption of the amendments to appendix C1.

In addition to the amendments to appendix C1, DOE is also establishing a new appendix C2. As stated, use of the new appendix C2 will be required in conjunction with the compliance date of any future amendments to the energy conservation standards for dishwashers. DOE is specifying the evaluation of cleaning performance in the new appendix C2. Specifically, DOE is requiring that each tested soil load must meet a minimum per-cycle cleaning index threshold of 70 for a test cycle to be considered valid. Further, the new appendix C2 includes changes to the annual number of cycles and low-power mode hours, both of which are used for the calculation of energy consumption. While the requirement to evaluate cleaning performance would increase test burden, the updates to the annual number of cycles and low-power mode hours will change certain inputs to the calculation, but will not impact the burden as compared to conducting the calculation under the test procedure as amended in appendix C1.

DOE estimates the cost to test a soil-sensing dishwasher, according to the new appendix C2, to be approximately \$2,334 per basic model and that for a non-soil-sensing dishwasher to be approximately \$735 per basic model. These costs were estimated as follows.

Based on its experience conducting dishwasher testing, DOE estimates the total duration to test dishwashers according to the currently applicable version of appendix C1, and the amended appendix C1, to be 25 hours for a soil-sensing dishwasher and 6 hours for a non-soil-sensing dishwasher. The additional time required to score a load at the end of cycle and calculate the cleaning index is estimated to be 1 hour per soil load. The new appendix C2 also prescribes the use of a new detergent type and method to calculate the detergent dosage compared to the detergent dose estimation in the current appendix C1. Based on testing that DOE conducted in support of the October

2020 Final Rule, DOE estimates that the updated detergent dosage methodology will reduce testing time by about 1 hour because the new methodology estimates detergent dosage based on the number of place settings as opposed to the prewash and main wash fill water volumes as required under the currently applicable (and amended) appendix C1 test procedure. Determination of the prewash and main wash fill water volumes requires about 1 hour to identify the prewash and main wash phases of a test cycle, isolate the water consumed during these specific portions of the cycle, and then calculate the quantity of detergent required. Therefore, DOE estimates the test duration under the new appendix C2 to be 27 hours for soil-sensing dishwashers (25 hours currently + 1 hour per soil load to score the load and calculate the cleaning index—1 hour using the updated detergent dosage methodology). As discussed previously, DOE does not expect manufacturers to run additional tests as part of compliance testing to determine the most energy-intensive cycle type, in the event that a given basic model cannot meet the specified cleaning index threshold on the normal cycle at any soil load. Accordingly, DOE has not estimated costs for this test.

Non-soil-sensing dishwashers are to be tested on the heavy soil load under the new appendix C2. This will increase testing time by approximately 2.5 hours (in addition to the 1 hour associated with scoring and calculating cleaning index) due to the additional time associated with preparing the soils, soiling the load, allowing the soils to dry, and loading the soiled dishes. To mitigate burden, DOE is additionally specifying that non-soil-sensing dishwashers are required to test the medium and light soil loads only if the next-greater soil load requires the use of the most energy-intensive cycle. To estimate the testing burden associated with the new appendix C2, DOE estimated that most non-soil-sensing dishwashers will only be tested at the heavy soil load. DOE also estimates that the updated detergent dosage methodology will reduce testing time by about 1 hour. Therefore, DOE estimated the total testing duration for non-soil-sensing dishwashers under the new appendix C2 to be 8.5 hours (6 hours currently + 2.5 hours to soil the load + 1 hour to score the load and calculate the cleaning index—1 hour using updated detergent dosage methodology). Similar to soil-sensing dishwashers, DOE does not expect manufacturers to run additional tests as part of compliance testing to determine the

most energy-intensive cycle type, in the event that a given basic model cannot meet the specified cleaning index threshold on the normal cycle at any soil load. Accordingly, DOE has not estimated costs for this test.

Based on data from the Bureau of Labor Statistics' ("BLS's") Occupational Employment and Wage Statistics, the mean hourly wage for electrical and electronic engineering technologist and technician is \$30.47.⁵² Additionally, DOE used data from BLS's Employer Costs for Employee Compensation to estimate the percent that wages comprise the total compensation for an employee. DOE estimated that wages make up 70.5 percent of the total compensation for private industry employees.⁵³ Therefore, DOE estimated that the total hourly compensation (including all fringe benefits) of a technician performing these tests to be approximately \$43.22.⁵⁴ Using these labor rates and time estimates, DOE estimated that it will cost dishwasher manufacturers approximately \$2,334 to test at least two units for each basic model for soil-sensing dishwashers and approximately \$735 to test at least two units for each basic model for non-soil-sensing dishwashers.⁵⁵

The incremental increases in testing costs under the new appendix C2 compared to the current and amended appendix C1 are approximately \$173 per soil-sensing dishwasher basic model and approximately \$216 per non-soil-sensing dishwasher basic model.⁵⁶

As previously discussed, the use of the new appendix C2 would not be required until the time of the compliance date of future amended energy conservation standards for dishwashers, should such amendments be adopted. At that time, manufacturers

⁵² DOE used the mean hourly wage of the "17-3027 Mechanical Engineering Technologists and Technicians" from the most recent BLS Occupational Employment and Wage Statistics (May 2021) to estimate the hourly wage rate of a technician assumed to perform this testing. See www.bls.gov/oes/current/oes173027.htm. Last accessed July 4, 2022.

⁵³ DOE used the June 2022 "Employer Costs for Employee Compensation" to estimate that for "Private Industry Workers," "Wages and Salaries" are 70.5 percent of the total employee compensation. See www.bls.gov/news.release/pdf/ecec.pdf. Last accessed October 19, 2022.

⁵⁴ $\$30.47 + 0.705 = \43.22 .

⁵⁵ Soil-sensing dishwasher: $\$43.22 \times 27 \text{ hours} \times 2 \text{ units per basic model} = \$2,333.88$ (rounded to \$2,334); non-soil-sensing dishwasher: $\$43.22 \times 8.5 \text{ hours} \times 2 \text{ units per basic model} = \734.74 (rounded to \$735).

⁵⁶ Soil-sensing dishwasher under current appendix C1: $\$43.22 \times 25 \text{ hours} \times 2 \text{ units per basic model} = \$2,161$. Non-soil-sensing dishwasher under current appendix C1: $\$43.22 \times 6 \text{ hours} \times 2 \text{ units per basic model} = \518.64 (rounded to \$519). $\$2,334 - \$2,161 = \$173$. $\$735 - \$519 = \$216$.

would need to retest models in accordance with appendix C2. In addition to the potential retesting costs, DOE expects that some manufacturers may incur one-time capital costs if their current testing laboratories are at capacity and additional laboratory space or test stations are required. DOE would incorporate the estimated costs associated with testing to the newly established appendix C2 into the analysis of any future energy conservation standards based on appendix C2.

