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Contents

Federal Register

Vol. 88, No. 28

Friday, February 10, 2023

Agriculture Department

See Animal and Plant Health Inspection Service

See The U.S. Codex Office

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8792–8793

Air Force Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8823–8824

Environmental Impact Statements; Availability, etc.:
Tinian Divert Infrastructure Improvements
Commonwealth Northern Marianas Islands; Record of Decision, 8823

Animal and Plant Health Inspection Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Environmental Monitoring, 8793–8794

Environmental Assessments; Availability, etc.:
Release of *Aphalara itadori* from Murakami, Japan for the Biological Control of Japanese, Giant, and Bohemian Knotweeds in the Contiguous United States;
Supplemental, 8794–8795

Army Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8825

Environmental Impact Statements; Availability, etc.:
Heat and Electrical Upgrades at Fort Wainwright, AK, 8824–8825

Bureau of Consumer Financial Protection

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8822–8823

Bureau of the Fiscal Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Agreement and Request for Disposition of a Decedent's Treasury Securities, 8992

Offering of U.S. Mortgage Guaranty Insurance Company Tax and Loss Bonds, 8991–8992

Special Bond of Indemnity by Purchaser of United States Savings Bonds/Notes Involved in a Chain Letter Scheme, 8991

Centers for Disease Control and Prevention

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8864–8867

Centers for Medicare & Medicaid Services

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Medicaid and Children's Health Insurance Program
Generic Information Collection, 8867

Civil Rights Commission

NOTICES

Meetings:

Massachusetts Advisory Committee, 8796

Coast Guard

RULES

Security Zone:

Corpus Christi Ship Channel, Corpus Christi, TX, 8769–8770

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8878–8879

Commerce Department

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

See National Telecommunications and Information Administration

Committee for Purchase From People Who Are Blind or Severely Disabled

NOTICES

Procurement List; Additions and Deletions, 8820–8822

Commodity Futures Trading Commission

RULES

Reporting, Recordkeeping, Daily Trading Records, and Swap Documentation Requirements for Swap Dealers and Major Swap Participants; Corrections, 8752–8755

NOTICES

Meetings; Sunshine Act, 8822

Comptroller of the Currency

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Company-Run Annual Stress Test Reporting Template, Documentation for Covered Institutions with Total Consolidated Assets of 250 Billion Dollars or More; Dodd-Frank Wall Street Reform and Consumer Protection Act, 8989–8991

Defense Department

See Air Force Department

See Army Department

See Navy Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8825–8828

Charter Amendments, Establishments, Renewals and Terminations:

Education for Seapower Advisory Board, 8828

Meetings:

Defense Health Board, 8828–8829

Education Department

NOTICES

Applications for New Awards:

Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship Program, 8832–8837

Energy Department

See Federal Energy Regulatory Commission

NOTICES

Guidance and Application for the Hydroelectric Efficiency Improvement Incentives; Intent Regarding Future Release, 8837–8838

Environmental Protection Agency**RULES**

Air Quality State Implementation Plans; Approvals and Promulgations:
Tennessee; Packaging Corporation of America Nitrogen Oxides SIP Call Alternative Monitoring, 8771–8773

NOTICES

Environmental Impact Statements; Availability, etc., 8843
Final for Approval of Alternative Means of Emission Limitation, 8844–8860

Federal Aviation Administration**RULES**

Airspace Designations and Reporting Points:
Union Springs, AL, 8750–8751
Airworthiness Directives:
BAE Systems (Operations) Limited Airplanes, 8747–8750
Bombardier, Inc., Airplanes, 8743–8747
Dassault Aviation Airplanes, 8740–8743
Normal and Transport Category Rotorcraft Certification, 8729–8740
Restricted Areas:
R–2204 Oliktok Point High and R–2204 Oliktok Point Low, Alaska, 8751–8752

NOTICES

Meetings:
National Parks Overflights Advisory Group, 8987–8988

Federal Deposit Insurance Corporation**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8860–8862

Federal Emergency Management Agency**NOTICES**

Flood Hazard Determinations, 8879–8884
Major Disaster Declarations and Related Determinations:
Expiration of COVID–19-Related Measures, 8884–8886

Federal Energy Regulatory Commission**NOTICES**

Application:
Northern States Power Co., Wisconsin, 8838–8839
Combined Filings, 8838–8841
Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:
Lockhart ESS, LLC, 8842
Institution of Section 206 Proceeding and Refund Effective Date:
Nevada Power Co., Sierra Pacific Power Co., 8841
PacifiCorp, 8841
Meetings:
Interregional High Voltage Direct; Current Merchant Transmission; Technical Conference, 8842
Request for Information:
DC Energy, LLC v. PJM Interconnection, LLC, 8842–8843

Federal Reserve System**NOTICES**

Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 8862–8863

Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 8863

Fish and Wildlife Service**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Horseshoe Crab and Cooperative Fish Tagging Programs, 8906–8907
Permits; Applications, Issuances, etc.:
Endangered Species; Recovery, 8903–8904
N.M. Ranch Properties, Inc. (Armendaris Ranch) Bolson Tortoise Safe Harbor Agreement; Socorro and Sierra Counties, NM, 8904–8906

Food and Drug Administration**NOTICES**

Guidance:
Protein Efficiency Ratio Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein, 8868–8872
Temporary Policy on Repackaging or Combining Propofol Drug Products During the COVID–19 Public Health Emergency; Withdrawal, 8872–8873
Withdrawal of Approval of Drug Application:
Emergent Biosolutions Inc.; Narcan (Naloxone Hydrochloride) Nasal Spray, 2 Milligrams/0.1 Milliliter, 8873

Foreign-Trade Zones Board**NOTICES**

Proposed Production Activity:
CAN-ONE (USA), Inc. (Aluminum Beverage Cans), Foreign-Trade Zone 81, Nashua, NH, 8796–8797

General Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Equity Study on Remote Identity Proofing, 8863–8864

Health and Human Services Department

See Centers for Disease Control and Prevention

See Centers for Medicare & Medicaid Services

See Food and Drug Administration

See National Institutes of Health

NOTICES

Emergency Use Authorization:
New In Vitro Diagnostics for Detection of Enterovirus D68; Termination, 8874–8875
Meetings:
Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, 8873–8874
Request for Information:
Promising Practices for Advancing Health Equity for Intersex Individuals, 8876

Homeland Security Department

See Coast Guard

See Federal Emergency Management Agency

Housing and Urban Development Department**NOTICES**

Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2022, 8886–8903

Indian Affairs Bureau**NOTICES**

Land Acquisitions:

Buena Vista Rancheria of Me-Wuk Indians of California,
8907–8908

Interior Department

See Fish and Wildlife Service

See Indian Affairs Bureau

See Land Management Bureau

See National Park Service

International Trade Administration**NOTICES**Antidumping or Countervailing Duty Investigations, Orders,
or Reviews:

Certain Carbon and Alloy Steel Cut-to-Length Plate from
Austria, Belgium, Brazil, the People's Republic of
China, France, the Federal Republic of Germany, the
Republic of Korea, Italy, Japan, South Africa, Taiwan,
and the Republic of Turkey, 8802–8812

Certain Collated Steel Staples from the People's Republic
of China, 8800–8802

Gray Portland Cement and Cement Clinker from Japan,
8812–8813

Prestressed Concrete Steel Wire Strand from Thailand,
8798–8800

Steel Concrete Reinforcing Bar from the Republic of
Turkey, Taiwan, and Japan, 8797–8798

International Trade Commission**NOTICES**Investigations; Determinations, Modifications, and Rulings,
etc.:

Lemon Juice from Brazil and South Africa, 8912–8913

Steel Nails from India, Thailand, and Turkey, 8912

Meetings; Sunshine Act, 8912

Labor Department

See Occupational Safety and Health Administration

NOTICESAgency Information Collection Activities; Proposals,
Submissions, and Approvals:

Workforce Recruitment Program, 8913–8914

Land Management Bureau**NOTICES**

Meetings:

Colorado Resource Advisory Council, Joint and
Individual, 8909–8910

Southwest District Colorado Resource Advisory Council
Sheep Grazing Subcommittee, 8908–8909

Public Land Order:

No. 7918; Russian River and Upper Russian Lake
Recreation Corridor; AK; Extension of No. 7555, 8909

National Archives and Records Administration**NOTICES**

Records Schedules, 8915–8916

National Highway Traffic Safety Administration**NOTICES**

Petition for Decision of Inconsequential Noncompliance:

Continental Tire the Americas, LLC; Denial, 8988–8989

National Institutes of Health**NOTICES**

Meetings:

Center for Scientific Review, 8876–8877

National Center for Advancing Translational Sciences,
8877–8878

National Human Genome Research Institute, 8878

National Institute of Allergy and Infectious Diseases,
8878

National Oceanic and Atmospheric Administration**PROPOSED RULES**

Endangered and Threatened Species:

90-Day Finding on a Petition to List Olympic Peninsula
Steelhead, 8774–8785

Fisheries of the Caribbean, Gulf of Mexico, and South
Atlantic:

Coastal Migratory Pelagic Resources in the Gulf of
Mexico and Atlantic Region, 8785–8791

Takes of Marine Mammals Incidental to Specified
Activities:

Sunrise Wind Offshore Wind Farm Project Offshore New
York, 8996–9103

NOTICES

Meetings:

Western Pacific Fishery Management Council, 8813

Taking or Importing of Marine Mammals:

Ferry Berth Improvements in Tongass Narrows in
Ketchikan, AK, 8814–8820

National Park Service**NOTICES**

Requests for Nominations:

Acadia National Park Advisory Commission, 8911

Tule Springs Fossil Beds National Monument Advisory
Council, 8910–8911

National Science Foundation**NOTICES**Agency Information Collection Activities; Proposals,
Submissions, and Approvals:

Grantee Reporting Requirements for the Industry-
University Cooperative Research Centers Program,
8916–8917

**National Telecommunications and Information
Administration****NOTICES**Agency Information Collection Activities; Proposals,
Submissions, and Approvals:

Middle Mile Grant Program, 8820

Navy Department**NOTICES**Agency Information Collection Activities; Proposals,
Submissions, and Approvals, 8829–8831**Nuclear Regulatory Commission****NOTICES**

License Amendment Application:

National Institute of Standards and Technology; National
Bureau of Standards Test Reactor, 8918–8921

Occupational Safety and Health Administration**RULES**Procedures for the Handling of Retaliation Complaints
under the Criminal Antitrust Anti-Retaliation Act,
8755–8768**NOTICES**

Meetings:

Advisory Committee on Construction Safety and Health,
8914–8915

Railroad Retirement Board**NOTICES**

Privacy Act; Matching Program, 8921–8922

Securities and Exchange Commission**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 8946, 8949–8950

Application:

Constitution Capital Access Fund, LLC, et al., 8980–8981

Meetings; Sunshine Act, 8946

Self-Regulatory Organizations; Proposed Rule Changes:

BOX Exchange, LLC, 8947–8949

Nasdaq GEMX, LLC, 8922–8945

Nasdaq ISE, LLC, 8950–8975

Nasdaq MRX, LLC, 8945–8946, 8975–8980

NYSE Arca, Inc., 8949, 8980

NYSE National, Inc., 8950

Small Business Administration**NOTICES**

Disaster Declaration:

Alabama, 8981

North Dakota; Public Assistance Only, 8981

State Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Junta's Anti-Democratic Efforts Act Questionnaire, 8982

Culturally Significant Objects Imported for Exhibition:

Women Defining Women in Contemporary Art of the Middle East and Beyond, 8982–8983

Delegation of Authorities:

Certain Congressional Reporting Functions, 8982

Surface Transportation Board**NOTICES**

Acquisition of Control:

Van Pool Transportation LLC, Local Motion, Inc., 8984–8986

Continuance in Control:

CWW, LLC, Yak Rail, LLC, 8983–8984

Modified Rail Certificate:

Yak Rail, LLC, 8983

Railroad Cost of Capital—2022, 8984

Railroad Cost Recovery Procedures:

Productivity Adjustment, 8984

Susquehanna River Basin Commission**NOTICES**

Meetings, 8986

The U.S. Codex Office**NOTICES**

Meetings:

Committee on Food Import and Export Inspection and Certification Systems, 8795–8796

Trade Representative, Office of United States**NOTICES**

China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation:

Conforming and Technical Amendments, 8986–8987

Transportation Department

See Federal Aviation Administration

See National Highway Traffic Safety Administration

Treasury Department

See Bureau of the Fiscal Service

See Comptroller of the Currency

Veterans Affairs Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Dependent's Request for Change of Program or Place of Training, 8992–8993

Request for Entitlement Restoration Due to Facility Closure, Program of Training or Course Disapproval, 8993

Separate Parts In This Issue**Part II**

Commerce Department, National Oceanic and Atmospheric Administration, 8996–9103

Reader Aids

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

14 CFR

27.....	8729
29.....	8729
39 (3 documents) ...	8740, 8743, 8747
71.....	8750
73.....	8751

17 CFR

23.....	8752
---------	------

29 CFR

1991.....	8755
-----------	------

33 CFR

165.....	8769
----------	------

40 CFR

52.....	8771
---------	------

50 CFR**Proposed Rules:**

217.....	8996
223.....	8774
224.....	8774
622.....	8785

Rules and Regulations

Federal Register

Vol. 88, No. 28

Friday, February 10, 2023

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 TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 27 and 29

[Docket No.: FAA–2017–0990; Amdt. Nos. 27–51, 29–59]

RIN 2120–AK80

Normal and Transport Category Rotorcraft Certification

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is amending the certification standards of normal and transport category rotorcraft. These changes are necessary to address modern designs currently used in the rotorcraft industry and will reduce the burden on applicants for certification of new rotorcraft designs. The changes will reduce or eliminate the need for certain special conditions currently required to obtain certification of modern rotorcraft. These changes also incorporate the provisions of equivalent level of safety findings and means of compliance issue papers that the FAA has made when approving certain design features.

DATES: Effective April 11, 2023.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see “How To Obtain Additional Information” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions concerning this action, contact Sandra Shelley, Aviation Safety Engineer, Safety Management Group, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email Sandra.Shelley@faa.gov.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules on 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 III, sections 44701 and 44704. Under section 44701, the FAA is charged with prescribing regulations promoting safe flight of civil aircraft in air commerce by prescribing minimum standards required in the interest of safety for the design and performance of aircraft. Under section 44704, the Administrator issues type certificates for aircraft, aircraft engines, propellers, and specified appliances when the Administrator finds the product is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under section 44701(a). This rulemaking is within the scope of these authorities because it promotes safety by updating the minimum prescribed standards used during the type certification process.

I. Overview of Final Rule

This final rule revises regulations in title 14 Code of Federal Regulations (14 CFR) part 27 (Airworthiness Standards: Normal Category Rotorcraft) and part 29 (Airworthiness Standards: Transport Category Rotorcraft) related to the certification of rotorcraft. These changes are necessary due to the extensive application of advancing technologies to rotorcraft. Current airworthiness standards do not adequately address increasing design complexity. To address these advances, the FAA has been issuing reoccurring special conditions, equivalent level of safety (ELOS) findings, and means of compliance (MOC) issue papers. This final rule addresses these areas by updating those standards that have been addressed by these special conditions, ELOS findings and MOC issue papers. Compliance with the regulatory changes implemented by this final rule will continue to be shown by the same testing, analysis, and inspections required by existing special conditions, ELOS findings and MOC issue papers. However, there will be a reduced administrative burden, to both the rotorcraft industry and the FAA, through the reduction or elimination of

reoccurring special conditions, ELOS findings, and MOC issue papers.

II. Background

A. Statement of the Problem

This final rule updates parts 27 and 29 because the regulations in these parts were originally published in 1964 and past revisions to the airworthiness standards have not kept pace with advances in technology for rotorcraft. The FAA addresses these changes to technology by issuing reoccurring special conditions, ELOS findings, and MOC issue papers. These three processes are necessary to address new design features for which airworthiness standards are lacking, compliance with a rule cannot be achieved, or alternative methods of compliance are proposed. Special conditions are prescribed under 14 CFR 21.16 when the FAA finds the applicable airworthiness standards do not contain adequate or appropriate safety standards because of a novel or unusual design feature. The FAA issues ELOS findings under § 21.21(b)(1) where a design does not comply with the airworthiness standards, but compensating factors exist that provide an equivalent level of safety. MOC issue papers document compliance methodologies that fall outside existing guidance and policies.

The process of developing, drafting and finalizing these special conditions, ELOS findings, and MOC issue papers has an impact on both the FAA’s and the applicants’ resources. In addition, they impact applicants’ schedules for obtaining FAA approval of their products. By updating the affected standards, many of these special conditions, ELOS findings, and MOC issue papers are now unnecessary, thus reducing the burden on both the FAA and industry.

In some cases, advancements in technology have rendered the regulations in parts 27 and 29 obsolete. This final rule revises those regulations. This final rule also updates a few of these rules to correct typographical errors.

B. National Transportation Safety Board Recommendations

As a result of incidents involving smoke and fire caused by failure of lithium batteries installed on Boeing 787 aircraft, the National Transportation Safety Board (NTSB) issued Safety

Recommendations A-14-032 through 036 to the FAA on May 22, 2014.¹ The NTSB recommended the FAA develop abuse tests to simulate failures observed in the incidents investigated and to address findings in recent research (A-14-032), perform these tests on new aircraft for certain installations (A-14-033), develop guidance on acceptable methods to induce thermal runaway that reliably simulates battery failures (A-14-034), review methods of compliance used to certificate in-service lithium-ion battery aircraft installations to ensure that they adequately protect against adverse effects of a cell thermal runaway (A-14-035), and develop policy to establish a panel of technical experts to advise on compliance and best practices for safely installing new technology (A-14-036). This final rule incorporates these NTSB recommendations as they relate to rotorcraft into §§ 27.1353 and 29.1353.

C. Summary of the NPRM

On November 1, 2017, the FAA published a notice of proposed rulemaking (NPRM), “Normal and Transport Category Rotorcraft Certification” (82 FR 50583). In the NPRM, the FAA proposed changes necessary to address modern designs currently used in the rotorcraft industry and to reduce the burden on applicants for certification of new rotorcraft designs. The FAA proposed changes that would reduce or eliminate the need for certain special conditions that were often required to obtain certification of modern rotorcraft. The FAA also proposed to incorporate the provisions of ELOS findings and MOC issue papers that the FAA has made when approving certain design features.

The comment period closed on January 30, 2018.

D. General Overview of Comments

The FAA received comments from 22 commenters. About half of the commenters were individuals. The remaining commenters included the NTSB, aviation manufacturers, industry groups and organizations, and foreign civil aviation authorities. One commenter, the Aircraft Electronics Association, supported the proposed rule without change. Most commenters were generally supportive of the proposal but some suggested changes to the proposed rule, as discussed in more detail later in this preamble. Some comments were beyond the scope of the proposal.

III. Discussion of Public Comments and Final Rule

A. Engines (§ 27.903(d))

In the NPRM, the FAA proposed to reformat the paragraph designation in § 27.903(d) to be consistent with § 29.903(e). When § 27.903(d) was adopted, the paragraph designation of § 29.903(e) was not used even though the FAA intended the requirements to be identical. This designation led to confusion. This final rule eliminates the confusion by reformatting the paragraph designation in § 27.903(d) as proposed in the NPRM. The restart capability requirements of § 27.903(d) are not being changed in this rulemaking.

Bell Helicopter Textron, Inc. (Bell) and the General Aviation Manufacturers Association (GAMA) requested that part 27 appendix C be revised to remove the need for compliance with § 29.903(e), as the requirements are identical to proposed § 27.903(d). The FAA agrees and has removed the reference to § 29.903(e) from appendix C of part 27.

B. Powerplant Instruments (§§ 27.1305 and 29.1305)

Current §§ 27.1305 and 29.1305 prescribe the specific required powerplant instruments for rotorcraft. The changes to these sections will allow for other means of compliance for certain powerplant instrument indicators. Additionally, for § 29.1305, the FAA will permit an optional feature to simulate one engine inoperative (OEI) conditions without damaging the engines. Rotorcraft with OEI Training Mode will require additional indications to differentiate the simulated OEI conditions from actual engine failure.

Airbus Helicopters requested that the FAA use different wording to describe a synthesized power indicator (SPI) for an instrument that provides a single indicator of engine performance, because presenting the information as a percentage of power to the nearest engine limit is only one of the methods of informing the flightcrew.

The commenter’s request did not pertain to the proposed regulatory text but rather to industry examples in the NPRM preamble. However, the guidance associated with this final rule, Advisory Circulars (AC) 27-1B, Certification of Normal Category Rotorcraft and AC 29-2C, Certification of Transport Category Rotorcraft, identifies other concepts of showing proximity to engine limits other than as a percentage.

Airbus Helicopters also commented that certification of SPIs can be accomplished using the existing rules, and provided examples of two designs

that have been approved by the European Aviation Safety Agency (EASA). These technologies could only be certificated in the past by the FAA through processes such as that necessary for an ELOS finding. A key purpose of this rulemaking is to reduce or eliminate the need for reoccurring special conditions, ELOS findings, and MOC issue papers. Therefore, the FAA has made no changes to the regulatory text in response to this comment.

Bell, GAMA, Transport Canada, and an individual requested the FAA expand the changes to §§ 27.1305 and 29.1305 to allow synthesized dual/triple tachometers. This requested change is beyond the scope of the proposal. A key purpose of this rulemaking is to reduce or eliminate the need for reoccurring special conditions, ELOS findings, and MOC issue papers. The FAA has not issued any of these documents for synthesized dual or triple tachometers.

EASA requested that the FAA change the reference in the proposed § 27.1305(o) from engine “torque” to engine “power” to be consistent with § 29.1305(a)(16) and allowing for other forms of power determination. The requirement in § 27.1305(o) to display engine torque to the pilot is contingent on the establishment of a torque limitation for the engine under § 27.1521(e). Therefore, the requested change would create an incompatibility between §§ 27.1305(o) and 27.1521(e). The FAA did not make any changes in response to this comment.

Transport Canada requested that the FAA correct a typographical error in the current § 27.1305(k)(2) and change “or” to “and.” Transport Canada noted that this correction would make the wording of § 27.1305(k)(2) identical to that section’s part 29 counterpart, § 29.1305(a)(14)(ii). The FAA notes that the word “or” in § 27.1305(k)(2) is not a typographical error. The difference in wording between § 27.1305(k)(2) and § 29.1305(a)(14)(ii) has existed in the Federal Aviation Regulations from the promulgation of parts 27 and 29 to replace the Civil Air Regulations.² Moreover, the requested change would increase the regulatory requirement. The FAA did not make any changes in response to this comment.

Transport Canada also requested the FAA change the wording in proposed § 29.1305(a)(5) from “a means to indicate manifold pressure for each reciprocation engine, of the altitude type” to “a means to indicate manifold pressure for each altitude engine” to align the reference to this type of

¹ <https://www.ntsb.gov/safety/safety-recs/recletters/A-14-032-036.pdf>.

² 29 FR 15694 (Nov. 24, 1964); 29 FR 16148 (Dec. 3, 1964).

reciprocating engine with references to this same engine type used throughout part 27. The FAA agrees and has made this change. Additionally, this change provides consistency with § 27.1305(e) and with the identification of this type of engine elsewhere in part 29, and the term “altitude engine” is as type of engine that is a reciprocating engine.

Bell, GAMA, and an individual proposed new language for § 27.1305 that would permit OEI training mode capability. OEI Training Mode is a design feature for Category A training purposes. As explained by the FAA in the NPRM, the FAA did not propose these changes because part 27 Category A rotorcraft are approved under appendix C to part 27, which requires compliance with § 29.1305. The FAA did not make any changes in response to these comments.

C. Rotorcraft Equipment, Systems, and Installations (§§ 27.1309, 29.1309, and Appendix C to Part 27)

Sections 27.1309 and 29.1309 require applicants to assess the effects of failures resulting from installed systems and equipment. The changes to § 27.1309 made by this final rule now address advances in technology and increases in performance of normal category rotorcraft that were not envisioned when the rule was originally promulgated, and eliminate the distinction between single-engine and multi-engine rotorcraft. The final rule broadens the scope of the previous performance-based requirement to include catastrophic failure conditions, thus eliminating the need for recurring special conditions. The final rule also more closely aligns with current industry practices and accommodates potential future changes in industry failure analysis techniques.

EASA requested the FAA reserve the paragraph numbering and allocate new paragraph numbers for the new regulatory text to avoid confusion between the proposed regulations and previous amendments. The FAA has determined that this requested change is impracticable as it would result in numerous regulatory paragraphs without content. Part 21 requires aviation manufacturers to be familiar with the airworthiness standards that are effective as the certification basis as of the date of their application for a type certificate. EASA also suggested designating the first paragraph under §§ 27.1309 and 29.1309 as “(a)” for clarity. The FAA did not add such a designation because the first two sentences of §§ 27.1309 and 29.1309 are generally applicable requirements.

Bell, GAMA, Robinson Helicopter Company (Robinson), and two individuals commented that the proposed changes to § 27.1309 would increase the amount of analysis necessary to show compliance for normal category rotorcraft. GAMA and Bell stated that the proposed changes would exceed what is required to address complex systems, eliminate the distinction between single and multi-engine rotorcraft, and fail to maintain sufficient distinction from § 29.1309. Bell and GAMA also expressed that an increase in certification burden would be imposed by the changes, and be likely to cause significant economic damage to the rotorcraft industry. Similarly, Robinson stated that the proposed changes to § 27.1309 would significantly increase the regulatory burden on normal category rotorcraft by removing the distinction between single and multi-engine. According to Robinson, this would require additional failure analysis by the applicant, and alerting means in the design, resulting in a significant increase in the cost and complexity of small helicopters. Bell and GAMA requested that the proposed § 27.1309 be replaced with the recently promulgated § 23.2510, while Robinson requested that none of the proposed changes be made to § 27.1309.

This rulemaking does not change the current industry standard and compliance means for non-critical and noncomplex (simple) systems and equipment installed in normal category rotorcraft. As explained in the NPRM, the distinction between single and multi-engines no longer reflects the level of complexity of the systems installed in rotorcraft. Most applicants have been using industry standard methods, such as SAE/ARP 4761, for conducting their system safety analyses to show compliance with § 27.1309. These methods require assessment at the aircraft level regardless of whether the proposed design is a single or multi-engine configuration. As stated in the NPRM, the applicant’s method for conducting the failure analysis remains the same. The changes eliminate the need for special conditions by incorporating prior special condition requirements for catastrophic and hazardous failure conditions into the rule text. The changes also provide a means for the integration of new technology into part 27 rotorcraft. A means of compliance for noncomplex (simple) systems is already provided in the guidance material for normal and transport category rotorcraft. Finally, the request to incorporate § 23.2510, a performance-based regulation

contingent on the use of consensus standards, is beyond the scope of the NPRM.

Bell, GAMA, and Robinson commented that the changes to § 27.1309 eliminate an applicant’s use of the FAA’s safety continuum policy for part 27 rotorcraft. The FAA clarifies that the safety continuum policy, Policy No. PS-ASW-27-15, dated June 30, 2017,³ provides a tiered approach for compliance with § 27.1309, based upon the rotorcraft’s weight, occupant capacity, and number and type of engines. This policy remains applicable as an option for any applicant. Under the policy, the certification rigor for simpler, less complex rotorcraft and systems differs from that which is necessary for more complex rotorcraft and systems to show compliance with § 27.1309.

EASA, Transport Canada, and an individual requested additional definition of the applicability of §§ 27.1309 and 29.1309. The commenters stated there will be confusion regarding whether to apply §§ 27.1309 and 29.1309 to systems outside of the current subpart. The FAA recognized the need to be clear about the applicability of the regulation; therefore, the proposed introductory text published in the NPRM for §§ 27.1309 and 29.1309 clarified that the rule would apply to any system or equipment whose failure has not been specifically addressed by another requirement in chapter I of title 14 of the CFR. The FAA has determined that the proposed regulatory text is adequately clear and has adopted it without change in this final rule.

EASA and Thales AVS France commented on the proposed ACs intended to provide acceptable means to comply with §§ 27.1309 and 29.1309. These commenters requested that the AC text providing that “the catastrophic failure condition should not result from a single failure” should be included in the regulation to resolve the inconsistency resulting from the inclusion of such language in the AC but not the regulatory text. The guidance materials provide analysis techniques for showing how an applicant can achieve “extremely improbable” in conjunction with a single failure. Single failures are not the only failure conditions that need to be addressed in order for the analysis to be complete. The FAA has clarified this in AC 27-1B and AC 29-2C, which

³ <https://drs.faa.gov/browse/excelExternalWindow/0D4AF6EE7F3013848625815600705441.0001>.

provide acceptable means to comply with §§ 27.1309 and 29.1309.

Bell and GAMA requested the FAA not adopt the proposed requirement in §§ 27.1309(a) and 29.1309(a) for equipment, systems, and installations to be analyzed for hazards both individually and with regard to their integration with the rest of the aircraft. The commenters stated that the appropriate safety analysis methodologies for the equipment to be installed are already covered by paragraph (d) in §§ 27.1309 and 29.1309. The commenters stated the specific analysis is defined in guidance, and that including this statement in the regulation imposes a significant increase in the certification burden. This is incorrect. The requirement the commenters opposed for inclusion in paragraph (a) is already present in § 29.1309 and is included in special conditions for part 27 to certify proposed design features such as autopilot systems. In addition, this regulatory text does not dictate a specific analysis methodology to be used to show compliance; therefore, there is no increase in the certification burden.

GAMA, EASA, and Thales AVS France requested that the FAA change proposed §§ 27.1309(b) and 29.1309(b) to specify three levels of failure classification: catastrophic, hazardous, and major. In the NPRM, the FAA proposed a top level failure classification (catastrophic), a bottom level (minor), and any other level in between as long as the probability of the failure condition is inversely proportional to its consequences. EASA and GAMA stated that the proposed rule change would increase the regulatory burden by requiring the same analysis for minor failure conditions as for other, more severe failure conditions.

The FAA recognizes that proposed §§ 27.1309(b)(2) and 29.1309(b)(2) would have inadvertently raised the regulatory burden. That was not the FAA's intent, so in this final rule the FAA has revised §§ 27.1309(b)(2) and 29.1309(b)(2) to change the bottom level failure classification to major, in order to maintain the current regulatory requirement.

The final rule provides flexibility for future changes in industry standards and practices by allowing as many levels of failure classification as an applicant wishes to propose, as long as the probability of the failure condition is inversely proportional to its consequences.

GAMA and an individual requested that the FAA make the language in §§ 27.1309(c) and 29.1309(c) consistent

with one another, in that the word "and" is missing from § 27.1309(c). As explained in the NPRM, the FAA intended for these two sections to be consistent and thus, has corrected this error in this final rule such that "and" is included in § 27.1309(c), consistent with current § 29.1309(c).

Bell and GAMA commented on the FAA proposal to remove §§ 29.1309(b)(2) and 29.1309(e), which are specific to Category A rotorcraft, stating that these provisions are necessary companions to § 29.903(b) engine systems isolation requirements. The commenters stated that without a specific regulation for Category A systems and equipment, § 29.903(b) becomes the specific regulation and applies rather than § 29.1309. The commenters provided an example that, in order to show compliance with § 29.903(b), it would be necessary to show physical isolation between left engine and right engine indication systems, instead of providing integrated displays with redundancy rather than isolation with an appropriate probability for failure conditions that might affect both engine's indications. The commenters are correct that § 29.903(b) is the specific regulation for Category A engine isolation requirements. However, the § 29.903(b) analysis is limited to systems required for engine operations. The commenters' application of this analysis to engine indication systems and displays, which do not affect engine operation, is misplaced. Section 29.1309 requires applicants to assess the effects of failures resulting from installed systems and equipment, such as engine indicators or displays that may be necessary for performing Category A operations. These requirements are unchanged by the proposals in the NPRM.

GAMA requested that proposed §§ 27.1309(d)(2) and 29.1309(d)(2), which require an analysis of "[t]he effect of multiple failures and latent failures," be revised to preclude future interpretations of this paragraph as requiring consideration of multiple failures of unrelated functions or systems.

Although there are cases where the failures of unrelated functions or systems should be considered, the FAA shares the commenter's concern on the need to limit multiple failure analysis so that every combination of failures of unrelated functions or systems will not need to be considered. The FAA has changed the guidance material, AC 27-1B and AC 29-2C, to provide guidance to help applicants determine the depth of analysis necessary when considering

multiple failures in complying with §§ 27.1309(d)(2) and 29.1309(d)(2).

GAMA and Transport Canada requested that for the analysis of crew warning cues in proposed §§ 27.1309(d)(4) and 29.1309(d)(4), the FAA correct the word "warning." In the NPRM, the FAA proposed to replace the term "warning" with "annunciation," but in §§ 27.1309(d)(4) and 29.1309(d)(4) the term "warning" remained in the proposed regulatory text. However, Transport Canada suggested that "warning" be replaced with "alerting."

The FAA has determined that the term "alerting" is generally understood to include warnings and cautions that may include aural and visual types of cues to the pilot as appropriate. The FAA agrees that "alerting" more accurately conveys the requirement, and so has included it in this final rule.

An individual requested the FAA address the additional costs that may be incurred by U.S. applicants seeking validation of type-certificated products by EASA. The commenter states that the FAA's changes to §§ 27.1309 and 29.1309 compromise the rules' harmonization with EASA's rules.

The FAA's changes in this final rule incorporate the provisions of prior special conditions. EASA has validated several aircraft designs with the provisions of these special conditions. Therefore, the commenter's concern about additional costs during validation is not warranted.

D. Automatic Pilot and Flight Guidance System (§§ 27.1329 and 29.1329)

In the NPRM, the FAA proposed to revise §§ 27.1329 and 29.1329 by combining the existing requirements for automatic pilot with those of §§ 27.1335 and 29.1335 for flight director systems into one rule for automatic pilot and flight guidance systems. EASA noted the FAA proposed to change the requirements in §§ 27.1329(a)(1) and 29.1329(a)(1) so that the system can be overpowered by "one pilot" to "the pilot" and in §§ 27.1329(a)(2) and 29.1329(a)(2) that the system can be disengaged by "each pilot" to "the pilot." EASA stated that these changes reduce the level of safety, as the prior rules required that the effort of one pilot be enough to overpower the system. The effect of the proposed language as described by EASA was not the FAA's intent. Accordingly, the final rule refers to "one pilot," in §§ 27.1329(a)(1) and 29.1329(a)(1) and "each pilot" in §§ 27.1329(a)(2) and 29.1329(a)(2) to be consistent with the existing regulatory requirement.

Transport Canada noted that the proposed rule appeared to include fly-by-wire in its definition of an automatic flight guidance and control system, and that manufacturers would not be able to comply with a requirement to completely disengage a fly-by-wire system. Transport Canada therefore requested the rule be changed so that a proposed design would only have to only disengage “any malfunctioning components of” the system.

The FAA did not intend for §§ 27.1329 and 29.1329 to cover flight control systems, including fly-by-wire. The section title and the introductory sentence have been changed in this final rule to remove references to “control.” Sections 27.1329(a)(2) and 29.1329(a)(2) have also been changed in this final rule so that applicants may design the system to either disengage the entire system, any malfunctioning component of the system, or both.

Bell, GAMA, Transport Canada, and Thales AVS France commented that the proposed §§ 27.1329(d) and 29.1329(d) would have eliminated the condition of “assuming that corrective action begins within a reasonable period of time.” The commenters stated that the FAA did not explain the elimination of this statement.

The existing text identified by commenters was inadvertently omitted from the NPRM, but is included in this final rule.

E. Instrument Systems (§ 29.1333 and Appendix B to Parts 27 and 29)

Current § 29.1333(a) requires isolating the pilot instrument system from any other operating systems because at the time the rule was promulgated, these systems were federated, and connecting the systems increased the likelihood that a fault in one system could cause a failure in the pilot instrument system. In the NPRM, the FAA proposed to revise § 29.1333(a) and section VIII(b)(5)(i) of appendix B to parts 27 and 29 limiting it to pneumatic systems, allowing for the use of current technology to display integrated information to the pilot.

Airbus Helicopters requested that the FAA change the word “system” to “parts” so that the requirement for physical independence only applies to the pneumatic parts of a system.

The FAA intended for only the pneumatic portion of the system to have physical independence. The FAA is not changing the proposed rule text as suggested by the commenter because the word “parts,” could be interpreted as a component as opposed to only the pneumatic portion of the system. This

section of the rule is adopted as proposed in the NPRM.

F. Energy Storage System (§§ 27.1353 and 29.1353)

The FAA’s current regulations pertaining to batteries for rotorcraft include requirements specific to lead-acid batteries and nickel-cadmium batteries. In the NPRM, the FAA proposed performance-based requirements to accommodate any energy storage system. As a result, this final rule incorporates, for rotorcraft, the NTSB’s recommendation that the FAA require aircraft manufacturers to demonstrate acceptable performance as part of the certification of any new aircraft design that incorporates the installation of lithium-ion batteries.

Bell and GAMA requested that the FAA modify proposed §§ 27.1353(a) and 29.1353(a) by removing the word “automatic” from the protective design features required for hazard mitigation, and expressed concern that a requirement that the features be “automatic” would increase certification requirements. Current §§ 27.1353(g) and 29.1353(c) contain a similar requirement for automatic features to monitor the battery system for nickel-cadmium batteries and prevent or mitigate an over temperature condition or battery failure. Special conditions issued by the FAA to certificate lithium battery installations have required automatic features to monitor the battery system and protect the aircraft. The proposed regulation does not change this requirement but rather incorporates it into a rule that accommodates any energy storage system. Some energy storage system hazards may occur too rapidly to be mitigated by pilot action; therefore, automatic monitoring and control is necessary which would not increase certification requirements.

In another comment, the NTSB suggested including more prescriptive language in §§ 27.1353(a) and 29.1353(a) to address all possible mitigation strategies. By using performance-based requirements, this final rule allows both current and future mitigation strategies. A prescriptive list of current acceptable mitigation strategies may not allow for future energy storage technologies. Accordingly, in this final rule, the FAA has adopted §§ 27.1353(a) and 29.1353(a) as proposed.

Bell and GAMA requested modifying proposed §§ 27.1353(b) and 29.1353(b), because they would have required venting as the means of limiting the accumulation of hazardous gases, fluids, and smoke. The FAA agrees with these comments and has adopted Bell and

GAMA’s recommended language in this final rule, in order to allow other types of hazard mitigation. The intent of the rule is to require that emissions not accumulate in hazardous (flammability, toxicity, visibility, etc.) quantities. Designs may accomplish this through venting or through other means.

Bell and GAMA commented that the term “damage” in §§ 27.1353(c) and 29.1353(c) is unclear and requested that the rule be revised from “must not damage surrounding structures, adjacent equipment, or systems necessary for continued safe flight and landing” to “must not result in any hazardous effect on structures, equipment, or systems necessary for continued safe flight and landing.” The language proposed in the NPRM was retained from the current rule and accurately captures the requirement. The commenter’s suggested change would allow damage to occur undetected until it evolved into a hazardous condition, which was not the intent of the rule. Accordingly, in this final rule, the FAA has adopted §§ 27.1353(c) and 29.1353(c) as proposed.

The NTSB requested that proposed §§ 27.1353(d) and 29.1353(d) be revised to address the maximum amount of pressure from an energy storage system failure. The FAA agrees, since a rapid increase in pressure that exceeds the maximum amount for an energy storage system that is not contained may result in damage to surrounding systems or structure. Proposed §§ 27.1353(d) and 29.1353(d) have been revised consistent with the NTSB comment.

GAMA commented that the §§ 27.1353(e) and 29.1353(e) requirement to provide a means to monitor and inform the pilot of energy storage system health precludes other mitigating design features and may be unnecessary when effective containment measures are used. GAMA requested adding an alternative requirement to allow sufficient containment of the energy storage system.

GAMA’s requested change to §§ 27.1353(e) and 29.1353(e) would invalidate the requirement that the pilot be notified of all critical system parameters. The pilot must know the health of the required energy storage system. The regulation does not preclude other mitigating strategies but these must include a means for the pilot to know the condition of all critical system parameters. Accordingly, in this final rule, the FAA has adopted §§ 27.1353(e) and 29.1353(e) as proposed.

G. Airspeed Indicator (§ 27.1545)

Current § 27.1545 requires instruments to be marked with a green arc and red radial lines. In the NPRM, the FAA proposed to remove the restrictive requirement for some instrument markings to allow alternative means of compliance.

Bell and GAMA requested the rule specify when V_{NE} must be displayed, allow provisions for variable V_{NE} information, and clarify that a V_{NE} caution range is not always applicable. These requested changes are beyond the scope of this rulemaking, which was to make the color and depiction of the airspeed indicator markings less prescriptive. In addition, the suggested wording would be more prescriptive, and therefore restrict traditional systems from being approved.

An individual requested the FAA change the term “yellow arc” in § 27.1545(b)(3) to “amber arc” to be consistent with § 27.1322(b). The requested change is beyond the scope of this rulemaking, which was to eliminate the need for reoccurring MOC issue papers for a lack of green arc in modern electronic displays. The FAA has not created any issue papers because of the requirement for a “yellow” arc.

H. Powerplant Instruments (§ 27.1549)

The current regulation requires instruments to be marked with a green arc and red radial lines. In the NPRM, the FAA proposed to remove these requirements for some instrument markings.

EASA suggested the term “radial” in §§ 27.1549(a) and 29.1549(a) be replaced with “range,” similar to the proposed §§ 27.1549(d) and 29.1549(d). Sections 27.1549(a) and 29.1549(a) specify the requirement for marking of maximum and minimum safe operating limits. A red line is a defined limit. A range, in this context, would allow a level of ambiguity in the marking of the indicator. The FAA did not make any changes in response to the comment.

Transport Canada requested that the term “marked” be changed to “displayed” throughout §§ 27.1549 and 29.1549. The term “marked” is more consistent with the other instrument regulations for rotorcraft and airplanes. The FAA did not make any changes in response to the comment.

An individual requested the FAA change the term “yellow arc” in §§ 29.1549(b)(3) and 29.1549(c) to “amber arc” to be consistent with § 27.1322(b). The requested change is beyond the scope of this rulemaking, which was to eliminate the need for reoccurring MOC issue papers for a lack

of green arc in modern electronic displays. The FAA has not created any issue papers because of the requirement for a “yellow” arc.

Bell and GAMA requested that the word “propeller” be changed to “rotor” in §§ 27.1549(d) and 29.1549(d). The word “propeller” comes from a prior rule amendment to parts 27 and 29 that was based on a part 25 rule. Although “propeller” is an appropriate term for airplanes, “rotor” is the more appropriate term for rotorcraft. The FAA agrees and has made the requested change.

One commenter noted the typographical omission of the word “and” between the proposed §§ 27.1549(d) and 27.1549(e). The FAA has corrected this error in this final rule by including “and” at the end of paragraph (d), consistent with the current rule.

I. Control Marking (§§ 27.1555 and 29.1555)

The control marking regulations required marking the usable fuel capacity at the fuel quantity indicator. The intent of these regulations was to provide a continuous indication of usable fuel capacity at the fuel quantity indicator. Older, analog gauges used a placard to comply with this requirement. In the NPRM, the FAA proposed performance-based requirements to permit other means of informing the pilot of the usable fuel system capacity. However, this final rule requires that alternative methods address any lack of continuous display by ensuring the information is readily accessible to the pilot.

Bell and GAMA requested modifying proposed §§ 27.1555(c)(1) and 29.1555(c)(1) to require “a means to provide the usable fuel capacity to the pilot.” The intent of the language proposed in the NPRM was to keep the existing requirement for applicants that choose to follow that method, while providing an additional, less prescriptive method.

Similarly, EASA requested the FAA make the requirement more generic by eliminating the reference “to the pilot” within §§ 27.1555(c)(1)(i) and 29.1555(c)(1)(i), since this information is also used during maintenance and servicing. However, removing the requirement that the information be accessible to the pilot would not ensure that the pilot always has access to the data, which is the purpose of this rule.

GAMA also requested modifying § 27.1555(c)(2) and 29.1555(c)(2), which contains usable fuel capacity requirements for fuel systems with selector controls, to match the proposed

language in §§ 27.1555(c)(1) and 29.1555(c)(1) for fuel systems with no selector controls. The changes in the NPRM were proposed to eliminate the issues associated with placarding a digital display in a modern glass cockpit. Placarding near or at the selector switches does not create these issues.

Additionally, GAMA requested that the FAA update §§ 27.1583(b)(3) and 29.1583(b)(3) to require that the flight manual include the usable fuel capacity information required per §§ 27.1555(c)(1) and 29.1555(c)(1) respectively. This requested change is not appropriate, because the requirement to add the capacity information into the flight manual is only necessary if it is not continuously displayed at the indicator. The commenter’s requested language would require the information in the flight manual for all designs.

Airbus Helicopters requested that the FAA clarify whether “usable fuel capacity” refers to the actual remaining fuel or to the total usable capacity of the fuel system. The FAA notes that the term “usable fuel capacity” refers to the total usable capacity of the fuel system. The requirements for indicating the actual usable quantity are contained within §§ 27.1305, 27.1337, 29.1305, and 29.1337. In the NPRM, the FAA did not propose modifying the language or meaning of “usable fuel capacity.” Changing the meaning is outside the scope of this rulemaking. The proposed rule language provides an alternative, less prescriptive requirement allowing the applicant to relay the fuel system capacity to the crew by means other than a placard at the fuel quantity indicator.

J. Undue Burden on Industry

In the NPRM preamble, the FAA stated that this rulemaking would update several rules that cause unnecessary burdens in cost and time to both the FAA and the rotorcraft industry. These changes are necessary due to the extensive application of advancing technologies to rotorcraft, which the airworthiness standards did not adequately address. The FAA proposed that, by updating the affected standards, many special conditions, ELOS findings, and MOC issue papers would become unnecessary, thus reducing the burden of cost and time on the FAA and industry.

GAMA requested rewording or deleting “reduced burden for the rotorcraft industry,” because showing compliance by the same testing analysis and inspections strongly implies there is no reduced burden. Additionally,

GAMA requested that the FAA perform an analysis of the economic impact of the regulatory changes on small entities and provide access to the results of such analysis in the proposed rulemaking.

This rule updates parts 27 and 29 to address changes in technology and to include updated airworthiness standards. The FAA maintains that while compliance is shown by the same testing, analysis, and inspections, there will be savings to both the FAA and industry from updating the airworthiness standards. Updating the airworthiness standards reduces the number of reoccurring special conditions, ELOS findings, and MOC issue papers and the administration burden associated with processing one of the three documents.

Further information regarding final rule revisions that address comments on this issue is provided in discussions, C. *Rotorcraft Equipment, Systems, and Installations* (§§ 27.1309, 29.1309, and Appendix C to Part 27) and F. *Energy Storage System* (§§ 27.1353 and 29.1353). Additionally, the FAA has complied with the Regulatory Flexibility Act for this rulemaking and certified that a regulatory flexibility analysis is not required, as this rule will not have a significant economic impact on a substantial number of small entities.

K. Other Comments

One individual requested guidance for installing antennas on helicopters for both part 27 and 29. Two other individuals requested the FAA adopt rules to address accident rates, such as adding § 25.1302 to parts 27 and 29 and implementing Terrain Awareness and Warning Systems and Radar Altimeters. Another individual provided comments about minimum backup systems for VFR-only rotorcraft. The FAA appreciates the interest in aviation safety from these commenters; however, these comments were beyond the scope of this rulemaking effort.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements

Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

This final rule revises regulations in 14 CFR part 27 (Airworthiness Standards: Normal Category Rotorcraft) and part 29 (Airworthiness Standards: Transport Category Rotorcraft) related to the certification of rotorcraft. The changes are necessary because the airworthiness standards did not adequately address the increases in design complexity resulting from advancing technologies. As a result, many regulatory sections have been subject to reoccurring special conditions, ELOS findings, and MOC issue papers. This rulemaking addresses these items by updating the rules that cause unnecessary burdens in cost and time to both the rotorcraft industry and the FAA.

The FAA received comments on the NPRM that was published on November 1, 2017. The comments and the FAA's response to them are discussed in "III. Discussion of Public Comments and Final Rule," in the preamble to this final rule. The FAA made changes to the proposed rule as a result of the public comments. However, the changes assisted the FAA in clarifying and updating the proposal to ensure there will not be additional costs from this rulemaking. These changes did not result in additional costs to industry or the FAA. The FAA expects this rule will not result in additional costs to industry since it incorporates current industry practice. In addition, the rule will provide small savings to industry and the FAA by avoiding the burden and costs associated with developing special conditions, ELOS findings and MOC issue papers. The rule affects U.S. manufacturers of normal and transport category rotorcraft plus any rotorcraft operator or owner who applies for a supplemental type certificate (STC). The remainder of this section provides

discussion of the impact and savings of this final rule by topic.

1. Powerplant Instruments (§§ 27.1305 and 29.1305)

Changes to these sections will allow for other means of compliance for certain powerplant instrument indicators. These means of compliance are voluntary and do not impose any new cost but could be cost relieving for applicants that choose to use them. Additionally, for § 29.1305, the FAA will permit an optional feature to simulate OEI conditions without damaging the engines. Rotorcraft with OEI Training Mode must have additional indications to differentiate the simulated OEI condition from actual engine failure. The OEI Training Mode is often installed in modern multi-engine rotorcraft. The FAA finds that this change will not result in additional costs to industry. The OEI Training Mode is optional and this change removes the need to issue special conditions for those manufacturers or modifiers including OEI training modes in their rotorcraft.

2. Normal Category Rotorcraft Equipment, Systems, and Installations (§ 27.1309 and Appendix C to Part 27)

The FAA revises the failure analysis requirement for equipment, systems, and installations to reduce the need for special conditions. These changes more closely align with current industry practices and also accommodate future changes in industry failure analysis techniques. Additionally, the FAA eliminates the distinction between single-engine and multi-engine rotorcraft. This distinction is no longer relevant because current analysis tools for technologies and associated failure effects no longer consider the number of engines. This will reduce the need to issue recurring special conditions, potentially providing small savings for manufacturers and anybody who modifies the rotorcraft. As these are current industry practice, the FAA finds there are no additional costs associated with these changes.

3. Transport Category Rotorcraft Equipment, Systems, and Installation (§ 29.1309)

This section is updated to be consistent with industry standards and practices for conducting failure analysis. The rule clarifies the requirement to perform a failure analysis and recognizes that the severity of failures can vary. Additionally, this section accommodates future changes in industry failure analysis techniques and reflects current certification practices.

The rule allows for other options that will reduce the need to issue recurring special conditions, potentially providing small savings for manufacturers and applicants looking to modify a rotorcraft.

4. Automatic Pilot and Flight Guidance Systems (§§ 27.1329, 27.1335, 29.1329, and 29.1335)

This rule standardizes terminology and combines the requirements for automatic pilot and flight director systems into one rule. Modern designs combine both automatic pilot and flight director systems and are now referred to as automatic pilot and flight guidance systems.

5. Instrument Systems (§ 29.1333 and Appendix B to Parts 27 and 29)

The change allows for the use of more modern integrated systems to monitor and display highly integrated information regarding the rotorcraft. This section does not impose additional costs as the updates reflect modern industry practices of integrating instrument systems.

6. Electrical Systems and Equipment (§ 29.1351) and Energy Storage Systems (§§ 27.1353 and 29.1353)

The changes accommodate different energy storage systems. The regulation applies to lead acid, nickel-cadmium, and lithium batteries without imposing additional requirements. The changes will provide the flexibility necessary for the regulations to keep up with changes in technology.

7. Instrument Markings (§§ 27.1545, 29.1545, 27.1549, and 29.1549)

The final rule provides flexibility for some instrument markings. Allowing for other markings will not result in additional mandatory costs and may be possibly cost relieving for manufacturers that elect to outfit the rotorcraft with different instrument markings.

8. Control Markings (§§ 27.1555 and 29.1555)

The rule permits more than one method to inform the pilot of the usable fuel system capacity. However, alternative methods must address the lack of continuous display currently required. Changes to this section allow for more than one means of compliance at no additional costs. Offering alternative means of compliance allows industry to meet the requirement with the least costly option, which can be cost relieving.

9. Typographical and Standardizing Corrections (§§ 27.87, 27.903, 29.955, 29.977, 29.1019, 29.1517, and 29.1587)

There are no additional costs for changes to these sections as these are typographical or standardizing corrections.

Based on the discussion above, the FAA has determined that this final rule is not a “significant regulatory action” as defined in section 3(f) of Executive Order 12866.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule amends the certification standards of normal and transport category rotorcraft to incorporate modern designs currently used in the rotorcraft industry. Currently, changes in technology are addressed by issuing reoccurring special conditions, ELOS findings, and MOC issue papers. These three processes are necessary to address new design features for which airworthiness standards are lacking, compliance with a rule cannot be achieved, or alternative methods of compliance are proposed. These special conditions, ELOS findings, and MOC issue papers impact

FAA and industry resources as well as applicants’ schedules for obtaining FAA approval of their products. By updating the affected standards with this final rule, many special conditions, ELOS findings, and MOC issue papers will become unnecessary, thus reducing both the FAA and industry’s administration burden associated with processing one of the three documents.

As the rule reduces the administrative burden and does not include any new regulatory burden, the FAA expects this rule will not result in additional costs and may result in small cost savings for any small entity affected by this rulemaking action. If an agency determines that a rulemaking will not result in a significant economic impact on a substantial number of small entities, the head of the agency may so certify under section 605(b) of the RFA. Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this final rule and determined that the potential benefits are available to both domestic and international firms, which would either have no effect or a positive effect on international trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the

aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$155 million in lieu of \$100 million.

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

E. Paperwork Reduction Act

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

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these final regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6.f and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

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

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

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that

Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it will not be a “significant energy action” under the executive order and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained from the internet by—

1. Searching the Federal eRulemaking Portal (www.regulations.gov);
2. Visiting the FAA’s Regulations and Policies web page at www.faa.gov/regulations_policies/; or
3. Accessing the Government Printing Office’s web page at www.GovInfo.gov.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to <https://www.regulations.gov> and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA’s 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.).

C. Small Business Regulatory Enforcement Fairness Act

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

List of Subjects

14 CFR Part 27

Aircraft, Aviation safety.

14 CFR Part 29

Aircraft, Aviation safety.

The Amendments

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations (CFR) parts 27 and 29 as follows:

PART 27—AIRWORTHINESS STANDARDS: NORMAL CATEGORY ROTORCRAFT

- 1. The authority citation for part 27 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

- 2. Amend § 27.87 by revising the section heading and paragraph (a) introductory text to read as follows:

§ 27.87 Height-velocity envelope.

(a) If there is any combination of height and forward velocity (including hover) under which a safe landing cannot be made under the applicable power failure condition in paragraph (b) of this section, a limiting height-velocity envelope must be established (including all pertinent information) for that condition, throughout the ranges of—

* * * * *

- 3. Amend § 27.903 by revising paragraph (d) to read as follows:

§ 27.903 Engines.

* * * * *

(d) *Restart capability.* (1) A means to restart any engine in flight must be provided.

(2) Except for the in-flight shutdown of all engines, engine restart capability must be demonstrated throughout a flight envelope for the rotorcraft.

(3) Following the in-flight shutdown of all engines, in-flight engine restart capability must be provided.

- 4. Amend § 27.1305 by revising paragraphs (e), (k) introductory text, (n), and (o) to read as follows:

§ 27.1305 Powerplant instruments.

* * * * *

(e) A means to indicate manifold pressure for each altitude engine.

* * * * *

(k) A means to indicate the r.p.m. of each engine and at least one tachometer, as applicable, for:

* * * * *

(n) A means to indicate the gas temperature for each turbine engine.

(o) A means to enable the pilot to determine the torque of each turbine engine, if a torque limitation is established for that engine under § 27.1521(e).

* * * * *

- 5. Revise § 27.1309 to read as follows:

§ 27.1309 Equipment, systems, and installations.

The equipment, systems, and installations whose functioning is required by this subchapter must be designed and installed to ensure that they perform their intended functions under any foreseeable operating condition. For any item of equipment or system whose failure has not been specifically addressed by another requirement in this chapter, the following requirements also apply:

(a) The design of each item of equipment, system, and installation must be analyzed separately and in relation to other rotorcraft systems and installations to determine and identify any failure that would affect the capability of the rotorcraft or the ability of the crew to perform their duties in all operating conditions.

(b) Each item of equipment, system, and installation must be designed and installed so that:

(1) The occurrence of any catastrophic failure condition is extremely improbable;

(2) The occurrence of any major failure condition is no more than improbable; and

(3) For the occurrence of any other failure condition between major and catastrophic, the probability of the failure condition must be inversely proportional to its consequences.

(c) A means to alert the crew in the event of a failure must be provided when an unsafe system operating condition exists and to enable them to take corrective action. Systems, controls, and associated monitoring and crew alerting means must be designed to minimize crew errors that could create additional hazards.

(d) Compliance with the requirements of this section must be shown by analysis and, where necessary, by ground, flight, or simulator tests. The analysis must account for:

(1) Possible modes of failure, including malfunctions and misleading data and input from external sources;

(2) The effect of multiple failures and latent failures;

(3) The resulting effects on the rotorcraft and occupants, considering the stage of flight and operating conditions; and

(4) The crew alerting cues and the corrective action required.

■ 6. Amend § 27.1329 by revising the section heading, adding introductory text, and revising paragraphs (a), (d), and (e) to read as follows:

§ 27.1329 Automatic pilot and flight guidance system.

For the purpose of this subpart, an automatic pilot and flight guidance system may consist of an autopilot, flight director, or a component that interacts with stability augmentation or trim.

(a) Each automatic pilot and flight guidance system must be designed so that it:

(1) Can be overpowered by one pilot to allow control of the rotorcraft;

(2) Provides a means to disengage the system, or any malfunctioning component of the system, by each pilot to prevent it from interfering with the control of the rotorcraft; and

(3) Provides a means to indicate to the flight crew its current mode of operation. Selector switch position is not acceptable as a means of indication.

(d) The system must be designed so that, within the range of adjustment available to the pilot, it cannot produce hazardous loads on the rotorcraft, or create hazardous deviations in the flight path, under any flight condition appropriate to its use or in the event of a malfunction, assuming that corrective action begins within a reasonable period of time.

(e) If the automatic pilot and flight guidance system integrates signals from auxiliary controls or furnishes signals for operation of other equipment, there must be a means to prevent improper operation.

§ 27.1335 [Removed]

■ 7. Remove § 27.1335.

■ 8. Revise § 27.1353 to read as follows:

§ 27.1353 Energy storage systems.

Energy storage systems must be designed and installed as follows:

(a) Energy storage systems must provide automatic protective features for any conditions that could prevent continued safe flight and landing.

(b) Energy storage systems must not emit any flammable, explosive, or toxic gases, smoke, or fluids that could accumulate in hazardous quantities within the rotorcraft.

(c) Corrosive fluids or gases that escape from the system must not damage surrounding structures, adjacent equipment, or systems necessary for continued safe flight and landing.

(d) The maximum amount of heat and pressure that can be generated during any operation or under any failure condition of the energy storage system or its individual components must not result in any hazardous effect on

rotorcraft structure, equipment, or systems necessary for continued safe flight and landing.

(e) Energy storage system installations required for continued safe flight and landing of the rotorcraft must have monitoring features and a means to indicate to the pilot the status of all critical system parameters.

■ 9. Amend § 27.1545 by revising paragraph (b) to read as follows:

§ 27.1545 Airspeed indicator.

* * * * *

(b) The following markings must be made:

(1) A red line—

(i) For rotorcraft other than helicopters, at V_{NE} .

(ii) For helicopters, at V_{NE} (power-on).
(iii) For helicopters, at V_{NE} (power-off). If V_{NE} (power-off) is less than V_{NE} (power-on) and both are simultaneously displayed, the red line at V_{NE} (power-off) must be clearly distinguishable from the red line at V_{NE} (power-on).

(2) [Reserved]

(3) For the caution range, a yellow range.

(4) For the normal operating range, a green or unmarked range.

* * * * *

■ 10. Amend § 27.1549 by revising paragraphs (a) through (d) to read as follows:

§ 27.1549 Powerplant instruments.

* * * * *

(a) Each maximum and, if applicable, minimum safe operating limit must be marked with a red line;

(b) Each normal operating range must be marked as a green or unmarked range;

(c) Each takeoff and precautionary range must be marked with a yellow range or yellow line;

(d) Each engine or rotor range that is restricted because of excessive vibration stresses must be marked with red ranges or red lines; and

* * * * *

■ 11. Amend § 27.1555 by revising paragraph (c)(1) to read as follows:

§ 27.1555 Control markings.

* * * * *

(c) * * *

(1) For fuel systems having no selector controls, the usable fuel capacity of the system must be indicated at the fuel quantity indicator unless it is:

(i) Provided by another system or equipment readily accessible to the pilot; and

(ii) Contained in the limitations section of the rotorcraft flight manual.

* * * * *

■ 12. Amend § 27.1587 by revising paragraph (a)(1) to read as follows:

§ 27.1587 Performance information.

(a) * * *

(1) Enough information to determine the limiting height-velocity envelope.

* * * * *

■ 13. Amend appendix B to part 27 by revising paragraphs VIII introductory text and VIII(b)(5)(i) to read as follows:

Appendix B to Part 27—Airworthiness Criteria for Helicopter Instrument Flight

* * * * *

VIII. *Equipment, systems, and installation.* The basic equipment and installation must comply with §§ 29.1303, 29.1431, and 29.1433, with the following exceptions and additions:

* * * * *

(b) * * *

(5) * * *

(i) For pneumatic systems, only the required flight instruments for the first pilot may be connected to that operating system;

* * * * *

■ 14. In appendix C to part 27 amend section “C27.2 Applicable part 29 sections” by removing “29.1309(b)(2)(i) and (d)—Equipment, systems, and installations” and by revising “29.903(b)(c) and (e)—Engines” to read as follows:

Appendix C to Part 27—Criteria for Category A

* * * * *

29.903 (b) and (c)—Engines.

* * * * *

PART 29—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY ROTORCRAFT

■ 15. The authority citation for part 29 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44702, 44704.

■ 16. Amend § 29.955 by revising paragraph (a)(7) to read as follows:

§ 29.955 Fuel flow.

(a) * * *

(7) The fuel filter required by § 29.997 is blocked to the degree necessary to simulate the accumulation of fuel contamination required to activate the indicator required by § 29.1305(a)(18).

* * * * *

■ 17. Amend § 29.977 by revising paragraphs (a)(1) and (2) to read as follows:

§ 29.977 Fuel tank outlet.

(a) * * *

(1) For reciprocating engine powered rotorcraft, have 8 to 16 meshes per inch; and

(2) For turbine engine powered rotorcraft, prevent the passage of any object that could restrict fuel flow or damage any fuel system component.

* * * * *

■ 18. Amend § 29.1019 by revising paragraph (a)(5) to read as follows:

§ 29.1019 Oil strainer or filter.

(a) * * *

(5) An oil strainer or filter that has no bypass, except one that is installed at an oil tank outlet, must have a means to connect it to the warning system required in § 29.1305(a)(19).

* * * * *

■ 19. Amend § 29.1305 by revising paragraphs (a)(5), (11), and (12) and adding (b)(4) to read as follows:

§ 29.1305 Powerplant instruments.

* * * * *

(a) * * *

(5) A means to indicate manifold pressure for each altitude engine;

* * * * *

(11) A means to indicate the gas temperature for each turbine engine;

(12) A means to indicate the gas producer speed for each turbine engine;

* * * * *

(b) * * *

(4) For each Category A rotorcraft for which OEI Training Mode is requested, a means must be provided to indicate to the pilot the simulation of an engine failure, the annunciation of that simulation, and a representation of the OEI power being provided.

* * * * *

■ 20. Revise § 29.1309 to read as follows:

§ 29.1309 Equipment, systems, and installations.

The equipment, systems, and installations whose functioning is required by this subchapter must be designed and installed to ensure that they perform their intended functions under any foreseeable operating condition. For any item of equipment or system whose failure has not been specifically addressed by another requirement in this chapter, the following requirements also apply:

(a) The design of each item of equipment, system, and installation must be analyzed separately and in relation to other rotorcraft systems and installations to determine and identify any failure that would affect the capability of the rotorcraft or the ability of the crew to perform their duties in all operating conditions.

(b) Each item of equipment, system, and installation must be designed and installed so that:

(1) The occurrence of any catastrophic failure condition is extremely improbable;

(2) The occurrence of any major failure condition is no more than improbable; and

(3) For the occurrence of any other failure condition in between major and catastrophic, the probability of the failure condition must be inversely proportional to its consequences.

(c) A means to alert the crew in the event of a failure must be provided when an unsafe system operating condition exists and to enable them to take corrective action. Systems, controls, and associated monitoring and crew alerting means must be designed to minimize crew errors that could create additional hazards.

(d) Compliance with the requirements of this section must be shown by analysis and, where necessary, by ground, flight, or simulator tests. The analysis must account for:

(1) Possible modes of failure, including malfunctions and misleading data and input from external sources;

(2) The effect of multiple failures and latent failures;

(3) The resulting effects on the rotorcraft and occupants, considering the stage of flight and operating conditions; and

(4) The crew alerting cues and the corrective action required.

■ 21. Amend § 29.1329 by revising the section heading, adding introductory text, and revising paragraphs (a), (d), and (e) to read as follows:

§ 29.1329 Automatic pilot and flight guidance system.

For the purpose of this subpart, an automatic pilot and flight guidance system may consist of an autopilot, flight director, or a component that interacts with stability augmentation or trim.

(a) Each automatic pilot and flight guidance system must be designed so that it:

(1) Can be overpowered by one pilot to allow control of the rotorcraft;

(2) Provides a means to disengage the system, or any malfunctioning component of the system, by each pilot to prevent it from interfering with the control of the rotorcraft; and

(3) Provides a means to indicate to the flight crew its current mode of operation. Selector switch position is not acceptable as a means of indication.

* * * * *

(d) The system must be designed so that, within the range of adjustment

available to the pilot, it cannot produce hazardous loads on the rotorcraft, or create hazardous deviations in the flight path, under any flight condition appropriate to its use or in the event of a malfunction, assuming that corrective action begins within a reasonable period of time.

(e) If the automatic pilot and flight guidance system integrates signals from auxiliary controls or furnishes signals for operation of other equipment, there must be a means to prevent improper operation.

* * * * *

■ 22. Amend § 29.1333 by revising paragraph (a) to read as follows:

§ 29.1333 Instrument systems.

* * * * *

(a) For pneumatic systems, only the required flight instruments for the first pilot may be connected to that operating system.

* * * * *

§ 29.1335 [Removed]

■ 23. Remove § 29.1335.

■ 24. Amend § 29.1351 by adding paragraphs (e) and (f) to read as follows:

§ 29.1351 General.

* * * * *

(e) Electrical equipment, controls, and wiring must be installed so that operation of any one unit or system of units will not adversely affect the simultaneous operation of any other electrical unit or system essential to safe operation.

(f) Cables must be grouped, routed, and spaced so that damage to essential circuits will be minimized if there are faults in heavy current-carrying cables.

■ 25. Revise § 29.1353 to read as follows:

§ 29.1353 Energy storage systems.

Energy storage systems must be designed and installed as follows:

(a) Energy storage systems must provide automatic protective features for any conditions that could prevent continued safe flight and landing.

(b) Energy storage systems must not emit any flammable, explosive, or toxic gases, smoke, or fluids that could accumulate in hazardous quantities within the rotorcraft.

(c) Corrosive fluids or gases that escape from the system must not damage surrounding structures, adjacent equipment, or systems necessary for continued safe flight and landing.

(d) The maximum amount of heat and pressure that can be generated during any operation or under any failure condition of the energy storage system

or its individual components must not result in any hazardous effect on rotorcraft structure, equipment, or systems necessary for continued safe flight and landing.

(e) Energy storage system installations required for continued safe flight and landing of the rotorcraft must have monitoring features and a means to indicate to the pilot the status of all critical system parameters.

■ 26. Amend § 29.1517 by revising the section heading to read as follows:

§ 29.1517 Limiting height-velocity envelope.

* * * * *

■ 27. Amend § 29.1545 by revising paragraph (b) to read as follows:

§ 29.1545 Airspeed indicator.

* * * * *

(b) The following markings must be made:

- (1) A red line:
(i) For rotorcraft other than helicopters, at V_{NE}.
(ii) For helicopters, at V_{NE} (power-on).
(iii) For helicopters, at V_{NE} (power-off). If V_{NE} (power-off) is less than V_{NE} (power-on) and both are simultaneously displayed, the red line at V_{NE} (power-off) must be clearly distinguishable from the red line at V_{NE} (power-on).

- (2) [Reserved]
(3) For the caution range, a yellow range.
(4) For the normal operating range, a green or unmarked range.

* * * * *

■ 28. Amend § 29.1549 by revising paragraphs (a) through (d) to read as follows:

§ 29.1549 Powerplant instruments.

* * * * *

(a) Each maximum and, if applicable, minimum safe operating limit must be marked with a red line;

(b) Each normal operating range must be marked as a green or unmarked range;

(c) Each takeoff and precautionary range must be marked with a yellow range or yellow line;

(d) Each engine or rotor range that is restricted because of excessive vibration stresses must be marked with red ranges or red lines; and

* * * * *

■ 29. Amend § 29.1555 by revising paragraph (c)(1) to read as follows:

§ 29.1555 Control markings.

* * * * *

- (c) * * *
(1) For fuel systems having no selector controls, the usable fuel capacity of the

system must be indicated at the fuel quantity indicator unless it is:

(i) Provided by another system or equipment readily accessible to the pilot; and

(ii) Contained in the limitations section of the rotorcraft flight manual.

* * * * *

■ 30. Amend § 29.1587 by revising paragraph (b)(6) to read as follows:

§ 29.1587 Performance information.

* * * * *

(b) * * *

(6) The height-velocity envelope except for rotorcraft incorporating this as an operating limitation;

* * * * *

■ 31. Amend appendix B to part 29 by revising paragraphs VIII introductory text and VIII(b)(5)(i) to read as follows:

Appendix B to Part 29—Airworthiness Criteria for Helicopter Instrument Flight

* * * * *

VIII. Equipment, systems, and installation. The basic equipment and installation must comply with §§ 29.1303, 29.1431, and 29.1433, with the following exceptions and additions:

* * * * *

(b) * * *

(5) * * *

(i) For pneumatic systems, only the required flight instruments for the first pilot may be connected to that operating system;

* * * * *

Issued in Washington, DC, on or about February 6, 2023.

Billy Nolen,

Acting Administrator.

[FR Doc. 2023-02771 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2022-1411; Project Identifier MCAI-2022-00912-T; Amendment 39-22320; AD 2023-02-13]

RIN 2120-AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2020-21-19, which applied to certain Dassault Aviation Model FALCON 900EX airplanes. AD 2020-21-19 required

revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD continues to require the actions in AD 2020–21–19, and also requires revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations; as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 17, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 17, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of December 7, 2020 (85 FR 69142, November 2, 2020).

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2022–1411; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2022–1411.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198;

telephone 206–231–3226; email tom.rodriguez@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2020–21–19, Amendment 39–21292 (85 FR 69142, November 2, 2020) (AD 2020–21–19). AD 2020–21–19 applied to certain Dassault Aviation Model FALCON 900EX airplanes. AD 2020–21–19 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2020–21–19 to address reduced structural integrity of the airplane. AD 2020–21–19 specifies that accomplishing the actions required by paragraph (g) or (i) of that AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) for Dassault Aviation Model FALCON 900EX airplanes, serial numbers 1 through 96 inclusive, and serial numbers 98 through 119 inclusive. This AD therefore continues to allow that terminating action.

The NPRM published in the **Federal Register** on November 10, 2022 (87 FR 67849). The NPRM was prompted by AD 2022–0144, dated July 11, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0144) (referred to after this as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2022–1411.

In the NPRM, the FAA proposed to continue to require the actions in AD 2020–21–19 and to require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in EASA AD 2022–0144.

The FAA is issuing this AD to address reduced structural integrity of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another

country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

EASA AD 2022–0144 specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD also requires EASA AD 2020–0116, dated May 20, 2020, which the Director of the Federal Register approved for incorporation by reference as of December 7, 2020 (85 FR 69142, November 2, 2020).

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 88 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2020–21–19 to be \$7,650 (90 work-hours × \$85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be \$7,650 (90 work-hours × \$85 per work-hour).

Authority for This Rulemaking

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

detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by:
- a. Removing Airworthiness Directive 2020–21–19, Amendment 39–21292 (85 FR 69142, November 2, 2020); and
 - b. Adding the following new airworthiness directive:

2023–02–13 Dassault Aviation:

Amendment 39–22320; Docket No. FAA–2022–1411; Project Identifier MCAI–2022–00912–T.

(a) Effective Date

This airworthiness directive (AD) is effective March 17, 2023.

(b) Affected ADs

(1) This AD replaces AD 2020–21–19, Amendment 39–21292 (85 FR 69142, November 2, 2020) (AD 2020–21–19).

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 900EX airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022–0144, dated July 11, 2022 (EASA AD 2022–0144).

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With a New Terminating Action

This paragraph restates the requirements of paragraph (i) of AD 2020–21–19, with a new terminating action. Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0116, dated May 20, 2020 (EASA AD 2020–0116). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2020–0116, With No Changes

This paragraph restates the exceptions specified in paragraph (j) of AD 2020–21–10, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0116 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2020–0116 specifies revising "the approved AMP" within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the "limitations, tasks and associated thresholds and intervals" specified in paragraph (3) of EASA AD 2020–0116 within 90 days after December 7, 2020 (the effective date of AD 2020–21–19).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0116 is at the applicable "associated thresholds" specified in paragraph (3) of EASA AD 2020–0116, or

within 90 days after December 7, 2020 (the effective date of AD 2020–21–19), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2020–0116 do not apply to this AD.

(5) The "Remarks" section of EASA AD 2020–0116 does not apply to this AD.

(i) Retained Restrictions on Alternative Actions and Intervals, With a New Exception

This paragraph restates the requirements of paragraph (k) of AD 2020–21–19, with a new exception. Except as required by paragraph (j) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections) and intervals are allowed unless they are approved as specified in the provisions of the "Ref. Publications" section of EASA AD 2020–0116.

(j) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0144. Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2022–0144

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0144 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2022–0144 specifies revising "the approved AMP" within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0144 is at the applicable "associated thresholds" as incorporated by the requirements of paragraph (3) of EASA AD 2022–0144, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0144 do not apply to this AD.

(5) The "Remarks" section of EASA AD 2022–0144 does not apply to this AD.

(l) New Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (e.g., inspections) and intervals are allowed unless they are approved as specified in the provisions of the "Ref. Publications" section of EASA AD 2022–0144.

(m) Terminating Action for Certain Actions in AD 2010–26–05

Accomplishing the actions required by paragraph (g) or (j) of this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, for Dassault Aviation Model FALCON 900EX airplanes, serial numbers 1 through 96

inclusive, and serial numbers 98 through 119 inclusive only.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(o) Additional Information

For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206-231-3226; email tom.rodriguez@faa.gov.

(p) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on March 17, 2023.

(i) European Union Aviation Safety Agency (EASA) AD 2022-0144, dated July 11, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on December 7, 2020 (85 FR 69142, November 2, 2020).

(i) European Union Aviation Safety Agency (EASA) AD 2020-0116, dated May 20, 2020.

(ii) [Reserved]

(5) For EASA ADs 2022-0144 and 2020-0116, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADS@easa.europa.eu; website easa.europa.eu. You may find these EASA ADs on the EASA website at ad.easa.europa.eu.

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

(7) You may view this material that is incorporated by reference at the National

Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on January 25, 2023.

Christina Underwood,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-02782 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2022-0684; Project Identifier MCAI-2021-01204-T; Amendment 39-22287; AD 2022-27-02]

RIN 2120-AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD-700-2A12 airplanes. This AD was prompted by a report of a lateral offset observed on the head-up display (HUD) of several airplanes between the synthetic vision system (SVS) and actual runway due to mechanical misalignment of the HUD during manufacturing and assembly. This AD requires revising the existing airplane flight manual (AFM) to prohibit steep approach landing (SAL) and enhanced flight vision system (EFVS) operations. This AD also requires calibrating the HUD. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 17, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of March 17, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA-2022-0684; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of

Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 1-514-855-2999; email ac.yul@aero.bombardier.com; website bombardier.com.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at regulations.gov under Docket No. FAA-2022-0684.

FOR FURTHER INFORMATION CONTACT:

Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7347; email 9-avs-nyaco-cos@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc., Model BD-700-2A12 airplanes. The NPRM published in the **Federal Register** on June 21, 2022 (87 FR 36783). The NPRM was prompted by AD CF-2021-36, dated November 1, 2021, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that during production activities, a lateral offset was observed on the HUD of several airplanes between the SVS and actual runway. An investigation determined the cause of the offset to be mechanical misalignment of the HUD during manufacturing and assembly. This offset, if not corrected, will create an incorrect airplane reference display on the HUD, which could lead to excessive deviation during landing. This could particularly affect SAL or EFVS operations.

In the NPRM, the FAA proposed to require revising the existing AFM to prohibit SAL and EFVS operations, and calibrating the HUD. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA-2022-0684.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from Executive Jet Management, Inc. (EJM). The following presents the comment received on the NPRM and the FAA's response.

Request To Provide Means To Allow Later-Approved Service Information

EJM noted that ADs for Bombardier airplanes often involve approval for alternative methods of compliance (AMOCs) because the required AFMs or other service information becomes outdated before the AD becomes effective. Because of the increasing number of Bombardier ADs that require these AMOCs, EJM expressed concern over the burden associated with the AMOC process. EJM recognized that the FAA cannot allow the future use of service information that is not available when the AD is published. EJM noted that an AD issued by the European Union Aviation Safety Agency (EASA) typically states that the use of later-approved revisions of the required service information is acceptable for compliance, and that the corresponding FAA AD refers to that EASA AD for the requirements. EJM requested a similar process for ADs for Bombardier airplanes, adding that this process would streamline their workload and enhance safety.

The FAA partially agrees with the request. The FAA agrees with referencing the latest AFM revisions in this AD. Certain sections of Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1 cited in the NPRM have been revised, as described under "Related Service Information under 1 CFR part 51" in this final rule. The AFM sections are modified to revise calculations for certain performance data, and therefore do not add any additional work to the proposed requirements of the NPRM. The FAA revised paragraphs (g)(1) through (3) of this AD to require the revised service information. This AD also provides credit for use of the documents that were identified in the NPRM, as specified in revised paragraph (i) of this AD.

The FAA disagrees with adding a statement that allows using later-approved revisions of the AFM sections specified in the Related Service Information under 1 CFR part 51 section of this AD, as the FAA would need to determine their effect to the AD. Further, the FAA is required by Office of the Federal Register (OFR) regulations for approval of materials incorporated

by reference, as specified in 1 CFR 51.1(f), to either publish the service document contents as part of the actual AD language; or submit the service document to the OFR for approval as referenced material, in which case the FAA may only refer to such material in the text of an AD. However, it is not necessary to include a statement in this final rule that allows the use of later-approved revisions of the AFM. Paragraph (g) of this AD requires revising the existing AFM to "include the information in" the specified sections of the AFM. As long as the information included in the AFM is identical to "the information in" those AFM sections, operators may use means other than the specified AFM revisions to comply with the requirement.

Regarding the IBR the MCAI process, the FAA must have permission from the design approval holder to post in the AD docket the service information required for compliance with the MCAI. At this time, the FAA has not received Bombardier's permission for the "IBR the MCAI" process. Without this permission, the FAA cannot IBR the MCAI.

Additional Changes Made to This AD

The FAA has revised paragraph (h) of this AD to allow the HUD calibration to be done using Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, or Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021; and Bombardier Service Bulletin 700-34-7523, Revision 01, dated December 8, 2021; as applicable. This change more closely reflects the revisions specified in paragraph B. of the MCAI. The FAA has also removed paragraph (i)(1)(iv) of this AD (paragraph (i)(4) of the proposed AD), and reidentified the subsequent paragraph accordingly, because Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, is now specified in paragraph (h) of this AD. Further, paragraphs (i)(1)(i) through (iv) have been clarified to specify which documents are and are not incorporated by reference in this AD.

Conclusion

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

issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

Bombardier has issued the following documents to prohibit SAL and EFVS operations until the HUD has been calibrated.

- Section 6., Service Bulletins, Chapter 1—Introduction, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.
- Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.
- Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

(For obtaining this material in the Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, use Document Identification No. GL 7500 AFM.)

Bombardier has issued the following documents, which specify procedures for calibrating the HUD (and second HUD if installed). The procedures include an inspection of the HUD mounting brackets and sill beams for damage and contamination (*e.g.*, drill shavings and adhesive) of the mating surfaces and injection holes, an inspection for voids in the structural adhesive, and applicable corrective actions. Corrective actions include replacing damaged brackets and backfilling voids with structural adhesive. These documents are distinct since they apply to different airplane configurations.

- Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021.
- Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021.
- Bombardier Service Bulletin 700-34-7523, Revision 01, dated December 8, 2021.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

Earlier revisions of Bombardier Service Bulletins 700–34–7521 and 700–34–7523 included a typographical error on the metric values on the “External Target Board” table. This error was corrected in Bombardier Service Bulletin 700–34–7521, Revision 03, dated July 27, 2021; Bombardier Service Bulletin 700–34–7521, Revision 04, dated December 6, 2021; and Bombardier Service Bulletin 700–34–7523, Revision 01, dated December 8,

2021. This error is further described in the Retroactive Action section in these service bulletins. The FAA has determined that the earlier revisions are acceptable for compliance with the requirements of this AD under certain conditions in their entirety if imperial values were used. However, if the metric values specified in the earlier revisions were used, the HUD calibration is not considered completed for the purposes of Supplement 7—Enhanced Flight Vision System (EFVS) Operations, and Supplement 20—Steep

Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, of Chapter 7—Supplements, of the Bombardier Global 7500 AFM, Publication No. CSP 700–7000–1, until retroactive actions are also done as specified in paragraph (i) of this AD.

Costs of Compliance

The FAA estimates that this AD affects 40 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
HUD calibration	39 work-hours (for 36 airplanes with 1 HUD) or 108 work-hours (for 4 airplanes with 2 HUDs) × \$85 per hour = \$3,315 (1 HUD) or \$9,180 (2 HUDs).	\$7,400 per HUD	\$10,715 (1 HUD) or \$23,980 (2 HUDs).	\$385,740 (36 airplanes with 1 HUD); \$95,920 (4 airplanes with 2 HUDs).
AFM revision	1 work-hour × \$85 per hour	\$0	\$85	\$3,400.

The FAA estimates that replacement brackets would cost up to \$1,200 (per HUD) if required for any on-condition corrective actions in this AD. The FAA has received no definitive data on which to base the work-hour estimates for this replacement. The FAA has no way of determining the number of airplanes that might need this on-condition action.

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

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. The time for public reporting for this collection of information, including reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, is provided in the Costs of Compliance section already described. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this

burden, to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2022–27–02 Bombardier, Inc.: Amendment 39–22287; Docket No. FAA–2022–0684; Project Identifier MCAI–2021–01204–T.

(a) Effective Date

This airworthiness directive (AD) is effective March 17, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD-700-2A12 airplanes, certificated in any category, serial numbers 70006 through 70084 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by a report of a lateral offset observed on the head-up display (HUD) of several airplanes between the synthetic vision system (SVS) and actual runway. The FAA is issuing this AD to address this offset, which could create an incorrect aircraft reference display on the HUD, and lead to excessive deviation during landing, particularly affecting steep approach landing (SAL) or enhanced flight vision system (EFVS) operations.

(f) Compliance

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

(g) Revision of the Existing Airplane Flight Manual (AFM)

Within 30 days after the effective date of this AD, revise the existing AFM to include the information in the sections of the AFM specified in paragraphs (g)(1) through (3) of this AD.

(1) Section 6., Service Bulletins, Chapter 1—Introduction, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

Note 1 to paragraph (g)(1): For obtaining the sections and supplements of the Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, specified in paragraphs (g)(1) through (3) of this AD, use Document Identification No. GL 7500 AFM.

(2) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

(3) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

(h) Head-Up Display (HUD) Calibration

Within 27 months after the effective date of this AD, calibrate the HUD and second HUD (if installed), including a general visual inspection of the HUD mounting brackets and sill beams for damage and contamination (e.g., drill shavings and adhesive) of the mating surfaces and injection holes, a general visual inspection for voids in the structural adhesive, and applicable corrective actions, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, or Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021; and Bombardier Service Bulletin 700-34-7523, Revision 01, dated December 8, 2021; as applicable. All corrective actions must be done before further flight.

(i) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using the service information identified in, and meeting the applicable conditions specified in, paragraphs (i)(1)(i) through (iv) of this AD.

(i) Credit is allowed for Bombardier Service Bulletin 700-34-7521, dated April 1, 2021 (which is not incorporated by reference in this AD), if the retroactive actions identified in Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, or Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021, (which are incorporated by reference in this AD) are done within 27 months after the effective date of this AD.

(ii) Credit is allowed for Bombardier Service Bulletin 700-34-7521, Revision 01, dated April 30, 2021 (which is not incorporated by reference in this AD), if the retroactive actions identified in Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, or Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021, (which are incorporated by reference in this AD) are done within 27 months after the effective date of this AD.

(iii) Credit is allowed for Bombardier Service Bulletin 700-34-7521, Revision 02, dated July 12, 2021 (which is not incorporated by reference in this AD), if the retroactive actions identified in Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021, or Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021 (which are incorporated by reference in this AD) are done within 27 months after the effective date of this AD.

(iv) Credit is allowed for Bombardier Service Bulletin 700-34-7523, dated April 1, 2021 (which is not incorporated by reference in this AD), if the retroactive actions identified in Bombardier Service Bulletin 700-34-7523, Revision 01, dated December 8, 2021 (which is incorporated by reference in this AD), are done within 27 months after the effective date of this AD.

(2) This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (i)(2)(i) through (xii) of this AD, as applicable.

Note 2 to paragraph (i)(2): For obtaining the sections and supplements of the Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, specified in paragraphs (i)(2)(i) through (xii) of this AD, use Document Identification No. GL 7500 AFM.

(i) Section 6., Service Bulletins, Chapter 01—Introduction, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 14, dated October 21, 2021.

(ii) Section 6., Service Bulletins, Chapter 1—Introduction, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 15, dated February 3, 2022.

(iii) Section 6., Service Bulletins, Chapter 1—Introduction, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 16, dated April 26, 2022.

(iv) Section 6., Service Bulletins, Chapter 1—Introduction, Bombardier Global 7500

AFM, Publication No. CSP 700-7000-1, Revision 17, dated July 14, 2022.

(v) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 14, dated October 21, 2021.

(vi) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 15, dated February 3, 2022.

(vii) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 16, dated April 26, 2022.

(viii) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 17, dated July 14, 2022.

(ix) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 14, dated October 21, 2021.

(x) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 15, dated February 3, 2022.

(xi) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 16, dated April 26, 2022.

(xii) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 17, dated July 14, 2022.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7300. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval

Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Additional Information

(1) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7347; email 9-avs-nyacos@faa.gov.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (4) of this AD.

(l) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 700-34-7521, Revision 03, dated July 27, 2021.

(ii) Bombardier Service Bulletin 700-34-7521, Revision 04, dated December 6, 2021.

(iii) Bombardier Service Bulletin 700-34-7523, Revision 01, dated December 8, 2021.

(iv) Section 6., Service Bulletins, Chapter 01—Introduction, Bombardier Global 7500 Airplane Flight Manual (AFM), Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

Note 3 to paragraph (l)(2)(iv): For obtaining the section and supplements of the Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, specified in paragraphs (l)(2)(iv) through (vi) of this AD, use Document Identification No. GL 7500 AFM.

(v) Supplement 7—Enhanced Flight Vision System (EFVS) Operations, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

(vi) Supplement 20—Steep Approaches with Published Glidepath Angles from 4.5 to 5.5 Degrees, Chapter 7—Supplements, Bombardier Global 7500 AFM, Publication No. CSP 700-7000-1, Revision 18, dated August 18, 2022.

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 1-514-855-2999; email ac.yul@aero.bombardier.com; website bombardier.com.

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

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

Issued on December 20, 2022.

Christina Underwood,
Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-02781 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2022-1313; Project Identifier MCAI-2021-01418-T; Amendment 39-22317; AD 2023-02-10]

RIN 2120-AA64

Airworthiness Directives; BAE Systems (Operations) Limited Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 99-25-11 for certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146-RJ series airplanes. AD 99-25-11 required repetitive inspections for cracks along the face of the retraction attachment boss in the nose landing gear (NLG) sidewall; and corrective action, if necessary. This AD was prompted by a report of a crack found on the left-hand sidewall well on the NLG, and by the determination that additional airplanes are subject to the identified unsafe condition. This AD continues to require the actions in AD 99-25-11, and expands the applicability. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective March 17, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of March 17, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of February 1, 2000 (64 FR 72522, December 28, 1999).

ADDRESSES:

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA-2022-1313; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of

Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; phone: +44 1292 675207; fax: +44 1292 675704; email: RAPublications@baesystems.com; website: regional-services.com.

- You may view this service information at the Airworthiness Products Section, Operational Safety Branch, FAA, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call (206) 231-3195. It is also available at regulations.gov under Docket No. FAA-2022-1313.

FOR FURTHER INFORMATION CONTACT:

Todd Thompson, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: (206) 231-3228; email: Todd.Thompson@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 99-25-11, Amendment 39-11454 (64 FR 72522, December 28, 1999) (AD 99-25-11). AD 99-25-11 applied to certain BAE Systems (Operations) Limited Model BAe 146 and Avro 146-RJ series airplanes. AD 99-25-11 required repetitive eddy current inspections for cracks along the face of the retraction attachment boss in the NLG sidewall; and corrective action, if necessary. AD 99-25-11 was prompted by issuance of MCAI by a foreign civil aviation authority. The FAA issued AD 99-25-11 to address cracking along the face of the retraction attachment boss in the NLG sidewall, which could result in premature extension of the NLG or result in depressurization of the airplane.

FAA AD 99-25-11 corresponds to British AD 015-10-98.

The NPRM published in the **Federal Register** on October 31, 2022 (87 FR 65541). The NPRM was prompted by AD G-2021-0016R1, dated February 18, 2022 (U.K. CAA AD G-2021-0016R1) (also referred as the MCAI), issued by the Civil Aviation Authority, which is the aviation authority for the United Kingdom. U.K. CAA AD G-2021-0016R1 superseded European Union

Aviation Safety Agency (EASA) AD 2007–0305, dated December 20, 2007, which superseded British AD 015–10–98. The FAA did not issue an AD corresponding to EASA AD 2007–0305. The MCAI states that evidence of cracking was found on several in-service airplanes in the bore and along the face of the retraction jack attachment boss on the left-hand NLG sidewall. Undetected cracking of the NLG sidewall could lead to explosive decompression of the fuselage near to the flightcrew (since the NLG sidewall forms part of the nose fuselage pressure shell), leading to significant structural damage to the airframe and/or incapacitation of the flightcrew.

The effectivity of each revision of Inspection Service Bulletin ISB.53–152 before Revision 8 was limited to airplanes that were not modified by torque tightening modification HCM01641A in production. BAE Systems (Operations) Limited has received reports of two airplanes with cracks at the NLG retraction jack attachment boss; those airplanes were post-modification HCM01641A and as such were not subject to the requirements of FAA AD 99–25–11. As a result of new findings and further analysis, BAE Systems (Operations) Limited issued Revision 8 of ISB.53–152, dated February 19, 2018, which extends the effectivity to all BAe 146 and Avro 146–RJ airplanes, except for airplanes post-modification HCM20011A, HCM20012A,

HCM20013A, HCM20313A, HCM20314A, or HMC20315A.

Revisions prior to Revision 8 of ISB.53–152 included provisions for continued operation with certain crack conditions, which was also allowed in FAA AD 99–25–11 if approved as specified in paragraph (h)(1) of this AD. The U.K. CAA and the FAA have determined that continued operation with known cracks is not acceptable. Therefore, this AD does not allow flight with cracks.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1313.

In the NPRM, the FAA proposed to continue to require the actions in AD 99–25–11 and expand the applicability.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018. This service information describes procedures for repetitive eddy current inspections for cracking in the bore and along the face of the retraction attachment boss in the left-hand NLG sidewall, and repair or replacement of a cracked sidewall.

The FAA also reviewed British Aerospace Service Bulletin SB.53–152, dated October 8, 1998, which the Director of the Federal Register approved for incorporation by reference as of February 1, 2000 (64 FR 72522, December 28, 1999).

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 20 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 99–25–11.	1 work-hour × \$85 per hour = \$85 per inspection cycle.	\$0	\$85 per inspection cycle	\$1,700 per inspection cycle.
New proposed actions	2 work-hours × \$85 per hour = \$170.	0	170 per inspection cycle	3,400 per inspection cycle.

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA

with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

power and responsibilities among the various levels of government.

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:
 ■ a. Removing Airworthiness Directive 99–25–11, Amendment 39–11454 (64 FR 72522, December 28, 1999); and
 ■ b. Adding the following new airworthiness directive:

2023–02–10 BAE Systems (Operations)

Limited: Amendment 39–22317; Docket No. FAA–2022–1313; Project Identifier MCAI–2021–01418–T.

(a) Effective Date

This airworthiness directive (AD) is effective March 17, 2023.

(b) Affected ADs

This AD replaces AD 99–25–11, Amendment 39–11454 (64 FR 72522, December 28, 1999) (AD 99–25–11).

(c) Applicability

This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A airplanes; and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; certificated in any category, without modification HCM20011A, HCM20012A, HCM20013A, HCM20313A, HCM20314A, or HMC20315A.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a report of a crack found on the left-hand sidewall well on the nose landing gear (NLG), and by the determination that additional airplanes are subject to the identified unsafe condition. We are issuing this AD to address cracking along the face of the retraction attachment boss in the NLG sidewall, which could result in premature extension of the NLG or result in depressurization of the airplane.