2. Harmonization With Industry Standards

DOE's established practice is to adopt industry test standards as DOE test procedures for covered products and equipment, unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that equipment during a representative average use cycle. Section 8(c) of 10 CFR part 430 subpart C appendix A. In cases where the industry standard does not meet EPCA statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards as the DOE test procedure.

The current test procedure for dishwashers at appendix C1 references ANSI/AHAM DW-1-2010 in definitions and for testing conditions, and IEC 62301 Ed. 2.0 for test conditions, equipment, and standby mode power consumption measurement. The industry standards DOE is referencing in this document are discussed in further detail in section III.C and section IV.N of this document.

DOE notes that some of its modifications would not require re-testing and recertification of dishwasher basic models as compared to adopting AHAM DW-1-2020 and AHAM DW-2-2020 without modification, while maintaining the representativeness of the DOE test procedure. DOE is maintaining the list of test load items currently in appendix C1 as an alternative to the test load items specified in AHAM DW-1-2020, so test laboratories that currently have the test load items are not required to purchase new items. DOE is also maintaining the current detergent and dosage requirements as alternatives to the detergent and dosage requirements specified in AHAM DW-1-2020 because this would allow manufacturers to continue to rely on existing test data and would not require re-testing or

certification of dishwashers on the market.

Additionally, DOE is maintaining the annual number of cycles and low-power mode hours currently specified in appendix C1 because these values can impact the EAUE, which provides the basis for the existing energy conservation standards. DOE is adopting the annual number of cycles and low-power mode hours from AHAM DW-1-2020 in the new appendix C2, which would be applicable upon the compliance date of any future amended energy conservation standards for dishwashers. DOE is also adopting the test procedure waiver provisions applicable to dishwashers for which water is supplied through a manually filled attached tank and for in-sink dishwashers without a main detergent compartment. AHAM DW-1-2020 does not have comparable provisions. Adopting these requirements specified in the relevant waivers would eliminate the need of manufacturers of such products from having to seek waivers and would thereby reduce compliance burden. These modifications would ensure, as required by EPCA, that the DOE test procedure is not unduly burdensome to conduct. Additionally, AHAM DW-1-2020 references the relevant sections of AHAM DW-2-2020 for the requirements where appendix C1 currently references ANSI/AHAM DW-1-2010 and maintains references to IEC 62301 Ed. 2.0 for the requirements where appendix C1 already references this standard. Further, DOE's incorporation of a methodology for measuring cleaning performance and including a consumer-representative minimum cleaning performance threshold as a condition for a cycle to be valid in appendix C2 is to be referenced from the relevant sections of AHAM DW-2-2020.

M. Effective and Compliance Dates

The effective date for the adopted test procedures will be 30 days after publication of this final rule in the **Federal Register**. EPCA prescribes that all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with an amended test procedure, beginning 180 days after publication of the final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60

days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*) Manufacturers will be required to use the amended test procedure at appendix C1 until the compliance date of any final rule establishing amended energy conservation standards based on the newly established test procedure at appendix C2. At such time, manufacturers will be required to begin using the newly established test procedure at appendix C2.

Upon the compliance date of test procedure provisions in this final rule any waivers that had been previously issued and are in effect that pertain to issues addressed by such provisions are terminated. 10 CFR 430.27(h)(3). Recipients of any such waivers are required to test the products subject to the waiver according to the amended test procedure as of the compliance date of the amended test procedure. The amendments adopted in this document pertain to issues addressed by waivers granted to Whirlpool, Case No. DW-011, Miele, Case No. DW-012, CNA, Case No. 2020-008, and FOTILE, Case No. 2020-020. 78 FR 65629, 82 FR 17227, 85 FR 79171, and 86 FR 26712, respectively.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Executive Order ("E.O.") 12866, "Regulatory Planning and Review," as supplemented and reaffirmed by E.O. 13563, "Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing

economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit “significant regulatory actions” to OIRA for review. OIRA has determined that this final regulatory action does not constitute a “significant regulatory action” under section 3(f) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (“FRFA”) for any final rule where the agency was first required by law to publish a proposed rule for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003 to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website: www.energy.gov/gc/office-general-counsel. DOE reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

DOE has concluded that this rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

The Small Business Administration (“SBA”) considers a business entity to be a small business, if, together with its affiliates, it employs less than a

threshold number of workers specified in 13 CFR part 121. DOE used SBA’s small business size standards to determine whether any small entities would be subject to the requirements of the rule. These size standards and codes are established by the North American Industry Classification System (“NAICS”) and are available at www.sba.gov/document/support-table-size-standards. Dishwasher manufacturers are classified under NAICS code 335220, “Major Household Appliance Manufacturing.” The SBA sets a threshold of 1,500 employees or fewer for an entity to be considered as a small business for this category.

DOE conducted a focused inquiry into small business manufacturers of the products covered by this rulemaking. DOE reviewed its Compliance Certification Database,⁵⁷ California Energy Commission’s Modernized Appliance Efficiency Database System,⁵⁸ and ENERGY STAR’s Product Finder dataset⁵⁹ to create a list of companies that import or otherwise manufacture the products covered by this proposal. DOE then consulted publicly available data to identify original equipment manufacturers (“OEMs”) selling dishwashers in the U.S. DOE relied on public data and subscription-based market research tools (e.g., Dun & Bradstreet⁶⁰) to determine company location, headcount, and annual revenue. DOE screened out companies that do not offer products covered by this rulemaking, do not meet SBA’s definition of a “small business,” or are foreign-owned and operated.

DOE identified 21 dishwasher OEMs. Consistent with the preliminary determination in the December 2021 NOPR, DOE did not identify any domestic OEMs that qualify as a “small business.”⁶¹

In this final rule, DOE amends the existing test procedure for dishwashers at appendix C1 and adopts a new test procedure at appendix C2. The amendments to appendix C1 establish requirements for water hardness,

relative humidity, and loading pattern; update requirements for ambient temperature, detergent dosage, and standby power measurement; and include testing approaches from published waivers for dishwashers. The new appendix C2 additionally includes provisions for evaluating cleaning performance and establishing a minimum per cycle cleaning index threshold as a condition for a valid test; and updated annual number of cycles and low-power mode hours for the calculation of energy consumption.

DOE has determined that the amendments to appendix C1 would not increase testing costs relative to the current appendix C1 or result in manufacturers needing to re-rate dishwashers. As detailed in the final rule notice, use of the new appendix C2 would not be required until the time of the compliance date of future amended energy conservation standards for dishwashers, should such amendments be adopted. For appendix C2, DOE estimates the incremental increases in testing costs compared to the current and amended appendix C1 are approximately \$173 per soil-sensing dishwasher basic model and approximately \$216 per non-soil-sensing dishwasher basic model.⁶² Therefore, DOE estimates the cost to test a soil-sensing dishwasher according to the new appendix C2 to be approximately \$2,334 per basic model and that for a non-soil-sensing dishwasher to be approximately \$735 per basic model.⁶³

If DOE were to adopt future energy conservation standards based on appendix C2, manufacturers would need to retest models in accordance with appendix C2. In addition to the potential retesting costs, DOE expects that some manufacturers may incur one-time capital costs if their current testing laboratories are at capacity and additional laboratory space or test stations are required. The cost of retesting in accordance with appendix C2 would be incorporated into the analysis of any future energy conservation standards based on appendix C2. DOE would also investigate and include the estimated upfront capital investments associated

⁵⁷ U.S. Department of Energy Compliance Certification Database, available at www.regulations.doe.gov/certification-data/products.html#q=Product_Group_s%3A*. Last accessed July 8, 2022.

⁵⁸ California Energy Commission Modernized Appliance Efficiency Database System, available at cacertappliances.energy.ca.gov/Pages/Search/AdvancedSearch.aspx. Last accessed June 3, 2022.

⁵⁹ ENERGY STAR® Product Finder data set, available at www.energystar.gov/productfinder. Last accessed June 3, 2022.

⁶⁰ The Dun & Bradstreet Hoovers subscription login is accessible at app.dnbhoovers.com. Last accessed June 7, 2022.

⁶¹ 86 FR 72738, 72766.

⁶² Soil-sensing dishwasher under current appendix C1: \$43.22 × 25 hours × 2 units per basic model = \$2,161. Non-soil-sensing dishwasher under current appendix C1: \$43.22 × 6 hours × 2 units per basic model = \$518.64 (rounded to \$519). \$2,334 – \$2,161 = \$173. \$735 – \$519 = \$216.

⁶³ 27 hours testing time per soil-sensing unit × \$43.22 per hour × 2 units per basic model = \$2,333.88 (rounded to \$2,334) and 8.5 hours test time per non-soil-sensing unit × \$43.22 per hour × 2 units per basic model = \$734.74 (rounded to \$735).

with testing to the newly established appendix C2 in any future analysis of energy conservation standards for dishwashers.

DOE did not receive written comments that specifically addressed impacts on small businesses or that were provided in response to the initial regulatory flexibility analysis (“IRFA”).

Given the lack of small entities with a direct compliance burden, DOE concludes that the cost effects accruing from the final rule would not have a “significant economic impact on a substantial number of small entities,” and that the preparation of a FRFA is not warranted. DOE has submitted a certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of dishwashers must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including dishwashers. (See generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOE is not amending the certification or reporting requirements for dishwashers in this final rule. Instead, DOE may consider proposals to amend the certification requirements and reporting for dishwashers under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply

with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE establishes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for dishwashers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE’s implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, appendix A to subpart D, A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (“UMRA”) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan

for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at www.energy.gov/gc/office-general-counsel. DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf. DOE has reviewed this final rule under the OMB and DOE

guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; “FEAA”) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (“FTC”) concerning the impact of the commercial or industry standards on competition.

The modifications to the test procedure for dishwashers adopted in this final rule incorporates testing

methods contained in certain sections of the following commercial standards: AHAM DW–1–2020, AHAM DW–2–2020, and IEC 62301 Ed. 2.0. DOE has evaluated these standards and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.*, whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in these standards and has received no comments objecting to their use.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

N. Description of Materials Incorporated by Reference

AHAM DW–1–2020, “Uniform Test Method for Measuring the Energy Consumption of Dishwashers”. AHAM DW–1–2020 is a voluntary industry-accepted test procedure that measures the energy and water consumption of household electric dishwashers.

AHAM DW–2–2020, “Household Electric Dishwashers”. AHAM DW–2–2020 is an industry standard to determine the cleaning performance of dishwashers.

The AHAM standards are reasonably available from AHAM (www.aham.org/AHAM/AuxStore).

IEC 62301 Ed. 2.0 is an international standard that specifies methods of measurement of electrical power consumption of household appliances in standby mode(s) and other low power modes, as applicable. IEC 62301 Ed. 2.0 is reasonably available from IEC (<https://webstore.ansi.org> or <https://webstore.iec.ch/>).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on December 16, 2022, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the Federal Register.

Signed in Washington, DC, on December 19, 2022.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends parts 429 and 430 of chapter II of title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317, 28 U.S.C. 2461 note.

2. Amend § 429.134 by adding paragraph (z) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(z) Dishwashers—(1) Determination of Most Energy-Intensive Cycle. For any dishwasher basic model that does not meet the specified cleaning index threshold at a given soil load, the most energy-intensive cycle will be determined through testing as specified in sections 4.1.1 and 5.2 of appendix C2 to subpart B of part 430.

(2) [Reserved]

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

3. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

4. Amend § 430.3 by:

- a. Redesignating paragraphs (i)(2) through (6) as (i)(3) through (7);
b. Adding new paragraph (i)(2); and
c. Revising newly redesignated paragraph (i)(3); and
d. In paragraph (p)(7), removing the text “C1, D1” and adding in its place “C1, C2, D1”.

The addition and revision read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(i) * * *

(2) AHAM DW–1–2020, Uniform Test Method for Measuring the Energy Consumption of Dishwashers, copyright 2020; IBR approved for § 430.32; appendices C1 and C2 to subpart B.

(3) AHAM DW–2–2020, Household Electric Dishwashers, copyright 2020; IBR approved for appendices C1 and C2 to subpart B.

* * * * *

5. Section 430.23 is amended by revising paragraph (c) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(c) Dishwashers. (1) The Estimated Annual Operating Cost (EAO) for dishwashers must be rounded to the nearest dollar per year and is defined as follows:

(i) When cold water (50 °F) is used,

EAO = (D_e × E_TLP) + (D_e × N × (M + M_WS + M_DO + M_CO + E_F - (E_D/2)))

Where,

D_e = the representative average unit cost of electrical energy, in dollars per kilowatt-hour, as provided by the Secretary,

E_TLP = the annual combined low-power mode energy consumption in kilowatt-hours per year and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

N = the representative average dishwasher use of 215 cycles per year when EAO is determined pursuant to appendix C1 to this subpart, and 184 cycles per year when EAO is determined pursuant to appendix C2 to this subpart,

M = the machine energy consumption per cycle, in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

M_WS = the machine energy consumption per cycle for water softener regeneration, in kilowatt-hours and determined pursuant to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

M_DO = for water re-use system dishwashers, the machine energy consumption per cycle during a drain out event in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

M_CO = for water re-use system dishwashers, the machine energy consumption per cycle during a clean out event, in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

E_F = the fan-only mode energy consumption per cycle, in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable, and

E_D = the drying energy consumption, in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable.