(f) Compliance

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

(g) Retained Repetitive Inspections, With New Terminating Action

This paragraph restates the requirements of paragraph (a) of AD 99–25–11, with new terminating action. For airplanes listed in British Aerospace Service Bulletin SB.53–152, dated October 8, 1998: Prior to the accumulation of 8,000 total flight cycles, or within 200 flight cycles after February 1,

2000 (the effective date of AD 99–25–11), whichever occurs later, perform an eddy current inspection to detect cracking along the face of the retraction attachment boss in the NLG sidewall, in accordance with British Aerospace Service Bulletin SB.53–152, dated October 8, 1998. Thereafter, repeat the eddy current inspection at intervals not to exceed 2,600 flight cycles, except as provided in paragraph (j) of this AD.

(h) Retained Repair, With Revised Repair Approval

This paragraph restates the requirements of paragraph (b) of AD 99–25–11, with revised repair approval.

(1) If any crack is detected before the effective date of this AD, during any inspection required by paragraph (g) of this AD, prior to further flight, repair or re-inspect in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Civil Aviation Authority (or its delegated agent). For a repair method to be approved by the Manager, International Branch, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

(2) If any crack is detected on or after the effective date of this AD during any inspection required by paragraph (g) of this AD: Before further flight, either repair using a method approved by the Manager, International Validation Branch, FAA; or the U.K. Civil Aviation Authority (U.K. CAA); or BAE Systems (Operations) Limited's U.K. CAA Design Organization Approval (DOA); or do the replacement specified in paragraph (i) of this AD. If approved by the DOA, the approval must include the DOA-authorized signature.

(i) New Requirements: Repetitive Inspections and Corrective Actions

(1) *For all airplanes:* Before the accumulation of 7,375 total flight cycles, or within 625 flight cycles after the effective date of this AD, or within 2,600 flight cycles since the most recent inspection required by paragraph (g) of this AD, whichever occurs latest, do an eddy current inspection for cracking in the bore and along the face of the retraction jack attachment boss in the left-hand NLG sidewall, in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018. Before further flight, repair or replace any cracked sidewall, as applicable, in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018. Repeat the inspection thereafter at intervals not to exceed 6,700 flight cycles, except as provided in paragraphs (i)(1)(i) and (ii) of this AD.

(i) For airplanes on which a repair identified for Option A, D, or E in Table 1 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018, has been done: Inspect within 20,000 flight cycles after the repair, and repeat thereafter at intervals not to exceed 4,000 flight cycles.

(ii) For airplanes on which the replacement with part number HC537L0002–000, –002, or

–004 identified in Option F in Table 1 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–52, Revision 8, dated February 19, 2018, has been done: Inspect within 20,000 flight cycles after the repair, and repeat thereafter at intervals not to exceed 4,000 flight cycles.

(2) For airplanes on which re-inspection of cracks was allowed as specified in paragraph (h)(1) of this AD: Within 2,600 flight cycles after the most recent inspection required by paragraph (g) of this AD, repair or replace any cracked sidewall, as applicable, in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018.

(j) Terminating Action

(1) Accomplishment of the initial inspection and applicable corrective actions required by paragraph (i) of this AD terminates the repetitive inspection requirements of paragraph (g) of this AD.

(2) Accomplishment of the action identified for Option B or C in Table 1 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018, terminates the repetitive inspection requirements of paragraphs (g) and (i)(1) of this AD.

(3) Accomplishment of the replacement with part number HC537L0002–006 identified for Option F in Table 1 of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018, terminates the repetitive inspection requirements of paragraphs (g) and (i)(1) of this AD.

(k) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraphs (i) and (j)(2) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (k)(1)(i) and (ii) of this AD.

(i) BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 6, dated March 5, 2014.

(ii) BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 7, dated May 7, 2014.

(2) This paragraph provides credit for the actions required by paragraph (j)(3) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (k)(2)(i) and (ii) of this AD, provided the sidewall replacement for Option F was part number HC537L0002–006.

(i) BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 6, dated March 5, 2014.

(ii) BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 7, dated May 7, 2014.

(l) No Reporting Requirement

Although BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–152, Revision 8, dated February 19, 2018, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(m) Other FAA AD Provisions

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (n)(2) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer*: As of the effective date of this AD, for any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or the U.K. CAA; or BAE Systems (Operations) Limited's U.K. CAA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Additional Information

(1) Refer to Civil Aviation Authority (United Kingdom) AD G-2021-0016, dated December 17, 2021, for related information. This U.K. CAA AD may be found in the AD docket at regulations.gov under Docket No. FAA-2022-1313.

(2) For more information about this AD, contact Todd Thompson, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: (206) 231-3228; email: Todd.Thompson@faa.gov.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (o)(5) and (6) of this AD.

(o) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on March 17, 2023.

(i) BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53-152, Revision 8, dated February 19, 2018.

(ii) [Reserved]

(4) The following service information was approved for IBR on February 1, 2000 (64 FR 72522, December 28, 1999).

(i) British Aerospace Service Bulletin SB.53-152, dated October 8, 1998.

(ii) [Reserved]

(5) For service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; phone: +44 1292 675207; fax: +44 1292 675704; email: RAPublications@

baesystems.com; website regional-services.com.

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

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

Issued on January 24, 2023.

Christina Underwood,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-02783 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-13-P

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

[Docket No. FAA-2022-1262; Airspace Docket No. 22-ASO-21]

RIN 2120-AA66

Establishment of Class E Airspace; Union Springs, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface at Franklin Field Airport, Union Springs, AL, to accommodate area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving this airport.

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, contact the Rules and Regulations 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 establishes airspace in Union Springs, AL, to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA-2022-1262 in the **Federal Register** (87 FR 65180, October 28, 2022) to establish Class E airspace extending upward from 700 feet above the surface at Franklin Field Airport, Union Springs, AL, to accommodate RNAV GPS standard instrument approach procedures (SIAPs) serving this airport.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. One comment was received supporting this action.

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 D and E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates will be published subsequently in the next update to FAA Order JO 7400.11. 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 establishing Class E airspace extending upward from 700 feet above the surface within an 8.1-mile radius of Franklin Field Airport, Union Springs, AL, to accommodate RNAV GPS standard instrument approach procedures (SIAPs) serving this airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

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 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.

Lists 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 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.

* * * * *

ASO AL E5 Union Springs, AL [Established]

Franklin Field Airport, AL
(Lat. 32°10'03" N, long. 85°48'40" W)

That airspace extending upward from 700 feet above the surface within an 8.1-mile radius of Franklin Field Airport.

Issued in College Park, Georgia, on February 3, 2023.

Andree C. Davis,

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

[FR Doc. 2023–02842 Filed 2–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2023–0307; Airspace Docket No. 22–AAL–78]

RIN 2120–AA66

Amendment of Restricted Areas R–2204 Oliktok Point High and R–2204 Oliktok Point Low; AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the using agency listed for restricted areas R–2204 Oliktok Point High, AK, and R–2204 Oliktok Point Low, AK, from “Department of Energy, Office of Science, Washington DC” to “Department of Energy, Arctic Energy Office, Washington, DC.” This action does not change any boundaries, altitudes, times of designation, or activities conducted within the restricted areas.

DATES: Effective date 0901 UTC, April 20, 2023.

FOR FURTHER INFORMATION CONTACT: Steven Roff, 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 updates the using agency listed for restricted areas R–2204 Oliktok Point High, AK, and R–2204 Oliktok Point Low, AK.

Background

The U.S. Department of Energy (DOE) requested that the Federal Aviation Administration amend the descriptions of restricted areas R–2204 Oliktok Point High, AK, and R–2204 Oliktok Point Low, AK, by changing the using agency listed for each from “Department of Energy, Office of Science, Washington, DC” to “Department of Energy, Arctic Energy Office, Washington, DC”. The request is the result of the DOE re-establishing the Arctic Energy Office with an office in Fairbanks, AK, and determining it to be in the best interest of the DOE that the Arctic Energy Office undertake the using agency responsibilities for the R–2204 Oliktok Point High and R–2204 Oliktok Point Low restricted areas. Both DOE offices, the Office of Science, Biological and Environmental Research and the Arctic Energy Office, support the using agency change.

The Rule

This action amends 14 CFR part 73 by changing the using agency name listed for restricted areas R–2204 Oliktok Point High and R–2204 Oliktok Point Low, AK, from “Department of Energy, Office of Science, Washington DC” to “Department of Energy, Arctic Energy Office, Washington, DC”. This action is necessary in order to reflect the current organization tasked with using agency responsibilities for the restricted areas.

This is an administrative change that does not affect the boundaries, designated altitudes, times of designation, or activities conducted within restricted areas R–2204 Oliktok Point High and R–2204 Oliktok Point

Low, AK; therefore, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

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 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 of amending the using agency information for R-2204 Oliktok Point High and R-2204 Oliktok Point Low, AK, 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 5-6.5d, which categorically excludes from further environmental impact review the modification of the technical description of special use airspace (SUA) that does not alter the dimensions, altitudes, or times of designation of the airspace (such as changes in designation of the controlling or using agency, or correction of typographical errors). This airspace action is an administrative change to the description of restricted areas R-2204 Oliktok Point High and R-2204 Oliktok Point Low, AK, to update the using agency name. It does not alter the restricted area dimensions, designated altitudes, times of designation, or use of the airspace. Therefore, this airspace action is not expected to result in any significant

environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5-2 regarding Extraordinary Circumstances, this action has been reviewed 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.

Lists of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

- 1. The authority citation for 14 CFR part 73 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.

§ 73.22 [Amended]

- 2. Section 73.22 is amended as follows:

* * * * *

R-2204 Oliktok Point High, AK [Amended]

By removing the current using agency and adding the following in its place:

Using Agency. U.S. Department of Energy, Arctic Energy Office, Washington, DC.

* * * * *

R-2204 Oliktok Point Low, AK [Amended]

By removing the current using agency and adding the following in its place:

Using Agency. U.S. Department of Energy, Arctic Energy Office, Washington, DC.

* * * * *

Issued in Washington, DC, on February 6, 2023.

Brian Konie,

Acting Manager, Airspace Rules and Regulations.

[FR Doc. 2023-02822 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-13-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

Reporting, Recordkeeping, Daily Trading Records, and Swap Documentation Requirements for Swap Dealers and Major Swap Participants; Corrections

AGENCY: Commodity Futures Trading Commission.

ACTION: Correcting amendments.

SUMMARY: The Commission is making correcting amendments in its regulations concerning swap documentation, swap reporting, and daily trading records requirements to conform those regulations to previous amendments of other regulations, and to correct other minor errors. These correcting amendments do not substantively affect any Commission requirements.

DATES: Effective on March 13, 2023.

FOR FURTHER INFORMATION CONTACT: Matthew Jones, Attorney Advisor, (202) 418-6710, majones@cftc.gov, or Philip Newsom, Attorney Advisor; pnewsom@cftc.gov, Market Participants Division, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION: In September 2020, the Commodity Futures Trading Commission (Commission) adopted final rules to revise, among other things, part 45 of its regulations on swap data recordkeeping and reporting requirements for swap data repositories, derivatives clearing organizations, swap execution facilities, designated contract markets, swap dealers (SDs), major swap participants (MSPs), and swap counterparties that are neither SDs nor MSPs.¹ Part 23 of the Commission’s regulations contains multiple cross-references to, and relies on terms defined in, part 45 of the Commission’s regulations. The Commission has identified the following errors in part 23 relating to part 45 as well as certain other similar errors, and is correcting them as shown in the regulatory text in this **Federal Register** document.

In accordance with the Administrative Procedure Act, the Commission has good cause to find that it is unnecessary to provide the public

¹ Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020) (the “2020 Final Rule”) (updating the Commission regulations in part 45 in addition to parts 46 and 49).

prior notice and an opportunity to comment on these technical amendments.² As more fully described below, the amendments make only typographical and clerical changes that are necessary to avoid confusion or mistakes. There is no substantive change on which the public could comment. As the revisions to the Commission's regulations in this rulemaking are only technical in nature and will not cause any party to undertake any new obligations, the Commission has determined to publish this rulemaking without prior notice and comment. Similarly, because the Commission is not promulgating, changing, or deleting any regulatory requirement, consideration of costs and benefits and consideration of the public interest to be protected by the antitrust laws are not required by the Commodity Exchange Act.³ Finally, these correcting amendments do not implicate any requirements under the Paperwork Reduction Act of 1995.⁴

A. Correcting Cross-References

Commission regulation § 23.202 (Daily trading records)⁵ erroneously cross-references Commission regulations § 45.4(a), (b), and (c). The Commission is correcting the cross-references to Commission regulations §§ 45.5, 45.6, and 45.7, respectively.

Commission regulation § 23.205(a) (Real-time public reporting of swap transaction and pricing data)⁶ erroneously cross-references the real-time public "recording" requirements in part 43 of the Commission's regulations. The Commission is correcting the reference to replace the word "recording" with the word "reporting."

B. Updating the Term "Unique Transaction Identifier"

The Commission is replacing the term unique swap identifier (USI) with the term unique transaction identifier (UTI). The Commission previously updated part 45 to make this change,⁷ but did not make the necessary conforming changes in part 23 where it is referenced.⁸

C. Updating the Term "Legal Entity Identifier"

The Commission is updating and conforming its references to a

counterparty's identifier to clarify that a counterparty must provide its legal entity identifier (LEI) or, when applicable, an alternate identifier.⁹ Part 23 does not consistently use the term LEI (in one instance using the term unique counterparty identifier instead),¹⁰ and does not clearly address the full set of circumstances when a counterparty may use an alternate identifier in lieu of an LEI, but rather only provides for the use of an alternate identifier where the counterparty is a natural person.¹¹

D. Updating Use of the Term "Unique Product Identifier"

The Commission is updating and conforming its references to a swap's unique product identifier (UPI) to clarify that the swap trading record shall include the UPI and description using the product classification system as prescribed in part 45, when applicable.¹² Commission regulation § 23.202(a)(2)(vii) does not address the possibility that a swap may not have a UPI.¹³

E. Updating Example of a Floating Rate

The Commission is replacing the example floating rate in Exhibit C of part 23, subpart I, appendix 1, to use "Fed Funds." Exhibit C currently uses the outdated "USD-Libor-BBA" as an example for the field labeled Floating rate index name/rate period.¹⁴

List of Subjects in 17 CFR Part 23

Reporting and recordkeeping requirements, Swaps, Trading records.

For the reasons stated in the preamble, 17 CFR part 23 is corrected by

⁹ The Commission previously updated part 45 to allow a counterparty that is not eligible to receive an LEI to use an alternate identifier. See 2020 Final Rule at 75527.

¹⁰ See 17 CFR 23.202(a)(2)(v).

¹¹ See 17 CFR part 23, subpart I, appendix 1, Exhibits A through D.

¹² See Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, 2166 (Jan. 13, 2012) (explaining that each swap must be identified by a UPI and product classification system, when applicable).

¹³ See 17 CFR 23.202(a)(2)(vii).

¹⁴ 17 CFR part 23, subpart I, appendix 1, Exhibit C. The British Bankers Association no longer administers the London Interbank Offered Rate (LIBOR), and the ICE Benchmark Administration Limited has decided to cease the publication of all remaining LIBOR settings on June 30, 2023. See Announcements on the end of LIBOR, March 5, 2021, available at: <https://www.fca.org.uk/news/press-releases/announcements-end-libor>. See also ICE Benchmark Administration Publishes Feedback Statement for the Consultation on Its Intention to Cease the Publication of LIBOR® Settings, March 5, 2021, available at: <https://ir.theice.com/press/news-details/2021/ICE-Benchmark-Administration-Publishes-Feedback-Statement-for-the-Consultation-on-Its-Intention-to-Cease-the-Publication-of-LIBOR-Settings/default.aspx>.

making the following correcting amendments:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. In § 23.202, revise paragraphs (a)(2)(iii), (v), and (vii) to read as follows:

§ 23.202 Daily trading records.

(a) * * *

(2) * * *

(iii) The unique transaction identifier, as required by § 45.5 of this chapter, for each swap;

* * * * *

(v) The name of the counterparty with which each such swap was executed, including its legal entity identifier or alternate identifier, as required by § 45.6 of this chapter;

* * * * *

(vii) The product name of each swap, including its unique product identifier and description using the product classification system, as required by § 45.7 of this chapter;

* * * * *

■ 3. In § 23.205, revise paragraph (a) to read as follows:

§ 23.205 Real-time public reporting.

(a) *Real-time public reporting of swap transaction and pricing data.* Each swap dealer and major swap participant shall report all information and swap transaction and pricing data required to be reported in accordance with the real-time public reporting requirements in part 43 of this chapter.

* * * * *

■ 4. In appendix 1 to subpart I of part 23:

■ a. In Exhibit A:

■ i. Remove the entry for "The Unique Swap Identifier for the swap" and add the entry "The Unique Transaction Identifier for the swap" in its place;

■ ii. Remove the entry "The Legal Entity Identifier of the reporting counterparty" and add the entry "The Legal Entity Identifier or alternate identifier of the reporting counterparty" in its place;

■ iii. Remove the entry "The Legal Entity Identifier of the non-reporting party" and add the entry "The Legal Entity Identifier or alternate identifier of the non-reporting party" in its place; and

² See 5 U.S.C. 553(b)(3)(B).

³ See 7 U.S.C. 19(b).

⁴ See 44 U.S.C. 3501 *et seq.*

⁵ 17 CFR 23.202.

⁶ 17 CFR 23.205(a).

⁷ See 2020 Final Rule at 75515 ("The Commission is amending § 45.5 to adopt requirements for UTIs, the globally accepted transaction identifier, replacing USIs in existing § 45.5.")

⁸ See 17 CFR 23.202(a)(2)(iii) and 17 CFR part 23, subpart I, appendix 1, Exhibits A through D.

- iv. Revise the entries for “An indication of the counterparty purchasing protection”, “An indication of the counterparty selling protection”, and “Information identifying the reference entity”.
- b. In Exhibit B:
 - i. Remove the entry for “The Unique Swap Identifier for the swap” and add the entry “The Unique Transaction Identifier for the swap” in its place;
 - ii. Remove the entry “The Legal Entity Identifier of the reporting counterparty” and add the entry “The Legal Entity Identifier or alternate identifier of the reporting counterparty” in its place; and
 - iii. Remove the entry “The Legal Entity Identifier of the non-reporting party” and add the entry “The Legal Entity Identifier or alternate identifier of the non-reporting party” in its place.

- c. In Exhibit C:
 - i. Remove the entry for “The Unique Swap Identifier for the swap” and add the entry “The Unique Transaction Identifier for the swap” in its place;
 - ii. Remove the entry “The Legal Entity Identifier of the reporting counterparty” and add the entry “The Legal Entity Identifier or alternate identifier of the reporting counterparty” in its place;
 - iii. Remove the entry “The Legal Entity Identifier of the non-reporting counterparty” and add the entry “The Legal Entity Identifier or alternate identifier of the non-reporting counterparty” in its place; and
 - iv. Revise the entry for “Floating rate index name/rate period”.
- d. In Exhibit D:
 - i. Remove the entry for “The Unique Swap Identifier for the swap” and add

- the entry “The Unique Transaction Identifier for the swap” in its place;
- ii. Remove the entry “The Legal Entity Identifier of the reporting counterparty” and add the entry “The Legal Entity Identifier or alternate identifier of the reporting counterparty” in its place;
- iii. Remove the entry “The Legal Entity Identifier of the non-reporting party” and add the entry “The Legal Entity Identifier or alternate identifier of the non-reporting party” in its place; and
- iv. Revise the entries for “Buyer” and “Seller”.

The additions and revisions read as follows:

Part 23, Subpart I, Appendix 1—Exhibits A–D

EXHIBIT A—MINIMUM PRIMARY ECONOMIC TERMS DATA—CREDIT SWAPS AND EQUITY SWAPS

Data categories and fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in § 45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting party.	As provided in § 45.6 of this chapter.
* * * * *	
An indication of the counterparty purchasing protection	Field values: LEI, or alternate identifier.
An indication of the counterparty selling protection	Field values: LEI, or alternate identifier.
Information identifying the reference entity	The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI, or alternate identifier.
* * * * *	

EXHIBIT B—MINIMUM PRIMARY ECONOMIC TERMS DATA—FOREIGN EXCHANGE TRANSACTIONS
[Other than cross-currency swaps]

Data fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in § 45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting party.	As provided in § 45.6 of this chapter.
* * * * *	

EXHIBIT C—MINIMUM PRIMARY ECONOMIC TERMS DATA—INTEREST RATE SWAPS
[Including cross-currency swaps]

Data fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
Floating rate index name/rate period	<i>E.g.</i> , Fed Funds.
* * * * *	

EXHIBIT D—MINIMUM PRIMARY ECONOMIC TERMS DATA—OTHER COMMODITY SWAPS

Data fields for all swaps	Comment
* * * * *	
The Unique Transaction Identifier for the swap	The UTI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier or alternate identifier of the reporting counterparty.	As provided in §45.6 of this chapter.
* * * * *	
The Legal Entity Identifier or alternate identifier of the non-reporting party.	As provided in §45.6 of this chapter.
* * * * *	
Buyer	The counterparty purchasing the product: (<i>E.g.</i> , the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI, if available, or alternate identifier.
Seller	The counterparty offering the product: (<i>E.g.</i> , the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI, or alternate identifier.
* * * * *	

Issued in Washington, DC, on January 26, 2023, by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Reporting, Recordkeeping, Daily Trading Records, and Swap Documentation Requirements for Swap Dealers and Major Swap Participants; Corrections—Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the

affirmative. No Commissioner voted in the negative.

[FR Doc. 2023–01979 Filed 2–9–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1991

[Docket Number: OSHA–2021–0011]

RIN 1218–AD38

Procedures for the Handling of Retaliation Complaints Under the Criminal Antitrust Anti-Retaliation Act (CAARA)

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides the interim final text of regulations governing the anti-retaliation (whistleblower protection) provision of the Criminal Antitrust Anti-Retaliation Act (CAARA or the Act). This rule establishes procedures and timeframes for the handling of retaliation complaints under CAARA, including procedures and timeframes for complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary's decisions. It also sets forth the Secretary's interpretations of the CAARA anti-retaliation provision on certain matters.

DATES: This interim final rule is effective on February 10, 2023. Comments and additional materials must be submitted (post-marked, sent or received) by April 11, 2023.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at: <https://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to <http://www.regulations.gov>. Documents in the docket are listed in the <https://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693-2350 (TTY (877) 889-5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA-2021-0011). OSHA will place comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Extension of comment period: Submit requests for an extension of the comment period on or before February

27, 2023 to the Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-4618, Washington, DC 20210, or by fax to (202) 693-2199.

FOR FURTHER INFORMATION CONTACT: Marisa Johnson, Program Analyst, Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration; telephone (202) 693-2199 (this is not a toll-free number) or email: OSHA.DWPP@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Criminal Antitrust Anti-Retaliation Act (CAARA or the Act), Public Law 116-257, 134 Stat. 1147, was enacted on December 23, 2020. Section 2 of the Act, codified at 15 U.S.C. 7a-3 and referred to throughout these interim final rules as CAARA, prohibits retaliation by an employer, defined in the statute as "a person, or any officer, employee, contractor, subcontractor, or agent of such person," against a "covered individual," defined in the statute as "an employee, contractor, subcontractor or agent of an employer," in the terms and conditions of employment in reprisal for the individual having engaged in protected activity. Protected activity under CAARA includes any lawful act done by an individual to report certain information to the Federal Government, the individual's supervisor, or a person working for the employer who has the authority to investigate, discover, or terminate misconduct. The information must relate to: a violation (or conduct the individual reasonably believes is a violation) of section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3), or a violation (or conduct the individual reasonably believes is a violation) of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act, or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. The Act also protects individuals from retaliation for causing to be filed, testifying in, participating in, or otherwise assisting in a Federal Government investigation or proceeding relating to a violation (or conduct the individual reasonably believes is a violation) of section 1 or 3 of the Sherman Act, or a violation (or conduct the individual reasonably believes is a violation) of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act, or in conjunction with

an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Acts. The Federal Government is defined by the statute as a Federal regulatory or law enforcement agency, or any Member of Congress or committee of Congress. These interim final rules establish procedures for the handling of retaliation complaints under the Act.

II. Summary of Statutory Procedures

CAARA incorporates the rules, procedures, and burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121(b), with some exceptions. Under CAARA, a person who believes that they have been discharged or otherwise retaliated against in violation of the Act (complainant) may file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) and to the complainant's employer (which in most cases will be the respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation. The Secretary must then conduct an investigation, within 60 days of receipt of the complaint, after affording the respondent an opportunity to submit a written response and to meet with the investigator to present statements from witnesses.

The Act provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity. OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the information they provide in their complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the complainant and respondent of those findings, and issue a preliminary order providing all relief necessary to make the complainant whole, including,

where appropriate: reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees.

The complainant and the respondent then have 30 days after the date of receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an Administrative Law Judge (ALJ). The filing of objections will not stay any reinstatement order. However, under OSHA's regulations, the filing of objections will stay any other remedy in the preliminary order. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, the Act requires the hearing be conducted "expeditiously." The Secretary then has 120 days after the conclusion of any hearing to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary will order all relief necessary to make the complainant whole, including, where appropriate, reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit where the complainant resided on the date of the violation.

The Act permits the covered individual to bring an action for de novo review of a CAARA retaliation claim in the appropriate United States district court in the event that the Secretary has not issued a final decision within 180 days after the filing of the complaint, and there is no showing that such delay is due to the bad faith of the

complainant. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy. Finally, nothing in the CAARA anti-retaliation provision shall be deemed to diminish the rights, privileges, or remedies of any covered individual under any Federal or State law, or under any collective bargaining agreement.

III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of the Act. Responsibility for receiving and investigating complaints under the Act has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) pursuant to Secretary of Labor's Order No. 08-2020 (May 15, 2020), 85 FR 58393 (September 18, 2020). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. See Secretary of Labor's Order 01-2020 (Feb. 21, 2020), 85 FR 13186-01 (Mar. 6, 2020) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

Section 1991.100—Purpose and Scope

This section describes the purpose of the regulations implementing the anti-retaliation provisions of CAARA and provides an overview of the procedures covered by these regulations.

Section 1991.101—Definitions

This section includes definitions of certain terms used in CAARA and this rule.

One term defined in § 1991.101 is "antitrust laws," which CAARA defines as meaning section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3). See 15 U.S.C. 7a-3(a)(3)(A).

Another term defined in the statute is "covered individual," which means an employee, contractor, subcontractor, or agent of an employer. See 15 U.S.C. 7a-3(a)(3)(B). Consistent with the approach that OSHA has taken in implementing other whistleblower protection provisions and consistent with applicable ARB case law, the interim final rule includes "an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be

affected by, another person" in the definition of "covered individual." See, e.g., 29 CFR 1979.101 (AIR21 definition of employee); 29 CFR 1980.101(g) (Sarbanes-Oxley Act of 2002 (SOX) definition of employee).

The term "employer" is defined in CAARA as meaning a person, or any officer, employee, contractor, subcontractor, or agent of such person. See 15 U.S.C. 7a-3(a)(3)(C). The term "Federal Government" is defined in CAARA as meaning a Federal regulatory or law enforcement agency; or any Member of Congress or committee of Congress. See 15 U.S.C. 7a-3(a)(3)(D).

The term "person" is defined in CAARA to have the same meaning as in 15 U.S.C. 12(a). Under that section, the term includes individuals as well as corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. See 15 U.S.C. 7a-3(a)(3)(E) (incorporating 15 U.S.C. 12(a)).

Section 1991.102 Obligations and Prohibited Acts

This section describes the activities that are protected under CAARA and the conduct that is prohibited in response to any protected activities. The Act prohibits an employer, defined to include a person or any officer, employee, contractor, subcontractor, or agent of such person, from discharging, demoting, suspending, threatening, harassing or in any other manner retaliating against a covered individual in their terms and conditions of employment because the covered individual engaged in certain protected activity relating to certain antitrust laws—sections 1 and 3 of the Sherman Act, 15 U.S.C. 1 and 3. The Act further provides a rule of construction that "[t]he term 'violation', with respect to the antitrust laws, shall not be construed to include a civil violation of any law that is not also a criminal violation." 15 U.S.C. 7a-3(a)(4).

Protected activity under CAARA includes any lawful act by a covered individual to provide information or cause information to be provided regarding conduct which is of the type that constitutes a violation of section 1 or 3 of the Sherman Act, or which the covered individual reasonably believes constitutes a violation of section 1 or 3 of the Sherman Act; or conduct which the covered individual reasonably believes to be a violation of another criminal law which is committed, or which the covered individual reasonably believes to have been committed, in conjunction with a

potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. To be protected, the information or assistance must be provided to a Federal regulatory or law enforcement agency, any Member of Congress or committee of Congress, a person with supervisory authority over the covered individual, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

The Act also protects covered individuals from discharge or other retaliation for any lawful act done to cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to any violation of, or any act or omission which is of the type that constitutes a violation of section 1 or 3 of the Sherman Act, or which the covered individual reasonably believes to be a violation of, section 1 or 3 of the Sherman Act; or any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed, or which the covered individual reasonably believes was committed, in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act. The type of conduct that constitutes a violation of section 1 or 3 of the Sherman Act can include bid rigging, price fixing, and market allocation agreements between competitors.

Under the Act, a covered individual who provides information, causes information to be provided, or engages in other activities listed in the statute is protected as long as the conduct at issue is of the type that violates section 1 or 3 of the Sherman Act, or the covered individual reasonably believes that the conduct at issue is the type of conduct that violates section 1 or 3 of the Sherman Act; or the covered individual reasonably believes that the conduct at issue is a violation of another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation. To have a reasonable belief, the individual must subjectively believe that such conduct is occurring and that belief must be objectively reasonable. See, e.g., *Rhinehimer v. U.S. Bancorp. Invs., Inc.*, 787 F.3d 797, 811 (6th Cir. 2015)

(discussing the reasonable belief standard under analogous language in the SOX whistleblower provision, 18 U.S.C. 1514A) (citations omitted); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (agreeing with First, Fourth, Fifth, and Ninth Circuits that determining reasonable belief under the SOX whistleblower provision requires analysis of the complainant's subjective belief and the objective reasonableness of that belief); *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011) (same). The objective reasonableness of a complainant's belief is typically determined "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp*, 558 F.3d at 723 (quoting *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008)). Moreover, the complainant need not cite any provision of law in their communications to the employer or show that the conduct constituted an actual violation of law. See, e.g., *Sylvester*, 2011 WL 2165854, at *11-12. Pursuant to this standard, a complainant's whistleblower activity is protected when it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. See *Van Asdale v. Int'l Game Techs.*, 577 F.3d 989, 1001 (9th Cir. 2009); *Allen*, 514 F.3d at 477.

Activity will not be protected if the covered individual is found to have planned and initiated a violation or attempted violation of section 1 or 3 of the Sherman Act, planned and initiated a violation or attempted violation of another criminal law in conjunction with a violation or attempted violation of section 1 or 3 of the Sherman Act, or planned and initiated an obstruction or attempted obstruction of an investigation by the Department of Justice of a violation of section 1 or 3 of the Sherman Act.

Section 1991.103 Filing of Retaliation Complaint

This section explains the requirements for filing a retaliation complaint under CAARA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), an alleged violation occurs when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the covered individual is aware or reasonably should be aware of the employer's decision to take an

adverse action. *EEOC v. United Parcel Serv., Inc.*, 249 F.3d 557, 561-62 (6th Cir. 2001). The time for filing a complaint under CAARA may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action. *Xanthopoulos v. U.S. Dep't of Labor*, 991 F.3d 823, 832 (7th Cir. 2021) (affirming ARB's refusal to toll the statute of limitations under SOX and explaining the limited circumstances in which tolling is appropriate for a timely filing in the wrong forum).

Complaints filed under CAARA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the covered individual, complaints may be filed by any person on the covered individual's behalf.

Section 1991.104 Investigation

This section describes the procedures that apply to the investigation of CAARA complaints. Paragraph (a) of this section outlines the procedures for notifying the respondent, the employer (if different from the respondent), and the Antitrust Division of the United States Department of Justice of the complaint and notifying the respondent of rights under these regulations. In certain circumstances, OSHA may briefly delay notification to the respondent if requested by law enforcement. See OSHA Whistleblower Investigations Manual Chapter 3.IX.B, available at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf. Paragraph (b) describes the procedures for the respondent to submit the response to the complaint. Paragraph (c) specifies that OSHA will request that the parties provide each other with copies of their submissions to OSHA during the investigation and that, if a party does not provide such copies, OSHA generally will do so at a time permitting the other party an opportunity to respond to those submissions. Before providing such materials, OSHA will redact them consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. CAARA incorporates the burdens of proof in AIR21. Thus, in order for OSHA to

conduct an investigation, CAARA requires that a complainant make an initial prima facie showing that a protected activity was “a contributing factor” in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. The complainant will be considered to have met the required burden for OSHA to commence an investigation if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant’s burden at this stage may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. See *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974, as amended (ERA), which is the same as that under CAARA, serves a “gatekeeping function” intended to “stem[] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, CAARA requires that the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss the complaint and not investigate further if either: (1) the complainant fails to make the prima facie showing that protected activity was a contributing factor in the alleged adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Wiest v. Tyco Elec. Corp.*, 812 F.3d 319, 330 (3d Cir. 2016) (discussing “contributing factor standard” under SOX); *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (same); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013) (same). A

conclusion that protected activity was a contributing factor in an adverse action can be based on direct evidence or circumstantial evidence “such as the temporal proximity between the protected activity and the adverse action, indications of pretext such as inconsistent application of policies and shifting explanations, antagonism or hostility toward protected activity, the relation between the discipline and the protected activity, and the presence [or absence] of intervening events that independently justify” the adverse action. *Hess v. Union Pac. R.R. Co.*, 898 F.3d 852, 858 (8th Cir. 2018) (quoted source omitted) (discussing the contributing factor standard under the Federal Railroad Safety Act).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 42121(b)(2)(B)(iv). The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. *Clarke v. Navajo Express*, ARB No. 09–114, 2011 WL 2614326, at *3 (ARB June 29, 2011).

Paragraph (f) describes the procedures OSHA will follow prior to the issuance of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred and reinstatement is required. Their purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (requiring OSHA to give a Surface Transportation Assistance Act respondent the opportunity to review the substance of the evidence and respond prior to ordering preliminary reinstatement).

Section 1991.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order all relief necessary to make the complainant whole, including reinstatement with the

same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. The findings and, where appropriate, the preliminary order, will also advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, the preliminary order, will also advise the respondent of the right to request an award of attorney fees not exceeding a total of \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

The remedies provided under CAARA aim to make the complainant whole by restoring the complainant to the position that the complainant would have occupied absent the retaliation and to counteract the chilling effect of retaliation on protected whistleblowing in the complainant’s workplace. The back pay and other remedies appropriate in each case will depend on the individual facts of the case and the evidence submitted, and the complainant’s interim earnings must be taken into account in determining the appropriate back pay award. When there is evidence to determine these figures, a back pay award under CAARA might include, for example, amounts that the complainant would have earned in commissions, bonuses, overtime, or raises had the complainant not been discharged in retaliation for engaging in protected activity under CAARA. Lost benefits may also be included in a back pay award when there is evidence to support an award for lost benefits. A benefits award under CAARA might include amounts that the employer would have contributed to a 401(k) plan, insurance plan, profit-sharing plan, or retirement plan on the complainant’s behalf had the complainant not been discharged in retaliation for engaging in protected activity under CAARA. Other damages, including non-pecuniary damages, such as damages for emotional distress due to

the retaliation, are also available under CAARA. See, e.g., *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 670–71 (4th Cir. 2015) (holding that emotional distress damages are available under identical remedial provision in SOX); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 264–66 (5th Cir. 2014) (same). Consistent with the rules under other whistleblower statutes enforced by the Department of Labor, in ordering interest on back pay under CAARA, OSHA will compute interest due by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621(a)(2) is the Federal short-term rate plus three percentage points, against back pay. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (Federal Railroad Safety Act (FRSA)); 29 CFR 1988.105(a) (Moving Ahead for Progress in the 21st Century Act (MAP–21)).

Consistent with the rules governing other Department of Labor-enforced whistleblower protection statutes, where appropriate, in ordering back pay, OSHA will require the respondent to submit the appropriate documentation to the Social Security Administration (SSA) allocating the back pay to the appropriate periods. See, e.g., 29 CFR 1980.105(a) (SOX); 29 CFR 1982.105(a) (FRSA); 29 CFR 1988.105(a) (MAP–21)).

The statute permits OSHA to preliminarily reinstate covered individuals to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of CAARA. See 49 U.S.C. 42121(b)(2)(A). When a violation is found, the norm is for OSHA to order immediate preliminary reinstatement. In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that the complainant received prior to termination but not actually return to work. Such “economic reinstatement” is akin to an order of front pay and is sometimes employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., *Sec’y of Labor, MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589, 2011 WL 1455831, at *4 (FMSHRC Mar. 25, 2011) (explaining economic reinstatement in lieu of temporary reinstatement in the context of section 105(c)). Front pay has been recognized as an appropriate remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. See, e.g., *Deltek, Inc. v.*

Dep’t of Labor, Admin. Rev Bd., 649 Fed. App’x. 320, 333 (4th Cir. 2016) (affirming award of front pay in SOX case due to “pronounced animosity between the parties;” explaining that “front pay ‘is designed to place the complainant in the identical financial position’ that she would have occupied had she remained employed or been reinstated.”); *Continental Airlines, Inc. v. Admin. Review Bd.*, 638 Fed. App’x. 283, 289–90, 2016 WL 97461, at *4 (5th Cir. 2016) (affirming front pay award under AIR21, and explaining that “front-pay is available when reinstatement is not possible”), aff’g *Luder v. Cont’l Airlines, Inc.*, ARB No. 10–026, 2012 WL 376755, at *11 (ARB Jan. 31, 2012); see also *Brown v. Lockheed Martin Corp.*, ALJ No. 2008–SOX–00049, 2010 WL 2054426, at *55–56 (ALJ Jan. 15, 2010) (noting that while reinstatement is the “presumptive remedy” under SOX whistleblower provision, front pay may be awarded as a substitute when reinstatement is inappropriate), aff’d *Lockheed Martin Corp. v. U.S. Dept. of Labor*, 717 F.3d 1121, 1138 (10th Cir. 2013) (noting availability of all relief necessary to make the employee whole in SOX case but remanding for DOL to quantify remedies); *Indiana Michigan Power Co. v. U.S. Dept. of Labor*, 278 Fed. Appx. 597, 606 (6th Cir. 2008) (affirming front pay award under ERA). Neither an employer nor a covered individual has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA’s satisfaction that immediate reinstatement is inadvisable for some reason, notwithstanding the employer’s retaliatory discharge of the individual.

Subpart B—Litigation

Section 1991.106 Objections to the Findings and the Preliminary Order and Requests for a Hearing

Objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, in accordance with 29 CFR part 18, as applicable, within 30 days of the receipt of the findings. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the

other parties of record, as well as on the OSHA official who issued the findings and order, the Assistant Secretary, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards, the failure to serve copies of the objections on the other parties of record does not affect the ALJ’s jurisdiction to hear and decide the merits of the case. See *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04–101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005). OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, to serve them with copies of objections to OSHA’s findings.

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary’s preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary’s preliminary order of reinstatement under CAARA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and that the public interest favors a stay. If no timely objection to the Assistant Secretary’s findings and/or preliminary order is filed, then the Assistant Secretary’s findings and/or preliminary order become the final decision of the Secretary not subject to judicial review.

Section 1991.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

Section 1991.108 Role of Federal Agencies

The Assistant Secretary may participate as a party or amicus curiae at any time in the administrative

proceedings under CAARA. For example, the Assistant Secretary may exercise discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as *amicus curiae* before the ALJ or the ARB. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, multiple employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Department of Justice Antitrust Division, if interested in a proceeding, also may participate as *amicus curiae* at any time in the proceedings.

Section 1991.109 Decisions and Orders of the Administrative Law Judge

This section sets forth the requirements for the content of the decisions and orders of the ALJ, and includes the standard for finding a violation under CAARA. Specifically, because CAARA incorporates the burdens of proof in AIR21, the complainant must demonstrate (*i.e.*, prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. See 49 U.S.C. 42121(b)(2)(B)(iii); see, *e.g.*, *Allen*, 514 F.3d at 475 n.1 (“The term ‘demonstrates’ [under identical burden-shifting scheme in the SOX whistleblower provision] means to prove by a preponderance of the evidence.”). If the complainant demonstrates that the alleged protected activity was a contributing factor in the adverse action, then the employer must demonstrate by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 49 U.S.C. 42121(b)(2)(B)(iv).

Paragraph (c) of this section further provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation under § 1991.104 is not subject to review. OSHA’s determinations on whether to proceed with an investigation under CAARA and whether to make investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or

make further factual findings. Paragraph (d) notes the remedies that the ALJ may order under CAARA and, as discussed under § 1991.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily, and that the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. Paragraph (e) requires that the ALJ’s decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of the ALJ’s decision on them. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ’s order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the ARB. If a timely petition for review is not filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review.

Section 1991.110 Decisions and Orders of the Administrative Review Board

Upon the issuance of the ALJ’s decision, the parties have 30 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is only accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to accept the petition for review. If the ARB does not accept the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ’s factual

determinations will be reviewed under the substantial evidence standard.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ’s preliminary order of reinstatement under CAARA (which otherwise would be effective immediately) while the ARB reviews the order. A stay of an ALJ’s preliminary order of reinstatement under CAARA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and that the public interest favors a stay. See, *e.g.*, *Bailey v. Consol. Rail Corp.*, ARB Case Nos. 13–030 13–033, 2013 WL 1385563, at *2 (ARB Mar. 27, 2013).

If the ARB concludes that the respondent has violated the law, it will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes pursuant to 26 U.S.C. 6621(a)(2) and will be compounded daily, and the respondent will be required to submit appropriate documentation to the SSA allocating any back pay award to the appropriate periods. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding a total of \$1,000.

The decision of the ARB is subject to discretionary review by the Secretary of Labor. See Secretary of Labor’s Order, 01–2020 (Feb. 21, 2020), 85 FR 13186, 13187 (Mar. 6, 2020).

As provided in that Secretary’s Order, a party may petition the ARB to refer a decision to the Secretary for further review, after which the Secretary may accept review, decline review, or take no action. If no such petition is filed, the ARB’s decision shall become the final action of the Department 28 calendar days after the date on which the decision was issued. If such a petition is filed and the ARB declines to refer the case to the Secretary, the ARB’s

decision shall become final 28 calendar days after the date on which the petition for review was filed. If the ARB refers a decision to the Secretary for further review, and the Secretary takes no action in response to the ARB's referral, or declines to accept the case for review, the ARB's decision shall become final either 28 calendar days from the date of the referral, or on the date on which the Secretary declines review, whichever comes first.

In the alternative, under the Secretary's Order, at any point during the first 28 calendar days after the date on which an ARB decision was issued, the Secretary may direct the ARB to refer the decision to the Secretary for review. If the Secretary directs the ARB to refer a case to the Secretary, or notifies the parties that the case has been accepted for review, the ARB's decision shall not become the final action of the Department and shall have no legal force or effect, unless and until the Secretary adopts the ARB's decision.

Under the Secretary's Order, any final decision made by the Secretary shall be made solely based on the administrative record, the petition and briefs filed with the ARB, and any amicus briefs permitted by the Secretary. The decision shall be in writing and shall be transmitted to the ARB, who will publish the decision and transmit it to the parties to the case. The Secretary's decision shall constitute final action by the Department and shall serve as binding precedent in all Department proceedings involving the same issue or issues.

Subpart C—Miscellaneous Provisions

Section 1991.111 Withdrawal of Complaints, Findings, Objections, and Petitions for Review; Settlement

This section provides the procedures and time periods for withdrawal of complaints, withdrawal of findings and/or preliminary orders by the Assistant Secretary, and withdrawal of objections to findings and/or orders. It permits complainants to withdraw their complaints orally, and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and adjudicatory stages of the case.

Section 1991.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ARB or the ALJ to submit the record of proceedings to the appropriate court pursuant to the rules of such court.

Section 1991.113 Judicial Enforcement

This section describes the ability of the Secretary, the complainant, and the respondent under CAARA to obtain judicial enforcement of final orders, preliminary orders of reinstatement, and terms of settlement agreements approved by the Department of Labor as provided in § 1991.111(d) and (e). CAARA provides that “[i]f a person fails to comply with an order or preliminary order issued by the Secretary of Labor pursuant to the procedures set forth in section 42121(b) of title 49, the Secretary of Labor or the person on whose behalf the order was issued may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.” 15 U.S.C. 7a–3(b)(2)(E). As explained in section 1991.106, if a timely objection to OSHA's preliminary order is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. See also 49 U.S.C. 42121(b)(2)(A) (“The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.”). Thus, CAARA permits both private parties and the Secretary to seek district court enforcement of preliminary orders of reinstatement and final orders of the Secretary, including approved settlement agreements.

Section 1991.114 District Court Jurisdiction of Retaliation Complaints

This section sets forth CAARA's provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with OSHA, if there has been no final decision of the Secretary within 180 days after the date of the filing of the complaint, and there is no showing that such delay is due to the bad faith of the complainant. See 15 U.S.C. 7a–3(b)(1)(B). This section also reflects the statutory provision that specifies the burdens of proof in a district court action. See 15 U.S.C. 7a–3(b)(2)(C) (incorporating 49 U.S.C. 42121(b)).

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the ARB, depending on where the proceeding is pending. If the ARB has issued a decision that has not yet become final under Secretary of Labor's Order 01–2020, the case is regarded as pending before the ARB for purposes of this section and a copy of any district

court complaint should be sent to the ARB. A copy of the district court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. This provision is necessary to notify the agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

Finally, it should be noted that although a complainant may file an action in district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint with OSHA, it is the Department of Labor's position that complainants may not initiate an action in federal court after any decision of the Department of Labor becomes the final decision of the Secretary, even if the date of the final decision is more than 180 days after the filing of the complaint. Thus, for example, after the ARB has issued a decision that has become final denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. See *Soo Line R.R., Inc. v. Admin. Review Bd.*, 990 F.3d 596, 598 n.1 (8th Cir. 2021). The purpose of the “kick-out” provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. See 49 U.S.C. 42121(b)(4)(B) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

Section 1991.115 Special Circumstances; Waiver of Rules

This section provides that, in circumstances not contemplated by these rules or for good cause, the ALJ or the ARB may, upon application and notice to the parties, waive any rule or issue such orders as justice or the administration of CAARA requires.

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1991.103) which was previously reviewed as a statutory requirement of CAARA and approved for use by the Office of Management and Budget (OMB), as part of the Information Collection Request (ICR) assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (PRA). See Public Law 104–13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

V. Administrative Procedure Act

The notice and comment rulemaking procedures of section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section, because it provides the procedures for the handling of retaliation complaints. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for this rule. Although this is a procedural and interpretative rule not subject to the notice and comment procedures of the APA, OSHA is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after OSHA receives and reviews the public’s comments.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. OSHA also finds good cause to provide an immediate effective date for this interim final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132

The Office of Information and Regulatory Affairs has concluded that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866, reaffirmed by Executive Order 13563, because it is not likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866. Therefore, no economic impact analysis under section 6(a)(3)(C) of Executive Order 12866 has been prepared.

Also, because this rule is not significant under Executive Order 12866, and because no notice of proposed rulemaking has been published, no statement is required under section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532. In any event, this rulemaking is procedural and interpretative in nature and is thus not expected to have a significant economic impact. Finally, this rule 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[.]” and therefore, is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The notice and comment rulemaking procedures of section 553 of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See Small Business Administration Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, at 9; also found at <https://www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act>. This is a rule of agency procedure, practice, and interpretation within the meaning of 5 U.S.C. 553; and, therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

List of Subjects in 29 CFR Part 1991

Administrative practice and procedure, Employment, Antitrust, Whistleblower.

Authority and Signature

This document was prepared under the direction and control of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC, on February 6, 2023.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

■ Accordingly, for the reasons set out in the preamble, title 29, chapter XVII, of the Code of Federal Regulations is amended by adding part 1991 to read as follows:

PART 1991—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE CRIMINAL ANTITRUST ANTI-RETALIATION ACT (CAARA).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

Sec.

- 1991.100 Purpose and scope.
- 1991.101 Definitions.
- 1991.102 Obligations and prohibited acts.
- 1991.103 Filing of retaliation complaint.
- 1991.104 Investigation.
- 1991.105 Issuance of findings and preliminary orders.

Subpart B—Litigation

- 1991.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1991.107 Hearings.
- 1991.108 Role of Federal agencies.
- 1991.109 Decisions and orders of the administrative law judge.
- 1991.110 Decisions and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

- 1991.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1991.112 Judicial review.
- 1991.113 Judicial enforcement.
- 1991.114 District court jurisdiction of retaliation complaints.
- 1991.115 Special circumstances; waiver of rules.

Authority: 15 U.S.C. 7a–3; Secretary of Labor’s Order 08–2020 (May 15, 2020), 85 FR 58393 (September 18, 2020); Secretary of Labor’s Order 01–2020 (Feb. 21, 2020), 85 FR 13186–01 (Mar. 6, 2020).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

§ 1991.100 Purpose and scope.

(a) This part sets forth procedures for, and interpretations of section 2 of the Criminal Antitrust Anti-Retaliation Act (CAARA), Public Law 116–257, 134 Stat. 1147 (December 23, 2020) (codified at 15 U.S.C. 7a–3). CAARA provides for

protection from retaliation because the covered individual has engaged in protected activity pertaining to any violation of, or any act or omission which the covered individual reasonably believes constitutes a violation of, section 1 or 3 of the Sherman Act; or any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation of section 1 or 3 of the Sherman Act or in conjunction with an investigation by the Department of Justice of a potential violation of section 1 or 3 of the Sherman Act.

(b) This part establishes procedures under CAARA for the expeditious handling of retaliation complaints filed by covered individuals, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set forth the procedures under CAARA for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges (ALJs), post-hearing administrative review, and withdrawals and settlements. In addition, these rules provide the Secretary's interpretations of certain statutory provisions.

§ 1991.101 Definitions.

As used in this part:

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom the Assistant Secretary delegates authority under CAARA.

Antitrust laws means section 1 or 3 of the Sherman Act (15 U.S.C. 1 or 3).

Business days means days other than Saturdays, Sundays, and Federal holidays.

CAARA means the Criminal Antitrust Anti-Retaliation Act, Public Law 116–257, 134 Stat. 1147 (December 23, 2020) (codified at 15 U.S.C. 7a–3).

Complainant means the covered individual who filed a CAARA complaint or on whose behalf a complaint was filed.

Covered individual means an employee, contractor, subcontractor, or agent of an employer and includes an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by, another person.

DOJ means the Antitrust Division of the United States Department of Justice.

Employer means a person, or any officer, employee, contractor, subcontractor, or agent of such person.

Federal Government means a Federal regulatory or law enforcement agency; or any Member of Congress or committee of Congress.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Person has the same meaning as in 15 U.S.C. 12(a) and includes individuals as well as corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Respondent means the person named in the complaint who is alleged to have violated CAARA.

Secretary means the Secretary of Labor.

§ 1991.102 Obligations and prohibited acts.

(a) No employer may discharge, demote, suspend, threaten, harass, or in any other manner retaliate against, including, but not limited to, intimidating, restraining, coercing, blacklisting, or disciplining, a covered individual in the terms and conditions of employment of the covered individual because of any lawful act done by the covered individual to engage in any of the activities specified in paragraph (b)(1) and (2) of this section.

(b) A covered individual is protected against retaliation (as described in paragraph (a) of this section) for any lawful act done by the covered individual:

(1) To provide information, or cause information to be provided to the Federal Government or a person with supervisory authority over the individual, or any other person working for the employer who has the authority to investigate, discover, or terminate misconduct, regarding:

(i) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the antitrust laws; or

(ii) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation of the antitrust laws or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws; or

(2) To cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to:

(i) Any violation of, or any act or omission the covered individual

reasonably believes to be a violation of, the antitrust laws; or

(ii) Any violation of, or any act or omission the covered individual reasonably believes to be a violation of, another criminal law committed in conjunction with a potential violation or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws.

(3) The term violation with respect to the antitrust laws shall not be construed to include a civil violation of any law that is not also a criminal violation.

(4) Paragraphs (b)(1) and (2) of this section shall not apply to any covered individual if the covered individual:

(i) Planned and initiated a violation or attempted violation of the antitrust laws;

(ii) Planned and initiated a violation or attempted violation of another criminal law in conjunction with a violation or attempted violation of the antitrust laws; or

(iii) Planned and initiated an obstruction or attempted obstruction of an investigation by the Department of Justice of a violation of the antitrust laws.

§ 1991.103 Filing of retaliation complaint.

(a) *Who may file.* A covered individual who believes that they have been discharged or otherwise retaliated against by any employer in violation of CAARA may file, or have filed by any person on their behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the complainant resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following internet address: <http://www.osha.gov>. Complaints may also be filed online at <https://www.osha.gov/whistleblower/WBComplaint.html>.

(d) *Time for filing.* Within 180 days after an alleged violation of CAARA occurs, any person who believes that they have been retaliated against in violation of CAARA may file, or have filed by any person on their behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic filing or

transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint to be tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1991.104 Investigation.

(a) OSHA will notify the respondent(s) and the complainant's employer (if different) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1991.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the DOJ.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to OSHA a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with OSHA to present its position.

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA generally will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential

basis, other than the complainant, in accordance with 29 CFR part 70.

(e)(1) A complaint will be dismissed unless the complainant has made a *prima facie* showing that a protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:

(i) The individual engaged in a protected activity;

(ii) The respondent knew or suspected that the individual engaged in the protected activity;

(iii) The individual suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the individual engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a *prima facie* showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy its burden set forth in the prior paragraph, OSHA will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1991.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this

part, to believe that the respondent has violated CAARA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigator, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

§ 1991.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of CAARA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include all relief necessary to make the complainant whole including, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment

of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. Where appropriate, the preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by physical or electronic means that allow OSHA to confirm delivery to all parties of record (or each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order, also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor, or appropriate information regarding filing objections electronically with the Office of Administrative Law Judges if electronic filing is available. The findings also may specify the means, including electronic means, for serving OSHA and the Associate Solicitor for Fair Labor Standards with documents in the administrative litigation as required under this part. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been timely filed as provided at § 1991.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B—Litigation

§ 1991.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under CAARA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1991.105. The objections and request for hearing and/or request for attorney fees must be in writing and must state whether the objections are to the findings, the preliminary order, or both, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic transmittal is considered the date of filing; if the objection is filed in person, by hand delivery, or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, in accordance with 29 CFR part 18, and copies of the objections must be served at the same time on the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving them with copies of the objections.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1991.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice

and procedure for administrative hearings before the Office of Administrative Law Judges, codified at 29 CFR part 18, subpart A.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1991.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent, and the right to seek discretionary review of a decision of the Administrative Review Board (ARB) from the Secretary.

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules. Except as otherwise provided in rules of practice and/or procedure before the OALJ or the ARB, OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for serving them with documents under this section.

(b) The DOJ, if interested in a proceeding, may participate as *amicus curiae* at any time in the proceeding, at the DOJ's discretion. At the request of

the DOJ, copies of all documents in a case must be sent to the DOJ, whether or not it is participating in the proceeding.

§ 1991.109 Decisions and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1991.104(e) nor OSHA's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order providing all relief necessary to make the complainant whole, including, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate periods.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought

in bad faith, the ALJ may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of decisions on them under this section. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 30 days after the date of the decision unless a timely petition for review has been filed with the ARB. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

§ 1991.110 Decisions and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue decisions under this part subject to the Secretary's discretionary review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 30 days of the date of the decision of the ALJ. All petitions and documents submitted to the ARB must be filed in accordance with 29 CFR part 26. The date of the postmark, facsimile transmittal, or electronic transmittal will be considered to be the date of filing; if the petition is filed in person, by hand delivery, or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. The petition for review also must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of petitions for review on them under this section.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this

section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If a timely petition for review is not filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If a timely petition for review is not filed, the resulting final order is not subject to judicial review.

(c) The decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 30 days after the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 30 days after a new decision is issued. The ARB's decision will be served upon all parties and the Chief Administrative Law Judge. The decision will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party. OSHA and the Associate Solicitor for Fair Labor Standards may specify the means, including electronic means, for service of ARB decisions on them under this section.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue an order providing all relief necessary to make the complainant whole. The order will require, where appropriate: reinstatement with the same seniority status that the complainant would have had, but for the retaliation; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621(a)(2) and will be compounded daily. The order will also require the respondent to submit appropriate documentation to

the Social Security Administration allocating any back pay award to the appropriate periods. Such order is subject to discretionary review by the Secretary (as provided in Secretary's Order 01-2020 or any successor to that order).

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000. An order under this section is subject to discretionary review by the Secretary (as provided in Secretary's Order 01-2020 or any successor to that order).

Subpart C—Miscellaneous Provisions

§ 1991.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw the complaint by notifying OSHA, orally or in writing, of the withdrawal. OSHA then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. OSHA will notify the parties (or each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw the complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1991.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The

ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, but before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's approval of a settlement reached by the respondent and the complainant demonstrates OSHA's consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. If the Secretary has accepted the case for discretionary review, or directed that the case be referred for discretionary review, the settlement must be approved by the Secretary. A copy of the settlement will be filed with the ALJ or the ARB, as appropriate.

(e) Any settlement approved by OSHA, the ALJ, the ARB or the Secretary will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1991.113.

§ 1991.112 Judicial review.

(a) Within 60 days after the issuance of a final order for which judicial review is available (including a decision issued by the Secretary upon discretionary review), any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of the case, including the record of proceedings before the ALJ, will be transmitted by the ARB or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§ 1991.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order issued by the Secretary under CAARA, including one approving a settlement agreement, the Secretary or the person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1991.114 District court jurisdiction of retaliation complaints.

(a) If the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1991.109.

(c) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

§ 1991.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, and after three days' notice to all parties, waive any rule or issue such orders that justice or the administration of CAARA requires.

[FR Doc. 2023-02916 Filed 2-9-23; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0118]

RIN 1625–AA87

Security Zones; Corpus Christi Ship Channel, Corpus Christi, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing three temporary, 500-yard radius, moving security zones for certain vessels carrying Certain Dangerous Cargoes (CDC) within the Corpus Christi Ship Channel and La Quinta Channel. The temporary security zones are needed to protect the vessels, the CDC cargo, and the surrounding waterway from terrorist acts, sabotage, or other subversive acts, accidents, or other events of a similar nature. Entry of vessels or persons into these zones is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi or a designated representative.

DATES: This rule is effective without actual notice from February 10, 2023 until February 13, 2023. For the purposes of enforcement, actual notice will be used from February 7, 2023, until February 10, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Anthony Garofalo, Sector Corpus Christi Waterways Management Division, U.S. Coast Guard; telephone 361–939–5130, email Anthony.M.Garofalo@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
 COTP Captain of the Port Sector Corpus Christi
 DHS Department of Homeland Security
 FR Federal Register
 NPRM Notice of proposed rulemaking
 § Section
 U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good

cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish these security zones by February 7, 2023 to ensure security of these vessels and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to provide for the security of these vessels.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sector Corpus Christi (COTP) has determined that potential hazards associated with the transit of the Motor Vessel (M/V) DOM EXPLORER and M/V ADRIANO KNUITSEN, when loaded, will be a security concern within a 500-yard radius of each vessel. This rule is needed to provide for the safety and security the vessels, their cargo, and surrounding waterway from terrorist acts, sabotage or other subversive acts, accidents, or other events of a similar nature while they are transiting within Corpus Christi, TX, from February 7, 2023 through February 13, 2023.

IV. Discussion of the Rule

The Coast Guard is establishing four 500-yard radius temporary moving security zones around M/V DOM EXPLORER and M/V ADRIANO KNUITSEN. The zones for the vessels will be enforced from February 7, 2023, through February 13, 2023. The duration of the zones are intended to protect the vessels and cargo and surrounding waterway from terrorist acts, sabotage or other subversive acts, accidents, or other events of a similar nature. No vessel or person will be permitted to enter the security zones without obtaining permission from the COTP or a designated representative.

Entry into these security zones is prohibited unless authorized by the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Corpus Christi. Persons or

vessels desiring to enter or pass through each zone must request permission from the COTP or a designated representative on VHF–FM channel 16 or by telephone at 361–939–0450. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative. The COTP or a designated representative will inform the public through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate for the enforcement times and dates for each security zone.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration, and location of the security zones. This rule will impact a small designated area of 500-yards around the moving vessels in the Corpus Christi Ship Channel and La Quinta Channel as the vessels transit the channel over a seven day period. Moreover, the rule allows vessels to seek permission to enter the zones.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the temporary security zones 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 moving security zones lasting for the duration of time that the M/V DOM EXPLORER and M/V ADRIANO KNUTSEN are within the Corpus Christi Ship Channel and La Quinta Channel while loaded with cargo. It will prohibit entry within a 500-yard radius of M/V DOM EXPLORER and M/V ADRIANO KNUTSEN while the vessels are transiting loaded within Corpus Christi Ship Channel and La Quinta Channel. It is categorically excluded from further review under L60 in Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to 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 recordkeeping

requirements, Security measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 70124; 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.T08–0118 to read as follows:

§ 165.T08–0118 Security Zones; Corpus Christi Ship Channel. Corpus Christi, TX.

(a) *Location.* The following area are moving security zones: All navigable waters encompassing a 500-yard radius around the M/V DOM EXPLORER and M/V ADRIANO KNUTSEN while the vessels are in the Corpus Christi Ship Channel and La Quinta Channel.

(b) *Enforcement period.* This section will be enforced from February 7, 2023 through February 13, 2023.

(c) *Regulations.* (1) The general regulations in § 165.33 of this part apply. Entry into the zones is prohibited unless authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Corpus Christi.

(2) Persons or vessels desiring to enter or pass through the zones must request permission from the COTP Sector Corpus Christi on VHF–FM channel 16 or by telephone at 361–939–0450.

(3) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

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

Dated: February 6, 2023.

J.B. Gunning,

Captain, U.S. Coast Guard, Captain of the Port Sector Corpus Christi.

[FR Doc. 2023–02806 Filed 2–9–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R04-OAR-2022-0155; FRL-10503-02-R4]

Air Plan Approval; Tennessee; Packaging Corporation of America Nitrogen Oxides SIP Call Alternative Monitoring**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is conditionally approving revisions to the Tennessee State Implementation Plan (SIP) submitted by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC), through a letter dated June 29, 2021. This revision establishes alternative monitoring, recordkeeping, and reporting requirements under the Nitrogen Oxides (NO_x) SIP Call. EPA is finalizing action to conditionally approve these changes pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective March 13, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2022-0155. All documents in the docket are listed on the *regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303-8960. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Steven Scofield, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental

Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9034. Mr. Scofield can also be reached via electronic mail at *scofield.steve@epa.gov*.

SUPPLEMENTARY INFORMATION:**I. Background**

Packaging Company of America (PCA) petitioned TDEC to adopt revised permit conditions applicable to PCA's Highway 57, Counce, Tennessee facility (PCA Counce Mill) with an alternative monitoring option for this large non-EGU, along with corresponding revised recordkeeping and reporting conditions. This petition resulted in the issuance of the permit for PCA Counce Mill included as part of TDEC's SIP submittal. The changes allow PCA Counce Mill to address the NO_x SIP Call's requirements for enforceable limits on ozone season NO_x mass emissions through non-Part 75 alternative monitoring and reporting methodologies. The June 29, 2021, source-specific SIP revision submitted by TDEC contains the permit provisions that TDEC modified to specifically address the alternative monitoring provisions allowed under the NO_x SIP Call. TDEC requests conditional approval of those provisions into the SIP.

Through a notice of proposed rulemaking (NPRM) published on December 23, 2022 (87 FR 78892), EPA proposed to conditionally approve the June 10, 2021, changes to Tennessee Air Pollution Control Board operating permit No. 078563 contained in TDEC's June 29, 2021 submittal. TDEC requests that this approval be conditioned on Tennessee's commitment to modify the provisions at Tennessee Air Pollution Control Regulation (TAPCR) 1200-03-27.12(11) to specify allowable non-Part 75 permissible alternative monitoring and reporting methodologies for large industrial non-EGUs subject to the NO_x SIP Call, such as the alternative monitoring and reporting provisions in permit No. 078563. The details of Tennessee's submission, as well as the background and EPA's rationale for conditionally approving the changes, are described in more detail in the December 23, 2022, NPRM. Comments on the December 23, 2022, NPRM were due on or before January 23, 2023. No comments were received on the December 23, 2022, NPRM, adverse or otherwise.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes

incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as discussed in Section III of this preamble, EPA is finalizing the incorporation by reference of Tennessee Air Pollution Control Board operating permit No. 078563 for PCA Counce Mill, state effective on June 10, 2021, into the Tennessee SIP. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

III. Final Action

EPA is taking final action to conditionally approve Tennessee Air Pollution Control Board operating permit No. 078563 for PCA Counce Mill, state effective June 10, 2021, for incorporation into the Tennessee SIP. These changes were submitted by Tennessee on June 29, 2021. As discussed in more detail in the December 23, 2022 NPRM, these changes to Tennessee's SIP are approved subject to the condition that Tennessee meets its commitment to submit a SIP revision modifying the provisions of TAPCR 1200-03-27.12(11) to specify permissible non-Part 75 alternative monitoring and reporting methodologies, as allowed under 40 CFR 51.121(i)(1) and (4), by 12 months from the date of this final approval. If the State fails to submit this revision on or before 12 months from the date of final approval of this action, the conditional approval will become a disapproval pursuant to CAA section 110(k)(4).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 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. This action merely conditionally approves state law as

¹ *See* 62 FR 27968 (May 22, 1997).

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).
- 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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 11, 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) of the CAA.

List of Subjects in 40 CFR Part 52

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

Dated: February 2, 2023.

Daniel Blackman,
Regional Administrator, Region 4.

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.*

Subpart RR—Tennessee

- 2. Section 52.2219 is added to read as follows:

§ 52.2219 Conditional approval.

(a) Tennessee submitted a source-specific SIP revision to EPA on June 29, 2021, regarding the Packaging Company of America’s Highway 57, Counce, Tennessee facility, along with a commitment to modify the provisions at Tennessee Air Pollution Control Regulation 1200–03–27.12(11) to specify allowable non-Part 75 permissible alternative monitoring and reporting methodologies for large industrial non-EGUs subject to the NO_x SIP Call. EPA conditionally approved the June 29, 2021, SIP revision in an action published in the **Federal Register** on February 10, 2023. If Tennessee fails to meet its commitment by February 12, 2024, the conditional approval will become a disapproval on February 12, 2024.

(b) [Reserved]

- 3. In § 52.2220(d), amend the table by adding an entry for “Packaging Corporation of America—Counce Mill” at the end of the table to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED TENNESSEE SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit No.	State effective date	EPA approval date	Explanation
* * Packaging Corporation of America—Counce Mill	* 078563	* 6/10/2021	* 2/10/2023, [Insert citation of publication].	* * Conditional approval based on TDEC's commitment to modify the provisions at TAPCR 1200-03-27.12(11) to specify allowable non-Part 75 permissible alternative monitoring and reporting methodologies for large industrial non-EGUs subject to the NO _x SIP Call.

* * * * *

[FR Doc. 2023-02648 Filed 2-9-23; 8:45 am]

BILLING CODE 6560-50-P

Proposed Rules

Federal Register

Vol. 88, No. 28

Friday, February 10, 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 COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 230206–0036; RTID 0648–XR124]

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List Olympic Peninsula Steelhead as Threatened or Endangered Under the Endangered Species Act

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

ACTION: 90-Day petition finding, request for information, and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to list Olympic Peninsula (OP) steelhead (*Oncorhynchus mykiss*) as a threatened or endangered distinct population segment (DPS) under the Endangered Species Act (ESA) and to designate critical habitat concurrently with the listing. We find that the petition presents substantial scientific and commercial information indicating the listing may be warranted. We will conduct a status review of OP steelhead to determine whether listing is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species from any interested party.

DATES: Scientific and commercial information pertinent to the petitioned action must be received by April 11, 2023.

ADDRESSES: You may submit data and information relevant to our review of the status of Olympic Peninsula Steelhead, identified by “Olympic Peninsula Steelhead Petition (NOAA–NMFS–2022–0137),” by either of the following methods:

- **Federal eRulemaking Portal:** Go to <https://www.regulations.gov> and enter NOAA–NMFS–2022–0137 in the Search box. Click the “Comment Now” icon, complete the required fields, and enter or attach your comments.

- **Mail or Hand-Delivery:** Protected Resources Division, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115. Attn: Laura Koehn.

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, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Electronic copies of the petition and other materials are available from the NMFS website at <https://www.fisheries.noaa.gov/endangered-species-conservation/candidate-species-under-endangered-species-act>.

FOR FURTHER INFORMATION CONTACT: Laura Koehn, NMFS West Coast Region, at laura.koehn@noaa.gov, (206) 300–8127; or John Rippe, NMFS Office of Protected Resources, at john.rippe@noaa.gov, (301) 427–8467.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2022, the Secretary of Commerce received a petition from The Conservation Angler and Wild Fish Conservancy (hereafter, the Petitioners) to list the OP Steelhead DPS as threatened or endangered under the ESA. The Petitioners also request the designation of critical habitat concurrent with ESA listing. Copies of the petition are available as described above (see **ADDRESSES**, above).

ESA Statutory, Regulatory, and Policy Provisions, and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary

of Commerce shall make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). If NMFS finds that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a “positive 90-day finding”), we are required to promptly commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted, within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the best available information, as compared to the narrow scope of review at the 90-day stage, a “positive 90” finding does not prejudice the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). In 1991, NMFS issued the Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon (ESU Policy; 56 FR 58612, November 20, 1991). Under this policy, Pacific salmon populations are considered a DPS, and hence a “species” under the ESA, if it represents an “evolutionarily significant unit” (ESU) of the biological species. The two criteria for delineating an ESU are: (1) It is substantially reproductively isolated from other conspecific populations, and (2) it represents an important component in the evolutionary legacy of the species. On February 7, 1996, NMFS and the U.S. Fish and Wildlife Service (USFWS) adopted a joint policy for recognizing DPSs under the ESA (DPS Policy; 61 FR 4722). The DPS Policy adopted criteria similar to those in the ESU Policy for determining when a group of vertebrates constitutes a DPS: the group must be discrete from other populations; and it must be significant to its taxon. A group of organisms is discrete if it is

“markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors.” Significance is measured with respect to the taxon (species or subspecies).

NMFS used the ESU Policy to define the OP steelhead ESU in 1996 (61 FR 41541, August 9, 1996). In 2006, NMFS changed its previous practice of applying the ESU Policy to delineate species of *O. mykiss*, however, and instead applied the joint DPS Policy (71 FR 834, January 5, 2006). NMFS determined that the use of the ESU Policy—originally intended for Pacific salmon—should not continue to be extended to *O. mykiss*, a type of salmonid with characteristics not typically exhibited by Pacific salmon.

A species, subspecies, or DPS is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five ESA section 4(a)(1) factors: (1) the present or threatened destruction, modification, or curtailment of the species’ habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms to address identified threats; (5) or any other natural or manmade factors affecting the species’ continued existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(h)(1)(i)) define “substantial scientific or commercial information” in the context of reviewing a petition to list, delist, or reclassify a species as “credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.” Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered “substantial information.” In reaching the initial (90-day) finding on the petition, we consider the information described in 50 CFR 424.14(c), (d), and (g) (if applicable).

Our determination as to whether the petition provides substantial scientific

or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information: (1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available; (2) identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species; (3) whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.*, the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are; (4) information on adequacy of regulatory protections and effectiveness of conservation activities by states as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and (5) a complete, balanced representation of the relevant facts, including information that may contradict claims in the petition. See 50 CFR 424.14(d).

If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original petition, and the statutory timeframes will begin when such supplemental information is received. See 50 CFR 424.14(g).

We may also consider information readily available at the time the determination is made. We are not required to consider any supporting materials cited by the petitioner if the petitioner does not provide electronic or hard copies, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (*e.g.*, publications, maps, reports, letters from authorities). See 50 CFR 424.14(c)(6), 424.14(h)(1)(ii).

The substantial scientific or commercial information standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition. Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to

determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action—such as a final listing determination, 90-day not-substantial finding, or 12-month not-warranted finding—a petition will generally not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information or analyses not previously considered. See 50 CFR 424.14(h)(1)(iii).

At the 90-day finding stage, we do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We accept the petitioners’ sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition’s information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation, or that is contradicted by other available information, will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person conducting an impartial scientific review would conclude it supports the petitioners’ assertions. In other words, conclusive information indicating that the species may meet the ESA’s requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person conducting an impartial scientific review would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, in light of the information readily available in our files, indicates that the petitioned entity constitutes a “species” eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk such that listing, delisting, or reclassification may be warranted; this may be indicated

in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.*, population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1) of the ESA.

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, alone, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by nongovernmental organizations, such as the International Union for Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by such organizations or made under other Federal or state statutes may be informative, but such classification alone will not provide sufficient basis for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do "not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act" because NatureServe assessments "have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide" (<https://explorer.natureserve.org/AboutTheData/DataTypes/ConservationStatusCategories>). Additionally, species classifications under IUCN and the ESA are not equivalent; data standards, criteria used

to evaluate species, and treatment of uncertainty are also not necessarily the same. Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Distribution, Habitat, and Life History of West Coast *O. mykiss*

Steelhead is the name commonly applied to the anadromous form of the biological species *O. mykiss*. The present distribution of steelhead extends from Kamchatka in Asia, east to Alaska, and down to the U.S. Mexico border (Busby *et al.*, 1996; 67 FR 21586, May 1, 2002). *O. mykiss* exhibit perhaps the most complex suite of life history traits of any species of Pacific salmonid. They can be anadromous ("steelhead"), or freshwater residents ("rainbow or redband trout"), and under some circumstances yield offspring of the opposite life-history form. Those that are anadromous can spend up to 7 years in freshwater prior to smoltification (the physiological and behavioral changes required for the transition to salt water), and then spend up to 3 years in salt water prior to first spawning. *O. mykiss* is also iteroparous (meaning individuals may spawn more than once), whereas the Pacific salmon species are principally semelparous (meaning individuals generally spawn once and die). Within the range of West Coast steelhead, spawning migrations occur throughout the year, with seasonal peaks of activity. In a given river basin there may be one or more peaks in migration activity; since these "runs" are usually named for the season in which the peak occurs, some rivers may have runs known as winter, spring, summer, or fall steelhead.

Steelhead can be divided into two basic reproductive ecotypes, based on the state of sexual maturity at the time of river entry and duration of spawning migration (Burgner *et al.*, 1992). The summer or "stream-maturing" type enters fresh water in a sexually immature condition between May and October, and requires several months to mature and spawn. The winter or "ocean-maturing" type enters fresh water between November and April with well-developed gonads and spawns shortly thereafter. In basins with both summer and winter steelhead runs, the summer run generally occurs where habitat is not fully utilized by the winter run, or where a temporal hydrologic barrier separates them, such as a waterfall. Summer steelhead usually spawn farther upstream than winter

steelhead (Withler, 1966; Roelofs, 1983; Behnke, 1992; Myers *et al.*, 2015).

Olympic Peninsula Steelhead and Previous ESA Status Review

In 1996, NMFS completed a comprehensive status review of coastal and inland steelhead populations in Washington, Oregon, Idaho, and California (Busby *et al.*, 1996). As part of this review, NMFS identified an OP steelhead ESU which "occupies river basins of the Olympic Peninsula, Washington, west of the Elwha River and south to, but not including, the rivers that flow into Grays Harbor on the Washington coast." The OP steelhead ESU is primarily made up of winter-run steelhead but includes several summer-run steelhead populations as well (Busby *et al.*, 1996). NMFS also generally included the resident *O. mykiss* in the ESUs described because of the opportunity for resident to interbreed with anadromous life history forms.

NMFS concluded that the OP steelhead ESU was not in danger of extinction or likely to become endangered in the foreseeable future (Busby *et al.*, 1996). However, NMFS was concerned about the overall health of the ESU and specific populations. Although the majority of abundance trends for winter-run OP steelhead were upward at the time, including for three of the four largest populations, several other populations had downward trends and for three populations this decline was statistically significant. No data were available for adult summer-run OP steelhead trends. NMFS also noted concerns that hatchery fish were widespread, and interbreeding between natural and hatchery fish could reduce the genetic diversity of natural-origin OP steelhead. The estimated proportion of hatchery stocks on natural spawning grounds ranged from 16 to 44 percent, but this proportion was lowest for the two rivers with the largest production of natural-origin steelhead (Queets and Quillayute). Finally, NMFS noted that there was a great deal of uncertainty about the overall health of the ESU because there was little information known about summer steelhead stocks in the Olympic Peninsula and the amount of interaction between hatchery and natural stocks. Informed by the status review (Busby *et al.*, 1996), NMFS concluded that the OP steelhead ESU did not warrant listing under the ESA (61 FR 41541, August 9, 1996).

A court ruling in 2001 (*Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001)) determined that listing only a subset of a species or ESU/DPS, such as the anadromous portion of *O.*

mykiss, was not allowed under the ESA. Because of this court ruling, NMFS conducted updated status reviews for ESA-listed West Coast steelhead ESUs that took into account those non-anadromous populations below dams and other major migration barriers that were considered to be part of the steelhead ESUs (Good *et al.*, 2005). Subsequently, NMFS used the joint USFWS–NMFS DPS Policy to delineate steelhead-only DPSs rather than ESUs that included both steelhead and the related non-anadromous forms (71 FR 833, January 5, 2006). OP steelhead were not addressed in the 2005 status review (Good *et al.*, 2005) or subsequent listings (71 FR 833, January 5, 2006).

Analysis of Petition and Information Readily Available in NMFS Files

The Petitioners request that NMFS list OP steelhead as a DPS and present information about the life history of the anadromous form of *O. mykiss*. We interpret the Petitioner's request as asking that NMFS list the anadromous form of *O. mykiss* within the Olympic Peninsula region as a DPS. The petition refers to information from the NMFS 1996 status review indicating that OP steelhead are substantially isolated from steelhead in other regions of western Washington, and are characterized by different habitat, climate, and zoogeography relative to adjacent steelhead populations. Based on the information provided and referenced in the petition, we conclude there is substantial scientific information that OP steelhead may qualify as a DPS pursuant to our DPS Policy. The reader is also referred to previously published **Federal Register** notices for further discussion of the delineation of *O. mykiss* DPSs under the joint DPS Policy (70 FR 67131, November 4, 2005; 71 FR 834, January 5, 2006).

In the sections that follow, we provide a synopsis of our analysis of the information provided in the petition and readily available in our files regarding OP steelhead status and trends and whether and to what extent factors identified in section 4(a)(1) of the ESA may cause OP steelhead to be an endangered or threatened species.

Status and Population Trends

The Washington Department of Fish and Wildlife (WDFW) and tribal co-managers describe the population structure of OP steelhead for their Salmonid Stock Inventory (SaSI). The Petitioners note that WDFW (in Cram *et al.*, (2018)) describes OP steelhead as consisting of 7 summer-run and 24 winter-run steelhead populations and

the Petitioners present information based on this population structure. Most of the information the Petitioners present focuses on the four largest winter-run OP steelhead populations: Queets, Hoh, Quillayute, and Quinault Rivers, but they also present data for summer-run OP steelhead populations in these systems and some smaller winter-run OP steelhead populations.

In support of their claim that OP steelhead are likely to become endangered in the foreseeable future, the Petitioners provide information on the four demographic descriptors that NMFS uses to assess demographic risk in status reviews: abundance, productivity, diversity, and spatial structure (McElhany *et al.*, 2000).

The Petitioners assert that chronic declining trends in abundance and recent sharp declines indicate that OP steelhead are at risk of extinction more so now than at the time of NMFS's 1996 status review (Busby *et al.*, 1996). To support this, the Petitioners summarize multiple past stock assessments for various winter-run OP steelhead populations conducted by WDFW, NMFS, North Olympic Peninsula Lead Entity for Salmon (NOPE), and the Hatchery Scientific Review Group (HSRG). According to Cram *et al.* (2018), only 20 percent of the populations of winter-run OP steelhead have an increasing trend for populations where trends could be assessed. The Petitioners note that contemporary summer-run OP steelhead abundance information is lacking, with the exception of snorkel surveys for some summer-run populations.

The Petitioners assert that most winter-run OP steelhead populations have declined from historical abundance relative to present day trends, presenting data from multiple sources. McMillan *et al.* (2022) applied multiple approaches using tribal and sport catch data, catch per unit effort, and watershed size (as a proxy for basin capacity) to generate multiple estimates of historical abundance (for the period 1948–1960). They calculated the mean among these estimates to determine historical abundance for Hoh, Quillayute, Queets, and Quinault Rivers winter-run steelhead. McMillan *et al.* (2022) estimated a historical abundance of 13,505 winter-run steelhead for Hoh River, 21,843 for Quillayute River, 16,897 for Quinault River, and 15,191 for Queets River. McMillan *et al.* (2022) also examined cannery records from 1923 to estimate the abundance of Queets River winter-run steelhead to be 32,223 (ranging from 27,829–43,732, assuming a range of exploitation rates).

The Petitioners assert that current mean annual run sizes (averaged from 1978–2020 or 1980–2020) of winter-run OP steelhead populations are 4,117 for Hoh, 13,064 for Quillayute, 5,883 for Quinault, and 7,648 for Queets.

The Petitioners also summarize recently reported trends in abundance from Cram *et al.* (2018) and McMillan *et al.* (2022). Specifically, Cram *et al.* (2018) estimated trends in abundance between 1978 to 2013 of negative 6 percent for the Quillayute River, negative 69 percent for the lower Quinault River, positive 24 percent for the upper Quinault River, negative 29 percent for the Queets River, and negative 16 percent for the Hoh River winter-run steelhead population. McMillan *et al.* (2022) estimated trends for 1980–2017 and found no trend for the Quillayute, a 44 percent declining trend for the lower and upper Quinault combined, a 45 percent declining trend for the Queets, and a 37 percent declining trend for the Hoh River winter-run steelhead populations (Table 1). By comparison, the Petitioners summarize that NMFS's earlier review (Busby *et al.*, 1996) reported percent annual change positive trends of 0.2 percent for the Hoh River, positive 0.9 percent for Queets River, positive 1.8 percent for the Upper Quinault River, negative 2.6 percent trend for Quinault River/Lake Quinault, and a negative 0.2 percent trend for Quillayute/Bogachiel River.

The Petitioners report larger declines in abundance for winter-run OP steelhead comparing older historical estimates (1948–1960) to the more recent time frame (since 1978) versus the more recent time frame alone. The Petitioners report estimated historical abundance from McMillan *et al.* (2022) for years 1948–1960 based on an ensemble of approaches and associated catch data, and compare this to contemporary estimates for years 1978–2017 and 2016–2020. The Quillayute River winter-run steelhead population had a 38 percent decline from historical (1948–1960) to 1978–2017 and 61 percent decline from historical to 2016–2020. The Quinault River winter-run steelhead populations (lower and upper) declines across the two time ranges were 63 percent and 80 percent, respectively. Hoh River winter-run steelhead declines were 69 and 79 percent, respectively. And the Queets River winter-run steelhead population declines were 50 and 69 percent, respectively. Declines were greater if using cannery data to estimate historical abundance.

TABLE 1—ABUNDANCE TREND ESTIMATES ACROSS DIFFERENT TIME PERIODS FOR THE FOUR LARGEST WINTER-RUN OP STEELHEAD POPULATIONS

Winter-run population	Abundance trend 1978–2013 from Cram <i>et al.</i> 2018 (percent)	Abundance trend 1980–2017 from McMillan <i>et al.</i> 2022 (percent)	Abundance trend 1948–1960 compared to 1978–2017 from McMillan <i>et al.</i> 2022 (percent)	Abundance trend 1948–1960 compared to 2016–2020 provided by the Petitioners (percent)
Hoh River	–16	–37	–69	–79
Quillayute River	–6	No trend	–38	–61
Queets River	–29	–45	–50	–69
Quinault River	–69 (lower) ... +24 (upper)	–44	–63	–80

The Petitioners also report information on how often winter-run OP steelhead populations have recently met escapement goals to provide evidence of population decline. The Petitioners state that escapement goals are 2,400 fish for Hoh River, 5,900 for a system-wide goal for Quillayute (combining Calawah River, Sol Duc River, Bogachiel and Quillayute River proper, and Dickey River), 1,200 fish for upper Quinault River (none for lower), and 4,200 or 2,500 fish for Queets River (first is set by WDFW, second is used by the tribe). From Cram *et al.* (2018), the Hoh and Queets Rivers only met escapement goals in 50 percent of years while the Quinault and Quillayute Rivers met goals 100 percent (for upper, lower Quinault has no escapement goal) and 90 percent, respectively (for 2004–2013). Updating this for the most recent 10 years (2011–2020), the Petitioners state that two of the four largest winter-run OP steelhead populations have not met escapement goals in half or more of the last 10 years with recent years having low escapement (Queets met the escapement goal 30 percent of 10 years and Clearwater River met the goal 50 percent). Quillayute River on the other hand has met escapement goals in 9 out

of 10 most recent years and 18 of the past 20 years. The major Quillayute tributaries of the Dickey and Calawah Rivers have met escapement goals in each of the past 10 years, while Bogachiel/Quillayute and Sol Duc Rivers have met escapement goals in 60 percent and 70 percent of the last 10 years, respectively.

The Petitioners report abundance trends from Cram *et al.* (2018), which, together with Petitioners’ updates to escapement trends, provide evidence of declines for smaller winter-run OP steelhead populations (populations other than Quinault, Queets, Hoh, and Quillayute Rivers), as well (Table 2). The Petitioners also summarize older abundance trends for these smaller winter-run OP steelhead populations including from NMFS in 1996 that reported a negative 5.8 percent trend for Pysht River, negative 7.6 percent for Hoko River, negative 4.4 percent for Dickey River, negative 0.1 percent for Sol Duc River, negative 0.5 percent for Clearwater River, and positive trends of 1.1 percent for Calawah River and 13.6 percent for Moclips River winter-run steelhead. From Cram *et al.* (2018), Goodman Creek winter-run had a negative 54 percent long term abundance trend, Salt Creek/

independent tributaries had a negative 43 percent trend, negative 27 percent trend for the Clallam River, negative 21 percent for Pysht River/Independent tributaries, negative 40 percent for Hoko River, negative 22 percent for Dickey River, negative 12 percent for Clearwater River, negative 9 percent for Sol Duc River, and then positive trends of 50 percent and 27 percent for Calawah and Moclips Rivers, respectively (see Table 7 in Cram *et al.*, 2018). The Petitioners also assert that certain smaller winter-run OP steelhead populations have rarely met escapement goals in the past decade (see Table 3). The Petitioners assert that Goodman Creek has only met its escapement once in past decade (up to 2020), Salt Creek met its escapement once in last 10 years but the population may have stabilized recently, Pysht River met escapement in 70 percent of last 10 years, and Hoko River met escapement in 80 percent of last 10 years (escapement goal of 400 fish). Based on all the above, the Petitioners assert that winter-run OP steelhead are in chronic decline and that the OP steelhead population is at greater risk of extinction now than at the time of NMFS’s last review (Busby *et al.*, 1996).

TABLE 2—ABUNDANCE TREND ESTIMATES ACROSS DIFFERENT TIME PERIODS AND FOR SMALLER WINTER-RUN OP STEELHEAD POPULATIONS

Winter-run population	Abundance trend estimate from NMFS (Busby <i>et al.</i> , 1996—Appendix E) (percent)	Abundance trend estimate from WDFW (Cram <i>et al.</i> , 2018) (percent)
Goodman Creek	(*)	–54
Pysht River	–5.8	–21
Salt Creek	(*)	–43
Hoko River	–7.6	–40
Dickey River	–4.4	–22
Sol Duc River	–0.1	–9
Clearwater River	–0.5	–12

TABLE 2—ABUNDANCE TREND ESTIMATES ACROSS DIFFERENT TIME PERIODS AND FOR SMALLER WINTER-RUN OP STEELHEAD POPULATIONS—Continued

Winter-run population	Abundance trend estimate from NMFS (Busby <i>et al.</i> , 1996—Appendix E) (percent)	Abundance trend estimate from WDFW (Cram <i>et al.</i> , 2018) (percent)
Calawah River	1.1	50
Moclips River	13.6	27
Clallum River	(*)	-27

* Not provided.

The Petitioners assert that almost all summer-run OP steelhead populations are at critically low levels, while noting that there is no formal analysis of summer-run OP steelhead historical catch and no monitoring by the co-managers. The Petitioners provide rough estimates of peak historical abundance for summer-run OP steelhead based on harvest data for the larger systems (Quinalt, Hoh, Quillayute, and Queets). Abundance of summer-run OP steelhead in these systems ranged from 848 to 1,788 adult spawners from the late 1940s/early 1950s to the late 1970s. Using snorkel surveys, Brenkman *et al.* (2012) and McMillan (2022) estimated recent numbers of adult summer-run OP steelhead returning to spawn each year in several different populations (Calawah River system, North Fork Calawah River, South Fork Calawah River, Sitkum River, and South Fork Hoh River for Brenkman *et al.*, 2012; Bogachiel River, Sol Duc River, South Fork Hoh River, East Fork Quinalt River, and North Fork Quinalt for McMillan, 2022). Mean estimates ranged from 3 to 303 individuals. The Calawah River is at the upper end of this range, but most of the returning adult summer-run OP steelhead are hatchery-origin (89 native-origin, 214 hatchery-origin). For the other rivers, the mean proportion of hatchery-origin spawners ranged from 3 to 43 percent. McMillan (2006) estimated that the Queets River and Clearwater River summer-run OP steelhead abundance is no more than 100 fish based on catch data. Based on the above information, Petitioners assert that summer-run OP steelhead populations are at critically low levels, so much so that summer-run “could be facing extirpation in the near term if some are not already functionally extinct.”

The Petitioners also assert that because historical estimates are from a period after habitat changes had already occurred and after the onset of fisheries and canneries, declines are likely

greater than those presented above. Any unreported catch would also affect these estimates.

The review of OP steelhead in Cram *et al.* (2018) assessed overall total population viability risk of OP steelhead populations based on four risk metrics (1) long-term abundance trends, (2) short-term decline, (3) risk of extinction, (4) failure to meet escapement goals (using data up to 2013) (see Table 5 in Cram *et al.* 2018). Out of 15 OP steelhead populations for which there was sufficient information to determine risk (out of 31 populations), one population ranked at high overall risk, seven at moderate overall risk, and seven at low overall risk. Cram *et al.* (2018) concluded that overall, low productivity and declines in abundance, “did not appear to pose immediate or substantial threats to this DPS.” However, Cram *et al.* (2018) noted substantial data gaps regarding abundance, diversity, and productivity for OP steelhead, which limited the risk assessment to 15 of the 31 populations that were considered.

The Petitioners also summarize available data on population productivity to support claims that productivity is in a long-term decline and that, in combination with depleted abundance, OP steelhead populations are at risk of extinction in the foreseeable future. The Petitioners assert that winter-run OP steelhead populations have increasingly failed to replace themselves based on spawner-to-spawner recruitment, and highlight that smolt-to-adult return rates are negative for at least one population (Cram *et al.*, 2018). The Petitioners assert that winter-run steelhead populations in the Hoh and Quillayute Rivers have failed to replace themselves in 4 of the past 10 years, note there is no clear trend in smolt-to-adult winter-run return for the Queets River populations, and state that for Quinalt River, they could not find estimates of productivity (but assume fisheries co-

managers have estimates). The Petitioners also assert that declines in productivity could be a result of fishery, hatchery, or habitat effects or loss of repeat spawners. Finally, the Petitioners note that there is little known about productivity of the summer-run OP steelhead populations, as well as the smaller winter-run OP steelhead populations.

The Petitioners also describe the potential loss of life history diversity. The Petitioners state that little information is known on genetic diversity for natural-origin OP steelhead. The Petitioners assert that declining levels of repeat spawning for winter-run OP steelhead indicate the potential loss of this life history and that this may be one of the factors contributing to declining productivity. The Petitioners also note potential future loss of the summer-run OP steelhead life form and assert the potential loss of the genetic basis for premature migration if these populations are lost. The Petitioners also cite recent work from McMillan *et al.* (2022) that provides evidence of compressed run timing in winter-run OP steelhead. McMillan *et al.* (2022) estimated that the number of days between when 25 percent and 75 percent of the runs had passed in each system declined by 16, 26, and 22 days for the Quillayute, Hoh, and Queets Rivers, respectively, since historical periods (1948–1960 vs. 1980–2017). The Petitioners assert, therefore, that the population’s fate is reliant on late-returning winter OP steelhead that may not “keep pace” with environmental factors associated with climate change. Finally, the Petitioners speculate on the impacts of this shift in timing as well as certain habitat barriers (culverts, roads; no large dams in the system) on the spatial structure of OP steelhead.

In sum, while data presented in the petition and readily available in our files on OP steelhead abundance, diversity, and productivity is

incomplete, a reasonable person would conclude that the information presented in the petition indicates that many OP steelhead populations likely have declined.

Analysis of ESA Section 4(a)(1) Factors for Olympic Peninsula Steelhead

The Petitioners assert that all five ESA section 4(a)(1) factors contribute to the need to list OP steelhead as threatened or endangered, but point to main threats of declining freshwater and marine habitat and recreational and commercial fishing pressure. The Petitioners also note that a recent WDFW review (Cram *et al.*, 2018) listed key threats for OP steelhead as habitat degradation (from forestry practices) and potential impacts from hatchery and harvest. Each of the five ESA section 4(a)(1) factors is discussed in detail below.

The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

For OP steelhead habitat, most of the major river basins occupied by OP steelhead originate within the Olympic National Park (ONP) where habitat is protected from most detrimental land-use practices such as logging, but drainage areas for these river systems extend outside of the park and were or are subject to logging and other land-use practices. Though the Petitioners note that forest management outside of ONP lands has improved, including logging practices on state, Federal, and private lands, the Petitioners assert that habitat degradation is a threat to OP steelhead due to historical and ongoing logging and land-use practices (including road and culvert construction). For reference, according to the petition, 57 percent of the Hoh River watershed, nearly one-third of the Quillayute River basin, 47 percent of the Quinault River basin, and nearly all of the course of the Queets River (except the lower 8 miles) occur inside the ONP (see petition for breakdown for other rivers or areas). The Petitioners summarize that logging has altered stream flows and hydrology, road construction has led to erosion and increased sedimentation, and culverts have blocked access to various spawning grounds and habitat and impacted sedimentation and wood recruitment processes. Although efforts are underway to address these issues, it may take decades for habitat to recover (Martens *et al.*, 2019) and climate change may exacerbate conditions (Wade *et al.*, 2013). The Petitioners assert that climate change is and will further degrade habitat both inside and outside of the ONP (see section on *Other Natural or Manmade Factors Affecting*

Its Continued Existence for discussion on climate change).

Cram *et al.* (2018) stated that legacy effects of historical land-use practices, especially past extensive clear-cut logging, continue to threaten natural-origin steelhead on the Peninsula. Cram *et al.* (2018) note that although many of the large rivers begin within ONP, lower areas are subject to logging outside of the park boundaries. Cram *et al.* (2018) also note that extensive logging coupled with construction has led to increased sediment loads and a reduction in large woody debris in the Clearwater River basin (which has headwaters outside of the ONP). However, improvements have been made in the Hoh River basin, where recent land acquisitions (approximately 90 percent of the basin is now owned by state and Federal government or conservation organizations) and subsequent efforts to restore and protect habitat has led to various stages of regeneration across the Hoh River valley rainforest (Cram *et al.*, 2018).

The Petitioners summarize current status of habitat for the Water Resource Inventory Areas (WRIAs) that overlap with OP steelhead (areas 19–21), mainly for areas outside of the ONP. Washington State Department of Ecology (WDOE) developed WRIAs to delineate major watersheds within Washington and manage activities. The Petitioners summarize that in a previous review, WRIA 20 had an overall salmonid habitat rating of “poor-fair,” including “poor” water temperature, side channel floodplain, sediment quantity and quality, bank/streambed stability, instream woody debris, and riparian, “fair” road density and hydro high flows, and only pool habitat rated “good” (Smith, 2005). The Petitioners further summarize threats within individual rivers within this inventory area, which include warm temperatures, low summer stream flows, landslides, passage blockages, flooding, increased fine sediment, debris flows resulting in the scouring of spawning gravels, and poor riparian conditions, amongst other things. For the portion of WRIA 21 that is outside of ONP, the Petitioners summarize that this area was subject to timber harvest and that there is excessive sedimentation, poor conditions for water temperature and side-channel floodplain, and fair conditions for pool habitat, instream large woody debris, and riparian habitat (citing multiple references). For WRIA 19, the Petitioners state that this area has been subject to logging practices and a large percent of the old growth area has been converted to tree farms (citing McHenry *et al.*, 1996). Smith (2005) also

rated multiple habitat attributes as being in “poor” condition in this WRIA. The Petitioners also describe past and current forest practices, including past logging within the Olympic National Forest (Olympic NF), and assert that though management has improved, the impacts of past practices are still effecting OP steelhead habitat.

The Petitioners further assert that the impacts of past and current logging harm OP steelhead through increasing water temperatures and sedimentation, removing woody debris, altering stream flows, and impacting habitat connectivity. The Petitioners cite Hicks (1999), stating that high water temperatures can cause mortality, metabolic distress, alter disease susceptibility, change migration and breeding times, and can form temperature barriers to migrating fish. The Petitioners summarize that logging has resulted in increased sedimentation and landslides within the region, and that this can reduce prey availability, block habitat access, suffocate early life stages like eggs and fry, impact respiratory function, and increase water temperature (citing McHenry *et al.*, 2016, USFWS, 2020). Also, the Petitioners state that loss of woody debris from logging can result in less habitat cover and less rearing and refuge habitat. Finally, the Petitioners assert that logging roads and culverts have decreased or blocked access to available habitat.

According to the Petitioners, many rivers and streams in WRIA 19–21 do not meet state temperature standards and certain rivers and streams also do not meet dissolved oxygen and/or pH standards (WDOE, 2016). Hundreds of culverts within WRIAs 19–21 also may be creating migration barriers, though some work is ongoing to repair or replace culverts. Based on information provided by the Petitioners and readily available in our files, we find that habitat degradation may be posing a threat to the continued existence of OP steelhead.

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition identifies overutilization for commercial and recreational purposes as a main threat to OP steelhead. The fisheries are mainly managed through escapement goals for OP steelhead winter-runs, which were set based on maximum sustainable harvest. According to WDFW’s review, OP steelhead has sustained the highest harvest rate among Washington state steelhead populations with an annual harvest rate of 25.6 percent (Cram *et al.*,

2018). WDFW also notes that harvest rate estimates were only available for one-third of the OP steelhead populations with escapement data and three additional river systems with combined population escapement (Cram *et al.*, 2018). The Petitioners assert that using escapement goals based on maximum sustainable harvest does not provide enough detail to “responsibly manage harvest or maintain the persistence of the species” and question whether or not current management targets are sustainable based on high harvest rates stated in Cram *et al.* (2018) and declining abundance. Cram *et al.* (2018) also stated concerns about the high harvest rates given recent declines and limited availability of monitoring data. In recent years, WDFW has shortened or closed the recreational fishing season on winter-run OP steelhead at least in part due to low returns. WDFW also imposed restrictions on recreational angling by banning the use of boats and bait (see the following: <https://wdfw.medium.com/changes-to-the-coastal-steelhead-season-67131dd05ba7>; <https://wdfw.medium.com/frequently-asked-questions-march-2022-coastal-steelhead-closure-364cfa62826f>; <https://www.peninsuladailynews.com/sports/fishing-olympic-national-park-to-shut-down-fishing-on-west-end-rivers/>).

The Petitioners also report results from their analysis (provided in the petition, Appendix A from N. Gayeski, <https://www.fisheries.noaa.gov/endangered-species-conservation/candidate-species-under-endangered-species-act>) estimating productivity and abundance capacity/equilibrium abundance over time in order to support their assertion that managing for maximum sustainable harvest or yield is not sustainable. Using data on spawner returns and juvenile recruits from WDFW and a Ricker stock-recruit model, the Petitioners estimate productivity and unfished equilibrium abundance overtime for Hoh River and Quillayute River winter-run steelhead. These analyses show fairly steady declines in both productivity (alpha parameter) and equilibrium abundance from 1986 to 2014 for both populations.

The Petitioners further summarize current information and data on harvest impacts for the winter-run OP steelhead that are harvested in Tribal fisheries and non-Tribal recreational fisheries. The Petitioners report that mean harvest rates for the four largest winter-run OP steelhead populations (Quillayute, Hoh, Queets, and Quinault Rivers) between the late 1970s/early 1980s to 2020 were 28, 35, 35, and 46 percent, respectively;

and ratios of hatchery to natural-origin fish vary from 0.7:1 to 4.7:1 depending on the river system and specific fishery. Tribal fishers catch natural-origin OP steelhead throughout their fishing seasons. In 2016, WDFW changed the recreational fishing regulations to prohibit retention of natural-origin winter-run steelhead in OP steelhead river basins. The number of natural-origin OP steelhead that are captured and released is calculated by WDFW via creel surveys, and it is estimated that catch and release has a 10 percent mortality rate. However, the Petitioners assert that OP steelhead are potentially being caught and released more than once, for which mortality rates are unknown.

The Petitioners further support their assertion that the winter-run OP steelhead populations are over-utilized by summarizing recent failures to meet harvest management escapement goals. The Petitioners summarize the proportion of years that harvested natural-origin OP steelhead met their escapement goals both from Cram *et al.* (2018) and updated for more recent years, and assert that many populations are failing to meet escapement goals (see the Status and Population Trends section).

In the case of summer-run OP steelhead, the Petitioners note that current tribal catch is low and that retention of natural-origin summer-run OP steelhead by recreational anglers has been prohibited for several decades (since the 1990s). Petitioners provide time-series of catch data for the late 1970s to 2020 for summer-run OP steelhead but note that in certain years, hatchery fish were not marked, making it difficult to distinguish between hatchery-origin and natural-origin fish. The Petitioners also assert that harvest of natural-origin summer-run OP steelhead occurred in the Quillayute River through 2006 (based on WDFW records) though catch and release was implemented beginning in 1993, and the Petitioners assert that the data possibly represents illegal harvest but they are uncertain. Where they could distinguish natural-origin from hatchery-origin fish, historical recreational mean annual harvest of natural-origin summer-run OP steelhead ranged from 8 to 54 (1985–2006) across Queets, Quillayute, Hoh, and Quinault Rivers. Harvest of hatchery-origin summer-run OP steelhead ranged from 15 to 673 fish (years 1986–2016). However, the Petitioners assert that prior to 1986, hatchery fish were not marked and harvest of summer-run OP steelhead was higher in the Quillayute (in the low thousands), Hoh, and Queets (in the

hundreds) river basins. The Petitioners summarize tribal summer-run OP steelhead harvest, but were unable to distinguish between hatchery-origin and natural-origin fish for Quillayute, Queets, Hoh, and Quinault Rivers. The mean annual harvest in those rivers was in the low hundreds, but higher for Quinault, although the Petitioners question if some of that harvest may include winter-run kelts (steelhead that survived spawning and return to the ocean). Though this harvest may be relatively low, the Petitioners emphasize that summer-run OP steelhead have less monitoring, low abundance, and lack escapement goals.

Finally, the Petitioners discuss how overutilization may be reducing OP steelhead life history diversity, putting the population at further risk. Both the Petitioners and Cram *et al.* (2018) summarize that harvest may be effecting the diversity of sizes, ages, and run-timing. Analysis of scale samples indicated that Tribal fisheries harvested more of the older fish, whereas the recreational fisheries harvested more of the younger fish (Cram *et al.*, 2018). The Petitioners also assert that since the number of treaty fishing days per week declines throughout the season, this has resulted in greater harvest of the fish that return in the early part of the run (Cram *et al.*, 2018), and could result in a shortened breeding season, reduced productivity, reduced diversity, and a reduction in the adaptive capacity with changing climate. Finally, the Petitioners express concern about fishing impacts to rates of iteroparity (rate of fish that spawn more than once) in OP steelhead and assert that fisheries targeting Chinook salmon (with incidental harvest of steelhead) and Tribal fisheries for steelhead in the spring and summer could be impacting kelts that might otherwise come back to spawn. They speculate that declines in rates of iteroparity are contributing to OP steelhead population declines.

Based on information provided by the Petitioners, as well as information readily available in our files, we find past and future harvest may be posing threats to the continued existence of OP steelhead.

Disease or Predation

The Petitioners assert that disease and predation pose a risk to natural-origin steelhead on the Olympic Peninsula. The Petitioners cite work by Breyta *et al.* (2013) summarizing detections of the genogroup (group of related viruses) of infectious hematopoietic necrosis virus (IHNV) that causes high levels of mortality in steelhead and rainbow trout, in the Hoh, Queets, Quinault, and

Quillayute river basins between 2007 to 2011. Though most detections were in hatchery-origin fish, Breyta *et al.* (2013) note that although natural-origin fish are less commonly sampled, there were detections of this virus in natural-origin fish in the Hoh and Quinault river basins. No IHNV was detected in 2012, but the future risk of IHNV in OP steelhead is unknown given known fluctuations of IHNV incidences in other regions (like Columbia River basin) (Breyta *et al.*, 2013). Although virus outbreaks are concerning, the extent to which natural-origin OP steelhead may be threatened by future outbreaks is not clear based on the information in the petition or otherwise readily available.

The Petitioners assert that there is increased distribution of predators in the Dickey River basin likely from increased temperatures, citing Smith (2000), and that predation risk will likely increase with decreasing stream flow and increasing water temperature (citing Dalton *et al.*, 2016). However, information to substantiate the extent that OP steelhead in particular will be threatened by increased predation is not provided and is not readily available in our files.

Inadequacy of Existing Regulatory Mechanisms

The Petitioners also explain that existing regulatory mechanisms have inadequately protected and restored ecosystems that OP steelhead depend on, and is therefore a threat to OP steelhead. The Petitioners assert that the National Forest Management Act, including the associated Northwest Forest Plan and Aquatic Conservation Strategy (ACS) and Land and Resource Management Plan (LRMP) for the Olympic NF under the U.S. Forest Service (USFS), have not led to anticipated restored sediment regimes (under which OP steelhead evolved) and they could not find evidence of increased anadromous fish production, as the 1990 USFS LRMP claimed would occur. Also, they assert that even with the ACS, Olympic National Forest Strategic Plan, and Road Management Strategy, there are still hundreds of miles of road that pose a threat to fish in the Olympic NF, like OP steelhead, and other aquatic resources (though 435 miles [700.1 km] have been decommissioned). Furthermore, riparian corridors have not been reestablished with conifers, which would contribute woody debris to adjacent stream channels. The Petitioners also question if USFS has included anything in the ACS in response to climate change, and broadly assert that the U.S. Government has failed to adequately address climate

change. Finally, the Petitioners discuss how Washington is not meeting EPA water quality standards for many rivers and streams in OP steelhead habitat and assert that the Clean Water Act is failing to protect steelhead because discharge and runoff from logging is not being adequately regulated.

The Petitioners include information on protections afforded to other ESA-listed species in the Olympic Peninsula region that could benefit OP steelhead, and assert that the current status of OP steelhead indicates these are not sufficient. Multiple rivers and streams where OP steelhead occur have been designated as bull trout critical habitat (75 FR 63875–63978, October 18, 2010). Listed species like bull trout, marbled murrelets, and Northern Spotted Owl occur on the peninsula, and the USFWS has conducted biological opinions for Federal actions in this region, including for the Forest Management Activities in the Olympic NF. However, the Petitioners note that even with conservation measures in place stemming from the biological opinions and recommended by USFWS, the USFWS still anticipates adverse effects to bull trout critical habitat.

The Petitioners also discuss state regulatory mechanisms that can impact OP steelhead habitat. The Washington Department of Natural Resources Trust Lands (DNR) Habitat Conservation Plan (HCP), including its Riparian Forest Restoration Strategy, has habitat protections for riparian buffers and wetland protections, but the Petitioners assert that loss of woody debris and increased water temperatures is still occurring. The Washington State Forest Practices (FP) HCP also includes habitat protections from forestry impacts, but the Petitioners assert that NMFS and USFWS have voiced concerns that Washington Department of Natural Resources (WDNR) has not adequately followed water typing (not correctly identifying fish habitat) and monitoring described in the FP HCP (the Petitioners cite a Letter from Kim Kratz, Assistant Regional Administrator, NMFS, and Eric V. Rickerson, State Supervisor, USFWS, to Peter Goldmark, Commissioner of Public Lands, DNR (July 2, 2015)).

The Petitioners also provide information on the National Environmental Policy Act (NEPA), which requires federal agencies to assess impacts of major actions and action alternatives on the environment. According to the Petitioners, because there is no requirement that Federal agencies pick the alternative with the least impact, NEPA is inadequate to protect OP steelhead. The State

Environmental Policy Act (SEPA) has similar requirements at the state level.

The Petitioners further assert that because OP steelhead are in decline, that state plans in Washington like the Statewide Steelhead Management Plan and Hatchery and Fishery Reform Policies, as well as Harvest Management Plans with the Tribes, are not adequate to protect OP steelhead. The Petitioners assert that the Steelhead Management Plan says WDFW should maintain escapement objectives above or at maximum sustainable harvest for populations with status of “healthy,” but they assert that assessment of status is nearly two decades old for OP steelhead and recent escapement data shows WDFW is not maintaining this escapement. They also assert that under the Steelhead Management Plan, more gene banks should have been established to protect populations of OP steelhead. In addition, the Petitioners discuss general fishery management by the state and the impact of fisheries to OP steelhead (see *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes* section).

Petitioners also discuss the inadequacy of hatchery regulatory mechanisms in Washington State. The Petitioners identify the 2009 Hatchery and Fishery Reform Policy adopted by the Washington Fish and Wildlife Commission (WFWC), and note that after a SEPA review of this policy, Hatchery Action Implementation Plans were to be developed for each hatchery facility. The Petitioners assert that to their knowledge these plans were never developed or implemented. The 2009 Hatchery and Fishery Reform Policy outlined multiple guidelines for WDFW hatchery management including to “Use the principles, standards, and recommendations of the Hatchery Scientific Review Group (HSRG) to guide the management of hatcheries operated by the Department.” The HSRG was an independent scientific panel that reviewed Pacific Northwest hatcheries and developed recommendations for reform. The HSRG completed its work in 2021. Subsequent review of the 2009 policy (Murdoch and Marston, 2020), according to the Petitioners, found various issues, including that there was inadequate information to assess the policy’s effectiveness at protecting wild salmonids, that implementation of certain guidelines was prevented due to lack of funding, that there is a lack of state-wide monitoring, and that there is missing data collection and analysis for adaptive management. The Petitioners state that the same review (Murdoch and Marston, 2020) found that little

progress had occurred in implementing HSRG recommendations for hatcheries on the Bogachiel River on the Olympic Peninsula. WDFW recently replaced the 2009 hatchery policy with new policy, but the Petitioners assert that the new plan “abandons commitments to follow HSRG guidelines,” did not undergo SEPA review, is currently under litigation, and is behind schedule in implementation.

On the other hand, the Petitioners note that within the ONP, mechanisms like the National Park Service Organic Act, fishing regulations (catch and release, recent closures), and actions taken by the National Park Service to reduce impacts of construction and maintenance, have helped protect OP steelhead and their habitat. However, based on information provided by the Petitioners and information readily available in our files, we find that existing regulatory mechanisms for areas primarily outside of the ONP may not be adequate to address habitat modification and curtailment, overutilization, or other anthropogenic factors (hatcheries) that may be affecting OP steelhead.

Other Natural or Manmade Factors Affecting Its Continued Existence

The Petitioners provide information on three other natural or manmade factors that they assert are affecting the continued existence of OP steelhead: hatcheries, climate change and ocean conditions, and loss of nutrients.

The Petitioners cite concerns about potential effects of hatchery production on OP steelhead. In its 1996 review, NMFS noted that past hatchery practices and practices at the time of the review were a major threat to the genetic integrity of OP steelhead. The recent review of OP steelhead from WDFW (Cram *et al.*, 2018) also named hatchery operations as “a threat to genetic integrity of wild steelhead populations” in the area occupied by OP steelhead. Cram *et al.* (2018) stated that, as of 2014, there were 11 hatchery programs on the Olympic Peninsula with an average annual release of 1,393,022 smolts from 2000 to 2008 and 1,072,781 from 2009 to 2013. Most hatchery programs (10 of 11) are used for harvest augmentation and most of these use stock from two steelhead populations not native to the Olympic Peninsula—Chambers Creek early winter and Skamania early summer (the use of which is being eliminated elsewhere on the West Coast due to impacts on listed steelhead, see Ford *et al.*, 2022). Of the hatchery programs in the Olympic Peninsula, five are off-site release programs that transfer smolts from their natal hatchery to

another watershed for release. Cram *et al.* (2018) notes that if adults from these programs are not caught by fisheries, they place natural-origin OP steelhead at risk genetically and ecologically. As of 2013, an integrated hatchery program was initiated in the Bogachiel River, while the program on the Sol Duc River ended and steelhead there are now protected from hatchery influence by the river’s designation as a “Wild Steelhead Gene Bank” (Cram *et al.*, 2018).

The Petitioners assert that straying of hatchery-origin steelhead, and the associated interbreeding and competition between natural-origin and hatchery-origin steelhead on the Olympic Peninsula, are presenting genetic risks to natural-origin OP steelhead. The Petitioners also assert that the harvest of early-running hatchery-origin steelhead on the Olympic Peninsula is contributing to depletion of early returning native-origin OP steelhead. The Petitioners cite multiple studies that report the straying of hatchery steelhead into rivers and streams occupied by natural-origin OP steelhead. However, the Petitioners note that little data is available to quantify straying of hatchery winter-run steelhead and assert that some of the hatcheries in the Queets River basin and one hatchery in the Quinault River basin do not mark hatchery fish, which makes it difficult to discern hatchery-origin from natural-origin fish. Based on snorkel surveys by Brenkman *et al.* (2012) and McMillan (2022), the Petitioners assert that there is substantial straying of summer hatchery-origin steelhead into summer-run OP steelhead watersheds that do not have hatchery programs, and straying within the same system of release, but outside of release location (the proportion of hatchery-origin fish ranged from 0 to 100 percent depending on the river/stream and year). Weirs and adult traps can be used to capture hatchery-origin fish, but the Petitioners note a lot of uncertainty about whether or not these are in use. The Petitioners conclude that straying of hatchery-origin fish threaten the genetic integrity of OP steelhead, and pose a great risk to summer-run OP steelhead given their low abundance.

Where hatchery-origin and natural-origin steelhead co-occur on the Olympic Peninsula, there is concern about genetic introgression due to interbreeding, which NMFS stated as a risk to OP steelhead in the 1996 status review (Busby *et al.*, 1996). Estimates of the proportion of naturally spawning steelhead that were of hatchery-origin ranged from 16 to 44 percent, but with

the largest runs (Queets and Quillayute) having the lowest proportions of hatchery-origin spawners (Busby *et al.*, 1996). The Petitioners cite the Washington Coast Sustainable Salmon Plan (2013) for more recent proportions of natural-origin winter-run OP steelhead spawners. This indicates, assuming that the rest are hatchery-origin, that the Sooes/Waatch Rivers, Goodman Creek, Quinault River estimated proportions of hatchery-origin are as much as 50 percent. However, the Dickey River, Klalaloch Creek, Clearwater River, Moclips River, and Copalis River hatchery-origin steelhead proportions are only 0–5 percent. Additionally, a 2008 WDFW report cited by the Petitioners reported gene flow of Chambers Creek hatchery stock to Hoko, Pysht, and Sol Duc River winter-run steelhead of 5.5 to 14.5 percent, 12 to 75 percent, and 2.5 to 6 percent, respectively. The Petitioners assert that offspring of hatchery-origin spawners or hybrid offspring may then compete with natural-origin offspring for food and habitat.

The Petitioners also assert that hatchery practices have contributed to a compression of the run timing of winter-run OP steelhead. Specifically, the Petitioners note that the amount of open treaty fishery days per week is highest earlier on in the fishing season to target hatchery returning steelhead, and earlier returning fish remain in the system for longer periods. Thus, recreational fisheries (catch and release) may catch early-returners multiple times. This may contribute to the compressed run-timing of OP steelhead shown in McMillan *et al.* (2022). With the potential for greater early-winter peak flows and more intense summer temperatures in association with climate change, the Petitioners assert that spawning and rearing conditions in the future may be more ideal earlier in the season, but that hatchery and fishery practices with selection of late run timing are “blocking the potential for adaptations in migration timing” for OP steelhead.

The Petitioners assert that climate change impacts in both the marine environment and in the terrestrial/freshwater environment will adversely impact OP steelhead. An assessment by the USFS on climate change impacts in the Olympic NF and ONP, indicated declines in freshwater habitat quantity and quality for OP steelhead (Halofsky *et al.*, 2011).

The Petitioners, citing multiple assessments, summarize the potential effects of climate change on freshwater habitats and potential impacts to OP steelhead. Specifically, the Petitioners summarize that climate change on the

Olympic Peninsula has or will increase air temperature, melt glaciers, reduce snowpack, decrease summer precipitation, increase precipitation at other times of the year, decrease summer stream flow, increase winter flooding, increase water temperature, and increase sediment pollution. Halofsky *et al.* (2011) stated that for steelhead, generally, because of their long freshwater residency, are likely more sensitive to climate change effects in freshwater habitats than certain other salmonids (like ocean-type Chinook, pink, or chum salmon). In a separate assessment by the Oregon Climate Change Research Institute (Dalton *et al.*, 2016), the authors note that based on studies in western Washington, changes in water temperature and stream flow are the main factors associated with climate change that will impact salmon and steelhead (Wade *et al.*, 2013). The Petitioners summarize multiple potential adverse effects to OP steelhead from these two primary factors due to exposure on the Olympic Peninsula. They assert (citing various assessments including Dalton *et al.*, 2016 and Halofsky *et al.*, 2011) that low summer flows will lead to less cold water and holding pools for migrating adult OP steelhead and thereby potentially lowering reproductive success; increased winter flow that could reduce survival of early life stages of steelhead, displace juveniles, and reduce slow-water habitat for juveniles (which could impact survival); and high water temperatures that may impact the smoltification process and growth. Dalton *et al.* (2016) also summarized work showing that water temperature may impact the expression of resident vs. anadromous life history. However, the Petitioners note that OP steelhead may also realize some benefits from climate change, such as increased food web productivity and expanded growing seasons (summarized in Halofsky *et al.*, 2011).

The Petitioners summarize that, in the marine environment, climate change may impact sea surface temperature, upwelling, ocean acidification, and dissolved oxygen (resulting in anoxic and hypoxic events), potentially negatively affecting steelhead survival in the Pacific Northwest. The Petitioners note that NMFS stated in a recent review (Ford, 2022) that cyclic ocean conditions will likely be disrupted by climate change resulting in more low productivity years for salmonids. In general, salmonid abundance is correlated with decadal-scale environmental variability. The Petitioners assert that it is unclear if

salmonids will continue to persist with shifts in marine conditions in combination with other threats. The Petitioners assert that climate change in the marine environment will likely also reduce forage fish prey for steelhead generally. Finally, a study by Abdul-Aziz *et al.* (2011) predicted an 8 to 43 percent contraction of steelhead species' marine habitat due to climate change between the 2020s and 2080s.

As an additional threat, the Petitioners assert that the loss of marine-derived nutrients from declines of other salmonids in Olympic Peninsula rivers is likely limiting OP steelhead productivity through impacts to smolt survival. Information on whether, how, and to what extent nutrient declines are impacting OP steelhead specifically was limited.

Based on information provided by the Petitioners and information readily available in our files, we find that hatcheries and climate change may be posing threats to the continued existence of OP steelhead.

Petition Finding

After reviewing the information in the petition, the literature cited in the petition, and other information readily available in our files, we find there is substantial scientific and commercial information indicating that the petitioned action to list OP steelhead as a threatened or endangered DPS under the ESA may be warranted. Therefore, in accordance with section 4(b)(3)(A) of the ESA and NMFS' implementing regulations (50 CFR 424.14(h)(2)), we will commence a status review to determine whether OP steelhead constitute a DPS, and, if so, whether OP steelhead is in danger of extinction throughout all or a significant portion of its range, or is likely to become so within the foreseeable future throughout all or a significant portion of its range. As required by section 4(b)(3)(B) of the ESA, within 12 months of the receipt of the petition (August 1, 2023), we will make a finding as to whether listing the OP steelhead DPS as an endangered or threatened species is warranted. If listing is warranted, we will publish a proposed rule and solicit public comments before developing and publishing a final rule.

Information Sought

To ensure that our status review is informed by the best available scientific and commercial data, we are opening a 60-day public comment period to solicit comments and information on OP steelhead. We request information from the public, concerned governmental agencies, Native American tribes, the

scientific community, agricultural and forestry groups, conservation groups, fishing groups, industry, or any other interested parties concerning the current and/or historical status of OP steelhead. Specifically, we request information regarding: (1) species abundance; (2) species productivity; (3) species distribution or population spatial structure; (4) patterns of phenotypic, genotypic, and life history diversity; (5) habitat conditions and associated limiting factors and threats; (6) ongoing or planned efforts to protect and restore the species and their habitats; (7) information on the adequacy of existing regulatory mechanisms, whether protections are being implemented, and whether they are proving effective in conserving the species; (8) data concerning the status and trends of identified limiting factors or threats; (9) information on targeted harvest (tribal, commercial, and recreational) and incidental harvest of the species; (10) other relevant new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes; (11) information concerning the impacts of environmental variability and climate change on survival, recruitment, distribution, and/or extinction risk; and (12) information on interactions or relationships between different steelhead life history forms in the Olympic Peninsula, such as anadromous and resident steelhead, or between hatchery-origin and natural-origin steelhead.

We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, and any association, institution, or business that the person represents. Please send any comments in accordance with the instructions provided in the **ADDRESSES** section above. We will base our findings on a review of the best available scientific and commercial information available, including all information received during the public comment period.

References

A complete list of all references cited herein is available upon request (See **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 6, 2023.

Samuel D. Rauch, III,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 230202-0035]

RIN 0648-BL71

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region; Amendment 34

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

ACTION: Proposed rule; request for
comments.

SUMMARY: NMFS proposes regulations to implement Amendment 34 to the Fishery Management Plan (FMP) for the Coastal Migratory Pelagic (CMP) Resources of the Gulf of Mexico and Atlantic Region (CMP FMP) (Amendment 34), as prepared and submitted by the South Atlantic Fishery Management Council (South Atlantic Council) and the Gulf of Mexico Fishery Management Council (Gulf Council). For Atlantic migratory group king mackerel (Atlantic king mackerel), this proposed rule would revise the stock and sector annual catch limits (ACL), and the recreational bag and possession limits off the east coast of Florida. For both Atlantic king mackerel and Atlantic migratory group Spanish mackerel (Atlantic Spanish mackerel), this proposed rule would revise the landing fish intact provisions for the recreational sector. In addition, for Atlantic king mackerel, Amendment 34 would revise the acceptable biological catch (ABC), annual optimum yield (OY), and sector allocations. The purpose of this proposed rule and Amendment 34 is to revise the catch limits based on a recent stock assessment and revise sector allocations for Atlantic king mackerel based on the best scientific information available and to revise management measures for Atlantic king and Spanish mackerel.

DATES: Written comments must be received on or before March 13, 2023.

ADDRESSES: You may submit comments on the proposed rule, identified by “NOAA-NMFS-2022-0108,” by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter “NOAA-NMFS-2022-0108”, in the Search box. Click the “Comment” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Mary Vara, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

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

Electronic copies of Amendment 34, which includes a fishery impact statement and a regulatory impact review, may be obtained from the Southeast Regional Office website at <https://www.fisheries.noaa.gov/action/amendment-34-catch-level-and-allocation-adjustments-and-management-measures-atlantic-king>.

FOR FURTHER INFORMATION CONTACT:

Mary Vara, telephone: 727-824-5305, or email: Mary.Vara@noaa.gov.

SUPPLEMENTARY INFORMATION: Under the CMP FMP, the South Atlantic and Gulf Councils (Councils) jointly manage fishing for king mackerel and Spanish mackerel in Federal waters from Texas through New York (to the intersection point of Connecticut, Rhode Island, and New York). Atlantic king mackerel and Atlantic Spanish mackerel are managed under the CMP FMP in Federal waters of the Atlantic from New York to the Miami-Dade/Monroe County, Florida, boundary. The Atlantic migratory groups of king mackerel and Spanish mackerel are further divided into the northern and southern zones separated by a line extending from the North Carolina/South Carolina border. The CMP FMP was prepared by the Councils and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act).

All weights in this proposed rule are in round and eviscerated weight combined, unless otherwise specified.

Background

The Magnuson-Stevens Act requires that NMFS and regional fishery management councils prevent overfishing and achieve, on a continuing basis, the OY from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to minimize bycatch and bycatch mortality to the extent practicable.

The Atlantic king mackerel ABC is apportioned between the northern and southern zones. Under the current framework procedures in the CMP FMP, the South Atlantic Council is responsible for specifying management measures for Atlantic king mackerel and Atlantic Spanish mackerel.

The most recent Southeast Data, Assessment and Review (SEDAR) stock assessment for Atlantic king mackerel was completed in April 2020 (SEDAR 38 Update 2020). The fishing year for Atlantic king mackerel is from March through February. The assessment update incorporated 5 years of additional data through the 2017-2018 fishing year (March 2017 through February 2018). The assessment indicated that Atlantic king mackerel was not overfished or undergoing overfishing. The South Atlantic Council's Scientific and Statistical Committee (SSC) reviewed the SEDAR 38 Update (2020) at their April 2020 meeting and determined that the assessment was conducted using the best scientific information available and was adequate for determining stock status and supporting fishing level recommendations.

Additionally, the findings of SEDAR 38 Update (2020) showed that recreational and commercial landings, and catch per unit effort, all showed an increasing trend in biomass. The SEDAR 38 Update (2020) incorporated the revised estimates for recreational catch from the Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES). In 2018, MRIP replaced the fishing effort estimates from the MRIP Coastal Household Telephone Survey (CHTS) with those from the FES. MRIP-FES is considered

to be a more reliable estimate of recreational effort by the Councils and their SSCs and NMFS, and more robust compared to the MRIP–CHTS method. Total recreational fishing effort estimates generated from MRIP–FES are generally greater than MRIP–CHTS estimates, and those higher effort estimates necessarily increase the recreational landings estimates. This difference in the estimates is because MRIP–FES is designed to more accurately measure fishing activity, not because there was a sudden increase in fishing effort.

Based on the results of the SEDAR 38 Update (2020), the South Atlantic Council's SSC updated their Atlantic king mackerel catch level recommendations to increase harvest. The South Atlantic Council developed Amendment 34 in response to the results of the SEDAR 38 Update (2020) and their SSC's recommendations. However, the current and proposed overfishing limits (OFL), ABC, and ACLs are not directly comparable because they are based on different assessments and the updated assessment includes changes in the recreational catch estimates based on new MRIP–FES methodology.

In addition to the revisions to the stock (total) ACL, sector ACLs, and recreational annual catch target (ACT), the South Atlantic Council is proposing modifications to Atlantic king mackerel management measures to allow for recreational and commercial harvest at the proposed fishing levels. The proposed rule would increase the recreational bag and possession limits for Atlantic king mackerel in the Exclusive Economic Zone (EEZ) off the east coast of Florida. The proposed rule would also modify the recreational requirement for Atlantic king mackerel and Spanish mackerel to be landed with heads and fins intact. This would allow for damaged Atlantic king mackerel and Atlantic Spanish mackerel caught under the recreational bag limit and that comply with the minimum size limits, to be possessed, and offloaded ashore.

The South Atlantic Council determined that the actions in Amendment 34 would achieve OY while minimizing, to the extent practicable, adverse social and economic effects.

Management Measures Contained in This Proposed Rule

This proposed rule would revise the Atlantic king mackerel stock (total) ACLs, sector ACLs, recreational ACT, commercial zone ACLs, and commercial southern zone seasonal ACLs based on the results of SEDAR 38 Update (2020)

and the revised MRIP–FES estimates. Additionally, the proposed rule would revise the recreational bag and possession limits off the east coast of Florida for Atlantic king mackerel, and modify the recreational requirement for Atlantic king mackerel and Atlantic Spanish mackerel to be landed with heads and fins intact.

Atlantic King Mackerel Stock ACLs

As implemented through Amendment 26 to the CMP FMP (82 FR 17387, May 11, 2017), the current OY and stock ACL (total ACL) for Atlantic king mackerel are equal to the ABC of 12,700,000 lb (5,760,623 kg). In Amendment 34, the ABC would be revised based on the results of the SEDAR 38 Update (2020) and the revised MRIP–FES estimates, and set the stock ACL and annual OY equal to each other.

Amendment 34 and this proposed rule would revise the stock ACL and annual OY for Atlantic king mackerel and set these values equal to 95 percent of the ABC. The revised stock ACL would be 31,160,000 lb (14,133,938 kg) for the 2022–2023 fishing year; 26,980,000 lb (12,237,922 kg) for the 2023–2024 fishing year; 24,130,000 lb (10,945,184 kg) for the 2024–2025 fishing year; 22,135,000 lb (10,040,267 kg) for the 2025–2026 fishing year; and 20,710,000 lb (9,393,898 kg) for the 2026–2027 fishing year and subsequent fishing years.

Atlantic King Mackerel Sector Allocations and ACLs

Amendment 34 and this proposed rule would revise the Atlantic king mackerel stock ACL as it is allocated between the recreational and commercial sectors. The Atlantic king mackerel stock ACL is allocated at 62.9 percent to the recreational sector and 37.1 percent to the commercial sector. This allocation was established in 1985 through Amendment 1 to the CMP FMP, using the average proportion of landings for the longest time series where both recreational and commercial landings data were available (50 FR 34840, August 28, 1985). Applying this allocation to the current stock ACL for Atlantic king mackerel of 12,700,000 lb (5,760,623 kg) results in 8,000,000 lb (3,628,739 kg) to the recreational sector (recreational ACL) and 4,700,000 lb (2,131,884 kg) to the commercial sector (commercial ACL). In Amendment 34, the South Atlantic Council decided to retain the same current sector allocation percentages of 62.9 percent for the recreational sector and 37.1 percent for the commercial sector, and apply this allocation to the new stock ACL, which incorporates the revised MRIP–FES

estimates for recreational catch. The Council determined that this allocation would be fair and equitable to both the recreational and commercial sectors because it would allow both sectors room to expand their harvest without risking either sector meeting or exceeding their sector annual catch limit.

Under this proposed rule, the revised recreational ACLs would be 19,599,640 lb (8,890,247 kg) for the 2022–2023 fishing year; 16,970,420 lb (7,697,653 kg) for the 2023–2024 fishing year; 15,177,770 lb (6,884,521 kg) for the 2024–2025 fishing year; 13,922,915 lb (6,315,328 kg) for the 2025–2026 fishing year; and 13,026,590 lb (5,908,762 kg) for the 2026–2027 fishing year and subsequent fishing years. The South Atlantic Council acknowledged that the recreational sector has not met their quota in recent years but determined that the increase in poundage for the recreational sector may result in positive social benefits associated with the potential for increased harvest. The recreational sector does not have in-season accountability measures (AMs) in place but does have post-season AMs to address any overages of the recreational ACL. However, based on the new MRIP–FES recreational landings, none of the proposed recreational ACLs are expected to be reached.

Under this proposed rule, the commercial ACLs would be 11,560,360 lb (5,243,691 kg) for the 2022–2023 fishing year; 10,009,580 lb (4,540,269 kg) for the 2023–2024 fishing year; 8,952,230 lb (4,060,663 kg) for the 2024–2025 fishing year; 8,212,085 lb (3,724,939 kg) for the 2025–2026 fishing year; and 7,683,410 lb (3,485,136 kg) for the 2026–2027 fishing year and subsequent fishing years. Similar to the recreational sector, the commercial sector has not met their quota in recent years. The South Atlantic Council determined that the increase in poundage for the commercial sector may also result in positive social benefits associated with the potential for increased harvest. The commercial sector for Atlantic king mackerel has in-season AMs in place to prevent the commercial ACL from being exceeded and post-season AMs, based on stock status, to address any overages of the commercial ACL. However, based on commercial landings for the fishing years of 2015–2016 through 2019–2020, none of the proposed commercial ACLs are expected to be reached.

Atlantic King Mackerel Commercial Zone ACLs

In addition to sector allocations, the commercial sector is divided into a northern and southern zone, with the commercial ACL further allocated between the two zones. The South Atlantic Council decided not to modify those zone allocations in Amendment 34 based on recommendations from their Mackerel Cobia Advisory Panel (AP) that the current zone allocations are functioning well. The northern zone (from the New York/Connecticut/Rhode Island line to the North Carolina/South Carolina line) is allocated 23.04 percent of the commercial ACL and the southern zone (North Carolina/South Carolina line to the Miami-Dade/Monroe County, Florida, line) is allocated 76.96 percent of the commercial ACL. In addition, there is an allowed incidental commercial harvest of Atlantic king mackerel by purse seine gear that is limited to 0.40 million lb (0.18 million kg) per fishing year. The current commercial sector ACL zone allocations and the purse seine allocation would not change in Amendment 34.

The current northern zone commercial quota is 1,082,880 lb (491,186 kg). Based on the revised stock and commercial ACLs, under this proposed rule the commercial northern zone ACL (quota) would be 2,663,507 lb (1,208,146 kg) for the 2022–2023 fishing year; 2,306,207 lb (1,046,078 kg) for the 2023–2024 fishing year; 2,062,594 lb (935,577 kg) for the 2024–2025 fishing year; 1,892,064 lb (858,226 kg) for the 2025–2026 fishing year; and 1,770,258 lb (802,976 kg) for the 2026–2027 and subsequent fishing years.

The current southern zone commercial ACL (quota) is 3,617,120 lb (1,640,698 kg). Under this proposed rule the southern zone commercial ACL (quota) would be 8,896,853 lb (4,035,545 kg) for the 2022–2023 fishing year; 7,703,373 lb (3,494,191 kg) for the 2023–2024 fishing year; 6,889,636 lb (3,125,086 kg) for the 2024–2025 fishing year; 6,320,021 lb (2,866,713 kg) for the 2025–2026 fishing year; and 5,913,152 lb (2,682,161 kg) for the 2026–2027 and subsequent fishing years. The proposed revised commercial northern and southern zone ACLs for Atlantic king mackerel are all greater than the observed landings in recent years. Based on the average commercial landings from 2015–2016 through 2019–2020, future landings would be expected to continue to be less than the proposed commercial zone ACLs, and are not expected to be constraining on harvest or alter fishing activity.

Atlantic King Mackerel Commercial Southern Zone Seasonal Quotas

The commercial fishing year for Atlantic king mackerel is March through February, and the commercial ACL for the southern zone is divided between two seasons. Season 1 is March 1 through September 30, and Season 2 is October 1 through the end of February. Season 1 is allocated 60 percent of the Atlantic king mackerel commercial ACL for the southern zone and Season 2 is allocated 40 percent. The current quota for Season 1 is 2,170,272 lb (984,419 kg) and the quota for Season 2 is 1,446,848 lb (656,279 kg).

Based on the revised stock, commercial, and commercial southern zone ACLs in Amendment 34, the commercial southern zone quota for Season 1 would be 5,338,112 lb (2,421,327 kg) for the 2022–2023 fishing year, 4,622,024 lb (2,096,515 kg) for the 2023–2024 fishing year; 4,133,782 lb (1,875,052 kg) for the 2024–2025 fishing year; 3,792,012 lb (1,720,028 kg) for the 2025–2026 fishing year; and 3,547,891 lb (1,609,296 kg) for the 2026–2027 fishing year and subsequent fishing years. The commercial southern zone quota for Season 2 would be 3,558,741 lb (1,614,218 kg) for the 2022–2023 fishing year; 3,081,349 lb (1,397,676 kg) for the 2023–2024 fishing year; 2,755,854 lb (1,250,034 kg) for the 2024–2025 fishing year; 2,528,008 lb (1,146,685 kg) for the 2025–2026 fishing year; and 2,365,261 lb (1,072,864 kg) for the 2026–2027 fishing year and subsequent fishing years. The proposed commercial southern zone seasonal quotas for Atlantic king mackerel are all greater than the observed landings in recent years. Based on the average commercial landings from 2015–2016 through 2019–2020, landings would be expected to continue to be less than the proposed commercial southern zone seasonal quotas, and are not expected to be constraining on harvest or alter fishing activity.

Atlantic King Mackerel Recreational ACTs

The Atlantic king mackerel recreational ACT was first established in Amendment 18 to the CMP FMP (76 FR 82057, December 29, 2011) using the equation $\text{recreational ACL} * ((1 - \text{Proportional Standard Error (PSE)}) \text{ or } 0.5, \text{ whichever is greater})$. Recreational ACTs for Atlantic king mackerel are utilized in triggering the post-season recreational AMs. For the Atlantic king mackerel post-season AM, if recreational landings exceed the ACL, and the sum of the commercial and recreational landings exceed the stock

ACL, a reduced bag limit would be implemented the following fishing year by the amount necessary to ensure the recreational landings may achieve the recreational ACT, but do not exceed the recreational ACL. Additionally, if the sum of the commercial and recreational landings exceeds the stock ACL and Atlantic king mackerel are overfished, the recreational ACL and ACT may be reduced for the following year by the amount of any recreational sector overage in the prior fishing year. Because the post-season recreational AM has not been triggered in the past, and the SEDAR 38 Update (2020) indicates that the Atlantic king mackerel is not overfished, sector ACLs and the recreational ACT can be increased without having negative effects on the sustainability of the stock and are not expected to trigger post-season recreational AMs. In Amendment 18 and past CMP amendments, the South Atlantic Council has chosen to use the 5-year average PSE because it better represents the precision of recent catch estimates than the 3-year average. The current recreational ACT of 7,400,000 lb (3,356,584 kg) is derived from the current ABC and recreational ACL. Amendment 34 and this proposed rule would maintain the formula for determining the recreational ACTs, but the PSE values used in the formula have been updated to reflect the revised recreational landings that are based on the MRIP's newer FES method, and the revised stock ACL and recreational ACL. The 5-year average PSE for the recreational data was 0.137. Using the current formula to calculate the recreational ACT, the resulting recreational ACT would be equal to the recreational ACL multiplied by $(1 - 0.137)$, or 0.863, setting the recreational ACT at 86.3 percent of the recreational ACL.

Based on the revised stock and recreational ACLs in Amendment 34, the recreational ACT would be 16,914,489 lb (7,672,283 kg) for the 2022–2023 fishing year; 14,645,472 lb (6,643,074 kg) for the 2023–2024 fishing year; 13,098,416 lb (5,941,342 kg) for the 2024–2025 fishing year; 12,015,476 lb (5,450,128 kg) for the 2025–2026 fishing year; and 11,241,947 lb (5,099,261 kg) for the 2026–2027 fishing year and subsequent fishing years.

Atlantic King Mackerel Recreational Bag and Possession Limits

This proposed rule would revise the recreational bag and possession limits in the EEZ off the east coast of Florida. The current recreational daily bag limit for Atlantic king mackerel in both Federal and state waters off the east coast of

Florida is two fish per person. However, the recreational daily bag limit is three fish per person in the rest of the Gulf, South Atlantic, and Mid-Atlantic Federal waters. Fishermen and Mackerel Cobia AP members have requested that the Councils increase the bag limit for Federal waters off of the Florida east coast to three fish per person, to match the bag limit within the rest of the management area. Increasing the bag limit in Federal waters off the east coast of Florida would allow recreational fishermen throughout the South Atlantic Council's management jurisdiction the opportunity to harvest the same amount of Atlantic king mackerel. Additionally, the recreational sector has not been reaching their ACL, and the South Atlantic Council anticipates that an increased recreational ACL combined with an increased bag limit will help increase harvest.

Recreational Atlantic King Mackerel and Atlantic Spanish Mackerel Landing Fish Intact

Currently, Atlantic king mackerel and Atlantic Spanish mackerel recreational fishermen must land recreationally harvested fish with the head and fins intact. As described at 50 CFR 622.381(b), commercial Atlantic king mackerel and Atlantic Spanish mackerel fisherman are allowed to land these fish without the head and fins intact (cut-off/damaged) provided the remaining portion of the fish complies with the minimum size limit. The commercial provision for cut-off fish was implemented through Amendment 9 to the CMP FMP (65 FR 16336, March 28, 2000) because of increasing interactions with sharks or barracudas resulting in Atlantic king mackerel and Atlantic Spanish mackerel having their tails bitten off before they could be landed. In response to similar concerns from the recreational sector about interactions with sharks or barracudas resulting in Atlantic king mackerel and Atlantic Spanish mackerel having their tails bitten off before they could be landed, the Councils considered revising the landing fish intact requirements in Amendment 34. The Councils decided that allowing possession of damaged Atlantic king mackerel or Atlantic Spanish mackerel could be expected to minimally increase recreational harvest, while reducing the number of discarded fish.

This proposed rule would allow cut-off (damaged) Atlantic king mackerel and Atlantic Spanish mackerel caught under the recreational bag limit and that comply with the minimum size limits, to be possessed, and offloaded ashore.

Additionally, this proposed rule revises the definition of "damaged fish" to refer to king or Spanish mackerel that are damaged only through natural predation.

Management Measures in Amendment 34 Not Codified Through This Proposed Rule

OFL and ABC

The current OFL and ABC for Atlantic king mackerel are 15,200,000 lb (6,894,604 kg) and 12,700,000 lb (5,760,623 kg), respectively, implemented through Amendment 26 to the CMP FMP (82 FR 17387, May 11, 2017). These catch limits are based on the SEDAR 38 (2014) stock assessment that used recreational landings estimates generated using the Marine Recreational Fishery Statistics Survey estimation methods and the MRIP-CHTS. Amendment 34 would adopt the new OFL and ABC based on the results of the SEDAR 38 Update (2020), which used MRIP-FES recreational landings estimates. Thus, the current and proposed OFL and ABC are not directly comparable because they are based on different assessments and the updated assessment includes changes in the recreational catch estimates based on new MRIP-FES methodology.

In Amendment 34, the OFL would be 33,900,000 lb (15,376,781 kg) for 2022–2023; 29,400,000 lb (13,335,616 kg) for 2023–2024; 26,300,000 lb (11,929,479 kg) for 2024–2025; 24,200,000 lb (10,976,935 kg) for 2025–2026; and 22,800,000 lb (10,341,906 kg) for 2026–2027 and subsequent years. The ABC would be 32,800,000 lb (14,877,830 kg) for 2022–2023; 28,400,000 lb (12,882,023 kg) for 2023–2024; 25,400,000 lb (11,521,246 kg) for 2024–2025; 23,300,000 lb (10,568,702 kg) for 2025–2026; and 21,800,000 lb (9,888,314 kg) for 2026–2027 and subsequent years.

Classification

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

This proposed rule has been determined to be not significant for purposes of Executive Order 12866. The Magnuson-Stevens Act provides the statutory basis for this proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified. A description of this proposed rule and its purpose and need

are contained in the **SUMMARY** section of the preamble.

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

The rule concerns commercial and recreational fishing for Atlantic migratory king mackerel in Federal waters of the Mid-Atlantic and South Atlantic. Anglers (recreational fishers) would be directly affected by this rule; however, anglers are not considered small entities as that term is defined in 5 U.S.C. 601(6). The rule would also directly apply to businesses that operate in the commercial fishing industry, and particularly those that operate commercial fishing vessels that harvest king mackerel in the Mid-Atlantic and South Atlantic EEZ. Charter vessels and headboats (for-hire) fishing businesses would be indirectly affected, and because the effects on for-hire fishing businesses are indirect, they fall outside the scope of the Regulatory Flexibility Act (RFA).

From 2015 through 2019, an average of 99.9 percent of commercial landings of king mackerel were harvested from and landed in the South Atlantic region (Atlantic Coastal Cooperative Statistics Program data). Because commercial harvest from and landings in the South Atlantic are so predominant, the following analysis focuses on king mackerel harvested from the South Atlantic region and landed in a South Atlantic state. All monetary figures are in 2019 dollars.

Any commercial fishing vessel that harvests king mackerel in the South Atlantic EEZ (or Mid-Atlantic EEZ) must have a valid Federal king mackerel permit specifically assigned to that vessel. A condition of the permit is that all landings of king mackerel harvested from either the EEZ or state waters must be reported. An annual average of 858 vessels had valid Federal king mackerel permits from 2015 through 2019, and approximately 839 of those Federally permitted vessels had homeports in the South Atlantic. Approximately 81 percent (681) of the 839 South Atlantic Federally permitted vessels had annual reported landings of king mackerel on average.

An estimated 532 unique businesses operate the average 681 Federally permitted vessels that harvest Atlantic king mackerel annually. These 532 businesses represent approximately 74 percent of the 722 unique businesses

located in the South Atlantic that hold the 858 Federal king mackerel permits.

The average of federally permitted king mackerel vessels that annually land king mackerel in the South Atlantic have a total annual revenue of \$29,232 from all landings and king mackerel accounts for approximately 29 percent of that average annual revenue. However, that average annual revenue varies by state. Annual total dockside revenue for the average federally permitted vessel that lands king mackerel in Florida and Georgia is approximately \$26,446, and king mackerel accounts for approximately 35 percent of total dockside revenue. The average permitted vessel with landings of king mackerel in North Carolina and South Carolina has annual total dockside revenue of \$28,651 and \$83,633, respectively. King mackerel accounts for approximately 21 percent of average annual total revenue of the average permitted vessel that lands king mackerel in North Carolina and approximately 3 percent for the average permitted vessel that lands king mackerel in South Carolina.

NMFS expects all of the estimated 532 businesses that operate the average annual 681 king mackerel permitted vessels that harvest Atlantic king mackerel operate primarily in, but not necessarily exclusively in, the commercial fishing industry. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 Code of Federal Regulations (CFR) 200.2). A business primarily engaged in commercial fishing (North American Industry Classification System (NAICS) code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates) and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. As stated above, the average annual total revenue for the average permitted vessel that reports landings of Atlantic king mackerel is substantially less than \$11 million. Moreover, additional analysis indicates none of the estimated 532 businesses have combined revenues that reach that figure. Therefore, all of the 532 businesses that operate commercial vessels that annually harvest king mackerel in the South Atlantic EEZ are small.

This proposed rule is composed of five actions. Three of the actions concern recreational fishing only and for reasons stated above their impacts are not relevant to this analysis. Action

1 in Amendment 34 would revise the ABC and total ACL (commercial and recreational) for Atlantic king mackerel. Action 1 would increase the total ACL. The increase would be 18,460,000 lb (8,373,315 kg) in the 2022/2023 fishing year, then lessen each year following until the increase is 8,010,000 lb (3,633,275 kg) in the 2026–2027 and subsequent fishing years. The impact of this action on small commercial fishing businesses is dependent on Action 2 (sector allocation).

Action 2 would retain the current allocation of 37.1 percent of the total ACL to the commercial sector and the remaining 62.9 percent to the recreational sector. Action 2 combined with Action 1 would increase the commercial ACL by 6,860,360 lb (3,111,807 kg) in the 2022–2023 fishing year, then lessen each year thereafter until the increase in the commercial ACL is 2,983,401 lb (1,353,248 kg) in 2026–2027 and beyond fishing years.

The increased commercial ACL would allow for increased Atlantic king mackerel landings, which could benefit the average annual 681 permitted vessels that harvest Atlantic king mackerel and the 532 small businesses that operate these vessels. With an average dockside price of \$2.30 per lb, the maximum annual potential benefit to the combined small businesses, assuming they account for all king mackerel ACL landings, would be annual increases in dockside revenue from Atlantic king mackerel landings that would range from approximately \$6.86 million to \$15.78 million. That, however, is a potential benefit only because status quo commercial landings have been less than the status quo commercial ACL. Commercial landings would have to increase in the future beyond the status quo ACL to benefit from the proposed increases in the commercial ACL.

The commercial ACL for Atlantic king mackerel is divided into two zones, each with its own quota. The northern zone is allocated 23.04 percent of the commercial ACL while the southern zone is allocated the remaining 76.96 percent of the commercial ACL. Under combined Actions 1 and 2, the zone allocations would not change, but the quotas for both zones would increase with the increase in the commercial ACL. Although both zones' status quo landings have been less than their respective status quo quotas, there is the potential benefit of increased landings in either or both zones in the future because the quotas would increase.

Since 2020–2021, the fishing year for the southern zone has been divided into two seasons: Season 1 (March 1–

September 30) and Season 2 (October 1–end of February), with 60 percent of the southern zone quota allocated to Season 1 and the remaining 40 percent being allocated to Season 2. During the 2020–2021 and 2021–2022 fishing years, landings of Atlantic king mackerel in Season 1 and Season 2 were less than the seasonal quotas. Hence, the increases in the southern zone seasonal quotas under combined Actions 1 and 2 are not expected to have any beneficial impact on small businesses that harvest Atlantic king mackerel in the southern zone during either Season 1 or Season 2. Nonetheless, there is the potential future benefit that comes from increases in the seasonal quotas.

In summary, the proposed rule is expected to have no adverse or beneficial impact on small businesses. However, the increases in the commercial ACL and the corresponding increases in the zone quotas and southern zone seasonal quotas, would generate potential future beneficial impacts.

Action 5 would change the definition of a damaged Atlantic king or Atlantic Spanish mackerel. Currently, it is equated with a cut-off fish, and that has created confusion, particularly in the recreational sector. The proposed action would remove “cut-off,” while adding that a damaged fish refers to a Atlantic king mackerel or Atlantic Spanish mackerel that is damaged only through natural predation. Current commercial requirements concerning landing fish intact and damaged fish would be retained. As such, Action 5 is an administrative action concerning the commercial sector and any impact would be indirect.

From the above it is concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities and an initial regulatory flexibility analysis is not required and none has been prepared.

Because no new reporting or record-keeping requirements are introduced by this proposed rule, the Paperwork Reduction Act does not apply to this proposed rule.

List of Subjects in 50 CFR Part 622

Annual catch limits, Atlantic, Bag and possession limits, Fisheries, Fishing, King mackerel, Spanish mackerel.

Dated: February 2, 2023.

Samuel D. Rauch, III,

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

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

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

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

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

§ 622.19 [Amended]

■ 2. In § 622.19, remove and reserve paragraph (b)(1).

■ 3. In § 622.381, revise paragraphs (a) and (b) to read as follows:

§ 622.381 Landing fish intact.

(a) *Intact fish requirement.* Cobia in or from the Gulf and in the South Atlantic EEZ south of a line extending due east from the Florida/Georgia border, and king mackerel and Spanish mackerel in or from the Gulf, Mid-Atlantic, or South Atlantic EEZ, except as specified for king mackerel and Spanish mackerel in paragraph (b) of this section, must be maintained with head and fins intact. Such fish may be eviscerated, gilled, and scaled, but must otherwise be maintained in a whole condition. The operator of a vessel that fishes in the EEZ is responsible for ensuring that fish on that vessel in the EEZ are maintained intact and, if taken from the EEZ, are maintained intact through offloading ashore, as specified in this section.

(b) *Damaged king or Spanish mackerel*—(1) *Commercial.* Damaged king or Spanish mackerel in the Gulf, Mid-Atlantic, and South Atlantic EEZ that comply with the minimum size limits in § 622.380(b) and (c), respectively, and the trip limits in § 622.385(a) and (b), respectively, may be possessed in the Gulf, Mid-Atlantic, or South Atlantic EEZ on, and offloaded ashore from, a vessel that is operating under the respective trip limits. Such damaged fish also may be sold. A maximum of five additional damaged king mackerel, not subject to the size limits or trip limits, may be possessed or offloaded ashore but may not be sold or purchased and are not counted against the trip limit. For the purposes of this paragraph (b)(1), damaged fish, refers to king or Spanish mackerel that are damaged only through natural predation.

(2) *Recreational.* Damaged king or Spanish mackerel in the Mid-Atlantic and South Atlantic EEZ that comply

with the minimum size limits § 622.380(b) and (c), respectively, and the recreational bag and possession limits in § 622.382(a), may be possessed in the Mid-Atlantic or South Atlantic EEZ on, and offloaded ashore from, a vessel that is operating under the respective bag and possession limits. For the purposes of this paragraph (b)(2), damaged fish, refers to king or Spanish mackerel that are damaged only through natural predation.

■ 4. In § 622.382, revise paragraph (a)(1)(i) to read as follows:

§ 622.382 Bag and possession limits

* * * * *

(a) * * *

(1) * * *

(i) Atlantic migratory group king mackerel—3.

* * * * *

■ 5. In § 622.384, revise introductory paragraph (b)(2), and paragraphs (b)(2)(i) and (b)(2)(ii) to read as follows:

§ 622.384 Quotas.

* * * * *

(b) * * *

(2) *Atlantic migratory group.* The Atlantic migratory group is divided into northern and southern zones. The descriptions of the zones are specified in § 622.369(a). Quotas for the northern and southern zones are as follows:

(i) *Northern zone.* The quota is 2,663,507 lb (1,208,146 kg) for the 2022–2023 fishing year, 2,306,207 lb (1,046,078 kg) for the 2023–2024 fishing year, 2,062,594 lb (935,577 kg) for the 2024–2025 fishing year, 1,892,064 lb (858,226 kg) for the 2025–2026 fishing year, and 1,770,258 lb (802,976 kg) for the 2026–2027 and subsequent fishing years. No more than 0.40 million lb (0.18 million kg) may be harvested by purse seine gear.

(ii) *Southern zone.* The quota is 8,896,853 lb (4,035,545 kg) for the 2022–2023 fishing year, 7,703,373 lb (3,494,191 kg) for the 2023–2024 fishing year, 6,889,636 lb (3,125,086 kg) for the 2024–2025 fishing year, 6,320,021 lb (2,866,713 kg) for the 2025–2026 fishing year, and 5,913,152 lb (2,682,161 kg) for the 2026–2027 and subsequent fishing years.

(A) For the period March 1 through September 30, each year, the seasonal quota is 5,338,112 lb (2,421,327 kg) for the 2022–2023 fishing year, 4,622,024 lb (2,096,515 kg) for the 2023–2024 fishing year, 4,133,782 lb (1,875,052 kg) for the 2024–2025 fishing year, 3,792,012 lb (1,720,028 kg) for the 2025–2026 fishing year, and 3,547,891 lb (1,609,296 kg) for the 2026–2027 fishing year and subsequent fishing years.

(B) For the period October 1 through the end of February each year, the seasonal quota is 3,558,741 lb (1,614,218 kg) for the 2022–2023 fishing year, 3,081,349 lb (1,397,676 kg) for the 2023–2024 fishing year, 2,755,854 lb (1,250,034 kg) for the 2024–2025 fishing year, 2,528,008 lb (1,146,685 kg) for the 2025–2026 fishing year, and 2,365,261 lb (1,072,864 kg) for the 2026–2027 fishing year and subsequent fishing years.

(C) Any unused portion of the quota specified in paragraph (b)(2)(ii)(A) of this section will be added to the quota specified in paragraph (b)(2)(ii)(B) of this section. Any unused portion of the quota specified in paragraph (b)(2)(ii)(B) of this section, including any addition of quota specified in paragraph (b)(2)(ii)(A) of this section that was unused, will become void at the end of the fishing year and will not be added to any subsequent quota.

* * * * *

■ 6. In § 622.388, revise paragraphs (b)(1)(iii), (b)(2)(i), and (b)(3) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(iii) The commercial ACL for the Atlantic migratory group of king mackerel is 11,560,360 lb (5,243,691 kg) for the 2022–2023 fishing year, 10,009,580 lb (4,540,269 kg) for the 2023–2024 fishing year, 8,952,230 lb (4,060,663 kg) for the 2024–2025 fishing year, 8,212,085 lb (3,724,939 kg) for the 2025–2026 fishing year, and 7,683,410 lb (3,485,136 kg) for the 2026–2027 fishing year and subsequent fishing years.

(2) *Recreational sector.*

(i) If the recreational landings exceed the recreational ACL as specified in this paragraph and the sum of the commercial and recreational landings, as estimated by the SRD, exceeds the stock ACL, as specified in paragraph (b)(3) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the bag limit by the amount necessary to ensure recreational landings may achieve the recreational ACT, but do not exceed the recreational ACL, in the following fishing year. The recreational ACL is 19,599,640 lb (8,890,247 kg) for the 2022–2023 fishing year, 16,970,420 lb (7,697,653 kg) for the 2023–2024 fishing year, 15,177,770 lb (6,884,521 kg) for the 2024–2025 fishing year, 13,922,915 lb (6,315,328 kg) for the

2025–2026 fishing year, and 13,026,590 lb (5,908,762 kg) for the 2026–2027 fishing year and subsequent fishing years. The recreational ACT is 16,914,489 lb (7,672,283 kg) for the 2022–2023 fishing year, 14,645,472 lb (6,643,074 kg) for the 2023–2024 fishing year, 13,098,416 million lb (5,941,342 kg) for the 2024–2025 fishing year, 12,015,476 lb (5,450,128 kg) for the

2025–2026 fishing year, and 11,241,947 lb (5,099,261 kg) for the 2026–2027 fishing year and subsequent fishing years.

* * * * *

(3) The stock ACL for Atlantic migratory group king mackerel is 31,160,000 lb (14,133,938 kg) for the 2022–2023 fishing year, 26,980,000 lb (12,237,922 kg) for the 2023–2024

fishing year, 24,130,000 lb (10,945,184 kg) for the 2024–2025 fishing year, 22,135,000 lb (10,040,267 kg) for the 2025–2026 fishing year, and 20,710,000 lb (9,393,898 kg) for the 2026–2027 fishing year and subsequent fishing years.

* * * * *

[FR Doc. 2023–02777 Filed 2–9–23; 8:45 am]

BILLING CODE 3510–22–P

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 13, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Importation of Table Eggs from Regions Where Newcastle Disease and Highly Pathogenic Avian Influenza is Considered to Exist and Exportation of Poultry and Hatching Eggs.

OMB Control Number: 0579–0328.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. Veterinary Services, a program with the Animal and Plant Health Inspection Service (APHIS) is responsible for administering regulations intended to prevent the dissemination of animal disease within the United States. Regulations in title 9, Code of Federal Regulations, section 94.6 deal specifically with the importation of table eggs from certain regions that may pose a risk of introducing Newcastle Disease (ND) into the United States. Although this collection applies to any region where ND is considered to exist, the United States is not currently importing table eggs from any ND-affected region.

Need and Use of the Information: APHIS uses the following information activities to requires that U.S. exporters use a health certificate to ensure poultry and hatching eggs are free of disease: (1) a certificate for table eggs from ND-affected regions; and (2) a government seal issued by the veterinarian accredited by the national government who signed the certificate. APHIS will also use form VS–17–6, Export Health Certificate for Poultry or Hatching Eggs for Export. If the information were collected less frequently or not collected at all, APHIS would be unable to establish an effective defense against the incursion of ND from table eggs imported from ND-affected regions. This would cause serious economic consequences for U.S. poultry industry, which would be unable to export poultry and hatching eggs.

Description of Respondents: Business or other for-profit; Federal Government.

Number of Respondents: 201.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 3,405.

Animal and Plant Health Inspection Service

Title: Case-Control Study of Highly Pathogenic Avian Influenza in Poultry 2022.

OMB Control Number: 0579–0483.

Summary of Collection: Collection and dissemination of animal health data and information is mandated by 7 U.S.C. 391, the Animal Industry Act of 1884, which established the precursor of the APHIS, Veterinary Services, the Bureau of Animal Industry. Legal requirements for examining and reporting on animal disease control methods were further mandated by 7 U.S.C. 8308 of the Animal Health Protection Act, "Detection, Control, and Eradication of Diseases and Pests," May 13, 2002. This collection of commercial table egg flock data is consistent with the APHIS mission of protecting and improving American agriculture's productivity and competitiveness.

In 2015, the United States experienced an outbreak of HPAI that has been described as the worst animal health event in U.S. history, requiring over \$950,000,000 in federal expenditures and a loss of nearly 50 million birds. At that time, in Iowa alone, more than 30 million table egg layers and pullets were lost to infection or depopulation. This represented a loss of 52% of the Iowa table egg layer inventory.

Since that time, Federal, State, and industry groups have promoted biosecurity and preparedness efforts and engaged in research that has guided prevention work to minimize future outbreaks. Though the 2022 outbreak of HPAI has a wider geographic distribution, the impacts have been lessened. However, these effects are still devastating. As of the end of May 2022, nearly \$800 million in federal expenditures has been authorized. Over 58 million birds have been lost to infection or depopulation, and over 70 percent of these birds are commercial table egg layers, pullets, and breeder birds.

Need and Use of the Information: APHIS will collect information using a questionnaire that include questions on-farm practices including current biosecurity practices, ecology and wild birds/wildlife, farm worker practices, equipment, egg handling, dead bird handling, and barn-level parameters. This information can support informed

decision-making for producers seeking to protect themselves against future infection.

Without information on the most likely routes of disease introduction, flock managers are unable to implement updated science-informed approaches to preventing infection and/or spread.

Description of Respondents: Business or other for-profit; State, local or Tribal government.

Number of Respondents: 270.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 155.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023-02869 Filed 2-9-23; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2023-0003]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Environmental Monitoring

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with environmental monitoring.

DATES: We will consider all comments that we receive on or before April 11, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS-2023-0003 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-2023-0003, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at regulations.gov or in our reading room, which is located in

room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. 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 information on environmental monitoring, contact Mr. Kai Caraher, Biological Scientist-Staff Officer, Permitting and Compliance Coordination Branch, PPQ, APHIS, 4700 River Road Unit 150, Riverdale, MD 20737; (301) 851-2345; kai.caraher@usda.gov. For information on the information collection reporting process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483; joseph.moxey@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Environmental Monitoring.

OMB Control Number: 0579-0117.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) provides leadership in ensuring the health and care of animals and plants, improves agricultural productivity and competitiveness, and contributes to the national economy and the public health.

APHIS is committed to accomplishing its mission in a manner that promotes and protects the integrity of the environment. This includes APHIS' compliance with all applicable environmental statutes and regulations, including 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), (3) USDA's NEPA-implementing regulations (7 CFR part 1b), and (4) APHIS' NEPA-Implementing Procedures (7 CFR part 372).

APHIS engages in environmental monitoring for certain activities that we conduct to control or eradicate certain pests and diseases. We monitor those activities that have the greatest potential for harm to the human environment to ensure that the mitigation measures developed to avoid that harm are enforced and effective. In many cases, monitoring is required where APHIS programs are conducted close to habitats of endangered and threatened species. This monitoring is developed in coordination with the U.S. Department of the Interior's Fish and Wildlife

Service, in compliance with the Endangered Species Act (50 U.S.C. 17.11 and 17.12). APHIS field personnel and State cooperators jointly use an APHIS-provided environmental monitoring form to collect information concerning the effects of pesticide use in these sensitive areas. The goal of environmental monitoring is to track the potential impact that APHIS activities may have on the environment and to use this knowledge in making any necessary adjustments in future program actions.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.20 hours per response.

Respondents: Growers, pesticide applicators, and State department of agriculture personnel.

Estimated annual number of respondents: 10.

Estimated annual number of responses per respondent: 3.

Estimated annual number of responses: 25.

Estimated total annual burden on respondents: 5 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 6th day of February 2023.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023-02814 Filed 2-9-23; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2019-0002]

Notice of Availability of a Supplemental Environmental Assessment for Release of *Aphalara itadori* From Murakami, Japan for the Biological Control of Japanese, Giant, and Bohemian Knotweeds in the Contiguous United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a supplemental environmental assessment (EA) relative to a 2020 EA for the release of *Aphalara itadori* for the biological control of Japanese, Giant, and Bohemian knotweeds (*Fallopia japonica*, *F. sachalinensis*, and *F. x bohemica*), significant invasive weeds, within the contiguous United States. This supplement analyzes the potential impacts of the release of *A. itadori* from Murakami, Japan, that may be more effective than the present Hokkaido and Kyushu lines of *A. itadori* in reducing infestations of knotweeds, particularly hybrid knotweed, which is the most abundant type of knotweed in the United States. We are making the supplemental EA available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 13, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *FederaleRulemaking Portal:* Go to www.regulations.gov. Enter APHIS-2019-0002 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-2019-0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

The supplemental environmental assessment and any comments we

receive on this docket may be viewed at www.regulations.gov or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. 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: Dr. Robert S. Pfannenstiel, Acting Assistant Director, Pests, Pathogens and Biocontrol Permitting, Plant Health Programs, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 851-2198; email: bob.pfannenstiel@usda.gov.

SUPPLEMENTARY INFORMATION: Invasive knotweeds in North America are a complex of three closely related species in the family Polygonaceae that were introduced from Japan during the late 19th century. They include *Fallopia japonica* (Japanese knotweed), *F. sachalinensis* (Giant knotweed), and the hybrid between the two, *F. x bohemica* (Bohemian knotweed). These large herbaceous perennials have spread throughout much of North America, with the greatest infestations in the Pacific Northwest, the northeast of the United States, and eastern Canada. While capable of growing in diverse habitats, the knotweeds have become especially problematic along the banks and floodplains of rivers and streams, where they crowd out native plants and potentially affect stream nutrients and food webs. While several States have active control programs against knotweeds, the inaccessibility of some of the infestations and the difficulty with which the plants are killed suggest that complete eradication of knotweeds within the United States is unlikely.

Previously, the Hokkaido and Kyushu biotypes of the insect, *Aphalara itadori*, were chosen as potential biological control organisms. The biotypes were expected to reduce the severity of infestations of Japanese, Giant, and Bohemian knotweed, and they are known to be highly host specific due to their intimate relationship with their host plants.

On May 28, 2019, the Animal and Plant Health Inspection Service (APHIS) published in the **Federal Register** (84 FR 24463-24464, Docket No. APHIS-2019-0002)¹ a notice in which we announced the availability, for public review and comment, of an

environmental assessment (EA) that examined the potential environmental impacts associated with the release of *A. itadori* from Kyushu and Hokkaido, Japan, for the biological control of Japanese, Giant, and Bohemian knotweed within the contiguous United States. After soliciting and reviewing comments on the EA, we prepared a finding of no significant impact (FONSI). On November 30, 2020, we published in the **Federal Register** (85 FR 76515-76516, Docket No. APHIS-2019-0002) a notice in which we announced the availability of the final EA and FONSI.

In June 2021, APHIS received a request to issue permits for the environmental release of *A. itadori* sourced from Murakami, Japan, into the contiguous United States. Environmental release of the Murakami line of *A. itadori* may be more effective than the Hokkaido and Kyushu lines. It is native to a climate and photoperiod better matched to the primary target knotweed regions of the United States. It is recently collected and thus field-adapted (not lab-adapted as are currently permitted lines). It also performs particularly well on hybrid knotweed (*F. x bohemica*), the most abundant knotweed type in the United States.

Before permits are issued for the release of *A. itadori* from Murakami, Japan, APHIS needs to analyze the potential impacts of the release of *A. itadori* from Murakami, Japan. Accordingly, APHIS has prepared a supplemental EA titled "Field Release of the Knotweed Psyllid *Aphalara itadori* (Hemiptera: Psyllidae) from Murakami, Japan for Classical Biological Control of Japanese, Giant, and Bohemian Knotweeds, *Fallopia japonica*, *F. sachalinensis*, and *F. x bohemica* (Polygonaceae), in the Contiguous United States, Supplemental Environmental Assessment" (November 2022).

We are making the supplemental EA available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the heading DATES at the beginning of this notice.

The supplemental EA may be viewed on the Regulations.gov website or in our reading room (see **ADDRESSES** above for instructions accessing Regulations.gov and information on the location and hours of the reading room). In addition, paper copies may be obtained by calling or writing to the individual listed under

FOR FURTHER INFORMATION CONTACT.

The supplemental EA has been prepared in accordance with: (1) The National Environmental Policy Act of

¹To view the notice, supporting documents, and the comments we received, go to <https://www.regulations.gov>. Enter APHIS-2019-0002 in the Search field.

1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) Animal and Plant Health Inspection Service's NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 6th day of February 2023.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–02812 Filed 2–9–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

Codex Alimentarius Commission: Meeting of the Codex Committee on Food Import and Export Inspection and Certification Systems

AGENCY: U.S. Codex Office, USDA.

ACTION: Notice of public meeting and request for comments.

SUMMARY: The U.S. Codex Office is sponsoring a public meeting on March 23, 2023 from 1:00–3:00 p.m. EST. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 26th Session of the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) of the Codex Alimentarius Commission, which will meet in Hobart, Tasmania, Australia from May 1–5, 2023. The U.S. Manager for Codex Alimentarius and the Under Secretary for Trade and Foreign Agricultural Affairs recognize the importance of providing interested parties the opportunity to obtain background information on the 26th Session of the CCFICS and to address items on the agenda.

DATES: The public meeting is scheduled for March 23, 2023, from 1–3 p.m. EST.

ADDRESSES: The public meeting will take place via Video Teleconference only. Documents related to the 26th Session of the CCFICS will be accessible via the internet at the following address: <https://www.fao.org/fao-who-codexalimentarius/meetings/detail/en?meeting=CCFICS&session=26>.

Dr. Michelle Catlin, U.S. Delegate to the 26th Session of the CCFICS, invites interested U.S. parties to submit their comments electronically to the

following email address:

michelle.catlin@usda.gov.

Registration: Attendees may register to attend the public meeting here: <https://www.zoomgov.com/meeting/register/vJltc-ypqT4rG02UwvvpvFjgyoCNe5q1vSXA>. After registering, you will receive a confirmation email containing information about joining the meeting.

For further information about the 26th Session of the CCFICS, contact Michelle Catlin, Ph.D., International Coordination Executive, Office of International Coordination, Food Safety and Inspection Service, U.S. Department of Agriculture; Phone: +1 (202) 708–8769, Email: michelle.catlin@usda.gov. For further information about the public meeting, contact the U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, South Agriculture Building, Washington, DC 20250; Phone: +1 (202) 720–9483; Email: uscodex@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices in the food trade.

The Terms of Reference for the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) are:

(a) to develop principles and guidelines for food import and export inspection and certification systems with a view to harmonising methods and procedures which protect the health of consumers, ensure fair trading practices and facilitate international trade in foodstuffs;

(b) to develop principles and guidelines for the application of measures by the competent authorities of exporting and importing countries to provide assurance where necessary that foodstuffs comply with requirements, especially statutory health requirements;

(c) to develop guidelines for the utilisation, as and when appropriate, of quality assurance systems¹ to ensure that foodstuffs conform with

¹ *Quality assurance* means all those planned and systematic actions necessary to provide adequate confidence that a product or service will satisfy given requirements for quality (ISO–8402 Quality—Vocabulary)

requirements and to promote the recognition of these systems in facilitating trade in food products under bilateral/multilateral arrangements by countries;

(d) to develop guidelines and criteria with respect to format, declarations and language of such official certificates as countries may require with a view towards international harmonization;

(e) to make recommendations for information exchange in relation to food import/export control;

(f) to consult as necessary with other international groups working on matters related to food inspection and certification systems; and,

(g) to consider other matters assigned to it by the Commission in relation to food inspection and certification systems.

The CCFICS is hosted by Australia, and the meeting is attended by the United States as a member country of the Codex Alimentarius.

Issues To Be Discussed at the Public Meeting

The following items on the agenda for the 26th Session of the CCFICS will be discussed during the public meeting:

- Matters referred by CAC and other subsidiary bodies
- Matters of interest arising from FAO/WHO
- Proposed draft guidelines on recognition and maintenance of equivalence of National Food Control Systems (NFCS)
- Proposed draft Guidance on the prevention and control of food fraud
- Proposed draft Principles and Guidelines on the Use of Remote Audit and Verification in Regulatory Frameworks
- Proposed draft consolidated Codex Guidelines related to equivalence
- Discussion paper on review and update of the “Principles for Traceability/Product Tracing as a Tool Within a Food Inspection and Certification System (CXG 60–2006)
- Other business and future work

Public Meeting

At the public meeting on March 23, 2023, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Dr. Michelle Catlin, U.S. Delegate to the 26th Session of the CCFICS (see **ADDRESSES**). Written comments should state that they relate to activities of the 26th Session of the CCFICS.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA Codex web page located at: <http://www.usda.gov/codex>, a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscriptions themselves and have the option to password protect their accounts.

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To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer>, or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email. Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250-9410; Fax: (202) 690-7442; Email: program.intake@usda.gov. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

Done at Washington, DC.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

[FR Doc. 2023-02810 Filed 2-9-23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Massachusetts 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 Massachusetts Advisory Committee (Committee) to the U.S. Commission on Civil Rights will convene a business meeting on February 23, 2023, 11:00 a.m. Eastern Time. The purpose of the meeting is to continue its work on civil asset forfeiture.

DATES: February 23; from 11:00 a.m. (ET)

ADDRESSES: Meeting will be held via Zoom.

Meeting Link (Audio/Visual): <https://tinyurl.com/3zhm98kf>; passcode, if needed: USCCR-MA.

Join by Phone (Audio Only): 1-551-285-1373; Meeting ID: 160 350 7809#.

FOR FURTHER INFORMATION CONTACT:

Evelyn Bohor, at ebohor@usccr.gov or 202-381-8915.

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 land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are 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 to Evelyn Bohor at ebohor@usccr.gov. Persons who desire additional information may contact the Regional Programs Unit at (312) 353-8311.

Records generated from the meetings may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via www.facadatabase.gov under the Commission on Civil Rights, Massachusetts Advisory Committee link. Persons interested in the work of this Committee are directed to the

Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

Agenda

- I. Welcome and Roll Call
- II. Discussion on Civil Asset Forfeiture
- III. Public Comment
- IV. Discuss Next Steps
- V. Adjournment

Dated: February 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-02870 Filed 2-9-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B-12-2023]

Foreign-Trade Zone (FTZ) 81— Portsmouth, New Hampshire; Notification of Proposed Production Activity; CAN-ONE (USA), INC. (Aluminum Beverage Cans), Nashua, New Hampshire

CAN-ONE (USA), INC. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Nashua, New Hampshire, within Subzone 81F. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on January 19, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via www.trade.gov/ftz.

The proposed finished product is aluminum beverage cans (duty rate is 5.7%).

The proposed foreign-status materials and components include various aluminum components (coils; can ends; can lids; uncoated sheets; coated sheets); tin-plated steel in sheets; and, flat-rolled steel plated with tin (duty rate ranges from duty-free to 6.5%). The request indicates that certain materials/components are subject to duties under Section 232 of the Trade Expansion Act of 1962 (Section 232) or Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and Section 301

decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: ftz@trade.gov. The closing period for their receipt is March 22, 2023.

A copy of the notification will be available for public inspection in the "Online FTZ Information System" section of the Board's website.

For further information, contact Juanita Chen at juanita.chen@trade.gov.

Dated: February 6, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023-02818 Filed 2-9-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-489-829, A-583-859, A-588-876, C-489-830]

Steel Concrete Reinforcing Bar From the Republic of Turkey, Taiwan, and Japan: Continuation of Antidumping and Countervailing Duty Orders

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

SUMMARY: The U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) have determined that revocation of the antidumping duty (AD) orders on steel concrete reinforcing bar (rebar) from the Republic of Turkey (Turkey), Taiwan, and Japan, and the countervailing duty (CVD) order on rebar from Turkey would likely lead to continuation or recurrence of dumping as well as net countervailable subsidies and materials injury to an industry in the United States. Therefore, Commerce is publishing a notice of continuation of these AD and CVD orders.

DATES: Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Jose Rivera, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-0842.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2022, Commerce published the notice of initiation of the sunset reviews of the AD and CVD orders.¹

¹ See *Initiation of Five-Year (Sunset) Reviews*, 87 FR 33123 (June 1, 2022); see also *Steel Concrete*

Commerce received a notice of intent to participate from the Rebar Trade Action Coalition (RTAC) and its individual members, Nucor Corporation, Gerdau Ameristeel US Inc., Commercial Metals Company, Steel Dynamics, Inc., and Byer Steel (collectively, domestic interested party) within the deadline specified in 19 CFR 351.218(d)(1)(i).²

On June 30, 2022, Commerce received a substantive response from the domestic interested party within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).³ We also received a substantive response from the Government of Turkey (GOT).⁴ However, we did not receive a substantive response from any other respondent interested party in this proceeding, and no party requested a hearing.

On July 21, 2022, Commerce notified the ITC that it did not receive adequate substantive responses from respondent interested parties.⁵ As a result, pursuant to section 751(c)(3)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited (120-day) sunset reviews of the *Orders*.

As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to the continuation or recurrence of dumping and subsidization. Therefore, Commerce notified the ITC of the magnitude of the margins and subsidy rates likely to prevail should the *Orders* be revoked, pursuant to sections 751(c), and 752(b)

Reinforcing Bar from the Republic of Turkey and Japan: Amended Final Affirmative Antidumping Duty Determination for the Republic of Turkey and Antidumping Duty Orders, 82 FR 32532 (July 14, 2017); *Steel Concrete Reinforcing Bar from the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 82 FR 32531 (July 14, 2017); *Steel Concrete Reinforcing Bar from Taiwan: Antidumping Duty Order*, 82 FR 45809 (October 2, 2017) (collectively, *Orders*).

² See RTAC's Letters, "Notice of Intent to Participate—Taiwan," "Notice of Intent to Participate—Turkey," "Notice of Intent to Participate—Japan," all dated June 15, 2022, and "Notice of Intent to Participate in CVD Sunset Review," dated June 15, 2022.

³ See RTAC's Letters, "Substantive Response to Notice of CVD Sunset Review Initiation," dated June 30, 2022 (RTAC's CVD Substantive Response); "Substantive Response of Domestic Producers to Notice of Initiation," dated June 30, 2022 (Substantive Response Turkey); "Substantive Response of Domestic Producers to Notice of Initiation," dated June 30, 2022 (Substantive Response Taiwan); and "Substantive Response of Domestic Producers to Notice of Initiation," dated June 30, 2022 (Substantive Response Japan).

⁴ See GOT's Letter, "Substantive Response of the Government of the Republic of Türkiye in the First Sunset Review of the Countervailing Duty Order on Steel Concrete Reinforcing Bar," dated June 30, 2022 (GOT's Substantive Response).

⁵ See Commerce's Letter, "Sunset Reviews Initiated on June 1, 2022," dated July 21, 2022.

and (c) of the Act.⁶ On January 30, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁷

Scope of the Orders

The merchandise subject to these *Orders* is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof. Subject merchandise includes deformed steel wire with bar markings (e.g., mill mark, size, or grade) and which has been subjected to an elongation test.

The subject merchandise includes rebar that has been further processed in the subject countries or a third country, including but not limited to cutting, grinding, galvanizing, painting, coating, or any other processing that would not otherwise remove the merchandise from the scope of the *Orders* if performed in the country of manufacture of the rebar.

Specifically excluded are plain rounds (i.e., nondeformed or smooth rebar). Also excluded from the scope is deformed steel wire meeting ASTM A1064/A1064M with no bar markings (e.g., mill mark, size, or grade) and without being subject to an elongation test.

At the time of the filing of the petition, there was an existing CVD order on steel reinforcing bar from the Republic of Turkey. See *Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 FR 65926 (November 6, 2014) (*2014 Turkey CVD Order*). The scope of this CVD Order with regard to rebar from Turkey covers only rebar produced and/or exported by those companies that are excluded from the *2014 Turkey CVD Order*. At the time of the issuance of the *2014 Turkey CVD Order*, Habas was the only excluded Turkish rebar producer or exporter.

The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. The subject merchandise

⁶ See *Steel Concrete Reinforcing Bar from the Republic of Turkey, Taiwan, and Japan; Final Results of First Expedited Sunset Reviews of the Antidumping Duty Orders*, 87 FR 60120 (October 4, 2022); and *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results of the Expedited Five-Year Sunset Review of the Countervailing Duty Order*, 87 FR 60376 (October 5, 2022).

⁷ See *Steel Concrete Reinforcing Bar from Japan, Taiwan, and Turkey Investigation Nos. 701-TA-564 and 731-TA-1338-1340 (Review)*, 88 FR 5918 (January 30, 2023).

may also enter under other HTSUS numbers including 7215.90.1000, 7215.90.5000, 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to sections 751(c)(1) and 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the AD orders on rebar from Turkey, Taiwan, and Japan, and the CVD order on rebar from Turkey. U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of these *Orders* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year review of the *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Notification to Interested Parties

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: February 6, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023-02853 Filed 2-9-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-549-820]

Prestressed Concrete Steel Wire Strand From Thailand: Preliminary Results of Antidumping Duty Administrative Review; 2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that prestressed concrete steel wire strand (PC strand) from Thailand was sold in the United States at less than normal value (NV) during the period of review (POR) of January 1, 2021, through December 31, 2021. Interested parties are invited to comment on these preliminary results.

DATES: Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Samantha Kinney, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-1766 or (202) 482-2285, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 28, 2004, Commerce published the antidumping duty order on PC strand from Thailand.¹ On March 9, 2022, in accordance with 19 CFR 351.221(c)(i), Commerce initiated an administrative review of the *Order*, covering one producer/exporter, The Siam Industrial Wire Co., Ltd. (SIW).²

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), on September 23, 2022, Commerce determined that it was not practicable to complete the preliminary results of this review within 245 days and extended the deadline for the preliminary results of this review until January 31, 2023.³

For a detailed description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.⁴ A list of topics

¹ See *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Prestressed Concrete Steel Wire Strand from Thailand*, 69 FR 4111 (January 28, 2004) (*Order*).

² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 FR 13252 (March 9, 2022).

³ See Memorandum, “Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2021,” dated September 23, 2022.

⁴ See Memorandum, “Prestressed Concrete Steel Wire Strand from Thailand: Decision Memorandum

discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is available via Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Order

The merchandise covered by the *Order* is PC strand from Thailand. Products subject to the *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7312.10.3010 and 7312.10.3012. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive. For a complete description of the scope of the *Order*, see the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, see the Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminarily determine the following weighted-average dumping margin exists for the period January 1, 2021, through December 31, 2021:

Exporter/producer	Weighted-average dumping margin (percent)
The Siam Industrial Wire Co., Ltd	2.18

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results of review to interested parties with an administrative protective order within five days of the date of publication of the preliminary results in accordance with 19 CFR 351.224(b).

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs

for Preliminary Results of Antidumping Duty Administrative Review; 2021,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.⁵ Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.⁶ Case and rebuttal briefs should be filed using ACCESS.⁷

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS, within 30 days after the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold a hearing at a time and date to be determined.⁸ Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time on the date that the document is due. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.⁹

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any case or rebuttal briefs, no later than 120 days after the date of publication of this notice, unless this deadline is extended.¹⁰

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce intends to determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject

merchandise covered by this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this administrative review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

If SIW's weighted-average dumping margin is not zero or *de minimis* (*i.e.*, less than 0.5 percent) in the final results of this review, and because SIW reported entered values for all of its sales, we intend to calculate importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of those sales, in accordance with 19 CFR 351.212(b)(1). We intend to instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.*, 0.50 percent). If SIW's overall weighted-average dumping margin is zero or *de minimis* or where an importer-specific *ad valorem* assessment rate is zero or *de minimis*, in the final results of review, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties.¹¹

In accordance with Commerce's "automatic assessment" practice, for entries of subject merchandise during the POR produced by SIW for which it did not know that the merchandise was destined for the United States, we intend to instruct CBP to liquidate those entries at the all-others rate in the original less-than-fair-value (LTFV) investigation¹² if there is no rate for the intermediate company(ies) involved in the transaction.¹³

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse,

for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for SIW will be that established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not participating in this review, the cash deposit will continue to be the company-specific cash deposit rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, a prior review, or the underlying investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 12.91 percent, the all-others rate established in the LTFV investigation.¹⁴ These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: January 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Discussion of the Methodology
- V. Currency Conversion

⁵ See 19 CFR 351.309(d)(1) and (2); see also *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19; Extension of Effective Period*, 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

⁶ See 19 CFR 351.309(c)(2) and (d)(2).

⁷ See 19 CFR 351.303(f).

⁸ See 19 CFR 351.310(d).

⁹ See *Temporary Rule*.

¹⁰ See section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

¹¹ See 19 CFR 351.106(c)(2); see also *Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101, 8103 (February 14, 2012).

¹² See *Order*, 69 FR at 4111.

¹³ For a full discussion of this practice, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

¹⁴ See *Order*, 69 FR at 4111.

VI. Recommendation

[FR Doc. 2023-02905 Filed 2-9-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-112]

Certain Collated Steel Staples From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; and Partial Rescission; 2020-2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Tianjin Hweschun Fasteners Manufacturing Co., Ltd. (Hweschun) and Zhejiang Best Nail Industrial Co., Ltd./Shaoxing Bohui Import & Export Co., Ltd. (Best Nail/Shaoxing Bohui) did not sell certain collated steel staples from the People's Republic of China (China) at less than normal value during the period of review (POR), January 8, 2020, through June 30, 2021. Commerce further determines that Unicorn Fasteners Co., Ltd. (Unicorn Fasteners) made no shipments and Tianjin Jinyifeng Hardware Co., Ltd. (Tianjin Jinyifeng) had no reviewable entries of the subject merchandise during the POR. Commerce also determines that China Staple (Tianjin) Co., Ltd. (China Staple); Shanghai Yueda Nails Co., Ltd. (Shanghai Yueda); and Shijiazhuang Shuangming Trade Co., Ltd. (Shijiazhuang Shuangming) have not established their separate rate eligibility and, therefore, are part of the China-wide entity.

DATES: Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Max Goldman or Brian Smith, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-0224 or (202) 482-1766, respectively.

SUPPLEMENTARY INFORMATION:**Background**

On August 8, 2022, Commerce published the *Preliminary Results*.¹ For

¹ See *Certain Collated Steel Staples from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2020-2021*, 87 FR 48153 (August 8, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

events subsequent to the *Preliminary Results*, see the Issues and Decision Memorandum.²

Scope of the Order³

The merchandise subject to the *Order* is certain collated steel staples which are currently classifiable under subheading 8305.20.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). While the HTSUS subheading and ASTM specification are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>. *Changes Since the Preliminary Results.*

Based on our verification findings, review of the record, and comments received from interested parties regarding our *Preliminary Results*, we made changes to the margin calculation for Best Nail/Shaoxing Bohui.⁴

Final Determination of No Shipments

In the *Preliminary Results*, we preliminarily determined that Unicorn Fasteners had no shipments of subject merchandise to the United States during the POR.⁵ No party filed comments with respect to this preliminary finding and we received no information to contradict it. Therefore, we continue to

² See Memorandum, "Certain Collated Steel Staples from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2020-2021 Antidumping Duty Administrative Review," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

³ See *Certain Collated Steel Staples from the People's Republic of China: Antidumping Duty Order*, 85 FR 43815 (July 20, 2020) (*Order*).

⁴ See Issues and Decision Memorandum; see also Memorandum, "Final Results Calculation Memorandum for Best Nail/Shaoxing Bohui," dated concurrently with this notice.

⁵ See *Preliminary Results*, 87 FR at 48154.

find that Unicorn Fasteners had no shipments of subject merchandise during the POR and will issue appropriate liquidation instructions that are consistent with our "automatic assessment" clarification for these final results.⁶

Partial Rescission

In the *Preliminary Results*, we preliminarily granted Tianjin Jinyifeng Hardware Co., Ltd. (Jinyifeng) a separate rate. However, based on comments received from interested parties and the record information, we determine that Jinyifeng had no reviewable entries of subject merchandise during the POR.⁷ Therefore, we are rescinding this review with respect to Jinyifeng in accordance with 19 CFR 351.213(d)(3) because Jinyifeng did not have a reviewable entry of subject merchandise during the POR.

Separate Rate Respondents

In our *Preliminary Results*, we determined that Best Nail/Shaoxing Bohui, Hweschun, and Jinyifeng demonstrated their eligibility for separate rates.⁸ We received no arguments since the issuance of the *Preliminary Results* that provide a basis for reconsideration of this determination with respect to Best Nail/Shaoxing Bohui and Hweschun. Therefore, for these final results, we continue to find that Best Nail/Shaoxing Bohui and Hweschun are each eligible for a separate rate, as indicated in the table in the "Final Results of Review" section of this notice. As noted above, we are rescinding this review with respect to Jinyifeng in the final results.