(ii) When electrically heated water (120 °F or 140 °F) is used,

EAO = (D_e × E_TLP) + (D_e × N × (M + M_WS + M_DO + M_CO + E_F - (ED/2))) + (D_e × N × (W + W_WS + W_DO + W_CO))

Where,

D_e, E_TLP, N, M, M_WS, M_DO, M_CO, E_F, and E_D, are defined in paragraph (c)(1)(i) of this section,

W = the water energy consumption per cycle, in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

W_WS = the water softener regeneration water energy consumption per cycle in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

W_DO = The drain out event water energy consumption per cycle in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable, and

W_CO = The clean out event water energy consumption per cycle in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable.

(iii) When gas-heated or oil-heated water is used,

EAO_g = (D_e × E_TLP) + (D_e × N × (M + M_WS + M_DO + M_CO + E_F - (ED/2))) + (D_g × N × (W_g + W_WS_g + W_DO_g + W_CO_g))

Where,

D_e, E_TLP, N, M, M_WS, M_DO, M_CO, E_F, and E_D, are defined in paragraph (c)(1)(i) of this section,

D_g = the representative average unit cost of gas or oil, as appropriate, in dollars per BTU, as provided by the Secretary,

W_g = the water energy consumption per cycle, in Btus and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable.

W_{WSg} = the water softener regeneration energy consumption per cycle in Btu per cycle and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable,

W_{DOg} = the drain out water energy consumption per cycle in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable, and

W_{COg} = the clean out water energy consumption per cycle in kilowatt-hours and determined according to section 5 of appendix C1 or appendix C2 to this subpart, as applicable.

(2) The estimated annual energy use, EAEU, expressed in kilowatt-hours per year must be rounded to the nearest kilowatt-hour per year and is defined as follows:

$$EAEU = (M + M_{WS} + M_{DO} + M_{CO} + E_F - (E_D/2) + W + W_{WS} + W_{DO} + W_{CO}) \times N + E_{TLP}$$

Where,

M , M_{WS} , M_{DO} , M_{CO} , E_F , E_D , E_{TLP} are all defined in paragraph (c)(1)(i) of this section and W , W_{WS} , W_{DO} , W_{CO} are defined in paragraph (c)(1)(ii) of this section.

(3) The sum of the water consumption, V , the water consumption during water softener regeneration, V_{WS} , the water consumption during drain out events for dishwashers equipped with a water re-use system, V_{DO} , and the water consumption during clean out events for dishwashers equipped with a water re-use system, V_{CO} , expressed in gallons per cycle and defined pursuant to section 5 of appendix C1 or appendix C2 to this subpart, as applicable, must be rounded to one decimal place.

(4) Other useful measures of energy consumption for dishwashers are those which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of appendix C1 to this subpart or appendix C2 to this subpart, as applicable.

* * * * *

■ 6. Appendix C1 to subpart B of part 430 is revised to read as follows:

Appendix C1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Dishwashers

Note: Before July 17, 2023 manufacturers must use the results of testing under this appendix as codified on February 17, 2023 or this appendix as it appeared in the January 1, 2023 edition of 10 CFR parts 200–499 to determine compliance with the relevant standard from § 430.32(f)(1) as it appeared in the January 1, 2023 edition of 10 CFR parts 200–499. Beginning July 17, 2023,

manufacturers must use the results of testing under this appendix to determine compliance with the relevant standard from § 430.32(f)(1) as it appeared in the January 1, 2023 edition of 10 CFR parts 200–499. Manufacturers must use the results of testing under appendix C2 to determine compliance with any amended standards for dishwashers provided in 10 CFR 430.32(f)(1) that are published after January 1, 2023. Any representations related to energy or water consumption of dishwashers must be made in accordance with the appropriate appendix that applies (*i.e.*, appendix C1 or appendix C2) when determining compliance with the relevant standard. Manufacturers may also use appendix C2 to certify compliance with any amended standards prior to the applicable compliance date for those standards.

0. Incorporation by Reference

In § 430.3, DOE incorporated by reference the entire standard for AHAM DW–1–2020 and AHAM DW–2–2020; however, only enumerated provision of AHAM DW–1–2020, AHAM DW–2–2020, and IEC 62301 are applicable as follows:

0.1 AHAM DW–1–2020

- (a) Sections 1.1 through 1.30 as referenced in section 1 of this appendix;
- (b) Section 2.1 as referenced in sections 2 and 2.1 of this appendix;
- (c) Sections 2.2 through 2.3.3, sections 2.5 through 2.7, sections 2.7.2 through 2.8, and section 2.11, as referenced in section 2 of this appendix;
- (d) Section 2.4 as referenced in sections 2 and 2.2 of this appendix;
- (e) Section 2.7.1 as referenced in sections 2 and 2.3 of this appendix;
- (f) Section 2.9 as referenced in sections 2 and 2.4 of this appendix;
- (g) Section 2.10 as referenced in sections 2 and 2.5 of this appendix;
- (h) Sections 3.1 through 3.2 and sections 3.5 through 3.7 as referenced in section 3 of this appendix;
- (i) Section 3.3 as referenced in sections 3 and 3.1 of this appendix;
- (j) Section 3.4 as referenced in sections 3 and 3.2 of this appendix;
- (k) Sections 4.1 through 4.1.2 and sections 4.1.4 through 4.2 as referenced in section 4 of this appendix;
- (l) Section 4.1.4 as referenced in sections 4 and 4.1 of this appendix; and
- (m) Section 5 as referenced in section 5 of this appendix.

0.2 AHAM DW–2–2020: Household Electric Dishwashers

- (a) Section 3.4 as referenced in sections 2 and 2.3 of this appendix, and through reference to sections 1.5 and 1.22 of AHAM DW–1–2020 in section 1 of this appendix.
- (b) Section 3.5 through reference to sections 1.5 and 1.22 of AHAM DW–1–2020 in section 1 of this appendix.

(c) Section 4.1 as referenced in section 2 of this appendix.

(d) Sections 5.3 through 5.8 as referenced in section 2 of this appendix, and through reference to sections 1.18, 1.19, and 1.20 of AHAM DW–1–2020 in section 1 of this appendix.

0.3 IEC 62301

(a) Sections 4.2, 4.3.2, and 5.2 as referenced in section 2 of this appendix; and

(b) Sections 5.1, note 1, and 5.3.2 as referenced in section 4 of this appendix.

1. Definitions

The definitions in sections 1.1 through 1.30 of AHAM DW–1–2020 apply to this test procedure, including the applicable provisions of AHAM DW–2–2020 as referenced in sections 1.5, 1.18, 1.19, 1.20, and 1.22 of AHAM DW–1–2020.

2. Testing Conditions

The testing conditions in sections 2.1 through 2.11 of AHAM DW–1–2020 apply to this test procedure, including the following provisions of:

(a) Sections 5.2, 4.3.2, and 4.2 of IEC 62301 as referenced in sections 2.1, 2.2.4, and 2.5.2 of AHAM DW–1–2020, respectively, and

(b) Sections 5.3 through 5.8 of AHAM DW–2–2020 as referenced in sections 2.6.3.1, 2.6.3.2, and 2.6.3.3 of AHAM DW–1–2020; section 3.4 of AHAM DW–2–2020, excluding the accompanying Note, as referenced in section 2.7.1 of AHAM DW–1–2020; section 5.4 of AHAM DW–2–2020 as referenced in section 2.7.4 of AHAM DW–1–2020; section 5.5 of AHAM DW–2–2020 as referenced in section 2.7.5 of AHAM DW–1–2020, and section 4.1 of AHAM DW–2–2020 as referenced in section 2.10.1 of AHAM DW–1–2020. Additionally, the following requirements are also applicable.

2.1 Installation Requirements.

The installation requirements described in section 2.1 of AHAM DW–1–2020 are applicable to all dishwashers, with the following additions:

2.1.1 In-Sink Dishwashers.

For in-sink dishwashers, the requirements pertaining to the rectangular enclosure for under-counter or under-sink dishwashers are not applicable. For such dishwashers, the rectangular enclosure must consist of a front, a back, two sides, and a bottom. The front, back, and sides of the enclosure must be brought into the closest contact with the appliance that the configuration of the dishwasher will allow. The height of the enclosure shall be as specified in the manufacturer's

instructions for installation height. If no instructions are provided, the enclosure height shall be 36 inches. The dishwasher must be installed from the top and mounted to the edges of the enclosure.

2.1.2 Dishwashers without a Direct Water Line.

Manually fill the built-in water reservoir to the full capacity reported by

the manufacturer, using water at a temperature in accordance with section 2.3 of AHAM DW-1-2020.

2.2 Water pressure.

The water pressure requirements described in section 2.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line.

2.3 Test load items.

The test load items described in section 2.7.1 of AHAM DW-1-2020 apply to this test procedure, including the applicable provisions of section 3.4 of AHAM DW-2-2020, as referenced in section 2.7.1 of AHAM DW-1-2020. The following test load items may be used in the alternative.

Dishware/glassware/flatware item	Primary source	Description	Primary No.	Alternate source	Alternate source No.
Dinner Plate	Corning Comcor®/ Corelle®.	10 inch Dinner Plate ...	6003893		
Bread and Butter Plate	Corning Comcor®/ Corelle®.	6.75 inch Bread & Butter.	6003887	Arzberg	8500217100 or 2000-00001-0217-1.
Fruit Bowl	Corning Comcor®/ Corelle®.	10 oz. Dessert Bowl ...	6003899	Arzberg	3820513100.
Cup	Corning Comcor®/ Corelle®.	8 oz. Ceramic Cup	6014162	Arzberg	1382-00001-4732.
Saucer	Corning Comcor®/ Corelle®.	6 inch Saucer	6010972	Arzberg	1382-00001-4731.
Serving Bowl	Corning Comcor®/ Corelle®.	1 qt. Serving Bowl	6003911		
Platter	Corning Comcor®/ Corelle®.	9.5 inch Oval Platter ...	6011655		
Glass—Iced Tea	Libbey		551 HT		
Flatware—Knife	Oneida®—Accent		2619KPVF	WMF—Gastro 0800	12.0803.6047.
Flatware—Dinner Fork ..	Oneida®—Accent		2619FRSF	WMF—Signum 1900 ...	12.1905.6040.
Flatware—Salad Fork ...	Oneida®—Accent		2619FSLF	WMF—Signum 1900 ...	12.1964.6040.
Flatware—Teaspoon	Oneida®—Accent		2619STSF	WMF—Signum 1900 ...	12.1910.6040.
Flatware—Serving Fork	Oneida®—Flight		2865FCM	WMF—Signum 1900 ...	12.1902.6040.
Flatware—Serving Spoon.	Oneida®—Accent		2619STBF	WMF—Signum 1900 ...	12.1904.6040.

2.4 Preconditioning requirements.

The preconditioning requirements described in section 2.9 of AHAM DW-1-2020 are applicable to all dishwashers. For dishwashers that do not have a direct water line, measurement of the prewash fill water volume, V_{pw} , if any, and measurement of the main wash fill water volume, V_{mw} , are not taken.

2.5 Detergent.

The detergent requirements described in section 2.10 of AHAM DW-1-2020 are applicable to all dishwashers. For any dishwasher that does not have a main wash detergent compartment and the manufacturer does not recommend a location to place the main wash detergent, determine the amount of main wash detergent (in grams) according to section 2.10 of AHAM DW-1-2020, or as specified below, and place the detergent directly into the dishwasher chamber.

Additionally, the following detergent and dosage may also be used for all dishwashers. Note that if the detergent specified in section 2.10 of AHAM DW-1-2020 is used, then the dosage requirements specified in section 2.10 of AHAM DW-1-2020 must be used. Alternately, if the detergent specified

below is used, the dosage requirements specified below must be used.

Use Cascade with the Grease Fighting Power of Dawn powder as the detergent formulation. For all dishwashers other than water re-use system dishwashers determine the amount of detergent (in grams) to be added to the prewash compartment (if provided) or elsewhere in the dishwasher (if recommended by the manufacturer) and the main wash compartment according to sections 2.6.1 and 2.6.2 of this appendix.

2.5.1 Detergent Dosing for Dishwashers other than Water Re-use System Dishwashers.

2.5.1.1 Prewash Detergent Dosing. If the cycle setting for the test cycle includes prewash, determine the quantity of dry prewash detergent, D_{pw} , in grams (g) that results in 0.25 percent concentration by mass in the prewash fill water as:

$$D_{pw} = V_{pw} \times \rho \times k \times 0.25/100$$

Where,

V_{pw} = the prewash fill volume of water in gallons,

ρ = water density = 8.343 pounds (lb)/gallon for dishwashers to be tested at a nominal inlet water temperature of 50 °F (10 °C), 8.250 lb/gallon for dishwashers to be tested at a nominal inlet water temperature of 120 °F (49 °C), and 8.205

lb/gallon for dishwashers to be tested at a nominal inlet water temperature of 140 °F (60 °C), and

k = conversion factor from lb to g = 453.6 g/lb.