The China-Wide Entity

In the *Preliminary Results*, Commerce found that three companies for which a review was requested⁹ did not establish eligibility for a separate rate because they did not file a timely separate rate application or a separate rate certification, as appropriate.¹⁰ No party commented on the *Preliminary Results* with respect to these three companies' separate rate ineligibility. Therefore, for these final results, we determine the three companies at issue to be part of the China-wide entity. Because no party requested a review of the China-wide

⁶ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011) (*Assessment Practice Refinement*).

⁷ See Issues and Decision Memorandum at Comment 2 for further discussion.

⁸ See *Preliminary Results* PDM at 5-9.

⁹ *Id.* at 9-10. These companies are China Staple; Shanghai Yueda; and Shijiazhuang Shuangming.

¹⁰ *Id.*

entity, and Commerce no longer considers the China-wide entity as an exporter conditionally subject to administrative reviews,¹¹ we did not conduct a review of the China-wide entity. Thus, the weighted-average dumping margin for the China-wide entity (*i.e.*, 112.01 percent)¹² is not subject to change as a result of this review.

Final Results of Review

For companies subject to this review, which established their eligibility for a separate rate, Commerce determines that the following weighted-average dumping margins exist for the period January 8, 2020, through June 30, 2021:

Exporters	Weighted-average dumping margin (percent)
Tianjin Hweschun Fasteners Manufacturing Co., Ltd	0.00
Zhejiang Best Nail Industrial Co., Ltd./Shaoxing Bohui Import & Export Co., Ltd	0.00

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.212(b), Commerce has determined, and U.S Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

¹¹ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65969–70 (November 4, 2013).

¹² The China-wide rate determined in the less-than-fair-value investigation is 122.55 percent. See *Order*, 85 FR at 43816. This rate was adjusted for export subsidies to determine the cash deposit rate (112.01 percent) for companies in the China-wide entity.

For both mandatory respondents whose *ad valorem* weighted-average dumping margins are zero, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.¹³ For entries that were not reported in the U.S. sales databases submitted by each mandatory respondent during this review, Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.*, 112.01 percent).

For the companies identified as part of the China-wide entity, China Staple, Shanghai Yueda, and Shijiazhuang Shuangming, we will instruct CBP to apply the China-wide rate (*i.e.*, 112.01 percent) to all entries of subject merchandise during the POR which were exported by those companies.

For Unicorn Fasteners, which Commerce determined had no shipments of the subject merchandise), any suspended entries that entered under that exporter's case number (*i.e.*, at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity, consistent with Commerce's assessment practice in non-market economy cases.¹⁴ For Jinyifeng, for which the administrative review is rescinded, antidumping duties shall be assessed at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i).

Cash Deposit Requirements

The following per-unit cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for Best Nail/Shaoxing Bohui and Hweschun, the cash deposit rate will be equal to their weighted-average dumping margins established in the final results of this review; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be equal to the

¹³ See 19 CFR 351.106(c)(2).

¹⁴ For a full discussion of this practice, see *Assessment Practice Refinement*, 76 FR at 65694.

weighted-average dumping margin for the China-wide entity (*i.e.*, 112.01 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied that non-Chinese exporter. These per-unit cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties has occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: February 3, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Changes Since the Preliminary Results
- V. Discussion of the Issues
 - Comment 1: Whether to Apply Adverse Facts Available to Hweschun and Best Nail/Shaoxing Bohui
 - Comment 2: Whether Jinyifeng Is Eligible for a Separate Rate

Comment 3: Whether to Conduct a *Bona Fides* Analysis of Best Nail's Sales
 Comment 4: Valuation of Best Nail's Reported Glue Factor
 Comment 5: Valuation of Hweschun's Non-Market Economy Ocean Freight
 Comment 6: Whether to Grant Hweschun a Steel Scrap Offset

VI. Recommendation

[FR Doc. 2023-02816 Filed 2-9-23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-433-812, A-423-812, A-351-847, A-570-047, A-427-828, A-428-844, A-475-834, A-588-875, A-580-887, A-791-822, A-583-858, A-489-828]

Certain Carbon and Alloy Steel Cut-to-Length Plate From Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, the Republic of Korea, Italy, Japan, South Africa, Taiwan, and the Republic of Turkey: Continuation of Antidumping Duty Order (Austria, Belgium, the People's Republic of China, France, the Federal Republic of Germany, the Republic of Korea, Italy, Japan, South Africa, Taiwan, and the Republic of Turkey) and Revocation of Antidumping Duty Order (Brazil)

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on certain carbon and alloy steel cut-to-length plate (CTL plate) from Austria, Belgium, the People's Republic of China (China), France, the Federal Republic of Germany (Germany), Italy, Japan, the Republic of Korea (Korea), South Africa, Taiwan, and the Republic of Turkey (Turkey) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD orders. Further, as a result of the ITC's determination that revocation of the AD order on CTL plate from Brazil is not likely to lead to continuation or recurrence of material injury to an industry in the United States, Commerce is revoking the AD order on CTL plate from Brazil.

DATES: AD Revocation (Brazil): Applicable February 1, 2022; AD Continuation (Austria, Belgium, China, France, Germany, Italy, Japan, Korea,

South Africa, Taiwan, and Turkey): Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Bryan Hansen or Minoo Hatten, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-3683 or (202) 482-1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2017, Commerce published the AD orders on CTL plate from Brazil, South Africa, and Turkey. On March 20, 2017, Commerce published the AD order on CTL plate from China. On May 25, 2017, Commerce published the AD orders on CTL plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan.¹ On December 1, 2021, Commerce initiated,² and the ITC instituted,³ sunset reviews of the *Orders*, pursuant to section 751(c)(2) of the Tariff Act of 1930, as amended (the Act).

As a result of its reviews, Commerce determined, pursuant to sections 751(c)(1) and 752(c) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of dumping. Commerce, therefore, notified the ITC of the magnitude of the margins of dumping rates likely to prevail should these *Orders* be revoked.⁴ On February 3, 2023, the ITC published its determinations, pursuant to section 751(c) of the Act, that revocation of the AD orders on CTL plate from Austria,

¹ See *Certain Carbon and Alloy Steel Cut-to-Length Plate from Brazil, South Africa, and the Republic of Turkey: Antidumping Duty Orders*, 82 FR 8911 (February 1, 2017); *Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China: Antidumping Duty Order*, 82 FR 14349 (March 20, 2017); and *Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders*, 82 FR 24096 (May 25, 2017) (collectively, *Orders*).

² See *Initiation of Five-Year (Sunset) Reviews*, 86 FR 68220 (December 1, 2021).

³ See *Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey: Institution of Five-Year Reviews*, 86 FR 68269 (December 1, 2021).

⁴ See *Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, the Republic of Korea, Italy, Japan, South Africa, Taiwan, and the Republic of Turkey: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 87 FR 17066 (March 25, 2022), and accompanying Issues and Decision Memorandum.

Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, but that revocation of the AD order on CTL plate from Brazil would not be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.⁵

Scopes of the Orders

The product covered by the *Orders* is CTL plate. For complete descriptions of the scopes of the *Orders*, see the appendix to this notice.

Continuation of the AD Orders on CTL Plate From Austria, Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey

As a result of the determinations by Commerce and the ITC that revocation of the AD orders on CTL plate from Austria, Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the AD orders on CTL plate from Austria, Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey. U.S. Customs and Border Protection (CBP) will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the AD orders on CTL plate from Austria, Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year (sunset) review of the AD orders on CTL plate from Austria, Belgium, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey not later than 30 days prior to the fifth anniversary of the effective date of continuation.

⁵ See *Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, South Africa, South Korea, Taiwan, and Turkey*, 88 FR 7462 (February 3, 2023); see also *Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, South Africa, South Korea, Taiwan, and Turkey*, Investigation Nos. 701-TA-560-561 and 731-TA-1317-1328 (Review), USITC Pub. 5399 (January 2023).

Revocation of the AD Order on CTL Plate From Brazil

As a result of the determination by the ITC that revocation of the AD order on CTL plate from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, 19 CFR 351.222(i)(1)(iii), and 19 CFR 351.218(a), Commerce is revoking the AD order on CTL plate from Brazil. Pursuant to section 751(d)(3) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is February 1, 2022 (*i.e.*, the fifth anniversary of the date of publication in the **Federal Register** of the notice of the AD order on CTL plate from Brazil).⁶

Cash Deposits and Assessment of Duties on CTL Plate From Brazil

Commerce intends to notify CBP to terminate the suspension of liquidation and to discontinue the collection of AD cash deposits on entries of CTL plate from Brazil, entered or withdrawn from warehouse, on or after February 1, 2022. Commerce intends to further instruct CBP to refund with interest all cash deposits on unliquidated entries made on or after February 1, 2022. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and AD deposit requirements and assessments.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceedings. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(c) and (d)(2) and 777(i)(1) of the Act, and 19 CFR 351.218(f)(4) and 19 CFR 351.222(i)(1)(iii).

Dated: February 3, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scopes of the Orders

Austria, Belgium, France, Germany, and Italy

The products covered by these *Orders* are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) Except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above, and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of these *Orders* are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the *Orders* if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of these

Orders unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of these *Orders*:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of these *Orders*;

(3) Stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350 HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A

⁶ See *supra*, n.1.

not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,

• Hydrogen not greater than 2 ppm, and

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to these *Orders* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to these *Orders* may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of these *Orders* is dispositive.

Japan

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150

mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (*i.e.*, *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016), and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of these *Orders* unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL–A–12560,
- MIL–DTL–12560H,
- MIL–DTL–12560J,
- MIL–DTL–12560K,
- MIL–DTL–32332,

- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-100,
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of these *Orders*;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350 HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,

- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to the *Orders* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the *Orders* may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the *Orders* is dispositive.

Korea

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if

application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (*i.e.*, *Certain Hot Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016), and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified

to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than

15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) (ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301. At the time of the filing of the petition, there was an existing antidumping duty order on certain cut-to-length carbon-quality steel plate products from Korea. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 FR 73196 (December 29, 1999), as amended, 65 FR 6585 (February 10, 2000) (*1999 Korea AD Order*). The scope of the antidumping duty order with regard to cut-to-length plate from Korea covers only (1) subject cut-to-length plate not within the physical

description of cut-to-length carbon quality steel plate in the 1999 Korea AD Order, regardless of producer or exporter; and (2) cut-to-length plate produced and/or exported by those companies that were excluded or revoked from the 1999 Korea AD Order as of April 8, 2016. The only revoked or excluded company is Pohang Iron and Steel Company, also known as POSCO.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the order may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

Taiwan

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) except where otherwise stated where the nominal and actual thickness or width

measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (*i.e.*, Notice of Antidumping Duty Order; Certain Hot-Rolled Carbon Steel Flat Products from Taiwan, 66 FR 59563 (November 29, 2001)); and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100,
- and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and (d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having Charpy V at -40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having Charpy V at -40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the order may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080,

7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

Brazil and Turkey

The products covered by these *Orders* are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) Except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (*i.e.*, *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016)); and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of these *Orders* are products in which: (1) iron

predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of these *Orders* if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of these *Orders* unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of these *Orders*:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-3233Z,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of these *Orders*;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,

- Nickel not greater than 1.0,
 - Sulfur not greater than 0.007,
 - Phosphorus not greater than 0.020,
 - Chromium 1.0–2.5,
 - Molybdenum 0.35–0.80,
 - Boron 0.002–0.004,
 - Oxygen not greater than 20 ppm,
 - Hydrogen not greater than 2 ppm, and
 - Nitrogen not greater than 60 ppm;
- (b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to these *Orders* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to these *Orders* may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of these *Orders* is dispositive.

South Africa

The products covered by this order are certain carbon and alloy steel hot-rolled or

forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) Except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above; and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of this order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350 HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and (d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,

- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75 ksi min and UTS 95 ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: A Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145 ksi or more and UTS

160 ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to this order may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of this order is dispositive.

China

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1,250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (e.g., *Notice of the Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China*, 66 FR 59561 (November 29, 2001)); and

(2) where the width and thickness vary for a specific product (e.g., the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80,
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that

references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.20,
- Manganese 1.20–1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0–2.5,
- Molybdenum 0.35–0.80,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270–300 HBW,
- (ii) 290–320 HBW, or
- (iii) 320–350 HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23–0.28,
- Silicon 0.05–0.15,
- Manganese 1.20–1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20–1.50,
- Molybdenum 0.35–0.55,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75 ksi min and UTS 95 ksi or more, Elongation of 18% or more and

Reduction of area 35% or more; having charpy V at –75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01–75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at –40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25–0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0–3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0–1.5,
- Molybdenum 0.6–0.9,
- Vanadium 0.08 to 0.12,
- Boron 0.002–0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: a Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145 ksi or more and UTS 160 ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at –40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578–S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

Excluded from the scope of the antidumping duty order on cut-to-length plate from the People's Republic of China are any products covered by the existing antidumping duty order on certain cut-to-length carbon steel plate from the People's Republic of China. See *Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China; Termination of Suspension*

Agreement and Notice of Antidumping Duty Order, 68 FR 60081 (October 21, 2003), as amended, *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 76 FR 50996–97 (August 17, 2011). On August 17, 2011, the U.S. Department of Commerce found that the order covered all imports of certain cut-to-length carbon steel plate products with 0.0008 percent or more boron, by weight, from China not meeting all of the following requirements: aluminum level of 0.02 percent or greater, by weight; a ratio of 3.4 to 1 or greater, by weight, of titanium to nitrogen; and a hardenability test (*i.e.*, Jominy test) result indicating a boron factor of 1.8 or greater.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the order may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0016, 7214.91.0020, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

[FR Doc. 2023–02817 Filed 2–9–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–815]

Gray Portland Cement and Cement Clinker From Japan: Continuation of Antidumping Duty Order

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on gray portland cement and cement clinker (cement and clinker) from Japan would likely lead to a continuation or recurrence of dumping and material injury to an industry in the

United States, Commerce is publishing a notice of continuation of the AD order.

DATES: Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT: Eliza DeLong, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3878.

SUPPLEMENTARY INFORMATION:

Background

On May 10, 1991, Commerce published the AD order on cement and clinker from Japan.¹ On June 1, 2022, the ITC instituted,² and Commerce initiated,³ the fifth sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its review, Commerce determined that a revocation of the *Order* would likely lead to continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margin of dumping likely to prevail should the *Order* be revoked.⁴

On February 1, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁵

Scope of the Order

The products covered by the *Order* are cement and cement clinker from Japan. Cement is a hydraulic cement and the primary component of concrete. Cement clinker, an intermediate material produced when manufacturing cement, has no use other than grinding into finished cement. Microfine cement was specifically excluded from the *Order*. Cement is currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS)

¹ See *Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker from Japan*, 56 FR 12156 (March 22, 1991), as amended by *Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker from Japan*, 56 FR 21658 (May 10, 1991), and *Amended Final Determination of Sales at Less Than Fair Value and Antidumping Order; Gray Portland Cement and Clinker from Japan*, 60 FR 39150 (August 1, 1995) (*Order*).

² See *Gray Portland Cement and Cement Clinker from Japan; Institution of a Five-Year Review*, 87 FR 33210 (June 1, 2022).

³ See *Initiation of Five-Year (Sunset) Reviews*, 87 FR 33123 (June 1, 2022).

⁴ See *Gray Portland Cement and Cement Clinker from Japan; Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 87 FR 60121 (October 4, 2022).

⁵ See *Gray Portland Cement and Cement Clinker from Japan*, 88 FR 6783 (February 1, 2023).

subheading 2523.29 and cement clinker is currently classifiable under HTSUS subheading 2523.10. Cement has also been entered under HTSUS subheading 2523.90 as “other hydraulic cements.” The HTSUS subheadings are provided for convenience and customs purposes. The written product description remains dispositive as to the scope of the product covered by the *Order*.⁶

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or a recurrence of dumping, as well as material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Order*. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

This five-year sunset review and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

⁶ Commerce has made two scope rulings regarding subject merchandise. See *Scope Rulings*, 57 FR 19602 (May 7, 1992) (classes G and H of oil well cement are within the scope of the *Order*); see also *Scope Rulings*, 58 FR 27542 (May 10, 1993) (“Nittetsu Super Fine” cement is not within the scope of the *Order*).

Dated: February 3, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023-02815 Filed 2-9-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC763]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold its Hawaii Archipelago Fishery Ecosystem Plan (FEP) Advisory Panel (AP), the Fishing Industry Advisory Committee (FIAC), and the American Samoa Fishery Archipelago FEP AP to discuss and make recommendations on fishery management issues in the Western Pacific Region.

DATES: The meetings will be held between February 24 and February 28, 2023. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The American Samoa Archipelago Fishery Ecosystem Plan (FEP) Advisory Panel (AP) meeting will be held by web conference via Webex. The Hawaii Archipelago FEP AP and Fishing Industry Advisory Committee (FIAC) meetings will be held in a hybrid format with in-person and remote participation (Webex) options available for the members, and public attendance limited to web conference via Webex. In-person attendance for Hawaii Archipelago FEP AP and FIAC members will be hosted at the Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI, 96813. Instructions for connecting to the web conference and providing oral public comments will be posted on the Council website at www.wpcouncil.org. For assistance with the web conference connection, contact the Council office at (808) 522-8220.

Council address: Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813.

FOR FURTHER INFORMATION CONTACT:

Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522-8220.

SUPPLEMENTARY INFORMATION: The Hawaii Archipelago FEP AP will meet

on Friday, February 24, from 9 a.m. to 4 p.m., the FIAC will meet on Monday, February 27, from 2 p.m. to 5 p.m., and the American Samoa Archipelago FEP AP will meet on Tuesday, February 28, 2022, from 5 p.m. to 8 p.m. All times listed are local island times except for the FIAC which is in Hawaii Standard Time.

Public Comment periods will be provided in the agendas. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for the Hawaii Archipelago AP Meeting

Friday, February 24, 2022, 9 a.m.–4 p.m. (Hawaii Standard Time)

1. Welcome and Introductions
2. Report of the 2019–22 Hawaii Advisory Panel (AP) Plan
3. Feedback from the Fleet
 - A. First Quarter Hawaii Fishermen Observations
 - B. Hawaii AP Fisheries Issues and Priorities
4. Council Fishery Issues and Activities
 - A. Options for Establishing Main Hawaiian Island (MHI) Kona Crab Status Determination Criteria
 - B. Options for Gold Coral Management
 - C. Options for a Multi-Year Bigeye Tuna Catch and Allocation Limits
5. Hawaii Fishery Issues and Activities
 - A. Status of the Deep-Set Longline Draft Biological Opinion
 - B. Review of Potential Measures for the False Killer Whale Take Reduction Plan Modification
 - C. Update on Plans for MHI Small-boat Fishery Engagement
 - D. Pacific Remote Island Area Marine Conservation Plan Review
 - E. Council Pelagic Fisheries Research Priorities
6. Introduction to the 2023 Hawaii Longline Cost Earning Survey
7. Setting the Direction for the Hawaii AP
8. Public Comment
9. Discussion and Recommendations
10. Other Business

Schedule and Agenda for the Fishing Industry Advisory Committee Meeting

Monday, February 27, 2022, 2 p.m.–5 p.m. (Hawaii Standard Time)

1. Welcome and Introductions
2. Status Report on Previous FIAC Recommendations
3. Roundtable update on Fishing/Market Issues/Impacts
4. Developing Options for Multi-Year Territorial Bigeye Tuna Catch and Allocation Limits

5. Workshops on Western and Central Pacific Fisheries Commission (WCPFC) Tropical Tuna Longline Management
6. International Billfish Biological Sampling Program in Longline Fisheries
7. 2023 Hawaii Longline Cost Earnings Survey
8. Update on the Main Hawaiian Islands Small-Boat Fishery Plans
9. Report out on the Hawaii Shortline/Seamount Fisheries
10. Exploratory Longline Fishing in the CNMI
11. False Killer Whale Take Reduction Team
12. Status of Deepset & American Samoa Longline Biological Opinions
13. Other Issues
14. Public Comment
15. Discussion and Recommendations

Schedule and Agenda for the American Samoa Archipelago AP Meeting

Tuesday, February 28, 2022, 5 p.m.–8 p.m. (American Samoa Standard Time)

1. Welcome and Introductions
2. Report of the 2019–22 American Samoa (AS) Advisory Panel (AP) Plan
3. Feedback from the Fleet
4. First Quarter AS Fishermen Observations
5. Advisory Panel Fishery Issues and Priorities
6. AS Fishery Issues and Activities
7. Options for a Multi-Year Bigeye Tuna Catch and Allocation Limits
8. Status on the Draft American Samoa Longline Biological Opinion
9. Bottomfish Management Unit Species Revision Update
10. Bottomfish Western Pacific Stock Assessment Review Outcomes
11. Council Pelagic Fisheries Research Priorities
12. Setting the Direction for the American Samoa Advisory Panel
13. Public Comment
14. Discussion and Recommendations
15. Other Business

Special Accommodations

These meetings are accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522-8220 (voice) or (808) 522-8226 (fax), at least 5 days prior to the meeting date.

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

Dated: February 7, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XC729]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Improvements in Tongass Narrows in Ketchikan, Alaska

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

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

SUMMARY: NMFS received a request from the Alaska Department of Transportation and Public Facilities (ADOT) for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to ferry berth improvements in Tongass Narrows in Ketchikan, Alaska. These activities consist of activities that are covered by the current authorization, but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than February 27, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to ITP.Fleming@noaa.gov.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://>

www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act without charge. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Kate Fleming, Office of Protected Resources (OPR), NMFS, (301) 427–8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notifications 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, an incidental harassment authorization is issued.

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 one 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 1-time 1-year renewal IHA following notification to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notification is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notification 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 notification of issuance of the initial IHA, 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); and
- 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 notification 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. Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notification. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notification of our decision.

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 preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

History of Request

On March, 5 2022, NMFS issued an IHA to ADOT to take marine mammals incidental to the construction and/or improvements to four ferry berths in Tongass Narrows in Ketchikan Alaska: Gravina Airport Ferry Layup Facility, the Gravina Freight Facility, the Revilla New Ferry Berth and Upland Improvements, and the New Gravina

Island Shuttle Ferry Berth/Related Terminal Improvements (87 FR 15387, March 18, 2022), effective from March, 5, 2022 through March 4, 2023. NMFS previously issued two consecutive IHAs, one of which was renewed and the other reissued, prior to issuing the initial IHA (which includes some construction that was originally planned under the consecutive IHA's as well as some new/additional work) associated with this renewal request.

Following the issuance of the initial IHA, ADOT reported the presence of northern elephant seals (*Mirounga angustirostris*) in the area, which had not been anticipated. In June 2022, NMFS modified the March 2022 initial IHA by adding authorized take by Level B harassment of this species at ADOT's request.

In July 2022 ADOT also requested to install a subset of temporary piles via down-the-hole (DTH) methods rather than the previously assumed vibratory pile driving, in case the overburden onsite was not deep enough. In September 2022 NMFS determined that ADOT's requested modification did not alter the original scope of activity analyzed or the impact analysis in a manner that materially affected the basis for the original findings. NMFS additionally modified the IHA to require additional shutdown zones but determined that authorization of additional take was not required.

On January 5, 2023, NMFS received an application for the renewal of the initial IHA. Following NMFS' review of the application, the ACOE submitted a revised version on January 19, 2023 and again on January 25, 2023. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization (and subsequent modifications) discussed above but will not be completed prior to its expiration. As required, the applicant provided a preliminary monitoring report which confirms 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 the Specified Activities and Anticipated Impacts

ADOT is making improvements to existing ferry berths and constructing new ferry berths on Gravina Island and Revillagigedo (Revilla) Island in Tongass Narrows, near Ketchikan in southeast Alaska. These ferry facilities provide the only public access between the city of Ketchikan, AK on Revilla

Island, and the Ketchikan International Airport on Gravina Island. In-water work associated with the Revilla New Ferry Berth and Upland Improvements, and Gravina Airport Ferry Layup Facility have been completed. Only partial in-water work has been completed at the Gravina Island Shuttle Ferry Berth/Related Terminal Improvements, and no in-water work has been completed towards the Freight Facility. The remaining marine construction associated with the activities is planned to occur over 30 non-consecutive days over 1 year beginning March 5, 2023. The project's planned activities that have the potential to take marine mammals, by Level A harassment and Level B harassment, include vibratory and impact pile driving, DTH operations for pile installation (rock socketing of piles and tension anchors to secure piles), and vibratory pile removal.

Under the initial IHA, Level B harassment is authorized for a small number of nine species of marine mammals (including northern elephant seal). Of those nine species, Level A harassment was authorized for five species Steller sea lion (*Eumetopias jubatus*), harbor seal (*Phoca vitulina richardii*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*) and minke whale (*Balaenoptera acutorostrata*). Neither ADOT nor NMFS expects serious injury or mortality to result from this activity and, therefore, a renewal IHA is appropriate.

The following documents are referenced in this notification and include important supporting information:

- Initial 2022 final IHA (87 FR 15387, March 18, 2022);
- Initial 2022 proposed IHA (87 FR 5980, February 2, 2022); and
- Initial IHA application, Biological Opinion, References (available at www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-department-transportation-ferry-berth-improvements-0).

Detailed Description of the Activity

A detailed description of the ferry berth construction and improvements for which take is proposed here may be found in the notifications of the proposed and final IHAs for the initial authorization. NMFS also incorporates the installation of 20 24-inch temporary piles via DTH methods (rather than vibratory pile driving) at the Freight and Layup Facility (via the September 2022 modification of the initial IHA) to that detailed description, increasing the overall DTH drilling duration by

approximately 6 percent over the duration of the project, as compared with the analysis in the **Federal Register** notices for the initial IHA. The 20 temporary piles require relatively short durations of DTH drilling in comparison to the production piles included in the initial analysis, which are drilled much further into the bedrock.

While the in-water work associated with the Revilla New Ferry Berth and Gravina Airport Ferry Layup Facility have been completed, the Gravina Shuttle Island Ferry Berth and the Freight Facility have not. At the time of the renewal request no in-water work had been completed at the Freight Facility and a subset of in-water work had been completed at the Gravina Island Shuttle Ferry Berth:

- Installation and removal of twelve 20-inch temporary piles;
- Installation of 10 rock sockets; and
- Installation of 12 24-inch permanent piles.

In-water work that is planned for completion under this renewal IHA include remaining work at the Gravina Island Shuttle Ferry Berth:

- Installation of twenty-three 24-inch piles;
- Installation of twenty-eight tension anchors;
- Installation of 11 rock sockets and all pile driving activities for the Freight Facility;
- Installation of six 20-inch steel piles;
- Installation of three 24-inch piles;
- Installation of four 30-inch steel piles;
- Installation and removal of twelve 24-inch temporary piles;
- Installation of 13 tension anchors;
- Installation of 5 rock sockets.

The location, timing (e.g. seasonality), and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notifications (as updated through incorporation of the request to install temporary piles via DTH, rather than vibratory driver).

The remaining marine construction associated with the activities is planned to occur over 30 non-consecutive days over one year beginning March 5, 2023. Though concurrent use of two hammers is unlikely/expected to rarely occur during the remaining work under the renewal, the possibility remains. The initial IHA accounted for concurrent use of any combination of hammers for half the anticipated number of days of construction. That assumption is carried over into this proposed renewal IHA. The proposed renewal would be effective for a period not exceeding one year from the date of expiration of the initial IHA (March 5, 2023).

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notice of the proposed IHA (87 FR 5980, February 2, 2022), the final IHA (87 FR 15387, March 18, 2023) for the initial authorization. We supplement that description here with additional information for northern elephant seals.

Northern elephant seals breed and give birth in California and Baja California, primarily on offshore islands (Stewart *et al.*, 1994). Spatial segregation in foraging areas between males and females is evident from satellite tag data (Le Beouf *et al.*, 2000). Males migrate to the Gulf of Alaska and western Aleutian Islands along the continental shelf to feed on benthic prey, while females migrate to pelagic areas in the Gulf of Alaska and the central North Pacific to feed on pelagic prey (Le Beouf *et al.*, 2000). Elephant seals spend a majority of their time at sea (average of 74.7 days during post breeding migration and an average of 218.5 days during the postmolting migration; Robinson *et al.*, 2012). Although northern elephant seals are known to visit the Gulf of Alaska to feed on benthic prey, they rarely occur on the beaches of Alaska. However, there are recent reports of elephant seals occurring in and near the Tongass Narrows.

NMFS has reviewed the monitoring data from the initial IHA, recent draft 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 the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA. This includes consideration of changes proposed in the Draft 2022 Marine Mammal Stock Assessment Report (SARs) (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>) published on January 24, 2023, which include a slightly reduced Alaska Resident killer whale population abundance estimate.

In addition, the draft 2022 SARs include proposed update to stock structures for humpback whale and harbor porpoise. For humpback whales, the new structure, if finalized, would modify the MMPA-designated stocks to

align more closely with ESA-designated distinct population segments (DPSs). Please refer to the draft 2022 Alaska and Pacific Ocean SARs for additional information.

NMFS OPR, Permits and Conservation Division has generally considered peer-reviewed data in draft SARs (relative to data provided in the most recent final SARs), when available, as the best available science, and has done so in this proposed renewal IHA for all species and stocks with the exception of the new proposal to revise certain stock structures. Given that the proposed changes to the stock structures involve the application of NMFS' Guidance for Assessing Marine Mammal Stocks and could be revised following consideration of public comments, it is more appropriate to conduct our analysis for this proposed renewal IHA based on the status quo stock structures identified in the most recent final SARs (2021, Muto *et al.*, 2022).

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 the authorization of take is proposed here may be found in the notices of the proposed IHA (87 FR 5980, February 2, 2022) and final IHA (87FR15387, March 18, 2023) for the initial authorization.

In the case of installing temporary piles via DTH drilling rather than vibratory drilling, the nature of the impacts are the same, but they required identification of larger Level A harassment zones and a larger Level B harassment zone than originally anticipated. For installation of these temporary piles using DTH drilling, given the estimated source level of 167 dB RMS, the Level B harassment zone would be 13,594 m for all hearing groups. Regarding Level A harassment, using an estimated source level of 159 dB SEL at 10m, a strike rate of 15 strikes per second, an estimated DTH drilling duration of 180 minutes per pile (maximum duration estimated by ADOT), two piles per day (maximum daily pile number estimated by ADOT), and a transmission loss coefficient of 15 m, the use of DTH drilling for these temporary piles is estimated to produce the following hearing group-specific Level A harassment zones:

- Low-frequency cetaceans: 1,183 m;
- Mid-frequency cetaceans: 42 m;
- High-frequency cetaceans: 1,410 m;
- Phocid pinnipeds: 633 m; and
- Otariid pinnipeds: 46 m.

NMFS has reviewed the monitoring data from the initial IHA, recent draft

Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, 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 (87 FR 5980, February 2, 2022; 87 FR 15387, March 18, 2022) for the initial authorization. The source levels and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Here, we provide additional discussion for northern elephant seal.

In consideration of the information provided by ADOT, described above in this section, NMFS expected that one elephant seal may have been taken by Level B harassment per week over the remainder of the effective period of the IHA (through March 4, 2023). At the time of analysis, 37 weeks remained in the effective period of the IHA, and NMFS authorized 37 takes of the California breeding stock of elephant seals.

Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA and subsequent authorization of take by Level B harassment of elephant seal. The take calculation method also remains the same, with the exception of fewer days of activity than what was

described in the initial IHA. The approximate total number of operational days for this Renewal IHA is 33 percent of what was analyzed in support of the initial IHA. As such, take for most stocks have been reduced to 33 percent of the take authorized through the initial IHA (including for elephant seal). In cases when such a change would bring authorized take levels below the estimated group size for a given species [described in Initial 2021 proposed IHA (87 FR 5980, February 2, 2022; the Initial 2022 final IHA (87 FR 15387, March 18, 2022)]; take has been increased to the estimated group size to retain some allowance in the event that this species should occur in the project area.

TABLE 1—ESTIMATED TAKE PROPOSED FOR AUTHORIZATION AND PROPORTION OF POPULATION POTENTIALLY AFFECTED.

Species	DPS/stock	Proposed authorized take		Total	Percent of stock
		Level A harassment	Level B harassment		
Steller sea lion	Eastern U.S.	30	716	746	1.7
Harbor seal	Clarence Strait	38	335	373	1.3
Harbor porpoise	Southeast Alaska	*5	9	14	1.1
Dall's porpoise	Alaska	*12	68	80	0.6
Pacific white-sided dolphin	North Pacific	0	*92	92	3.4
Killer whale	Alaska Resident	0	24	24	1.0
West Coast Transient	Northern Resident			6.9	7.9
Humpback whale	Central North Pacific	0	75	75	0.7
Minke whale	Alaska	*1	*2	3	N/A
Northern Elephant Seal	California Breeding Stock	0	12	12	0.01

* Take for most stocks have been reduced to 33 percent of the take authorized through the initial IHA. In cases when such a change would bring authorized take levels below the estimated group size for a given species [described in Initial 2021 proposed IHA (87 FR 5980, February 2, 2022; the Initial 2022 final IHA (87 FR 15387, March 18, 2022)], take has been increased to the estimated group size group size to retain some allowance in the event that this species should occur in the project area.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the FR Notification announcing the issuance of the initial IHA (87 FR 15387, March 18, 2022), and subsequent updates to shutdown zones for DTH installation of temporary piles, are included in Table 2 and Table 3.

The same measures are proposed for this renewal and are summarized here:

- ADOT must implement a minimum shutdown zone of 10 m radius around the pile/hole/vessel for use of in-water

heavy machinery/vessel (e.g., barge, dredge);

- ADOT must shut down if any marine mammals come within hearing group-specific shutdown zones (Table 2 and Table 3);
- ADOT must implement pile driving soft-starts whereby hammer energy is gradually ramped-up;
- ADOT must employ at least three PSOs to monitor the harassment zones;
- ADOT must submit a draft report detailing all monitoring within ninety calendar days of the completion of marine mammal monitoring or sixty days prior to the issuance of any subsequent IHA for this project, whichever comes first;

- ADOT must prepare and submit final report within thirty days following resolution of comments on the draft report from NMFS;

- ADOT must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above); and
- ADOT must report injured or dead marine mammals.

The discussion of the least practicable adverse impact included in those documents and the Notice of the proposed IHA (87 FR 5980, February 2, 2022) remains accurate.

TABLE 2—TIERED SHUTDOWN ZONES AND LEVEL B HARASSMENT ZONES, BASED ON ACTIVITY AND DURATION FOR VIBRATORY PILE DRIVING AND REMOVAL, IMPACT PILE DRIVING, AND SINGLE-SOURCE DTH

Activity	Pile size (m)	Minutes per pile or strikes per pile	Minimum shutdown zone (m)						Level B harassment isopleth		
			LF (humpback whales)	LF (minke whales)	MF	HF	PW	OW		Elephant Seal	
Vibratory Installation	30	60 min	50				20			6,310	
	24	60 min								5,412	
	20	60 min									
Vibratory Removal	24	60 min									
	24	60 min									
	24	60 min									
DTH of Temporary Piles	24	180 min	1,200	1,200	50	1,450	650	650	50	13,594	
	30	60 min	780	1,500	30	500	200	200	40	13,594	
DTH of Rock Sockets	24	120 min	1,300		50				50		
		180 min	1,700		60				70		
		240 min	2,000		70					80	
		300 min	2,300		90					90	
		360 min	2,600				100			100	
		420 min	2,900								
		480 min	3,100								
		540 min	3,400								
		600 min	3,600								
		120 min	360	1,500		130	500	200	200	100	1,950
		180 min	570			20				20	200
		240 min	750			30				30	
		300 min	910			30				30	
		360 min	1,100			40				40	
		420 min	1,200			50				50	
480 min	1,400			50				60			
540 min	1,500			60				60			
600 min	1,600			60				70			
600 min	1,700			60				70			
DTH of Tension Anchor	8	120 min	90	90	20	100	50	100	20	600	
		240 min	130	130		160	70	70		900	
Impact Installation	30	50 strikes	100	100	20	120	60	120	20	60	
		24	50 strikes	60	60		70	30		30	
		20	50 strikes								30

(-) Dashes indicate that shutdown zones have not been explicitly calculated. ADOT may implement a tiered approach to shutdown zones, depending on the daily duration of activities, following the method described in the Mitigation Measures section of the initial IHA Notice.

TABLE 3—SHUTDOWN ZONES, BY HEARING GROUP FOR SIMULTANEOUS USE OF TWO DTH HAMMERS

Activity combination	Duration (minutes)	Level A harassment isopleth (m)					
		LF	MF	HF	PW	OW	Elephant seal
8-in pile, 8-in pile	60	90	20	100	50	20	50
	120	130		160	70		70
	180	170		200	100		100
	240	210		250	110		150
8-in pile, 24-in pile	60	520	20	500	200	20	300
	120	820	30			40	450
	180	1,080	40			50	600
	240	1,300	50			60	700
8-in pile, 30-in pile	60	1,110	40			50	600
	120	1,770	70			70	950
	180	2,310	90			90	1,250
	240	2,800	100			110	1,500
24-in pile, 24-in pile	60	570	20			30	350
	120	910	32			40	500
	180	1,190	42			50	650
	240	1,440	60			60	800
24-in pile, 30-in	60	900	40			40	500
	120	1,430	60			60	800
	180	1,880	70			80	1,050
	240	2,270	90			90	1,250
30-in pile, 30-in pile	60	1,230	50			50	700
	120	1,950	70			80	1,050
	180	2,550	100			100	1,400
	240	3,090	110			120	1,650

Comments and Responses

As noted previously, NMFS published a notification of a proposed IHA (87 FR 5980, February 2, 2022) and solicited public comments on both our proposal to issue the initial IHA for ferry berth construction and improvement and on the potential for a renewal IHA, should certain requirements be met. No public comments were received.

Preliminary Determinations

The proposed renewal request consists of a subset of activities analyzed through the initial authorization and subsequent authorizations described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that ADOT’s activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (e.g., less than one-third the abundance of all stocks). Although new abundance information became available for Alaska Resident killer whale, none of this new information affects NMFS’ determinations supporting issuance of the initial IHA. The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA (as modified).

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. 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) ADOT’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

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 OPR consults internally whenever we propose to authorize take for endangered or threatened species, in this case with NMFS’ Alaska Regional Office (AKRO).

The effects of the Federal action authorized through the initial IHA were adequately analyzed in NMFS ESA section 7(a)(2) Biological Opinion for

Construction of the Tongass Narrows Project (Gravina Access), revised December 19, 2019. It concluded that the take NMFS proposed to authorize through the initial IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat. Because this proposed renewal IHA would authorize a subset of activities already analyzed through the existing Biological Opinion, reinitiating consultation is not necessary.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to ADOT for conducting ferry berth construction and improvements in Tongass Narrows, Kethickan, AK, between March 5, 2023 and March 4, 2024, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notification. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: February 6, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission for OMB Review and Approval; Comment Request; Middle Mile Grant Program

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on November 4, 2022. This notice allows for an additional 30 days for public comments.

Agency: National Telecommunications and Information Administration (NTIA), Commerce.

Title: Middle Mile Grant Program.

OMB Control Number: 0660-XXXX.

Form Number(s): None.

Type of Request: New information collection.

Number of Respondents: 75.

Average Hours per Response: 33.22.

Burden Hours: 7,474.50.

Needs and Uses: With this information collection, NTIA will be able to monitor the grant recipients' spending habits and activities. In the absence of collecting this information, NTIA would fail to evaluate the grant recipients' progress toward the grant program priority areas and program goals. Moreover, without these reports, the grants could be the subject of waste, fraud, and abuse of Federal funds. Therefore, it is necessary for the Agencies to collect information using the Bi-Annual Performance Report form.

Affected Public: Grant award recipients consisting of States, political subdivisions of a State, Tribal governments, technology companies, electric utilities, utility cooperatives, public utility districts, telecommunications companies, telecommunications cooperatives,

nonprofit foundations, nonprofit corporations, nonprofit institutions, nonprofit associations, regional planning councils, Native entities, economic development authorities, or any partnership of two (2) or more of these entities.

Frequency: Bi-Annually and at the end of the Period of Performance.

Respondent's Obligation: Mandatory.

Legal Authority: Section 60401 of the Infrastructure Investment and Jobs Act of 2021, Public Law 117-58, 135 Stat. 429 (November 15, 2021).

This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function and entering the title of the collection.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Department of Commerce.

[FR Doc. 2023-02923 Filed 2-9-23; 8:45 am]

BILLING CODE 3510-60-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) and service(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* March 12, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703)

785-6404 or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Additions

On 10/28/2022, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51-2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the product(s) and service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501-8506 and 41 CFR 51-2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501-8506) in connection with the product(s) and service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Contractor Operated Parts Store
Mandatory for: Sierra Army Depot, Herlong, CA

Designated Source of Supply: South Texas Lighthouse for the Blind, Corpus Christi, TX

Contracting Activity: DEPT OF THE ARMY, W6QK SIAD CONTR OFF

The Committee finds good cause to dispense with the 30-day delay in the effective date normally required by the Administrative Procedure Act. See 5 U.S.C. 553(d). This addition to the Committee's Procurement List is effectuated because of the expiration of

the Department of the Army, Sierra Army Depot contract. The Federal customer contacted and has worked diligently with the AbilityOne Program to fulfill this service need under the AbilityOne Program. To avoid performance disruption, and the possibility that the Department of the Army will refer its business elsewhere, this addition must be effective on February 21, 2023, ensuring timely execution for a February 21, 2023 start date while still allowing 11 days for comment. The Committee also published a notice of proposed Procurement List addition in the **Federal Register** on October 28, 2022 and did not receive any comments from any interested persons. This addition will not create a public hardship and has limited effect on the public at large, but, rather, will create new jobs for other affected parties—people with significant disabilities in the AbilityOne program who otherwise face challenges locating employment. Moreover, this addition will enable Federal customer operations to continue without interruption.

Deletions

On 11/10/20 and 12/9/20, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) and service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the product(s) and service(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) and service(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

- 7520-00-139-4869—File, Horizontal Desk, 12" × 8½" × 15", 6 Shelf, Beige
- 7520-00-728-5761—File, Horizontal Desk, 12" × 8½" × 15", 6 Shelf, Gray
- 7520-01-445-0733—File, Horizontal Desk, 12" × 8½" × 17½", 7 Shelf, Beige
- 7520-01-445-0735—File, Horizontal Desk, 12" × 8½" × 12½", 5 Shelf, Beige
- 7520-01-445-0736—File, Horizontal Desk, 12" × 8½" × 19⅝", 8 Shelf, Beige
- 7520-01-445-0739—File, Horizontal Desk, 12" × 8½" × 7⅛", 3 Shelf, Beige
- 7520-01-445-0741—File, Horizontal Desk, 12" × 8½" × 10" 4 Shelf, Beige
- 7520-01-452-1558—File, Vertical Desk, 8" × 11" × 14¼", 8 Shelf, Black
- 7520-01-452-1562—File, Vertical Desk, 8" × 11" × 14¼", 8 Shelf, Beige
- 7520-01-452-1563—File, Combination Desk, 7¾" × 14" × 11", Beige
- 7520-01-452-1564—File, Combination Desk, 7¾" × 14" × 11", Black

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2), NEW YORK, NY

NSN(s)—Product Name(s):

- 8415-01-364-3320—Suit, Contamination Avoidance Suit, Hooded Poncho and Trousers, Army, Green, S
- 8415-01-364-3321—Suit, Contamination Avoidance Suit, Hooded Poncho and Trousers, Army, Green, M/L
- 8415-01-364-3322—Suit, Contamination Avoidance Suit, Hooded Poncho and Trousers, Army, Green, XL/XXL

Designated Source of Supply: ORC Industries, Inc., La Crosse, WI

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Service(s)

Service Type: Mattress & Box Spring Rehabilitation

Designated Source of Supply: Mississippi Industries for the Blind, Jackson, MS

Contracting Activity: GENERAL SERVICES ADMINISTRATION, FPDS AGENCY COORDINATOR

Service Type: Document Assembly

Mandatory for: USDA Forest Service, Northern Research Station, 1992 Folwell Avenue, Saint Paul, MN

Designated Source of Supply: AccessAbility, Inc., Minneapolis, MN

Contracting Activity: FOREST SERVICE, USDA FOREST SERVICE

Service Type: Custodial & Pest Control Services

Mandatory for: US Navy, Naval Operations Support Center, 3623 Carolina Beach Rd., Wilmington, NC

Designated Source of Supply: OE Enterprises, Inc., Hillsborough, NC

Contracting Activity: DEPT OF THE NAVY, NAVAL FAC ENGINEERING CMD MID

LANT

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-02878 Filed 2-9-23; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the procurement list.

SUMMARY: The Committee is proposing to add product(s) to the procurement list that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and delete product(s) previously furnished by such agencies.

DATES: Comments must be received on or before: March 12, 2023.

ADDRESSES: Committee for Purchase from People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785-6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Service(s)

Service Type: Janitorial Service

Mandatory for: US Air Force, Alabama Air National Guard, HQ 117th Air Refueling Wing, Birmingham, AL

Designated Source of Supply: Alabama Goodwill Industries, Inc., Birmingham, AL

Contracting Activity: DEPT OF THE ARMY, W7MT USPFO ACTIVITY ALANG 117

Deletions

The following product(s) are proposed for deletion from the Procurement List:

*Product(s)**NSN(s)—Product Name(s):*

MR 1021—Holder, Pot, Deluxe, Black
Designated Source of Supply: Alphapointe, Kansas City, MO

Contracting Activity: Military Resale-Defense Commissary Agency

NSN(s)—Product Name(s):

MR 11041—Gift Bag Set, Cellophane, Christmas

Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC

Contracting Activity: Military Resale-Defense Commissary Agency

NSN(s)—Product Name(s):

MR 876—Ergo Ice Cream Scoop

Designated Source of Supply: CINCINNATI ASSOCIATION FOR THE BLIND AND VISUALLY IMPAIRED, Cincinnati, OH

Contracting Activity: Military Resale-Defense Commissary Agency

NSN(s)—Product Name(s):

4730-01-112-3240—Cabinet, Fitting Kit

Designated Source of Supply: The Opportunity Center Easter Seal Facility—The Ala ES Soc, Inc., Anniston, AL

Contracting Activity: DLA LAND AND MARITIME, COLUMBUS, OH

NSN(s)—Product Name(s):

6645-01-456-5008—Clock, Wall, Slimline, Bronze, Custom Logo, 9 1/4 Quartz

6645-01-456-6018—Clock, Wall, Slimline, Brown, Custom Logo, 12 3/4" Quartz

6645-01-557-3149—Clock, Wall, Self-Set, Brown, 12" Diameter

6645-01-557-8131—Clock, Wall, Self-Set, Custom Logo, Brown, 12" Diameter

Designated Source of Supply: Chicago Lighthouse Industries, Chicago, IL

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):

MR 1080—Refill, Scrub Brush with Eraser, Utility, 2PK

Designated Source of Supply: Industries for the Blind and Visually Impaired, Inc., West Allis, WI

Contracting Activity: Military Resale-Defense Commissary Agency

NSN(s)—Product Name(s):

7520-01-645-9512—Pen, Stick, Plastic Fine Point, Water Resistant Permanent Blue Ink

7520-01-645-9513—Pen, Stick, Plastic Fine Point, Water Resistant Permanent Red Ink

7520-01-645-9514—Pen, Stick, Plastic Medium Point, Water Resistant Permanent Black Ink

7520-01-645-9515—Pen, Stick, Plastic Fine Point, Water Resistant Permanent Black Ink

7520-01-645-9516—Pen, Stick, Plastic Medium Point, Water Resistant Permanent Blue Ink

7520-01-645-9517—Pen, Stick, Plastic Medium Point, Water Resistant Permanent Red Ink

Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-02877 Filed 2-9-23; 8:45 am]

BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION**Sunshine Act Meetings**

TIME AND DATE: 9:00 a.m. ET, Wednesday, February 15, 2023.

PLACE: Virtual meeting.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commodity Futures Trading Commission ("Commission" or "CFTC") will hold this meeting to consider the following matters:

- Advance Notice of Proposed Rulemaking (ANPRM) on Risk Management Program Regulations for Swap Dealers, Major Swap Participants, and Futures Commission Merchants; and

- Order Designating the Unique Product Identifier and Product Classification System to be Used in Recordkeeping and Swap Data Reporting.

The agenda for this meeting will be available to the public and posted on the Commission's website at <https://www.cftc.gov>. Instructions for public access to the live feed of the meeting will also be posted on the Commission's website. In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's website.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202-418-5964.

Authority: 5 U.S.C. 552b.

Dated: February 8, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023-03043 Filed 2-8-23; 4:15 pm]

BILLING CODE 6351-01-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2023-0014]

Agency Information Collection Activities; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau or CFPB) requests the revision of the Office of Management and Budget's (OMB's) approval of an existing information collection titled "Terms of Credit Card Plans Survey" approved under OMB Number 3170-0001.

DATES: Written comments are encouraged and must be received on or before March 13, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Anthony May, Paperwork Reduction Act Officer, at (202) 435-7278, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov. Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Terms of Credit Card Plans Survey.

OMB Control Number: 3170-0001.

Type of Review: Revision of a currently approved collection.

Affected Public: Private sector: businesses or other for-profits institutions.

Estimated Number of Respondents: 665.

Estimated Total Annual Burden Hours: 564.

Abstract: The Bureau intakes different forms of credit card data from credit card issuers, as required by the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, and implementing regulations:

- The “Terms of Credit Card Plans Survey” collects data on credit card pricing and availability from a sample of at least 150 financial institutions that offer credit cards. The data enables the Bureau to present information to the public on terms of credit card plans;

- Sections 204 and 305 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), amending TILA, and 12 CFR 1026.57(d) and 1026.58, require card issuers to submit to the Bureau:

- Agreements between the issuer and a consumer under a credit card account for an open-end consumer credit plan; and

- Any college credit card agreements to which the issuer is a party and certain additional information regarding those agreements.

The data collections enable the Bureau to provide Congress and the public with a centralized and searchable repository for consumer and college credit card agreements and information regarding the arrangements between financial institutions and institutions of higher education.

Request for Comments: The Bureau published a 60-day **Federal Register** notice on August 18, 2022 (87 FR 50851) under Docket Number: CFPB–2022–0048. The Bureau is publishing this notice and soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau’s estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be reviewed by OMB as part of its review of this request. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2023–02865 Filed 2–9–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Record of Decision for the Supplemental Environmental Impact Statement Tinian Divert Infrastructure Improvements Commonwealth Northern Marianas Islands

ACTION: Notice of availability of record of decision.

SUMMARY: On December 15, 2022, the Department of the Air Force (DAF) signed the Record of Decision (ROD) for the Tinian Divert Infrastructure Improvements Commonwealth Northern Marianas Islands Final Supplemental Environmental Impact Statement.

ADDRESSES: Mr. Erik Waldrip, AFCEC/CZN, Building 1 Bay 8 Room 8009, 3515 S General McMullen, San Antonio, TX 78226–1710, (210) 925–3001; erik.waldrip@us.af.mil.

SUPPLEMENTARY INFORMATION: The DAF has selected the East underground fuel pipeline alternative and the roadway improvements alternative.

The DAF decision documented in the ROD was based on matters discussed in the Final Supplemental Environmental Impact Statement, inputs from the public and regulatory agencies, and other relevant factors. The Final Supplemental Environmental Impact Statement was made available to the public on July 17, 2020 through a Notice of Availability in the **Federal Register** (Volume 85, Number 138, Page 43580) with a waiting period that ended on August 18, 2020.

Authority: This Notice of Availability is published pursuant to the regulations (40 CFR part 1506.6) implementing the provisions of the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) and the Air Force’s Environmental Impact Analysis Process (32 CFR parts 989.21(b) and 989.24(b)(7)).

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–02864 Filed 2–9–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2023–HQ–0004]

Proposed Collection; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, Air Force Services announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency’s estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Air Force Services, 1040 Air Force Pentagon, Washington, DC 20330–1040; ATTN: Randi Ramcharan, or call (703) 693–0683.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Air Force Families Forever Annual Survey; OMB Control Number 0701–AFFF.

Needs and Uses: The goal of the annual Air Force Families Forever (AFFF) survey is to measure effectiveness of the program from the customer perspective. The information

from the survey will be used to update policy, operational guidance, processes, or resources based on the feedback provided. Respondents include next of kin family members of deceased Regular Air Force, Space Force, and Reserve Component members who died in an active duty, inactive duty for training, or annual training status and whose relationship was established prior to the member's death.

Affected Public: Individuals or households.

Annual Burden Hours: 116.67.

Number of Respondents: 350.

Responses per Respondent: 1.

Annual Responses: 350.

Average Burden per Response: 20 minutes.

Frequency: Annually.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02894 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Army

Final Environmental Impact Statement Addressing Heat and Electrical Upgrades at Fort Wainwright, Alaska

AGENCY: Department of the Army, DoD.

ACTION: Notice of Availability.

SUMMARY: The Department of the Army (Army) announces the availability of the Final Environmental Impact Statement (Final EIS) addressing heat and electrical upgrades at Fort Wainwright, Alaska. The current coal-fired central heat and power plant (CHPP) and its aging heat distribution system require an upgrade that resolves safety, resiliency, fiscal, and regulatory concerns. The Final EIS analyzes and evaluates reasonable alternatives, potential environmental impacts, and mitigation measures, and responds to comments on the Draft EIS. The Army will observe a 30-day waiting period before deciding how to proceed.

DATES: The waiting period for the Final EIS will end 30 days after publication of this Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency, at which time the Army can execute a Record of Decision.

ADDRESSES: Please submit questions or requests for a hard copy of the Final EIS to Mr. Matt Sprau at: Directorate of Public Works, ATTN: AMIM-AKP-E (M. Sprau), 1046 Marks Road #4500, Fort Wainwright, AK 99703-4500; or by

email at usarmy.wainwright.id-pacific.mbx.heu-eis@army.mil.

FOR FURTHER INFORMATION CONTACT: Mr. Grant Sattler at: Public Affairs Office, AMIM-AKG-PA (Sattler), 1060 Gaffney Road #5900, Fort Wainwright, AK 99703-5900; by telephone at (907) 353-6701; or by email at alan.g.sattler.civ@army.mil.

SUPPLEMENTARY INFORMATION: Fort Wainwright is in the interior of Alaska in the Fairbanks North Star Borough. It is home to U.S. Army Garrison—Alaska (USAG-Alaska) and units of the 11th Airborne Division. The soldiers, families, and civilian employees that make up the Fort Wainwright population rely on a 65-year-old coal-fired CHPP and an antiquated heat distribution system, with 24 percent of the steam and condensate pipe installed in the 1950s, to heat and power more than 400 facilities. The CHPP is one of the oldest working coal-fired power plants in the United States and is operating beyond its design life. Constructing upgraded heat and electrical infrastructure would reduce utility costs, minimize the risk of a catastrophic failure, help safeguard mission readiness, meet energy efficiency standards, comply with emissions standards, and conform to Army-directed energy security criteria.

The Final EIS was prepared in accordance with: the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S. Code § 4321 *et seq.*); NEPA implementing regulations issued by the President's Council on Environmental Quality (40 Code of Federal Regulations [CFR] Parts 1500-1508); and the Army's NEPA implementing regulation (32 CFR part 651, Environmental Analysis of Army Actions).

The Final EIS will inform decision-makers, as well as federal, state, and local agencies, interested parties, Alaska Natives, Native Americans, Native American organizations and Tribes, public organizations, and the general public of the possible environmental consequences associated with heat and electrical upgrades at Fort Wainwright.

USAG Alaska is proposing to upgrade its coal-fired central heat and power plant on Fort Wainwright to a more reliable and sustainable heating and electrical infrastructure system that would be compliant with Army installation energy security requirements and air quality regulations for the region. The purpose of the Proposed Action is to provide reliable heat and electrical infrastructure for the installation that resolves current safety, resiliency, fiscal, and regulatory

concerns. The Proposed Action is needed to prevent the failure of heat and power generation and distribution. Such a failure could require evacuation of the installation and severely affect mission readiness. USAG-Alaska needs to meet DoD and Army energy efficiency, energy security, and resiliency criteria, and must comply with air quality regulations. Within the last decade, the installation experienced four critical, near-catastrophic failures of the CHPP and 11 unexpected, installation-wide outages due to maintenance, repair, or operational issues. Unexpected outages present substantial risk to safety and mission readiness.

The Final EIS considered a No-Action Alternative and three Action Alternatives that were determined to be reasonable: (1) construction of a new coal-fired CHPP; (2) construction of a new dual-fuel combustion turbine generator CHPP that would primarily rely on natural gas; and (3) decentralization of heat and power, whereby heat would be provided by natural gas boilers at facilities across the installation and electricity would be purchased from a local utility provider.

Implementation of the preferred alternative would result in significant adverse socioeconomic and environmental justice impacts. Significant impacts to cultural resources could be mitigated to be less than significant. Beneficial impacts would primarily involve enhancements in heating efficiency, air quality, and job creation. The Final EIS summarizes the potential impacts for each considered alternative.

The Final EIS identified several non-carbon-based alternative energy sources, including nuclear, geothermal, wind, and solar power. These alternatives were not carried forward for full analysis because they could not fully meet the heat and power needs of the installation. Such technologies could potentially be used in the future to supplement the installation's energy output.

The Army identified Alternative 3, Install Distributed Natural Gas Boilers, as the preferred alternative. The Army based its preference on: public comments; environmental, social, technical, and economic considerations; and the ability to meet the missions of USAG-Alaska and the 11th Airborne Division.

An electronic copy of the Final EIS is available online at: <https://home.army.mil/alaska/index.php/fort-wainwright/NEPA/HEU-EIS>. Hard copies of the Final EIS will be available at the following facilities when they are open: the Noel Wien Library, 1215

Cowles Street, Fairbanks, AK 99701; the Post Library, Building 3700, Santiago Avenue, Fort Wainwright, AK 99703; and the Tri-Valley Community Library, 400 Suntrana Road, Healy, AK 99743. Requests for a hard copy of the Final EIS can also be directed to Mr. Matt Sprau at: Directorate of Public Works, ATTN: AMIM-AKP-E (M. Sprau), 1046 Marks Road #4500, Fort Wainwright, AK 99703-4500; or by email at usarmy.wainwright.id-pacific.mbx.heu-eis@army.mil.

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2023-02861 Filed 2-9-23; 8:45 am]

BILLING CODE 3711-02-P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA-2022-HQ-0013]

Submission for OMB Review; Comment Request

AGENCY: U.S. Army Corps of Engineers, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 13, 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.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: U.S. Army Corps of Engineers Navigation Improvement Surveys; OMB Control Number 0710-NAVS.

Type of Request: New collection.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Annual Responses: 1,000.

Average Burden per Response: 40 minutes.

Annual Burden Hours: 667.

Needs and Uses: USACE operates, maintains, and improves much of the

nation's navigation infrastructure. This includes inland navigation infrastructure and coastal infrastructure. USACE conducts periodic navigation improvement studies to ensure continuity of operations now and into the future. To fully evaluate these studies, USACE needs data on the use of the Nation's waterways, the extent of navigation inefficiencies, and anticipated changes in vessel operations and sizes. This information is used in planning studies to formulate and evaluate the projected benefits and impacts of alternatives. Navigation improvement studies conducted by USACE typically use empirical data provided by the USACE Waterborne Commerce Statistics Center; however, the impacts on waterway traffic of alternative capital and operations and maintenance investment strategies collected by these surveys will complement the empirical data.

Affected Public: Business or other for-profit.

Frequency: As Required.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Matthew Oreska.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02884 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD-2022-OS-0128]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Intelligence and Security (OUSD(I&S)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 13, 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.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB

Number: Qualification to Possess Firearms or Ammunition; DD Form 2760; OMB Control Number 0704-0461.

Type of Request: Reinstatement.

Number of Respondents: 80,000.

Responses per Respondent: 1.

Annual Responses: 80,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 20,000.

Needs and Uses: The information collection is necessary to determine if a Department of Defense (DoD) employee or potential employee who will carry a firearm related to a covered position does not have a qualifying conviction of domestic violence. The applicant uses the DD Form 2760, "Qualification to Possess Firearms of Ammunition," to ensure compliance with 18 U.S.C. 922 and DoDI 6400.06. This disclosure is mandatory for all DoD employees or potential employees who are required by their job duties to possess a firearm or ammunition.

Affected Public: Business or other for-profit; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02883 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2023-HA-0014]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the OASD(HA) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use

of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09-09, Alexandria, VA 22350-3100, Angela Duncan, 571-372-7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Health Related Behaviors Survey; OMB Control Number 0720-HRBS.

Needs and Uses: The Department of Defense's (DoD) Health Related Behaviors Survey (HRBS) is the largest population-based health survey of service members that collects self-report data on a number of important behavioral health issues affecting the wellbeing of active duty and reserve personnel. It provides a valuable snapshot of the overall behavioral health of the Force, both Active and Reserve Components, and alerts DoD leadership to areas of success, as well as areas where more attention—resources and policies—may be needed.

The survey fulfills several DoD requirements. First, Department of Defense Instruction (DoDI) 1010.01, dated September 13, 2012, on the Military Personnel Drug Abuse Testing Program (MPDATP) states: "Targeted and periodic surveys will be conducted of DoD MPDATP policy and guidance"

(p. 9); the HRBS is the survey used for that documentation and to assess the effectiveness of DoD's Drug Demand Reduction Program (DDRP). Second, the HRBS permits comparisons between military populations in health behaviors over time. Importantly and contrary to other similar total force surveys in the military, the HRBS is a confidential survey conducted external to the DoD by a Federally Funded Research and Development Center. Thus, the HRBS has the advantage of reducing the possibility of underreporting of health behavior concerns associated with possible career impacts such as substance misuse. The items in the HRBS are informed directly by stakeholders and workgroups across the DoD who use the findings and data to respond to a variety of requests related to frequency of health-related problems in their services and health topic areas. The HRBS also allows for comparisons between military and civilian populations and can be used to assess progress with respect to identified goals and objectives for population health and well-being. For roughly the past 40 years, the Office of Disease Prevention and Health Promotion has developed a set of evidence-based objectives aimed at improving the health of American citizens. Benchmarks are established for 10-year cycles and the current set of goals is outlined in Healthy People 2030 (HP2030). DoDI 1010.10 states that it is Department policy to "Support the achievement of the Department of Health and Human Services' vision for improving the health of all Americans as outlined in Healthy People 2020." Data from the HRBS facilitate comparisons to the updated HP2030 objectives. The 2023 version of the HRBS will assess a number of topics, including substance use and abuse (*i.e.*, alcohol, tobacco, and illicit substances), physical and mental health, suicide, mental health service utilization, sexual health, and current topical issues affecting readiness.

Affected Public: Individuals or households.

Annual Burden Hours: 7,367.

Number of Respondents: 22,100.

Responses per Respondent: 1.

Annual Responses: 22,100.

Average Burden per Response: 20 minutes.

Frequency: On occasion.

Approximately 250,000 randomly selected active-duty service members from the Air Force, Army, Marine Corps, Navy, Space Force, and Coast Guard (excluding those at flag rank [07 and above] and trainees [*e.g.*, students at military academies]) will be invited by both mail and email to participate in a

one-time, web-based, confidential survey. The survey, the HRBS, has been routinely fielded roughly every three years since 1980 and is DoD's flagship self-report survey on the health and health behaviors of service members. Sample members will receive an initial survey invitation via postal mail as well as via email. Over the course of 12 weeks, respondents will receive one follow up postal letter and up to five reminder emails. These reminders are only sent to those sample members who have not yet completed the survey or opted out of notifications. The survey, which is web-based and can be taken on a desktop, laptop, or mobile device (e.g., smartphone, tablet), should take approximately 20 minutes to complete. Each respondent receives a unique identification code which will allow him/her to take the survey at a specified website. Once a respondent is finished, he/she submits the survey electronically. The survey will be administered by Westat, RAND's survey vendor. Westat will maintain and clean the responses and provide RAND with a final dataset. We expect roughly 22,100 completed surveys.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02904 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD-2022-OS-0103]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 13, 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.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB

Number: Community Capacity Inventory; OMB Control Number 0704-CCIS.

Type of Request: Existing collection in use without an OMB Control Number.

Number of Respondents: 10,500.

Responses per Respondent: 1.

Annual Responses: 10,500.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 5,250.

Needs and Uses: The purpose of the Community Capacity Inventory is to provide a tool to help military leadership and family service providers at the Service and Program level make informed decisions about resource allocation and service delivery. The evidence-informed online tool is designed to be an option to assist commanders in periodically assessing the programs within the Military Family Readiness System (MFS). Ultimately the CCI assists commanders in assessing whether the current resources available to unit-level personnel are accessible and sufficient, or if outreach, counseling, coaching, education, skill building, and informal networks need to be augmented or re-allocated to improve the quality and/or accessibility of support.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02880 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2023-OS-0013]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments,

please write to: Office of the Assistant Secretary of Defense for Manpower & Reserve Affairs, Attn: Director, Civil-Military Programs, 1500 Defense Pentagon, Room 2E565, Washington, DC 20301-1500 or contact Capt. Rick Howell, richard.a.howell6.mil@mail.mil, (703) 693-7493.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Junior Reserve Officers' Training Corps Instructor Prohibited Activities Acknowledgement; DD Form X854; OMB Control Number 0704-JRIA.

Needs and Uses: This information is needed to confirm that school district employees assigned to JROTC duty understand DoD's expectations for the performance of their duties and expect conduct in the execution thereof.

Affected Public: Individuals or households.

Annual Burden Hours: 1,875.

Number of Respondents: 7,500.

Responses per Respondent: 1.

Annual Responses: 7,500.

Average Burden per Response: 15 minutes.

Frequency: As needed.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02899 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Federal Advisory Committees—Education for Seapower Advisory Board

AGENCY: Department of Defense (DoD).

ACTION: Amendment of federal advisory committee charter.

SUMMARY: The DoD is publishing this notice to announce that it is amending the charter for the Education for Seapower Advisory Board (E4SAB).

FOR FURTHER INFORMATION CONTACT: Jim Freeman, DoD Advisory Committee Management Officer, 703-692-5952.

SUPPLEMENTARY INFORMATION: The DoD is amending the charter for the E4SAB in accordance with chapter 10 of title 5 (commonly known as the "Federal Advisory Committee Act" or "FACA") and 41 CFR 102-3.50(d). The charter and contact information for the E4SAB's Designated Federal Officer (DFO) are found at <https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation>.

The E4SAB provides the Secretary of Defense and the Deputy Secretary of

Defense ("DoD Appointing Authority"), through the Secretary of the Navy, with independent advice and recommendations on matters relating to the Naval University System, and specifically, the U.S. Naval Community College, the Naval Postgraduate School, and the Naval War College. The E4SAB shall: (a) Provide advice on naval education strategy and implementation thereof, (b) provide advice on organizational management, curricula and methods of instruction, facilities, other issues of accreditation, and other matters of interest.

The E4SAB shall be composed of no more than 15 members appointed in accordance with DoD policies and procedures, who are imminent authorities in the fields of academia, business, national defense and security, the defense industry, and research and analysis. Not less than 50 percent of E4SAB members shall be eminent authorities in the field of academia. The Deputy Chief of Naval Operations for Manpower, Personnel, Training and Education, the Deputy Chief of Naval Operations for Warfighting Development, and the Commanding General, U.S Marine Corps Training and Education Command shall serve as ex-officio members of the Board, having voting rights and counting toward the E4SAB's total membership.

Individual members are appointed according to DoD policy and procedures, and serve a term of service of one-to-four years with annual renewals. One member will be appointed as Chair of the E4SAB. No member, unless approved according to DoD policy and procedures, may serve more than two consecutive terms of service on the E4SAB, or serve on more than two DoD Federal advisory committees at one time.

E4SAB members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, are appointed as experts or consultants, pursuant to 5 U.S.C. 3109, to serve as special government employee members. E4SAB members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services are appointed pursuant to 41 CFR 102-3.130(a), to serve as regular government employee members.

All E4SAB members are appointed to provide advice based on their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official E4SAB-related travel and per diem, members serve without compensation.

The public or interested organizations may submit written statements about the E4SAB's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the E4SAB. All written statements shall be submitted to the DFO for the E4SAB, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02906 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Health Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Health Board (DHB) will take place.

DATES: Open to the public Wednesday, March 22, 2023 from 9:00 a.m. to 4:15 p.m. Eastern time.

ADDRESSES: The address of the open meeting is 8111 Gatehouse Rd., Room 252, Falls Church, VA 22042. The meeting will be held both in-person and virtually. To participate in the meeting, see the Meeting Accessibility section for instructions.

FOR FURTHER INFORMATION CONTACT: CAPT Gregory H. Gorman, Medical Corps, U.S. Navy, 703-275-6060 (voice), gregory.h.gorman.mil@health.mil (email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, Virginia 22042. Website: <http://www.health.mil/dhb>. The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C.), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102-3.140 and 102-3.150.

Availability of Materials for the Meeting: Additional information, including the agenda, is available on the DHB website, <http://www.health.mil/>

dhb. A copy of the agenda or any updates to the agenda for the March 22, 2023, meeting will be available on the DHB website. Any other materials presented in the meeting may be obtained at the meeting.

Purpose of the Meeting: The DHB provides independent advice and recommendations to maximize the safety and quality of, as well as access to, health care for DoD health care beneficiaries. The purpose of the meeting is to provide progress updates on specific tasks before the DHB. In addition, the DHB will receive information briefings on current issues related to military medicine.

Agenda: The DHB anticipates receiving two decision briefings on Optimizing Virtual Health in the Military Health System and on Beneficiary Mental Health Access. The DHB also expects to receive an update from the Health Systems Subcommittee on Eliminating Racial and Ethnic Health Disparities in the Military Health System and an information briefing on the TRICARE T5 Contract.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165 and subject to the availability of space, this meeting will be held in-person and virtually and is open to the public from 9:00 a.m. to 4:15 p.m. Seating and virtual participation is limited and is on a first-come basis. All members of the public who wish to participate must register by emailing their name, rank/title, and organization/company to dha.ncr.dhb.mbx.defense-health-board@health.mil or by contacting Mr. Rubens Lacerda at (703) 275–6012 no later than Wednesday, March 15, 2023. Additional details will be required from all members of the public attending in-person that do not have Gatehouse building access. Once registered, participant access information will be provided.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mr. Rubens Lacerda at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Statements: Any member of the public wishing to provide comments to the DHB related to its current taskings or mission may do so at any time in accordance with section 10(a)(3) of the FACA, 41 CFR 102–3.105(j) and 102–3.140, and the procedures described in this notice. Written statements may be submitted to the DHB's Designated Federal Officer (DFO), Captain Gorman, at gregory.h.gorman.mil@health.mil. Supporting documentation may also be included, to establish the appropriate

historical context and to provide any necessary background information. If the written statement is not received at least five (5) business days prior to the meeting, the DFO may choose to postpone consideration of the statement until the next open meeting. The DFO will review all timely submissions with the DHB President and ensure they are provided to members of the DHB before the meeting that is subject to this notice. After reviewing the written comments, the President and the DFO may choose to invite the submitter to orally present their issue during an open portion of this meeting or at a future meeting.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–02907 Filed 2–9–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2023–HQ–0008]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense

for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Department of the Navy Information Management Control Officer, 2000 Navy Pentagon, Rm. 4E563, Washington, DC 20350, ATTN: Ms. Sonya Martin, or call 703–614–7585.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Navy Insider Threat Report; OPNAV Form 5510/423; OMB Control Number 0703–ISTF.

Needs and Uses: The U.S. Navy Insider Threat Program/Navy Analytic Hub (Navy Hub) must collect information in accordance with Executive Order 13587, Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information, directing U.S. government executive branch departments and agencies to establish, implement, monitor, and report on the effectiveness of insider threat programs to protect classified national security information, and requires the development of an executive branch program for the deterrence, detection, and mitigation of insider threats, or other unauthorized disclosure. Accordingly, the Navy Hub is soliciting standardized information on the OPNAV Form 5510/423, “Navy Insider Threat Report. Navy Hub’s mission is to prevent, detect, deter, and mitigate insider threat risks from potential malicious or unwitting Navy insiders by gathering, integrating, reviewing, assessing, and responding to information about potential insider threats. The OPNAVINST 5510.165B, “Navy Insider Threat Program,” which prescribes this new form, provides instruction to all U.S. Navy commands, activities and field offices with responsibilities as it pertains to Insider Threat. The revision of this instruction

is currently pending finalization, and replacing OPNAVINST 5510.165A, published 1 Oct 2015. The OPNAV 5510/423 will be utilized as to obtain information about a potential insider threat. When an inquiry is made for help in the investigation of a potential insider threat, the Navy Hub sends the OPNAV 5510/423 to the respondent via email or they may access it on the Navy Forms On-Line (NFOL) website at <https://forms.documentservices.dla.mil/order/>. The OPNAV 5510/423 is completed as a fillable portable document format (PDF). The form will then be saved and transferred to the Insider Threat Hub via email or an official Navy website. Once completed by a Navy Hub analyst, the OPNAV 5510/423 will be stored on Navy networks for use by the Navy Hub. The respondents will include military, civilian, and contractor personnel who have access to government systems.

Affected Public: Individuals or households.

Annual Burden Hours: 25.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 15 minutes.

Frequency: On Occasion.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02900 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN-2023-HQ-0007]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and

clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Department of the Navy Information Management Control Officer, 2000 Navy Pentagon, Rm. 4E563, Washington, DC 20350, ATTN: Ms. Sonya Martin, or call 703-614-7585.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: NAVSUP Enterprise Web Portal; OMB Control Number 0703-EPWP.

Needs and Uses: The NAVSUP Enterprise Web Portal is the combined Web Presence for the Naval Supply Systems Command (NAVSUP). NAVSUP Enterprise Web is used primarily by Military Service Members and Department of Defense (DoD) Civilian Employees. In limited circumstances, information is collected from members of the public for vendors based in the continental United States (CONUS) doing business with the Navy and Foreign National Employees at locations outside of the continental United States (OCONUS). Per DoD policy contained in DoD Instruction 8510.01 "Risk Management Framework for DoD Systems" and Navy policy from Department of the Navy (DON) Chief Information Officer (CIO) Memorandum

of 20 May 2014 "Implementation of the Risk Management Framework for DoD Information Technology," NAVSUP is required to implement standard cybersecurity requirements and cyberspace operational risk management functions based on the National Institute of Standard (NIST) security controls. Access Control and Identification and Authorization controls require NAVSUP to collect information needed to identify users of NAVSUP Enterprise Web applications and ensure appropriate roles for use. The WorkFlow Pro Vendor application allows DON vendors, under a contract agreement, to submit their post award modification requests to NAVSUP Civilian or Military contracting officers. Foreign National employees outside of the Continental United States (OCONUS) access the portal via their DoD standard CAC or by a User Token card. They must first register their CAC or User Token Card via an online form linked to a master repository maintained by NAVSUP and provide their name, work email address and phone number, Country of Citizenship, and organizational affiliation.

Affected Public: Individuals or households; Businesses or other for-profit.

Annual Burden Hours: 25.

Number of Respondents: 300.

Responses per Respondent: 1.

Annual Responses: 300.

Average Burden per Response: 5 minutes.

Frequency: As Required.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02898 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN-2023-HQ-0006]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 11, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Department of the Navy Information Management Control Officer, 2000 Navy Pentagon, Rm. 4E563, Washington, DC 20350, ATTN: Ms. Sonya Martin, or call 703-614-7585.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB

Number: Leaders to SEA Embark Request; OPNAV Form 5720/11; OMB Control Number 0703-0060.

Needs and Uses: Information collection from members of the public via OPNAV Form 5720/11, "Leaders to SEA Embark Request," is necessary to facilitate embarkation on U.S. Navy surface ships or submarines and determine embarkation qualification. Respondents are interested persons, such as community leaders, legislators, business executives, educators, foreign military and dignitaries, as well as other Non-Federal Government employees wishing to embark on a Navy vessel. To

request embarkation on a Navy vessel, the respondent uses OPNAV 5720/11 Leaders to Sea Embark Request Form located on <https://www.chinfo.navy.mil/embarks>. This information may also be used for notification of next of kin in the event of death or serious injury or to permit transmission of public affairs information from the Navy to the individual concerned. Completion of the information is completely voluntary; however, failure to provide required information may result in denial of embarkation request. In the rare case that the electronic system is not accessible, the information collection will revert to submitting the paper form version of OPNAV Form 5720/11 to a Navy public affairs officer using secure methods. The information collected is reviewed by a Navy Public Affairs Officer to determine if the person qualifies for embarkation.

Affected Public: Individuals or households.

Annual Burden Hours: 750.

Number of Respondents: 3,000.

Responses per Respondent: 1.

Annual Responses: 3,000.

Average Burden per Response: 15 minutes.

Frequency: As Required.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02896 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN-2022-HQ-0034]

Submission for OMB Review; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by March 13, 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.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB

Number: Camp Lejeune Notification Database; OMB Control Number 0703-0057.

Type of Request: Extension.

Number of Respondents: 10,000.

Responses per Respondent: 1.

Annual Responses: 10,000.

Average Burden per Response: 6 minutes.

Annual Burden Hours: 1,000.

Needs and Uses: The information collection requirement is used to obtain and maintain contact information on people who may have been exposed to contaminated drinking water in the past aboard Marine Corps Base Camp Lejeune, NC, as well as other persons interested in the issue. The information will be used to provide notifications and updated information as it becomes available. The information will also be used to correspond with registrants, as necessary.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: February 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-02879 Filed 2-9-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF EDUCATION**Applications for New Awards;
Fulbright-Hays Doctoral Dissertation
Research Abroad Fellowship Program**

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for Fiscal Year (FY) 2023 for the Fulbright-Hays Doctoral Dissertation Research Abroad (DDRA) Fellowship Program, Assistance Listing Number 84.022A. This notice relates to the approved information collection under OMB control number 1840-0005.

DATES:

Applications Available: February 10, 2023.

Deadline for Transmittal of Applications: April 11, 2023.

Pre-Application Webinar Information:

The Department will hold a pre-application meeting via webinar for prospective applicants. Detailed information regarding this webinar will be provided on the Doctoral Dissertation Research Abroad website at <https://www2.ed.gov/programs/iegpsddrap/applicant.html>. Additional information for new potential applicants who are unfamiliar with grantmaking at the Department regarding the discretionary grant process and funding basics resources is available at <https://www2.ed.gov/fund/grant/about/grantmaking/index.html>.

ADDRESSES: The addresses pertinent to this competition—including the addresses for obtaining and submitting an application—can be found under

SUPPLEMENTARY INFORMATION.**FOR FURTHER INFORMATION CONTACT:**

Amy Marrion, U.S. Department of Education, 400 Maryland Avenue SW, Room 258-24, Washington, DC 20202. Telephone: (202) 453-5628. Email: DDRA@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:**Full Text of Announcement****I. Funding Opportunity Description**

Purpose of Program: The Fulbright-Hays DDRA Fellowship Program provides opportunities for doctoral students to engage in dissertation research abroad in modern foreign languages and area studies. The program is designed to contribute to the development and improvement of the study of modern foreign languages and area studies in the United States.

Priorities: This notice contains one absolute priority and three competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority and Competitive Preference Priorities 1 and 2 are from the regulations for this program (34 CFR 662.21(d)). Competitive Preference Priority 3 is from the Secretary's Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

Absolute Priority: For FY 2023, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Specific Geographic Regions of the World.

A research project that focuses on one or more of the following geographic areas: Africa, East Asia, Southeast Asia and the Pacific Islands, South Asia, the Near East, Central and Eastern Europe and Eurasia, and the Western Hemisphere (excluding the United States and its territories).

Competitive Preference Priorities: For FY 2023, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an additional two points to an application that meets Competitive Preference Priority 1; an additional two points to an application that meets Competitive Preference Priority 2; and an additional two points to an application that meets Competitive Preference Priority 3 (up to 6 additional points possible).

These priorities are:

Competitive Preference Priority 1—Focus on Less Commonly Taught Languages (2 points).

A research project that focuses on any modern foreign language except French, German, or Spanish.

Competitive Preference Priority 2—Thematic Focus on Academic Fields (2 points).

Applications that propose dissertation research projects in modern foreign languages and area studies with an academic focus on any of the following academic fields: science (including climate change), technology, engineering (including infrastructure studies), mathematics, computer science, education (comparative or international), international development, political science, public health (including epidemiology), or economics.

Competitive Preference Priority 3—Promoting Equity in Student Access to Educational Resources and Opportunities (2 points).

Projects implemented by one of the following entities:

- Historically Black colleges and universities (as defined in this notice);
- Minority-serving institutions (as defined in this notice); or
- Tribal colleges and universities (as defined in this notice).

Definitions: The following definitions are from the Supplemental Priorities, to provide clarity for applicants addressing Competitive Preference Priority 3.

Historically Black colleges and universities means colleges and universities that meet the criteria set out in 34 CFR 608.2.

Minority-serving institutions means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the Higher Education Act of 1965 (HEA).

Tribal colleges or universities has the meaning ascribed it in section 316(b)(3) of the HEA.

Program Authority: 22 U.S.C. 2452(b)(6).

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 662. (e) The Supplemental Priorities.

Note: The open licensing requirement in 2 CFR 3474.20 does not apply to this program.

II. Award Information

Type of Award: Discretionary grants redistributed as fellowships to individual beneficiaries.

Estimated Available Funds: \$10,311,000 for the Fulbright-Hays Overseas programs. We intend to use an estimated \$3,408,863 for the DDRA competition.

Estimated Range of Awards: \$15,000–\$60,000.

Estimated Average Size of Awards: \$37,876.

Estimated Number of Awards: 90.

Note: The Department is not bound by any estimates in this notice.

Project Period: The institutional project period is 18 months. Doctoral students may request funding for a period of no less than 6 months and no more than 12 months.

III. Eligibility Information

1. a. *Eligible Applicants:* Institutions of higher education (IHEs). Eligible doctoral students submit their individual research narratives and forms to the project director at their home IHE, who then compiles the doctoral student submissions and incorporates them into the institutional grant application that is submitted electronically to the Department through the G5 system.

b. *Individuals Eligible to Receive a Fellowship:* An individual is eligible to receive a fellowship if the individual: is a citizen or national of the United States; or is a permanent resident of the United States; is a graduate student in good standing at an institution of higher education; and, when the fellowship period begins, is admitted to candidacy in a doctoral degree program in modern foreign languages and area studies at that institution; is planning a teaching career in the United States upon completion of his or her doctoral program; and possesses sufficient foreign language skills to carry out the dissertation research project.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in the grantee's application.

4. *Other:* Under 34 CFR 662.22(b), no DDRA Fellowship Program applicant concurrently may receive a grant from the Fulbright U.S. Student Program (FUSP) and a grant from the Fulbright-Hays DDRA Fellowship Program. For this reason, when applying for a grant under the Fulbright-Hays DDRA Fellowship Program, a doctoral student must indicate in the application whether they have also applied for a FUSP grant. At any time during the U.S. Department of Education Fulbright-Hays DDRA Fellowship Program competition process, if a doctoral student accepts a fellowship award from the FUSP, or the FUSP disperses funds to provide training services to a doctoral student, that doctoral student is automatically deemed ineligible for consideration for a grant under the Fulbright-Hays DDRA Fellowship Program. Also, if the FUSP notifies the Fulbright-Hays DDRA Fellowship Program that it has awarded funds or

provided training to a potential recipient of a Fulbright-Hays DDRA Fellowship, the Department will automatically deem the doctoral student ineligible for further consideration. Doctoral students thus should notify the person listed under **FOR FURTHER INFORMATION CONTACT** prior to accepting any grant support or training from the FUSP.

IV. Application and Submission Information

1. *Address to Request Application Package:* Both IHEs and doctoral student applicants can obtain an application package via the internet or from the Education Publications Center (ED Pubs). To obtain a copy via the internet, use the following address: www.G5.gov. To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1-877-433-7827. FAX: (703) 605-6794. If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

You also can contact ED Pubs at its website at www.ed.gov/edpubs/, or at its email address at edpubs@inet.ed.gov.

If you request an application package from ED Pubs, be sure to identify this program as follows: Assistance Listing Number 84.022A.

2. Submission Dates and Times:

Submit applications for grants under the program electronically using G5.gov. For information (including dates and times) about how to submit your application electronically, please refer to *Other Submission Requirements*.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

3. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 10 pages and the bibliography to no more than two pages and (2) use the following standards:

- A "page" is 8.5" x 11", on one side only, with 1" margins at the top, bottom, and both sides.

- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).

- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet, budget section, including the narrative budget justification; the assurance and certifications; or the one-page abstract, the resumes, the biography, or letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Unique Entity Identifier (UEI), Taxpayer Identification Number (TIN), and System for Award Management (SAM):*

To do business with the Department, you must—

- Have a UEI and a TIN;
- Register both your UEI and TIN with SAM, the Government's primary registrant database;
- Provide your UEI and TIN on your application; and

- Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program

administered by the Department, please allow sufficient time to obtain and register your UEI and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can submit an application through G5.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your UEI is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at www.SAM.gov. To further assist you with obtaining and registering your UEI and TIN in SAM or updating your existing SAM account, please visit <https://sam.gov/content/help>.

7. Other Submission Requirements: Applications for grants under this program must be submitted electronically unless an IHE qualifies for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications.

Submit applications for grants under the Fulbright-Hays DDRA Fellowship

Program, Assistance Listing Number 84.022A, electronically using the G5 system, accessible through the Department's G5 site at: www.G5.gov. While completing the electronic application, both the IHE and the doctoral student applicant will be entering data online that will be saved into a database. Neither the IHE nor the doctoral student applicant may email an electronic copy of a grant application to us.

Please note the following:

- The process for submitting applications electronically under the Fulbright-Hays DDRA Fellowship Program requires several steps. The following is a brief overview of the process; however, all applicants should review the detailed description of the application process in the application package. In summary, the major steps are:

(1) IHEs must email the name of the institution and the full name and email address of the project director to DDRA@ed.gov. We suggest that applicant IHEs submit this information no later than 2 weeks prior to the application deadline date to ensure that

they obtain access to G5 well before that date;

(2) Doctoral students must complete their individual applications and submit them to their home IHE project director using G5;

(3) Persons providing references for individual doctoral students must complete and submit reference forms for the doctoral students to the IHE project director using G5; and

(4) The IHE project director must officially submit the IHE's application, including all eligible individual doctoral student applications, reference forms, and other required forms, using G5.

- The IHE must complete the electronic submission of the grant application by 11:59:00 p.m., Eastern Time, on the application deadline date. G5 will not accept an application for this competition after 11:59:00 p.m., Eastern Time, on the application deadline date. Therefore, we strongly recommend that both the IHE and the doctoral student applicant not wait until close to the application deadline date to begin the application process. The table below shows the days and times that the G5 website will be available.

G5 HOURS OF OPERATION IN EASTERN TIME

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Unavailable from 03:00 p.m.–11:59 p.m.	Unavailable from 12:00 a.m.–06:00 a.m.	Available 24 hours	Unavailable from 09:00 p.m.–11:59 p.m.	Unavailable from 12:00 a.m.–06:00 a.m.	Available 24 hours	Available 24 hours.

- Doctoral student applicants will not receive additional points because they submit their applications in electronic format, nor will we penalize the IHE or the doctoral student applicant if the applicant qualifies for an exception to the electronic submission requirement, as described elsewhere in this section, and submits an application in paper format.

- IHEs must upload all application documents electronically, including the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

- Both IHEs and doctoral student applicants must upload their applications, including the required narrative sections and all required attachments to their applications, as files in a read-only flattened Portable Document Format (PDF), meaning any

fillable documents must be saved and submitted as non-fillable PDF files. Do not upload any interactive or fillable PDF files. If you upload a file type other than a read-only, non-modifiable PDF (e.g., Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will be unable to review that material. Please note that this will likely result in your application not being considered for funding. The Department will not convert material from other formats to PDF.

- Submit doctoral student transcripts electronically through the G5 system.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.

- After the individual doctoral student electronically submits their application to the IHE, the doctoral student will receive an automatic acknowledgment from the G5 system. After a person submits a reference electronically, they will receive an automatic acknowledgment from the G5

system. After the applicant IHE submits its application to the Department, including all eligible individual doctoral student applications, the applicant IHE will receive an automatic acknowledgment from G5 that will include a unique PR/Award number for the IHE's application.

- Within 3 working days after submitting its electronic application, the applicant IHE must—

- (1) Print the SF 424 from G5;
- (2) Have the Authorizing Representative sign the SF 424 form;
- (3) Place the PR/Award number in the upper right-hand corner of the hard-copy signature page of the SF 424; and
- (4) Email the signed SF 424 to DDRA@ed.gov.

- We may request that you provide us hard copies with original signatures for other forms in the application at a later date.

Application Deadline Date Extension in Case of System Unavailability: If an IHE is prevented from electronically submitting its application on the

application deadline date because the G5 system is unavailable, we will grant the IHE an extension until 11:59:00 p.m., Eastern Time, the following business day to enable the IHE to transmit its application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) The IHE is a registered user of the G5 system and the IHE has initiated an electronic application for this competition; and

(2) G5 is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 11:59 p.m., Eastern Time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting the IHE an extension. To request this extension or to confirm our acknowledgment of any system unavailability, an IHE may contact either (1) the person listed under **FOR FURTHER INFORMATION CONTACT** or (2) the e-Grants help desk at 1-888-336-8930. If G5 is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an email will be sent to all registered users who have initiated a G5 application. Extensions referred to in this section apply only to the unavailability of the G5 system.

b. Submission of Paper Applications.

We discourage paper applications, but if electronic submission is not possible (e.g., you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. Send this written statement no later than 2 weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday) to Amy Marrion, U.S. Department of Education, 400 Maryland Ave. SW, Room 258-24, Washington, DC 20202-4260. Telephone: (202) 453-5628. Email: DDRA@ed.gov. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date.

If you submit a paper application, you must have, and include in your application, a UEI and you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, OFO/G5 Functional Application Team, Mail Stop 5C231, Attention: 84.022A, 400 Maryland Avenue SW, Washington, DC 20202-4260.

The IHE must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If the IHE mails its application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, the IHE should check with its local post office.

We will not consider applications postmarked after the application deadline date.

c. Note for Mail or Hand Delivery of Paper Applications: If an IHE mails or hand delivers its application to the Department—

(1) The IHE must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424, the Assistance Listing Number, including suffix letter, if any, of the competition under which the IHE is submitting its application; and

(2) The G5 Functional Application Team will notify you of the Department's receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the regulations for this program in 34 CFR 662.21¹ and are as follows:

(a) *Quality of proposed project.* (74 points) The Secretary reviews each application to determine the quality of the research project proposed by the applicant. The Secretary considers—

(1) The statement of the major hypotheses to be tested or questions to be examined, and the description and justification of the research methods to be used (29 points);

(2) The relationship of the research to the literature on the topic and to major theoretical issues in the field, and the

project's originality and importance in terms of the concerns of the discipline (10 points);

(3) The preliminary research already completed in the United States and overseas or plans for such research prior to going overseas, and the kinds, quality and availability of data for the research in the host country or countries (10 points);

(4) The justification for overseas field research and preparations to establish appropriate and sufficient research contacts and affiliations abroad (10 points);

(5) The applicant's plans to share the results of the research in progress and a copy of the dissertation with scholars and officials of the host country or countries (5 points); and

(6) The guidance and supervision of the dissertation advisor or committee at all stages of the project, including guidance in developing the project, understanding research conditions abroad, and acquainting the applicant with research in the field (10 points).

(b) *Qualifications of the applicant.* (26 points) The Secretary reviews each application to determine the qualifications of the applicant. The Secretary considers—

(1) The overall strength of the applicant's graduate academic record (10 points);

(2) The extent to which the applicant's academic record demonstrates strength in area studies relevant to the proposed project (10 points);

(3) The applicant's proficiency in one or more of the languages (other than English and the applicant's native language) of the country or countries of research, and the specific measures to be taken to overcome any anticipated language barriers (1 point); and

(4) The applicant's ability to conduct research in a foreign cultural context, as evidenced by the applicant's references or previous overseas experience, or both (5 points).

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires

¹ As noted in the Unified Agenda of Regulatory and Deregulatory Actions, for potential use in future competitions, the Department intends to invite public comment on proposed changes to these selection criteria, including how to consider applicants who are proficient in their native language.

various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2023, doctoral student applications will be divided into seven categories based on the world area focus of their research projects, as described in the absolute priority. Foreign language and area studies experts assigned to world area-based panels will review the doctoral student applications. Each panel will review, score, and rank its applications separately from the applications assigned to the other world area panels. At the conclusion of the peer review process, however, all fellowship applications in the competition will be ranked from the highest to the lowest score for funding purposes.

If there are applications on the rank order slate with the same average score, the Fulbright Foreign Scholarship Board's (FFSB) policy governing veteran's preference will be used in the tiebreaker and selection process. Veteran's preference will be used first to determine which application to recommend for funding. This means that in instances where two or more applications have the same average score on the rank order slate, and there are insufficient funds to support all of the equally ranked applications, the veteran's application will be given preference.

For applications that have tied average scores but are not subject to veteran's preference consideration, we will use the average score assigned on the Technical Review Forms for the "Quality of the Proposed Project" selection criterion. If a tie still exists, the average score for Competitive Preference Priority 1 will be used as the tiebreaker. A final tiebreaker, should it become necessary, will use the average score assigned for the "Qualifications of the Applicant" selection criterion.

3. Risk Assessment and Specific Conditions: Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. Integrity and Performance System: If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently \$250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds \$10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed \$10,000,000.

5. In General: In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. Award Notices: If your application is successful, we notify your U.S. Representative and U.S. Senators and

send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. Administrative and National Policy Requirements: We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. Reporting: (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to www.ed.gov/fund/grant/apply/appforms/appforms.html.

4. Performance Measures: The objective for the Fulbright-Hays DDRA Fellowship Program is to provide grants to colleges and universities to fund individual doctoral students to conduct research in other countries in modern foreign languages and area studies for periods of 6 to 12 months.

For the purpose of Department reporting under 34 CFR 75.110, the Department will use the following measures to evaluate its success in meeting this objective:

DDRA Measure 1: The percentage of DDRA fellows who increased their foreign language scores in speaking, reading, or writing by at least one proficiency level.

DDRA Measure 2: The percentage of DDRA fellows who complete their degree in their program of study within four years of receipt of the fellowship.