2.5.1.2 Main Wash Detergent Dosing.

Determine the quantity of dry main wash detergent, D_{mw} , in grams (g) that results in 0.25 percent concentration by mass in the main wash fill water as:

$$D_{mw} = V_{mw} \times \rho \times k \times 0.25/100$$

Where,

V_{mw} = the main wash fill volume of water in gallons, and

ρ and k are defined in section 2.5.1.1 of this appendix.

For dishwashers that do not have a direct water line, the V_{mw} is equal to the manufacturer reported water capacity used in the main wash stage of the test cycle.

2.5.2 Detergent Dosing for Water Re-use System Dishwashers. Use the same detergent dosing requirement as specified in section 2.10.2 of AHAM DW-1-2020.

2.6 Connected functionality.

For dishwashers that can communicate through a network (e.g., Bluetooth® or internet connection), disable all network functions that can be disabled by means provided in the manufacturer's user manual, for the

duration of testing. If network functions cannot be disabled by means provided in the manufacturer's user manual, conduct the standby power test with network function in the "as-shipped" condition.

3. Instrumentation

For this test procedure, the test instruments are to be calibrated annually according to the specifications in sections 3.1 through 3.7 of AHAM DW-1-2020, including the applicable provisions of IEC 62301 as referenced in section 3.6 of AHAM DW-1-2020. Additionally, the following requirements are also applicable.

3.1 Water meter.

The water meter requirements described in section 3.3 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water meter conditions do not apply and water is added manually pursuant to section 2.1.1 of this appendix.

3.2 Water pressure gauge.

The water pressure gauge requirements described in section 3.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water pressure gauge conditions do not apply and water is added manually pursuant to section 2.1.1 of this appendix.

4. Test Cycle and Measurements

The test cycle and measurement specifications in sections 4.1 through 4.2 of AHAM DW-1-2020 apply to this test procedure, including section 5.1, note 1, and section 5.3.2 of IEC 62301 as referenced in section 4.2 of AHAM DW-1-2020. Additionally, the following requirements are also applicable.

4.1 Water consumption.

The water consumption requirements described in section 4.1.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water consumption measurement requirements do not apply and water consumption, *V*, is the value reported by the manufacturer.

5. Calculation of Derived Results From Test Measurements

The calculations in section 5.1 through 5.7 of AHAM DW-1-2020 apply to this test procedure. The following additional requirements are also applicable:

(a) In sections 5.1.3, 5.1.4, 5.1.5, 5.4.3, 5.4.4, 5.4.5, and 5.7 of AHAM DW-1-

2020, use $N = 215$ cycles/year in place of $N = 184$ cycles/year.

(b) In section 5.7 of AHAM DW-1-2020, use $S_{LP} = 8,465$ for dishwashers that are not capable of operating in fan-only mode.

(c) For dishwashers that do not have a direct water line, water consumption is equal to the volume of water use in the test cycle, as specified by the manufacturer.

(d) In sections 5.6.1.3, 5.6.1.4, 5.6.2.3, and 5.6.2.4 of AHAM DW-1-2020, use (C/e) in place of *K*.

■ 7. Appendix C2 to subpart B of part 430 is added to read as follows:

Appendix C2 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Dishwashers

Note: Manufacturers must use the results of testing under this appendix C2 to determine compliance with any standards for dishwashers provided in § 430.32(f)(1) that are published after January 1, 2023. Representations related to energy or water consumption of dishwashers must be made in accordance with the appropriate appendix that applies (*i.e.*, appendix C1 or appendix C2) when determining compliance with the relevant standard. Manufacturers may also use appendix C2 to certify compliance with any amended standards prior to the applicable compliance date for those standards.

0. Incorporation by Reference

In § 430.3, DOE incorporated by reference the entire standard for AHAM DW-1-2020 and AHAM DW-2-2020; however, only enumerated provision of AHAM DW-1-2020, AHAM DW-2-2020, and IEC 62301 are applicable as follows:

0.1 AHAM DW-1-2020

(a) Sections 1.1 through 1.30 as referenced in section 1 of this appendix;

(b) Section 2.1 as referenced in sections 2 and 2.1 of this appendix;

(c) Sections 2.2 through 2.3.3, sections 2.5 and 2.7, sections 2.7.2 through 2.8, and section 2.11, as referenced in section 2 of this appendix;

(d) Section 2.4 as referenced in sections 2 and 2.2 of this appendix;

(e) Section 2.6.3 as referenced in sections 2 and 2.3 of this appendix;

(f) Section 2.7.1 as referenced in sections 2 and 2.4 of this appendix;

(g) Section 2.9 as referenced in sections 2 and 2.5 of this appendix;

(h) Section 2.10 as referenced in sections 2 and 2.6 of this appendix;

(i) Sections 3.1 through 3.2 and sections 3.5 through 3.7 as referenced in section 3 of this appendix;

(j) Section 3.3 as referenced in sections 3 and 3.1 of this appendix;

(k) Section 3.4 as referenced in sections 3 and 3.2 of this appendix;

(l) Section 4.1 as referenced in sections 4 and 4.1 of this appendix;

(m) Section 4.1.4 as referenced in sections 4 and 4.1.2 of this appendix; and

(n) Section 5 as referenced in section 5 of this appendix.

0.2 AHAM DW-2-2020

(a) Section 3.4 as referenced in sections 2 and 2.4 of this appendix, and through reference to sections 1.5 and 1.22 of AHAM DW-1-2020 in section 1 of this appendix.

(b) Section 3.5 through reference to sections 1.5 and 1.22 of AHAM DW-1-2020 in section 1 of this appendix.

(c) Section 4.1 as referenced in section 2 of this appendix.

(d) Sections 5.3 through 5.8 as referenced in section 2 of this appendix, and through reference to sections 1.18, 1.19 and 1.20 of AHAM DW-1-2020 in section 1 of this appendix.

(e) Section 5.10 as referenced in sections 2 and 2.8 of this appendix;

(f) Sections 5.10.1.1 as referenced in sections 4 and 4.2 of this appendix; and

(g) Section 5.12.3.1 as referenced in sections 5 and 5.1 of this appendix.

0.3 IEC 62301

(a) Sections 4.2, 4.3.2, and 5.2 as referenced in section 2 of this appendix; and

(b) Sections 5.1, note 1, and 5.3.2 as referenced in section 4 of this appendix.

1. Definitions

The definitions in sections 1.1 through 1.30 of AHAM DW-1-2020 apply to this test procedure, including the applicable provisions of AHAM DW-2-2020 as referenced in sections 1.5, 1.18, 1.19, 1.20, and 1.22 of AHAM DW-1-2020.

2. Testing Conditions

The testing conditions in Section 2.1 through 2.11 of AHAM DW-1-2020, except sections 2.6.1 and 2.6.2, and the testing conditions in section 5.10 of AHAM DW-2-2020 apply to this test procedure, including the following provisions of:

(a) Sections 5.2, 4.3.2, and 4.2 of IEC 62301 as referenced in sections 2.1, 2.2.4, and 2.5.2 of AHAM DW-1-2020, respectively, and

(b) Sections 5.3 through 5.8 of AHAM DW-2-2020 as referenced in sections 2.6.3.1, 2.6.3.2, and 2.6.3.3 of AHAM DW-1-2020; section 3.4 of AHAM DW-2-2020, excluding the accompanying Note, as referenced in section 2.7.1 of AHAM DW-1-2020; section 5.4 of AHAM DW-2-2020 as referenced in section 2.7.4 of AHAM DW-1-2020; section 5.5 of AHAM DW-2-2020 as

referenced in section 2.7.5 of AHAM DW-1-2020, and section 4.1 of AHAM DW-2-2020 as referenced in section 2.10.1 of AHAM DW-1-2020. Additionally, the following requirements are also applicable.

2.1 *Installation Requirements.*

The installation requirements described in section 2.1 of AHAM DW-1-2020 are applicable to all dishwashers, with the following additions:

2.1.1 *In-Sink Dishwashers.*

For in-sink dishwashers, the requirements pertaining to the rectangular enclosure for under-counter or under-sink dishwashers are not applicable. For such dishwashers, the rectangular enclosure must consist of a front, a back, two sides, and a bottom. The front, back, and sides of the enclosure must be brought into the closest contact with the appliance that the configuration of the dishwasher will allow. The height of the enclosure shall be as specified in the manufacturer's instructions for installation height. If no instructions are provided, the enclosure height shall be 36 inches. The

dishwasher must be installed from the top and mounted to the edges of the enclosure.

2.1.2 *Dishwashers without a Direct Water Line.*

Manually fill the built-in water reservoir to the full capacity reported by the manufacturer, using water at a temperature in accordance with section 2.3 of AHAM DW-1-2020.

2.2 *Water pressure.*

The water pressure requirements described in section 2.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line.

2.3 *Non-soil-sensing and soil-sensing dishwashers to be tested at a nominal inlet temperature of 50 °F, 120 °F, or 140 °F.*

The test load and soiling requirements for all non-soil-sensing and soil-sensing dishwashers shall be the same as those requirements specified in section 2.6.3 of AHAM DW-1-2020 for soil-sensing dishwashers. Additionally, both non-soil-sensing and soil-sensing compact dishwashers that have a capacity of less than four place settings shall be tested

at the rated capacity of the dishwasher and the test load shall be soiled as follows at each soil load:

(a) Heavy soil load: soil two-thirds of the place settings, excluding flatware and serving pieces (rounded up to the nearest integer) or one place setting, whichever is greater;

(b) Medium soil load: soil one-quarter of the place settings, excluding flatware and serving pieces (rounded up to the nearest integer) or one place setting, whichever is smaller;

(c) Light soil load: soil one-quarter of the place settings, excluding flatware and serving pieces (rounded up to the nearest integer) or one place setting, whichever is smaller, using half the quantity of soils specified for one place setting.

2.4 *Test load items.*

The test load items described in section 2.7.1 of AHAM DW-1-2020 apply to this test procedure, including the applicable provisions of section 3.4 of AHAM DW-2-2020, as referenced in section 2.7.1 of AHAM DW-1-2020. The following test load items may be used in the alternative.

Dishware/glassware/flatware item	Primary source	Description	Primary No.	Alternate source	Alternate source No.
Dinner Plate	Corning Comcor®/ Corelle®.	10 inch Dinner Plate ...	6003893		
Bread and Butter Plate	Corning Comcor®/ Corelle®.	6.75 inch Bread & Butter.	6003887	Arzberg	8500217100 or 2000-00001-0217-1.
Fruit Bowl	Corning Comcor®/ Corelle®.	10 oz. Dessert Bowl	6003899	Arzberg	3820513100.
Cup	Corning Comcor®/ Corelle®.	8 oz. Ceramic Cup	6014162	Arzberg	1382-00001-4732.
Saucer	Corning Comcor®/ Corelle®.	6 inch Saucer	6010972	Arzberg	1382-00001-4731.
Serving Bowl	Corning Comcor®/ Corelle®.	1 qt. Serving Bowl	6003911		
Platter	Corning Comcor®/ Corelle®.	9.5 inch Oval Platter ...	6011655		
Glass—Iced Tea	Libbey		551 HT		
Flatware—Knife	Oneida®—Accent		2619KPVF	WMF—Gastro 0800	12.0803.6047.
Flatware—Dinner Fork ..	Oneida®—Accent		2619FRSF	WMF—Signum 1900 ...	12.1905.6040.
Flatware—Salad Fork ...	Oneida®—Accent		2619FSLF	WMF—Signum 1900 ...	12.1964.6040.
Flatware—Teaspoon	Oneida®—Accent		2619STSF	WMF—Signum 1900 ...	12.1910.6040.
Flatware—Serving Fork	Oneida®—Flight		2865FCM	WMF—Signum 1900 ...	12.1902.6040.
Flatware—Serving Spoon.	Oneida®—Accent		2619STBF	WMF—Signum 1900 ...	12.1904.6040.

2.5 *Preconditioning requirements.*

The preconditioning requirements described in section 2.9 of AHAM DW-1-2020 are applicable to all dishwashers except the measurement of the prewash fill water volume, V_{pw} , if any, and measurement of the main wash fill water volume, V_{mw} , are not required.

2.6 *Detergent.*

The detergent requirements described in section 2.10 of AHAM DW-1-2020 are applicable to all dishwashers. For any dishwasher that does not have a

main wash detergent compartment and the manufacturer does not recommend a location to place the main wash detergent, place the detergent directly into the dishwasher chamber.

2.7 *Connected functionality.*

For dishwashers that can communicate through a network (e.g., Bluetooth® or internet connection), disable all network functions that can be disabled by means provided in the manufacturer's user manual, for the duration of testing. If network functions

cannot be disabled by means provided in the manufacturer's user manual, conduct the standby power test with network function in the "as-shipped" condition.

2.8 *Evaluation Room Lighting Conditions.*

The lighting setup in the evaluation room where the test load is scored shall be according to the requirements specified in section 5.10 of AHAM DW-2-2020.

3. Instrumentation

For this test procedure, the test instruments are to be calibrated annually according to the specifications in section 3.1 through 3.7 of AHAM DW-1-2020, including the applicable provisions of IEC 62301 as referenced in section 3.6 of AHAM DW-1-2020. Additionally, the following requirements are also applicable.

3.1 Water meter.

The water meter requirements described in section 3.3 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water meter conditions do not apply and water is added manually pursuant to section 2.1.1 of this appendix.

3.2 Water pressure gauge.

The water pressure gauge requirements described in section 3.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water pressure gauge conditions do not apply and water is added manually pursuant to section 2.1.1 of this appendix.