DDRA Measure 3: The percentage of DDRA fellows who found employment that utilized their language and area studies skills within eight years of receiving their award.

DDRA Measure 4: Efficiency Measure—The cost per DDRA fellow who found employment that utilized their language and area studies skills within eight years.

The information provided by grantees in their performance reports submitted via the International Resource Information System (IRIS) will be the source of data for these measures. Reporting screens for institutions and fellows may be viewed at http://iris.ed.gov/iris/pdfs/DDRA_director.pdf, and http://iris.ed.gov/iris/pdfs/DDRA_fellow.pdf.

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Nasser H. Paydar,
Assistant Secretary for Postsecondary Education.

[FR Doc. 2023-02827 Filed 2-9-23; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Notice of Intent Regarding the Future Release of Guidance and Application for the Hydroelectric Efficiency Improvement Incentives

AGENCY: Grid Deployment Office, Department of Energy.

ACTION: Notice of intent (NOI).

SUMMARY: The Department of Energy (DOE) Grid Deployment Office (GDO) intends to release the final guidance and open the 2023 application period for the Hydroelectric Efficiency Improvement Incentives as authorized through the Energy Policy Act of 2005 (EPA 2005) and amended by the Infrastructure Investment and Jobs Act (IIJA) of 2021, in the second quarter of calendar year 2023. This notice provides preliminary information regarding the GDO's Hydroelectric Efficiency Improvement Incentives Program, including application requirements and processes that will be further described in the guidance accompanying the upcoming solicitation. All the information contained in this notice is subject to change.

ADDRESSES: The future application period announcement will be published in the **Federal Register** and guidance will be made available via the GDO website <https://www.energy.gov/gdo/section-243-hydroelectric-efficiency-improvement-incentives-program>.

FOR FURTHER INFORMATION CONTACT: Questions may be addressed to Ms. Luciana Ciocci, U.S. Department of Energy, Grid Deployment Office, 1000 Independence Ave. SW, Washington, DC, 20585, (202) 480-5768 or by email at hydroelectricincentives@hq.doe.gov.

SUPPLEMENTARY INFORMATION: In the coming weeks, the Grid Deployment Office intends to open the 2023 application period for section 243 of EPA 2005, Hydroelectric Efficiency Improvement Incentives, as amended by section 40332 IIJA of 2021, Public Law 117-58.¹ At that time, GDO will also make available an accompanying guidance document that will describe the application process and the information necessary for the Secretary of Energy to make incentive payments to owners and authorized operators of qualified hydroelectric facilities at existing dams to be used to make capital improvements in the facilities that are directly related to improving the efficiency of such facilities by at least three percent pursuant to section 243 of EPA 2005.² GDO previously released a

request for information (RFI) and held a public webinar related to section 243 incentive. See 87 FR 40515 (Jul. 7, 2022). The information gathered through the RFI and webinar were used to support the development of the guidance.

The guidance will describe the application process and the information necessary for the Secretary of Energy to make incentive payments to owners and authorized operators of qualified hydroelectric facilities pursuant to section 243 of EPA 2005, Hydroelectric Efficiency Improvement Incentives. Topics include, eligibility requirements, general application requirements and process, procedures for processing applications, allocation of funding for eligible projects in the event of oversubscription, and funding restrictions.

Under the statute, the incentive payments include the following limitations: an incentive payment shall not exceed 30 percent of the costs of the applicable capital improvement(s); and no more than one incentive payment may be made to a single qualified hydroelectric facility in any fiscal year that shall not exceed \$5,000,000.³

GDO intends to open the 2023 application period by publishing a notice in the **Federal Register**, in the coming weeks, and releasing the guidance online, which will be located at <https://www.energy.gov/gdo/section-243-hydroelectric-efficiency-improvement-incentives-program>. GDO anticipates utilizing the Clean Energy Infrastructure Funding Opportunity eXCHANGE for submission of applications once the application period is opened. The Clean Energy Infrastructure Funding Opportunity eXCHANGE is located at <https://infrastructure-exchange.energy.gov/>.

A public webinar will be held in the weeks following the release of the guidance and 2023 solicitation to provide clarity on the guidance document, as necessary. The webinar will be held in a question and answer format with registration details available at <https://www.energy.gov/gdo/section-243-hydroelectric-efficiency-improvement-incentives-program> in the near future.

Signing Authority

This document of the Department of Energy was signed on February 6, 2023, by Maria Duaine Robinson, Director of the Grid Deployment Office, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is

¹ Public Law 117-58, div. D, title III, § 40332(a).

² 42 U.S.C. 15882(a).

³ 42 U.S.C. 15882(b).

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 February 7, 2023.

Treana V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023-02854 Filed 2-9-23; 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: RP23-422-000.
Applicants: Ruby Pipeline, L.L.C.
Description: § 4(d) Rate Filing: RP 2023-02-03 Administrative Changes to be effective 3/6/2023.
Filed Date: 2/3/23.
Accession Number: 20230203-5147.
Comment Date: 5 p.m. ET 2/15/23.
Docket Numbers: RP23-423-000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Freepoint Commodities LLC R-7250-45 to be effective 2/3/2023.
Filed Date: 2/3/23.
Accession Number: 20230203-5164.
Comment Date: 5 p.m. ET 2/15/23.
Docket Numbers: RP23-424-000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Macquarie Energy LLC R-4090-26 to be effective 2/3/2023.
Filed Date: 2/3/23.
Accession Number: 20230203-5167.
Comment Date: 5 p.m. ET 2/15/23.
Docket Numbers: RP23-425-000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Citadel Energy Marketing LLC R-7705-14 to be effective 2/3/2023.
Filed Date: 2/3/23.
Accession Number: 20230203-5169.

Comment Date: 5 p.m. ET 2/15/23.

Docket Numbers: RP23-426-000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Castleton Commodities Merchant Trading L.P. R-4010-35 to be effective 2/3/2023.

Filed Date: 2/3/23.

Accession Number: 20230203-5170.

Comment Date: 5 p.m. ET 2/15/23.

Docket Numbers: RP23-427-000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Castleton Commodities Merchant Trading L.P. R-4010-36 to be effective 2/3/2023.

Filed Date: 2/3/23.

Accession Number: 20230203-5171.

Comment Date: 5 p.m. ET 2/15/23.

Docket Numbers: RP23-428-000.

Applicants: Iroquois Gas Transmission System, L.P.

Description: § 4(d) Rate Filing: 2.3.23 Negotiated Rates—Uniper Global Commodities North America LLC R-7650-05 to be effective 2/3/2023.

Filed Date: 2/3/23.

Accession Number: 20230203-5189.

Comment Date: 5 p.m. ET 2/15/23.

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: February 6, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-02887 Filed 2-9-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2639-028]

Northern States Power Company—Wisconsin; Notice Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* P-2639-028.

c. *Date filed:* November 30, 2021.

d. *Applicant:* Northern States Power Company—Wisconsin.

e. *Name of Project:* Cornell Hydroelectric Project.

f. *Location:* The existing project is located on the Lower Chippewa River in the township of Cornell, Chippewa County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)-825(r).

h. *Applicant Contact:* Donald R. Hartinger, Director, Hydro Plants, 1414 W Hamilton Avenue, P.O. Box 8; Eau Claire, WI 54701; donald.r.hartinger@xcelenergy.com; (612) 321-3063.

i. *FERC Contact:* Michael Davis at (202) 502-8339; or michael.davis@ferc.gov.

j. *Deadline for filing scoping comments:* March 8, 2023.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P-2639-028.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must

also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. *Project Description:* The project consists of the following existing facilities: (1) a reservoir having 985 acres surface area, gross storage capacity of 8,000 acre-feet and a net storage capacity of 1,500 acre-feet at a maximum normal water surface elevation of 1,002.0 National Geodetic Vertical Datum 1929 (NGVD); (2) an 861-foot-long earth and concrete dam including: (a) a 42-foot-wide east concrete non-overflow section with a top elevation of 1,010.0 feet NGVD, (b) a 131-foot-long, 151.5-foot-wide, 82-foot-high powerhouse-intake structure containing three horizontal shaft turbine-generators rated at 10 megawatts each and one vertical shaft turbine-generator rated at 750 kilowatts, (c) an 85-foot-long gated spillway containing two 37-foot-wide by 23.3-foot-high Tainter gates with top of pier elevation of 1,008.0 feet NGVD, (d) a 10-foot-long non-overflow concrete dam section with a top elevation of 1,004.2 feet NGVD, (e) a 292-foot-long gated spillway containing 12 20-foot-long by 16-foot-high steel Tainter gates with a top of pier elevation of 1,004.2 feet NGVD, (f) a 210-foot-long by 28-foot-high overflow concrete section topped with 48-inch-high flashboards with top of flashboard elevation of 1,002.2 feet NGVD, and (g) a 91-foot-long west earthen embankment with a top elevation of 1,010.0 feet NGVD; (3) four 160-foot-long, 7.2-kilovolt (kV) transmission lines connecting the powerhouse to an adjacent project owned substation that is the point of interconnection to a 115-kV distribution line belonging to the Northern States Power Company—Wisconsin; and (4) appurtenant facilities. The project average annual generation between 2016 and 2020 was 113,839 megawatt hours.

m. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (e.g., scoping 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 (P-2639). For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

You may also register online at <http://www.ferc.gov/docs-filing/>

esubscription.asp to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:*

Commission staff will prepare either an environmental assessment (EA) or an environmental impact statement (EIS) that describes and evaluates the probable effects, if any, of the licensee's proposed action and alternatives. The EA or EIS will consider environmental impacts and reasonable alternatives to the proposed action. The Commission's scoping process will help determine the required level of analysis and satisfy the National Environmental Policy Act (NEPA) scoping requirements, irrespective of whether the Commission prepares an EA or an EIS. At this time, we do not anticipate holding on-site scoping meetings. Instead, we are soliciting written comments and suggestions on the preliminary list of issues and alternatives to be addressed in the NEPA document, as described in scoping document 1 (SD1), issued February 6, 2023.

Copies of the SD1 outlining the subject areas to be addressed in the NEPA document were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of SD1 may be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call 1-866-208-3676 or for TTY, (202) 502-8659.

Dated: February 6, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-02882 Filed 2-9-23; 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: EC23-54-000.

Applicants: Evergy Kansas Central, Inc., Evergy, Inc., Persimmon Creek Wind Farm 1, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Evergy Kansas Central, Inc., et al.

Filed Date: 2/6/23.

Accession Number: 20230206-5088.

Comment Date: 5 p.m. ET 2/27/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23-80-000.

Applicants: Lockhart ESS, LLC.

Description: Lockhart ESS, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 2/3/23.

Accession Number: 20230203-5205.

Comment Date: 5 p.m. ET 2/24/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-1841-028; ER10-1849-030; ER10-1851-018; ER10-1852-076; ER10-1857-021; ER10-1890-025; ER10-1899-020; ER13-712-032; ER13-752-019; ER13-1991-026; ER13-1992-026; ER15-2582-014; ER15-2676-023; ER16-1672-021; ER17-804-004; ER17-2152-017; ER18-882-017; ER18-1534-012; ER18-1863-015; ER18-1978-011; ER19-987-015; ER19-1003-015; ER19-1393-015; ER19-1394-015; ER19-2269-008; ER19-2437-011; ER19-2461-011; ER20-122-009; ER20-1769-009; ER20-1980-008; ER20-1986-007; ER20-1987-010; ER20-2049-007; ER21-1320-005; ER21-1519-005; ER21-1682-005; ER21-1879-006; ER21-2118-008; ER21-2293-008; ER21-2296-007; ER22-381-006; ER22-2518-002; ER22-2634-002; ER23-71-001; ER22-2516-001.

Applicants: Chaves County Solar II, LLC, Buena Vista Energy Center, LLC, Buffalo Ridge Wind, LLC, Clearwater Wind I, LLC, Dunns Bridge Solar Center, LLC, Ensign Wind Energy, LLC, Fish Springs Ranch Solar, LLC, Dodge Flat Solar, LLC, Farmington Solar, LLC, Elora Solar, LLC, Cool Springs Solar, LLC, Crystal Lake Wind Energy III, LLC, Cedar Springs Wind III, LLC, Cerro Gordo Wind, LLC, Day County Wind I, LLC, Cedar Springs Wind, LLC, Chicot Solar, LLC, Crowned Ridge Interconnection, LLC, Crowned Ridge Wind, LLC, Emmons-Logan Wind, LLC, Dougherty County Solar, LLC, Endeavor Wind II, LLC, Endeavor Wind I, LLC, Crystal Lake Wind Energy II, LLC, Crystal Lake Wind Energy I, LLC, Casa Mesa Wind, LLC, Coolidge Solar I, LLC, East Hampton Energy Storage Center, LLC, Elk City Renewables II, LLC, Cottonwood Wind Project, LLC, Coram California Development, L.P., Chaves County Solar, LLC, Cedar Bluff Wind, LLC, Carousel Wind Farm, LLC, Desert Sunlight 300, LLC, Desert Sunlight 250, LLC, Energy Storage Holdings, LLC, Cimarron Wind Energy, LLC, FPL Energy Illinois Wind, LLC, FPL Energy Green Power Wind, LLC, FPL Energy Cape, LLC, Florida Power & Light

Company, ESI Vansycle Partners, L.P., Elk City Wind, LLC, Butler Ridge Wind Energy Center, LLC.

Description: Notice of Change in Status of NextEra Companies, et al.
Filed Date: 1/31/23.

Accession Number: 20230131-5515.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER10-1907-027;

ER10-1918-028; ER10-1930-018; ER10-1931-019; ER10-1932-021; ER10-1935-022; ER10-1950-028; ER10-1962-025; ER11-2160-025; ER11-2642-024; ER11-3635-020; ER12-1228-031; ER13-2112-020; ER13-2147-008; ER14-2447-002; ER15-2101-015; ER15-2477-018; ER15-2601-012; ER16-90-018; ER16-2275-019; ER17-2340-015; ER18-1952-014; ER18-2246-017; ER19-1392-010; ER19-2389-010; ER19-2398-013; ER20-2019-008; ER20-2064-009; ER20-2690-009; ER21-254-007; ER21-1953-007; ER21-2225-007; ER22-1982-004.

Applicants: Great Prairie Wind, LLC, Irish Creek Wind, LLC, Heartland Divide Wind II, LLC, Harmony Florida Solar, LLC, Jordan Creek Wind Farm LLC, High Majestic Wind I, LLC, Gray County Wind, LLC, Hancock County Wind, LLC, Grazing Yak Solar, LLC, High Lonesome Mesa Wind, LLC, Heartland Divide Wind Project, LLC, Gulf Power Company, Golden Hills North Wind, LLC, Kingman Wind Energy I, LLC, Golden Hills Interconnection, LLC, Green Mountain Storage, LLC, Golden Hills Wind, LLC, Golden West Power Partners, LLC, Granite Reliable Power, LLC, Frontier Utilities Northeast LLC, Genesis Solar, LLC, High Majestic Wind II, LLC, Hatch Solar Energy Center I, LLC, FPL Energy South Dakota Wind, LLC, FPL Energy Montezuma Wind, LLC, High Winds, LLC, Garden Wind, LLC, FPL Energy Wyman IV, LLC, FPL Energy Wyman, LLC, FPL Energy Vansycle, L.L.C., FPL Energy Stateline II, Inc., FPL Energy North Dakota Wind II, LLC, FPL Energy North Dakota Wind, LLC.

Description: Notice of Change in Status of NextEra Companies, et al.
Filed Date: 2/1/23.

Accession Number: 20230201-5270.

Comment Date: 5 p.m. ET 2/22/23.

Docket Numbers: ER10-1966-020;

ER11-4462-076; ER12-895-029; ER12-2225-019; ER12-2226-019; ER14-21-016; ER14-1630-016; ER14-2138-016; ER14-2707-026; ER15-1375-019; ER16-1354-014; ER16-1872-018; ER16-2276-019; ER16-2443-015; ER17-1774-010; ER18-772-010; ER18-1535-011; ER18-1771-017; ER18-2003-015; ER18-2066-010; ER18-2182-016; ER20-1907-008; ER20-2695-010;

ER21-2117-007; ER21-2149-007; ER21-2699-008; ER22-2536-002; ER23-489-002.

Applicants: Neptune Energy Center, LLC, Kossuth County Wind, LLC, Minco Wind Energy III, LLC, Minco Wind Energy II, LLC, Little Blue Wind Project, LLC, Mohave County Wind Farm LLC, Minco Wind I, LLC, Minco IV & V Interconnection, LLC, Minco Wind IV, LLC, Lorenzo Wind, LLC, Langdon Renewables, LLC, Montauk Energy Storage Center, LLC, New Mexico Wind, LLC, NextEra Energy Bluff Point, LLC, NextEra Blythe Solar Energy Center, LLC, Kingman Wind Energy II, LLC, Marshall Solar, LLC, Live Oak Solar, LLC, McCoy Solar, LLC, Mammoth Plains Wind Project, LLC, Limon Wind III, LLC, Mantua Creek Solar, LLC, Mountain View Solar, LLC, Limon Wind, LLC, Limon Wind II, LLC, Minco Wind Interconnection Services, LLC, NEPM II, LLC, Logan Wind Energy LLC.

Description: Notice of Change in Status of NextEra Companies, et al.
Filed Date: 2/1/23.

Accession Number: 20230201-5271.

Comment Date: 5 p.m. ET 2/22/23.

Docket Numbers: ER10-2005-028;

ER15-1418-019; ER15-1883-019; ER15-1925-024; ER16-91-018; ER16-632-018; ER16-2190-020; ER16-2191-020; ER16-2453-021; ER18-2118-016; ER19-1073-009; ER19-2373-011; ER19-2901-010; ER20-819-012; ER20-820-010; ER20-2179-008; ER21-1990-006; ER21-2294-007; ER21-2304-007; ER21-2674-006; ER22-415-006; ER23-568-001.

Applicants: Big Cypress Solar, LLC, Arlington Energy Center III, LLC, Borderlands Wind, LLC, Arlington Solar, LLC, Arlington Energy Center II, LLC, Blackwell Wind Energy, LLC, Baldwin Wind Energy, LLC, Blythe Solar IV, LLC, Blythe Solar III, LLC, Bronco Plains Wind, LLC, Ashtabula Wind I, LLC, Alta Wind VIII, LLC, Armadillo Flats Wind Project, LLC, Brady Interconnection, LLC, Brady Wind II, LLC, Brady Wind, LLC, Blythe Solar II, LLC, Blythe Solar 110, LLC, Breckinridge Wind Project, LLC, Adelanto Solar, LLC, Adelanto Solar II, LLC, Ashtabula Wind II, LLC.

Description: Notice of Change in Status of NextEra Companies, et al.

Filed Date: 1/31/23.

Accession Number: 20230131-5514.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER11-2044-040;

ER10-1520-011; ER10-1521-011; ER10-1522-008; ER12-162-034; ER13-1266-045; ER15-2211-042; ER20-2493-006; ER21-2280-004.

Applicants: Independence Wind Energy LLC, OTCF, LLC, MidAmerican

Energy Services, LLC, CalEnergy, LLC, Bishop Hill Energy II LLC, Occidental Chemical Corporation, Occidental Power Marketing, L.P., Occidental Power Services, Inc., MidAmerican Energy Company.

Description: Notice of Non-Material Change in Status of MidAmerican Energy Company, et al.

Filed Date: 1/31/23.

Accession Number: 20230131-5513.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER23-1051-000.

Applicants: Southwestern Electric Power Company.

Description: Tariff Amendment: Rate Schedule 305, System Integration Agreement Concurrence to be effective 5/22/2022.

Filed Date: 2/3/23.

Accession Number: 20230203-5186.

Comment Date: 5 p.m. ET 2/24/23.

Docket Numbers: ER23-1052-000.

Applicants: Union Atlantic Electricity.

Description: Notice of Cancellation of Market Based Rate Tariff of Union Atlantic Electricity.

Filed Date: 2/3/23.

Accession Number: 20230203-5239.

Comment Date: 5 p.m. ET 2/24/23.

Docket Numbers: ER23-1053-000.

Applicants: Merino Solar, LLC.

Description: Request for Limited Waiver, et al. of Merino Solar, LLC.

Filed Date: 2/3/23.

Accession Number: 20230203-5246.

Comment Date: 5 p.m. ET 2/24/23.

Docket Numbers: ER23-1054-000.

Applicants: PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: PPL Electric Utilities Corporation submits tariff filing per 35.13(a)(2)(iii); PPL submits SA No. 6789 Construction Service Agreement to be effective 1/9/2023.

Filed Date: 2/6/23.

Accession Number: 20230206-5073.

Comment Date: 5 p.m. ET 2/27/23.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH23-4-000.

Applicants: Unison Energy, LLC, AIM Universal Holdings, LLC, Hunt Companies, Inc.

Description: Unison Energy, LLC, et al., submits FERC 65-A Exemption Notification.

Filed Date: 2/6/23.

Accession Number: 20230206-5087.

Comment Date: 5 p.m. ET 2/27/23.

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: February 6, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-02892 Filed 2-9-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL23-26-000]

Pacificorp; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 3, 2023, the Commission issued an order in Docket No. EL23-26-000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Pacificorp's Large Generator Interconnection Procedures are unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Pacificorp*, 182 FERC ¶ 61,050 (2023).

The refund effective date in Docket No. EL23-26-000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL23-26-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2021), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the

Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFile" link at <http://www.ferc.gov>. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: February 6, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-02890 Filed 2-9-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL23-27-000]

Nevada Power Company; Sierra Pacific Power Company; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 3, 2023, the Commission issued an order in Docket No. EL23-27-000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Nevada Power Company's Large Generator Interconnection Procedures¹ are unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Nevada Power Company*, 182 FERC ¶ 61,051 (2023).

The refund effective date in Docket No. EL23-27-000, established pursuant to section 206(b) of the FPA, will be the

¹ Nevada Power is the administrator of the joint Open Access Transmission Tariff of which Nevada Power and Sierra Pacific Power Company are parties.

date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL23-27-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2021), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFile" link at <http://www.ferc.gov>. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: February 6, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-02889 Filed 2-9-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. ER23–1048–000]

Lockhart ESS, 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 Lockhart ESS, 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 February 27, 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 TYY, (202) 502–8659.

Dated: February 6, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–02888 Filed 2–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. AD22–13–000]

Interregional High Voltage Direct, Current Merchant Transmission; Notice of Request for Technical Conference

Take notice that on November 10, 2022, Invenergy Transmission LLC, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207 (2021), filed a petition requesting that the Commission hold a technical conference to explore ways to remove barriers to the development of interregional merchant high voltage direct current transmission.

Any person that wishes to comment in this proceeding must file comments in accordance with Rule 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 (2021). Comments will be considered by the Commission in determining the appropriate action to be taken. Comments must be filed on or before the comment date.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National

Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link. There is an "eSubscription" link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on March 8, 2023.

Dated: February 6, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023–02881 Filed 2–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. EL18–170–000]

DC Energy, LLC v. PJM Interconnection, L.L.C.; Notice of Request for Comments

On June 4, 2018, pursuant to sections 206 and 306 of the Federal Power Act (FPA), and Rule 206 of the Commission's Rules of Practice and Procedure, DC Energy, LLC (DC Energy) filed a complaint in the above captioned proceeding alleging that PJM Interconnection, L.L.C.'s (PJM) then-current collateral and minimum capitalization requirements for Financial Transmission Rights auction participants were unjust and unreasonable. On September 25, 2018, the Commission set the complaint for paper hearing to determine whether, in light of the Commission's acceptance of a volumetric credit requirement in Docket No. ER18–2090–000, PJM's tariff was unjust and unreasonable, to aid in evaluating the complaint.¹

On November 9, 2018, as renewed on December 10, 2018, April 19, 2019, December 20, 2019, and July 6, 2020, PJM requested that the Commission hold its proceedings in abeyance and allow additional time for its stakeholder processes to continue to review and make revisions to its credit

¹ DC Energy, LLC v. PJM Interconnection, L.L.C., 164 FERC ¶ 61,216 (2018).

requirements. No party objected to holding the proceedings in abeyance.

By this notice, the Commission requests comment regarding: (1) whether issues remain outstanding in this proceeding; (2) what those issues are; and (3) whether, if issues remain outstanding, the Commission should continue to hold the complaint in abeyance in light of any ongoing PJM stakeholder proceedings or for other reasons. If there are no further outstanding issues in this proceeding, please explain how each of the issues that were raised in this proceeding have been addressed (e.g., through other filings the Commission has accepted in the interim, etc.). Comments must be submitted on or before 30 days from the date of this notice.

Comments may be filed electronically via the internet.² Instructions are available on the Commission's website <http://www.ferc.gov/docs-filing/efiling.asp>. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, (202) 502-8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, submissions sent via the U.S. Postal Service must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: February 6, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-02891 Filed 2-9-23; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP-OFA-056]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202-564-5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS)

Filed January 30, 2023 10 a.m. EST

Through February 6, 2023 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its

comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

EIS No. 20230017, Final Supplement, NRC, WI, NUREG-2183 Supplement 1, Environmental Impact Statement Related to the Operating License for the SHINE Medical Isotope Production Facility—Final Report, Review Period Ends: 03/13/2023, Contact: Lance J Rakovan 301-415-2589.

EIS No. 20230018, Final, EPA, LA, Adoption—Proposed Mid-Barataria Sediment Diversion Project in Plaquemines Parish, Louisiana, Contact: Michael Jansky 214-665-7451.

The Environmental Protection Agency (EPA) has adopted the U.S. Army Corps of Engineers' Final EIS No. 20220137, filed 9/19/2022 with the Environmental Protection Agency. The EPA was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230019, Final, DOI, LA, Adoption—Proposed Mid-Barataria Sediment Diversion Project in Plaquemines Parish, Louisiana, Contact: Mary Josie Blanchard 202-208-3406.

The Department of the Interior (DOI) has adopted the U.S. Army Corps of Engineers' Final EIS No. 20220137, filed 9/19/2022 with the Environmental Protection Agency. The DOI was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230020, Final, USDA, LA, Adoption—Proposed Mid-Barataria Sediment Diversion Project in Plaquemines Parish, Louisiana, Contact: Ronald Howard 601-812-9449.

The United States Department of Agriculture (USDA) has adopted the U.S. Army Corps of Engineers' Final EIS No. 20220137, filed 9/19/2022 with the Environmental Protection Agency. The USDA was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230021, Final, NOAA, LA, Adoption—Proposed Mid-Barataria Sediment Diversion Project in Plaquemines Parish, Louisiana, Contact: Mel Landry 301-427-8711.

The National Oceanic and Atmospheric Administration (NOAA) has adopted the U.S. Army Corps of Engineers' Final EIS No. 20220137, filed 9/19/2022 with the Environmental Protection Agency. The NOAA was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230022, Draft, FERC, TN, Cumberland Project, Comment Period Ends: 03/27/2023, Contact: Office of External Affairs 866-208-3372.

EIS No. 20230023, Final, DOD, AK, Heat and Electrical Upgrades at Fort Wainwright, Alaska, Review Period Ends: 03/13/2023, Contact: Grant Sattler 907-353-6701.

EIS No. 20230024, Draft, USAF, FL, KC-46A—Main Operating Base No. 6 Beddown, Comment Period Ends: 03/27/2023, Contact: Helen Kellogg 210-925-7843.

EIS No. 20230025, Draft, BIA, ID, Nez Perce Tribe Integrated Resource Management Plan, Comment Period Ends: 04/11/2023, Contact: Tobiah Mogavero 435-210-0509.

EIS No. 20230026, Draft Supplement, TVA, AL, Browns Ferry Nuclear Plant Subsequent License Renewal, Comment Period Ends: 03/27/2023, Contact: J Taylor Johnson 423-751-2732.

Amended Notice

EIS No. 20220185, Draft, NNSA, SC, Surplus Plutonium Disposition Program, Comment Period Ends: 03/16/2023, Contact: Maxcine Maxted 803-952-7434. Revision to FR Notice Published 12/16/2022; Extending the Comment Period from 02/14/2023 to 03/16/2023.

EIS No. 20220191, Draft Supplement, USFS, VA, Mountain Valley Pipeline and Equitrans Expansion Project, Comment Period Ends: 02/21/2023, Contact: Joby Timm, Forest Supervisor 888-603-0261. Revision to FR Notice Published 12/23/2022; Extending the Comment Period from 02/06/2023 to 02/21/2023.

Dated: February 6, 2023.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023-02897 Filed 2-9-23; 8:45 am]

BILLING CODE 6560-50-P

² See 18 CFR 385.2001(a)(1)(iii) (2021).

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2021-0299; FRL-8193-01-OAR]

Notice of Final for Approval of Alternative Means of Emission Limitation**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice, final approval.

SUMMARY: This action announces the EPA approval of the request by Flint Hills Resources (FHR), under the Clean Air Act (CAA), for an alternative means of emission limitation (AMEL) to utilize a leak detection sensor network (LDSN) with a detection response framework (DRF) at its Meta-Xylene and Mid-Crude process units located at FHR's West Refinery in Corpus Christi, Texas. The EPA received 6 public comments on the October 13, 2021, initial notice for this AMEL. This approval document specifies the alternative leak detection and repair (LDAR) requirements that this facility must follow to demonstrate compliance with the approved AMEL. In addition, this notice finalizes a framework that facilities can follow to help expedite and streamline approval of future AMEL requests for similar systems.

DATES: The approval of the AMEL request from FHR to utilize a LDSN with a DRF at its Meta-Xylene and Mid-Crude process units located at FHR's West Refinery in Corpus Christi, Texas, as specified in this document, is effective on February 10, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2021-0299. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Mr. Neil Feinberg, Sector Policies and Programs Division (E143-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-2214; fax number: (919) 541-0516; and

email address: feinberg.stephen@epa.gov.

SUPPLEMENTARY INFORMATION:

Acronyms and abbreviations. We use multiple acronyms and terms in this document. While this list may not be exhaustive, to ease the reading of this document and for reference purposes, the EPA defines the following terms and acronyms here:

AMEL alternative means of emission limitation
 AVO audio, visual, or olfactory
 CAA Clean Air Act
 CDX Central Data Exchange
 CFR Code of Federal Regulations
 CRADA Cooperative Research and Development Agreement
 DRF detection response framework
 DTU upper limit of the detection threshold band
 EPA Environmental Protection Agency
 EST eastern standard time
 FHR Flint Hills Resources
 FID flame ionization detector
 FEMP Fugitive Emissions Management Plan
 GPS Global Positioning System
 HC hydrocarbon
 HON National Emission Standards for Hazardous Air Pollutants for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry
 LDAR leak detection and repair
 LDSN leak detection sensor network
 LDSN-DRF leak detection sensor network-detection response framework
 NC Leaker non-compliant leaker
 NSPS new source performance standards
 OGI optical gas imaging
 ppbe parts per billion equivalent
 ppm parts per million
 ppmv parts per million by volume
 PSL potential source location
 QA/QC quality assurance/quality control
 QIP quality improvement program
 VOC volatile organic compounds
 ZIC zone of inadequate coverage

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

- I. Background
- II. Summary of Public Comments on FHR's AMEL Request and the Framework for Streamlining Approval of Future LDSN-DRF AMEL Requests
- III. Framework for Streamlining Approval of Future LDSN-DRF AMEL Requests
- IV. Final Notice of Approval for the Mid-Crude and Meta-Xylene Process Units at the FHR West Refinery AMEL Request and Required Operating Conditions

I. Background

On April 21, 2020, FHR requested an AMEL under the CAA to use a leak detection sensor network-detection response framework (LDSN-DRF) at its West and East Refineries located in Corpus Christi, Texas in lieu of the traditional LDAR program using Method 21 of appendix A-7 of part 60 (EPA

Method 21) required by a number of applicable regulations in 40 CFR parts 60, 61, and 63. See Table 1 in section IV of this notice for a complete list of applicable regulations for this AMEL.

In the initial notice, the EPA solicited comment on all aspects of the AMEL request and alternative LDAR requirements that would be necessary to achieve a reduction in emissions of volatile organic compounds (VOC) and hazardous air pollutants (HAPs) at least equivalent to the reduction in emissions required by the applicable LDAR standards listed in Table 1 in section IV of this notice. The initial notice also presented and solicited comment on all aspects of a generic framework for future LDSN-DRF AMEL requests, which would afford the EPA the ability to evaluate those requests in a more efficient and streamlined manner.

FHR included in its AMEL application information to demonstrate that the LDSN-DRF will achieve a reduction in emissions at least equivalent to the reduction in emissions achieved by the requirements in the applicable standards summarized in Table 1 of section IV of this notice for the Meta-Xylene and Mid-Crude process units located at FHR's West Refinery in Corpus Christi, Texas. For FHR's AMEL request, including any supporting materials FHR submitted, see Docket ID No. EPA-HQ-OAR-2021-0299.

This action finalizes the EPA's approval of this AMEL request. Section II summarizes the comments received on the request and our responses thereto. Section III sets forth the final operating conditions EPA has established for the LDSN-DRF as part of this AMEL approval.

II. Summary of Public Comments on FHR's AMEL Request and the Framework for Streamlining Approval of Future LDSN-DRF AMEL Requests

This section contains a summary of all comments received on the October 13, 2021, initial notice,¹ and the EPA's responses to those comments. This section also contains rationale for the alternative LDAR requirements that are approved in this notice. The EPA received six comments on the initial notice.²

¹ 86 FR 56934 (October 13, 2021).

² See Document ID Nos. EPA-HQ-OAR-2021-0299-0032 (TRICORD Consulting, LLC), EPA-HQ-OAR-2021-0299-0033 (Anonymous), EPA-HQ-OAR-2021-0299-0034 (ATLAS), EPA-HQ-OAR-2021-0299-0035 (Molex), EPA-HQ-OAR-2021-0299-0036 (FHR), EPA-HQ-OAR-2021-0299-0037 (Eastman Chemical Company).

A. Comments and Responses Related to General Framework for Future LDSN-DRF AMEL Requests

The EPA solicited comment on all aspects of the general framework proposed for future AMEL requests using a LDSN-DRF. Two comments were received specific to the proposed framework.³

Comment: In their comments, FHR and Molex, LLC requested that the general framework provide flexibility to apply the same Molex LDSN design and deployment processes to similar units without the need to conduct an additional pilot test. Both commenters stated that the science behind the technology is established, and “substantial” controlled gas release experiments, including the pilot test results⁴ presented for this AMEL support their request for flexibility. Specifically, FHR and Molex suggested addition of the phrase “if necessary to demonstrate equivalency” to the language in paragraph III.D.(3) regarding submission of the results of the pilot study conducted for each unit in a LDSN-DRF AMEL application.

Response: The EPA disagrees with the commenters’ recommendation that test studies are not necessary for each process unit for which an AMEL application is submitted. At this time, it is still appropriate to require test studies for LDSNs on additional process units in order to gather more information on how the networks perform in different types of process units. The EPA may reevaluate its position on the necessity of test studies in the future if it has more data with which to do so. The EPA is providing the framework as described in section III of this notice, with no changes from the initial notice. We anticipate this framework would enable the Agency to evaluate future AMEL requests for LDSN-DRF installations in a more expeditious timeframe because we anticipate that the information required by the framework would provide sufficient information to evaluate future AMEL requests on a case-by-case basis. We note that all aspects of future AMEL requests will still be subject to the notice and comment process.

B. Comments and Responses Related to the Equivalency Demonstration

Comment: One commenter⁵ raised concerns with two of the assumptions made by FHR when performing simulation modeling to demonstrate equivalency of the LDSN-DRF to the applicable EPA Method 21 LDAR requirements: (1) Leaks would be repaired within 7 days of detection and (2) a leak would remain constant from the time it is detected until it is repaired. This commenter referenced a statement in the EPA’s Best Practices Guide for LDAR⁶ that notes a common problem related to the repair requirements is that sources fail to complete repairs within the specified timeline in the regulation. The commenter then states that it is, therefore, inappropriate to assume that a leak would be repaired in half the amount of time required by the applicable regulation, and instead suggests that FHR should perform new simulations assuming 10 to 15 days for repairs. Further, the commenter suggests that FHR should conduct more equivalency simulations that do not assume a constant leak rate because FHR’s discussion on PSL closure acknowledges that a PSL cannot be closed if there is an increase in the detection level. In the commenter’s opinion, this assumes that FHR knows that leak rates can change and not remain constant until repaired.

Response: The AMEL requires leaks to be repaired within 15 days of detection, with a first attempt within the first five days. During the pilot study, there was a median repair time of 2 and 3 days for the Mid-Crude and Meta-Xylene units, respectively. Based on this information, the EPA finds no reason that the average repair time would exceed 7 days. The commenter is correct that a leak can increase over time, but they fail to note that it could also decrease. The EPA has determined the assumption of a constant leak rate between detection and repair is appropriate for this AMEL.

Comment: One commenter noted that some leaks above the upper limit of the detection threshold (DTU) were found by EPA Method 21 and not by the LDSN and asked how realistic it was that the LDSN would detect leaks in a complex process unit.

Response: The EPA acknowledges that some leaks above the DTU were found with EPA Method 21 during the

pilot test studies. However, during the pilot test studies, FHR continued to adapt and adjust the network. Additionally, FHR is adding additional sensors to the network in areas that previously had gaps in coverage. These changes should ensure the LDSN performs adequately and identifies all leaks above the DTU. The annual compliance demonstrations provide added assurance of network performance by verifying there are no undetected leaks above the DTU. The EPA also notes that the results of the pilot study presented in the Cooperative Research and Development Agreement (CRADA) showed greater emission reductions using the LDSN than with EPA Method 21.

Comment: One commenter⁷ stated that the sensor network only minimally outperformed EPA Method 21 by at most 2 percent. The commenter further stated that the size and scope of the study and the results suggest this technology still needs scrutiny and that the pilot study was performed in controlled conditions with a team of motivated researchers present.

Response: The EPA has found the performance of the LDSN to be equivalent or better than current work practice requirements for the Mid-Crude and Meta-Xylene process units at FHR’s West Refinery in Corpus Christi, Texas. Thus, the EPA finds it appropriate to issue this AMEL for those process units. Any future approval of this technology would be evaluated based on the information provided in that specific application.

C. Comments and Responses Related to the LDSN

Comment: FHR and Molex commented that updating the sensor detection floor continuously on a 15-minute basis would result in erroneous sensor failure indications and requested the expansion of corrective action options to include other appropriate solutions. They stated that the sensor detection floor is based on raw sensor readings which are collected every second and provided an example where a sensor would be shown as failing when updating the sensor detection floor while detecting a continuous leak. They stated that no sensor would pass the detection floor update requirement once every 15 minutes, as currently included in the proposal. Both commenters requested a requirement for monthly review of the sensor detection floor, with corrections made if the sensor did not pass review. They

⁷ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

³ See Document ID Nos. EPA-HQ-OAR-2021-0299-0035 and EPA-HQ-OAR-2021-0299-0036.

⁴ See “Progress on LDAR Innovation, Report on Research Under CRADA #914-16”, EPA Publication Number EPA/600/R-20/422, revision 0.8, located at Document ID No. EPA-HQ-OAR-2021-0299-0014.

⁵ See Document ID No. EPA-HQ-OAR-2021-0299-0033.

⁶ EPA, *Leak Detection and Repair: A Best Practices Guide*, located at <https://www.epa.gov/sites/default/files/2014-02/documents-ldarguide.pdf>.

claimed that a bump test is not a calibration, is not performed in a "clean" environment as calibrations are, and adjusting readings based on bump tests would create additional uncertainty in sensor readings. Additionally, FHR and Molex commented that adjusting the sensor detection floor based on a bump test is inappropriate as the sensor detection floor is a fixed number set by the manufacturer. Additionally, one commenter asked for clarification on how the baseline levels are continuously monitored, while another asked for clarification on the detection level that indicated emissions. Finally, one commenter asked how sensors would be calibrated and verified.

Response: The EPA is updating the requirements for the sensor detection floor. First, the EPA is revising the requirement for a continuously updated sensor detection floor such that the data must be reviewed each day to confirm each sensor detection floor remains below the established threshold of 10 parts-per-billion by volume isobutylene equivalent (ppbe) during at least one 10-minute period in the past 72-hour period. Further, the EPA agrees with FHR and Molex that adjusting the sensor detection floor based on a bump test is inappropriate due to the variable bump test responses observed during the pilot study, which are not related to the baseline noise of the instrument. An emissions anomaly is defined as any detection by the sensor network greater than the detection floor. Sensors must be calibrated by the manufacturer prior to deployment. Once installed, each sensor must be tested for responsiveness and wireless communication by challenging it with isobutylene gas or another appropriate standard. Sensors must pass a quarterly bump test or be recalibrated or replaced.

Comment: FHR and Molex stated in their comments that the collection of wind speed and wind direction data is critical to the operation of the LDSN. However, both commenters stated that the requirement to have a wind sensor located in each individual process unit is not necessary. To support their comments, FHR and Molex provided clarification that the pilot study conducted for this AMEL at their West Refinery was performed with one wind sensor that covered both process units. Further, the commenters stated that analysis of wind data from the West Refinery and the Corpus Christi airport showed no substantial differences between wind sensors at 450 feet apart and wind sensors at 4 miles apart. Therefore, the commenters recommended that the EPA revise the

requirement to allow a minimum of one wind sensor covering up to a 2-mile radius.

Another commenter⁸ requested clarification on the acceptance criterion for the comparison of the LDSN north orientation wind direction sensor with data from the meteorological station located at the FHR refinery. This same commenter also asked why wind speed information was not included in the LDSN since wind can affect the sensitivity of the sensor measurements.

Response: The EPA agrees with FHR and Molex that one meteorological station on the FHR site is sufficient for both process units and has made this change within the AMEL. As noted by both commenters, only one wind sensor was used during the pilot study, and the EPA has determined that equivalent emission reductions were achieved based on that pilot study. See 86 FR 56941 (October 13, 2021). Regarding the use of wind speeds, the EPA notes that wind speeds are continuously collected at least once every 15 minutes (paragraph IV.A.(4)), recorded as part of the LDSN (paragraph IV.C.(8)), and are used for quality assurance checks of the network (paragraph IV.A.(5)(d)). The acceptance criteria are listed in the AMEL.

Comment: FHR requested additional flexibility in meeting quarterly quality assurance/quality control (QA/QC) requirements by allowing QA/QC tests to be within the same month of the quarter (or no more than 123 days apart) rather than the 100 days apart included in the initial notice. FHR commented that tracking by days would present an additional burden and reduce flexibility that the applicable LDAR regulations already afford. As an example, FHR stated that new source performance standards (NSPS) VV and NSPS VVa require quarterly activities within the same month of the quarter (*i.e.*, Month 1 (January/April/July/Oct)) and not within a specific number of days. FHR requested this same flexibility for the quarterly QA/QC requirements in the AMEL. Finally, FHR requests some flexibility if there is an outage of at least 3 weeks during the quarter such that either the "days apart" requirement does not apply for the quarter in which the outage occurs or the number of days in the outage are not counted in determining the 123-day requirement.

Response: The EPA agrees with FHR and has changed the requirements in paragraph IV.A.(5) to state quarterly QA/QC activities must be conducted no more than 123 days apart. EPA disagrees

that additional flexibility is needed for a prolonged unit outage, as these QA/QC procedures are necessary to establish that the LDSN is working as intended.

Comment: FHR and Molex commented that requiring an ambient moisture adjustment for all sensors during every bump test is not necessary or practical. To support their comments, FHR stated that the Gulf Coast experiences significant day-to-day variation in ambient moisture levels, citing relative humidity data for Corpus Christi in October 2021.⁹ Using the proximity of a sensor node to a steam letdown station as an example, FHR and Molex further explained that localized relative humidity conditions can vary significantly within a specific process unit, with moisture levels potentially changing with each steam plume that passes a sensor node. Additionally, Molex stated that even when a sensor has a response to humidity changes, using a higher gas concentration (*e.g.*, 1 part per million (ppm) instead of 0.5 ppm isobutylene) may be an appropriate step. Because these localized conditions may not affect all sensor nodes in the process unit, FHR and Molex recommended allowing ambient moisture adjustments as necessary, in place of requiring these adjustments for all sensors during each bump test. Finally, FHR requested revisions to the recordkeeping requirements related to the ambient moisture level during bump tests if the requested changes are made in the AMEL.

Response: There was not sufficient information provided to substantiate the removal of the requirement. The EPA is retaining the moisture adjustment requirement due to general sensitivities of sensors to humidity. The EPA has clarified the criteria for these adjustments in paragraph IV.A.(5)(b)(i). The EPA has not made any adjustments to the recordkeeping requirements as a result of this clarification.

Comment: FHR and Molex requested a correction to the vertical sensor placement requirement in the AMEL. Specifically, both commenters noted that the initial notice required placement of sensors at least every 20 feet vertically. The commenters stated their concern that this was an error and that placement every 40 feet vertically was included in the LDSN design used for the pilot test study and equivalency demonstration. As such, the commenters requested clarification that sensor placement within 40 feet vertically is required. Another

⁸ See Document ID No. EPA-HQ-OAR-2021-0299-0032.

⁹ See Document ID Nos. EPA-HQ-OAR-2021-0299-0035 and EPA-HQ-OAR-2021-0299-0036.

commenter¹⁰ asked how the AMEL ensures all LDAR components are covered under the AMEL.

Response: The EPA is clarifying that sensors must be spaced no more than 40 feet apart vertically, such that no component is more than 20 feet vertically from a sensor. The data submitted by FHR demonstrates that this vertical spacing provides coverage for all applicable components. The LDSN–DRF requirements in this AMEL are designed to cover all LDAR components in the Mid-Crude and Meta-Xylene process units at FHR’s West Refinery. As part of the AMEL, FHR must document that all LDAR components covered by the AMEL are less than the required distances from a sensor node both vertically and horizontally. These distance limits are based on the pilot test study used in the equivalency demonstration.

Comment: FHR and Molex requested a change in the response factor requirement from 3 to 10. FHR stated that EPA Method 21 requires a response factor of 10, and FHR requested this same response factor for the LDSN because it is equivalent to the EPA Method 21 requirement. Further, FHR stated that the response factor for all streams within the process units covered by this AMEL is less than 3, which would meet their requested limit of 10. Additionally, FHR is concerned that limiting the use of the LDSN to streams with a response factor of 3 or less will restrict the applicability of the AMEL and may affect the use of the AMEL in the Mid-Crude and Meta-Xylene process units should certain operational changes occur that result in those process units having process streams with response factors above 3. Similarly, Molex commented that this limit would potentially prevent other facilities from applying for an AMEL. Finally, both FHR and Molex commented that Molex has significantly improved the ability of their algorithm to detect leaks and requested that the allowable response factor limit be increased. Another commenter¹¹ noted that there was no data to support the system would perform adequately for response factors greater than 10 and noted that ethylene was particularly difficult to detect during the testing.

Response: In the initial AMEL application, FHR stated that the average response factor in the Meta-Xylene unit is 0.8, and that the response factor for some LDAR streams in the Mid-Crude

unit can be as high as 3. While it is possible that the LDSN will perform adequately at response factors greater than 3, the data in the pilot test study and equivalency demonstration was limited to streams with response factors at or below 3. As such, without further data supporting the system’s performance for streams with higher response factors for these process units, the EPA is retaining the response factor limit of 3 at the Mid-Crude and Meta-Xylene process units at FHR’s West Refinery in Corpus Christi, Texas. Because each AMEL is site-specific, the EPA would evaluate any future AMEL requests, including the appropriate response factor limit, based on data provided for the site-specific application of the LDSN–DRF system.

Comment: One commenter¹² noted that sensor maintenance may be extensive with the quarterly bump test requirements and replacements within 30 days if the sensor fails. Another commenter¹³ asked why the passing criterion of a bump test is only 50 percent of the standard’s nominal concentration, how initial calibration and set-up of sensors would be conducted and verified, and how sensor baseline levels are continuously monitored to ensure proper operation.

Response: Sensors must be calibrated by the manufacturer prior to deployment. Once installed, each sensor must be tested for responsivity and wireless communication by challenging it with isobutylene gas or another appropriate standard. Sensors must pass a quarterly bump test or be recalibrated or replaced. These bump tests are not calibrations, but simply tests for responsiveness.

Comment: One commenter noted that the LDSN was similar to a Continuous Emissions Monitoring System and asked what repercussions there would be for excessive downtime. The commenter noted that an appeal of the LDSN is the continuous monitoring, as opposed to intermittent EPA Method 21 monitoring, but noted that sensor failure is inevitable.

Response: Each individual sensor is limited to a downtime of no more than 10 percent on a rolling 12-month basis. Anything above this threshold is a deviation. These deviations must be included in the semiannual reports required under the AMEL. Deviations from any requirement or obligation established in this AMEL, including the individual sensor downtime limitation,

are violations that may be subject to enforcement.

D. Comments and Responses Related to the DRF

Comment: The EPA included a 30-day repair requirement for leaks on components not subject to LDAR requirements in the initial notice. FHR commented that non-LDAR component leaks are outside the scope of the regulations covered in this AMEL; therefore, repair should not be required under this AMEL. To support their comment, FHR noted these non-LDAR component leaks are regulated separately under programs such as CERCLA and TCEQ rules, with such leaks reported as title V deviations and subject to enforcement. In follow up discussions,¹⁴ FHR requested that if the EPA were to require repair under this AMEL for non-LDAR component leaks, then these leaks should also have provisions for delay of repair consistent with the provisions for LDAR component leaks. Additionally, FHR requested that if a non-LDAR leak is identified during an investigation for a potential source location (PSL), then repair of that non-LDAR component leak should provide allowance to close the PSL. Another commenter¹⁵ asked if these non-LDAR component leaks would be subject to a 15-day repair requirement.

Response: The EPA disagrees with FHR and has maintained a requirement in this AMEL to complete and verify repairs of leaks on non-LDAR components within 30 days of identification. The EPA included a 30-day repair requirement for leaks on components not subject to LDAR requirements in the initial notice both to require repair of leaks found (whether or not the leak is from an LDAR component) and to ensure that the LDSN is not confounded by the presence of these non-LDAR component leaks. 86 FR 56943 (October 13, 2021). The EPA still finds that these leaks have the potential to negatively impact the performance of the LDSN by potentially masking leaks from covered LDAR components which may occur in the same area as the non-LDAR component leak. Additionally, these non-LDAR component leaks would already require repair under the general duty to reduce emissions in each of the applicable subparts. However, the EPA does agree with FHR that delay of repair provisions should also apply to non-LDAR

¹⁰ See Document ID No. EPA–HQ–OAR–2021–0299–0032.

¹¹ See Document ID No. EPA–HQ–OAR–2021–0299–0034.

¹² See Document ID No. EPA–HQ–OAR–2021–0299–0034.

¹³ See Document ID No. EPA–HQ–OAR–2021–0299–0032.

¹⁴ See supporting materials from May 25, 2022, follow-up discussions with FHR located at Docket ID No. EPA–HQ–OAR–2021–0299.

¹⁵ See Document ID No. EPA–HQ–OAR–2021–0299–0032.

components; therefore, the AMEL approved in this notice allows for delay of repair of non-LDAR component leaks when repair cannot be completed within 30 days of identification and either: (1) The repair is technically infeasible without a process unit shutdown or (2) the non-LDAR component is isolated from the process and does not remain in contact with process fluids. We also note that these requirements will not supersede repair requirements in other regulations to which these non-LDAR components may be subject, and that leak sources outside the AMEL covered area are not included in this repair requirement.

Comment: FHR noted that the initial notice did not address their request to close a PSL if no emissions source is identified and there is no update to the PSL for 14 days (*i.e.*, there are no positive detections for more than five percent of the time over a 72-hour period). In their comments, FHR again requests the ability to close the PSL if, after complying with the initial and secondary surveys, there are no updates to the PSL for 14 days, instead of keeping the PSL open and conducting a final EPA Method 21 survey after 90 days, as required in paragraph IV.B.(4). FHR noted in their comments that the requested 14-day closure option would not apply to leaks that are ongoing and continuing to generate positive detection in the sensor network. They further state that if a PSL is closed and the leak reappears, the system would generate a new PSL which is then subject to the investigation requirements of the DRF. FHR provided suggested revisions to paragraph IV.B.(4) of the AMEL to incorporate closure of the PSL at both 14 days and 90 days.

Another commenter¹⁶ stated that a PSL should not be closed out if the leak is unable to be found. This commenter raised concerns that the AMEL appeared to allow operations/maintenance to “close out” a PSL when a leak is unable to be found even when the sensor is detecting a leak.

Finally, FHR recommended specific revisions to the recordkeeping and reporting requirements for PSL closures. First, they recommended adding records and reporting of a source outside the AMEL-covered process unit or a non-LDAR component leak source to paragraph IV.C.(11), as applicable. Second, FHR recommended adding records and reporting for PSL closures that occur where no cause of the PSL was determined after 14 days. Lastly, FHR recommended reporting the

number of PSLs that are closed because the emissions were authorized, from a source outside the AMEL covered process unit, and from a non-LDAR component leak source.

Response: The EPA agrees that there is the potential to have a transient leak and it is reasonable to close a PSL if the sensor nodes are not showing any indication of leak after 14 days and the required investigations have been conducted following generation of the PSL. Further, the EPA agrees that if a persistent leak is present, or the leak reappears, the LDSN is expected to continue generating a new PSL or updates to an existing PSL, thus triggering new investigations for the emissions source. Therefore, the EPA has revised paragraph IV.B.(4) to include an allowance to close the PSL if the initial and secondary investigations failed to identify the leak source and there have been no updates to the PSL for 14 days as requested by FHR.

Further, the EPA is clarifying the requirements for PSL closure in situations where 90 days have passed since the original PSL notification, but the sensor nodes still indicate the presence of a leak. First, we are adding language to paragraph IV.B.(4)(b) to specify the requirements of that paragraph apply when 90 days have passed since the original PSL notification.¹⁷ Second, we are clarifying that a full survey of all LDAR-applicable components must be conducted within 10 calendar days following the 90-day period following the original PSL notification to verify there are no detectable leaks within that PSL before closure of the PSL is allowed. Finally, the EPA is making the requested adjustments to the recordkeeping and reporting requirement.

Comment: FHR commented that the requirements around the accuracy and precision of the Global Positioning System (GPS) data collected during the 30-minute initial investigation are too narrow and limit the use of future technological advancements. Additionally, FHR raised a concern regarding how the exact path generated by the GPS tracking may be evaluated for compliance. Specifically, FHR noted that the process units included in this AMEL are multi-story with dense equipment areas. The specific path generated by the GPS tracking may indicate the technician was outside the PSL during the investigation or may

indicate gaps in data. To address these concerns, FHR suggested revisions to the language in paragraph IV.B.(1)(g) that include: (1) Record of coordinates to an accuracy and precision of 5 or more decimals of a degree, and (2) using the North America Datum of 1983 or newer to document the path taken by or presence of the technician in the PSL.

Response: The EPA agrees with this comment and the suggested revisions provided by FHR because it is not our intent to limit the technology options to meet this GPS tracking requirement. As such, we have revised the AMEL to require records of the latitude and longitude coordinates in decimal degrees to an accuracy and precision of 5 or more decimals of a degree using the *North American Datum of 1983* or newer to document the path taken by or presence of the technician in the PSL during the screening investigation.

Comment: One commenter¹⁸ raised concerns with the requirement to conduct an initial investigation within 3 days of a new PSL notification. This commenter stated that a first attempt at repair is required within 5 days of leak detection, but FHR would not begin looking for a leak source until 3 days after the LDSN has identified a potential leak. The commenter notes that waiting 3 days to investigate the PSL would allow for greater emissions and little time to make a good effort at a first attempt to repair the leaking component. Further, this commenter points to the requirements at 40 CFR 63.163(c)(1), which state repairs must be made “as soon as practicable,” and states their belief that the 3-day gap between LDSN detection and PSL investigation does not meet this requirement.

Response: The EPA notes that the LDSN is a continuous system, and as such, PSLs can form at any time. It is reasonable to allow some timeframe for an investigation to begin to ensure that the appropriate personnel are onsite to conduct the investigation. Additionally, current work practices only require inspections of components on an infrequent basis. Allowing a short timeframe after PSL formation to begin an investigation still addresses issues much sooner than they would be under current work practices. As such, the EPA has found that the requirements of this AMEL result in equivalent or better emission reductions when compared to the current LDAR requirements.

¹⁶ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

¹⁷ Paragraph IV.B(3) requires initiating a new investigation within 3 calendar days when the detections increase by a factor of 2 since the original PSL notification.

¹⁸ See Document ID No. EPA-HQ-OAR-2021-0299-0033.

Comment: One commenter¹⁹ stated that FHR should have to monitor all LDAR applicable components in a PSL using EPA Method 21 to ensure that no leaks in the PSL are missed. This commenter correctly noted that the AMEL would require FHR to perform an investigation to identify the source of a leak in a PSL, and that once FHR identifies one component with a maximum concentration of 3,000 parts-per-million by volume (ppmv) they would not be required to monitor any more components in the PSL. The commenter stated their concern that leaking components would be missed, and this is counter to a common problem identified in the EPA's Best Practices Guide for LDAR,²⁰ failure to monitor all regulated components. Another commenter²¹ noted that typical analyzers that would be used to obtain an EPA Method 21 concentration reading will lose 10 times a source concentration measurement for every one-inch the sensor or probe moves away from the emission source but did not provide additional information on this statement. This same commenter noted that the higher leak definition seems to contradict the efficacy of the system when compared to EPA Method 21 programs, especially where the EPA has lowered leak definitions for petroleum refineries.

Response: The EPA disagrees with the commenter. Requiring every component in every PSL to be monitored would be more stringent than the requirements summarized in Table 1. The design of the LDSN is such that it will continuously operate and continue to find any additional leaking components once a PSL is closed out. The results of the pilot test study and equivalence modeling demonstrate, to the Administrator's satisfaction, that the emission reductions achieved by the LDSN-DRF are equivalent or better than the emissions reductions achieved by the current LDAR requirements. While there may be some small leaks that go undetected, due to the continuous nature of the network, larger leaks, or even clusters of small leaks, can be found and fixed much faster.

Comment: One commenter²² requested that the EPA define what facility information would be included

or required to issue a PSL. This commenter also asked what concentration (in ppmv) defines "emission anomalies"²³ and whether this is a fixed concentration or if it varies by process unit.

Response: This LDSN uses a web-based analytics platform that automatically acquires and analyzes the real-time data from the sensor nodes, along with wind and facility component locations, to issue a PSL. As stated in response to comment in section II.C, an emissions anomaly is defined as any detection by the sensor network greater than the detection floor.

Comment: One commenter asked if a leaking component placed on delay of repair will result in the continuous detection of that emission or if those sensors detecting the component will be shut down or adjusted.

Response: Placing a component on delay of repair does not require the sensors detecting those emissions to be shut down. Sensors will still detect emissions from the component, but a PSL is generated that isolates the emissions from that component and allows the system to still identify emissions from other nearby areas.

Comment: One commenter²⁴ raised concerns that the DRF is a protocol that facility operations will need to follow to support this new LDAR approach. The commenter stated that similar to the common stereotypes surrounding LDAR technicians/contractors failing to perform their duties, an argument can be made on the potential disconnect between facility operations and environmental staff. This commenter raised questions about incentives for operations to manage the system and what potential compliance gaps may occur for failure to report an emissions event, ignored sensor readings, failure to investigate a PSL, or failure to complete required documentation.

Response: This AMEL applies to the Mid-Crude and Meta-Xylene process units at FHR's West Refinery in Corpus Christi, Texas. FHR must comply with all of the conditions in the AMEL. The failure to comply with any condition in the AMEL, like the failure to comply with any of the work practice standards replaced by the AMEL, is a CAA violation subject to enforcement.

E. Comments and Responses Related to Recordkeeping and Reporting

Comment: FHR requested specific modifications to the requirements for documentation related to management

of change (MOC) to clarify that this documentation requirement is only for MOC in the AMEL covered process units.²⁵ Another commenter²⁶ stated that evaluating sensor network MOC would likely require constant involvement with Molex.

Response: The EPA agrees with FHR's request and has made this change within the AMEL. The comment regarding Molex's involvement in MOC is outside the scope of this AMEL.

Comment: FHR and Molex requested revisions to paragraph IV.C.(7) of the AMEL related to the recordkeeping requirements for raw sensor data. The EPA included a requirement to maintain records of all raw sensor readings, in addition to, the percent of time positive detections were registered during the 72-hour lookback, and the minimum, average, and maximum detection floor. FHR and Molex commented that this amount of recordkeeping would create vast amounts of data that could be better managed as part of a batch, periodic evaluation. Further, the commenters noted that while the algorithm is constantly performing the calculations to provide this data, the data is not specifically recorded (*i.e.*, the data elements are not saved as defined in the requirement). Both commenters state that these calculations could be recreated at any time from the raw data that is saved and requests that the AMEL be modified to require records of the raw data, records of any notifications, and alerts from the algorithm and periodic validation of the algorithm. FHR and Molex suggested specific language for paragraph IV.C.(7) in their letters.²⁷

Response: The EPA disagrees that these data are superfluous and finds that recording of these data is important to maintain in order to establish an enforceable record of performance. Additionally, if algorithms for generating alerts change over time, the EPA is concerned it would alter the ability of FHR to replicate those original records as they were generated. For these reasons, the EPA has not removed the requirement to retain these records.

Comment: FHR commented that some reporting requirements in the applicable subparts are no longer meaningful to components covered by the AMEL. For example, FHR noted the percent leaker calculation will no longer be meaningful because the number of components monitoring with EPA Method 21 will be

¹⁹ See Document ID No. EPA-HQ-OAR-2021-0299-0033.

²⁰ EPA, *Leak Detection and Repair: A Best Practices Guide*, located at <https://www.epa.gov/sites/default/files/2014-02/documents-ldarguide.pdf>.

²¹ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

²² See Document ID No. EPA-HQ-OAR-2021-0299-0032.

²³ 86 FR 56939 (October 13, 2021).

²⁴ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

²⁵ See Document ID No. EPA-HQ-OAR-2021-0299-0036.

²⁶ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

²⁷ See Document ID Nos. EPA-HQ-OAR-2021-0299-0035 and EPA-HQ-OAR-2021-0299-0036.

minimal compared to the total population of equipment, thus, the percent leaker value is no longer a meaningful metric. FHR recommended a revision to paragraph IV.D.(1) to state that reporting of required information in the relevant subparts be limited to components not covered by the AMEL.

Response: The EPA has added language to clarify reporting requirements from relevant subparts that are no longer relevant and replaced by the LDSN.

Comment: One commenter²⁸ stated that new reporting and recordkeeping requirements are potentially burdensome and would be prone to compliance gaps. This commenter further stated there would be confusion for the industry on how to properly report information, and confusion for the EPA on how to properly evaluate those reports.

Response: The EPA disagrees that the recordkeeping and reporting requirements within the AMEL are prone to compliance gaps. The requirements within the AMEL are necessary to ensure compliance with the AMEL and are stated clearly. Without more information on these potential gaps, we are not adjusting the reporting and recordkeeping requirements based on this comment.

F. Comments and Responses Related to Additional Annual Compliance Demonstration

Comment: FHR commented that the proposed method to determine which valves to monitor for the annual compliance verification would be complicated to execute and proposed an alternative or secondary option that would require monitoring all valves in light liquid/gas vapor (LL/GV) service every 2 years, with half monitored in the first year and half monitored in the second year of a 2-year cycle. This monitoring alternative would be in addition to monitoring all pumps in every annual compliance verification survey. FHR stated that implementing the proposed valve monitoring would be difficult to execute in practice, requiring field surveys to measure distances of valves both horizontally and vertically from individual sensor nodes.

In their proposed alternative, FHR would monitor 50 percent of the LL/GV valves each year (e.g., odd numbered valves monitored in year 1 and even numbered valves in year 2). They stated that this would result in performing EPA Method 21 monitoring on more valves than the method proposed by the

EPA, and it would provide for easier administration of the annual compliance verification as it is based on the current tagging system in place at the refinery. FHR further stated that any EPA Method 21 instrument readings greater than 18,000 ppmv would be plotted on a plot plan showing the sensors and active PSLs, and corrective action would be triggered as outlined in paragraph IV.E.(1)(e) of the initial notice (86 FR 56949; October 13, 2021). FHR also requested the removal of the phrase “under current investigation” as an investigation may not have been initiated when this compliance monitoring is conducted.

Response: The EPA recognizes that the proposed verification strategy in FHR’s comments is easier to implement and will result in more components monitored with EPA Method 21 during the annual compliance demonstration of the LDSN. As such, we are revising the final AMEL to allow an alternative verification procedure based in part on FHR’s comments. The final AMEL will allow FHR to monitor 50 percent of the LL/GV valves in the process unit at a time, as suggested in their comment.

Comment: FHR and Molex both commented that, as proposed, a single component with a reading of 18,000 ppmv or greater (excluding active PSLs or components on delay of repair) would result in noncompliance for the entire LDSN, with that noncompliance extending until the corrective actions are complete and FHR has re-monitored the process unit to demonstrate no components are leaking above 18,000 ppmv outside an active PSL. These commenters requested revisions to the AMEL that would allow FHR the opportunity to address small gaps in the LDSN without considering the entire LDSN out of compliance. FHR stated that as written, one single gap in coverage invalidates the entire network even if it is working as designed and detecting leaks in the unit, and non-compliance with the AMEL would equate to non-compliance with all the underlying LDAR regulations. Further, FHR noted that the steps required to come back into compliance could extend beyond 120 days, especially since the EPA would have to review and approve any changes to the LDSN. Therefore, FHR also requested an avenue to come back into compliance in less than the 120-day cycle outlined by the EPA.

FHR provided a recommendation on how gaps they classified as “minor” could be addressed if the EPA were to accept their recommendation. FHR proposed using a threshold of 10 percent of monitored components above

18,000 ppmv to determine when the entire LDSN is out of compliance versus when a more targeted approach to addressing compliance issues may be appropriate. Specifically, FHR recommended that if less than 10 percent of the components monitored during the annual compliance verification were found leaking above 18,000 ppmv, and these components had not been identified by the LDSN (not in an active PSL and not on delay of repair), then FHR would conduct EPA Method 21 monitoring of all remaining LL/GV valves and pumps within a 15-foot radius of each 18,000 ppmv leaking component and repair any leaks identified. FHR would then modify the LDSN, and the non-compliance period would end after conducting the described EPA Method 21 monitoring and repairing all leaking components (or placing them on delay of repair, as applicable). FHR stated that all leaking components found above 18,000 ppmv would be considered deviations of the AMEL and reported as such. In addition, FHR stated they would conduct quarterly EPA Method 21 monitoring of all LL/GV valves and pumps within this 15-foot radius until the LDSN modification is completed and the modification has been tested through the required EPA Method 21 monitoring following the modification. FHR stated that any component found leaking above 18,000 ppmv during these quarterly monitoring events would be considered a deviation and reported as such in the periodic AMEL report and applicable title V deviation report.

FHR also proposed that, if more than 10 percent of the components monitored during the annual compliance verification were leaking above 18,000 ppmv and these components had not been identified by the LDSN, then the LDSN is not working properly and in this circumstance, FHR stated that it is appropriate to consider the LDSN out of compliance with the AMEL. In this situation, FHR stated that EPA Method 21 monitoring would be conducted as required in the underlying LDAR regulations on all AMEL covered LL/GV valves and pumps until the LDSN system is redesigned, approved, implemented, and tested through the required EPA Method 21 monitoring following the modification.

Additionally, FHR requested the timeline for submitting proposed revisions to the LDSN be changed to either 45 calendar days or, alternatively, 30 business days because it would take 7 to 10 days to verify if any identified leaks are within an active PSL or on delay of repair. Engagement with Molex for the redesign would take 2 weeks,

²⁸ See Document ID No. EPA-HQ-OAR-2021-0299-0034.

and FHR would need at least 2 weeks to develop the proposal prior to submitting the LDSN revisions to the EPA for approval.

FHR also proposed defining several key terms related to their proposed approach to determining compliance through the annual verification discussed in these comments: (1) Active PSL, (2) non-compliant (NC) leaker, and (3) zone of inadequate coverage (ZIC). First, FHR proposed to define an active PSL as “a PSL where a detection or PSL update has occurred within the previous 14 days or a PSL that is generated up to 72 hours after the monitoring event, indicating that the LDSN algorithm was in the process of determining whether a leak had begun when the monitoring took place.” Next, they proposed to define a non-compliant leaker (NC leaker) as “a component exhibiting a 18,000 ppmv leak or greater during annual compliance verification monitoring that is outside an active PSL and/or is not a leaker currently on delay of repair.” Finally, FHR proposed to define the ZIC as “a 15-foot radius horizontally and vertically around a component that is found to be leaking above 18,000 ppmv during any annual compliance verification monitoring conducted pursuant to paragraph IV.E.(1)(b)–(c).”

Response: The EPA agrees with FHR that it is not appropriate to consider the entire system out of compliance due to the LDSN failing to detect a single leak of 18,000 ppmv or greater. However, we do not agree with FHR’s proposal that compliance of the entire LDSN is achieved until more than 10 percent of monitored components are found leaking above 18,000 ppmv during the additional annual compliance demonstration. The EPA has revised the additional annual compliance demonstration to: (1) define NC leakers, (2) define when a root cause analysis and corrective action must be conducted, and (3) define what steps must be taken to bring the system back into compliance. First, the EPA is requiring FHR to plot all components with leaks above 3,000 ppmv on a plot plan of the process unit. For any component not already identified in a PSL or placed on delay of repair, a NC leaker would be defined as either of the following: (1) a component with a leak above 3,000 ppmv that is within 18 feet of a sensor node or (2) a component included in the LDSN–DRF system with a leak equal to or greater than 18,000 ppmv, regardless of distance to a sensor node. Each NC leaker is a deviation of the AMEL and may be subject to enforcement. Each NC leaker should be reported as a deviation until repairs are

made and verified and all other components in the ZIC are monitored with EPA Method 21 and repaired or placed on delay of repair as necessary. Additionally, FHR must perform a root cause analysis and take corrective action to address issues with the LDSN. If 2 or more NC leakers are found, the LDSN is out of compliance unless corrective action is completed within 45 days.

Comment: FHR and Molex requested removal of the requirement for leak simulations using a controlled release of isobutylene after modifying the LDSN. Both commenters stated the 1.4 g/hr controlled release is not directly correlated to an 18,000-ppmv leak rate. Further, both commenters stated that conducting a controlled release is more appropriate for scientific experiments and requires a controlled environment with no other interfering gases. Further, both commenters noted that the 2-year annual compliance verification clock would reset with each non-compliant leaker found, which will ensure at least 2 additional EPA Method 21 surveys of the redesigned system. Both commenters agree with retaining the requirement to conduct a follow up survey with EPA Method 21 within 60 days after implementing any changes to the LDSN.

Response: The EPA agrees with the commenters and has made this change to remove the requirement to conduct a controlled gas release of isobutylene following LDSN modification. However, the EPA notes that FHR could utilize a controlled gas release of isobutylene as part of the root cause analysis/corrective action requirements in paragraph IV.E.(1)(i.)

Comment: One commenter²⁹ expressed concerns that the requirements of the additional annual compliance demonstration are not more cost-effective than the EPA Method 21 requirements the AMEL would replace. They specifically stated that a compliance issue would be identified if a “statistically significant” number of EPA Method 21 readings are greater than 1.2 times the DTU but noted that the term “statistically significant” was not clearly defined. Further, the commenter noted that random sampling does not seem like an acceptable performance metric or a safe mode of operation. Finally, the commenter noted the requirements to reevaluate the LDSN and perform additional EPA Method 21 upon redesign seems costly.

Response: The EPA notes that this comment applies to the verification proposed by FHR in its AMEL

application. In the AMEL proposed by the EPA, the EPA did not propose that less than a statically significant number of leaks that were greater than 1.2 times the DTU would verify the system works. Instead, the EPA proposed that there should be no leaks above the DTU in order to verify that the system works. The potential cost effectiveness is not a factor in the EPA’s determination of equivalency of this AMEL and is, therefore, out of scope.

Comment: One commenter³⁰ suggested performing 2 additional biennial (every other year) compliance demonstrations after FHR demonstrates no leaks above 18,000 ppmv during 2 consecutive annual demonstrations, before allowing the sunset clause on additional annual demonstrations to come into effect. This commenter also asked whether FHR or a third-party would be conducting the EPA Method 21 monitoring for these compliance demonstrations, stating that use of staff from another facility or a third-party may provide a more robust compliance demonstration.

Response: The commenter did not provide any additional information to support the necessity of additional biennial demonstrations after FHR finds no leaks above the specific thresholds defined in section IV.E of the AMEL. The EPA notes that revisions have been made to the additional annual compliance demonstration based on feedback from other commenters. The EPA does not specify who would perform the EPA Method 21 monitoring and leaves that to the discretion of FHR.

G. Comments and Responses on Other Topics Related to the AMEL

Comment: FHR requested additional references be added to Table 5 of the initial notice (Table 1 in section IV of this notice) so that they are covered under the AMEL. The specific references and provisions include the following:

- 40 CFR part 60, subparts GGG and GGGa (NSPS GGG and NSPS GGGa)—NSPS for Equipment Leaks of VOC in Petroleum Refineries
- 40 CFR 63.163(d)(2)—National Emission Standards for Hazardous Air Pollutants for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry (HON) pump quality improvement program (QIP)
- 40 CFR 63.181(b)(1)(i)—List of identification numbers for equipment subject to the HON

²⁹ See Document ID No. EPA–HQ–OAR–2021–0299–0034.

³⁰ See Document ID No. EPA–HQ–OAR–2021–0299–0032.

- 40 CFR 63.181(b)(4)–(5)—List of instrumentation systems and list of screwed connectors
- 40 CFR 63.181(h)—QIP program recordkeeping
- 40 CFR 60.482–7(h)(2) and 40 CFR 60.482–7a(h)(2)—Criteria for a valve to be designated as difficult-to-monitor
- 40 CFR 60.486(b)(2) and 40 CFR 60.486a(b)(2)—Leak tag removal after 2 consecutive months of monitoring with no leaks detected after repair
- 40 CFR 60.486(e)(1) and 40 CFR 60.486a(e)(1)—List of identification numbers of equipment subject to 40 CFR part 60, subparts VV and VVa (NSPS VV and NSPS VVa).

Another commenter³¹ stated their support for the EPA to remove requirements for maintaining a list of components or tracking LDAR changes on a component-by-component basis because these activities can add significant cost to a traditional LDAR monitoring program. This commenter also stated that moving away from tracking LDAR changes and tagging of individual LDAR components would encourage further acceptance of newer technologies.

Response: The EPA agrees with FHR that some of the specific references and provisions are appropriate for inclusion in this AMEL. As such, Table 1 of the AMEL has been updated to include:

- NSPS GGG and NSPS GGGa because the LDSN–DRF has been demonstrated to provide emission reductions at least equivalent to those required by the requirements in those subparts.
- HON pump QIP because we are already including the valve QIP and view the AMEL as an alternative for pumps as well.
- QIP program recordkeeping because it is not relevant if FHR is not using the QIP.
- Criteria for a valve to be designated as difficult-to-monitor because the AMEL already serves as an alternative for difficult-to-monitor monitoring.
- Leak tag removal after 2 consecutive months of monitoring with no leaks detected after repair because the 2-month follow up on leaking valves is not required under the AMEL.

We disagree that the other references to the lists of equipment identification numbers are appropriate to add to Table 1. Because the AMEL requires FHR to maintain records that indicate what equipment is complying with the AMEL or the applicable EPA Method 21 requirements, the EPA finds that

maintaining these lists of equipment are important for compliance assurance purposes.

Comment: Multiple commenters supported the implementation and advancement of sensor networks for leak detection. One commenter³² stated their support for alternative means of compliance that do not include duplicative EPA Method 21 monitoring as that decreases the creation and adoption of new technology. Another commenter³³ noted that programs such as this LDSN–DRF, should be implemented because they can speed up the leak detection process.

Response: The EPA has noted the support for these sensor networks.

Comment: One commenter³⁴ stated that the abbreviation “ppbe” was not included in the Table of Abbreviations.

Response: This abbreviation has been added as requested.

Comment: One commenter³⁵ remarked on the CRADA between FHR, Molex, and the EPA Office of Research and Development. First, this commenter stated that FHR did not present the results of their study at a recent conference, thus preventing public scrutiny of its results and in direct conflict with one of the longer-term objectives of the CRADA to “disseminate non-proprietary technical learning established in this CRADA by publishing aspects of this research as part of scientific conferences and in peer reviewed journal articles and reports.”

Next, the commenter provided comments comparing the CRADA to EPA Method 21. Specifically, the commenter stated that the CRADA postulates unsubstantiated claims that are critical of EPA Method 21, such as modest emission reduction estimates based on concentration measurements at the leak interface, high turnover rates for inspectors, inefficiency with monitoring all components to find the few that are leaking, and difficulty with interfacing the data management and reporting software in multiple touchpoints. This commenter provided counter arguments to the statements in the CRADA, specifically noting that data loss is an issue also built into the LDSN–DRF.

Third, the commenter noted that common complaints about EPA Method 21 could also apply to the LDSN–DRF.

³² See Document ID No. EPA–HQ–OAR–2021–0299–0037.

³³ See Document ID No. EPA–HQ–OAR–2021–0299–0033.

³⁴ See Document ID No. EPA–HQ–OAR–2021–0299–0032.

³⁵ See Document ID No. EPA–HQ–OAR–2021–0299–0034.

The specific complaints noted in the comment letter deal with inefficiencies of programs (most components are not leaking), expense (safety and human capital), non-efficacy (all leaks will not be identified, or there may be a long time between checks), and proneness to error (recordkeeping for thousands of inspection events). The commenter noted that with the wrong incentives in place, LDAR can be ineffective. On the other hand, the commenter also notes that having an effective LDAR program provides additional “eyes and ears” for operations and maintenance because they can proactively inform these programs. The comment is concerned that the LDSN–DRF system would remove the presence of LDAR contractors from the refinery.

Response: The EPA made all the information provided by FHR available to the public in this docket and provided the opportunity for the public to comment on the data. Additionally, the report from the CRADA is publicly available.³⁶ Whether or not this study was presented in other forums is outside the scope of this AMEL.

Comment: One commenter³⁷ asked how EPA would perform an audit of this AMEL. This commenter also specifically asked how the EPA would determine that enough sensors are present in the process unit to effectively detect leaks, noting that FHR determined that additional sensors were needed during the pilot study.

Response: An additional annual compliance verification procedure has been established in section IV.E of the AMEL which includes EPA Method 21 monitoring of components to ensure that the LDSN–DRF is properly detecting leaks from components covered by this AMEL. This procedure includes EPA Method 21 monitoring of components covered by this AMEL to verify that the LDSN–DRF is detecting leaks as intended. The EPA would also look at records related to sensor downtime, actions taken in response to PSLs, and sensor bump tests, among other information required by the AMEL to determine compliance with the requirements. The procedure for developing the optimized sensor node placement is laid out in the CRADA report, and the information provided in FHR’s AMEL application demonstrates that the LDSN–DRF will provide a reduction in emissions at least equivalent to the reduction in emissions

³⁶ https://cfpub.epa.gov/si/si_public_record_Report.cfm?dirEntryId=350905&Lab=CEMM.

³⁷ See Document ID No. EPA–HQ–OAR–2021–0034.

³¹ See Document ID No. EPA–HQ–OAR–2021–0299–0037.

required by the applicable LDAR standards.

Comment: One commenter³⁸ stated that this LDSN framework should not replace, but instead should supplement, current LDAR practices.

Response: For the purposes of this AMEL, the EPA finds the pilot test study shows the LDSN provides equivalent or better emission reductions as the current LDAR requirements for the Mid-Crude and Meta-Xylene process units at FHR's West Refinery in Corpus Christi, Texas.

H. Out of Scope Comments

Several comments were received that are outside the scope of this AMEL.

Comment: One commenter asked if the LDSN will detect methane leaks and if the EPA will ask for methane reductions in the future.

Response: The AMEL is an alternative to LDAR work practices for VOC and HAP emissions. Any use of the LDSN for methane detection is outside the scope of this AMEL.

Comment: One commenter³⁹ asked if this AMEL will address how the facility will estimate emissions and permitted emission rates for equipment leak fugitive sources, and what effect this AMEL will have on permitting emission factors and control efficiencies based on traditional leak definitions and monitoring frequencies.

Response: This AMEL does not address how the facility will estimate emissions and permitted emission rates for equipment leak fugitive sources, as that is outside the scope of this AMEL, and the applicable standards summarized in Table 1 of section IV.

Comment: One commenter stated that the data presented in this AMEL shows that nontraditional LDAR components should be monitored too.

Response: Expanding the requirements of current LDAR programs is outside of the scope of this AMEL. Additionally, this AMEL is limited in scope to the proposed LDSN-DRF and whether or not it results in equivalent or better emissions reductions.

However, we note that we are requiring the repair of non-LDAR leaks in this AMEL when they contribute to a PSL.

Comment: One commenter stated that the pilot study indicated that the facility's LDAR program was not run as well as it could be and asked why the LDSN would be any different.

Response: This is outside the scope of this AMEL.

III. Final Framework for Streamlining Approval of Future LDSN-DRF AMEL Requests

The EPA is finalizing a framework that sources may use to submit an AMEL request to the EPA for the use of a LDSN-DRF to comply with the LDAR requirements under 40 CFR parts 60, 61, and 63. Sources applying for use of a LDSN-DRF as a work practice standard should provide the EPA with the following information, at a minimum, in their AMEL application to demonstrate equivalency of emission reductions.

A. Site-Specific Information Related to All Process Unit(s) Included in the Alternative Request

1. Site name and location and applicable process units.
2. Detailed list or table of applicable regulatory subparts for each included process unit, the citations within each subpart that will be replaced or changed by the AMEL and, if changed, how it will be changed, and the authority that allows for use of an AMEL.
3. Details of the specific equipment or components that will be inspected and repaired as part of the AMEL and whether any equipment within the process unit will not be covered by the AMEL.

4. A diagram showing the location of each sensor in the process unit and the minimum spacing that achieves equivalence (*i.e.*, the furthest distance a component can be located from a sensor while demonstrating equivalence), taking into consideration multi-level and elevated components.

5. Information on how MOC will be addressed. At a minimum, the MOC must include a determination of whether the changes are within the LDSN coverage area (*i.e.*, within the specified radius of coverage for each individual sensor, including coverage based on elevation) or if changes will result in components added to an applicable EPA Method 21 work practice where the LDSN would not provide coverage. The MOC must also address updates to the diagrams of each sensor or the list of equipment identification numbers, as applicable.

B. Identification of Monitoring Techniques Used for Both the LDSN and DRF

1. Identification of the sensors that will be used to detect and locate leaks, including the sensor measurement principle, type, and manufacturer.
2. Data recording frequency, the minimum data availability for the system and for each sensor, and the process for dealing with periods where data is not available.

3. Initial and ongoing QA/QC measures and the timeframes for conducting such measures.

4. Restrictions on where the sensors cannot be used.

5. How meteorological data will be collected, the specific data that will be collected, and how it will be paired with the sensor data.

C. Defined Work Practice

1. Description of what triggers action, description of the action(s) that is triggered, and the timeline for performing the action(s).

2. Definition for when a leak requires repair.

3. Identification of repair deadlines, including verification of repair.

4. Description for how repairs will be verified.

5. Actions that will be taken if an alert is issued by the system, but a leak cannot be found.

6. Initial and continuous compliance procedures, including recordkeeping and reporting, if the compliance procedures are different than those specified in the applicable subpart(s).

7. Compliance assurance procedures to ensure the LDSN is operating as designed and corrective actions (including timeframes) in response to findings.

D. Demonstration of Equivalency

1. Demonstration of the emission reduction achieved by the alternative work practice including restrictions and downtime. Restrictions should include any conditions which are not demonstrated as equivalent in the request, such as replacement of audio, visual, or olfactory (AVO) monitoring or no detectable emissions standards.

2. Determination of equivalency between the standard work practice and the alternative requested, which may include modeling results.

3. Results of the pilot test study conducted for each unit.

a. For each PSL generated, the date for each notice, the identified emission source, the date the associated emission source was found for each PSL, the date the emission source was repaired, the EPA Method 21 reading associated with the emission source, and the date of the last required and next required EPA Method 21 inspection for the emission source (or identification of the source as not subject to inspection).

b. For each leak found with an EPA Method 21 inspection that was not found by the LDSN-DRF during the test study, the date the leak was found, the EPA Method 21 reading for the leak, the date the leak was repaired, and the inspection frequency of the component.

³⁸ See Document ID No. EPA-HQ-OAR-2021-0034.

³⁹ See Document ID No. EPA-HQ-OAR-2021-0299-0032.

c. The results of all EPA Method 21 inspections for the unit during the test study.

IV. Final Notice of Approval for the Mid-Crude and Meta-Xylene Process Units at the FHR West Refinery AMEL Request and Required Operating Conditions

Based on information the EPA received from FHR and the comments

received through the public comment period, the EPA is approving FHR’s request for an AMEL for the LDSN–DRF system for the Mid-Crude and Meta-Xylene process units located at FHR’s West Refinery in Corpus Christi, Texas. The specific requirements of this LDSN–DRF AMEL are provided in this section. The approved work practice requirements for the LDSN–DRF will

achieve a reduction in emissions at least equivalent to the emissions reductions achieved by the portion of the current LDAR work practice specified in Table 1. This AMEL replaces the portions of the work practice standards outlined in Table 1. The leak definitions specified in Table 2 apply to all EPA Method 21 instrument readings required by this AMEL.

TABLE 1—SUMMARY OF LDAR REQUIREMENTS TO BE REPLACED WITH THE LDSN–DRF AMEL REQUIREMENTS

Applicable rules with LDAR requirements	Citation	Requirement replaced with LDSN–DRF AMEL requirements
NSPS VV	60.482–2(a)(1)	EPA Method 21 monitoring of pumps in light liquid service.
	60.482–7(a) and (c)	EPA Method 21 monitoring of valves in gas/vapor service and in light liquid service.
	60.482–7(h)(2)	EPA Method 21 monitoring criteria for difficult-to-monitor.
	60.482–7(h)(3)	EPA Method 21 monitoring at a reduced frequency for valves in gas/vapor service and in light liquid service that are designated as difficult-to-monitor.
NSPS VVa	60.486(b)(2)	Leak tag removal after 2 consecutive months of monitoring with no leaks detected after repair.
	60.486(g)	Schedule of monitoring and leak percentage for valves utilizing skip periods.
	60.482–2a(a)(1)	EPA Method 21 monitoring of pumps in light liquid service.
	60.482–7a(a) and (c)	EPA Method 21 monitoring of valves in gas/vapor service and in light liquid service.
NSPS GGG	60.482–7a(h)(2)	EPA Method 21 monitoring criteria for difficult-to-monitor.
	60.482–7a(h)(3)	EPA Method 21 monitoring at a reduced frequency for valves in gas/vapor service and in light liquid service that are designated as difficult-to-monitor.
	60.482–11a(a), (b), (b)(1), (b)(3), (b)(3)(i)–(iv), and (c).	EPA Method 21 monitoring of connectors in gas/vapor service and in light liquid service.
	60.486a(b)(2)	Leak tag removal after 2 consecutive months of monitoring with no leaks detected after repair.
NSPS GGGa	60.486a(g)	Schedule of monitoring and leak percentage for valves utilizing skip periods.
	60.482–2(a)(1), by reference from 60.592	EPA Method 21 monitoring of pumps in light liquid service.
	60.482–7(a) and (c), by reference from 60.592	EPA Method 21 monitoring of valves in gas/vapor service and in light liquid service.
	60.482–7(h)(3), by reference from 60.592	EPA Method 21 monitoring at a reduced frequency for valves in gas/vapor service and in light liquid service that are designated as difficult-to-monitor.
NSPS GGGa	60.486(g), by reference from 60.592	Schedule of monitoring and leak percentage for valves utilizing skip periods.
	60.482–2a(a)(1) by reference from 60.592a	EPA Method 21 monitoring of pumps in light liquid service.
	60.482–7a(a) and (c) by reference from 60.592a	EPA Method 21 monitoring of valves in gas/vapor service and in light liquid service.
	60.482–7a(h)(3) by reference from 60.592a	EPA Method 21 monitoring at a reduced frequency for valves in gas/vapor service and in light liquid service that are designated as difficult-to-monitor.
HON	60.482–11a(a), (b), (b)(1), (b)(3), (b)(3)(i)–(iv), and (c) by reference from 60.592a	EPA Method 21 monitoring of connectors in gas/vapor service and in light liquid service.
	60.486a(g) by reference from 60.592a	Schedule of monitoring and leak percentage for valves utilizing skip periods.
	63.163(b)(1)	EPA Method 21 monitoring of pumps in light liquid service.
	63.163(d)(2)	Quality improvement program for pumps.
	63.168(b)–(d)	EPA Method 21 monitoring of valves in gas/vapor service and in light liquid service.
	63.168(f)(3)	EPA Method 21 monitoring following successful repair of valves in gas/vapor service and in light liquid service.
	63.173(a)(1)	EPA Method 21 monitoring of agitators in gas/vapor service and in light liquid service.
	63.173(h)	EPA Method 21 monitoring at a reduced frequency for agitators in gas/vapor service and in light liquid service that are designated as difficult-to-monitor.
	63.174(a)–(c)	EPA Method 21 monitoring of connectors in gas/vapor service and in light liquid service.
	63.175(c)(3), (d)(1), and (d)(4)(ii)	Quality improvement program for valves where the leak rate is equal to or exceeds 2 percent.
63.178(c)(1)–(3)	EPA Method 21 monitoring of components using the alternative means of emission limitation for batch processes.	
63.181(b)(1)(ii)	Schedule by process unit for connector monitoring.	
63.181(b)(7)(i) and (ii)	Identification, explanation, and monitoring schedule of difficult-to-monitor components.	
63.181(d)(7)	Listing of connectors subject to EPA Method 21 monitoring.	
63.181(d)(8)	EPA Method 21 monitoring for batch processes.	
63.181(h)	Quality improvement program recordkeeping.	

TABLE 2—APPLICABLE LEAK DEFINITIONS FOR COMPONENTS IN THE LDSN–DRF SYSTEM

LDSN leak source classification	Leak source component class	LDSN leak definition	Initial repair attempt (days)	Final effective repair (days)	Final repair confirmation
LDAR Component Leak—“LDAR”	Agitator—FF	500 ppmv	5	15	<500 ppmv.
LDAR Component Leak—“LDAR”	Agitator—VV	2,000 ppmv	5	15	<2,000 ppmv.
LDAR Component Leak—“LDAR”	Agitator—HON	10,000 ppmv	5	15	<10,000 ppmv.
LDAR Component Leak—“LDAR”	Compressor—HON	500 ppmv	5	15	<500 ppmv.
LDAR Component Leak—“LDAR”	Compressor—non HON	2,000 ppmv	5	15	<2,000 ppmv.
LDAR Component Leak—“LDAR”	Compressor in Hydrogen Service	AVO	5	15	No AVO indication.
LDAR Component Leak—“LDAR”	Connector	500 ppmv	5	15	<500 ppmv.

TABLE 2—APPLICABLE LEAK DEFINITIONS FOR COMPONENTS IN THE LDSN–DRF SYSTEM—Continued

LDSN leak source classification	Leak source component class	LDSN leak definition	Initial repair attempt (days)	Final effective repair (days)	Final repair confirmation
LDAR Component Leak—“LDAR”	Pump—with permit specifying 500 ppmv.	500 ppmv	5	15	<500 ppmv.
LDAR Component Leak—“LDAR”	Pump—HON	1,000 ppmv	5	15	<1,000 ppmv.
LDAR Component Leak—“LDAR”	Pump—VV	2,000 ppmv	5	15	<2,000 ppmv.
LDAR Component Leak—“LDAR”	Valve	500 ppmv	5	15	<500 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Agitator—Hydrocarbon (HC) but non LDAR.	10,000 ppmv	Follow emission event reporting and repair guidelines.		<10,000 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Compressor—HC but non LDAR	2,000 ppmv	Follow emission event reporting and repair guidelines.		<2,000 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Connector—HC but non LDAR	500 ppmv	Follow emission event reporting and repair guidelines.		<500 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Pump—HC but non LDAR	2,000 ppmv	Follow emission event reporting and repair guidelines.		<2,000 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Relief Device—HC but non LDAR	500 ppmv	Follow emission event reporting and repair guidelines.		<500 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Valve—HC but non LDAR	500 ppmv	Follow emission event reporting and repair guidelines.		<500 ppmv.
Non-LDAR Component Leak—“Emission Event”.	Other	500 ppmv	Follow emission event reporting and repair guidelines.		<500 ppmv.
“Authorized Emission” ¹	Authorized Emission	N/A	N/A	N/A	N/A.

¹ Authorized emissions may include emissions from a stack or otherwise allowed. These emissions are not considered equipment leaks for purposes of this AMEL.

A. LDSN Specifications

1. Sensor Selection.

A sensor meeting the following specifications is required:

a. The sensor must respond to the compounds being processed.

The average response factor of each process stream must be less than or equal to 3. If the average response factor of a process stream is greater than 3, the components in that service are not covered by this AMEL.

b. The sensor must be capable of maintaining a detection floor of less than 10 ppbe on a 10-minute average. The detection floor is determined at three times the standard deviation of the previous 10 minutes of data excluding excursions related to emissions peaks.

$$Detection\ Floor_{Sensor\ n} = 3 \times SD_{Local\ n}$$

Detection Floor_{Sensor n} = Calculated detection floor of sensor n (ppbe)

SD_{Local n} = Local (previous ten minutes) standard deviation of measurements excluding transient spikes (sensor raw output typically mV)

c. The sensor must record data at a rate of once per second.

d. Records of sensor selection must be maintained as specified in IV.C(3) and records of detection floor must be maintained as specified in IV.C(g).

2. Sensor placement.

The sensor placement must meet the following specifications:

a. The Mid-Crude process unit must have a minimum of 44 sensors and the

Meta-Xylene process unit must have a minimum of 10 sensors.

All components covered by the LDSN–DRF must be no further than 50 feet from a sensor node in the horizontal plane and no more than 20 feet from a sensor node in the vertical plane. Sensor nodes must be placed and must remain in accordance with the single level and multi-level records required in IV.C(4).

b. As part of the management of change procedure, FHR must identify if the changes (i.e., additions or removals) to process equipment in the Mid-Crude and Meta-Xylene process units are within the 50-foot radius and 20-foot vertical distance to any single sensor within the process unit or whether new process streams exist within the LDSN.

FHR must identify any LDAR-applicable components associated with the changes to the process equipment that are outside of the 50-foot radius and 20-foot vertical distance requirements for the LDSN and either comply with the standard EPA Method 21 LDAR requirements for those components as required in the applicable subpart(s) or add additional sensor nodes to the LDSN such that all of the LDAR-applicable components covered by the LDSN–DRF are no further than 50 feet from a sensor node in the horizontal plane and no more than 20 feet from a sensor node in the vertical plane. FHR must identify any LDAR-applicable components associated with the changes to the process equipment that contain

process streams with a response factor of greater than three and comply with the standard EPA Method 21 LDAR requirements for those components as required in the applicable subpart(s). FHR must maintain the management of change records in IV.C(5).

3. PSL Notifications.

The system must perform a 72-hour lookback a minimum of once per day that includes the previous 24-hour period to determine the percent of time positive detections were registered. Positive detections are defined as peak excursions above the detection floor. If positive detections are registered for at least 5 percent of the time during the rolling 72-hour lookback, a PSL notification must be issued. Records of raw sensor readings and PSL notifications must be maintained in accordance with IV.C(7) and (9), respectively.

4. Meteorological Data.

FHR must continuously collect wind speed and wind direction data at least once every 15 minutes. The wind sensor must be located onsite and within 2 miles of each sensor node. FHR must maintain records in accordance with IV.C(8).

5. QA/QC.

The following QA/QC must be employed for the sensors in the network:

a. Sensors must be calibrated by the manufacturer prior to deployment.

Once installed, each sensor must be tested for responsiveness and wireless communication by challenging it with isobutylene gas or another appropriate standard. FHR must maintain records in accordance with IV.C(6).

b. FHR must conduct a bump test on each sensor quarterly.

At a minimum, quarterly bump tests must be conducted no more than 123 days apart.

(i) The bump test must be conducted with isobutylene gas or another appropriate standard (e.g., with similar response factors) and include a mechanism to provide nominally ambient level moisture to the gas (within 25 percent of ambient relative humidity).

(ii) The bump test is successful if the response of the sensor exceeds 50 percent of the nominal value of the standard. The bump test may be repeated immediately up to 2 additional times if the first bump test is unsuccessful.

(iii) If the bump test is unsuccessful after the third try, the sensor must be recalibrated or replaced with a calibrated sensor within 24 hours of the third unsuccessful try. After recalibration, a new bump test must be conducted following the procedure outlined above.

(iv) FHR must maintain records of the bump test in accordance with IV.C(6).

c. The health of each sensor must be confirmed for power and data transmission at least once every 15 minutes.

Data transmission, which includes data recorded by the sensor every second as noted in IV.A(1)(c), must occur at least once every 15 minutes. Appropriate corrective actions must be taken for any sensors that fail to collect data in accordance with IV.A(1)(b) and (c) and transmit data in accordance with this paragraph to ensure any errors or malfunctions are corrected in a timely manner. Such periods are considered downtime until corrected. If a sensor repair is necessary, FHR must test the responsiveness and wireless communication of the sensor through a bump test according to the procedure specified in IV.A(5)(b). FHR must maintain records of sensor health in accordance with IV.C(6).

d. The sensor detection floor shall be reviewed at 00:00 UTC each day to confirm each sensor detection floor remains below the established threshold of 10 ppbe during at least one 10-minute period in the past 72-hour period. If a sensor does not pass the detection floor review, then a sensor fault notification shall be issued, and the sensor issue shall be corrected through repair,

replacement, or another appropriate measure, unless FHR can demonstrate the sensor was continuously experiencing positive detections during this time.

e. At least once each calendar quarter, conduct a check for wind direction to ensure the wind sensor is properly oriented to the north. If the wind sensor is not within 15 degrees of true north, it must be adjusted to point to true north. At a minimum, quarterly wind direction checks must be conducted no more than 123 days apart. The results of the quarterly check for wind direction must be kept in accordance with IV.C(8).

6. Downtime.

The sensor network must continuously collect data as specified in paragraph IV.A(5)(c), except as specified in this paragraph:

a. The rolling 12-month average operational downtime of each individual sensor must be less than or equal to 10 percent.

b. Operational downtime is defined as a period of time for which the sensor fails to collect or transmit data as specified in IV.A(5)(c) or the sensor is out-of-control as specified in IV.A(6)(c).

c. A sensor is out-of-control if it fails a bump test or if the sensor output is outside of range.

The beginning of the out-of-control period for a failed bump test is defined as the time of the failure of a bump test. The end of the out-of-control period is defined as the time when either the sensor is recalibrated and passes a bump test, or a new sensor is installed and passes the responsiveness and communication challenge. The out-of-control period for a sensor outside of range starts at the time when the sensor first reads outside of range and ends when the sensor reads within range again.

d. The downtime for each sensor must be calculated each calendar month. Once 12 months of data are available, at the end of each calendar month, FHR must calculate the 12-month average by averaging that month with the previous 11 calendar months. FHR must determine the rolling 12-month average by recalculating the 12-month average at the end of each month.

e. FHR must maintain records of the downtime for each sensor in accordance with IV.C(13).

B. DRF Specifications

When a new PSL notification is received, the following requirements apply:

1. An initial screening investigation must begin within 3 calendar days of receiving a new PSL notification.

a. The initial screening investigation must utilize technology that can detect hydrocarbons or that is capable of responding to the compounds or mixture of compounds in the process streams at levels appropriate for locating leaks.

This technology must be maintained per manufacturer recommendations. Technologies that the EPA finds appropriate for use are photoionization detectors (PID), flame ionization detectors (FID), and optical gas imaging (OGI) cameras.

b. Each potential leak source identified in the initial screening investigation must be monitored by EPA Method 21 as specified in section 60.485a(b) of 40 CFR part 60, subpart VVa.

c. If an instrument reading equal to or greater than the concentrations listed in Table 2 is measured, a leak is detected.

The maximum instrument reading must be recorded for each leak identified. A weatherproof and readily visible identification shall be attached to the leaking equipment. The identification may be removed once the component has been repaired, with the repair confirmed through follow up EPA Method 21 monitoring.

d. When a leak is detected, it shall be repaired as specified in the applicable subpart(s), except as specified in this paragraph.

1. If the leak source is not applicable to LDAR but is within the AMEL covered area, repairs must be completed and verified within 30 calendar days of identification or placed on delay of repair. Delay of repair of equipment for which leaks have been detected will be allowed when repair cannot be completed within 30 days of identification and either the repair is technically infeasible without a process unit shutdown or the non-LDAR equipment is isolated from the process and does not remain in contact with process fluids. Repair of this equipment must occur prior to the end of the next process unit shutdown or prior to ending the equipment's isolation from the process and returning process fluids to the equipment. These requirements do not supersede repair requirements for other regulations.

2. If the leak source is determined to be associated with authorized emissions (e.g., regulated emissions from a stack or process equipment that are not fugitive emissions), the facility must document this information for the record, and the PSL can be closed.

e. If a single leak is detected at 3,000 ppmv or greater by EPA Method 21, the investigation is complete, and the PSL can be closed once this leak and any

leaks above the leak definitions specified in Table 2 found by Method 21 during this investigation have been repaired in accordance with the applicable subpart(s) or for non-LDAR equipment leaks, when the repair has been verified by EPA Method 21.

f. If a total of 3 leaks are detected below 3,000 ppmv but above the leak definitions specified in Table 2 by EPA Method 21, the investigation is complete, and the PSL can be closed once these leaks and any leaks above the leak definitions specified in Table 2 found by Method 21 during this investigation have been repaired in accordance with the applicable subpart(s) or for non-LDAR equipment leaks, when the repair has been verified by EPA Method 21.

g. For each initial screening investigation in which a potential leak source is not identified after 30 minutes of active screening within the PSL, record the latitude and longitude coordinates in decimal degrees to an accuracy and precision of 5 or more decimals of a degree using the North American Datum of 1983 or newer to document the path taken by or presence of the technician in the PSL during the screening investigation. Include the date and time stamp of the start and end of the investigation. The PSL must remain open, but the initial screening investigation may stop.

2. A second screening investigation must be conducted within 7 calendar days of stopping the initial screening investigation as described in IV.B(1)(g). The requirements specified in IV.B(1)(a) through (f) apply to this second screening investigation.

3. If no potential leak sources are identified during the second screening investigation, and the PSL detection level increases by 2 times the initial detection level, a PSL update notification must be sent to facility personnel based on the higher detection level. A new screening investigation must occur within 3 calendar days of receiving the PSL update notification with the higher detection level, following the conditions specified in paragraphs IV.B(1)(a) through (f). This step must be repeated every time the PSL notification is sent, and a leak source is not found in the previous screening. The PSL must remain open until the conditions in IV.B(1)(e) or (f) are met.

4. If no potential leak source has been identified following the screening investigations in IV.B(2) and (3), the PSL can be closed after meeting the conditions specified in either paragraph IV.B(4)(a) or (b).

a. If 14 days have passed since a positive detection within the PSL (*i.e.*, there have been no peak excursions above the detection floor), the PSL may be closed.

b. If 90 days have passed since the original PSL notification, all sensors used to create the PSL must be bump tested in accordance with IV.A(5)(b) and a full survey of the LDAR-applicable components within the PSL must be conducted with EPA Method 21 within 10 calendar days.

A leak is defined by the applicable subpart(s). All leaks identified during this survey must be repaired and verified after which the PSL will be closed. If no leaks are identified in this final screening, "no leak source found" must be recorded and the PSL will be closed.

c. FHR must maintain the records in accordance with IV.C(9)–(11).

C. Recordkeeping

The following records related to the LDSN–DRF must be maintained in addition to the records from the relevant subparts, except as noted in Table 1.

1. Fugitive Emission Management Plan (FEMP) detailing the boundaries of the Meta-Xylene and Mid-Crude process units which are complying with this AMEL.

The plan must include the records for the LDSN specified in paragraph IV.C(4), a list of identification numbers for equipment subject to the EPA Method 21, no detectable emissions, or AVO work practice requirements of the applicable subparts, and a map clearly depicting which areas in each process unit are covered by the LDSN–DRF and which are covered by the EPA Method 21, no detectable emissions, or AVO work practices.

2. Records of the sensor response factors for the applicable process streams.

3. Manufacturer, measurement principle, response factors, and detection level for each sensor.

4. Records of sensor placement, including geographic information system (GIS) coordinates and elevation of the sensor from the ground, and diagrams showing the location of each sensor and the detection radius of each sensor. One diagram must show all sensors, with an indication of the level each sensor is located on. Additional diagrams showing sensor layout must be provided for each level of the process unit.

5. Records of each MOC in an AMEL covered unit. For each MOC, records of the determination that IV.C(5)(a), (5)(b), or (5)(c) applies. The MOC must also address updates to the diagrams in the

FEMP of each sensor or the list of equipment identification numbers, as applicable.

a. The changes are within the LDSN coverage area (*i.e.*, no further than 50 feet from a sensor node in the horizontal plane and no more than 20 feet from a sensor node in the vertical plane) and the response factor of any new process streams is less than or equal to 3.

b. The response factor any new process streams is less than or equal to 3 and additional sensor nodes are being added to the LDSN such that all the LDAR-applicable components covered by the LDSN–DRF are no further than 50 feet from a sensor node in the horizontal plane and no more than 20 feet from a sensor node in the vertical plane.

c. The components will be added to an applicable EPA Method 21, no detectable emissions, or AVO work practice where the LDSN would not provide coverage.

6. Records of initial and subsequent calibrations, bump tests for responsiveness and wireless communication initially and upon sensor repair or reset, quarterly bump tests, bump tests prior to PSL closure where leaks have not been found within 90 days, and bump tests following out-of-control periods, including dates and results of each calibration and bump test, as well as a description of any required corrective action and the date the corrective action was performed. Records of calibration gases used for the bump tests, the ambient moisture level during the bump tests, and the mechanism for providing nominally ambient level moisture to the gas during the bump tests. Records of sensor health related to power and data transmission.

7. Raw Sensor Readings. Additionally, for each sensor, the percent of time positive detections were registered during the 72-hour lookback must be recorded each day and the minimum, average, and maximum detection floor.

8. Network Meteorological Data, Including Wind Direction and Wind Speed.

Record the results of each quarterly check of the wind sensor orientation. Record the latitude and longitude coordinates of the original location of the wind sensor. The wind sensor must remain within 300 feet of the original location. Record each movement of the wind sensor, the latitude and longitude coordinates for the new location, and the distance in feet between the new location and the original location.

9. PSL Documentation. For each PSL, the record must include the notification date, investigation start date, investigation results including the date each leak was found, leaking component

location description, EPA Method 21 reading, repair action taken, date of repair, and EPA Method 21 reading after repair. Additionally, for equipment placed on delay of repair, note that the equipment was placed on delay of repair and the reason for the delay of repair.

10. PSL documentation where PSL is not closed out after the initial investigation.

For each PSL that cannot be closed out after the initial investigation, the record must include each screening investigation performed, including the latitude and longitude coordinates indicating the path taken during the screening investigation, the start and end date and times of the investigation, any OGI video taken during the investigation, and any Method 21 readings observed during the investigation. The record must also include the date of each PSL update notification sent to facility personnel when the PSL detection level increases by 2 times the initial detection level.

11. If a PSL is caused by an authorized emission source or a source outside the AMEL-covered process unit, the documentation must include the notification date, investigation start date, investigation results, emission source identification, and description of the "authorized emissions" or source outside the AMEL-covered process unit.

12. Records of PSLs closed out where no cause of the PSL was determined. Note whether the PSL was closed because 14 days had passed since a positive detection within the PSL or the PSL was closed following the EPA Method 21 inspection conducted 90 days after the original PSL notification.

13. For each sensor, the date and time of the beginning and end of each period of operational downtime.

14. For each additional annual compliance demonstration conducted under the compliance assurance provisions of IV.E below, the documentation must include:

a. The date of each survey conducted with Method 21 of appendix A-7 of part 60.

b. If valves are monitored in accordance with IV.E(1)(b)(i) through (v), the plot plan showing the verification zone of each sensor, the list of valves in the verification zones, and the total population of valves in the process unit.

c. If valves are monitored in accordance with IV.E(1)(b)(vi), the list of all valves in the process unit and identification of each valve monitored during the survey.

d. The EPA Method 21 reading for each valve and pump monitored.

e. For each leak found, the date each leak was found, leaking component location description, repair action taken, date of repair, and EPA Method 21 reading after repair.

Additionally, for equipment placed on delay of repair, note that the equipment was placed on delay of repair and the reason for the delay of repair. Delay of repair shall be determined and signed-off from the relevant process unit supervisor or person of similar authority that the piece of equipment is technically infeasible to repair without a process unit shutdown.

f. Plot plan with all components identified with EPA Method 21 screening values greater than 3,000 ppmv, all active PSLs, and the locations of each sensor node, if applicable.

g. Identification of all non-compliant leakers and each zone of incomplete coverage.

h. For each survey conducted in a zone of incomplete coverage, the information in IV.D.(14)(a), (14)(d), and (14)(e), as well as an identification of each valve and pump monitored.

i. The start and end dates and results of any required root cause analysis, any corrective action taken in response to a non-compliant leaker, and any corrective action plans developed.

14. Records of deviations where a deviation means FHR fails to meet any requirement or obligation established in this AMEL or fails to meet any term or condition that is adopted to implement an applicable requirement or obligation in this AMEL and that is included in the operating permit for the Mid-Crude or Meta-Xylene process units at FHR.

D. Reporting

Semiannual reports must be submitted via the Compliance and Emissions Reporting Data Interface (CEDRI), which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov>), following the procedures specified in 40 CFR 63.9(k). Semiannual reports must include the following information:

1. All of the information required in the relevant subparts for components not covered by this AMEL.

2. For each PSL, the notification date, investigation start date, investigation results including the date each leak was found, type of component, EPA Method 21 reading, and date of repair. For each PSL that was not closed out after the initial investigation, the date of each PSL update notification sent to facility personnel when the PSL detection level increases by 2 times the initial detection level, each investigation start date, and results for each investigation.

3. Identification of equipment placed on delay of repair and the facts that explain each delay of repair.

4. The number of PSLs that were closed out where no cause of the PSL was determined. Note how many PSLs were closed because 14 days had passed since a positive detection within the PSL and how many PSLs were closed following the EPA Method 21 inspection conducted 90 days after the original PSL notification.

5. The number of PSLs that were closed because the emissions were authorized.

6. The number of PSLs that were closed because the source was found to be outside the AMEL covered process unit.

7. The operational downtime percentage for each sensor determined each month.

8. For each sensor that fails a bump test, identification of the sensor, date of failed bump test, and corrective action taken.

9. Any changes to the sensor network, including those resulting from the compliance assurance actions in IV.E.

10. For the additional annual compliance demonstration in IV.E:

a. The date of each EPA Method 21 survey.

b. The number of valves and pumps monitored.

c. The number of leaks identified.

d. The number of non-compliant leakers.

e. The number of leaks identified above 18,000 ppmv.

f. Date of each survey conducted in a zone of incomplete coverage, and for each survey in a zone of incomplete coverage the number of valves and pumps monitored and the number of leaks identified.

g. Any corrective action taken if there are non-compliant leakers.

11. Once the criteria in IV.E(3) is met, a statement that FHR has met the criteria and additional annual compliance demonstrations are no longer required.

12. Reports of deviations recorded under IV.C(15) which occurred in the semi-annual reporting period, including the date, start time, duration, description of the deviation, and corrective active.

E. Additional Annual Compliance Demonstration

In addition to continuous compliance with the LDSN-DRF as required by the sections IV.A-D, the following annual compliance demonstration actions are required for the LDSN-DRF system located in the Meta-Xylene and Mid-Crude process units:

1. Method 21 of appendix A-7 of part 60 must be conducted in each process unit equipped with the LDSN-DRF according to the following requirements:

a. The first survey must be conducted within 12 calendar months of implementation of the AMEL in a given process unit.

Subsequent surveys must be conducted no sooner than 10 calendar months and no later than 12 calendar months after the preceding survey.

b. Identify the valves to be monitored as described below.

Monitor the valves as described in IV.E(1)(b)(i) through (v) or IV.E(1)(b)(vi) using Method 21 of appendix A-7 of part 60 as specified in section 60.485a(b) of 40 CFR part 60, subpart VVa, with the exception that the high scale calibration gas must be 20,000.(+/- 1000.) ppmv.

(i) Determine the total number of valves located in the individual process unit. The minimum number of valves monitored must equal 20 percent of the total population of valves in the process unit.

(ii) Identify each verification zone on a plot plan. The verification zone is the area between the radii that are 45 and 50 feet from each individual sensor. Determine the total number of valves that occur in only one sensor verification zone (*i.e.*, verification zones that have no overlap with other verification zones). If the number of valves that occur in only one sensor verification zone is greater than the minimum number of valves that must be monitored, monitor a random selection of these valves according to IV.E(1)(b)(v).

(iii) If the number of valves that occur in only one sensor verification zone is less than the minimum number of valves that must be monitored, determine the total number of valves that occur in all verification zones, including those that overlap. If the total number of valves in all verification zones is greater than the minimum number of valves that must be monitored, monitor all the valves that occur in only one sensor verification zone. Additionally, monitor a random selection of valves, chosen in accordance with IV.E(1)(b)(v), that appear in verification zones that overlap until the 20 percent minimum is achieved.

(iv) If the number of valves in all verification zones is less than 20 percent of the total population, then monitor all of the valves in all verification zones. Additionally, monitor a random sample of additional valves within the LDSN but outside of the verification zones, chosen in accordance with IV.E(1)(b)(v),

until the 20 percent minimum is achieved.

(v) Random sampling of valves. To determine the random selection of valves to monitor, determine the population of valves that must be randomly sampled as determined in IV.E(1)(b)(ii), (iii), or (iv) (*i.e.*, the total valve population in one sensor verification zone, the total valve population in verification zones that overlap, or the total valve population minus the number of valves in the verification zones). Divide the population of valves by the number of valves that must be sampled and round to the nearest integer to establish the sampling interval. Using the valve IDs sequentially, monitor valves at this sequential interval (*e.g.*, every 5 valves). Alternatively, use the valve IDs and a random number generator to determine the valves to monitor. Each survey conducted under IV.E(1)(a) must start on a different valve ID such that the same population of valves is not monitored in each survey.

(vi) In lieu of implementing IV.E(1)(b)(i) through (v), FHR may elect to monitor 50 percent of the total number of light liquid and gas vapor (LL/GV) valves that occur within the LDSN coverage area each year. This shall be done by dividing the valves into 2 sets, with each set containing every other valve in the given tag range (*e.g.*, all odd numbered valves in one set and all even numbered valves in the second set). In the first survey, one set of valves shall be monitored, such that nominally 50 percent of the valves have been monitored. Each subsequent survey must rotate between the 2 sets of valves such that the same population of valves is not monitored during 2 consecutive surveys.

c. Monitor each pump located in the process unit using Method 21 of appendix A-7 of part 60 as specified in section 60.485a(b) of 40 CFR part 60, subpart VVa.

d. For purposes of this monitoring, a leak is identified as an instrument reading above the leak definitions in Table 2 of this AMEL.

All identified leaks must be repaired or placed on delay of repair within 15 calendar days of detection, with a first attempt completed within 5 calendar days of detection.

e. Once the annual monitoring survey is complete, any components identified with EPA Method 21 screening values greater than 3,000 ppmv shall be plotted on a plot plan of the process unit along with all active PSLs and the locations of each sensor node.

Any LDAR applicable component that is not in an active PSL or which was not

previously placed on delay of repair, will be considered a NC leaker if it meets at least one of the specifications in IV.E(1)(e)(i) or (ii):

(i) A component identified with an EPA Method 21 screening value above 3,000 ppmv that is located within 18 feet of any sensor node.

(ii) A component identified with an EPA Method 21 screening value above 18,000 ppmv that is located anywhere in the LDSN coverage area.

f. For each NC leaker, FHR must identify a ZIC. The ZIC shall be defined as the area with a 15-foot radius horizontally and vertically around the leaking component.

Monitoring with Method 21 of appendix A-7 of part 60 shall be conducted for all LL/GV valves and pumps in the ZIC that were not already monitored during the most recent annual survey. The leak definitions in Table 2 shall be used to determine if a leak is detected. Any identified leaks shall be repaired or placed on delay of repair per IV.E(1)(d).

g. All NC leakers shall be deviations of the AMEL and reported as such. The period of noncompliance shall end when the monitoring under IV.E(1)(f) has been completed and repairs for all leaking components have been made and verified or the components have been placed on delay of repair.

h. Until the actions in IV.E(1)(f) are completed, FHR shall monitor all LL/GV valves and pumps in the ZIC quarterly using Method 21 of appendix A-7 of part 60.

i. For each NC leaker, FHR shall conduct a root cause analysis (RCA) to determine the cause of the defect of the sensor network and to determine appropriate corrective action. The RCA shall begin within 5 days and be completed no later than 45 days after completion of the most recent annual survey. FHR must submit a corrective action plan within 15 days of the completion of the RCA to *CCG-AWP@epa.gov*. For any NC leaker with an EPA Method 21 screening value above 18,000 ppmv, the corrective action plan must include revisions to the sensor network. Revisions to the sensor network must include the addition of new sensors to reduce the detection radius of each sensor, location changes of any previously deployed sensors, and/or the deployment of a different sensor type.

j. If 2 or more NC leakers are found in the same annual survey and corrective actions will take longer than 45 days to complete, this shall be a deviation of the AMEL for the sensor network and reported as such.

The period of noncompliance shall end when corrective actions are completed.

2. The EPA or its delegated authority may conduct audits of the LDSN at any time, using the same approach as outlined in IV.E(1), to determine NC leakers. For each NC leaker found during any inspection by the EPA or its delegated authority, the requirements in paragraphs IV.E.(1)(f) through (j) apply.

3. FHR may stop conducting the additional annual compliance demonstration required in IV.E(1) if no NC leaks are identified with Method 21 of appendix A-7 of part 60 over a period of 2 consecutive calendar years.

Panagiotis Tsirigotis,
Director, Office of Air Quality Planning and Standards.

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FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064-0112; -0125; -0177]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below (OMB Control No. 3064-0112; -0125 and -0177).

DATES: Comments must be submitted on or before April 11, 2023.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website:* <https://www.fdic.gov/resources/regulations/federal-register-publications/>.
- *Email:* comments@fdic.gov. Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202-898-3767), Regulatory Counsel, MB-3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street NW), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, Regulatory Counsel, 202-898-3767, mcabeza@fdic.gov, MB-3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

1. *Title:* Real Estate Lending Standards.

OMB Number: 3064-0112.

Forms: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN
[OMB No. 3064-0112]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Real Estate Lending Standards, 12 CFR 365 (Mandatory).	Recordkeeping (Annual)	3,086	1	20:00	61,720
<i>Total Annual Burden (Hours):</i> ....	.....	.....	.....	.....	61,720

Source: FDIC.

General Description of Collection: Section 1828(o) of the Federal Deposit Insurance Act requires each federal banking agency to adopt uniform regulations prescribing real estate lending standards. Part 365 of the FDIC Rules and Regulations, which implements section 1828(o), requires institutions to have real estate lending policies that include (a) limits and standards consistent with safe and sound banking practices; (b) prudent underwriting standards, including loan-to-value ratio (LTV) limits that are clear and measurable; (c) loan administration

policies; (d) documentation, approval and reporting requirements; and (e) a requirement for annual review and approval by the board of directors. The rule also establishes supervisory LTV limits and other underwriting considerations in the form of guidelines. Since banks generally have written policies on real estate lending, the additional burden imposed by this regulation is limited to modifications to existing policies necessary to bring those policies into compliance with the regulation and the development of a system to report loans in excess of the

guidelines to the board of directors. There is no change in the substance or methodology of this information collection. The change in burden is due to a decrease in the number of respondents.

2. *Title:* Foreign Banking and Investment by Insured State Nonmember Banks.

OMB Number: 3064-0125.

Forms: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN
[OMB No. 3064-0125]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Notices or applications to establish, move, or close a foreign branch, 12 CFR 303.182 (Mandatory).	Reporting (On Occasion)	1	1	02:00	2
2. Filings for authorization for foreign branch to engage in activities other than those permitted under 12 CFR 347.115, 12 CFR 303 (Mandatory).	Reporting (On Occasion)	1	1	40:00	40
3. Filings to invest in foreign organizations, or to engage in certain activities through foreign organizations, 12 CFR 303.183(b) and 303.121, (Mandatory)	Reporting (On Occasion)	2	1	60:00	120
4. Merger transactions involving foreign organizations, 12 CFR 303.185(b) and 12 CFR 303.62 (Mandatory).	Reporting (On Occasion)	1	1	06:00	6
5. Filings by insured state non-member banks to invest in, or divest its interest in, a foreign organization, 12 CFR 303.183 (Mandatory).	Reporting (On Occasion)	1	1	02:00	2
6. Notice of foreign divestiture of foreign organization, 12 CFR 303.183(d) (Mandatory).	Reporting (On Occasion)	1	1	01:00	1
7. Document policies and procedures for supervision of foreign activities, 12 CFR 347.116 (Mandatory).	Recordkeeping (Annual)	6	1	400:00	2,400
<i>Total Annual Burden (Hours):</i> ....	.....	.....	.....	.....	2,571

Source: FDIC.

General Description of Collection: The Federal Deposit Insurance (FDI) Act requires state nonmember banks to obtain FDIC consent to establish or operate a foreign branch, or to acquire and hold, directly or indirectly, stock or other evidence of ownership in any foreign bank or other entity. The FDI Act also authorizes the FDIC to impose conditions for such consent and to issue regulations related thereto. This

collection is a direct consequence of those statutory requirements. There is no change in the substance or methodology of this information collection. The change in burden is due to a decline in the number of FDIC-supervised institutions that operate foreign branches and one fewer estimated respondent to IC 6.

3. *Title:* Treatment by the FDIC as Conservator or Receiver of Financial

Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation after September 30, 2010.

OMB Number: 3064-0177.

Forms: None.

Affected Public: Insured Depository Institutions.

Burden Estimate:

SUMMARY OF ESTIMATED ANNUAL BURDEN
[OMB No. 3064-0177]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
1. Credit performance and changes to compensation arrangements, 12 CFR 360.6(b)(2)(i)(C) & (D) (Mandatory).	Disclosure (Monthly)	28	125.857	02:00	7,048
2. Securitization structure and initial compensation arrangements, 12 CFR 360.6(b)(2)(i)(B) & (D) (Mandatory).	Disclosure (On Occasion)	28	10.488	03:00	882

SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued
[OMB No. 3064-0177]

Information collection (obligation to respond)	Type of burden (frequency of response)	Number of respondents	Number of responses per respondent	Time per response (HH:MM)	Annual burden (hours)
3. Residential mortgages: loan-level information and sponsor's disclosure of third-party due diligence report on compliance with 360.6(b)(2)(ii)(B), 12 CFR 360.6(b)(2)(ii)(A) & (B) (Mandatory).	Disclosure (On Occasion)	3	3.667	02:00	22
4. Residential mortgages: servicer or affiliate ownership interests, 12 CFR 360.6(b)(2)(ii)(C) (Mandatory).	Disclosure (On Occasion)	19	4.789	01:00	91
5. Securitization documents, 12 CFR 360.6(c)(7) (Mandatory).	Recordkeeping (On Occasion)	28	10.488	01:00	294
<i>Total Annual Burden (Hours):</i>					<i>8,337</i>

Source: FDIC.

General Description of Collection: Part 360.6 of the FDIC's regulations sets forth certain conditions that must be satisfied for a securitization transaction sponsored by an insured depository institution to be eligible for special treatment in the event that the FDIC is appointed receiver for the sponsor. Among other conditions, the securitization documents must require compliance with certain disclosure requirements (including the requirements of Regulation AB of the Securities and Exchange Commission). Conditions of eligibility for special treatment for participations in financial assets under part 360.6 are also set forth.

Based upon a closer review of the Rule, the FDIC has re-categorized the information collection requirements in 12 CFR part 360.6 into five distinct information collections (ICs) covering: (1) periodic disclosures of credit performance or changes to initial compensation arrangements under 12 CFR 360.6(b)(2)(i)(C) and (D); (2) disclosures of initial compensation arrangements and securitization structure under 12 CFR 360.6(b)(2)(i)(B) and (D); (3) sponsors' disclosures of loan-level information and third-party due diligence reports for RMBSs under 12 CFR 360.6(b)(2)(ii)(A) and (B); (4) servicers' disclosures of servicer or affiliate ownership interests for securitizations in which the assets include residential mortgage loans under 12 CFR 360.6(b)(2)(ii)(C); and (5) a recordkeeping requirement that the closing documents of a securitization be maintained in a readily accessible form under 12 CFR 360.6(c)(7). The burden associated with these five categories are enumerated in the estimated burden

table which now identifies the regulatory authorities for each IC.

While there is no change in the substance of the information collection, the ICR is being revised to reflect the re-categorization of the PRA requirements in 12 CFR part 360.6 into five distinct ICs. The additional IC was added to this ICR to recognize the periodic credit performance disclosure requirement.

Request for Comment: Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on February 7, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023-02848 Filed 2-9-23; 8:45 am]

BILLING CODE 6714-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than February 27, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414

1. *The Joy A. Nelson Trust dated March 12, 2020, Joy A. Nelson, as*

trustee; Jamie Razum, individually and as custodian for a minor; Kristina Wendell, individually and as custodian for a minor; Timothy Nelson, Thomas Nelson, Richard Razum, and Brad Wendell, all of Geneva, Illinois; to join the Nelson Family Control Group, a group acting in concert, to retain voting shares of Geneva Bancshares, Inc., and thereby indirectly retain voting shares of The State Bank of Geneva, both of Geneva, Illinois.

2. *The A. Gregg Nelson Family Trust u/a/d March 12, 2020 and the A. Gregg Nelson Marital GST Exempt Trust u/a/d March 12, 2020, Joy A. Nelson as trustee to both trusts, and Timothy Nelson as special asset manager to both trusts, all of Geneva, Illinois;* to join the Nelson Family Control Group, a group acting in concert, to acquire voting shares of Geneva Bancshares, Inc., and thereby indirectly acquire voting shares of The State Bank of Geneva, both of Geneva, Illinois.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-02902 Filed 2-9-23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also

involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843), and interested persons may express their views in writing on the standards enumerated in section 4. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

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 March 13, 2023.

A. Federal Reserve Bank of New York (Ivan J. Hurwitz, Head of Bank Applications) 33 Liberty Street, New York, New York 10045-0001. Comments can also be sent electronically to comments.applications@ny.frb.org:

1. *SNBNY Holdings Limited, Gibraltar, and Safra New York Corporation, New York, New York;* to acquire Delta North Bankcorp, Inc., and thereby indirectly acquire Delta National Bank and Trust Company, both of New York, New York.

B. Federal Reserve Bank of Minneapolis (Stephanie Weber, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291. Comments can also be sent electronically to MA@mpls.frb.org:

1. *GBH Inc., Breslau, Ontario, Canada; VersaBank, London, Ontario, Canada, and its wholly owned subsidiary, VersaHoldings US Corp. (VersaHoldings), Wilmington, Delaware;* to become bank holding companies by acquiring Stearns Financial Services, Inc., Saint Cloud, Minnesota, and thereby indirectly acquire Stearns Bank of Holdingford, National Association, Holdingford, Minnesota.

In addition, GBH Inc., VersaBank, and VersaHoldings, through VersaFinance US Corp., London, Ontario, Canada; to engage de novo in extending credit and servicing loans pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-02901 Filed 2-9-23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090-XXXX; Docket No. 2022-0001; Sequence No. 16]

Submission for OMB Review; GSA Equity Study on Remote Identity Proofing

AGENCY: Technology Transformation Services (TTS), General Services Administration (GSA).

ACTION: Notice of request for comments regarding a new request for an OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, GSA will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement. Respondents to this information collection will test several remote identity proofing services and provide demographic information to help better understand the behavior and impacts of remote identity-proofing technologies.

DATES: Submit comments on or before March 13, 2023.

ADDRESSES: Written comments and recommendations for this 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: Requests for additional information should be directed to Tiffany Andrews or Gerardo E. Cruz-Ortiz by phone 202-969-0772 or via email to identityequitystudy@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. Purpose

The GSA "Equity Study on Remote Identity Proofing" will assess the impact of ethnicity, race, gender, income, and other demographic factors on the components of identity proofing, which is the process of verifying that a person is who they say they are. GSA will test remote identity-proofing tools that include both biometric checks using facial verification technology as well as non-biometric methods like mobile-device account ownership and credit history. NIST's SP 800-63-3 guidelines for remote one-to-one identity proofing serve as a framework for the study.

GSA will publish an anonymized, peer-reviewed report of our findings, to help us make informed decisions regarding identity verification capabilities. The report will present a

statistical analysis of failures and successes for the proofing checks and explore the causes behind negative or inconclusive results. These results will help GSA understand the current technological barriers to equitable identity-proofing services for the public.

GSA will partner with a recruitment partner to engage the general American public to participate in the study. Respondents will be asked to share demographic information to help GSA understand if and how these variables impact the performance of various remote identity-proofing solutions; GSA will collect the respondent's race, ethnicity, gender, age, income, educational level, and other demographic data.

The identity-proofing workflow will also collect the following personally identifiable information (PII): a picture of the respondent's government-issued identification card (including face reference, name, date of birth, physical address, and document number), Social Security Number, phone number, and a picture of the respondent's face. Identity-proofing vendors will delete all respondent data from their systems within 24 hours of collection. GSA will retain records of this study in accordance with GSA's retention schedule for Customer Research and Reporting Records and any other applicable federal records schedules (See: https://www.archives.gov/files/records-mgmt/rccs/schedules/independent-agencies/rg-0269/daa-0269-2016-0013_sf115.pdf).

While respondents are using the study's web-based platform, GSA will also collect the personal mobile device's hardware and software data as well as device-behavioral information (how the device and its applications are used).

GSA will share de-identified demographic information, and identity-proofing results with an academic partner that will analyze the results and assist GSA in publishing a peer-reviewable academic paper.

Upon completion of the study, respondents will be asked to complete an exit survey that gathers additional demographic information, consent for publication, and feedback on the study.

Respondents who complete all study questions will be compensated for their participation in this study.

B. Annual Reporting Burden

Respondents: 2,000–4,000.

Responses per Respondent: 1.

Hours per Response: .75 hours.

Estimated Total Burden Hours: 3,000.

C. Discussion and Analysis

A 60-day notice was published in the **Federal Register** at 87 FR 57496 on September 20, 2022. GSA received two public comments discussing the following three areas:

—*Mobile Device Model:* The commenter discussed concerns about the impact of the mobile device type and model as well as its capabilities and age on the results of the study. GSA is aware of this potential variable and will explore the hypothesis that device type and age might influence proofing results. The study platform collects device data including mobile browser, operating system, and device model year; this data will enable an analysis of proofing results with respect to the devices' capabilities.

—*Human Verification Concerns:* The commenter recommended that GSA leverage automated systems given their higher performance over human evaluators. This study will not consider any identity proofing product that relies on or includes human verification or assistance. Furthermore, minimizing the number of people who are involved in verifying someone's identity will improve the system's privacy and security.

—*Other Biometric Proofing Methods:* The commenter suggested other biometric proofing methods including "Iris, palm, fingerprint, and voice" which are common in other parts of the world. GSA may consider these ideas for future studies.

Commenters found "little to no burden" in our information collection. GSA had already implemented the recommendation to use mobile devices. The other recommendation was to gather other biometric pieces of information that cannot be collected with our currently available commercial services nor fit within the required timeline.

GSA is consulting with the Center for Information Technology Research (CITeR) and researchers at Clarkson University to ensure that the statistical design of the study is sound. GSA representatives have met with staff from other government agencies that have conducted similar research such as DHS's Science and Technology group (DHS S&T). Both of these groups have agreed that the collection is useful and necessary to improve the delivery of government services.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the Regulatory Secretariat Division by calling 202–501–4755 or emailing

GSARegSec@gsa.gov. Please cite OMB Control No. "3090–XXXX, GSA Equity Study on Remote Identity Proofing" in all correspondence.

Beth Anne Killoran,

Deputy Chief Information Officer.

[FR Doc. 2023–02918 Filed 2–9–23; 8:45 am]

BILLING CODE 6820–AB–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–22GR]

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 "CDC's Milestone Tracker App User Surveys" 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 12, 2022 to obtain comments from the public and affected agencies. CDC did not receive comments 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

CDC’s Milestone Tracker App User Surveys—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC’s *Learn the Signs. Act Early.* (LTSAE) program promotes family-engaged developmental monitoring of children and aims to improve early identification of autism and other developmental disabilities so that children and families receive the services and support they need. LTSAE encourages families and early childhood providers/professionals (e.g., doctors, therapists, childcare, etc.) to learn the signs of healthy development, monitor every child’s early development, and act when there is a concern.

The Milestone Tracker application (app) serves as a developmental

monitoring, health education, and communication tool that facilitates developmental monitoring with interactive, illustrated, age-specific developmental milestone checklists for children ages two months—five years. The mobile app is available in both English and Spanish on Android and iPhone devices. The app provides families and early childhood providers/professionals with checklists, summaries of a child’s development, activities to support development, tips if there are concerns, and appointment reminders.

The Milestone Tracker app was first deployed in 2017 and as of October 2022 had been downloaded over 1.5 million times. However, no information has been collected on users’ experience with the app or actions taken after interaction with the app. The goal of this project is to evaluate CDC’s Milestone Tracker mobile app by assessing user satisfaction, usage patterns, and actions taken after a missed developmental milestone or developmental concern is identified. The evaluation will consist of three brief web surveys at three distinct times during the app user experience.

First, all parents (or guardians) who download the app will be asked to complete the Milestone Tracker App Parent Survey 1. This survey requests information about whether a child has missed a developmental milestone, whether the parent has shared information about a child’s developmental milestones with anyone, the parent’s overall perceptions of the app, and how the parent plans to use the app. The estimated number of respondents is 200,000 per year and the estimated burden per response is five

minutes. If a parent indicates that their child has missed a developmental milestone or has a developmental concern, the parent will be invited to complete the Milestone Tracker App Parent Survey 2. Because parents who download the app are more likely to have concerns about a child’s development than parents in the general U.S. population, for purposes of burden calculation CDC is also estimating up to 200,000 responses per year to Parent Survey 2. The second survey requests information about actual usage of the app and outcomes of sharing information about the child’s developmental milestones (e.g., referral to diagnostic testing or educational support services). The estimated burden per response is five minutes.

The third survey is for providers that use the app, e.g., health care providers or specialists in early childhood education. Information will be collected about how they use the app and their satisfaction with it. The estimated number of annualized responses is 100,000 and the estimated burden per response is five minutes.

The objectives of these three short surveys are to understand how the app is being used, if users like the app/find it helpful, if the app helped them to identify a possible developmental concern, if they plan to use it again, and what actions are taken after a missed developmental milestone or developmental concern is identified (e.g., talk to doctor, talk to family/friends, referral to specialist, etc.).

OMB approval is requested for three years. Participation is voluntary and there are no costs to respondents other than their time. The total estimated annualized burden is 41,667 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)
All parents using the Milestone tracker app	Milestone Tracker App Parent Survey 1.	200,000	1	5/60
Parents using the Milestone Tracker App who have missed a milestone or identified a developmental concern.	Milestone Tracker App Parent Survey 2.	200,000	1	5/60
Providers who use the Milestone Tracker App	Provider Survey	100,000	1	5/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023-02951 Filed 2-9-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-23-1295]

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 “Public Health Accreditation Board (PHAB): Assessment of Processes and Outcomes” 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 September 12, 2022 to obtain comments from the public and affected agencies. CDC did not receive comments 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

Public Health Accreditation Board (PHAB): Assessment of Processes and Outcomes (OMB Control No. 0920-1295, Exp. 4/30/2023)—Extension—Center for State, Tribal, Local, and Territorial Support (CSTLTS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) works to protect America from health, safety, and security threats, both foreign and domestic. CDC strives to fulfill this mission, in part, by supporting state, tribal, local, and territorial (STLT) health departments. One mechanism for supporting STLT health departments is through CDC’s support of a national, voluntary accreditation program.

CDC supports the Public Health Accreditation Board (PHAB), a non-profit organization that serves as the independent accrediting body. PHAB, with considerable input from national, state, tribal, and local public health professionals, developed a consensus set of standards to assess the capacity of STLT health departments. Between February 2013 (when the first health department was accredited) and November 2022, 40 state health

departments, 315 local health departments, six Tribal health departments, and one integrated system (comprised of 67 local health departments in one centralized state) have been accredited. Accreditation is granted for a five-year period and 91 health departments have successfully completed the reaccreditation process. Formal efforts to assess the outcomes of the accreditation program began in late 2012 and continue to date. Priorities focus on gathering feedback for program improvement and documenting program outcomes to demonstrate impact and inform decision making about future program direction. From 2012–2019, the Robert Wood Johnson Foundation (RWJF) and the social science organization NORC at the University of Chicago, led evaluation efforts. CDC assumed support of the evaluation beginning in 2020 and is seeking OMB approval to continue data collection.

The purpose of this Information Collection Request (ICR) is to support the collection of information from participating health departments through a series of five surveys. The surveys seek to collect longitudinal data on each health department throughout their accreditation process. Data collected through this ICR provides documentation about the evidence and value of health department accreditation.

Respondents will include STLT health department directors or designees, one respondent per each health department. All surveys will be administered electronically; a link to the survey website will be provided in an email invitation. The surveys will be administered on a quarterly basis and sent to all health departments that reach any of five milestones in the accreditation process (application, recently accredited, accredited for one year, approaching reaccreditation, and reaccreditation). Each health department will be invited to participate in each survey once (for a total of five surveys max per health department).

CDC requests OMB approval for an estimated 100 annual 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)
STLT HD Directors or Designee	Survey 1: Applicant HDs	60	1	20/60
STLT HD Directors or Designee	Survey 2: Recently Accredited HDs	60	1	20/60
STLT HD Directors or Designee	Survey 3: HDs Accredited One Year	60	1	20/60
STLT HD Directors or Designee	Survey 4: HDs Approaching Reaccreditation	60	1	20/60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
STLT HD Directors or Designee	Survey 5: Reaccredited HDs	60	1	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. 2023-02948 Filed 2-9-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS-10398 #79]

Medicaid and Children’s Health Insurance Program (CHIP) Generic Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: On May 28, 2010, the Office of Management and Budget (OMB) issued Paperwork Reduction Act (PRA) guidance related to the “generic” clearance process. Generally, this is an expedited process by which agencies may obtain OMB’s approval of collection of information requests that are “usually voluntary, low-burden, and uncontroversial collections,” do not raise any substantive or policy issues, and do not require policy or methodological review. The process requires the submission of an overarching plan that defines the scope of the individual collections that would fall under its umbrella. On October 23, 2011, OMB approved our initial request to use the generic clearance process under control number 0938-1148 (CMS-10398). It was last approved on April 26, 2021, via the standard PRA process which included the publication of 60- and 30-day **Federal Register** notices. The scope of the April 2021 umbrella accounts for Medicaid and CHIP State plan amendments, waivers, demonstrations, and reporting. This **Federal Register** notice seeks public comment on one or more of our collection of information requests that we believe are generic and fall within the scope of the umbrella. Interested persons are invited to submit comments

regarding our burden estimates 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 must be received by February 24, 2023.

ADDRESSES: When commenting, please reference the applicable form number (see below) and the OMB control number (0938-1148). To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to <http://www.regulations.gov>. Follow the instructions for “Comment or Submission” or “More Search Options” to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: CMS-10398 (#79)/OMB control number: 0938-1148, Room C4-26-05, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

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/PRAListing>.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION: Following is a summary of the use and burden associated with the subject information collection(s). More detailed information can be found in the collection’s supporting statement and associated materials (see **ADDRESSES**).

Generic Information Collections

1. *Title of Information Collection:* COVID-19 Risk Corridor Reconciliation Reporting Template; *Type of Information Collection Request:* New generic information collection request; *Use:* In response to the uncertainty from the COVID-19 pandemic, CMCS issued guidance to states recommending the implementation of risk corridors in their Medicaid managed care programs. States had flexibility in how these risk corridors could be implemented. CMCS also provided states with expenditure authority under section 1115 demonstrations to retroactively implement risk corridors. The subject COVID-19 Risk Corridor Reconciliation Reporting Template will assist CMCS in analyzing states’ implementation of these risk corridors, the overall results of these financial arrangements, and will provide lessons learned for future guidance for pandemics and other emergencies. *Form Number:* CMS-10398 (#79) (OMB control number: 0938-1148); *Frequency:* Once; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 30; *Total Annual Responses:* 30; *Total Annual Hours:* 90. (For policy questions regarding this collection contact Elizabeth (Beth) Jones at 410-786-7111.)

Dated: February 7, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-02919 Filed 2-9-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2022-D-2424]

Protein Efficiency Ratio Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein; Draft Guidance for Industry; Availability; Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance entitled “Protein Efficiency Ratio (PER) Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein.” The draft guidance, when finalized, will provide information for manufacturers and contract laboratories that perform PER studies to assist in designing, conducting, evaluating, and reporting PER studies. The draft guidance, when finalized, will explain “appropriate modifications” of AOAC Official Method 960.48 (the AOAC Method) with the aim of supporting industry in successfully conducting PER studies that demonstrate that a new infant formula meets the quality factor of sufficient biological quality of protein when fed as the sole source of nutrition.

DATES: Submit either electronic or written comments on the draft guidance by May 11, 2023 to ensure that we consider your comment on the draft guidance before we begin work on the final version of the guidance. Submit electronic or written comments on the proposed collection of information in the draft guidance by May 11, 2023.

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-2424 for “Protein Efficiency Ratio (PER) Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein.” 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.” We will review this copy, including the claimed confidential information, in our 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 Office of Nutrition and Food Labeling (HFS-800), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send one self-addressed adhesive label to assist that office in processing your request or include a Fax number to which the draft guidance may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT:

With regard to the draft guidance: Andrea Lotze, Center for Food Safety and Applied Nutrition, Office of Nutrition and Food Labeling (HFS-800), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240-402-1450, email: Andrea.Lotze@fda.hhs.gov; or Keronica Richardson, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS-024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240-402-2378.

With regard to the proposed collection of information: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 240-994-7399, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled

“Protein Efficiency Ratio (PER) Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein.” Our regulations, at 21 CFR 106.96, establish requirements for quality factors for infant formulas, including the quality factor of sufficient biological quality of protein. Subject to a limited exception (see § 106.96(g)), each manufacturer of an infant formula that is not an eligible infant formula must demonstrate that the formula meets the quality factor of sufficient biological quality of protein by establishing the biological quality of the protein in the infant formula when fed as the sole source of nutrition using an appropriate modification of the AOAC Official Method 960.48 (the AOAC Method) Protein Efficiency Ratio (PER) Rat Bioassay (§ 106.96(f)).¹

The AOAC Method provides a procedure by which the quality of a protein in food can be evaluated and compared with those of other proteins. Protein “quality” can be defined as the ability of a protein to meet the essential amino acid needs of an animal. The AOAC Method is a standardized bioassay with published collaborative study data. The AOAC Method permits the calculation of a PER as the ratio of the average animal body weight gain per gram of protein consumed of a test protein versus casein after a 28-day feeding period. Typically, the protein concentration of both the test and casein reference diet is set at about 10 percent, a level that is below the estimated requirement for growth of rats of 15 percent, to improve the sensitivity of the method. While growth is slower at 10 percent protein than at 15 percent protein, the lower protein level assures that available protein is efficiently utilized.

In the PER study described in the AOAC Method, a protein ingredient was assayed at 10 percent and other potential variables were standardized so that their numbers and potential effects were minimized. Vitamin composition, moisture, ash, carbohydrates, fat, and fiber were adjusted between the casein reference diet and the test diet. Use of

¹ We support the principles of the “3Rs” to reduce, refine, and replace animal use in testing when feasible. We encourage sponsors to consult with us if they wish to use a non-animal testing method they believe is suitable, adequate, and validated to demonstrate that the formula supports the quality factor for the biological quality of the protein as described in 21 CFR 106.96(g)(3). We support alternative methods by exemption in 21 CFR 106.96(f) which allows the manufacturer to request an exemption and provide certain required assurances described in 21 CFR 106.96(g). The applicability of this exemption is not the subject of this guidance.

a test diet that contains an infant formula in its entirety introduces matrices of high fat content and additional vitamins, minerals, and other ingredients, as well as the low protein source. A major challenge in analyzing infant formulas by the AOAC Method is matching the casein reference diet and test diet to achieve dietary groups with as few confounding variables as possible.

Since we promulgated § 106.96, we have found that industry is experiencing difficulties in consistently meeting its requirements. Therefore, we are announcing the availability of a draft guidance for industry entitled “Protein Efficiency Ratio (PER) Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein.” This draft guidance, when finalized, will help infant formula manufacturers and contract laboratories that perform PER studies in designing, conducting, evaluating, and reporting PER studies. The draft guidance, when finalized, will explain “appropriate modifications” of the AOAC Method to help manufacturers and contract laboratories conduct PER studies that demonstrate to FDA that a new infant formula meets the quality factor of sufficient biological quality of protein.

FDA’s work on this draft guidance document began prior to significant infant formula supply chain concerns that arose in early 2022. Although this guidance was not prepared specifically to alleviate supply chain concerns, this guidance will help ensure that infant formula products meet FDA’s regulatory requirements and will contribute to ensuring a more resilient infant formula supply. We are issuing the draft guidance consistent with our good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternate approach to make “appropriate modifications” if it satisfies the requirements of the applicable statutes and regulations. Topics discussed in the draft guidance include:

- Purpose of the AOAC Method;
- Overview of the AOAC Method as originally described;
- Need for “appropriate modifications” to update the AOAC Method and for use of infant formulas in PER bioassays;
- Conduct and analysis of a PER study with “appropriate modifications” (matching the reference and test diets);
- Protocols and reports;

- Reference guidelines; and
- *Appendices*: AOAC Official Method 960.48, composition of vitamin and mineral mixtures, compositions of diets, and examples of an approach for matching vitamin, mineral, and (methionine + cystine) compositions of PER study diets.

II. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Protein Efficiency Ratio (PER) Rat Bioassay Studies To Demonstrate That a New Infant Formula Supports the Quality Factor of Sufficient Biological Quality of Protein

OMB Control Number 0910–0256—Revision

Under § 106.96(e), an infant formula must meet the quality factor of sufficient biological quality of protein, and § 106.96(f) provides how an infant formula manufacturer must demonstrate that a formula meets this quality factor. PER studies are used to demonstrate to FDA that a new infant formula meets

the quality factor of sufficient biological quality of protein when fed as the sole source of nutrition. This draft guidance, when finalized, would help manufacturers and laboratories performing PER studies in the design, conduct, evaluation, and reporting of such studies. When finalized, the draft guidance would provide recommendations for additional

recordkeeping and reporting of protocols and PER studies related to the composition of test and control diets, as well as conditions, adverse effects, and attrition in rats. The draft guidance, when finalized, also will explain “appropriate modifications” of the AOAC Method to help manufacturers and contract laboratories conduct PER studies that demonstrate to FDA that a

new infant formula meets the quality factor of sufficient biological quality of protein.

Description of Respondents: Respondents to the information collection are manufacturers of infant formula. Respondents are from the private sector (for-profit businesses).

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN ¹

Activity; guidance document section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Records for composition of the test and control diets during PER studies; Section IV.	15	2	30	1	30
Records for conditions, adverse effects, and attrition in rats during PER studies; Section IV.	15	140	2,100	0.083 (5 minutes).	174
Total					204

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimates in tables 1 and 2 are based on experience with our infant formula safety and nutrition programs. We estimate that fifteen manufacturers annually will each create and maintain two records for the composition of test and control diets of PER studies. We estimate the recordkeeping burden to be

1 hour per record for an annual burden of 30 hours (15 manufacturers × 2 records). These estimates are based on numerous PER study protocols, reports, and laboratory experiences.

We estimate that fifteen manufacturers annually will each create and maintain 140 records to account for conditions, adverse effects, and attrition

in rats during PER studies. We estimate these records will take 5 minutes per record for an annual burden of 174.3 hours, rounded to 174 (15 manufacturers × 140 records × 0.083/ hours). We calculate the total recordkeeping burden will be 204 hours annually.

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN ¹

Activity; guidance document section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Development and submission of a PER study protocol; Section V	15	1	15	70	1,050
Development and submission of a PER study final report; Section V	15	1	15	40	600
Total					1,650

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

We estimate that fifteen manufacturers will prepare and submit to FDA a protocol to ensure that the specifications of the AOAC Method and FDA’s “appropriate modifications” are met. A protocol is a detailed plan for the conduct of the PER study that helps the manufacturer meet the requirements of § 106.96. In Table 1 in Appendix 6 of the draft guidance, we offer an illustration of how the values can be recorded as part of a protocol. An interested manufacturer will call FDA to discuss the manner in which a protocol will be submitted. We estimate each protocol will take 70 hours for an annual burden of 1,050 hours (15 protocols × 70 hours).

In addition, we estimate that fifteen manufacturers will submit a final report on all aspects of the PER study, including Certificates of Analyses (*i.e.*, a full specification of results) for relevant ingredients to FDA. A final report is submitted in the same manner as a protocol. We estimate each final report will take 40 hours for an annual burden of 600 hours (15 final reports × 40 hours). We calculate the total reporting burden will be 1,650 hours annually.

This draft guidance also refers to previously approved FDA collections of information. The collections of information in 21 CFR part 106 have been approved under OMB control number 0910–0256.

III. Electronic Access

Persons with access to the internet may obtain an electronic version of the draft guidance at <https://www.fda.gov/RegulatoryInformation/Guidances/default.html>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

IV. Other Issues for Consideration

Although FDA welcomes comments on any aspect of the draft guidance, we particularly invite comments on the following sections, issues, and questions related to the compositions of PER study test (infant formula) and reference (casein control) diets. We ask that your

comments explain how suggestions will meet the overall requirement of demonstrating that the quality factor has been met using an “appropriate modification.” When commenting on a particular question, please use the question numbers below as this will make it easier for us to determine how a specific comment relates to a particular question or topic.

A. Questions for Section IV.B.1.c. Fats and Carbohydrates

1. Fats

Question 1. Companies have expressed difficulties in qualitative matching of fat in test and reference diets (e.g., problems with physical consistency of reference diets when qualitative matching is attempted) and difficulties in quantitative matching because of the much lower fat requirement of rats. We invite comments on whether the fat compositions of the test and reference diets should be matched: (a) on a quantitative basis only; or (b) on both a quantitative and qualitative basis. Please explain your reasoning. If your answer is (b), please describe what additional flexibilities might be needed to reduce problems with formulation and palatability of the reference diets (e.g., use of more saturated fat in place of the unsaturated (liquid) fats in infant formulas; partial substitution of the unsaturated fat in the infant formula with saturated fat in the reference diet). Please describe your experience with use of fat compositions in the reference diets that differ from that of the infant formula.

Question 2. Would reducing the fat content of the reference diet to about 80 percent that of the infant formula test diet (e.g., to about 17–20 percent fat in the reference diet versus about 22–25 percent fat in the test diet) help to avoid issues (e.g., problems with physical consistency of reference diets when qualitative matching is attempted) reported with high-fat reference diets? If your answer is “yes,” please describe other compositional changes that might be needed to keep the test and reference diets isocaloric. If your answer is “no,” please explain your reasoning.

Question 3. The need for vitamin E increases with an increase in dietary polyunsaturated fatty acids (PUFA) and with the degree of unsaturation of PUFA. We are proposing the use of a minimum ratio value for vitamin E:PUFA of 0.48 ± 0.28 milligrams (mg) of d- α -tocopherol to grams (g) of PUFAs in the PER study diets. We suggest that the total PUFA content of the test and reference diets be estimated from the

Certificates of Analysis or other information and used with dietary concentrations of vitamin E to calculate the ratio of vitamin E:PUFA for both diets. The minimum ratio value of 0.48 can be used as a guideline for adjusting the concentration of vitamin E in the reference diet. Is this adjustment for using vitamin E needed? If you think the adjustment for vitamin E is needed, please explain your reasoning. If your answer is “no,” please explain why not. Is the mean ratio of 0.48 mg d- α -tocopherol per gram of PUFA reasonable or is there a more appropriate value? Please explain your reasoning.

2. Carbohydrates

Question 4. In explaining appropriate modifications to the AOAC Method, the IFR states that, among other things, if an infant formula contains a carbohydrate source other than lactose, the source(s) of carbohydrate in the formula should be added in the reference diet as well (see FDA’s interim final rule, *Current Good Manufacturing Practices, Quality Control Procedures, Quality Factors, Notification Requirements, and Records and Reports, for Infant Formula*, 79 FR 7933 at 8024, Feb. 10, 2014)).

The simultaneous qualitative matching of fat and carbohydrate composition has proven difficult during formulation of PER study reference diets (e.g., problems from adding sugars such as sucrose; hardening of mixture and compromised oil absorption when water is added to liquid oils). Our current thinking is that use of the same oil blend in the infant formula and reference diet may be one approach if there is not a need to qualitatively match all the carbohydrates. We invite comments on potential solutions to these difficulties. For example, would altering the type of fat used in the reference diet while retaining quantitative matching of the fat contents of the test and reference diets be sufficient to overcome these problems? Would the use of corn starch as a carbohydrate source in the reference diet allow the reference diet to be formulated with the same oil blends used in the infant formula? Please explain your reasoning.

B. Questions for Section IV.B.1.d. Removal of Water From Liquid Infant Formulas and Determination of Moisture in PER Study Diets

Question 5. The AOAC Method specifies a moisture content of 5 percent in the PER study test and reference diets. Some laboratories have had difficulty preparing diets to match fat and water contents, leading to physical inconsistencies in diets that makes it

difficult to accurately record food consumption. We invite comments on specific problems that have arisen when attempting to match dietary contents of fat and water, as well as solutions that have been identified to help limit the occurrence of such problems. Should flexibility be provided in matching the water and fat contents of the diets? If your answer is “yes,” please describe an approach (i.e., explain the types of flexibilities) that might be needed to reduce problems with the physical consistencies of the reference diets. If your answer is “no,” please explain your reasoning.

C. Questions for Section IV.B.1.e. Mineral Content

Question 6. FDA’s regulations require that the infant formula be studied in a PER assay (§ 106.96(f)). Further, the AOAC Method specifies that both the PER study test and reference diets contain similar contents of minerals based on matched ash contents. We invite comments on how this matching could be achieved while meeting the requirement that the infant formula be tested. Is ash content alone an adequate surrogate when matching minerals in test and reference diets? If your answer is “no,” please describe why not and discuss another approach that might be used to achieve the matching of minerals in test and reference diets.

Question 7. Multielement analysis (e.g., ICP–AES (inductively coupled plasma-atomic emission spectroscopy), ICP–MS (inductively coupled plasma-mass spectrometry)) is currently used for the simultaneous analysis of many minerals. We invite comments on whether use of multielement analysis for the quantitation and subsequent matching of all minerals would be preferable to continued use of ash as a surrogate for mineral content. If your answer is “yes,” please describe reasonable expectations regarding how such analyses can be used.

Question 8. In Appendix 6 of the draft guidance, FDA has suggested a process by which mineral compositions of the test and reference diets can be matched to within ± 20 percent. We invite comments on whether this is a reasonable approach. If your answer is “no,” please explain your reasoning and suggest an alternate approach.

D. Questions for Section IV.B.1.f. Vitamin Content

Question 9. The AOAC Method specifies that both the PER study test and reference diets contain the same vitamin composition. For the purpose of studying infant formula, we understand this to mean that the vitamin

composition of the test and reference diets in a PER study should be comparable. We invite comments on how such comparability should be defined and how it might be achieved.

Question 10. In Appendix 6 of the draft guidance, FDA has suggested a process by which vitamin compositions of the test and reference diets can be matched to within ± 20 percent. We invite comments on whether this approach is reasonable and ask you to explain your thinking. If you do not believe the approach is reasonable, please explain your reasoning and suggest an alternative approach.

Question 11. We invite comments on whether the matching of the vitamin compositions between the test and reference diets should be eliminated because, for example, vitamins such as vitamin K and vitamin B12, among others, do not impact the growth of rats during the 28-day PER study. If your answer is “yes, the matching of vitamin compositions between test and reference diets should be eliminated,” what do you propose as the vitamin composition for the reference diet? Please explain your reasoning. If your answer is “no,” please explain your reasoning.

E. Question for Section IV.B.1.g. Fiber

Question 12. We invite comment on whether fiber should be added to the PER study test and matched casein reference diets under all conditions, under specified conditions, or not added at all. If your answer is “yes, under all conditions,” what is your proposed level of addition (*e.g.*, to match the concentrations of non-digestible fiber in the infant formula at its rate of addition)? If your answer is “yes, under specified conditions,” what are the specific conditions under which fiber should be added and at what concentration? If your answer is “no, fiber should not be added,” please explain your reasoning.

F. Question for Section IV.B.1.h. Sulfur Amino Acids (Methionine, Cystine)

Question 13. In the draft guidance, we recommend that the concentration of inorganic sulfur (*e.g.*, as sulfate salts) in the PER study casein reference control diet be adjusted to 0.964 g/kilograms diet, the content calculated from the mineral composition set forth in the AOAC Method as originally described. We also provide a procedure for matching the (methionine + cystine) concentrations in the casein reference control and test diets, and for use of this sulfur amino acid-matched group as a second casein reference control group in PER studies. This approach will reduce the risk of a failure of the PER study

control group. If you think the approach is needed, please explain your reasoning. If you think that such an approach is not necessary, please explain why not. If you think that other approaches might be more helpful in reducing the risk of a failure of the reference control group, please describe such approaches and explain their advantages.

Dated: February 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–02836 Filed 2–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–1136]

Temporary Policy on Repackaging or Combining Propofol Drug Products During the COVID–19 Public Health Emergency; Withdrawal of Guidance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; withdrawal.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the withdrawal of the guidance for industry entitled “Temporary Policy on Repackaging or Combining Propofol Drug Products During the COVID–19 Public Health Emergency,” which was issued in April 2020 to communicate a temporary policy regarding the repackaging or combining of propofol drug products. FDA is withdrawing this guidance document because the conditions that created the need for this policy described in the document have evolved and the policy is no longer needed.

DATES: The withdrawal date is March 13, 2023.

FOR FURTHER INFORMATION CONTACT: Kimberly Thomas, Office of Regulatory Policy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–2357.

SUPPLEMENTARY INFORMATION:

I. Background

As part of FDA’s commitment to providing timely guidance to support response efforts to the Coronavirus Disease 2019 (COVID–19)¹ pandemic,

¹ The virus has been named “SARS–CoV–2” and the disease it causes has been named “Coronavirus Disease 2019” (COVID–19).

in April 2020, the Agency published the guidance for industry entitled “Temporary Policy on Repackaging or Combining Propofol Drug Products During the COVID–19 Public Health Emergency.” This guidance communicated the Agency’s temporary policy regarding the repackaging or combining of propofol drug products by licensed pharmacists in State licensed pharmacies, Federal facilities, and outsourcing facilities registered pursuant to section 503B of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 353b).² FDA had received reports from some hospitals that they were having difficulty obtaining adequate supplies of FDA-approved propofol injectable emulsion (propofol) products, 10 milligrams (mg) per milliliter (mL), in the presentations used to support COVID–19 patients who had been sedated and intubated, or for other procedures involved in the care of such patients. At the time the guidance was published, propofol was on FDA’s drug shortage list, with several presentations on backorder or on allocation. FDA recognized that pharmacies and outsourcing facilities that had access to certain presentations of propofol drug products wanted to repackaging or combine units of a finished, FDA-approved drug product to provide hospitals with presentations needed for patients with COVID–19. The guidance stated that as a temporary measure during the public health emergency related to COVID–19, or for such shorter time as FDA may announce by updating or withdrawing the guidance based on evolving needs and circumstances, FDA intended to extend, under certain circumstances described in the guidance, its existing enforcement discretion policy described in the

² As explained in the guidance, provided that circumstances described in the guidance were present, FDA did not intend to take action for violations of section 505 (concerning new drug applications), section 502(f)(1) (concerning labeling with adequate directions for use), and section 582 (concerning drug supply chain security) of the FD&C Act (21 U.S.C. 355, 352(f)(1), and 360eee-1) if a State-licensed pharmacy, a Federal facility, or an outsourcing facility prepared drug products as described in this guidance and met other applicable requirements. Applicable requirements included, for example, the requirement that manufacturers not adulterate a drug product by preparing, packing, or holding the drug product under insanitary conditions. See section 501(a)(2)(A) of the FD&C Act (21 U.S.C. 351(a)(2)(A)). In addition, FDA did not intend to take action for violations of section 501(a)(2)(B) of the FD&C Act if the drug product was repackaged by a State-licensed pharmacy or a Federal facility in accordance with the conditions described in the guidance, and any applicable requirements. Finally, with respect to entities that did not qualify for the exemptions from registration under section 510 of the FD&C Act (21 U.S.C. 360), FDA did not intend to take action for violations of section 502(o) of the FD&C Act.

guidance for industry entitled “Repackaging of Certain Human Drug Products by Pharmacies and Outsourcing Facilities,” (<https://www.fda.gov/regulatory-information/search-fda-guidance-documents/repackaging-certain-human-drug-products-pharmacies-and-outsourcing-facilities>), when a State-licensed pharmacy, Federal facility, or outsourcing facility repackaged an FDA-approved propofol injectable emulsion, 10 mg/mL product, or combined different FDA-approved propofol injectable emulsion, 10 mg/mL products in the same container.

As stated above, propofol had been on FDA’s drug shortage list when FDA issued the guidance document. Based on our review of currently available data, we have determined that the shortage of propofol drug products has been resolved, with manufacturers reporting having an adequate supply of the drug products. Further, hospitals have not been reporting to FDA that they are having difficulty obtaining adequate supplies of propofol drug products. Accordingly, we have determined that the circumstances related to this temporary policy have evolved such that the temporary policy is no longer needed, and the guidance document should be withdrawn.

II. Withdrawal Date

The withdrawal date for the guidance document discussed in this document is March 13, 2023. The COVID-19 pandemic is a constantly evolving situation. FDA continues to assess these circumstances and should the current data change to indicate that the demand of propofol drug product has again outstripped supply before March 13, 2023, FDA may revise this date.

Dated: February 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-02809 Filed 2-9-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2023-N-0148]

Emergent Biosolutions Inc.; Withdrawal of Approval of a Supplemental New Drug Application for NARCAN (Naloxone Hydrochloride) Nasal Spray, 2 Milligrams/0.1 Milliliter

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing the approval of a supplemental new drug application (sNDA) for NARCAN (naloxone hydrochloride) nasal spray, 2 milligrams (mg)/0.1 milliliter (mL), held by Emergent Biosolutions Inc., 400 Professional Dr., Suite 400, Gaithersburg, MD 20879. Emergent Biosolutions, Inc., has notified the Agency in writing that NARCAN (naloxone hydrochloride) nasal spray, 2 mg/0.1 mL, is not marketed and has requested that approval of the sNDA be withdrawn. This action has no impact on the continued approval and marketing of NARCAN (naloxone hydrochloride) nasal spray, 4 mg/0.1 mL.

DATES: Applicable February 10, 2023.

FOR FURTHER INFORMATION CONTACT:

Ayako Sato, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6206, Silver Spring, MD 20993-0002, 240-402-4191.

SUPPLEMENTARY INFORMATION: Emergent Biosolutions, Inc., has informed FDA that NARCAN (naloxone hydrochloride) nasal spray, 2 mg/0.1 mL, is not marketed and has requested that FDA withdraw approval of sNDA-001 208411, approved on January 24, 2017, under the process in § 314.150(c) (21 CFR 314.150(c)). Emergent Biosolutions, Inc., has also, by its request, waived its opportunity for a hearing. Withdrawal of approval of an application under § 314.150(c) is without prejudice to refiling.

Therefore, approval of the sNDA for NARCAN (naloxone hydrochloride) nasal spray, 2 mg/0.1 mL, is hereby withdrawn as of February 10, 2023. Introduction or delivery for introduction into interstate commerce of such product without an approved new drug application violates section 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(a) and 331(d)). Any NARCAN (naloxone hydrochloride) nasal spray, 2 mg/0.1 mL that is in inventory on February 10, 2023 may continue to be dispensed until the inventory has been depleted or the drug product has reached its expiration date or otherwise becomes violative, whichever occurs first.

Dated: February 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-02823 Filed 2-9-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meetings of the Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that a meeting is scheduled to be held for the Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria (PACCARB). The meeting will be held in-person at the Hubert H. Humphrey building in Washington, DC, and will be open to the public; the meeting will be streamed live on hhs.gov/live. A pre-registered public comment session will be held during the meeting. Pre-registration is required for members of the public who wish to present their comments in-person at the meeting. Individuals who wish to send in their written public comment should send an email to CARB@hhs.gov. Registration information is available on the website <http://www.hhs.gov/paccarb> and must be completed by March 17, 2023 for the March 23–24, 2023 Public Meeting. Additional information about registering for the meeting and providing public comment can be obtained at <http://www.hhs.gov/paccarb> on the Upcoming Meetings page.

DATES: The meeting is scheduled to be held on March 23–24, 2023, from 10 a.m. to 4 p.m. ET (times are tentative and subject to change). The confirmed times and agenda items for the meeting will be posted on the website for the PACCARB at <http://www.hhs.gov/paccarb> when this information becomes available. Pre-registration for attending the meeting is strongly suggested and should be completed no later than March 17, 2023.

ADDRESSES: U.S. Department of Health and Human Services, Hubert H. Humphrey Building, Great Hall, 200 Independence Avenue SW, Washington, DC 20201. All in-person attendees must have a valid U.S. government issued I.D. to enter the building. All non-U.S. citizen in-person attendees must contact CARB@hhs.gov at least two weeks prior to the meeting to accommodate the HHS security vetting process. The meeting can also be accessed through a live webcast on the day of the meeting. Additional instructions regarding attending this meeting virtually will be

posted at least one week prior to the meeting at: <http://www.hhs.gov/paccarb>.

FOR FURTHER INFORMATION CONTACT:

Jomana Musmar, M.S., Ph.D., Designated Federal Officer, Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, Office of the Assistant Secretary for Health, U.S. Department of Health and Human Services, 1101 Wootton Parkway, Rockville, MD 20852. Phone: 202-746-1512; Email: CARB@hhs.gov.

SUPPLEMENTARY INFORMATION: The Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria (PACCARB), established by Executive Order 13676, is continued by section 505 of Public Law 116-22, the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019 (PAHPAIA). Activities and duties of the PACCARB are governed by the provisions of the Federal Advisory Committee Act (FACA), Public Law 92-463, as amended (5 U.S.C. app.), which sets forth standards for the formation and use of federal advisory committees.

The PACCARB shall advise and provide information and recommendations to the Secretary of Health and Human Services (Secretary) regarding programs and policies intended to reduce or combat antibiotic-resistant bacteria that may present a public health threat and improve capabilities to prevent, diagnose, mitigate, or treat such resistance. The PACCARB shall function solely for advisory purposes.

Such advice, information, and recommendations may be related to improving: the effectiveness of antibiotics; research and advanced research on, and the development of, improved and innovative methods for combating or reducing antibiotic resistance, including new treatments, rapid point-of-care diagnostics, alternatives to antibiotics, including alternatives to animal antibiotics, and antimicrobial stewardship activities; surveillance of antibiotic-resistant bacterial infections, including publicly available and up-to-date information on resistance to antibiotics; education for health care providers and the public with respect to up-to-date information on antibiotic resistance and ways to reduce or combat such resistance to antibiotics related to humans and animals; methods to prevent or reduce the transmission of antibiotic-resistant bacterial infections; including stewardship programs; and coordination with respect to international efforts in order to inform and advance the United

States capabilities to combat antibiotic resistance.

The March 23-24, 2023 will be a two-day meeting that will focus on the report out from the Pandemic Preparedness Working Group as they present their findings in response to the 2022 task from the HHS Secretary in a report with recommendations to the full PACCARB for deliberation and vote. Upon completion of the voting process, the PACCARB will honor its retiring members. The meeting will also include updates from the international sector on progress in the ongoing fight against antimicrobial resistance and an exploration of future topics for the PACCARB to consider in the following year. The meeting agenda will be posted on the PACCARB website at <http://www.hhs.gov/paccarb> when it has been finalized. All agenda items are tentative and subject to change. Instructions regarding attending the meeting virtually will be posted at least one week prior to the meeting at: <http://www.hhs.gov/paccarb>.

Members of the public will have the opportunity to provide comments in-person during the March meeting by pre-registering online at <http://www.hhs.gov/paccarb>. Pre-registration is required for participation in this session with limited spots available. Written public comments can also be emailed to CARB@hhs.gov by midnight March 17, 2023 and should be limited to no more than one page. All public comments received prior to March 17, 2023, will be provided to the PACCARB members. Additionally, companies and/or organizations involved in combating antibiotic resistance have an opportunity to present their work to members of the PACCARB live during an Innovation Spotlight. Pre-registration is required for participation, with limited spots available. All information regarding this session can also be found online at <http://www.hhs.gov/paccarb>.

Dated: January 12, 2023.

Jomana F. Musmar,

Designated Federal Officer, Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, Office of the Assistant Secretary for Health.

[FR Doc. 2023-02921 Filed 2-9-23; 8:45 am]

BILLING CODE 4150-44-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Termination of Declaration Authorizing Emergency Use of New In Vitro Diagnostics for Detection of Enterovirus D68

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Secretary of Health and Human Services (HHS) is issuing this notice pursuant to section 564 of the Federal Food, Drug, and Cosmetic (FD&C) Act. On February 6, 2015, pursuant to section 564 of the FD&C Act, Sylvia M. Burwell, former Secretary of HHS, determined that there was a significant potential for a public health emergency that had a significant potential to affect national security or the health and security of United States citizens living abroad and that involved enterovirus D68 (EV-D68). Also on February 6, 2015, based on that determination, former Secretary Burwell declared that circumstances existed justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section. As of September 2022, the Centers for Disease Control and Prevention's (CDC's) EV-D68 2014 rRT-PCR for which an EUA was issued is no longer produced and all test kits were destroyed. CDC's EV-D68 2014 rRT-PCR was never distributed. On February 6, 2023, pursuant to section 564 of the FD&C Act, the Secretary of HHS determined that there is no longer a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves EV-D68. The Secretary of HHS also determined that circumstances justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 no longer exist. Based on these determinations, the Secretary of HHS terminated the declaration, effective February 20, 2023, that circumstances justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 exist.

DATES: Termination of the declaration is effective February 20, 2023.

FOR FURTHER INFORMATION CONTACT:

Dawn O'Connell, Assistant Secretary for Preparedness and Response,

Administration for Strategic Preparedness and Response, Department of Health and Human Services, 200 Independence Avenue SW, Washington, DC 20201, telephone (202) 205-2882 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Under section 564 of the FD&C Act, the Commissioner of the Food and Drug Administration (FDA), acting under delegated authority from the Secretary of HHS, may issue an EUA authorizing (1) the emergency use of an unapproved drug, an unapproved or uncleared device, or an unlicensed biological product; or (2) an unapproved use of an approved drug, approved or cleared device, or licensed biological product. Before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of four determinations: (1) a determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear (“CBRN”) agent or agents; (2) the identification of a material threat by the Secretary of Homeland Security pursuant to section 319F-2 of the Public Health Service (PHS) Act¹ sufficient to affect national security or the health and security of United States citizens living abroad; (3) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States military forces, including personnel operating under the authority of title 10 or title 50, of attack with (i) a biological, chemical, radiological, or nuclear agent or agents; or (ii) an agent or agents that may cause, or are otherwise associated with, an imminently life-threatening and specific risk to United States military forces; or (4) a determination by the Secretary that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of United States citizens living abroad, and that involves a CBRN agent or agents, or

a disease or condition that may be attributable to such agent or agents.

Based on any of these four determinations, the Secretary of HHS may then declare that circumstances exist that justify the EUA, at which point FDA may issue an EUA if the criteria for issuance of an authorization under section 564 of the FD&C Act are met.

A declaration justifying an authorization under section 564 of the FD&C Act terminates upon the earlier of: a determination by the Secretary of HHS, in consultation as appropriate with the Secretary of Homeland Security or the Secretary of Defense, that the circumstances justifying emergency authorization have ceased to exist; or a change in the approval status of the product under emergency authorization such that the product is no longer unapproved, unlicensed, or uncleared, or is no longer intended for an unapproved use.

The Secretary must provide advance notice of any termination of a declaration under section 564 of the FD&C Act. The period of advance notice must be a period reasonably determined to provide: in the case of an unapproved product, a sufficient period for disposition of the product, including the return of such product (except such quantities of product as are necessary to provide for continued use consistent with section 564(f)(2) of the FD&C Act) to the manufacturer (in the case of a manufacturer that chooses to have such product returned); and, in the case of an unapproved use of an approved product, a sufficient period for the disposition of any labeling, or any information under section 564(e)(2)(B)(ii) of the FD&C Act, as the case may be, that was provided with respect to the emergency use involved. If an EUA for an unapproved product issued by FDA ceases to be effective due to the termination of the Secretary of HHS’s declaration justifying emergency use, the Secretary of HHS shall consult with the manufacturer of such product with respect to the appropriate disposition of the product. As of September 2022, the CDC’s EV-D68 2014 rRT-PCR, which is the only EUA issued under the Secretary’s declaration, is no longer produced and all test kits were destroyed. CDC’s EV-D68 2014 rRT-PCR was never distributed. Therefore, a 14-day period of advance notice has been determined to be sufficient, as disposition of the only associated product is already complete.

II. Determination of a Significant Potential for a Public Health Emergency and Declaration That Emergency Use Is Justified by the Secretary of Health and Human Services

On February 6, 2015, pursuant to section 564 of the FD&C Act, Sylvia M. Burwell, former Secretary of HHS, determined that there was a significant potential for a public health emergency that had a significant potential to affect national security or the health and security of United States citizens living abroad and that involved EV-D68. Also on February 6, 2015, based on that determination, former Secretary Burwell declared that circumstances existed justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section.

III. Determination of the Secretary of Health and Human Services Terminating Declaration That Emergency Use Is Justified

On February 6, 2023, pursuant to section 564 of the FD&C Act, the Secretary of HHS determined that there is no longer a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves EV-D68. Also, on February 6, 2023, the Secretary of HHS determined that circumstances justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 no longer exist. Based on these determinations, the Secretary of HHS terminated, effective February 20, 2023, the declaration that circumstances justifying the authorization of emergency use of new in vitro diagnostics for detection of EV-D68 exist.

This **Federal Register** notice serves as advance notice that this declaration will be terminated, effective February 20, 2023, as required under section 564 of the FD&C Act. Notice of termination of an EUA issued by FDA pursuant to this declaration will be provided by FDA in the **Federal Register**, as required under section 564 of the FD&C Act.

Dated: February 7, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023-02872 Filed 2-9-23; 8:45 am]

BILLING CODE 4150-37-P

¹ 42 U.S.C. 247d-6b, which states: “[t]he Homeland Security Secretary, in consultation with the Secretary and the heads of other agencies as appropriate, shall on an ongoing basis—(i) assess current and emerging threats of chemical, biological, radiological, and nuclear agents; and (ii) determine which of such agents present a material threat against the United States population sufficient to affect national security.”

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Information on Promising Practices for Advancing Health Equity for Intersex Individuals

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services (HHS).

ACTION: Notice of Request for Information.

SUMMARY: Through this Request for Information (RFI), the Office of the Assistant Secretary for Health (OASH), Department of Health & Human Services, invites feedback from stakeholders throughout the scientific research community, clinical practice communities, patient and family advocates, scientific or professional organizations, federal partners, internal HHS stakeholders, and other interested constituents on the development of a report on promising practices for advancing health equity for intersex individuals. The overarching purpose of the report on the promising practices for advancing health equity for intersex individuals is to ensure access to affirming, high-quality care for intersex people who live in America.

DATES: The Office of the Assistant Secretary for Health's Request for Information is open for public comment for a period of 4 weeks. Comments must be received on or before COB (5 p.m. ET) March 13, 2023, to ensure consideration. After the public comment period has closed, the comments received by OASH will be considered in a timely manner in the development of the report on the promising practices for advancing health equity for intersex individuals.

ADDRESSES: Please see the supplementary information to view the questions. It is strongly encouraged to submit comments by email to Adrian Shanker, Adrian.shanker@hhs.gov, "notices for advancing health equity for intersex individuals" in the subject line.

FOR FURTHER INFORMATION CONTACT: Adrian Shanker, Adrian.shanker@hhs.gov or by phone at (202) 961-6483.

SUPPLEMENTARY INFORMATION:

Background: The OASH oversees the Department's key public health offices and programs, several Presidential and Secretarial advisory committees, 10 regional health offices across the nation, and the Office of the Surgeon General and the U.S. Public Health Service Commissioned Corps. On June 15, 2022, President Biden signed Executive Order (E.O.) 14075, Advancing Equity for

Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Individuals. E.O. 14075 built upon the historic progress the Biden-Harris Administration has made in advancing LGBTQI+ Equity and outlined policy actions to safeguard health care for transgender people, support programs designed to prevent youth suicide and preventing 'so called' conversion therapy. The Executive Order also directed HHS to issue a report on promising practices for advancing health equity for intersex individuals.

Request for Comments on the Report Development on Promising Practices for Advancing Health Equity for Intersex Individuals: The OASH invites input from stakeholders throughout the scientific research community, clinical practice communities, patient and family advocates, scientific or professional organizations, federal partners, internal HHS stakeholders, and other interested members of the public on the two questions highlighted below. This input will serve as a valuable element in the development of the report, and the community's time and consideration are highly appreciated.

- What do you see as the current clinical, research, or policy gaps that you are hoping this report addresses?
- What recent or ongoing research, innovative clinical approaches or policy actions do you think is important for us to know about as we begin this work?

The OASH seeks comments and/or suggestions from all interested parties on promising practices for advancing health equity for intersex individuals.

Responses to this RFI are voluntary. Do not include any proprietary, classified, confidential, trade secret, or sensitive information in your response. The responses will be reviewed by OASH staff, and individual feedback will not be provided to any responder. The Government will use the information submitted in response to this RFI at its discretion. The Government reserves the right to use any submitted information on public HHS websites; in reports; in summaries of the state of the science; in any possible resultant solicitation(s), grant(s), or cooperative agreement(s); or in the development of future funding opportunity announcements.

This RFI is for information and planning purposes only and should not be construed as a solicitation for applications or proposals, or as an obligation in any way on the part of the United States Federal Government, the HHS, or individual HHS Agencies and Offices to provide support for any ideas identified in response to it. The Federal

Government will not pay for the preparation of any information submitted or for the Government's use of such information.

No basis for claims against the U.S. Government shall arise as a result of a response to this RFI or from the Government's use of such information. Additionally, the Government cannot guarantee the confidentiality of the information provided.

Dated: February 6, 2023.

Rachel L. Levine,

Assistant Secretary for Health.

[FR Doc. 2023-02826 Filed 2-9-23; 8:45 am]

BILLING CODE 4150-28-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: Healthcare Delivery and Methodologies Integrated Review Group; Healthcare and Health Disparities Study Section.

Date: March 9-10, 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: Tara Roshell Earl, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007C, Bethesda, MD 20892, (301) 402-6857, earltr@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-20-117: Maximizing Investigators Research Award (MIRA) for Early Stage Investigators (R35—Clinical Trial Optional).

Date: March 9-10, 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: Robert O'Hagan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (240) 909-6378, ohaganr2@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Expanding Collaborative Implementation Science to Address Social and Structural Determinants of Health and Improve HIV Outcomes.

Date: March 9, 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: Wenjuan Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3154, Bethesda, MD 20892, (301) 480-8667, wangw22@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Genes, Genomes and Genetics.

Date: March 9-10, 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: Linda Wagner Jurata, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496-8032, linda.jurata@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 22-204: Development of Animal Models and Related Materials for HIV/AIDS Research.

Date: March 9, 2023.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Liliana Norma Berti-Mattera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 6158, MSC 7890, Bethesda, MD 20892, 301-827-7609, liliana.ber-ti-mattera@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Auditory Neuroscience and Learning and Memory Processes.

Date: March 9, 2023.

Time: 11:00 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: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182,

MSC 7844, Bethesda, MD 20892, (301) 408-9664, bishopj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Maternal Health Research COE Hubs.

Date: March 9, 2023.

Time: 11:00 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: Jennifer Ann Sanders, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496-3553, jennifer.sanders@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Respiratory, Cardiac, and Circulatory Sciences.

Date: March 9, 2023.

Time: 1:00 p.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: Richard D. Schneiderman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, Bethesda, MD 20817, 301-402-3995, richard.schneiderman@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Special Emphasis Panel on Topics in Endocrinology and Metabolism.

Date: March 10, 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: Victoria Martinez Virador, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301-594-4703, victoria.virador@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-22-254: Limited Competition: IDeA Regional Entrepreneurship Development (I-RED) Program (STTR) (UT2).

Date: March 10, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joonil Seog, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301-402-9791, joonil.seog@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; SBIR/STTR Applications in Drug Discovery and Development.

Date: March 13, 2023.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Sergei Ruvinov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7806, Bethesda, MD 20892, 301-435-1180, ruvinsr@csr.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-02859 Filed 2-9-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational 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 Center for Advancing Translational Sciences Special Emphasis Panel; CTSA RC2 High Impact Specialized Innovation Programs Review Meeting.

Date: May 18, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1037, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jing Chen, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1037, Bethesda, MD 20892, (301) 827-3268, chenjing@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry

Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: February 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–02860 Filed 2–9–23; 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; NIAID Clinical Trial Planning Grants (R34 Clinical Trial Not Allowed); NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44 Clinical Trial Required); NIAID Clinical Trial Implementation Cooperative Agreement (U01).

Date: March 28–29, 2023.

Time: 10:30 a.m. to 4:00 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 3G13B, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Yong Gao, 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 3G13B, Rockville, MD 20852, (240) 669–5048, gaol2@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: February 6, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–02858 Filed 2–9–23; 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; Mycobacterium tuberculosis (Mtb) Quality Assessment Program (TBQA).

Date: March 9, 2023.

Time: 10:00 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, 5601 Fishers Lane, Room 3G74, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Hailey Peterson Weerts, 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 3G74, Rockville, MD 20852 (240) 669–5931, hailey.weerts@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: February 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–02857 Filed 2–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee CIDR 01.
Date: March 10, 2023.

Time: 11:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3100, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Barbara J Thomas, Ph.D., Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3172, Bethesda, MD 20892, (301) 402–8837, barbara.thomas@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: February 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–02862 Filed 2–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0096]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625–0042

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an

Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0042, Requirements for Lightering of Oil and Hazardous Material Cargoes, and Advance Notice of Transfer; without change. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before April 11, 2023.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2023–0096] to the Coast Guard using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the “Public participation and request for comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

A copy of the ICR is available through the docket on the internet at <https://www.regulations.gov>. Additionally, copies are available from: Commandant (CG–6P), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.*, chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection’s purpose, the Collection’s likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of

information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology.

In response to your comments, we may revise this ICR or decide not to seek an extension of approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2023–0096], and must be received by April 11, 2023.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at <https://www.regulations.gov> and can be viewed by following that website’s instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Information Collection Request

Title: Requirements for Lightering of Oil and Hazardous Material Cargoes, and Advance Notice of Transfer.

OMB Control Number: 1625–0042.

Summary: The information for this report allows the U.S. Coast Guard to provide timely response to an emergency and minimize the environmental damage from an oil or hazardous material spill. The information also allows the Coast Guard to control the location and procedures for lightering activities. It also provides advance notice of transfers at certain facilities.

Need: 46 U.S.C. 3715 authorizes the Coast Guard to establish lightering regulations. Title 33 CFR 156.200 to 156.330 and 156.400 to 156.430

prescribes the Coast Guard regulations for lightering, including pre-arrival notice, reporting of incidents and operating conditions. 46 U.S.C. 70011 authorizes the Coast Guard to prescribe advance notice of transfer regulations. Title 33 CFR 156.118 prescribe the regulations.

Forms: CG–4020, 4 Hour Advance Notice of Transfer.

Respondents: Owners, masters and agents of lightering vessels, and facility representatives.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 985 hours to 899 hours a year, due to a decrease in the estimated annual number of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: February 2, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–02922 Filed 2–9–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2309]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect

in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before May 11, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2309, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard

determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to

review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Michael M. Grimm,
Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Phillips County, Colorado and Incorporated Areas Project: 20-08-0042S Preliminary Date: July 27, 2022	
City of Holyoke Unincorporated Areas of Phillips County	City Municipal Building, 407 East Denver Street, Holyoke, CO 80734. Phillips County Courthouse, 221 South Interocean Avenue, Holyoke, CO 80734.

[FR Doc. 2023-02909 Filed 2-9-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's

(FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of May 23, 2023 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at <https://msc.fema.gov> by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these

changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the

new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Michael M. Grimm,
Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Elko County, Nevada and Incorporated Areas Docket No.: FEMA-B-2174	
City of Carlin	Building Department, 810 Oak Street, Carlin, NV 89822.
City of Elko	City Hall, 1751 College Avenue, Elko, NV 89801.
Unincorporated Areas of Elko County	Elko County Administration Building, 540 Court Street, Suite 104, Elko, NV 89801.

[FR Doc. 2023-02911 Filed 2-9-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal

Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of July 5, 2023 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at <https://msc.fema.gov> by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each

community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Michael M. Grimm,
Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Haskell County, Oklahoma and Incorporated Areas Docket No.: FEMA-B-2212	
Choctaw Nation of Oklahoma	Choctaw Nation of Oklahoma, Office of Emergency Management, 3653 Big Lots Parkway, Durant, OK 74701.
City of Kinta	City Hall, 303 West Broadway, Kinta, OK 74552.
City of Stigler	City Hall, 115 South Broadway Street, Stigler, OK 74462.
Town of Keota	City Hall, 106 Main Street, Keota, OK 74941.
Town of McCurtain	Town Hall, 308 West Main Street, McCurtain, OK 74944.
Unincorporated Areas of Haskell County	Haskell County Clerk's Office, 105 Southeast 3rd Street, Unit C, Stigler, OK 74462.

Community	Community map repository address
Greenbrier County, West Virginia and Incorporated Areas Docket No.: FEMA-B-2223	
City of Ronceverte	City Hall, 693 Edgar Avenue, Ronceverte, WV 24970.
City of White Sulphur Springs	City Hall, 589 Main Street West, White Sulphur Springs, WV 24986.
Corporation of Falling Springs	Renick Town Hall, 135 Church Lane, Renick, WV 24966.
Town of Rainelle	Town Hall, 1233 Kanawha Avenue, Rainelle, WV 25962.
Town of Rupert	Town Hall, 528 Nicholas Street, Rupert, WV 25984.
Unincorporated Areas of Greenbrier County	Greenbrier County Courthouse, 912 Court Street North, Lewisburg, WV 24901.