4. Test Cycle and Measurements

The test cycle and measurement specifications in sections 4.1 through 4.2 of AHAM DW-1-2020 and the scoring specifications in section 5.10.1.1 of AHAM DW-2-2020 apply to this test procedure, including section 5.1, note 1, and section 5.3.2 of IEC 62301 as referenced in section 4.2 of AHAM DW-1-2020. Additionally, the following requirements are also applicable.

4.1 Active mode cycle.

The active mode energy consumption measurement requirements described in section 4.1 of AHAM DW-1-2020 are applicable to all dishwashers. Additionally, the following requirements are also applicable:

(a) After the completion of each test cycle (sensor heavy response, sensor medium response, and sensor light response), the test load shall be scored according to section 4.2 of this appendix and its cleaning index calculated according to section 5.1 of this appendix.

(b) A test cycle is considered valid if its cleaning index is 70 or higher; otherwise, the test cycle is invalid and the data from that test run is discarded.

(c) For soil-sensing dishwashers, if the test cycle at any soil load is invalid, clean the dishwasher filter according to manufacturer's instructions and repeat the test at that soil load on the most energy-intensive cycle (determined as provided in section 4.1.1 of this

appendix) that achieves a cleaning index of 70 or higher.

(d) For non-soil-sensing dishwashers, perform testing as described in section 4.1.a through 4.1.c of this appendix, except that, if a test cycle at a given soil load meets the cleaning index threshold criteria of 70 when tested on the normal cycle, no further testing is required for test cycles at lesser soil loads.

4.1.1 Determination of most energy-intensive cycle.

If the most energy-intensive cycle is not known and needs to be determined via testing, ensure the filter is cleaned as specified in the manufacturer's instructions and test each available cycle type, selecting the default cycle options for that cycle type. In the absence of manufacturer recommendations on washing and drying temperature options, the highest energy consumption options must be selected. Following the completion of each test cycle, the machine electrical energy consumption and water consumption shall be measured according to sections 4.1.1 and 4.1.4 of AHAM DW-1-2020, respectively. The total cycle energy consumption, E_{MEI} , of each tested cycle type shall be calculated according to section 5.2 of this appendix. The most energy-intensive cycle is the cycle type with the highest value of E_{MEI} .

For standard dishwashers, test each cycle with a clean load of eight place settings plus six serving pieces, as specified in section 2.7 of AHAM DW-1-2020. For compact dishwashers, test each cycle with a clean load of four place settings plus six serving pieces, as specified in section 2.7 of AHAM DW-1-2020. If the capacity of the dishwasher, as stated by the manufacturer, is less than four place settings, then the test load must be the stated capacity.

4.1.2 Water consumption.

The water consumption requirements described in section 4.1.4 of AHAM DW-1-2020 are applicable to all dishwashers except dishwashers that do not have a direct water line. For such dishwashers these water consumption measurement requirements do not apply and water consumption, V , is the value reported by the manufacturer.

4.2 Scoring.

Following the termination of an active mode test, each item in the test load shall be scored on a scale from 0 to 9 according to the instructions in section 5.10.1.1 of AHAM DW-2-2020.

5. Calculation of Derived Results From Test Measurements

The calculations in sections 5.1 through 5.7 of AHAM DW-1-2020 and

section 5.12.3.1 of AHAM DW-2-2020 apply to this test procedure. The following additional requirements are also applicable:

(a) For both soil-sensing and non-soil-sensing dishwashers, use the equations specified for soil-sensing dishwashers.

(b) If a non-soil-sensing dishwasher is not tested at a certain soil load as specified in section 4.1.d of this appendix, use the energy and water consumption values of the preceding soil load when calculating the weighted average energy and water consumption values (*i.e.*, if the sensor medium response and sensor light response tests on the normal cycle are not conducted, use the values of the sensor heavy response test for all three soil loads; if only the sensor light response test is not conducted, use the values of the sensor medium response test for the sensor light response test).

(c) For dishwashers that do not have a direct water line, water consumption is equal to the volume of water use in the test cycle, as specified by the manufacturer.

(d) In sections 5.6.1.3, 5.6.1.4, 5.6.2.3, and 5.6.2.4 of AHAM DW-1-2020, use (C/e) in place of K .

5.1 Cleaning Index.

Determine the per-cycle cleaning index for each test cycle using the equation in section 5.12.3.1 of AHAM DW-2-2020.

5.2 Calculation for determination of the most energy-intensive cycle type.

The total cycle energy consumption for the determination of the most energy-intensive cycle specified in section 4.1.1 of this appendix is calculated for each tested cycle type as:

$$E_{MEI} = M + E_F - (E_D/2) + W$$

where,

M = per-cycle machine electrical energy consumption, expressed in kilowatt hours per cycle,

E_F = fan-only mode electrical energy consumption, if available on the tested cycle type, expressed in kilowatt hours per cycle,

E_D = drying energy consumed using the power-dry feature after the termination of the last rinse option of the tested cycle type, if available on the tested cycle type, expressed in kilowatt hours per cycle, and

W = water energy consumption and is defined as:

$V \times T \times K$, for dishwashers using electrically heated water, and

$V \times T \times C/e$, for dishwashers using gas-heated or oil-heated water.

Additionally,

V = water consumption in gallons per cycle,

T = nominal water heater temperature rise and is equal to 90 °F for dishwashers that operate with a nominal 140 °F inlet water temperature, and 70 °F for dishwashers

that operate with a nominal 120 °F inlet water temperature,

K = specific heat of water in kilowatt-hours per gallon per degree Fahrenheit = 0.0024,

C = specific heat of water in Btu's per gallon per degree Fahrenheit = 8.2, and

e = nominal gas or oil water heater recovery efficiency = 0.75.

■ 8. Section 430.32 is amended by revising paragraph (f) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(f) *Dishwashers.* (1) All dishwashers manufactured on or after May 30, 2013, shall meet the following standard—

(i) Standard size dishwashers shall not exceed 307 kwh/year and 5.0 gallons per cycle. Standard size dishwashers have a capacity equal to or greater than eight place settings plus six serving pieces as specified in AHAM DW-1-2020 (incorporated by reference, see § 430.3) using the test load specified in section 2.3 of appendix C1 or section 2.4 of appendix C2 in subpart B of this part, as applicable.

(ii) Compact size dishwashers shall not exceed 222 kwh/year and 3.5 gallons per cycle. Compact size dishwashers have a capacity less than eight place settings plus six serving pieces as specified in AHAM DW-1-2020 (incorporated by reference, see § 430.3) using the test load specified in section 2.3 of appendix C1 or section 2.4 of appendix C2 in subpart B of this part, as applicable.

(2) [Reserved]

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