[FR Doc. 2023-02912 Filed 2-9-23; 8:45 am]
BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2311]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community

number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibt, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email)

patrick.sacbibt@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact

stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at

both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Michael M. Grimm,
Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
California:						
Riverside	Agua Caliente Band of Cahuilla Indian Reservation (21-09-0616P).	The Honorable Reid D. Milanovich, Chair, Tribal Council, Agua Caliente Band of Cahuilla Indians, 5401 Dinah Shore Drive, Palm Springs, CA 92264.	Tribal Administrative Office, Planning and Natural Resources, 5401 Dinah Shore Drive, Palm Springs, CA 92264.	https://msc.fema.gov/portal/advanceSearch .	Apr. 28, 2023	060763
Riverside	City of Menifee (22-09-0958P).	The Honorable Bill Zimmerman, Mayor, City of Menifee, 29844 Haun Road, Menifee, CA 92586.	Public Works and Engineering Department, 29714 Haun Road, Menifee, CA 92586.	https://msc.fema.gov/portal/advanceSearch .	May 17, 2023	060176
Riverside	City of Palm Springs (21-09-0616P).	The Honorable Lisa Middleton, Mayor, City of Palm Springs, 3200 East Tahquitz Canyon Way, Palm Springs, CA 92262.	Public Works and Engineering Department, 3200 East Tahquitz Canyon Way, Palm Springs, CA 92262.	https://msc.fema.gov/portal/advanceSearch .	Apr. 28, 2023	060257
Riverside	Unincorporated Areas of Riverside County (22-09-0446P).	The Honorable Jeff Hewitt, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	https://msc.fema.gov/portal/advanceSearch .	May 4, 2023	060245
Sonoma ...	City of Santa Rosa (22-09-0905P).	The Honorable Chris Rogers, Mayor, City of Santa Rosa, 100 Santa Rosa Avenue, Room 10, Santa Rosa, CA 95404.	City Hall, Engineering Division, 100 Santa Rosa Avenue, Room 3, Santa Rosa, CA 95404.	https://msc.fema.gov/portal/advanceSearch .	May 4, 2023	060381
Sonoma ...	Unincorporated Areas of Sonoma County (22-09-0905P).	The Honorable Lynda Hopkins, Chair, Board of Supervisors, Sonoma County, 575 Administration Drive, Room 100A, Santa Rosa, CA 95403.	Sonoma County, Permit and Resource Management, 2550 Ventura Avenue, Santa Rosa, CA 95403.	https://msc.fema.gov/portal/advanceSearch .	May 4, 2023	060375
Hawaii:						
Honolulu ..	City and County of Honolulu (22-09-0548P).	The Honorable Rick Blangiardi, Mayor, City and County of Honolulu, 530 South King Street, Room 300, Honolulu, HI 96813.	Department of Planning and Permitting, 650 South King Street, 1st Floor, Honolulu, HI 96813.	https://msc.fema.gov/portal/advanceSearch .	May 3, 2023	150001
Indiana:						
Hamilton ..	City of Noblesville (22-05-1795P).	The Honorable Chris Jensen, Mayor, City of Noblesville, City Hall, 16 South 10th Street, Noblesville, IN 46060.	Planning Department, 16 South 10th Street, Suite 150, Noblesville, IN 46060.	https://msc.fema.gov/portal/advanceSearch .	Apr. 6, 2023 ..	180082
Lake	Town of St. John (21-05-3750P).	Mike Aurelio, Chair, St. John Town Council, Municipal Offices, 10995 West 93rd Avenue, St. John, IN 46373.	Town Clerk's Office, 10955 West 93rd Avenue, St. John, IN 46373.	https://msc.fema.gov/portal/advanceSearch .	May 11, 2023	180141
Lake	Unincorporated Areas of Lake County (21-05-3750P).	Ted Bilski, President, Lake County Council, 2293 North Main Street, Building 'A', 3rd Floor, Crown Point, IN 46307.	Lake County Building, 2293 North Main Street, Crown Point, IN 46307.	https://msc.fema.gov/portal/advanceSearch .	May 11, 2023	180126
Minnesota:						
Redwood	City of Redwood Falls (22-05-1715P).	The Honorable Gary Revier, Mayor, City of Redwood Falls, P.O. Box 526, Redwood Falls, MN 56283.	City Office, 333 South Washington Street, Redwood Falls, MN 56283.	https://msc.fema.gov/portal/advanceSearch .	May 5, 2023	270393
Redwood	Unincorporated Areas of Redwood County (22-05-1715P).	Chair Priscilla Klabunde, Board of Redwood County Commissioners, P.O. Box 130, Redwood Falls, MN 56283.	Redwood County Government Center, 403 South Mill Street, Redwood Falls, MN 56283.	https://msc.fema.gov/portal/advanceSearch .	May 5, 2023	270644
Missouri:						
Jackson ...	City of Lee's Summit (22-07-0797P).	The Honorable Bill Baird, Mayor, City of Lee's Summit, 220 Southeast Green Street, Lee's Summit, MO 64063.	Mayor's Office, 207 Southwest Market Street, Lee's Summit, MO 64063.	https://msc.fema.gov/portal/advanceSearch .	May 8, 2023	290174
Nebraska:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Lancaster	City of Lincoln (22–07–0792P).	The Honorable Leirion Gaylor Baird, Mayor, City of Lincoln, 555 South 10th Street, Suite 301, Lincoln, NE 68508.	Building and Safety Department, 555 South 10th Street, Lincoln, NE 68508.	https://msc.fema.gov/portal/advanceSearch .	May 12, 2023	315273
Nevada: Clark	Unincorporated Areas of Clark County (22–09–1177P).	The Honorable James B. Gibson, Chair, Board of Commissioners, Clark County, 500 South Grand Central Parkway, 6th Floor, Las Vegas, NV 89155.	Clark County, Office of the Director of Public Works, 500 South Grand Central Parkway, 2nd Floor, Las Vegas, NV 89155.	https://msc.fema.gov/portal/advanceSearch .	May 4, 2023	320003
Texas: Williamson	City of Hutto (22–06–1965P).	The Honorable Mike Snyder, Mayor, City of Hutto, 500 West Live Oak Street, Hutto, TX 78634.	City Hall, 500 West Live Oak Street, Hutto, TX 78634.	https://msc.fema.gov/portal/advanceSearch .	Apr. 17, 2023	481047
Washington: Chelan	Unincorporated Areas of Chelan County (22–10–0970P).	Cathy Mulhall, Chelan County Administrator, 400 Douglas Street, Suite 401, Wenatchee, WA 98801.	Chelan County, Department of Public Works, 350 Orondo Street, Wenatchee, WA 98801.	https://msc.fema.gov/portal/advanceSearch .	Apr. 27, 2023	530015
Clark	City of Woodland (23–10–0005P).	The Honorable William Finn, Mayor, City of Woodland, P.O. Box 9, Woodland, WA 98674.	City Hall, 230 Davidson Avenue, Woodland, WA 98674.	https://msc.fema.gov/portal/advanceSearch .	May 11, 2023	530035
Clark	Unincorporated Areas of Clark County (23–10–0005P).	Karen Dill Bowerman, County Councilor, District 3, Clark County, P.O. Box 5000, Vancouver, WA 98666.	Clark County, 1300 Franklin Street, Vancouver, WA 98660.	https://msc.fema.gov/portal/advanceSearch .	May 11, 2023	530024
Cowlitz	Unincorporated Areas of Cowlitz County (23–10–0005P).	Arne Mortensen, County Commissioner, Cowlitz County, 207 4th Avenue North, Room 305, Kelso, WA 98626.	Cowlitz Administration Building, 207 4th Avenue North, Room 305, Kelso, WA 98626.	https://msc.fema.gov/portal/advanceSearch .	May 11, 2023	530032

[FR Doc. 2023–02908 Filed 2–9–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0001]

Major Disaster Declarations and Related Determinations: Expiration of COVID–19-Related Measures

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice; major disaster declarations.

SUMMARY: This notice amends the notices of major disaster declarations and related determinations resulting from the Coronavirus Disease 2019 (COVID–19) pandemic beginning on January 20, 2020.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, dean.webster@fema.dhs.gov, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for all COVID–19 major disaster

declarations and the nationwide emergency declaration will close effective May 11, 2023. Eligibility of work and costs reimbursable through Public Assistance funding will end on this date. The amendments to the COVID–19 major disaster declarations are as follows:

- Notice; New York; Amendment No. 12 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4480–DR.
- Notice; Washington; Amendment No. 9 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4481–DR.
- Notice; California; Amendment No. 9 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4482–DR.
- Notice; Iowa; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4483–DR.
- Notice; Louisiana; Amendment No. 7 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4484–DR.
- Notice; Texas; Amendment No. 7 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4485–DR.

- Notice; Florida; Amendment No. 7 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4486–DR.

- Notice; North Carolina; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4487–DR.

- Notice; New Jersey; Amendment No. 12 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4488–DR.

- Notice; Illinois; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4489–DR.

- Notice; Missouri; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4490–DR.

- Notice; Maryland; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4491–DR.

- Notice; South Carolina; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4492–DR.

- Notice; Puerto Rico; Amendment No. 13 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4493–DR.
- Notice; Michigan; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4494–DR.
- Notice; Guam; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4495–DR.
- Notice; Massachusetts; Amendment No. 9 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4496–DR.
- Notice; Kentucky; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4497–DR.
- Notice; Colorado; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4498–DR.
- Notice; Oregon; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4499–DR.
- Notice; Connecticut; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4500–DR.
- Notice; Georgia; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4501–DR.
- Notice; District of Columbia; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4502–DR.
- Notice; Alabama; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4503–DR.
- Notice; Kansas; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4504–DR.
- Notice; Rhode Island; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4505–DR.
- Notice; Pennsylvania; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4506–DR.
- Notice; Ohio; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4507–DR.
- Notice; Montana; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4508–DR.
- Notice; North Dakota; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4509–DR.
- Notice; Hawaii; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4510–DR.
- Notice; Commonwealth of the Northern Mariana Islands; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4511–DR.
- Notice; Virginia; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4512–DR.
- Notice; Virgin Islands; Amendment No. 13 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4513–DR.
- Notice; Tennessee; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4514–DR.
- Notice; Indiana; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4515–DR.
- Notice; New Hampshire; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4516–DR.
- Notice; West Virginia; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4517–DR.
- Notice; Arkansas; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4518–DR.
- Notice; Wisconsin; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4520–DR.
- Notice; Nebraska; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4521–DR.
- Notice; Maine; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4522–DR.
- Notice; Nevada; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4523–DR.
- Notice; Arizona; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4524–DR.
- Notice; Utah; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4525–DR.
- Notice; Delaware; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4526–DR.
- Notice; South Dakota; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4527–DR.
- Notice; Mississippi; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4528–DR.
- Notice; New Mexico; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4529–DR.
- Notice; Oklahoma; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4530–DR.
- Notice; Minnesota; Amendment No. 11 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4531–DR.
- Notice; Vermont; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4532–DR.
- Notice; Alaska; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4533–DR.
- Notice; Idaho; Amendment No. 10 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4534–DR.
- Notice; Wyoming; Amendment No. 11 to Notice of a Major Disaster

Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4535–DR.

- Notice; American Samoa; Amendment No. 9 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4537–DR.

- Notice; Seminole Tribe of Florida; Amendment No. 6 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4545–DR.

- Notice; Navajo Nation; Amendment No. 8 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4582–DR.

- Notice; Poarch Band of Creek Indians; Amendment No. 6 to Notice of a Major Disaster Declaration; Docket ID FEMA–2022–0001; Internal Agency Docket No. FEMA–4591–DR.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–02964 Filed 2–9–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6325–N–03]

Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2022

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous

Federal Register notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2022 and ending on September 30, 2022.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Aaron Santa Anna, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10282, Washington, DC 20410–0500, telephone 202–708–5300 (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>.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the third quarter of calendar year 2022.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

- Identify the project, activity, or undertaking involved;
- Describe the nature of the provision waived and the designation of the provision;
- Indicate the name and title of the person who granted the waiver request;
- Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from July 1, 2022 through September 30, 2022. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the third quarter of calendar year 2022) before the next report is published (the fourth quarter of calendar year 2022), HUD will include any additional waivers granted for the third quarter in the next report.

Accordingly, information about approved waiver requests pertaining to

HUD regulations is provided in the Appendix that follows this notice.

Damon Y. Smith,
General Counsel.

Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2022 Through September 30, 2022

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

- I. Regulatory waivers granted by the Office of Community Planning and Development.
- II. Regulatory waivers granted by the Office of Housing.
- III. Regulatory waivers granted by the Office of Public and Indian Housing

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

- *Regulation:* 24 CFR 91.105(c)(2) and (k); 24 CFR 91.115 (c)(2), and (i); and 24 CFR 91.401.

Project/Activity: The Commonwealth of Puerto Rico and any HUD Community Planning and Development (CPD) grantee located in the county equivalents (municipios) included in the declared-disaster area (see DR-4671-PR) seeking to expedite action in response to Hurricane Fiona, upon notification to the Community Planning and Development Director in its respective HUD Field Office. This authority is in effect for grantees in the areas covered by the major disaster declaration under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), DR-4671-PR, dated September 21, 2022, as may be amended (the “declared-disaster areas”) and is limited to facilitating preparation of substantial amendments to FY 2022 and prior year plans.

Nature of Requirement: The regulations at 24 CFR 91.105(c)(2) and (k); 24 CFR 91.115(c)(2) and (i); and 24 CFR 91.401 require a 30-day public comment period in the development of a consolidated plan and prior to the implementation of a substantial amendment.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Several CPD grantees were affected by Hurricane Fiona that hit Puerto Rico on September 17, 2022. As a result of substantial property loss and destruction, many individuals and families residing in the declared-disaster areas were displaced from their homes, including beneficiaries of various CPD programs, and families eligible to receive CPD program assistance. The

waiver granted will allow grantees to expedite recovery efforts for low- and moderate-income residents affected by the property loss and destruction resulting from this event.

Contact: Robert C. Peterson, Director, State and Small Cities Division, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7282, Washington, DC 20410, telephone (202) 402-4211.

- *Regulation:* 24 CFR 91.105(c)(2) and (k); 24 CFR 91.115(c)(2) and (i); and 24 CFR 91.401.

Project/Activity: The Commonwealth of Puerto Rico and any HUD Community Planning and Development (CPD) grantee located in the county equivalents (municipios) included in the declared-disaster areas (see DR-4671-PR) seeking to expedite action in response to Hurricane Fiona, upon notification to the Community Planning and Development Director in its respective HUD Field Office. This authority is in effect for grantees within the declared-disaster areas and is limited to facilitating preparation of substantial amendments to FY 2022 and prior year plans.

Nature of Requirement: The regulations at 24 CFR 91.105(c)(2) and (k); 24 CFR 91.115(c)(2) and (i); and 24 CFR 91.401 require the grantee to follow its citizen participation plan to provide citizens with reasonable notice and opportunity to comment. The citizen participation plan must state how reasonable notice and opportunity to comment will be given.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: As stated above, several CPD grantees were affected by Hurricane Fiona that hit Puerto Rico on September 17, 2022. As a result of substantial property loss and destruction, many individuals and families residing in the declared-disaster areas were displaced from their homes, including beneficiaries of various CPD programs, and families eligible to receive CPD program assistance. The waiver granted will allow grantees to determine what constitutes reasonable notice and opportunity to comment given their circumstances and provide that level of notice and opportunity to comment when amending prior year plans in response to the disaster.

Contact: Robert C. Peterson, Director, State and Small Cities Division, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7282, Washington, DC 20410, telephone (202) 402-4211.

- *Regulation:* 24 CFR 570.207(b)(4).

Project/Activity: All CDBG grantees located within and outside declared disaster areas assisting persons and families who have registered with FEMA in connection with Hurricane Fiona.

Nature of Requirement: The CDBG regulations at 24 CFR 570.207(b)(4) prohibit income payments, but permit emergency grant payments for three months. “Income payments” means a series of subsistence-type grant payments made to an individual or

family for items such as food, clothing, housing (rent or mortgage), or utilities. Emergency grant payments made over a period of up to three consecutive months to the providers of such items and services on behalf of an individual or family are eligible public services.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: HUD waives the provisions of 24 CFR 570.207(b)(4) to permit emergency grant payments for items such as food, clothing, housing (rent or mortgage), or utilities for up to six consecutive months. While this waiver allows emergency grant payments to be made for up to six consecutive months, the payments must still be made to service providers as opposed to the affected individuals or families. Many individuals and families have been forced to abandon their homes due to the damage associated with Hurricane Fiona. The waiver will allow CDBG grantees, including grantees providing assistance to evacuees outside the declared-disaster areas, to pay for the basic daily needs of individuals and families affected by the hurricane on an interim basis. This authority is in effect through the end of the grantee’s 2023 program year. This waiver aligns with waivers currently in effect for CDBG coronavirus (CDBG-CV) grants. The six-month periods allowed by waiver for CDBG and CDBG-CV shall not be used consecutively for the same beneficiary.

Contact: Robert C. Peterson, Director, State and Small Cities Division, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7282, Washington, DC 20410, telephone (202) 402-4211.

- *Regulation:* 24 CFR 91.105(c)(2) and (k), 24 CFR 91.115(c)(2) and (i), and 24 CFR 91.401.

Project/Activity: Any participating jurisdiction or grantee located in the declared-disaster area (see FEMA-DR-4671-PR) affected by Hurricane Fiona.

Nature of Requirement: This provision allows a CPD grantee to amend an approved consolidated plan in accordance with 24 CFR 91.505. Substantial amendments to the consolidated plan, such as the addition of new activities or a change in the use of grant funds from one eligible activity to another, are subject to the citizen participation process in the grantee’s citizen participation plan. The citizen participation plan must provide citizens with 30 days to comment on substantial amendments. The regulations require the grantee to follow its citizen participation plan to provide citizens with reasonable notice and opportunity to comment. The citizen participation plan must state how reasonable notice and opportunity to comment will be given.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: Given the need to expedite actions to respond to damage caused by Hurricane Fiona, HUD waives the 30-day public comment requirement of 24 CFR 91.105(c)(2) and (k), 91.115(c)(2), and (i), and 91.401, and reduces the public comment

period to no less than seven days. In reducing the comment period to seven days, HUD is balancing the need to quickly assist families dealing with the effects of Hurricane Fiona while continuing to provide reasonable notice and opportunity for citizens to comment on the proposed uses of CDBG, HOME, HTF, HOPWA, and ESG funds.

In addition, HUD recognizes the destruction wrought by Hurricane Fiona makes it difficult for impacted jurisdictions within the declared-disaster areas to provide notice to citizens in accordance with their citizen participation plans. Therefore, HUD waives 24 CFR 91.105(c)(2) and (k) and 24 CFR 91.115(c)(2) and (i) to allow these grantees to determine what constitutes reasonable notice and opportunity to comment given their circumstances.

Applicability: This authority is in effect for grantees within the declared-disaster areas through the end of the grantee's 2022 program year and is limited to facilitating preparation of FY 2022 Plan substantial amendments and substantial amendments to prior year plans.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

- **Regulation:** 24 CFR 92.203(a)(1) and (2).

Project/Activity: Projects located in the declared-disaster areas (see FEMA-DR-4671-PR).

Nature of Requirement: These sections of the HOME regulation require initial income determinations for HOME beneficiaries by examining source documents covering the most recent two months. Many families whose housing was destroyed or damaged by Hurricane Fiona will not have any documentation of income and will not be able to qualify for HOME assistance if the requirement remains effective.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: This waiver permits the participating jurisdiction to use self-certification of income, as provided in § 92.203(a)(1)(ii), in lieu of source documentation to determine eligibility for HOME assistance of persons displaced by Hurricane Fiona.

Applicability: This waiver applies only to families displaced by the disaster (as documented by FEMA registration) whose income documentation was destroyed or made inaccessible by Hurricane Fiona and remains in effect for six months from September 27, 2022. The participating jurisdiction or, as appropriate, HOME project owner, is required to maintain: (1) a record of FEMA registration to demonstrate that a family was displaced by Hurricane Fiona; and (2) a statement signed by appropriate family members certifying to the family's size and annual income and that the family's income documentation was destroyed or is inaccessible.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of

Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

- **Regulation:** 24 CFR 92.209(e), (h)(1), and (i).

Project/Activity: Projects located in the declared-disaster areas (see FEMA-DR-4671-PR).

Nature of Requirement: Section 92.209(e) requires that the term of a HOME TBRA contract made with a landlord begin on the first day of the lease. Section 92.209(h)(1) limits the subsidy that a participating jurisdiction may pay toward a TBRA recipient's rent to the difference between the participating jurisdiction's rent standard for the unit size and 30 percent of the family's monthly adjusted income. Section 92.209(i) requires that units occupied by TBRA recipients meet the housing quality standards established in 24 CFR 982.401.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: Suspending these provisions will provide the participating jurisdiction with greater flexibility to use tenant-based rental assistance as an emergency housing resource.

Applicability: The requirement in 24 CFR 92.209(e) that the start date of a TBRA contract begin on the first day of the term of a tenant's lease is waived for TBRA contracts a participating jurisdiction executes for persons or families displaced by Hurricane Fiona for a period of 24 months after September 27, 2022. The provision of 24 CFR 92.209(h)(1) imposing the maximum amount of TBRA assistance a participating jurisdiction may provide to a family under HOME TBRA is waived for TBRA recipients who are displaced by Hurricane Fiona for a period of 24 months after September 27, 2022. The waiver of the housing quality standards requirements at 24 CFR 92.209(i) applies to units leased by TBRA recipients who were displaced by Hurricane Fiona and are being assisted through a HOME TBRA program funded by the participating jurisdiction for a period of 24 months after September 27, 2022.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

- **Regulation:** 24 CFR 92.218 and 92.222(b).

Project/Activity: Any participating jurisdiction located in the declared-disaster areas (see FEMA-DR-4671-PR).

Nature of Requirement: This provision requires all HOME participating jurisdictions to contribute throughout the fiscal year to housing that qualifies as affordable housing under the HOME program. The contributions must total no less than 25 percent of the HOME funds drawn from the participating jurisdiction's HOME Investment Trust Fund Treasury account. Reducing the match requirement for the participating jurisdiction by 100 percent for FY 2022 and FY 2023 will eliminate the need for the participating jurisdiction to identify match for HOME projects related to the damage caused by

Hurricane Fiona. The requirement that the participating jurisdiction must submit a copy of the Presidential major disaster-declaration is waived.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: Given the urgent housing needs created by Hurricane Fiona and the substantial financial impact the participating jurisdiction will face in addressing those needs, the approval of a match reduction will relieve the participating jurisdiction from the need to identify and provide matching contributions to HOME projects.

Applicability: This match reduction applies to funds expended by a participating jurisdiction located in the declared-disaster areas from October 1, 2021, through September 30, 2023. The suspension also applies to State-funded HOME projects located in declared-disaster areas.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

- **Regulation:** 24 CFR 92.251.

Project/Activity: Projects located in the declared-disaster areas (see FEMA-DR-4671-PR).

Nature of Requirement: This provision requires that housing assisted with HOME funds meet property standards based on the activity undertaken, *i.e.*, homebuyer assistance, and state and local standards and codes or model codes for rehabilitation and new construction.

Property standard requirements are waived for repair of properties damaged by Hurricane Fiona. Units must meet State and local health and safety codes. The lead housing safety regulations established in 24 CFR part 35 are not waived. Also, accessibility requirements at 24 CFR 92.251(a)(2)(i) are not waived.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: This waiver is required to enable the participating jurisdiction to meet the critical housing needs of families whose housing was damaged and families who were displaced by Hurricane Fiona.

Applicability: This waiver applies only to housing units located in the declared-disaster areas which were damaged by the disaster and to which HOME funds are committed within two years of September 27, 2022.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

- **Regulation:** 24 CFR 93.151(c).

Project/Activity: Projects located in the declared-disaster areas (see FEMA-DR-4671-PR).

Nature of Requirement: This section of the HTF regulation requires initial income determinations for HTF beneficiaries by examining source documents covering the most recent two months. Many families whose homes were destroyed or damaged by

Hurricane Fiona will not have any documentation of income and will not be able to qualify for HTF assistance if the requirement remains effective.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary.

Date Granted: September 27, 2022.

Reason Waived: This waiver permits the grantee to use self-certification of income, as provided in section 93.151(d)(2), for HTF assisted units in lieu of source documentation to determine initial eligibility of persons displaced by Hurricane Fiona.

Applicability: This waiver applies only to families displaced by the disaster (as documented by FEMA registration) whose income documentation was destroyed or made inaccessible by Hurricane Fiona and remains in effect for six months from September 27, 2022. The grantee or, as appropriate, HTF project owner, is required to maintain: (1) a record of FEMA registration to demonstrate that a family was displaced by Hurricane Fiona; and (2) a statement signed by appropriate family members certifying to the family's size and annual income and that the family's income documentation was destroyed or is inaccessible.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: The cities of Bakersfield, California, El Monte, California, and Los Angeles, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by the local public housing agency (PHA) for 22nd Street Lofts, 88th & Vermont, the Metro Family Housing project, and Ybarra Village, four HOME-assisted projects.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: Jemine A. Bryon, Acting General Deputy Assistant Secretary for Community Planning and Development.

Date Granted: July 18, 2022.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: Marin County, California, requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by the local public housing agency (PHA) for Centertown Apartments, a HOME-assisted project.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: Jemine A. Bryon, Acting General Deputy Assistant Secretary for Community Planning and Development.

Date Granted: July 18, 2022.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: The State of Georgia requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by the local public housing agency (PHA) for Providence at Parkway Village Apartments, a HOME-assisted project.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: Jemine A. Bryon, Acting General Deputy Assistant Secretary for Community Planning and Development.

Date Granted: July 18, 2022.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban

Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

• *Regulation:* 24 CFR 92.252(d)(1) Utility Allowance Requirements.

Project/Activity: The State of North Dakota requested a waiver of 24 CFR 92.252(d)(1) to allow use of the utility allowance established by the local public housing agency (PHA) for Monterey Apartments and Winterland Apartments, two HOME-assisted projects.

Nature of Requirement: The regulation at 24 CFR 92.252(d)(1) requires participating jurisdictions to establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. However, participating jurisdictions are not permitted to use the utility allowance established by the local public housing authority for HOME-assisted rental projects for which HOME funds were committed on or after August 23, 2013.

Granted By: Marion M. McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: August 29, 2022.

Reason Waived: The HOME requirements for establishing a utility allowances conflict with Project Based Voucher program requirements. It is not possible to use two different utility allowances to set the rent for a single unit and it is administratively burdensome to require a project owner establish and implement different utility allowances for HOME-assisted units and non-HOME assisted units in a project.

Contact: Virginia Sardone, Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7160, Washington, DC 20410, telephone (202) 708-2684.

• *Regulation:* 24 CFR 574.310(b)(2)(iii), Space and Security.

Project/Activity: City of Tampa, FL; State of Arkansas; City of Denver, CO; State of Connecticut; City of Salt Lake City, UT; City of Los Angeles, CA; State of Hawaii; City of Las Vegas, NV.

Nature of Requirement: This section of the HOPWA regulations provides that each resident must be afforded adequate space and security for themselves and their belongings.

Granted By: Jemine A. Bryon, Deputy Assistant Secretary for Special Needs.

Date Granted: July 1, 2022–September 30, 2022.

Reason Waived: In 2020, CPD began issuing waivers of regulatory authority available on a nationwide basis with a simplified opt-in process to help recipients prevent and mitigate the spread of COVID-19. Between March 31, 2020, and December 30, 2021, CPD published several memoranda announcing nationwide availability of regulatory waivers. Under Notice CPD-22-09, issued on June 15, 2022, HOPWA grantees were provided the opportunity to apply for certain regulatory waivers to provide continued flexibility during the COVID-19 pandemic and pandemic recovery.

Notice CPD-22-09 provided expedited processing of requests to waive 24 CFR 574.310(b)(2)(iii), so that grantees and project

sponsors operating housing facilities and shared housing arrangements can place more than two people in a room or reconfigure rooms, common areas and other appropriate spaces for temporary quarantine services of eligible individuals and families affected by COVID-19. Notice CPD-22-09 required grantees to justify in the waiver request why the grantee or project sponsor cannot provide adequate space and security in accordance with the standard provided at 24 CFR 574.310(b)(2)(iii). The waiver request must also specify the period during which the grantee needs to use this waiver and that effective period must not extend beyond March 31, 2023.

Contact: Amy Palilonis, Office of HIV/AIDS Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7248, Washington, DC 20410, telephone (202) 402-5916, amy.l.palilonis@hud.gov.

• **Regulation:** 24 CFR 574.330(a)(1), Time Limits for Short-Term Housing Facilities and Short-Term Rent, Mortgage, and Utility Payments.

Project/Activity: City of Kansas City, MO; City of Cincinnati, OH; State of Louisiana; City of Tampa, FL; State of Florida; City of Boston, MA; State of Arkansas; State of Connecticut; City of Fort Lauderdale, FL; State of Hawaii; State of Kansas; City of Salt Lake City, UT; State of Wisconsin; State of Georgia; City of Oakland, CA; City of New York City, NY; City of Dallas, TX; City of Los Angeles, CA; State of New York; City of Richmond, VA; City of Denver, CO; State of Kentucky; City of Las Vegas, NV; Commonwealth of Puerto Rico.

Nature of Requirement: This section of the HOPWA regulations limits the total amount of time an eligible individual or family can reside in a short-term supported housing facility to no more than 60 days during any six-month period. It also limits the Short-Term Rent, Mortgage, and Utility (STRMU) payments to prevent the homelessness of the tenant or mortgagor of a dwelling to no more than 21 weeks in any 52-week period.

Granted By: Jemine A. Bryon, Deputy Assistant Secretary for Special Needs.

Date Granted: July 1, 2022–September 30, 2022.

Reason Waived: In 2020, CPD began issuing waivers of regulatory authority available on a nationwide basis with a simplified opt-in process to help recipients prevent and mitigate the spread of COVID-19. Between March 31, 2020, and December 30, 2021, CPD published several memoranda announcing nationwide availability of regulatory waivers. Under Notice CPD-22-09, issued on June 15, 2022, HOPWA grantees were provided the opportunity to apply for certain regulatory waivers to provide continued flexibility during the COVID-19 pandemic and pandemic recovery.

Notice CPD-22-09 provided expedited processing of grantee requests to waive the 21-week and 60-day limitations in 24 CFR 574.330(a)(1). In utilizing the waiver, the grantee or project sponsor must document, on an individual household basis, that a good faith effort has been made to assist the

household to achieve housing stability within the time limits specified in the regulations, but that financial needs or health and safety concerns have prevented the household from doing so. The grantee or project sponsor must also have written policies and procedures outlining efforts to regularly re-assess the needs of assisted households, as well as processes for granting extensions based on documented financial needs or health and safety concerns. The waiver request must specify the alternative limits to be used in place of the 21-week and 60-day limit as applicable, and those limits must not exceed 52 weeks and 120 days, respectively and specify the period during which the grantee needs to use this waiver and that effective period must not extend beyond March 31, 2023.

Contact: Amy Palilonis, Office of HIV/AIDS Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7248, Washington, DC 20410, telephone (202) 402-5916, amy.l.palilonis@hud.gov.

• **Regulation:** 24 CFR 574.530, Self-Certification of Income and Credible Information on HIV Status.

Project/Activity: Maui AIDS Foundation; City of Kansas City, MO; City of Cincinnati, OH; State of Louisiana; City of Tampa, FL; City of Boston, MA; State of Arkansas; State of Connecticut; City of Salt Lake City, UT; State of Wisconsin; Chicago House and Social Service Agency; City of Denver, CO; City of New York City, NY; City of Los Angeles, CA; State of New York; Commonwealth of Puerto Rico; State of Georgia; State of Hawaii; City of Las Vegas, NV.

Nature of Requirement: HOPWA grantees and project sponsors must maintain records to document compliance with HOPWA requirements, which includes determining the eligibility of a family to receive HOPWA assistance.

Granted By: Jemine A. Bryon, Deputy Assistant Secretary for Special Needs.

Date Granted: July 1, 2022–September 30, 2022.

Reason Waived: In 2020, CPD began issuing waivers of regulatory authority available on a nationwide basis with a simplified opt-in process to help recipients prevent and mitigate the spread of COVID-19. Between March 31, 2020, and December 30, 2021, CPD published several memoranda announcing nationwide availability of regulatory waivers. Under Notice CPD-22-09, issued on June 15, 2022, HOPWA grantees were provided the opportunity to apply for certain regulatory waivers to provide continued flexibility during the COVID-19 pandemic and pandemic recovery.

Notice CPD-22-09 provided expedited processing of requests to waive the requirement at 24 CFR 574.530 to have source documentation of HIV status at the time of the determination of eligibility. In utilizing the waiver, grantees and project sponsors may accept written certification of HIV status and income to document eligibility of an individual or family seeking assistance if the grantee or project sponsor

agrees to obtain source documentation of HIV status and income eligibility within 90 days of obtaining the written certification. Grantees and project sponsors must provide justification as to why source documentation cannot be acquired at the time of the eligibility determination. The waiver request must specify the period during which the grantee needs to use this waiver and that effective period must not extend beyond March 31, 2023.

Contact: Amy Palilonis, Office of HIV/AIDS Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7248, Washington, DC 20410, telephone (202) 402-5916, amy.l.palilonis@hud.gov.

I. Mega-Waiver for Hurricane Fiona—Continuum of Care (CoC) Program

On September 27, 2022, Principal Deputy Assistant Secretary Marion McFadden issued a memorandum offering waivers of certain statutory and regulatory requirements associated with several Community Planning and Development (CPD) grant programs to address damage and facilitate recovery from Hurricane Fiona in areas covered by a major disaster declaration under Title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), DR-4671-PR, dated September 21, 2022, and as may be amended (the “declared-disaster areas”). The following summarizes the waivers available for CoC Program Recipients. The September 27, 2022, memorandum was updated on December 8, 2022, to clarify the documentation requirements to support the use of some waivers to assist impacted individuals and provide greater clarity on the use of some waivers outside of the declared disaster area. CoC—Permanent Housing Rapid Re-Housing Limit to 24 Months of Rental Assistance

• **Regulation:** 24 CFR 578.37(a)(1)(ii), 24 CFR 578.37(a)(1)(ii)(C), and 24 CFR 578.51(a)(1)(i).

Project/Activity: For two years from September 27, 2022 the 24-month limit on rental assistance is waived for individuals and families who meet the following criteria. (1) The individual or family lives in a declared-disaster area or was displaced from a declared-disaster area as a result of the disaster; and (2) the individual or family is currently receiving rental assistance or begins receiving rental assistance within two years after the date of the memorandum.

Nature of Requirement: The CoC Program regulation at 24 CFR 578.37(a)(1)(ii) and 24 CFR 578.51(a)(1)(i) defines medium-term rental assistance as 3 to 24 months and 24 CFR 578.37(a)(1)(ii)(C) limits rapid re-housing projects to medium-term rental assistance, or no more than 24 months.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving the 24-month cap on rapid re-housing rental assistance will assist individuals and families affected by the disaster, including those already receiving rental assistance as well as those who will

receive rental assistance within 2 years of the date of the memorandum, to maintain stable permanent housing in another area and help them return to their hometowns, as desired, when additional permanent housing becomes available. It will also provide additional time to stabilize individuals and families in permanent housing where vacancy rates are extraordinarily low due to the disaster. Experience with prior disasters has shown us some program participants need additional months of rental assistance to identify and stabilize in housing of their choice, which can mean moving elsewhere until they are able to return to their hometowns.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—One Year Lease Requirement

- **Regulation:** 24 CFR 578.3, definition of permanent housing, 24 CFR 578.51(l)(1).

Project/Activity: The one-year lease requirement is waived for two years beginning on September 27, 2022, for program participants living in a declared-disaster area or program participants displaced from a declared-disaster area as a result of the disaster, so long as the initial lease term of all leases is for more than one month, and the leases are renewable for terms that are a minimum of one month long and the leases are terminable only for cause.

Nature of Requirement: The CoC Program regulation at 24 CFR 578.3, definition of permanent housing, and 24 CFR 578.51(l)(1) requires program participants residing in permanent housing to be the tenant on a lease for a term of one year that is renewable and terminable only for cause.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving the one-year lease requirement will allow program participants receiving PSH or RRH assistance under the CoC Program to enter leases that have an initial term of less than one year, so long as the leases have an initial term of more than one month. While some program participants desire to identify new housing, many program participants displaced during the disaster desire to return to their original permanent housing units when repairs are complete because of proximity to schools and access to public transportation and services. Additionally, it will permit new program participants to identify permanent housing units in a tight rental market where many landlords prefer lease terms of less than one year and might not be willing to alter their policies regarding the length of lease terms when considering permanent housing applicants. Therefore, HUD had determined that waiving the one-year lease requirement will improve the housing options available to program participants in permanent housing projects.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban

Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—One-Time Limit on Moving Costs

- **Regulation:** 24 CFR 578.53(e)(2).

Project/Activity: The one-time limit on moving costs of program participants is waived for two years beginning on September 27, 2022, for program participants living in a declared-disaster area or program participants displaced from a declared-disaster area as a result of the disaster.

Nature of Requirement: The CoC Program regulation at 24 CFR 578.53(e)(2) limits recipients of supportive service funds to using those funds to pay for moving costs to provide reasonable moving assistance, including truck rental and hiring a moving company, to only one-time per program participant.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving this provision will permit recipients to pay for reasonable moving costs for program participants more than once and will assist program participants affected by the disaster as well as those who become homeless in the areas impacted by the disaster to stabilize in housing locations of their choice. Many current program participants received assistance moving into their assisted units prior to being displaced by the disaster, and experience with prior disasters has shown us some program participants will need additional assistance moving to a new unit while others will need assistance moving back to their original units after repairs are completed. Further, until the housing market stabilizes, experience has shown many program participants will need to move more than once during their participation in a program to find a unit that best meets their needs.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—Fair Market Rent (FMR) Cap on Rent Paid With Leasing Funds

- **Regulation:** 24 CFR 578.49(b)(2).

Project/Activity: The FMR restriction is waived for any lease executed by a recipient or subrecipient in declared-declared areas to provide transitional or permanent supportive housing during the 2-year period beginning on September 27, 2022. The affected recipient or subrecipient must still ensure that rent paid for individual units that are leased with CoC Program leasing dollars meet the rent reasonableness standard in 24 CFR 578.49(b)(2) meaning the rent paid must be reasonable in relation to rents being charged for comparable units, taking into account the location, size, type, quality, amenities, facilities, and management services.

Nature of Requirement: The CoC Program regulation at 24 CFR 578.49(b)(2) prohibits a recipient from using grant funds for leasing to pay above FMR when leasing individual

units, even if the rent is reasonable when compared to other similar, unassisted units.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving the limit on using leasing funds to pay above FMR for individual units above FMR, but not greater than reasonable rent, will provide recipients and subrecipients with more flexibility in identifying housing options for program participants in declared-declared areas. The rental markets in areas impacted by disasters are often more expensive after the disaster due to decreased housing stock and increased rents. These more expensive rents are not reflected in the HUD-determined FMRs.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—Disability Documentation for Permanent Supportive Housing (PSH)

- **Regulation:** 24 CFR 578.103(a) and 24 CFR 578.103(a)(4)(i)(B).

Project/Activity: The requirement that intake-staff recorded observations of disability be confirmed and accompanied by other evidence no later than 45 days from the date of application for assistance is waived for any program participant admitted into PSH funded by the CoC program one-year from September 27, 2022, so long as (1) the intake-staff records observations of disability in the client file at time of application; or (2) the individual seeking assistance provides written certification that they have a qualifying disability is provided at time of application.

Nature of Requirement: 24 CFR 578.103(a) requires recipient to maintain records providing evidence they met program requirements and 24 CFR 578.103(a)(4)(i)(B) establishes the requirements for documenting disability for individuals and families that meet the “chronically homeless” definition in 24 CFR 578.3. Acceptable evidence of disability includes intake-staff recorded observations of disability no later than 45 days from the date of application for assistance, which is confirmed and accompanied by evidence in paragraphs 24 CFR 578.103(a)(4)(i)(B)(1), (2), (3), or (5). HUD is waiving the requirement to obtain additional evidence to confirm staff-recorded observations of disability.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving the requirement to obtain additional evidence of disability as provided in 24 CFR 578.103(a)(4)(i)(B)(4) as specified below will allow recipient to house people impacted by Hurricane Fiona by relying on intake staff-recorded observations of disability or a written self-certification by the program participant. This will help individuals and families with disabilities to expeditiously receive needed housing assistance when paperwork from the Social

Security Administration or medical professionals cannot be quickly obtained.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

II. Mega-Waiver for Hurricane Fiona—Emergency Solutions Grants (ESG) Program

On September 27, 2022, Principal Deputy Assistant Secretary Marion McFadden issued a memorandum offering waivers of certain statutory and regulatory requirements associated with several Community Planning and Development (CPD) grant programs to address damage and facilitate recovery from Hurricane Fiona in areas covered by a major disaster declaration under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), DR-4671-PR, dated September 21, 2022, and as may be amended (the “declared-disaster areas”). The following summarizes the waivers available for ESG Program Recipients.

ESG—Citizen Participation Public Comment Period for Consolidated Plan Amendment

- *Regulation:* 24 CFR 91.105(c)(2); 24 CFR 91.105(k) and 24 CFR 91.115(c)(2) and 24 CFR 91.115(i)—30-day Public Comment Period for Consolidated Plan Amendment.

Project/Activity: Many individuals and families residing in the declared-disaster area were affected, including the current beneficiaries of the ESG Program and families eligible to receive ESG assistance. The state has inquired about the availability of certain regulatory waivers of ESG Program requirements to facilitate recovery and assist individuals and families affected by the disaster. This authority is in effect through the end of the 2022 program year for grantees within the declared-disaster areas.

Nature of Requirement: An ESG Program recipient may amend an approved consolidated plan in accordance with 24 CFR 91.505. Substantial amendments to the consolidated plan, such as the addition of new activities or a change in the use of ESG Program funds from one eligible activity to another, are subject to the citizen participation process in the recipient’s citizen participation plan. The citizen participation plan must provide citizens with 30 days to comment on substantial amendments.

Regulations at 24 CFR 91.105(c)(2) and (k) and 24 CFR 91.115 (c)(2) and (i) set forth the citizen participation plan requirements for local governments and states, respectively. For substantial amendments to the consolidated plan, the regulations require the recipient to follow its citizen participation plan to provide citizens, for both local government and state plans, and units of general local government, for state plans, with reasonable notice and opportunity to comment. The citizen participation plan must state how reasonable notice and opportunity to comment will be given.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: HUD recognizes the destruction wrought by Hurricane Fiona makes it difficult for impacted jurisdictions within the declared-disaster areas to provide notice to citizens in accordance with their citizen participation plans. Therefore, HUD waives 24 CFR 91.105(c)(2) and (k) and 24 CFR 91.115(c)(2) and (i) to allow these grantees to determine what constitutes reasonable notice and opportunity to comment given their circumstances.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

ESG—Term Limits on Rental Assistance and Housing Relocation and Stabilization Services

- *Regulation:* 24 CFR 576.106(a); 24 CFR 576.105(a)(5); and 24 CFR 576.105(b)(2)—Term limits on Rental Assistance and Housing Relocation and Stabilization Services.

Project/Activity: The 24-month limits on rental assistance and housing relocation and stabilization services are waived for individuals and families who meet both of the following criteria: (1) the individual or family lives in a declared-disaster area or was displaced from a declared-disaster area as a result of Hurricane Fiona; and (2) the individual or family is currently receiving rental assistance or housing relocation stabilization services or begins receiving rental assistance or housing relocation and stabilization services within two years after the date of the memorandum. For these individuals and families, ESG funds may be used to provide up to 36 consecutive months of rental assistance, utility payments, and housing stability case management, in addition to the 30 days of housing stability case management that may be provided before the move into permanent housing under 24 CFR 576.105(b)(2). HUD will also consider further waiver requests to allow assistance to be provided for longer than three years, if the recipient demonstrates good cause.

Nature of Requirement: The ESG regulation at 24 CFR 576.106(a) prohibits a program participant from receiving more than 24 months of ESG rental assistance during any 3-year period. Section 576.105(a)(5) prohibits a program participant from receiving more than 24 months of utility payments under ESG during any 3-year period. Section 576.105(b)(2) limits the provision of housing stability case management to 30 days while the program participant is seeking permanent housing and 24 months while the program participant is living in permanent housing.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Waiving the 24-month caps on rental assistance, utility payments, and housing stability case management assistance will assist individuals and families, both those already receiving assistance and those who will receive

assistance subsequent to the date of the memorandum to maintain stable permanent housing in place or in another area and help them return to their hometowns, as desired, when additional permanent housing is available.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

ESG—Restriction of Rental Assistance to Units With Rent at or Below Fair Market Rent (FMR)

- *Regulation:* 24 CFR 576.106(d)(1).

Project/Activity: The FMR restriction is waived for any rent amount that takes effect during the two-year period beginning on September 27, 2022, for any individual or family who is renting or executes a lease for a unit in a declared-disaster area. However, the affected recipients and their subrecipients must still ensure that the units in which ESG assistance is provided to these individuals and families meet the rent reasonableness standard. HUD will consider requests to waive the FMR restriction for rent amounts that take effect after the two-year period, if a recipient demonstrates good cause.

Nature of Requirement: Under 24 CFR 576.106(d)(1), rental assistance cannot be provided unless the total rent is equal to or less than the FMR established by HUD, as provided under 24 CFR part 888, and complies with HUD’s standard of rent reasonableness, as established under 24 CFR 982.507.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: HUD granted this waiver to enable ESG recipients to meet the critical housing needs of individuals and families whose housing was damaged or who were displaced as a result of Hurricane Fiona. Waiving the FMR restriction will make more units available to individuals and families in need of permanent housing.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

ESG—Housing Standards

- *Regulation:* 24 CFR 576.403(c).

Project/Activity: The ESG housing standards at 24 CFR 576.403(c) are waived for units in the declared disaster area that are or will be occupied by individuals or families eligible for ESG Rapid Re-housing or Homelessness Prevention assistance, provided that: 1. Each unit must still meet applicable state and local standards; 2. Each unit must be free of life-threatening conditions as defined in Notice PIH 2017-20 (HA); and 3. Recipients must make sure all units in which program participants are assisted meet the ESG housing standards within 60 days of September 27, 2022.

Nature of Requirement: If ESG funds are used to help a program participant remain in or move into housing, the housing must meet the minimum habitability standards provided in 24 CFR 576.403(c).

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: This waiver is needed to enable ESG recipients to expeditiously meet the critical housing needs of many eligible individuals and families in the declared disaster area.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

ESG—Shelter Standards

- *Regulation:* 24 CFR 576.403(b).

Project/Activity: The ESG shelter standards at 24 CFR 576.403(b) are waived for shelters in the declared disaster area that are or will be occupied by individuals and families eligible for ESG emergency shelter assistance, provided that: (1) Each shelter must meet applicable state and local standards; (2) Each shelter must be free of life-threatening conditions defined in Notice PIH 2017–20 (HA); and (3) Recipients ensure that these shelters

Nature of Requirement: If ESG funds are used for shelter operations costs, the shelter must meet the minimum safety, sanitation and privacy standards under 24 CFR 576.403(b). If ESG funds are used to convert a building into a shelter, rehabilitation a shelter, or otherwise renovate a shelter, the shelter must meet the minimum safety, sanitation, and privacy standards in 24 CFR 576.403(b) as well as applicable state or local government safety and sanitation standards.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: This waiver is needed to enable ESG recipients to expeditiously meet the critical emergency shelter needs of many eligible individuals and families in the declared disaster area.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

ESG—Limited Waiver of 24-Month Expenditure Deadline for Rapid Re-Housing and Homelessness Prevention Assistance and Related Administrative and HMIS Costs

- *Regulation:* 24 CFR 576.203(b).

Project/Activity: The expenditure deadline is waived only for costs of providing homelessness prevention and rapid re-housing assistance to individuals and families under the flexibility provided by and reasonable HMIS and administrative costs related to that assistance. In addition, no expenditure may be made or charged to any grant on or after the date Treasury closes the relevant account as provided by 31 U.S.C. 1552.

Nature of Requirement: Section 576.203(b) of the ESG regulations requires all expenditures under an ESG grant to be made within 24 months after the date HUD signs the grant agreement with the recipient. For purposes of this requirement, expenditure means either an actual cash disbursement for a direct charge for a good or service or an indirect cost, or the accrual of a direct charge for a good or service or an indirect cost.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: Providing a limited waiver of the expenditure deadline as described in the applicability paragraph below will support recipients’ ability to assist individuals and families as provided by waivers 19 and 20 above.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

ESG—Assisting Program Participants With Subleases

- *Regulation:* 24 CFR 576.105 and 24 CFR 576.106.

Project/Activity: The requirements in 24 CFR 576.105 and 576.106 are waived to the extent that the references to “owner” and “lease” in 24 CFR 576.105 and 576.106 restrict an individual or family from receiving assistance in a unit they rent from the primary leaseholder, provided that all of the following criteria are met: 1. The individual or family lives in the declared-disaster area or was displaced from the declared-disaster area as a result of Hurricane Fiona; 2. The individual or family is currently receiving ESG-funded rental assistance as the leaseholder or housing relocation stabilization services or begins receiving rental assistance or housing relocation stabilization services within two years after September 27, 2022; 3. The individual or family chooses to rent a unit through a legally valid sublease or lease with the primary leaseholder for the unit; and 4. The recipient has developed written policies to apply the requirements of 24 CFR 576.105, 24 CFR 576.106, 24 CFR 576.409, and 24 CFR

576.500(h) with respect to that program participant by reading the references to “owner” and “housing owner” to apply to the primary leaseholder and reading the references to “lease” to apply to the program participant’s sublease or lease with the primary leaseholder.

Nature of Requirement: The use of “owner” and “lease” in 24 CFR 576.105 and 576.106 prohibit program participants from receiving rental assistance under 24 CFR 576.106 and certain services under 24 CFR 576.105 with respect to units that program participants rent from a person other than the owner or the owner’s agent. Justification: By increasing the permissible housing options for program participations, this waiver would allow the recipient to meet the critical housing needs of more eligible individuals and families in the declared disaster area.

Granted By: Marion McFadden, Principal Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 27, 2022.

Reason Waived: By increasing the permissible housing options for program participations, this waiver would allow the recipient to meet the critical housing needs of more eligible individuals and families in the declared disaster area.

Contact: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

III. Expedited COVID–19 Waivers (Notice CPD–22–09)—CoC

CoC—Suitable Dwelling Size and Housing Quality Standards—Permanent Housing—Rapid Re-Housing Projects

- *Regulation:* 24 CFR 578.75(c), and 24 CFR 982.401(d)(2)(ii) as required by 24 CFR 578.75(b).

Nature of Requirement: 4 CFR 578.75(c), suitable dwelling size, and 24 CFR 982.401(d)(2)(ii) as required by 578.75(b), Housing Quality Standards, requires units funded with CoC Program funds to have at least one bedroom or living/sleeping room for each two persons.

The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD–22–09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Project/activity	Date granted	Reasons waived
	Grant Nos.		
Erie County	PA0856L3E052004, PA0856L3E052105	7/1/2022	A, B
Project Community Connections, Inc	GA0314L4B002005, GA0278LB012006, GA0334L4B012004, GA0317L4B012005, GA0327L4B082005	7/18/2022	A, B
Eastern Carolina Housing Organization	SC0123L4E032106, SC0123L4E032005, SC0147L4E032104, SC0147L4E032003, SC0148L4E032104, SC0148L4E032003, SC0166L4E032102, SC0166L4E032001, SC0160D4E032103, SC0160D4E032002, SC0179D4E032100	7/25/2022	A

Grantee	Project/activity Grant Nos.	Date granted	Reasons waived
Clark County Homeless Coalition, Inc	KY0204L4I001901	8/16/2022	A
The Kitchen, Inc	MO0187L7P002007, MO0208L7P002005	8/16/2022	A
S.H.A.R.E. House, Inc	GA0295L4B012106	8/16/2022	A
Lee County Board of County Commissioners.	FL0537L4D032107, FL0815L4D032102, FL0816L4D032102, FL0817L4D032102, FL0818L4D032102.	8/16/2022	A, B
Services for the Underserved, Inc	NY1174L2T032104, NY1231L2T031901	8/16/2022	A
County of Kent	MI0173L5F062013, MI0173L5F062114, MI0174L5F062013, MI0174L5F062114	8/18/2022	A
Kentucky Housing Coalition	KY0024L4I002114, KY0138L4I002005, KY0138L4I002106, KY0145L4I002005, KY0150L4I002005, KY0151L4I002005, KY0151L4I002013, KY0152L4I002006, KY0152L4I002107, KY0154L4I002005, KY0154L4I002106, KY0156L4I002005, KY0156L4I002106.	8/17/2022	A
Pottstown Cluster of Religious Communities	PA0767L3T042005	8/24/2022	A, B
Valley Youth House Committee	PA0808L3T092004, PA0808L3T092105, PA0887L3T092003, PA0887L3T092104, PA0825L3T122004, PA0825L3T122105, PA0893L3T122003, PA0893L3T122104, PA0924L3T082002, PA0924L3T082103, PA0970L3T112001, PA0970L3T112102, PA0917L3T042002, PA0917L3T042103, PA0765L3T032005, PA0765L3T032106, PA0687L3T042107.	8/24/2022	A
Valencia Shelter Services	NM0056L6B012112, NM0129D6B012103	8/24/2022	A
Strategies to End Homelessness	OH0686Y5E002100, OH0683U5E002100, OH9999U5E002106	8/24/2022	A
Decatur Cooperative Ministry	GA0364L4B082003	8/30/2022	A
San Diego Housing Commission	CA0534L9D012013	9/7/2022	A
Barren River Area Safe Space, Inc	KY0206D4I002002; KY0206D4I002103	9/7/2022	A
Partners for HOME	GA0418D4B002100	9/9/2022	A
Community Resource Center	CA1598L9D012105, CA1793D9D012103	9/9/2022	A
St. Louis County, MO	MO0304L7E002001, MO0248L7E002003	9/9/2022	A
City of Indianapolis	IN0227Y5H031800, IN0228Y5H031800, IN0230Y5H031800, IN0186L5H032106, IN0196L5H032105, IN0209L5H032104, IN0225D5H032102, IN0247L5H032100.	9/29/2022	A

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local data related to the pandemic's impact that supports the waiver flexibility, the number of unassisted households living in units with more than two persons per room in the geographic area).

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban

Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—Fair Market Rent for Individual Units and Leasing Costs

- Regulation: 24 CFR 578.49(b)(2).

Nature of Requirement: 24 CFR 578.49(b)(2) prohibits a recipient from using grant funds for leasing to pay above FMR

when leasing individual units, even if the rent is reasonable when compared to other similar, unassisted units.

The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Mental Health Association of Tulsa, Inc	OK0114L6I012005, OK0114L6I012106, OK0043L6I012012, OK0043L6I012113	7/1/2022	A, B
Erie County	PA0854L3E052004, PA0463L3E052110	7/1/2022	A
The Center of Concern	IL0275L5T112013, IL0275L5T112114	7/8/2022	A
EightCAP, Inc	MI0435L5F002007, MI0668L5F002001	7/12/2022	A
Society of St. Vincent de Paul, Council of Louisville, Inc.	KY0131L4I012108, KY0095L4I012012, KY0095L4I012113	7/15/2022	A
Keystone Opportunity Center	PA0625L3T042007, PA0625L3T042108	7/18/2022	A, B
Eastern Carolina Housing Organization	SC0136L4E032105, SC0136L4E032004, SC0034L4E032114, SC0034L4E032013, SC0147L4E032104, SC0147L4E032003, SC0148L4E032104, SC0148L4E032003, SC0160D4E032103, SC0160D4E032002, SC0179D4E032100.	7/25/2022	A, B
Arizona Department of Housing	AZ0022L9T002013, AZ0022U9T002114	7/25/2022	A, B
Housing First Inc	AL0131L4C012005, AL0028L4C012013, AL0037L4C012013	8/1/2022	A, B
Community Rebuilders	MI0315L5F062111, MI0345L5F062110, MI0412L5F062007, MI0412L5F062108, MI0578L5F062003, MI0578L5F062104, MI0650D5F062001, MI0650D5F062102.	8/1/2022	B
Volunteers of America of Florida, Inc.	FL0247L4D012114, FL0192L4D002013	8/1/2022	A, B
City of Oklahoma	OK0127L6I022004, OK0127L6I022105, OK0052L6I022109	8/1/2022	B
Families First of Palm Beach County	FL0275L4D052012	8/1/2022	B
Clark County Homeless Coalition, Inc	KY0204L4I001901	8/16/2022	A
The Kitchen, Inc	MO0182L7P002007	8/16/2022	A, B
Family Gateway	TX0285L6T002009	8/16/2022	A, B
Crossroads Rhode Island	RI0003L1T002013, RI0003L1T002114, RI0030L1T002013	8/16/2022	A, B
Housing Services Mid Michigan	MI0327L5F232009, MI0327L5F232110	8/16/2022	A, B
County of Kent	MI0173L5F062013, MI0173L5F062114, MI0174L5F062013, MI0174L5F062114	8/18/2022	A, B
Kentucky Housing Coalition	KY0027L4I002013, KY0027L4I002114, KY0022L4I002013, KY0022L4I002114, KY0012L4I002013, KY0012L4I002114, KY0155L4I002005, KY0155L4I002106, KY0113L4I002008, KY0113L4I002109, KY0157L4I002005, KY0157L4I002106, KY0121L4I002009, KY0121L4I002110, KY0030L4I002114, KY0106L4I002110, KY0013L4I002114, KY0039L4I002013, KY0014L4I002114.	8/17/2022	A, B
Together We Cope	IL0237L5T112012, IL0252L5T112013, IL0237L5T112113, IL0252L5T112114	8/17/2022	B
Wayne County CoC	PA0883L3T092003, PA0883L3T092104	8/24/2022	B
Valley Youth House Committee	PA0893L3T122003, PA0893L3T122104, PA0917L3T042002, PA0917L3T042103	8/24/2022	B
Strategies to End Homelessness	OH0686Y5E002100, OH0683U5E002100, OH9999U5E002106	8/24/2022	A, B

Grantee	Grant Nos.	Date granted	Reasons waived
Thresholds	IL0554L5T112107, IL0578L5T102107, IL0417L5T022110, IL0577L5T102007, IL0577L5T102108, IL0002L5T002013, IL0002L5T002114, IL1675L5T002001, IL1675L5T002102.	8/25/2022	B
Concern for Independent Living	NY0528L2T032013	8/31/2022	B
Findlay Hope House for the Homeless, Inc	OH0383L5E072108	8/30/2022	B
Decatur Cooperative Ministry	GA0364L4B082003	8/30/2022	B
Coalition for the Homeless	KY0048L4I012011, KY0048L4I012112, KY0050L4I012114, KY0061L4I012114, KY0097L4I012113, KY0099L4I012012, KY0099L4I012113, KY0124L4I012009, KY0124L4I012110, KY0173L4I012004, KY0173L4I012105.	9/9/2022	B
Volunteers of America Oklahoma	OK0060L6I012112	9/7/2022	B
Monroe County Opportunity Program	MI0248L5F152012	9/9/2022	A, B
St. Louis County, MO	MO0003L7E002012, MO0106L7E002010	9/9/2022	A, B
OneEighty	OH0469L5E072105	9/23/2022	A, B
Connections for the Homeless, Inc	IL0053L5T112114	9/23/2022	B
City of Indianapolis	IN0073L5H032114	9/29/2022	B
Guam Housing & Urban Renewal	GU0018L9C002007, GU0018L9C002108	9/29/2022	A, B

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, increased rental rates, low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—One-Year Lease Requirement

- **Regulation:** 24 CFR 578.3 and 24 CFR 578.51(l)(1).
- Nature of Requirement:** 24 CFR 578.3, definition of permanent housing, and 24 CFR 578.51(l)(1) requires program participants residing in permanent housing to be the tenant on a lease for a term of at least one

year that is renewable and terminable for cause. The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Erie County	PA0331L3E052013, PA0331L3E052114, PA0854L3E052004, PA0856L3E052004, PA0856L3E052105, PA0463L3E052110.	7/1/2022	A, B
Catholic Charities of West Tennessee	TN0241L4J012106	7/12/2022	A, B
Project Community Connections, Inc	GA0314L4B002005, GA0278LBO12006, GA0334L4B012004, GA0317L4B012005, GA0327L4B082005.	7/18/2022	A
Connecticut Department of Mental Health and Addiction Service.	CT0161L1E052009, CT0022L1E052013, CT0054L1E052013, CT0062L1E052013, CT0070L1E052013, CT0073L1E052013, CT0089L1E052013, CT0164L1E052011, CT0035L1E032013, CT0061L1E052013, CT0211L1E052008, CT0011L1E052013, CT0013L1E052013, CT0131L1E052012, CT0151L1E052012, CT0212L1E052009, CT0246L1E052007, CT0265L1E052006, CT0285L1E032005, CT0286L1E052005, CT0297L1E052004, CT0328L1E032002, CT0329L1E032002, CT0340L1E052001, CT0077L1E052013, CT0162L1E052006, CT0034L1E032013, CT0176L1E052009, CT0052L1E052013, CT0129L1E052012, CT0142L1E052012, CT0154L1E052010, CT0172L1E052008, CT0185L1E052010, CT0200L1E052009, CT0204L1E052009, CT0210L1E032009, CT0076L1E052013, CT0053L1E052013, CT0141L1E052012, CT0104L1E032013, CT0324L1E032002, CT0012L1E052013, CT0023L1E052013, CT0135L1E052012, CT0237L1E052008, CT0161L1E052110, CT0022L1E052114, CT0054L1E052114, CT0062L1E052114, CT0070L1E052114, CT0073L1E052114, CT0089L1E052114, CT0164L1E052112, CT0035L1E032114, CT0061L1E052114, CT0211L1E052109, CT0011L1E052114, CT0013L1E052114, CT0131L1E052113, CT0151L1E052012, CT0212L1E052009, CT0246L1E052108, CT0265L1E052107, CT0285L1E032106, CT0286L1E052106, CT0297L1E052105, CT0328L1E032103, CT0329L1E032103, CT0340L1E052102, CT0077L1E052114, CT0034L1E032114, CT0176L1E052110, CT0052L1E052114, CT0129L1E052113, CT0142L1E052113, CT0154L1E052111, CT0172L1E052109, CT0185L1E052111, CT0200L1E052110, CT0204L1E052110, CT0210L1E032110, CT0076L1E052114, CT0053L1E052114, CT0141L1E052113, CT0104L1E032114, CT0324L1E032103, CT0012L1E052114, CT0023L1E052114, CT0135L1E052113, CT0237L1E052109, CT0355L1E052100.	7/25/2022	A, B
Eastern Carolina Housing Organization	SC0136L4E032105, SC0136L4E032004, SC0123L4E032106, SC0123L4E032005, SC0034L4E032114, SC0034L4E032013, SC0147L4E032104, SC0147L4E032003, SC0148L4E032104, SC0148L4E032003, SC0166L4E032102, SC0166L4E032001, SC0160D4E032103, SC0160D4E032002, SC0179D4E032100.	7/25/2022	A, B
Housing First Inc.	AL0131L4C012005, AL0028L4C012013, AL0037L4C012013	8/1/2022	A, B
Community Renewal Team	CT0059L1E052114, CT0272L1E052106, CT0261L1E052107	8/16/2022	A, B
S.H.A.R.E. House, Inc	GA0295L4B012106	8/16/2022	A
Dakota County	MN0077L5K02114	8/16/2022	A
Lee County Board of County Commissioners.	FL0537L4D032107, FL0815L4D032102, FL0816L4D032102, FL0817L4D032102, FL0818L4D032102.	8/16/2022	A
Chester County Department of Community Development.	PA0148L3T052114, PA0729L3T052106, PA0768L3T052106, PA0877L3T052104, PA0919L3T052103, PA0990L3T052102, PA1025L3T052100.	8/16/2022	A
Humboldt County	CA1192L9T222007, CA0852L9T222009	8/16/2022	A
Services for the Underserved, Inc	NY1174L2T032104, NY1231L2T031901	8/16/2022	A
Partners Health management	NC0099L4F092113, NC0116L4F092110, NC0042L4F032114	8/18/2022	A

Grantee	Grant Nos.	Date granted	Reasons waived
Kentucky Housing Coalition	KY0110L4I002011, KY0110L4I002112, KY0145L4I002005, KY0027L4I002013, KY0027L4I002114, KY0022L4I002013, KY0022L4I002114, KY0151L4I002005, KY0151L4I002013, KY0150L4I002005, KY0012L4I002013, KY0012L4I002114, KY0155L4I002005, KY0155L4I002106, KY0122L4I002005, KY0122L4I002106, KY0154L4I002005, KY0154L4I002106, KY0156L4I002005, KY0156L4I002106, KY0113L4I002008, KY0113L4I002109, KY0157L4I002005, KY0157L4I002106, KY0138L4I002005, KY0138L4I002106, KY0152L4I002006, KY0152L4I002107, KY0121L4I002009, KY0121L4I002110, KY0114L4I002010, KY0114L4I002111, KY0105L4I002109, KY0105L4I002110, KY0021L4I002115, KY0020L4I002115, KY0127L4I002109, KY0030L4I002114, KY0026L4I002114, KY0024L4I002114, KY0120L4I002105, KY0106L4I002110, KY0013L4I002114, KY0025L4I002114, KY0123L4I002105, KY0014L4I002114.	8/17/2022	A
Together We Cope	IL0237L5T112012, IL0252L5T112013, IL0237L5T112113, IL0252L5T112114	8/17/2022	B
Catholic Charities of Southern Missouri	MO0245L7P061903, MO0209L7P001904, MO0210L7P021904	8/24/2022	B
Pottstown Cluster of Religious Communities	PA0767L3T042005, PA0133L3T042013	8/24/2022	A
Valley Youth House Committee	PA0808L3T092004, PA0808L3T092105, PA0887L3T092003, PA0887L3T092104, PA0825L3T122004, PA0825L3T122105, PA0893L3T122003, PA0893L3T122104, PA0924L3T082002, PA0924L3T082103, PA0989L3T042001, PA0989L3T042102, PA0970L3T112001, PA0970L3T112102, PA0917L3T042002, PA0917L3T042103, PA0765L3T032005, PA0765L3T032106, PA0687L3T042107.	8/24/2022	B
Valencia Shelter Services	NM0056L6B012112, NM0129D6B012103	8/24/2022	A
Thresholds	IL0554L5T112107, IL0225L5T102114, IL0578L5T102107, IL0417L5T022110, IL0577L5T102007, IL0577L5T102108, IL0002L5T002013, IL0002L5T002114, IL1675L5T002001, IL1675L5T002102.	8/25/2022	B
Home Forward	OR0036L0E012114	8/30/2022	B
Women's Resource Center	PA0733L3T082005	8/30/2022	A, B
Economic Opportunity Council of Suffolk	NY1232L2T032103	8/30/2022	B
Decatur Cooperative Ministry	GA0364L4B082003	8/30/2022	B
San Diego Housing Commission	CA1602L9D012004, CA0534L9D012013, CA1208L9D0112007, CA1349L9D012006	9/7/2022	A, B
Barren River Area Safe Space, Inc	KY0206D4I002002, KY0206D4I002103	9/7/2022	B
Coalition for the Homeless	KY0048L4I012011, KY0048L4I012112, KY0050L4I012114, KY0061L4I012114, KY0097L4I012113, and KY0124L4I012009, KY0124L4I012110, KY0173L4I012004, KY0173L4I012105.	9/9/2022	A
Community Resource Center	CA1598L9D012105, CA1793D9D012103	9/9/2022	A
St. Louis County, MO	MO0304L7E002001, MO0003L7E002012, MO0248L7E002012, MO0106L7E002010	9/9/2022	A, B
OneEighty	OH0469L5E072105	9/23/2022	A
City of Indianapolis	IN0228Y5H031800, IN0230Y5H031800, IN0186L5H032106, IN0196L5H032105, IN0209L5H032104, IN0225D5H032102, IN0247L5H032100.	9/29/2022	A

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, delays in obtaining necessary paperwork due to office closures or staffing shortages, challenges securing 12-month leases due to landlord trepidation or low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—Permanent Housing Rapid Re-Housing Limit to 24 Months Rental Assistance

- **Regulation:** 24 CFR 578.37(a)(1)(ii), 24 CFR 578.51(a)(1)(i), 24 CFR 578.37(a)(1)(ii), and 24 CFR 578.37(a)(1)(ii)(C).
- Nature of Requirement:** 24 CFR 578.37(a)(1)(ii) and 24 CFR 578.51(a)(1)(i) defines medium term rental assistance as 3–24 months and 24 CFR 578.37(a)(1)(ii) and 24 CFR 578.37(a)(1)(ii)(C) limits rental

assistance in Rapid Re-housing projects to medium-term rental assistance, or no more than 24 months.

The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
NYC Department of Social Services	NY1276D2T001900, NY1044L2T002005, NY1110L2T002004, NY1223D2T002002, NY1224L2T002002, NY1225L2T002002, NY1274D2T002001, NY1275D2T002001, NY1276D2T002001, NY1297L2T002001, NY1110L2T002105, NY1223D2T002103, NY1225L2T002103, NY1274D2T002102, NY1275D2T002102, NY1276D2T002102, NY1297L2T002102.	7/1/2022	A, B
Erie County	PA0856L3E052004, PA0856L3E052105	7/1/2022	A, B
The House of Faith, Inc	NJ0507L2F062105	7/8/2022	A, B
Catholic Charities of West Tennessee	TN0241L4J012106	7/12/2022	A, B
Society of St. Vincent de Paul, Council of Louisville, Inc.	KY0230D4I012001, KY0230D4I012102	7/15/2022	A, B
Options for Community Living, Inc	NY1234L2T032002	7/18/2022	A, B
Keystone Opportunity Center	PA0625L3T042007, PA0625L3T042108	7/18/2022	A, B
Community Action Partnership of Lancaster and Saunders County.	NE0106L7D022004	8/1/2022	A, B
S.H.A.R.E. House, Inc	GA0295L4B012106	8/16/2022	A, B
Dakota County	MN0077L5K02114	8/16/2022	A, B
YWCA St. Joseph	MO0276D7P032002	8/18/2022	A, B
Kentucky Housing Coalition	KY0145L4I002005, KY0151L4I002005, KY0151L4I002013, KY0150L4I002005, KY0154L4I002005, KY0154L4I002106, KY0156L4I002005, KY0156L4I002106, KY0138L4I002005, KY0138L4I002106, KY0152L4I002107, KY0121L4I002009, KY0024L4I002114.	8/17/2022	A, B

Grantee	Grant Nos.	Date granted	Reasons waived
Wayne County CoC	PA0883L3T092003, PA0883L3T092104	8/24/2022	B
Pottstown Cluster of Religious Communities	PA0767L3T042005	8/24/2022	B
Valley Youth House Committee	PA0808L3T092004, PA0808L3T092105, PA0825L3T122004, PA0825L3T122105, PA0924L3T082002, PA0924L3T082103, PA0765L3T032005, PA0765L3T032106, PA0687L3T042107.	8/24/2022	B
Strategies to End Homelessness	OH0686Y5E002100, OH0683U5E002100, OH9999U5E002106	8/24/2022	A, B
Economic Opportunity Council of Suffolk	NY1232L2T032103	8/30/2022	A
Decatur Cooperative Ministry	GA0364L4B082003	8/30/2022	A, B
San Diego Housing Commission	CA0534L9D012013	9/7/2022	A
Partners for HOME	GA0418D4B002100	9/9/2022	A
Community Resource Center	CA1598L9D012105, CA1793D9D012103	9/9/2022	A, B
St. Louis County, MO	MO0204L7E002001, MO0248L7E002003	9/9/2022	B

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, delays in obtaining necessary paperwork due to office closures or staffing shortages, low vaccination rates or high hospitalization rates of people experiencing homelessness or higher unemployment rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

CoC—Disability Documentation for Permanent Supportive Housing
 • Regulation: 24 CFR 578.103(a) and 24 CFR 578.103(a)(4)(i)(B).
Nature of Requirement: Intake-staff recorded observations of disability is acceptable evidence when documenting disability for individuals and families that meet the “chronically homeless” definition at 24 CFR 578.3. However, the CoC Interim

Rule requires such observations to be confirmed and accompanied by other evidence no later than 45 days from the application for assistance.
 The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
The Salvation Army, Beaver County	PA0321L3E032114	7/1/2022	B
Mental Health Association of Tulsa, Inc	OK0114L6I012005, OK0114L6I012106, OK0043L6I012012, OK0043L6I012113, OK0153L6I012102.	7/1/2022	B
Bethesda Project	PA0074L3T002114, PA0075L3T002114	7/8/2022	B
Connecticut Department of Mental Health and Addiction Service.	CT0161L1E052009, CT0022L1E052013, CT0054L1E052013, CT0062L1E052013, CT0070L1E052013, CT0073L1E052013, CT0089L1E052013, CT0164L1E052011, CT0035L1E032013, CT0061L1E052013, CT0211L1E052008, CT0011L1E052013, CT0013L1E052013, CT0131L1E052012, CT0151L1E052012, CT0212L1E052009, CT0246L1E052007, CT0265L1E052006, CT0285L1E032005, CT0286L1E052005, CT0297L1E052004, CT0328L1E032002, CT0329L1E032002, CT0340L1E052001, CT0077L1E052013, CT0162L1E052006, CT0034L1E032013, CT0176L1E052009, CT0052L1E052013, CT0129L1E052012, CT0142L1E052012, CT0154L1E052010, CT0172L1E052008, CT0185L1E052010, CT0200L1E052009, CT0204L1E052009, CT0210L1E032009, CT0076L1E052013, CT0053L1E052013, CT0141L1E052012, CT0104L1E032013, CT0324L1E032002, CT0012L1E052013, CT0023L1E052013, CT0135L1E052012, CT0237L1E052008, CT0161L1E052110, CT0022L1E052114, CT0054L1E052114, CT0062L1E052114, CT0070L1E052114, CT0073L1E052114, CT0089L1E052114, CT0164L1E052112, CT0035L1E032114, CT0061L1E052114, CT0211L1E052109, CT0011L1E052114, CT0013L1E052114, CT0131L1E052113, CT0151L1E052012, CT0212L1E052009, CT0246L1E052108, CT0265L1E052107, CT0285L1E032106, CT0286L1E052106, CT0297L1E052105, CT0328L1E032103, CT0329L1E032103, CT0340L1E052102, CT0077L1E052114, CT0034L1E032114, CT0176L1E052110, CT0052L1E052114, CT0129L1E052113, CT0142L1E052113, CT0154L1E052111, CT0172L1E052109, CT0185L1E052111, CT0200L1E052110, CT0204L1E052110, CT0210L1E032110, CT0076L1E052114, CT0053L1E052114, CT0141L1E052113, CT0104L1E032114, CT0324L1E032103, CT0012L1E052114, CT0023L1E052114, CT0135L1E052113, CT0237L1E052109, CT0355L1E052100.	7/25/2022	B
Community Rebuilders	MI0315L5F062111, MI0345L5F062110, MI0412L5F062007, MI0412L5F062108	8/1/2022	B
City of Oklahoma	OK0127L6I022004, OK0127L6I022105, OK0052L6I022109	8/1/2022	B
Community Renewal Team	CT0059L1E052114, CT0272L1E052106, CT0261L1E052107	8/16/2022	A
Partnership Against Domestic Violence	GA0338L3B022004, GA0338L4B022105	8/16/2022	A, B
Services for the Underserved, Inc	NY1174L2T032104, NY1231L2T031901	8/16/2022	B
Partners Health management	NC0099L4F092113, NC0116L4F092110, NC0042L4F032114	8/18/2022	B
County of Kent	MI0173L5F062013, MI0173L5F062114, MI0174L5F062013, MI0174L5F062114	8/18/2022	B
Kentucky Housing Coalition	KY0110L4I002011, KY0110L4I002112, KY0027L4I002013, KY0027L4I002114, KY0022L4I002013, KY0022L4I002114, KY0012L4I002013, KY0012L4I002114, KY0155L4I002005, KY0155L4I002106, KY0122L4I002005, KY0122L4I002106, KY0113L4I002008, KY0113L4I002109, KY0157L4I002005, KY0157L4I002106, KY0121L4I002009, KY0121L4I002110, KY0114L4I002010, KY0114L4I002111, KY0105L4I002109, KY0105L4I002110, KY0021L4I002115, KY0020L4I002115, KY0127L4I002109, KY0030L4I002114, KY0026L4I002114, KY0120L4I002105, KY0106L4I002110, KY0013L4I002114, KY0025L4I002114, KY0123L4I002105, KY0014L4I002114.	8/17/2022	A, B
Pottstown Cluster of Religious Communities	PA0133L3T042013	8/24/2022	A, B
Strategies to End Homelessness	OH0686Y5E002100, OH0683U5E002100, OH9999U5E002106	8/24/2022	A, B
Findlay Hope House for the Homeless, Inc	OH0383L5E072108	8/30/2022	A

Grantee	Grant Nos.	Date granted	Reasons waived
A Safe Haven Foundation	IL00095L5T101912, IL0371L5T101911, IL0121L5T101912, IL0222L5T101912, IL0236L5T101912.	8/30/2022	A
San Diego Housing Commission	CA0534L9D012013	9/7/2022	B
City of Philadelphia	PA0013L3T002114	9/9/2022	B

Code Key for Reasons Waived:

- A. Insufficient staffing levels to carry out activities due to the pandemic's impact on the community or jurisdiction.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, delays in obtaining necessary paperwork due to office closures or staffing shortages, low vaccination rates or high hospitalization rates of people experiencing homelessness or people living with HIV).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

IV. Expedited COVID-19 Waivers (Notice CPD-22-09)—ESG
 ESG—Assisting Program Participants With Subleases
 • **Regulation:** 24 CFR 576.105; 24 CFR 576.106.
Nature of Requirement: The use of “owner” and “lease” in 24 CFR 576.105 and 576.106 restrict program participants from receiving rental assistance under 24 CFR

576.106 and certain services under 24 CFR 576.105 with respect to units that program participants sublease or lease from a person other than the owner or the owner’s agent.
 The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Lee County Human and Veteran Services ...	E21UC120013	7/12/2022	A, B

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, delays in obtaining necessary paperwork due to office closures or staffing shortages, challenges securing 12-month leases due to landlord trepidation or low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708-4300.

ESG—Durational Limits on Housing Relocation and Stabilization Services
 • **Regulation:** 24 CFR 576.105(b)(2); 24 CFR 576.105(c).
Nature of Requirement: 24 CFR 576.105(b)(2) limits the provision of housing stability case management to 30 days while the program participant is seeking permanent housing and to 24 months during the period the program participant is living in housing.

24 CFR 576.105(c) limits the total amount of time a program participant may receive services under 24 CFR 576.105(b) to 24 months during any 3-year period.
 The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Lee County Human and Veteran Services ...	E21UC120013	7/12/2022	A, B
City of Evanston	E22MC170012, E21MC170012	7/12/2022	A, B
Orange County Office of Community Development.	E21UC360105; E22UC360105	08/18/2022	A, B
City of Lexington	E21MC210004	08/17/2022	A, B

Code Key for Reasons Waived:

- A. Potential negative impacts of the pandemic on providing assistance to program participants, including the delay of identifying housing or the onset of housing instability.
- B. Local pandemic-specific delays or limitations (e.g., social distancing requirements, increased rental rates, low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room

7262, Washington, DC 20410, telephone number (202) 708-4300.
 ESG—24-Month Limit on Rental Assistance
 • **Regulation:** 24 CFR 576.106(a).
Nature of Requirement: 24 CFR 576.106(a) limits the total amount of time a program participant may receive rental assistance to 24-months during a 3-year period.

The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD-22-09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Lee County Human and Veteran Services ...	E21UC120013	7/12/2022	A
City of Evanston	E22MC170012, E21MC170012	7/12/2022	A
Orange County Office of Community Development.	E21UC360105, E22UC360105	08/18/2022	A
Collier County Government	E21UC120016, E22UC120016	08/16/2022	A

Grantee	Grant Nos.	Date granted	Reasons waived
City of Lexington	E21MC210004	08/17/2022	A

Code Key for Reasons Waived:

A. Local pandemic-specific delays or limitations (e.g., social distancing requirements, increased rental rates, low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

ESG—Restriction of Rental Assistance to Units With Rent at or Below FMR

- **Regulation:** 24 CFR 576.106(d)(1). **Nature of Requirement:** 24 CFR 576.106(d)(1) provides that rental assistance cannot be provided unless the total rent is equal to or less than the FMR established by HUD, as provided under 24 CFR part 888, and complies with HUD’s standard of rent

reasonableness, as established under 24 CFR 982.507.

The following table provides a summary of the waivers HUD provided with respect to this requirement in accordance with the expedited waiver process described in Notice CPD–22–09, which is available at www.hud.gov/sites/dfiles/OCHCO/documents/2022-09cpdn.pdf.

Grantee	Grant Nos.	Date granted	Reasons waived
Lee County Human and Veteran Services	E21UC120013, E19UC120013	7/12/2022	A
New York State Office of Temporary and Disability Assistance.	E21DC360001	7/1/2022	A
City of Evanston	E22MC170012, E21MC170012	7/12/2022	A
State of Arizona	E21DC040001	7/25/2022	A
Pinellas County Housing and Community Development Department.	E21UC120005, E22UC120005	7/25/2022	A
Orange County Office of Community Development.	E21UC360105; E22UC360105	08/18/2022	A
Collier County Government	E21UC120016, E22UC120016	08/16/2022	A
City of Raleigh	E21MC370009, E22MC370009	9/23/2022	A
City of Dallas	E21MC480009, E22MC480009	9/29/2022	A

Code Key for Reasons Waived:

A. Local pandemic-specific delays or limitations (e.g., social distancing requirements, increased rental rates, low vacancy rates).

Contact: More information about each waiver and a copy of the request and the approval may be obtained by contacting: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW, Room 7262, Washington, DC 20410, telephone number (202) 708–4300.

II. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

- **Regulation:** 24 CFR 200.73 (c), Property Development.

Project/Activity: O’Keefe Apartments, Project No. 071–11545, Chicago, Illinois.

Nature of Requirement: 24 CFR 200.73(c). The regulation requires that a site contain at least five rental dwelling units [of an FHA insured multifamily housing project] shall be on one site and it is part of other contiguous sites comprised of one marketable manageable real estate entity. The regulation reads as follows:

(c) *The improvements shall constitute a single project. Not less than five rental dwelling units or personal care units, 20 medical care beds, or 50 manufactured home pads, shall be on one site, except that such limitations do not apply to group practice facilities.*

Chapter 3 Section 3.1.30 of the MAP Guide permits a project with two or more noncontiguous parcels of land when the

parcels comprise one marketable, manageable real estate entity.

The lender, Merchants Capital Corporation, proposes to finance the acquisition of O’Keefe Apartments project with a loan to be insured pursuant to Section 223(f). The property is in the South Shore neighborhood of Chicago and is comprised of 5 buildings with a total of 67 units within a one-mile radius. Of the 5 buildings one has only 3 units within a two-story townhouse building. The O’Keefe Apartments has been part of HUD Multifamily’s assisted housing portfolio for many years and is now under a single Housing Assistance Payment (HAP) contract for rental assistance.

Granted by: Julia R. Gordon, Assistant Secretary Office of Housing-Federal Housing Administration.

Date Granted: September 23, 2022.

Reason Waived: The Lender, Merchants Capital Corporation has deep roots in affordable housing in the Chicago market. All units are covered by a Section 8 HAP contract and New 20-year renewals will be requested. The proposed mortgage amount is \$6,232,400. There is a total of \$1,270 in repairs. The project currently has one vacant unit for an overall occupancy of 98.5% per May 17, 2022, rent roll. The O’Keefe Apartments property continue to remain affordable and would preserves much needed affordable housing options for low-income residents in the South Shore neighborhood and is consistent with the Secretary’s goal of maintaining affordable housing for low-income persons.

Contact: Willie Fobbs, Director, Office of Multifamily Production, Office of Housing, HTD, Department of Housing and Urban

Development, 451 Seventh Street SW, Washington, DC 20410, telephone (202) 402–6257.

- **Regulation:** 24 CFR 219.220(b)(1995) Payment and Repayment of Operating Assistance.

Project/Activity: Warren Gardens Apartments; FHA No. 023–55049.

Nature of Requirement: This regulation sets forth the requirements that govern the repayment of operating assistance under the Flexible Subsidy Program for Troubled Projects and states “Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of mortgage insurance, prepayment of the mortgage, or sale of the project.”

Granted by: Julia R. Gordon Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 20, 2022.

Reason Waived: The regulation at 24 CFR 219.220(b)(1995) was waived to permit the deferment of the outstanding balance of the Flexible Subsidy Loans, plus accrued interest, for Warren Gardens, and permit the Owner to repay the loans through a repayment plan. This waiver is effective from the date of issuance.

Contact: Saadia Figueroa-Smallwood, Acting Director, Office of Asset Management and Portfolio Oversight, Field Asset Management Division, HTN, Office of Housing, 451 Seventh Street SW, Washington, DC 20410, telephone (904) 208–6026.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

- *Regulation:* 24 CFR 982.303(b)(1).

Nature of Requirement: Notice PIH 2022–09 Streamlined Regulatory Waivers for the Housing Choice Voucher (including Mainstream and Mod Rehab) Program. Allows PHAs to grant a family one or more extensions of the initial voucher term regardless of the policy described in the Administrative Plan. PHAs should ensure consistency with these requests and remain in compliance with the PHA's informally adopted interim standard.

Reason Waived: PHAs were granted to the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021–14 and 2021–34 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver request in accordance with Section 106 of the Department of Housing and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Housing Authority of the County of San Joaquin; Tulare County Housing Authority; Kings County Housing Authority; St. Petersburg Housing Authority; Great Bend Housing Authority; Liberty Housing Authority; Howell County Public Housing Agency; Jersey City Housing Authority; Lakewood Housing Authority; Newark Housing Authority; Village of Cobleskill; Montgomery County Housing Authority; Housing Authority of the City of El Paso, Housing Authority of Texarkana; Tarrant County Housing Assistance Office; Newport News Regional Housing Authority; Housing Authority of Racine County; Fairmont/Morgantown Housing Authority

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 982.303(b)(1).

Nature of Requirement: Notice PIH 2021–34 Expedited Regulatory Waivers for the Public Housing and Housing Choice Voucher (including Mainstream and Mod Rehab) Program(s). Allows PHAs to grant a family one or more extensions of the initial voucher term regardless of the policy described in the Administrative Plan. PHAs should ensure consistency with these requests and remain in compliance with the PHA's informally adopted interim standard.

Reason Waived: PHAs were granted the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021–14 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver requests in accordance with Section 106 of

the Department of Housing and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Harrison Housing Authority; St. Francis County Housing Authority; South Tucson Housing Authority; Housing Authority of the County of Merced; Housing Authority of the County of Stanislaus; Benicia Housing Authority; Suisun City Housing Authority; Housing Authority of the City of Long Beach; Housing Authority of the City of Madera; Compton Housing Authority; Santa Rosa Housing Authority; Burbank Housing Authority; Housing Authority of the City of Glendale; Housing Authority of the City of National City; Hartford Housing Authority; Middletown Housing Authority; Naugatuck Housing Authority; Cocoa Housing Authority; Housing Authority of Pompano Beach; Ocala Housing Authority; Fort Walton Beach Housing Authority; Hendry County Housing Authority; Collier County Housing Authority; Winnebago County Housing Authority; Terre Haute Housing Authority; Jeffersonville Housing Authority; Cambridge Housing Authority; Springfield Housing Authority; Milford Housing Authority; Andover Housing Authority; Hingham Housing Authority; Housing Authority of St. Mary's County (MD), Maryland Department of Housing And Community Development; Old Town Housing Authority; Saginaw Housing Commission; Benton Harbor Housing Commission; St. Clair Shores Housing Commission; Muskegon Housing Commission; Saint Paul Public Housing Agency; Independence Housing Authority; High Point Housing Authority; Greensboro Housing Authority; Durham Housing Authority; Chatham County Housing Authority; Southeastern Community & Family Services, Inc.; Franklin-Vance-Warren Opportunity Inc.; Omaha Housing Authority; Northern Regional Housing Authority; Rochester Housing Authority; Kingston Housing Authority; Ithaca Housing Authority; Springfield Metropolitan Housing Authority; Allen Metropolitan Housing Authority; Knox Metropolitan Housing Authority; Miami Metropolitan Housing Authority; Morrow Metropolitan Housing Authority; Pittsburgh Housing Authority; Columbia County Housing Authority; Newport Housing Authority; Bristol Housing Authority (RI); Rhode Island Housing; Municipality Of Mayaguez; Municipality Of Gurabo; Municipality Of Anasco; Municipality Of Naguabo; Lake City Housing Authority; Hartsville Housing Authority; South Carolina State Housing Finance and Development Authority; Meade County Housing and Redevelopment Commission; Lawrence County Housing and Redevelopment Commission; Butte County Housing Authority; Kingsport Housing and Redevelopment Authority; Morristown Housing Authority; San Antonio Housing Authority; Denton Housing Authority; Tarrant County Housing Assistance Office; Terrell Housing Department; Virginia Beach Department of Housing & Neighborhood Preservation; Springfield Housing Authority;

Bremerton Housing Authority; Madison Housing Authority; Sauk County Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 984.303(k).

Project/Activity: Idaho Housing and Finance Association.

Nature of Requirement: 24 CFR 984.303(k) is a regulation pertaining to termination with Family Self-Sufficiency (FSS) escrow disbursement.

Reason Waived: The agency requested a waiver of this regulation to allow the accrued escrow to be passed to a participant's mother. The mother is elderly and unable to work, which would prevent her from being able to assume the Contract of Participation and complete it, as envisioned in 24 CFR 984.305(d), Succession of FSS Account. After considering the information presented by the agency and absent a statutory prohibition, HUD finds good cause to waive 24 CFR 984.303(k) to allow for both a completion of the Contract of Participation and release of escrow without graduation.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 2, 2022.

Contact: Jayme Brown, Director, Community and Supportive Services Division, Office of Public Housing Investments; Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20140, telephone (202) 402–3624.

- *Regulation:* 24 CFR 983.153(c).

Project/Activity: St. Petersburg Housing Authority (SPHA).

Nature of Requirement: 24 CFR 983.153(c) prohibits a PHA from entering into the Agreement to Enter into Housing Assistance Payments (AHAP) contract with the owner if construction or rehabilitation has commenced after proposal submission.

Reason Waived: The HUD Miami Field Office reviewed the Request for Proposals issued by SPHA and the award to Innovare's development. The request addressed the requirement to not begin construction prior to entering into the AHAP. SPHA reported that the developer did not involve SPHA in its decision to start construction. Upon being notified of commenced work and resulting programmatic violations, SPHA requested that the contractor immediately cease construction activities, and began correcting deficiencies noted during the review. Notwithstanding the developer's failure to execute an AHAP with SPHA prior to beginning construction, it should be noted that the developer from the outset complied with all applicable Davis-Bacon requirements. Based on the above analysis and considering the good cause presented, HUD waived the regulation and allowed SPHA to sign and enter into an AHAP contract for 25 project-based vouchers in the Innovare project

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 7, 2022.

Contact: Nathaniel Johnson, Senior Housing Program Specialist, Office of Public Housing and Voucher Programs; Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20140, telephone: (202) 402-5156.

• *Regulation:* 24 CFR 985.101, 24 CFR 985.105.

Project/Activity: Marion County Housing Authority.

Nature of Requirement: 24 CFR 985.101 states that a PHA must submit to HUD a required Section 8 Management Assessment Program (SEMAP) certification form within 60 calendar days after the end of its fiscal year. 24 CFR 985.105 states that HUD shall assess each PHA's performance under SEMAP annually and shall assign each PHA a SEMAP score and overall performance rating.

Reason Waived: MCHA was greatly impacted by the COVID-19 pandemic, causing staff shortages, participant difficulty in submitting documentation and delayed scheduled inspections. In addition, the agency transitioned to a new software system—causing delayed Rent Reasonableness Certifications, which resulted in late annual reexaminations of family income—and was also impacted by two natural disasters—a major wildfire in September 2020 and an ice storm in February 2021. The agency hired 10 case managers and only retained three due to turnover. The Housing Quality Standards (HQS) Inspector's ongoing health condition limits their work assignments. In the past 2 months, 25 percent of scheduled inspections have been delayed because of a COVID-19 infection in the household. Further, landlords cited high cost of materials and delays in obtaining parts and appliance replacements delaying repairs. Despite MCHA losing its Housing Program Supervisor in November of 2021, and the former Executive Director in April of 2022, the agency's operations are now stabilized, including a third-party HQS Inspector assisting with overdue inspections along with the completed implementation of the new software system. The MCHA received a standard rating on its prior SEMAP certifications in 2019 (which carried over due to the regulatory waivers provided by the CARES Act) from 2018 and 2017. Moreover, the Portland Field Office recommended approval of MCHA's waiver request.

Due to these circumstances, HUD determined, pursuant to the waiver authority provided at 24 CFR 5.110, that there is good cause to waive both regulations.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: Sep. 27, 2022.

Contact: Michelle Daniels, Housing Program Specialist, Community and Supportive Services Division, Office of Public Housing Investments; Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street

SW, Washington, DC 20140, telephone: (202) 402-6051.

• *Regulation:* 24 CFR 982.503(b).

Nature of Requirement: Notice PIH 2022-09 Streamlined Regulatory Waivers for the Housing Choice Voucher (including Mainstream and Mod Rehab) Program.

Reason Waived: PHAs were granted to the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021-14 and PIH 2021-34 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver request in accordance with Section 106 of the Department of Housing and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Lono County Housing Authority; Housing Authority of the County of San Joaquin; Kings County Metropolitan Housing Authority; Livermore Housing Authority; West Hartford Housing Authority; St. Petersburg Housing Authority; Dekalb County Housing Authority; Springfield Housing Authority; Wichita Housing Authority; Great Bend Housing Authority; Weston Housing Authority; Liberty Housing Agency; Lakewood Housing Authority; Plattsburgh Housing Authority; Geneva Housing Authority; Mansfield Metropolitan Housing Authority; Huron Metropolitan Housing Authority; Crawford Metropolitan Housing Authority; Pike Metropolitan Housing Authority; Seneca Metropolitan Housing Authority; Berks County Housing Authority; Union County Housing Authority; Smithfield Housing Authority; Garland Housing Agency; Newport News Regional Housing Authority; Rhinelander Housing Authority; Ashland County Housing Authority; Chippewa County Housing Authority; Fairmont/Morgantown Housing Authority; Bluefield Housing Authority; Jefferson Metropolitan Housing Authority.

Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410-5000, telephone: (202) 402-7026.

• *Regulation:* 24 CFR 982.503(b).

Nature of Requirement: Notice PIH 2021-34 Expedited Regulatory Waivers for the Public Housing and Housing Choice Voucher (including Mainstream and Mod Rehab) Program(s).

Reason Waived: PHAs were granted to the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021-14 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver request in accordance with Section 106 of the Department of Housing and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Housing Authority of the City of Jasper; Opelika Housing Authority; Housing Authority of Foley; Tallassee Housing Authority; Troy Housing Authority; Northwest Regional Housing Authority; Harrison Housing Authority; Flagstaff Housing Authority; Winslow Housing Authority; South Tucson Housing Authority; Oakland Housing Authority; Benicia Housing Authority; Suisun City Housing Authority; Carlsbad Housing Agency; Burbank Housing Authority; Placer County Housing Authority; Hartford Housing Authority; Middletown Housing Authority; Ansonia Housing Authority; Vernon Housing Authority; Housing Authority of Pompano Beach; Ocala Housing Authority; Plant City Housing Authority; Punta Gorda Housing Authority; Boca Raton Housing Authority; Hendry County Housing Authority; Collier County Housing Authority; Housing Authority of the City and County of Honolulu; Waukegan Housing Authority; Delaware County Housing Authority; Lawrence County Housing and Redevelopment Commission; Butte County Housing Authority; Kingsport Housing and Redevelopment Authority; LaFollette Housing Authority; Brownsville Housing Authority; Morristown Housing Authority; Dayton Housing Authority; Bristol Housing Authority (TN); Roanoke-Chowan Regional Housing Authority; Southeastern Community & Family Services, Inc.; Omaha Housing Authority; Portsmouth Housing Authority; Bergen County Housing Authority; Union County Housing Authority; Mesilla Valley Housing Authority; Northern Regional Housing Authority; Herkimer Housing Authority; Kingston Housing Authority; Ithaca Housing Authority; Harrietstown Housing Authority; New York City Department of Housing Preservation and Development; City of New Rochelle Housing Authority; City of Peekskill; Town of Southampton Housing Authority; Zanesville Metropolitan Housing Authority; Allen Metropolitan Housing Authority; Logan County Metropolitan Housing Authority; Broken Bow Housing Authority; Columbia County Housing Authority; Newport Housing Authority; West Warwick Housing Authority; Coventry Housing Authority; East Greenwich Housing Authority; Rhode Island Housing; Municipality of Gurabo; Municipality of Anasco; Rock Hill Housing Authority; Watertown Housing Authority; Anthony Housing Authority; Central Texas Council of Governments; Anderson County; Terrell Housing Department; Housing Authority of Utah County; Logan City Housing Authority; Roosevelt City Housing Authority; Bear River Regional Housing Authority; Cedar City Housing Authority; Scott County Regional Housing Authority; Bremerton Housing Authority; Grays Harbor Housing Authority; Walla Walla Housing Authority; Madison Housing Authority; New London Housing Authority; Kenosha Housing Authority; Barron County Housing Authority; Richmond Housing Authority; Terre Haute Housing Authority; Warsaw Housing Authority; Lafayette Housing Authority; Atchison Housing Authority; Somerset Housing Authority; New Orleans Housing Authority; Springfield Housing Authority (MA); Milford Housing Authority; Hagerstown Housing

Authority; Maryland Department of Housing and Community Development; Old Town Housing Authority; Saginaw Housing Commission; Benton Harbor Housing Commission; The Kandiyohi County Housing and Redevelopment Authority; McLeod County Housing and Redevelopment Authority; Independence Housing Authority; Wilmington Housing Authority; Rocky Mount Housing Authority; Wadesboro Housing Authority; Meade County Housing and Redevelopment Commission; Housing Authority of Lubbock; Brenham Housing Authority; Burnet Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 982.505(c)(4).

Nature of Requirement: Notice PIH 2022–09 Streamlined Regulatory Waivers for the Housing Choice Voucher (including Mainstream and Mod Rehab) Program.

Reason Waived: PHAs have the option to increase the payment standard for the family at any time after the effective date of the increase, rather than waiting for the next regular reexamination.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Kings County Housing Authority; Suisun City Housing Authority; Orange County Housing Authority; St. Petersburg Housing Authority; Boise City Housing Authority; Ada County Housing Authority; Great Bend Housing Authority; Great Bend Housing Authority; Tennessee Valley Regional Housing Authority; Plattsburgh Housing Authority; Jefferson Metropolitan Housing Authority; Mansfield Metropolitan Housing Authority; Huron Metropolitan Housing Authority; Hocking Metropolitan Housing Authority; Crawford Metropolitan Housing Authority; Pike Metropolitan Housing Authority; City of Bowling Green Housing Division; Portland Housing Authority; Independence Housing Authority; Weston Housing Authority; Lincoln County Public Housing Agency; Liberty Housing Authority; Howell County Public Housing Agency; Seneca Metropolitan Housing Authority; Berks County Housing Authority; Housing Connect–Salt Lake County; Superior Housing Authority; Chippewa County Housing Authority; Fairmont/Morgantown Housing Authority; Bluefield Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 982.505(c)(4).

Nature of Requirement: Notice PIH 2021–34 Expedited Regulatory Waivers for the Public Housing and Housing Choice Voucher (including Mainstream and Mod Rehab) Program(s).

Reason Waived: PHAs were granted to the opportunity to apply for certain regulatory

waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021–14 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver request in accordance with Section 106 of the Department of Housing and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Mobile Housing Authority; Housing Authority of the City of Jasper; Opelika Housing Authority; Opp Housing Authority; Housing Authority of Foley; Tallahassee Housing Authority; St. Francis County Housing Authority; Winslow Housing Authority; Cocoa Housing Authority; Ocala Housing Authority; Plant City Housing Authority; Collier County Housing Authority; Housing Authority of the City and County of Honolulu; Southwestern Idaho Cooperative Housing Authority; Winnebago County Housing Authority; Delaware County Housing Authority; Tell City Housing Authority; Terre Haute Housing Authority; Jeffersonville Housing Authority; Lafayette Housing Authority; Beatrice Housing Authority; Portsmouth Housing Authority; Bergen County Housing Authority; Mesilla Valley Housing Authority; Rochester Housing Authority; Kingston Housing Authority; Town of Southampton; Zanesville Metropolitan Housing Authority; Municipality of Anasco; Meade County Housing and Redevelopment Commission; Lawrence County Housing and Redevelopment Commission; Butte County Housing Authority; Johnson City Housing Authority; Chattanooga Housing Authority; Kingsport Housing and Redevelopment Authority; Lafayette Housing Authority; Brownsville Housing Authority; Morristown Housing Authority; Bristol Housing Authority (TN); Southeast Tennessee Human Resource Agency; South Tucson Housing Authority; Housing Authority of the County of Merced; Housing Authority of the County of Stanislaus; Carlsbad Housing Agency; City of Norwalk; Hartford Housing Authority; Middletown Housing Authority; Naugatuck Housing Authority; Hingham Housing Authority; Massachusetts Department of Housing and Community Development; Maryland Department of Housing and Community Development; Saginaw Housing Commission; Benton Harbor Housing Commission; St. Clair Shores Housing Commission; Biloxi Housing Authority; Chatham County Housing Authority; East Spencer Housing Authority; Southeastern Community & Family Services, Inc.; Franklin-Vance-Warren Opportunity Inc.; Omaha Housing Authority; Springfield Metropolitan Housing Authority; Columbiana Metropolitan Housing Authority; Coshocton Metropolitan Housing Authority; Miami Metropolitan Housing Authority; Newport Housing Authority; West Warwick Housing Authority; Bristol Housing Authority (TN); Municipality of Gurabo; Housing Authority of the City of Waco; Edgewood Housing; Central Texas Council of Governments; Terrell Housing Department; Housing Authority of Utah County; Springfield

Housing Authority (VT); Bremerton Housing Authority; Grays Harbor Housing Authority; Madison Housing Authority; Wausau Housing Authority; Barron County Housing Authority; Clarksburg/Harrison Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 982.634(a).

Nature of Requirement: Notice PIH 2021–34 Expedited Waivers for the Public Housing and Housing Choice Voucher (including Mainstream and Mod Rehab) Program(s), 24 CFR 982.634(a) allows PHAs to extend homeownership assistance for one additional year.

Reason Waived: PHAs were granted the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021–14 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver requests in accordance with Section 106 of the Department and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: High Point Housing Authority; Greensboro Housing Authority; Southeastern Community & Family Services, Inc.; Omaha Housing Authority; Rochester Housing Authority; New York Department of Housing Preservation and Development; Lorain Metropolitan Housing Authority; Charleston County Housing Authority; Madison Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

- *Regulation:* 24 CFR 985.105, 24 CFR 985.101.

Nature of Requirement: Notice PIH 2021–34 Expedited Waivers for the Public Housing and Housing Choice Voucher (including Mainstream and Mod Rehab) Program(s), 24 CFR 985.105, 24 CFR 985.101 whereas PHAs with a fiscal year end 3/31/22, 6/30/22, or 9/30/22 may request to waive Section 8 Management Assessment Program if an indicator declines as a result of operational disruptions and from its adoption of one or more CARES Act waivers.

Reason Waived: PHAs were granted the opportunity to apply for certain regulatory waivers that were originally offered as part of the CARES Act waivers in Notice PIH 2021–14 to provide continued flexibility during the pandemic and pandemic recovery. HUD expeditiously responded to these waiver requests in accordance with Section 106 of the Department and Urban Development Reform Act of 1989.

Granted By: Dominique Blom, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1–September 30, 2022.

Project/Activity: Opelika Housing Authority; Tuscaloosa Housing Authority; Tallahassee Housing Authority; Hot Springs Housing Authority; Paragould Housing Authority; St. Francis County Housing Authority; City of Tempe Housing Authority; Housing Authority of the County of Stanislaus; Housing Authority of the City of San Buenaventura; Benicia Housing Authority; Housing Authority of the County of Yolo; Housing Authority of the City of Long Beach; Housing Authority of the City of Madera; Compton Housing Authority; Housing Authority of the City of Santa Paula; Frederick Housing Authority; Maryland Department of Housing and Community Development; Saginaw Housing Commission; Benton Harbor Housing Commission; Muskegon Housing Commission; Dowagiac Housing Commission; Saint Paul Public Housing Agency; Housing and Redevelopment Authority of Virginia; Independence Housing Authority; Weston Housing Authority; Greenville Housing Authority; Orange County Housing Authority; Roanoke-Chowan Regional Housing Authority; Chatham County Housing Authority; East Spencer Housing Authority; Stillwater Housing Authority; Housing Authority of Malheur County; Northeast Oregon Housing Authority; Berks County Housing Authority; Cumberland County Housing Authority; Providence Housing Authority; Newport Housing Authority; Bristol Housing Authority (RI); Rhode Island Housing; Municipality of Mayaguez; Municipality of Trujillo Alto; Bear River Regional Housing Authority; Bristol Regional Housing Authority; Scott County Regional Housing Authority; Loudoun County Office of Housing; Springfield Housing Authority (VT); Bremerton Housing Authority; Carlsbad Housing Agency; Santa Rosa Housing Authority; Burbank Housing Authority; Housing Authority of the City of Glendale; Placer County Housing Authority; South Metro Housing Options; Middletown Housing Authority; Jacksonville Housing Authority; Ocala Housing Authority; Fort Walton Beach Housing Authority; Hendry County Housing Authority; Collier County Housing Authority; Housing Authority of the City of Statesboro; Muscatine Housing Authority; Oskaloosa Municipal Housing Agency; Coastal Community Action, Inc.; Southeastern Community & Family Services, Inc.; Franklin-Vance-Warren Opportunity Inc.; Atlantic City Housing Authority; Bergen County Housing Authority; Penns Grove Housing Authority; New Jersey Department of Community Affairs; Mesilla Valley Housing Authority; Northern Regional Housing Authority; Saratoga Springs Housing Authority; Rochester Housing Authority; Kingston Housing Authority; Hornell Housing Authority; New York City Department of Housing Preservation and Development; City of Utica; Housing Authority of Myrtle Beach; South Carolina State Housing Finance and Development Authority; Meade County Housing and Redevelopment Commission; Lawrence County Housing and Redevelopment Commission; Butte County Housing Authority; Dayton Housing Authority;

Housing Authority of Slaton; Brenham Housing Authority; Denton Housing Authority; Tarrant County Housing Assistance Office; Logan City Housing Authority; Sauk County Housing Authority; Marinette County Housing Authority; Huntington Housing Authority; Bluefield Housing Authority; Clarksburg/Harrison Housing Authority; Albia Housing Agency; Central Iowa Regional Housing Authority; Iowa Northland Regional Housing Authority; Southwestern Idaho Cooperative Housing Authority; Idaho Housing and Finance Association; Joliet Housing Authority; Winnebago County Housing Authority; Jeffersonville Housing Authority; Campbellsville Housing Authority; Springfield Housing Authority (KY); City of Covington; Appalachian Foothills; Springfield Housing Authority (MA); Milford Housing Authority; Hingham Housing Authority; Youngstown Metropolitan Housing Authority; Portsmouth Metropolitan Housing Authority; Lorain Metropolitan Housing Authority; Butler Metropolitan Housing Authority; Ironton Metropolitan Housing Authority; Belmont Metropolitan Housing Authority; Springfield Metropolitan Housing Authority; Greene Metropolitan Housing Authority; Columbiana Metropolitan Housing Authority; Hocking Metropolitan Housing Authority; Allen Metropolitan Housing Authority; Adams Metropolitan Housing Authority; Knox Metropolitan Housing Authority; Morrow Metropolitan Housing Authority; Broken Bow Housing Authority; Municipality of Carolina; Municipality of Morovis; Municipality of Maricao; Municipality of Vega Baja; Municipality of Gurabo; Municipality of Naguabo; Municipality of Adjuntas; Charleston County Housing Authority; Columbia Housing Authority; Lake City Housing Authority; Hartsville Housing Authority.

Contact: Tesia Anyanaso, Program Specialist, Coordination and Compliance Division, Office of Field Operations; Public and Indian Housing, Department of Housing and Urban Development, 451 7th St. SW, Washington, DC 20410–5000, telephone: (202) 402–7026.

[FR Doc. 2023–02843 Filed 2–9–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2023–N002;
FXES11130100000–234–FF01E00000]

Endangered Species; Receipt of Recovery 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, have received an application for a permit to conduct activities intended to enhance the

propagation and survival of an endangered species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on this application. Before issuing the requested permit, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before March 13, 2023.

ADDRESSES: *Document availability and comment submission:* Submit a request for a copy of the application and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name and application number (e.g., Dana Ross, ES001705):

- *Email:* permitsR1ES@fws.gov.
- *U.S. Mail:* Marilet Zablan, Regional

Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181.

FOR FURTHER INFORMATION CONTACT:

Karen Colson, Regional Recovery Permit Program Assistant, Ecological Services, (208) 685–6956 (telephone); permitsR1ES@fws.gov (email).

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: We, the U.S. Fish and Wildlife Service, invite the public to comment on an application for a permit under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permit would allow the applicant to conduct activities intended to promote recovery of a species that is listed as endangered under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of "take" includes such activities as pursuing, harassing, trapping, capturing, or collecting, in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct

activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22 for endangered wildlife species,

50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Application Available for Review and Comment

Proposed activities in the following permit request are for the recovery and enhancement of propagation or survival of the species in the wild. The ESA

requires that we invite public comment before issuing this permit. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to this application. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
ES09155B	University of Washington, Seattle, WA.	Mariana crow (<i>Corvus kubaryi</i>).	Island of Rota, Commonwealth of the Northern Mariana Islands.	Harass by survey, monitor, capture, band, collect morphometrics, bio-sample, radio-tag, conduct playback surveys, record calls, and salvage.	Renew and amend.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. 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.

Next Steps

If we decide to issue an amended permit to the applicant listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Marilet A. Zablan,

Regional Program Manager for Restoration and Endangered Species Classification, Pacific Region.

[FR Doc. 2023-02856 Filed 2-9-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R2-ES-2022-N205;
FXES1113020000-234-FF02ENEH00]

Application for an Enhancement of Survival Permit; N.M. Ranch Properties, Inc (Armendaris Ranch) Bolson Tortoise Safe Harbor Agreement; Socorro and Sierra Counties, New Mexico

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have prepared a draft environmental assessment (EA) on the proposed *N.M. Ranch Properties, Inc. (Armendaris Ranch) Bolson Tortoise Safe Harbor Agreement* (SHA) in Socorro and Sierra Counties, New Mexico. New Mexico Ranch Properties, Inc (applicant) submitted the SHA in support of an application for an enhancement of survival permit (permit) under the Endangered Species Act. If approved, the requested permit would authorize incidental take of the Bolson tortoise that would allow a return to the baseline population condition (*i.e.*, zero free ranging tortoises/zero baseline) at the conclusion of the permit or sooner. Conservation and management activities for the Bolson tortoise are integral to meeting the SHA's net conservation benefit standard as well as ongoing and future activities on the enrolled property during the 50-year permit term. With this notice, we announce the availability for public comment of the SHA application, as well as the draft environmental assessment (EA), which

has been prepared in accordance with the requirements of the National Environmental Policy Act (NEPA).

DATES: We will accept comments received on or before March 13, 2023.

ADDRESSES: *Obtaining documents:* You may obtain copies of the SHA, draft EA, or other related documents on the internet at <https://www.fws.gov/office/new-mexico-ecological-services>.

Submitting comments: You may submit written comments by email to nmesfo@fws.gov. Please note which document(s) your comment references. For more information, see Public Availability of Comments.

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, Albuquerque, New Mexico, Ecological Services Office; telephone (505) 346-2525 or (800) 299-0196. 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: We, the U.S. Fish and Wildlife Service (Service), make available for public review the *N.M. Ranch Properties, Inc. (Armendaris Ranch) Bolson Tortoise Safe Harbor Agreement* (SHA) in Socorro and Sierra Counties, New Mexico, and associated draft environmental assessment (EA). N.M. Ranch Properties, Inc. (applicant) has applied for an enhancement of survival permit (permit) supported by the proposed SHA. If approved, the requested 50-year permit would authorize incidental take of the Bolson

tortoise (*Gopherus flavomarginatus*; tortoise), which is federally listed as endangered under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The permit would authorize incidental take of the tortoise resulting from conservation and management activities for the species that are integral to meeting the SHA net conservation benefit standard, as well as ongoing and future activities on the enrolled property during the permit term, and a return of the property to its baseline condition.

Background

Section 9 of the ESA and our implementing regulations at 50 CFR part 17 prohibit the “take” of fish or wildlife species listed as endangered or threatened. Take is defined under the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct” (16 U.S.C. 1538(19)). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. “Incidental take” is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity.

Regulations governing such take of endangered and threatened species are found at 50 CFR 17.21–22 and 50 CFR 17.31–32, respectively.

National Environmental Policy Act Compliance

In accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*), we advise the public that:

1. We have prepared a draft environmental assessment (EA) to evaluate the SHA and potential permit issuance. We are accepting comments on the SHA and draft EA.

2. The applicant and the Service have developed an SHA, which describes the measures the applicant has volunteered to take to meet the issuance criteria for a 10(a)(1)(A) permit associated with the SHA. The issuance criteria are found at 50 CFR 17.22(c)(1) and 50 CFR 17.32(c)(1).

3. The SHA would be implemented by the applicant and would remain effective until the expiration of the SHA.

4. As described in the SHA, the potential incidental take of the tortoise could result from otherwise lawful, activities covered by the SHA.

Proposed Action

The proposed action involves the issuance of a 10(a)(1)(A) enhancement

of survival permit (permit) to N.M. Ranch Properties, Inc. (applicant) in association with the *N.M. Ranch Properties, Inc. (Armendaris Ranch) Bolson Tortoise Safe Harbor Agreement* (SHA) in Socorro and Sierra Counties, New Mexico. The Bolson tortoise (*Gopherus flavomarginatus*; tortoise) was listed as endangered under the ESA on April 17, 1979 (44 FR 23062 23064), as a species native to Mexico and foreign to the United States. The tortoise was listed as a CITES Appendix II species on July 1, 1975 and elevated to Appendix I on June 28, 1979. The critically imperiled tortoise is not known to have inhabited New Mexico since European colonization. It was widely distributed across the southwestern United States after the Pleistocene glaciation and likely overlapped with Native American peoples.

The purpose of the proposed SHA is to implement population restoration activities for the tortoise through the release of captive-raised tortoises on the Armendaris Ranch in southern New Mexico. The tortoises to be released are part of an ongoing captive breeding program begun, in 2006, by the Turner Endangered Species Fund and located on Ted Turner’s Armendaris Ranch in Sierra and Socorro Counties.

Implementation of the proposed SHA would also allow the natural expansion of the released tortoise population into surrounding habitat on the ranch. The permit would authorize incidental take that may result from the implementation of the proposed conservation and management measures. These measures include maintaining the existing tortoise captive breeding and head-starting program to ensure that adequate numbers of tortoises are available for release. The head-starting enclosure is an outdoor facility that is enclosed with predator proof nets that prevent mammals and birds from preying on the tortoises and houses a few hundred tortoises with the potential to translocate. The measures also include releasing, monitoring, and managing several hundred tortoises as required to establish a foundation from which viable populations (100 individuals or more) could become established at the Armendaris Ranch. In addition, the permit would authorize incidental take that may result from ongoing and future activities on the enrolled property during the permit term, and a return of the property to its baseline condition at the conclusion of the permit.

The SHA, including the proposed conservation and management measures, was developed in coordination with the Service. The

permit would allow incidental take and a return to baseline conditions on the property. The proposed conservation and management measures, once implemented, are expected to provide a net conservation benefit to the tortoise.

Alternatives

We are considering one alternative to the proposed action as part of this process, the No Action Alternative. Under No Action Alternative, the Service would not issue the permit, and the SHA would not be implemented.

Next Steps

We will evaluate the permit application, SHA, draft EA, and comments we receive to determine whether the SHA application meets the requirements of the ESA, NEPA, and implementing regulations. If we determine that all requirements are met, we will approve the SHA and issue the permit under section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*) to the applicant in accordance with the terms of the SHA and specific terms and conditions of the authorizing permit. We will not make our final decision until after the 30-day comment period ends and we have fully considered all comments received during the public comment period.

Public Availability of Comments

All comments we receive become part of the public record associated with this action. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, NEPA, and Service and Department of the Interior policies and procedures. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. 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.

Authority

We provide this notice under the authority of section 10(c) of the ESA and its implementing regulations (50 CFR 17.22 and 17.32) and NEPA (42 U.S.C.

4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Amy L. Lueders,

Regional Director, Southwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2023-02649 Filed 2-9-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-R5-FAC-2023-0004; FXFR1335050000/234/FF05F24400; OMB Control Number 1018-0127]

Agency Information Collection Activities; Horseshoe Crab and Cooperative Fish Tagging Programs

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Fish and Wildlife Service (Service), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before April 11, 2023.

ADDRESSES: Send your comments on the information collection request (ICR) by one of the following methods (please reference 1018-0127 in the subject line of your comments):

- *Internet (preferred):* <https://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-R5-FAC-2023-0004.

- *Email:* Info_Coll@fws.gov.
- *U.S. mail:* Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041-3803.

FOR FURTHER INFORMATION CONTACT:

Madonna L. Baucum, Service Information Collection Clearance Officer, by email at Info_Coll@fws.gov, or by telephone at (703) 358-2503. 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: In accordance with the Paperwork Reduction Act (PRA, 44 U.S.C. 3501 *et seq.*) and its implementing regulations

at 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

- (1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

- (4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Fish and Wildlife Act of 1956 (16 U.S.C. 742f) requires the Department of the Interior to take steps “required for the development, advancement, management, conservation, and protection of fishery resources.” In addition, the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), the Wildlife Coordination Act (16

U.S.C. 661–666c), and the Anadromous Fish Conservation Act (16 U.S.C. 757a–757g) each authorize the Department of the Interior to enter into cooperative agreements with stakeholders to protect and conserve fishery resources. The Maryland Fish and Wildlife Conservation Office (MDFWCO) will collect information on horseshoe crabs and fishes captured by the public. Tag information provided by the public will be used to estimate recreational and commercial harvest rates, estimate natural mortality rates, and evaluate migratory patterns, length and age frequencies, and effectiveness of current regulations.

Horseshoe crabs play a vital role commercially, biomedically, and ecologically along the Atlantic coast. Horseshoe crabs are commercially harvested and used as bait in eel and conch fisheries. Biomedical companies along the coast also collect and bleed horseshoe crabs at their facilities. *Limulus* amebocyte lysate, derived from horseshoe crab blood, is used by pharmaceutical companies to test sterility of products. Finally, migratory shorebirds also depend on the eggs of horseshoe crabs to refuel on their migrations from South America to the Arctic. One bird in particular, the rufa red knot (*Calidris canutus rufa*), feeds primarily on horseshoe crab eggs during its stopover. Effective January 12, 2015, the rufa red knot was listed as threatened under the Endangered Species Act (79 FR 73706; December 11, 2014).

In 1998, the Atlantic States Marine Fisheries Commission (ASMFC), a management organization with representatives from each State on the Atlantic coast, developed a horseshoe crab management plan. The ASMFC plan and its subsequent addenda established mandatory State-by-State harvest quotas, and created the 1,500-square-mile Carl N. Shuster, Jr., Horseshoe Crab Sanctuary off the mouth of Delaware Bay.

Restrictive measures have been taken in recent years; however, populations are increasing slowly. Because horseshoe crabs do not breed until they are 9 years or older, it may take some time before the population measurably increases. Federal and State agencies, universities, and biomedical companies participate in a Horseshoe Crab Cooperative Tagging Program. The Service's MDFWCO maintains the information collected under this program and uses it to evaluate migratory patterns, survival, and abundance of horseshoe crabs.

Members of the public who recover tagged crabs provide the following

information using Form 3–2310 (Horseshoe Crab Recapture Report):

- Tag number;
- Whether or not tag was removed;
- Condition of crab;
- Date captured/found;
- Crab fate;
- Finder type;
- Capture method;
- Capture location;
- Reporter information; and
- Comments.

Agencies that tag and release the crabs complete Form 3–2311 (Horseshoe Crab Tagging) and provide the Service with:

- Organization name;
- Contact person name;
- Tag number;
- Sex of crab;
- Prosomal width; and
- Capture site, latitude, longitude,

waterbody, State, and date.

At the request of the public participant reporting the tagged crab, we send data pertaining to the tagging program and tag and release information on the horseshoe crab tag that was found.

Fish will be tagged with an external tag containing a toll-free number for MDFWCO. Tagged species of fish include striped bass (*Morone saxatilis*), Atlantic sturgeon (*Acipenser oxyrinchus*) and shortnose sturgeon (*Acipenser brevirostrum*), northern snakehead (*Channa argus*), and American shad (*Alosa sapidissima*). Members of the public reporting a tag will be asked a series of questions pertaining to the fish that they are referencing. The Service uses the following four forms to collect information used by fisheries managers throughout the Atlantic Coast, depending on species:

- Form 3–2493, “American Shad Recapture Report”;
- Form 3–2494, “Snakehead Recapture Report”;
- Form 3–2495, “Striped Bass Recapture Report”;
- Form 3–2496, “Sturgeon Recapture Report.”

American shad are tagged by the New York Department of Environmental Conservation (NYDEC), which retains all fish tagging information. The public reports tags to MDFWCO, who provides information on tag returns to NYDEC. Tag return data are used to monitor migration and abundance of shad along the Atlantic coast.

Northern snakehead is an invasive species found in many watersheds throughout the mid-Atlantic region. It has been firmly established in the Potomac River since at least 2004 and is now in nearly every major Chesapeake Bay tributary. Federal and State

biologists within the Chesapeake Bay watershed have been tasked with managing the impacts of northern snakehead. Tagging of northern snakehead is used to learn more about the species so that control efforts can be better informed. Tagging is also used to estimate population sizes to monitor trends in abundance. Recreational and commercial fishers reporting tags provide information on harvest rates and migration patterns as well.

Striped bass are cooperatively managed by Federal and State agencies through the Atlantic States Marine Fisheries Commission (ASMFC). The ASMFC uses fish tag return data to conduct stock assessments for striped bass. The database and collection are housed within MDFWCO, while the tagging is conducted by State agencies participating in striped bass management. Without this data collection, striped bass management would likely suffer from a lack of quality data. As required by Congress under the Atlantic Striped Bass Conservation Act (16 U.S.C. 5151–5158), striped bass tagging data is used to manage the coast-wide stock.

Sturgeon are tagged by Federal, State, and university biologists and nongovernmental organizations along the U.S. east coast and into Canada, and throughout the United States and Canada. Local populations of Atlantic sturgeon have been listed as either threatened or endangered since 2012, and shortnose populations have been listed since 1973. The information collected provides data on tag retention and sturgeon movement along the east coast. The data are also used to address some of the management and research needs identified by amendment 1 to the ASMFC’s Atlantic Sturgeon Fishery Management Plan.

Data collected across these tagging programs are similar in nature, including:

- Tag number;
- Date of capture;
- Waterbody of capture;
- Capture method;
- Fish length, weight, and fate (whether released or killed); and
- Fisher type (*i.e.*, commercial, recreational, etc.).

In addition, if the tag reporter desires more information on their tagged fish or wants the modest reward that comes with reporting a tag, we ask their address so that we can mail them the information.

The public may request a copy of Form 3–156 contained in this information collection by sending a request to the Service Information

Collection Clearance Officer (see **ADDRESSES**).

Title of Collection: Horseshoe Crab and Cooperative Fish Tagging Programs.
OMB Control Number: 1018–0127.

Form Number: Forms 3–2310, 3–2311, and 3–2493 through 3–2496.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Respondents include Federal and State agencies, universities, and biomedical companies who conduct tagging, and members of the general public who provide recapture information.

Total Estimated Number of Annual Respondents: 2,006.

Total Estimated Number of Annual Responses: 3,628.

Estimated Completion Time per Response: Varies from 5 minutes to 95 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 2,239.

Respondent’s Obligation: Voluntary.
Frequency of Collection: Respondents will provide information on occasion, upon tagging or upon encounter with a tagged crab or fish.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2023–02844 Filed 2–9–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

**[Bureau of Indian Affairs
[234A2100DD/AAKC001030/
AOA501010.999900]**

Land Acquisitions; Buena Vista Rancheria of Me-Wuk Indians of California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs has made a final determination to acquire 54.90 acres, more or less, into trust for the Buena Vista Rancheria of Me-Wuk Indians of California.

DATES: This final determination was made on February 3, 2023.

FOR FURTHER INFORMATION CONTACT: Amy Dutschke, Regional Director, Office

Indian Affairs Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way Room W-2820, Sacramento, CA 95825, comments@bia.gov, (916) 978-6000.

SUPPLEMENTARY INFORMATION: On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs issued a decision to accept land in trust for the Buena Vista Rancheria of Me-Wuk Indians of California under the authority of Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984). The land referred to herein, consisting of 54.90 acres, more or less, is in the unincorporated area of the County of Amador, State of California, described as follows.

Legal Description of Property

Parcel One: The Southeast quarter of the Northwest quarter and all that portion of the Southwest quarter of Section 30, Township 5 North, Range 10 East, M.D.M., lying North of the Northerly line of that certain 80 foot road, as said road was established and conveyed by Deed dated May 15, 1963, executed by Nona M. Kelly and Iona L. Striplin to County of Amador, recorded September 19, 1963 in Book 122 of Official Records, at Page 596.

Excepting therefrom that portion thereof described as follows:

Beginning at the North $\frac{1}{4}$ corner of said Section 30, as shown upon that certain Official Map entitled "Record of Survey Map of a Portion of the Camache Reservoir Project", recorded in the Amador County Recorder's Office on June 17, 1963 in Book 9 of Maps and Plats, at Page 90; thence, from said point of beginning, along the Northerly line of said Section 30, South $87^{\circ}47'51''$ West 60.02 feet to a $\frac{3}{4}$ inch steel rod tagged R.C.E. 10761; thence leaving said Northerly line, parallel to the North-South $\frac{1}{4}$ Section line, South $00^{\circ}34'17''$ East, 1348.29 feet to a similar rod; thence continuing South $00^{\circ}34'17''$ East, 1219.96 feet, more or less, to a similar steel rod set in the Northerly right-of-way fence of that certain roadway constructed by the East Bay Municipal Utility District; thence Easterly along said right-of-way fence, 83.24 feet to a similar steel rod; thence, leaving said right-of-way fence, parallel to said North-South $\frac{1}{4}$ Section line, North $00^{\circ}34'17''$ West 1197.11 feet to a similar steel rod; thence, continuing North $00^{\circ}34'17''$ West 1200.57 feet, more or less, to a similar steel rod set on the Northerly line of said Section 30; thence, along said Northerly line, South $87^{\circ}47'51''$ West, 20.00 feet to the point of beginning, as conveyed by Deed dated August 5, 1964, executed by Nona M. Kelly and Iona L. Striplin to County

of Amador recorded July 2, 1965 in Book 144 of Official Records, at Page 6.

Parcel Two: All that portion of the Southwest quarter of the Northwest quarter of Section 30, Township 5 North, Range 10 East, M.D.M., lying South and East of the land shown on that Record of Survey No. 4662 filed for record on December 24, 2002 in Book 55 of Maps and Plats at Page 25, Amador County Records.

This legal is made pursuant to that certain Boundary Line Agreement, recorded December 24, 2002 as Instrument No. 2002-16123 of Official Records.

Authority

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1, and is published to comply with the requirements of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the **Federal Register**.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023-02852 Filed 2-9-23; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
AOA501010.999900]

Land Acquisitions; Buena Vista Rancheria of Me-Wuk Indians of California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs has made a final agency determination to acquire 81 acres, more or less, into trust for the Buena Vista Rancheria of Me-Wuk Indians of California.

DATES: This final determination was made on February 3, 2023.

FOR FURTHER INFORMATION CONTACT: Amy Dutschke, Regional Director, Office Indian Affairs Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Room W-2820, Sacramento, CA 95825, comments@bia.gov, (916) 978-6000.

SUPPLEMENTARY INFORMATION: On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs issued a decision to accept land in trust for the Buena Vista Rancheria of Me-Wuk Indians of California under the

authority of Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984). The land referred to herein, consisting of 81 acres, more or less, is in the unincorporated area of Ione, County of Amador, State of California, described as follows:

Legal Description of Property

Parcel No. 1: Adjusted Parcel 2, as shown on "Record of Survey Boundary Line Adjustment for Buffalo Stop" filed for record April 23, 1993, in Book 47 of Maps at Page 44.

Parcel No. 2: That 50 feet wide access and public utility easement as shown on said Boundary Line Adjustment Map.

Authority

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1, and is published to comply with the requirements of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the **Federal Register**.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023-02851 Filed 2-9-23; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOS00000 L12200000.XX0000 234]

Notice of Southwest District Colorado Resource Advisory Council Sheep Grazing Subcommittee Meetings

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the Bureau of Land Management's (BLM's) Southwest District Colorado Resource Advisory Council (RAC) on September 8, 2022, voted to create a subcommittee to analyze domestic sheep grazing in bighorn sheep habitat on BLM-managed high alpine allotments outside of Silverton, Colorado. The Sheep Grazing Subcommittee will hold the following meetings.

DATES: The Sheep-Grazing Subcommittee will hold a total of six in-person meetings at the Uncompahgre Field Office on March 14, April 5, May 9, June 13, July 18, and August 15, 2023. All meetings will be held from 10 a.m.

to 2 p.m. Virtual participation options will also be available.

ADDRESSES: The Uncompahgre Field Office is located at 2465 S Townsend Ave., Montrose, CO 81401.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Dawson, Deputy District Manager, BLM Southwest District Office, 2465 S. Townsend Ave., Montrose, CO 81401; email: edawson@blm.gov, telephone: (970) 240-5430. 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: The Southwest District Colorado RAC voted to create a subcommittee to compile information, conduct research, and report their recommendations on sheep grazing to the full RAC for consideration. The BLM Southwest District has analyzed the effects of domestic sheep and goat grazing in domestic sheep grazing allotments on BLM-managed public land. The purpose of the Subcommittee is to review the BLM's analysis, policies, and best management practices and provide recommendations to the RAC on how best to advise the Southwest District regarding its domestic sheep grazing permit renewals. The Subcommittee will look at options to reduce the risk of contact and disease transmission between Rocky Mountain bighorn sheep and domestic sheep on the high-alpine allotments near Silverton, Colorado.

These meetings are open to the public and will adhere to applicable Centers for Disease Control and Prevention protocols regarding COVID-19. A public comment period will be held at each meeting from 12:45 p.m. to 1:15 p.m. Contingent on the number of people who wish to comment during the public comment period, individual comments may be limited. The public may present written comments to the Subcommittee prior to the meetings at the address listed in the **ADDRESSES** section of this notice. Please include "Subcommittee Comment" in your submission. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying

information from public review, we cannot guarantee that we will be able to do so.

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Summary minutes for the Subcommittee meetings will be maintained in the Southwest District Office and will be available for public inspection and reproduction during regular business hours within 30 days following the meeting (see **FOR FURTHER INFORMATION CONTACT**). Previous minutes and agendas are available at: <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado/southwest-rac>.

(Authority: 43 CFR 1784.4-2)

Douglas Vilsack,

BLM Colorado State Director.

[FR Doc. 2023-02895 Filed 2-9-23; 8:45 am]

BILLING CODE 4310-JB-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[223.LLAK941200.L1440000.ET0000; AA-82857]

Public Land Order No. 7918; Extension of Public Land Order No. 7555; Russian River and Upper Russian Lake Recreation Corridor; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This Public Land Order (PLO) extends the duration of the withdrawal created by PLO No. 7555, which would otherwise expire on February 12, 2023, for an additional 20-year term. PLO No. 7555 withdrew approximately 2,998 acres of National Forest System lands from location and entry under the United States mining laws, subject to valid existing rights, for the protection of the Russian River and Upper Russian Lake Recreation Corridor near Cooper Landing, Alaska.

DATES: This PLO takes effect on February 13, 2023.

FOR FURTHER INFORMATION CONTACT: Chelsea Kreiner, BLM Alaska State Office, 222 West Seventh Avenue, Mailstop 13, Anchorage, AK 99513-

7504, (907) 271-4205, or ckreiner@blm.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: The purpose for which the withdrawal was first made requires this extension to continue the protection of the Russian River and Upper Russian Lake Corridor near Cooper Landing, Alaska. The lands will remain open to such uses as may by law be made of National Forest System lands, and all public uses consistent with the recreational utilization and protection of the Russian River watershed.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), it is ordered as follows:

1. Subject to valid existing rights, PLO No. 7555, (68 FR 7387 (2003)), which withdrew approximately 2,998 acres of National Forest System lands from location or entry under the United States mining laws, subject to valid existing rights, to protect the Russian River and Upper Russian Lake Recreation Corridor, is hereby extended for an additional 20-year period.

2. The withdrawal extended by this Order will expire on February 12, 2043, unless, as a result of a review conducted prior to the expiration date, pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

(Authority: 43 U.S.C. 1714)

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023-02825 Filed 2-9-23; 8:45 am]

BILLING CODE 4331-10-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_CO_FRN_MO4500168794; LICO80200-L10200000.PH0000-212]

Notice of Joint and Individual Colorado Resource Advisory Council Meetings

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Colorado's Northwest Resource Advisory Council (RAC), Southwest RAC, and Rocky Mountain RAC will meet as follows.

DATES: The Northwest, Southwest, and Rocky Mountain RACs will hold a joint meeting on March 29, 2023, from 8:30 a.m. to 4:30 p.m. The Northwest and Southwest RACs will meet jointly on March 30, 2023, from 9 a.m. to noon. The Rocky Mountain RAC will meet on March 30, 2023, from 9 a.m. to 2 p.m. All meetings are open to the public and virtual participation options will be available.

ADDRESSES: All meetings will be held in Glenwood Springs, Colorado. The March 29 meeting will be held at Morgridge Commons, 815 Cooper Avenue. The March 30 meetings will be held at Colorado Mountain College's Glenwood Center, 1402 Blake Ave.

FOR FURTHER INFORMATION CONTACT: Northwest RAC—Greg Larson; BLM Upper Colorado River District Office, 2815 H Road Grand Junction, CO 81056; glarson@blm.gov, (970) 244–3015. Southwest RAC—Lisa Dawson; BLM Southwest District Office, 2465 S Townsend Ave., Montrose, CO 81401; edawson@blm.gov, (970) 240–5430. Rocky Mountain RAC—Levi Spellman, Public Affairs Specialist; BLM Rocky Mountain District Office, 3028 E Main St., Cañon City, CO 71212; lsPELLMAN@blm.gov, (719) 269–8553.

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 for contacting the BLM. 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. Individuals who need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM (see **FOR FURTHER INFORMATION CONTACT**).

SUPPLEMENTARY INFORMATION: The Colorado RACs advise the Secretary of the Interior, through the BLM, on a variety of public land issues in Colorado. Planned agenda items for the March 29 joint RAC meeting include presentations on partnership opportunities and Federal Lands Recreation Enhancement Act funding. Topics of discussion during the March

30 meetings may include recreation, land use planning, energy and minerals management, recreation, sage-grouse habitat management, and other issues as appropriate. Final agendas will be available online 2 weeks prior to the meetings at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado>.

A public comment period will be available at each meeting. Depending on the number of people who wish to comment during the public comment period, individual comments may be limited. Written comments may be submitted in advance of the individual RAC meetings via email to the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Please include "RAC Comment" in your submission.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Detailed minutes for the RAC meetings will be made available 90 days following the meetings online at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/colorado>.

(Authority: 43 CFR 1784.4–2)

Douglas Vilsack,

BLM Colorado State Director.

[FR Doc. 2023–02893 Filed 2–9–23; 8:45 am]

BILLING CODE 4331–16–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–TUSK–35082; PPPWTUSK00, PPMPSPD1Z.YM0000]

Request for Nominations for the Tule Springs Fossil Beds National Monument Advisory Council

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior, is requesting nominations for qualified persons to serve as members of the Tule Springs Fossil Beds National Monument Advisory Council (Council).

DATES: Written nominations must be postmarked by March 13, 2023.

ADDRESSES: Nominations should be sent to Derek Carter, Superintendent, Tule

Springs Fossil Beds National Monument, 601 Nevada Way, Boulder City, Nevada 89005, or email at derek_carter@nps.gov.

FOR FURTHER INFORMATION CONTACT:

Derek Carter, via telephone (702) 902–0431. 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: The Council was established by section 3092 (a)(6) of Public Law 113–291, and in accordance with the provisions of the Federal Advisory Committee Act (5 U.S.C. 10). The purpose of the Council is to provide the Secretary of the Interior (Secretary) and the NPS guidance for the management of the Monument.

The Council is composed of 10 members, appointed by the Secretary to 3-year terms, and consists of the following members: one representative of the County Commission; one representative appointed by the city council of Las Vegas, Nevada; one representative appointed by the city council of North Las Vegas, Nevada; one member appointed by the tribal council of the Las Vegas Paiute Tribe; one representative of the conservation community in southern Nevada; one representative of Nellis Air Force Base; one member who resides in the County and has a background that reflects the purpose for which the Monument was established; and two members who reside in Clark County or adjacent counties, both of whom shall have experience in the field of paleontology, obtained through higher education, experience, or both.

Individuals selected to serve as members who reside in the Clark County or adjacent counties and have experience in the field of paleontology, obtained through higher education, experience, or both, will be appointed as special Government employees (SGEs). Individuals selected from the other categories will be appointed as representative members. Please be aware that members selected to serve as SGEs will be required, prior to appointment, to file a Confidential Financial Disclosure Report in order to avoid involvement in real or apparent conflicts of interest. You may find a copy of the Confidential Financial Disclosure Report at the following website: <https://www.doi.gov/ethics/special-government-employees/>

financial-disclosure. Additionally, after appointment, members appointed as SGEs will be required to meet applicable financial disclosure and ethics training requirements. Please contact (202) 208-7960 or DOI_Ethics@sol.doi.gov with any questions about the ethics requirements for members appointed as SGEs.

We are currently seeking one member who resides in Clark County or adjacent counties, who shall have experience in the field of paleontology, obtained through higher education, experience, or both, and one representative appointed by the city council of Las Vegas. Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Council and permit the Department to contact a potential member. All documentation, including letters of recommendation, must be compiled and submitted in one complete package. All those interested in membership, including current members whose terms are expiring, must follow the same nomination process. Members may not appoint deputies or alternates.

Members of the Council serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Council as approved by the NPS, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under section 5703 of Title 5 of the United States Code.

Authority: 5 U.S.C. 10.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023-02914 Filed 2-9-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-NER-ACAD-35050; PPNEACADSO, PPMSPDIZ.YM0000]

Request for Nominations for the Acadia National Park Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior,

is requesting nominations for qualified persons to serve as members of the Acadia National Park Advisory Commission (Commission).

DATES: Written nominations must be postmarked by March 13, 2023.

ADDRESSES: Nominations should be sent to Brandon Bies, Deputy Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609, or by email brandon_bies@nps.gov.

FOR FURTHER INFORMATION CONTACT: Brandon Bies, via telephone at (207) 288-8701. 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: The Commission was established by section 103 of Public Law 99-420, as amended, (16 U.S.C. 341 note), and in accordance with the Federal Advisory Committee Act (5 U.S.C. 10). The Commission advises the Secretary of the Interior (Secretary) and the NPS on matters relating to the management and development of Acadia National Park, including but not limited to, the acquisition of lands and interests in lands (including conservation easements on islands) and the termination of rights of use and occupancy.

The Commission is composed of 16 members appointed by the Secretary, as follows: (a) three members at large; (b) three members appointed from among individuals recommended by the Governor of Maine; (c) four members appointed from among individuals recommended by each of the four towns on the island of Mount Desert; (d) three members appointed from among individuals recommended by each of the three Hancock County mainland communities of Gouldsboro, Winter Harbor, and Trenton; and (e) three members appointed from among individuals recommended by each of the three island towns of Cranberry Isles, Swans Island, and Frenchboro.

The NPS is seeking nominees to represent every category except Winter Harbor. Individuals selected to serve as the members at large will be appointed as special Government Employees (SGEs). Individuals selected from the other categories will be appointed as representative members. Please be aware that members selected to serve as SGEs will be required, prior to appointment, to file a Confidential

Financial Disclosure Report in order to avoid involvement in real or apparent conflicts of interest. You may find a copy of the Confidential Financial Disclosure Report at the following website: SGEs and Financial Disclosure Reporting | U.S. Department of the Interior ([doi.gov](https://www.doi.gov)). Additionally, after appointment, members appointed as SGEs will be required to meet applicable financial disclosure and ethics training requirements. Please contact 202-208-7960 or DOI_Ethics@sol.doi.gov with any questions about the ethics requirements for members appointed as SGEs.

Nominations received by the park will be sent directly to local municipalities for their consideration. Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Commission and permit the Department to contact a potential member. All documentation, including letters of recommendation, must be compiled and submitted in one complete package. All those interested in membership, including current members whose terms are expiring, must follow the same nomination process. Members may not appoint deputies or alternates.

Members of the Commission serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Commission as approved by the NPS, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under section 5703 of title 5 of the United States Code.

Authority: 5 U.S.C. 10.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023-02917 Filed 2-9-23; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1580, 1582, and 1583 (Final)]

Steel Nails From India, Thailand, and Turkey

Determinations

On the basis of the record¹ developed in the subject investigations, 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 not materially injured or threatened with material injury by reason of imports of steel nails from India, Thailand, and Turkey, provided for in subheadings 7317.00.55, 7317.00.65, and 7317.00.75 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 these investigations effective December 30, 2021, following receipt of petitions filed with the Commission and Commerce by Mid Continent Steel & Wire, Inc., Poplar Bluff, Missouri. The Commission scheduled the final phase of the investigations following notification of preliminary determinations by Commerce that imports of steel nails from India, Oman, Sri Lanka, and Turkey were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)).³ Notice of the scheduling of the final phase of the Commission’s investigations and of a public hearing to be held in connection therewith was given by posting copies

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 78929, December 23, 2022; 87 FR 78935, December 23, 2022; and 87 FR 78937, December 23, 2022. Commerce also published notice in the *Federal Register* of a negative final antidumping duty determination in connection with the investigation concerning steel nails from Sri Lanka (87 FR 78933, December 23, 2022). Accordingly, effective December 23, 2022, the Commission terminated its antidumping duty investigation concerning steel nails from Sri Lanka (88 FR 1291, January 9, 2023).

³ While Commerce preliminarily determined that countervailable subsidies were not being provided to producers and exporters of steel nails from Thailand, the Commission continued its investigative activities pursuant to Commission rule 207.21(c). Determinations by Commerce with respect to sales at less-than-fair-value value of imports of steel nails from India, Sri Lanka, Thailand, and Turkey were pending at that time and subsequently published in the *Federal Register* on August 4, 2022 (87 FR 47719, 87 FR 47701, 87 FR 47708, and 87 FR 47699).

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 June 21, 2022 (87 FR 36882). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its hearing through written testimony and video conference on August 17, 2022. All persons who requested the opportunity were permitted to participate.

The investigation schedules became staggered when Commerce did not align its countervailing duty investigations with its antidumping duty investigations and reached earlier final countervailing duty determinations. On October 6, 2022, the Commission issued final negative determinations in its countervailing duty investigations of steel nails from India, Oman, Sri Lanka, and Turkey (87 FR 61631, October 12, 2022). Following notification of final determinations by Commerce that imports of steel nails from India, Thailand, and Turkey were being sold at LTFV within the meaning of section 735(a) of the Act (19 U.S.C. 1673d(a)), notice of the supplemental scheduling of the final phase of the Commission’s antidumping duty investigations 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 scheduling of the final phase of Commission’s antidumping duty investigations (88 FR 2373, January 13, 2023).

The Commission made these determinations pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on February 6, 2023. The views of the Commission are contained in USITC Publication 5404 (February 2023), entitled *Steel Nails from India, Thailand, and Turkey: Investigation Nos. 731–TA–1580, 1582, and 1583 (Final)*.

By order of the Commission.

Issued: February 6, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–02833 Filed 2–9–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–011]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 13, 2023 at 11:00 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. No. 731–TA–410 (Fifth Review) (Light-Walled Rectangular Pipe and Tube from Taiwan). The Commission currently is scheduled to complete and file its determinations and views of the Commission on February 22, 2023.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Acting Supervisory Hearings and Information Officer, 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: February 7, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–02991 Filed 2–8–23; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1578–1579 (Final)]

Lemon Juice From Brazil and South Africa

Determinations

On the basis of the record¹ developed in the subject investigations, 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 lemon juice from Brazil and South

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

Africa, provided for in subheadings 2009.31.40, 2009.31.60, and 2009.39.60 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”).^{2,3}

Background

The Commission instituted these investigations effective December 30, 2021, following receipt of petitions filed with the Commission and Commerce by Ventura Coastal LLC, Ventura, California. The Commission scheduled the final phase of the investigations following notification of preliminary determinations by Commerce that imports of lemon juice from Brazil and South Africa 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 and subsequent revised schedule of the final phase of the Commission’s investigations and of a public hearing to be held in connection therewith was given by posting copies of the notices in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notices in the **Federal Register** of August 23, 2022 (87 FR 51701) and September 28, 2022 (87 FR 58821). The Commission conducted its hearing on December 15, 2022. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to § 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on February 6, 2023. The views of the Commission are contained in USITC Publication 5403 (February 2023), entitled *Lemon Juice from Brazil and South Africa: Investigation Nos. 731-TA-1578-1579 (Final)*.

By order of the Commission.

Issued: February 6, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023-02834 Filed 2-9-23; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Comment Request; Workforce Recruitment Program (WRP)

AGENCY: Office of Disability Employment Policy (ODEP), United States Department of Labor (DOL).

ACTION: Notice of information collections and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the DOL is soliciting public comments regarding this ODEP-sponsored information collection to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments pertaining to this information collection are due on or before April 11, 2023.

ADDRESSES:

Electronic submission: You may submit comments and attachments electronically at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Mail submission: 200 Constitution Ave. NW, Room S-5315, Washington, DC 2020.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the DOL, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the DOL’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT:

David Rosenblum by telephone at 202-693-7840 (this is not a toll-free number) or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The WRP is a recruitment and referral program that connects students with disabilities to an opportunity for employment. Through participating colleges and universities, WRP creates a database for Federal and select private-sector employers nationwide to find highly motivated college students and recent graduates with disabilities who are

eager to demonstrate their abilities in the workplace through summer or permanent jobs. Candidates represent all majors, and range from college freshmen to graduate students and law students. Information from these candidates is compiled in a searchable database that is available through this website to Federal Human Resources Specialists, Equal Employment Opportunity Specialists, and other Federal employees and hiring officials in Federal agencies.

Every year, WRP staff approach more than 300 colleges and universities to participate in the WRP recruitment process for the year. WRP School Coordinators at these schools conduct outreach to their eligible students and encourage them to apply to participate in the WRP. School Coordinators must be college staff and are usually from the career or disability services office. Candidates that are approved by the School Coordinators and completed the application by the deadline are given the opportunity to have an elective informational interview with a trained volunteer WRP Recruiter from a Federal agency.

To be eligible to register, candidates must be current, full-time, degree-seeking undergraduate or graduate students with a disability, or have graduated within two and a half years of the release of the database each December. Candidates must be U.S. citizens, must be attending or have graduated from a U.S. accredited college or university, and be eligible under the Schedule A Hiring Authority for persons with disabilities. Candidates must also be approved by a WRP School Coordinator to apply to WRP and participate in an interview.

Candidates are not interviewing for specific positions at specific agencies. They have the opportunity to have an elective informational interview with a Federal recruiter to learn about Federal service and discuss their career path. Candidates are not placed into jobs; they are simply applying to be part of a database of postsecondary students and recent graduates with disabilities that is made available to Federal employers directly and to the private sector through a contractor. Employers will then reach out to candidates directly if they are interested in interviewing or hiring them for a specific position. Candidates should be aware that WRP is not a guarantee of employment and not everyone who participates in WRP is contacted by employers.

This information collection is subject to the Paperwork Reduction Act (PRA). A Federal agency generally cannot conduct or sponsor a collection of

² 87 FR 78928 (December 23, 2022); 87 FR 78939 (December 23, 2022).

³ Chairman David S. Johanson determines that an industry in the United States is threatened with material injury by reason of imports of lemon juice from Brazil and South Africa.

information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

The DOL seeks PRA authorization for this information collection for three (3)

years. OMB authorization for an Information Collection Review cannot be for more than three (3) years without renewal. The DOL notes that currently approved information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review.

Agency: DOL–ODEP.

Type of Review: Revision of a currently approved collection.

Title of Collection: Workforce Recruitment Program (WRP).

OMB Control Number: 1230–0017.

Affected Public: Individuals and households.

Total Estimated Annual Number of Respondents: 2,500.

Frequency: Annually.

Total Estimated Annual Number of Responses: 2,500.

Total Estimated Annual Time Burden: 2,500 hours.

Total Estimated Annual Other Costs Burden: \$0.

ESTIMATED HOURS OF BURDEN TO PARTICIPANT DATA COLLECTION—YEARS 1–3

Study	Number of respondents	Hours/ response
Year 1	2,500	1
Year 2	2,500	1
Year 3	2,500	1
Three-year Total	7,500	7,500
Three-year Average	2,500	2,500

Authority: 44 U.S.C. 3506(c)(2)(A).

Taryn Williams,

Assistant Secretary, Office of Disability Employment Policy.

[FR Doc. 2023–02855 Filed 2–9–23; 8:45 am]

BILLING CODE 4510–FK–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2023–0002]

Advisory Committee on Construction Safety and Health (ACCSH): Notice of Meetings

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of ACCSH Committee and Workgroup meetings.

SUMMARY: The Advisory Committee on Construction Safety and Health (ACCSH) will meet March 1, 2023. ACCSH Workgroups will meet on February 28, 2023.

DATES:

ACCSH meeting: ACCSH will meet from 9:00 a.m. to 4:00 p.m., ET, Wednesday, March 1, 2023.

ACCSH Workgroup meetings: ACCSH Workgroups will meet Tuesday, February 28, 2023. (See ACCSH Workgroup Meetings in the **SUPPLEMENTARY INFORMATION** section of this notice for ACCSH Workgroup meetings scheduled times.)

ADDRESSES:

Submission of comments and requests to speak: Submit comments and

requests to speak at the ACCSH meeting by Thursday, February 23, 2023, identified by the docket number for this **Federal Register** notice (Docket No. OSHA–2023–0002), using the following method:

Electronically: Comments and requests to speak, including attachments, must be submitted electronically at: <http://www.regulations.gov>, the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

Requests for special accommodations: Submit requests for special accommodations for this ACCSH meeting by Thursday, February 23, 2023, to Ms. Gretta Jameson, OSHA, Directorate of Construction, U.S. Department of Labor; telephone: (202) 693–2020; email: jameson.grettah@dol.gov.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone (202) 693–1999; email: meilinger.francis2@dol.gov.

For general information about ACCSH: Mr. Damon Bonneau, OSHA, Directorate of Construction, U.S. Department of Labor; telephone (202) 693–2183; email: bonneau.damon@dol.gov.

Telecommunication requirements: For additional information about the telecommunication requirements for the meeting, please contact Ms. Gretta Jameson, OSHA, Directorate of Construction, U.S. Department of Labor; telephone: (202) 693–2020; email: jameson.grettah@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 on OSHA’s website at www.osha.gov.

SUPPLEMENTARY INFORMATION:

I. Background

ACCSH advises the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) in the formulation of standards affecting the construction industry, and on policy matters arising in the administration of the safety and health provisions under the Contract Work Hours and Safety Standards Act (Construction Safety Act (CSA)) (40 U.S.C. 3701 *et seq.*) and the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) (see also 29 CFR 1911.10 and 1912.3). In addition, the CSA and OSHA regulations require the Assistant Secretary to consult with ACCSH before the agency proposes occupational safety and health standards affecting construction activities (40 U.S.C. 3704; 29 CFR 1911.10).

ACCSH operates in accordance with the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. app. 2), and its implementing regulations (41 CFR 102–3 *et seq.*); and Department of Labor Manual Series Chapter 1–900 (3/25/2022). ACCSH generally meets two to four times a year.

II. Meetings

ACCSH Meeting

ACCSH will meet from 9:00 a.m. to 4:00 p.m., ET, Wednesday, March 1, 2023. The meeting is open to the public.

Meeting agenda: The tentative agenda for this meeting includes:

- Assistant Secretary's agency update and remarks;
- Directorate of Construction industry update;
- Hard hats to Helmets presentation by the American Society of Concrete Contractors;
- National Safety Stand-Down to Prevent Falls in Construction update;
- ACCSH Workgroup reports; and
- Public comment period.

ACCSH Workgroup Meetings

In conjunction with the ACCSH meeting, the following ACCSH Workgroups will meet on Tuesday, February 28, 2023. ACCSH Workgroup meetings are open to the public.

- Emerging and Current Issues 9:00 a.m. to 11:00 a.m.
- Infrastructure 12:00 p.m. to 2:00 p.m.
- Education, Training, and Outreach 2:15 p.m. to 4:15 p.m.

III. Meeting Information

The ACCSH Committee and ACCSH Workgroups will meet in Conference Room C-5320, Room 6, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Public attendance at the ACCSH Committee and Workgroup meetings will be in-person and virtual. In-person attendance will be limited to the first 25 people who register to attend the meetings in person. Please contact Ms. Gretta Jameson, OSHA, Directorate of Construction, U.S. Department of Labor; telephone: (202) 693-2020; email: jameson.gretta@dol.gov, to register. In-person meeting attendance registration must be completed by Thursday, February 23, 2023. Meeting in-person attendees must use the visitor's entrance located at 3rd & C Streets NW. Virtual meeting attendance information will be posted in the Docket (Docket No. OSHA-2023-0002) and on the ACCSH website, <https://www.osha.gov/advisory-committee/acssh>, prior to the meeting.

Requests to speak and speaker presentations: Attendees who wish to address ACCSH must submit a request to speak, as well as any written or electronic presentation, by Thursday, February 23, 2023, using the method listed in the **ADDRESSES** section of this notice. The request must state:

- The amount of time requested to speak;

- The interest you represent (*e.g.*, business, organization, affiliation), if any; and

- A brief outline of your presentation.

PowerPoint presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats.

Alternately, you may request to address ACCSH briefly during the public-comment period. At her discretion, the ACCSH Chair may grant requests to address ACCSH as time and circumstances permit.

Docket: OSHA will place comments, requests to speak, and speaker presentations, including any personal information you provide, in the public docket without change, and those documents may be available online at: <http://www.regulations.gov>. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security Numbers and birthdates. OSHA also places in the public docket the meeting transcript, meeting minutes, documents presented at the meeting, and other documents pertaining to the ACCSH meeting. These documents are available online at: <http://www.regulations.gov>. To read or download documents in the public docket for this ACCSH meeting, go to Docket No. OSHA-2023-0002 at: <http://www.regulations.gov>. All documents in the public docket are listed in the index; however, some documents (*e.g.*, copyrighted material) are not publicly available to read or download through <http://www.regulations.gov>. All submissions are available for inspection and copying, when permitted, at the OSHA Docket Office. For information on using <http://www.regulations.gov> to make submissions or to access the docket, click on the "Help" tab at the top of the homepage. Contact the OSHA Docket Office at (202) 693-2350, (TTY (877) 889-5627) for information about materials not available through that website and for assistance in using the internet to locate submissions and other documents in the docket.

Authority and Signature

James S. Fredrick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice pursuant to 29 U.S.C. 655, 40 U.S.C. 3704, Secretary of Labor's Order No. 8-2020 (85 FR 58393), 5 U.S.C. app. 2, and 29 CFR part 1912.

Signed at Washington, DC, on February 6, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023-02871 Filed 2-9-23; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA-23-0002; NARA-2023-016]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on [regulations.gov](http://www.regulations.gov) for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by March 28, 2023.

ADDRESSES: To view a records schedule in this notice, or submit a comment on one, use the following address: <https://www.regulations.gov/docket/NARA-23-0002/document>. This is a direct link to the schedules posted in the docket for this notice on [regulations.gov](http://www.regulations.gov). You may submit comments by the following method:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on [regulations.gov](http://www.regulations.gov) and on submitting comments, see their FAQs at <https://www.regulations.gov/faq>.

If you are unable to comment via [regulations.gov](http://www.regulations.gov), you may email us at request.schedule@nara.gov for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each

schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Kimberly Richardson, Strategy and Performance Division, by email at regulation_comments@nara.gov or at 301-837-2902. For information about records schedules, contact Records Management Operations by email at request.schedule@nara.gov or by phone at 301-837-1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the [regulations.gov](https://www.archives.gov/regulations.gov) docket for this notice as "other" documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the [regulations.gov](https://www.archives.gov) portal, you may contact request.schedule@nara.gov for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on [regulations.gov](https://www.archives.gov/regulations.gov) a "Consolidated Reply" summarizing the comments,

responding to them, and noting any changes we made to the proposed schedule. You may elect at [regulations.gov](https://www.archives.gov/regulations.gov) to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at <https://www.archives.gov/records-mgmt/rcs>, after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Defense, Defense Threat Reduction Agency, Exchanged Atomic Information Files (DAA-0374-2020-0008).

2. Department of Transportation, Federal Aviation Administration, Records of the Office of Aerospace Medicine (DAA-0237-2022-0018).
3. Department of the Treasury, Internal Revenue Service, Governance Board Policy Records (DAA-0058-2023-0001).
4. Central Intelligence Agency, Agency-wide, Interim Training Performance Report Records (DAA-0263-2023-0004).
5. Court Services and Offenders Supervision Agency for the District of Columbia, Pretrial Services Agency, Justice and Community Relations Records (DAA-0562-2021-0031).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2023-02841 Filed 2-9-23; 8:45 am]

BILLING CODE 7515-01-P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Grantee Reporting Requirements for the Industry-University Cooperative Research Centers (IUCRC) Program

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to renew this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting Office of Management and Budget (OMB) clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by April 11, 2023 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite E7400, Alexandria, Virginia 22314; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: Grantee Reporting Requirements for the Industry-University Cooperative Research Centers (IUCRC) Program.

OMB Number: 3145-0088.

Expiration Date of Approval: August 31, 2023.

Type of Request: Revision to and extension of approval of an information collection.

Proposed Project: The IUCRC program provides a structure for academic researchers to conduct fundamental, pre-competitive research of shared interest to industry and government organizations. These organizations pay membership fees to a consortium so that they can collectively envision and fund research, with at least 90% of Member funds allocated to the direct costs of these shared research projects.

IUCRCs are formed around research areas of strategic interest to U.S. industry. Industry is defined very broadly to include companies (large and small), startups and non-profit organizations. Principal Investigators form a Center around emerging research topics of current research interest, in a pre-competitive space but with clear pathways to applied research and commercial development. Industry partners join at inception, as an existing Center grows, or they inspire the creation of a new Center by recruiting university partners to leverage NSF support. Government agencies participate in IUCRCs as Members or by partnering directly with NSF at the strategic level.

Universities, academic researchers, and students benefit from IUCRC participation through the research funding, the establishment and growth of industry partnerships, and educational and career placement opportunities for students. Industry Members benefit by accessing knowledge, facilities, equipment, and intellectual property in a highly cost-efficient model; leveraging Center research outcomes in their future proprietary projects; interacting in an informal, collaborative way with other private sector and government entities with shared interests; and identifying and recruiting talent. NSF provides funding to support Center administrative costs and a governance framework to manage membership, operations, and evaluation.

Sites within Centers will be required to provide data to NSF and/or its authorized representatives (contractors and/or grantees) annually—after the award expires for their fiscal year of activity—for the life of the Phase I, and if applicable, Phase II, and Phase III award(s).

Information collected are both quantitative and descriptive; they will provide managing Program Directors a means to monitor the operational and financial states of the Centers and ensure that the award is in good standing. These data will also allow NSF to assess the Centers in terms of intellectual, broader, and commercial impacts that are core to our review criteria. Finally, in compliance with the Evidence Act of 2019, information collected will be used in satisfying congressional requests, and supporting the agency's policymaking and reporting needs.

In addition to the agency's annual report requirement, Principal Investigators (IUCRC Center and Site Directors) of the awards are required to provide the following information:

Center-Related Information:

- Center Data Reporting

- A comprehensive annual survey collecting information on structure, funding, membership, personnel, and outcomes of the Center during a given reporting period. A Center must submit data for each fiscal year no later than September 30 of each year of operation, as well as after the award expires to describe its final year of activity.

- Certification of Membership

- A list of members and membership fees collected by the Center and certified by the respective university's Sponsored Research Office (SRO), Total Program Income collected during the reporting period, In-kind Contributions during the reporting period, Allocation and Expenditures of each Site's research funds by project

- Site Research Projects Summary

- A list all projects in which the Site participated, including each project's goals; research tasks; key milestones, metrics/deliverables; developing results or outcomes; project budgets; and personnel.

- Assessment Coordinator Report

- An independent assessment of the annual Center activities (this report is done by an independent evaluator, and uploaded by the Principal Investigator as part of the NSF annual reporting requirement)

- Logistical Information:

- IUCRC Directory

- IUCRCs must provide accurate and current information for the online IUCRC directory. The IUCRC program helps awardees to get their information updated on the website.

- Optional:

- IUCRC Impact Stories for Public Distribution

IUCRCs are highly encouraged to submit information on their emerging research highlights and significant

breakthrough stories to NSF to showcase their impact to the public and industry (see <https://iucrc.nsf.gov/centers/achievements/>) including new products, technology creation and/or enhancements, intellectual property of significant commercial relevance, and major improvements in cost-savings, efficiency, sustainability, productivity, and job growth.

Not only do these data provide valuable information on program activities, products, outcomes, and impact, they also help to paint a detailed longitudinal view of the program, provide insights for benchmarking individual Center performance, advancing industry-university engagement approaches, strengthening future workforce, and contribute to the Nation's research and technology ecosystem.

Use of the Information: The information collected is for internal use by NSF, sharing with the US public, congressional requests, and for securing future funding for continued IUCRC program maintenance and growth. Survey data is collected and published at <https://iucrcstats.org>, made possible through NSF grant award 1732084.

Estimate Burden on the Public: Estimated at 16 hours per award for 225 sites for a total of 3,600 hours (per year).

Respondents: IUCRC Awardees (Academic Institutions).

Estimated Number of Respondents: One from each IUCRC site (estimated: 225 active sites/year).

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: February 7, 2023.

Suzanne H. Plimpton,
Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023-02920 Filed 2-9-23; 8:45 am]

BILLING CODE 7555-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–184; NRC–2023–0039]

National Institute of Standards and Technology; National Bureau of Standards Test Reactor

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Renewed Facility Operating License No. TR–5, issued to the National Institute of Standards and Technology (NIST, the licensee), for operation of the National Bureau of Standards Test Reactor (NBSR). The proposed amendment would authorize the use of a specific method to perform core loading analyses of the NBSR.

DATES: Submit comments by February 24, 2023. Requests for a hearing or petition for leave to intervene must be filed by April 11, 2023.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0039. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Patrick Boyle, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3936; email: Patrick.Boyle@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0039 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0039.
- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to PDR.Resource@nrc.gov. The license amendment request is available in ADAMS under Package Accession No. ML23033A114.

- *NRC’s PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC’s PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2023–0039 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment

submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is considering issuance of an amendment to Renewed Facility Operating License No. TR–5, issued to NIST, for operation of the NBSR, located in Montgomery County, Maryland.

The proposed amendment would revise the NBSR safety analysis report allowing a change to the method used to analyze the core loading pattern. The licensee was developing its core loading pattern and only recently determined that a license amendment would be required prior to any startup with the proposed core. NIST is otherwise prepared to resume operations upon any approval by the NRC of its separate restart request; therefore, a delay in the NRC’s acting on the license amendment request could delay the ability of the NBSR to resume operations.

Accordingly, consistent with paragraph 50.91(a)(6) of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC finds that exigent circumstances exist, in that the licensee and the NRC must act quickly and that time does not permit the NRC to publish a **Federal Register** notice allowing 30 days for prior public comment.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC’s regulations.

Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC’s regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented as follows:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

AFMS [alternative fuel management scheme] loadings deviate from the core loading scheme as described in the

FSAR [Final Safety Analysis Report] 4.5.1.1.2 “Fuel Management Scheme”. This amendment introduces a new section to the updated FSAR, “4.5.1.1.3 Alternative Fuel Management Schemes (AFMS)”, which describes bounding conditions and analysis requirements for any AFMS. The amendment also introduces an engineering procedure, namely “NBSR–0018–DOC–00 NBSR Alternative Core Loading Schemes Analysis Procedure” which describes the OFMS [original fuel management scheme] and AFMS, a basis for the analysis, providing limitations to evaluate potential AFMS, detailed safety review for a demonstration AFMS, along with a discussion of results and conclusions to be included in subsequent ECNs [engineering change notice] dealing with similar AFMS core loadings. The procedure provides a basis to analyze core loading so that

none of the Technical Specifications (TS) are exceeded. Several accident scenarios and therefore consequences may be affected by AFMS core loading deviations. Particularly, all accidents shown in Table 1 are required to be reevaluated for any AFMS core loading. Other accident scenarios given in the FSAR, including “Loss of Primary Coolant” (a major rupture in the cold leg of the primary system is assumed, which leads to draining the reactor core), “Maximum Hypothetical Accident (MHA)”, “Experiment Malfunction” and “External Event” are independent of core loading changes and therefore remain unchanged. Additionally, Natural Circulation Cooling at Low Power Operation must be analyzed for each AFMS to show compliance with Technical Specification 2.2. Natural Circulation Cooling at Low Power

Operation is not an accident scenario but an analysis to show natural circulation at low power operations. Note that all of the accident scenarios and Natural Circulation Cooling at Low Power Operation conditions are analyzed using the RELAP5 [Reactor Excursion and Leak Analysis Program] model as described in the “NBSR–0018–DOC–00 NBSR Alternative Core Loading Schemes Analysis Procedure”. The misloading accident is the only one that will require unique power distributions from corresponding MCNP [Monte Carlo N-Particle] simulations with the misloaded fuel configuration. Some scenario conditions are updated based on facility changes and available new information. “NBSR–0018–DOC–00 Appendix C” provides descriptions and modifications for accident scenarios.

TABLE 1—THE ACCIDENT SEQUENCES TO BE RE-ANALYZED, AND THEIR REFERENCES IN THE SAR

	Accident sequence	Section in the SAR
#1	Startup Accident	13.1.2.2.2.1
#2	Maximum Reactivity Insertion Accident	13.2.2
#3	Loss of Offsite Power	13.1.4.1
#4	Loss of Offsite Power with Shutdown Pump failure	13.1.4.5
#5	Seizure of One Primary Pump	13.1.4.2
#6	Throttling of Coolant Flow to the Outer Plenum	13.1.4.4
#7	Throttling of Coolant Flow to the Inner Plenum	13.1.4.3
#8	Misloading of Fuel	13.1.5

Based on detailed analysis provided in the technical report, and because these AFMS accident scenarios are specifically analyzed for probability and consequences, there are, by definition, no changes in the probability of occurrences or the consequences of previously analyzed accidents.

Therefore, the proposed FSAR amendment allowing analysis of AFMS does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The requested amendment to the facility license involves a SAR change to describe engineering analysis procedures for any [AFMS] wherein which the NBSR core is loaded with a different core loading pattern than as described in the updated FSAR. An AFMS is any core loading pattern that deviates from the [OFMS] in a manner such that the number of the specific type of fuel elements, such as fresh, or used is different than usual and/or their locations in the core are modified. As

there are no other changes besides that of fuel loading, changes in the core loading pattern do not initiate a different kind of accident.

Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The requested amendment to the facility license involves a SAR change to describe engineering analysis procedures for any Alternative Fuel Management. The requested amendment to the facility license involves a SAR change to describe engineering analysis procedures for any [AFMS] wherein which the NBSR core is loaded with a different core loading pattern than as described in the updated FSAR. An AFMS is any core loading pattern that deviates from the [OFMS] in a manner such that the number of the specific type of fuel elements, such as fresh, or used is different than usual and/or their locations in the core are modified. The AFMS can be deemed acceptable as long as the proposed AFMS is analyzed

according to the “NBSR–0018–DOC–00” and found to be within the updated FSAR, Technical Specifications limitations and boundary conditions listed therein. The boundary conditions are based on the Technical Specifications and updated FSAR requirements. Because these alternate fuel management schemes are specifically analyzed for a reduction in margin of safety, there is, by definition, no significant reduction in margin of safety. The proposed amendment contains no changes in the Technical Specification or other safety limitations as described in the updated FSAR.

Therefore, the proposed amendment of the SAR in allowing this operation does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee’s analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no

significant hazards consideration. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 14-day notice period. However, if circumstances change during the notice period, such that failure to act in a timely way would result, for example, in prevention of resumption of operation the Commission may issue the license amendment before the expiration of the 14-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. If the Commission takes this action, it will publish in the **Federal Register** a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's "Agency Rules of Practice and Procedure" in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the "Electronic Submissions (E-Filing)" section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment

and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (<https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053>) and on the NRC's public website at <https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate>.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the "Guidance for Electronic Submissions to the NRC" (ADAMS Accession No. ML13031A056) and on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at Hearing.Docket@nrc.gov, or by telephone at 301-415-1677, to (1) request a digital identification (ID) certificate, which allows the participant

(or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals/getting-started.html>. After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at <https://www.nrc.gov/site-help/electronic-sub-ref-mat.html>. A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the "Contact Us" link located on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>, by email to MSHD.Resource@nrc.gov, or by a toll-free call at 1-866-672-7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper

filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at <https://adams.nrc.gov/ehd>, unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click “cancel” when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated February 1, 2023.

Attorney for licensee: Henry N. Wixon, Chief of Counsel, National Institute of Standards and Technology, 100 Bureau Drive, Stop 1052, Gaithersburg, MD 20899–1052.

NRC Branch Chief: Joshua Borromeo.

Dated: February 7, 2023.

For the Nuclear Regulatory Commission.

Patrick G. Boyle,

Project Manager, Non-Power Production and Utilization Facility Licensing Branch, Division of Advanced Reactors and Non-Power Production and Utilization Facilities, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–02840 Filed 2–9–23; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Privacy Act of 1974, as Amended; Notice of Computer Matching Program (Railroad Retirement Board and Social Security Administration, Match Number 1007)

AGENCY: Railroad Retirement Board (RRB).

ACTION: Notice of a modified matching program.

SUMMARY: As required by the Privacy Act of 1974, as amended, the RRB is issuing public notice of its renewal of an ongoing computer-matching program with the Social Security Administration (SSA). The purpose of this notice is to advise individuals applying for or receiving benefits under the Railroad Retirement Act of the use made by RRB of this information obtained from SSA by means of a computer match. The RRB is also issuing public notice, on behalf of the SSA, of their intent to conduct a computer-matching program based on information provided to them by the RRB.

DATES: This matching program becomes effective as proposed without further notice on March 13, 2023. We will file a report of this computer-matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives; and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB).

ADDRESSES: Interested parties may comment on this publication by writing to Ms. Stephanie Hillyard, Secretary to the Board, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275.

FOR FURTHER INFORMATION CONTACT: Mr. Chad Peek, Chief Privacy Officer, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275, telephone 312–751–3389 or email at chad.peek@rrb.gov.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988, (Pub. L. 100–503), amended by the Privacy Act of 1974, (5 U.S.C. 552a) as amended, requires a Federal agency participating in a computer matching program to publish a notice in the **Federal Register** for all matching programs.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records contained in a Privacy Act System of

Records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

- (1) Negotiate written agreements with the other agency or agencies participating in the matching programs;
- (2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;
- (3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating, or denying a person's benefits or payments. The last notice for this matching program was published at 85 FR 83632 (December 22, 2020).

B. RRB Computer Matches Subject to the Privacy Act

We have taken appropriate action to ensure that all of our computer matching programs comply with the requirements of the Privacy Act, as amended.

Participating Agencies

Railroad Retirement Board (RRB) and the Social Security Administration (SSA), Match #1007.

Authority for Conducting the Matching Program

Section 7(b)(7) of the Railroad Retirement Act (45 U.S.C. 231f(b)(7)) provides that the Social Security Administration shall supply information necessary to administer the Railroad Retirement Act. Sections 202, 205(o) and 215(f) of the Social Security Act (42 U.S.C. 402, 405(o) and 415(f)) relate to benefit provisions, inclusion of railroad compensation together with wages for payment of benefits under certain circumstances, and the re-computation of benefits.

Purpose(s)

The RRB will, on a daily basis, obtain from SSA a record of the wages reported to SSA for persons who have applied for benefits under the Railroad Retirement Act and a record of the amount of benefits paid by that agency to persons who are receiving or have applied for benefits under the Railroad Retirement Act. The wage information is needed to compute the amount of the tier I annuity component provided by sections 3(a), 4(a) and 4(f) of the Railroad Retirement

Act (45 U.S.C. 231b(a), 45 U.S.C. 231c(a) and 45 U.S.C. 231c(f)). The benefit information is needed to adjust the tier I annuity component for the receipt of the Social Security benefit. This information is available from no other source.

Second, the RRB will receive from SSA the amount of certain social security benefits which the RRB pays on behalf of SSA. Section 7(b)(2) of the Railroad Retirement Act (45 U.S.C. 231f(b)(2)) provides that the RRB shall make the payment of certain social security benefits. The RRB also requires this information in order to adjust the amount of any annuity due to the receipt of a social security benefit. Section 10(a) of the Railroad Retirement Act (45 U.S.C. 231i(a)) permits the RRB to recover any overpayment from the accrual of social security benefits. This information is not available from any other source.

Third, once a year the RRB will receive from SSA a copy of SSA's Master Benefit Record for earmarked RRB annuitants. Section 7(b)(7) of the Railroad Retirement Act (45 U.S.C. 231f(b)(7)) requires that SSA provide the requested information. The RRB needs this information to make the necessary cost-of-living computation adjustments quickly and accurately for those RRB annuitants who are also SSA beneficiaries.

SSA will receive weekly from RRB earnings information for all railroad employees. SSA will match the identifying information of the records furnished by the RRB against the identifying information contained in its Master Benefit Record and its Master Earnings File. If there is a match, SSA will use the RRB earnings to adjust the amount of Social Security benefits in its Annual Earnings Reappraisal Operation. This information is available from no other source.

The SSA will also receive daily from RRB earnings information on selected individuals. The transfer of information may be initiated either by RRB or by SSA. SSA needs this information to determine eligibility to Social Security benefits and, if eligibility is met, to determine the benefit amount payable. Section 18 of the Railroad Retirement Act (45 U.S.C. 231q(2)) requires that earnings considered as compensation under the Railroad Retirement Act be considered as wages under the Social Security Act for the purposes of determining entitlement under the Social Security Act if the person has less than 10 years of railroad service or has 10 or more years of service but does not have a current connection with the

railroad industry at the time of his/her death.

Categories of Individuals

All applicants for benefits under the Railroad Retirement Act and current beneficiaries will have a record of any social security wages and the amount of any social security benefits furnished to the RRB by SSA. In addition, all persons who ever worked in the railroad industry after 1936 will have a record of their service and compensation furnished to SSA by RRB.

Categories of Records

1. Name, social security number, RRB claim number, annuity beginning date, date of birth, sex, last employer identification number, amount of daily pay rate, separation allowance or severance payment, creditable service and compensation after 1937, home address, date of death, and electronic mail address.

2. Information pertaining to the payment or denial of an individual's claim for benefits under the Railroad Retirement Act: Name, address, social security number, claim number, proofs of age, marriage, relationship, death, military service, creditable earnings and service months (including military service), entitlement to benefits under the Social Security Act, programs administered by the Veterans Administration, or other benefit systems, rates, effective dates, medical reports, correspondence and telephone inquiries to and about the beneficiary, suspension and termination dates, health insurance effective date, option, premium rate and deduction, direct deposit data, employer pension information, citizenship status and legal residency status (for annuitants living outside the United States), and tax withholding information (instructions of annuitants regarding number of exemptions claimed and additional amounts to be withheld, as well as actual amounts withheld for tax purposes).

System(s) of Records

The applicable RRB Privacy Act Systems of Records and their **Federal Register** citation used in the matching program are:

1. RRB-5, Master File of Railroad Employees' Creditable Compensation, September 30, 2014 (79 FR 58877)

2. RRB-22, Railroad Retirement, Survivor, Pensioner Benefit System, May 15, 2015 (80 FR 28018)

The applicable SSA Privacy Act Systems of Records used and their **Federal Register** citation used in the matching program are:

1. SSA 60-0058, Master Files of Social Security Number (SSN) Holders and SSN Applications (the Enumeration System); 75 FR 82121 (December 29, 2010)

2. SSA/OS, 60-0059, Earnings Recording and Self-Employment Income System (MEF); 71 FR 1819 (January 11, 2006)

3. SSA/ORSIS 60-0090, Master Beneficiary Record (MBR); 71 FR 1826 (January 11, 2006)

4. SSA/ODISSIS 60-103, Supplemental Security Income Record and Special Veteran Benefits; 71 FR 1830 (January 11, 2006)

5. SSA/OPB 60-0269, Prisoner Update Processing System (PUPS); 64 FR 11076 (March 8, 1999)

This matching program will become effective July 22, 2023, or 30 days after a copy of the agreement, as approved by the Data Integrity Board of each agency, is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is latest. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met. This matching program expires on July 21, 2024.

Dated: February 7, 2023.

By authority of the Board.

Stephanie Hillyard,

Secretary to the Board.

[FR Doc. 2023-02868 Filed 2-9-23; 8:45 am]

BILLING CODE 7905-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96817; File No. SR-GEMX-2023-02]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules in Connection with the Technology Migration to Enhanced Nasdaq Functionality

February 6, 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 23, 2023, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 its rules in connection with a technology migration to enhanced Nasdaq, Inc. ("Nasdaq") functionality.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/gemx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In connection with a technology migration to enhanced Nasdaq functionality that will result in higher performance, scalability, and more robust architecture, the Exchange proposes to amend its rules to adopt certain trading functionality currently utilized at Nasdaq affiliate options exchanges. As further discussed below, the Exchange is proposing to adopt such functionality substantially in the same form as currently on the Nasdaq affiliated options exchanges, while retaining certain intended differences between it and its affiliates. The Exchange also proposes a number of changes to memorialize existing functionality, add more granularity in its rules to describe how existing functionality operates today, and to harmonize the Exchange's rules where appropriate with the rules of its affiliated options exchanges by using consistent language to describe identical functionality.

The Exchange intends to begin implementation of the proposed rule change by Q3 2023. The Exchange would commence its implementation with a limited symbol migration and continue to migrate symbols over several weeks. The Exchange will issue an Options Trader Alert to Members to provide notification of the symbols that will migrate and the relevant dates.

Routing Changes

In connection with the technology migration to enhanced Nasdaq functionality, the Exchange recently amended Options 5 (Order Protections and Locked and Crossed Markets) in order to harmonize its routing functionality to that of Nasdaq BX, Inc. ("BX").³ As part of this harmonization, the Routing Filing included proposals to adopt or harmonize routing strategies on the Exchange that are substantially identical to BX, (*i.e.*, DNR, FIND, and SRCH), and eliminate existing Exchange routing functionality that BX does not offer today (*e.g.*, flash functionality,⁴ and Sweep Orders.⁵)

In connection with the proposed changes in the Routing Filing, the Exchange now proposes to make corresponding changes to the following Rules within Options 3 to account for the proposed amendments to Options 5: Section 5 (Entry and Display of Orders), Section 7 (Types of Orders and Orders and Quote Protocols), Section 9 (Trading Halts), and Section 10 (Priority of Quotes and Orders).⁶ First, the Exchange proposes to remove the following rule text in Options 3, Section 5(b)(1) relating to flash functionality and Non-Customer order handling in lieu of using flash functionality: "Orders that

are not automatically executed will be handled as provided in Supplementary Material .02 to Options 5, Section 2; provided that Members may specify that a Non-Customer order should instead be accepted and immediately cancelled automatically by the System⁷ at the time of receipt." With the removal of flash functionality in the Routing Filing, the foregoing rule text would no longer be necessary. In connection with this change, the Exchange will renumber current Section 5(b)(2) as (b)(1). Second, the Exchange proposes to delete similar flash-related language in Options 3, Section 5(d) that currently provides: "Orders that are not automatically executed will be handled as provided in Supplementary Material .02 to Options 5, Section 2; provided that Members may specify that a Non-Customer order should instead be cancelled automatically by the System at the time of receipt."

Third, the Exchange proposes to delete references to do-not-route orders⁸ and Sweep Orders in Options 3, Section 7(m) and (s), respectively, and reserve those Rules. As discussed in the Routing Filing, the Exchange is eliminating these order types (and for do-not-route orders, eliminating as an order type and describing these instead as a routing strategy) in order to align with BX's current offerings. Fourth, the Exchange proposes to add a new Supplementary Material .04 to Options 3, Section 7, which would set forth the new routing strategies that are substantially identical to BX's current routing strategies, as further discussed in the Routing Filing. Specifically, new Supplementary Material .04 would provide: "Routing Strategies. Orders may be entered on the Exchange with a routing strategy of FIND or SRCH, or, in the alternative, an order may be marked Do-Not-Route ("DNR") as provided in Options 5,

³ Specifically, the Exchange's affiliate, Nasdaq ISE, LLC ("ISE") amended ISE Options 5, which GEMX Options 5 incorporates by reference. See Securities Exchange Act Release No. 94897 (May 12, 2022), 87 FR 30294 (May 18, 2022) (SR-ISE-2022-11) ("Routing Filing"). As a result, the amendments to ISE Options 5 in the Routing Filing also amended GEMX Options 5.

⁴ Today, the Exchange's flash functionality permits certain eligible incoming orders to first be exposed at the National Best Bid or Offer ("NBBO") to all Members for execution at the NBBO price before that order is routed to another market for execution. See Supplementary Material .02 to Options 5, Section 2.

⁵ A Sweep Order is a limit order that is to be executed in whole or in part on the Exchange and the portion not so executed shall be routed pursuant to Supplementary Material .05 to Options 5, Section 2 to Eligible Exchange(s) for immediate execution as soon as the order is received by the Eligible Exchange(s). Any portion not immediately executed by the Eligible Exchange(s) shall be canceled. If a Sweep Order is not marketable when it is submitted to the Exchange, it shall be canceled. See Options 3, Section 7(s).

⁶ The Exchange notes that ISE proposed substantially similar amendments in ISE Options 3 as part of the Routing Filing.

⁷ The term "System" means the electronic system operated by the Exchange that receives and disseminates quotes, executes orders and reports transactions. See Options 1, Section (a)(49).

⁸ A do-not-route order is a market or limit order that is to be executed in whole or in part on the Exchange only. Due to prices available on another options exchange (as provided in Options 5 (Order Protection; Locked and Crossed Markets)), any balance of a do-not-route order that cannot be executed upon entry, or placed on the Exchange's limit order book, will be automatically cancelled. See Options 3, Section 7(m).

Section 4 through FIX⁹ or Precise¹⁰ only.” The addition of this sentence will make clear which routing strategies may be utilized when submitting an order type and will provide a citation to the routing rule in Options 5, Section 4 for ease of reference.¹¹

Fifth, the Exchange proposes to amend subparagraph (d)(2) of Options 3, Section 9. Among other things, this Rule describes the processing of Market Orders exposed at the NBBO pursuant to Supplementary Material .02 to Options 5, Section 2 after a trading halt. This rule text is no longer necessary with the elimination of flash functionality in the Routing Filing. Sixth, the Exchange proposes to amend Options 3, Section 10(a)(ii)¹² to remove a reference to flash functionality that will no longer exist with the proposed changes in the Routing Filing. The Exchange also proposes to renumber Options 3, Section 10(a)(i) and (ii) as Options 3, Section 10(a)(1) and (2) to conform the numbering in that Rule.

Seventh, the Exchange proposes to amend its Pricing Schedule at Options 7 to remove all references to pricing related to the flash functionality. In

⁹ “Financial Information eXchange” or “FIX” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders to the Exchange. Features include the following: (1) execution messages; (2) order messages; (3) risk protection triggers and cancel notifications; and (4) post trade allocation messages. See Supplementary Material .03(a) to Options 3, Section 7.

¹⁰ “Nasdaq Precise” or “Precise” is a front-end interface that allows Electronic Access Members and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (e.g., parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (e.g., NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (e.g., kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (e.g., order history and done away trade reports. See Supplementary Material .03(d) to Options 3, Section 7. The Exchange notes that FIX and Precise are the only order entry protocols on the Exchange that permit routing today.

¹¹ Routing options may be combined with all available order types and times-in-force (“TIFs”), with the exception of orders and TIFs whose terms are inconsistent with the terms of a particular routing option.

¹² Options 3, Section 10(a)(ii) currently provides that this rule does not apply to the Block Order Mechanism described within Options 3, Section 11(a), the Facilitation Mechanism described within Options 3, Section 11(b), the Solicited Order Mechanism described within Options 3, Section 11(d), the Price Improvement Mechanism described within Options 3, Section 13, orders described within Options 3, Section 12 or an exposure period as provided in Options 5, Section 2 at Supplementary Material .02, unless Options 3, Section 10 is specifically referenced within GEMX Rules applicable to the aforementioned functionality.

particular, the Exchange proposes to delete the definition of Flash Order in Options 7, Section 1.

Bulk Message

The Exchange proposes to codify existing functionality that allows Market Makers to submit their quotes to the Exchange in block quantities as a single bulk message. In other words, a Market Maker may submit a single message to the Exchange, which may contain bids and offers in multiple series. The Exchange does not permit bulk messaging for orders today. The Exchange has historically provided Market Makers with information regarding bulk messaging in its publicly available technical specifications.¹³ To promote greater transparency, the Exchange is seeking to codify this functionality in its Rulebook. Specifically, the Exchange proposes to amend Options 3, Section 4(b)(3) to memorialize that quotes may be submitted as a bulk message. The Exchange also proposes to add a definition of “bulk message” in new subparagraph (i) of Options 3, Section 4(b)(3), which will provide that a bulk message means a single electronic message submitted by a Market Maker to the Exchange which may contain a specified number of quotations as designated by the Exchange.¹⁴ The bulk message, submitted via SQF,¹⁵ may enter, modify, or cancel quotes. Bulk messages are handled by the System in the same manner as it handles a single quote message.

The Exchange notes that other exchanges like Cboe Options Exchange (“Cboe”) currently offer similar bulk

¹³ See https://www.nasdaq.com/docs/2022/05/17/SQF_8.2b.pdf (specifying for bulk quoting of up to 200 quotes per quote block message). The specifications note in other places the manner in which a Member can send such quote block messages.

¹⁴ See *id.* As noted above, quote bulk messages can presently contain up to 200 quotes per message. This is the maximum amount that is permitted in a bulk message. The Exchange would announce any change to these specifications in an Options Technical Update distributed to all Members.

¹⁵ “Specialized Quote Feed” or “SQF” is an interface that allows Market Makers to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying instruments); (2) System event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Market Maker. Market Makers may only enter interest into SQF in their assigned options series. See Supplementary Material .03(c) to Options 3, Section 7.

messaging functionality that allow their market participants to submit block quantity quotes in a single electronic message.¹⁶

Order Types

The Exchange proposes to make several enhancements to certain order types in Options 3, Section 7 in connection with the technology migration to Nasdaq enhanced functionality. Specifically in connection with the migration, the Exchange proposes to: (1) introduce an intra-day cancel timer feature for Market Orders,¹⁷ (2) eliminate non-Immediate-or-Cancel (“IOC”)¹⁸ Intermarket Sweep Orders (“ISOs”),¹⁹ (3) introduce BX-like re-pricing to Add Liquidity Orders (“ALOs”),²⁰ and (4) allow Market Orders to be entered as Opening Only (“OPG”)²¹ orders (currently only allowed for Limit Orders).²² As discussed below, the proposed enhancements are intended to align

¹⁶ See definition of “bulk message” in Cboe Rule 1.1. Unlike Cboe, which also allows bulk messaging for orders, the Exchange’s bulk message functionality only applies to quotes as discussed above.

¹⁷ A market order is an order to buy or sell a stated number of options contracts that is to be executed at the best price obtainable when the order reaches the Exchange. See Options 3, Section 7(a).

¹⁸ An IOC order must be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled. See Options 3, Section 7(b)(3). As discussed later in this filing, the Exchange will relocate the IOC rule into Supplementary Material .02 to Options 3, Section 7.

¹⁹ An ISO is a limit order that meets the requirements of Options 5, Section 1(h). See Options 3, Section 7(b)(5).

²⁰ An Add Liquidity Order is a limit order that is to be executed in whole or in part on the Exchange (i) only after being displayed on the Exchange’s limit order book; and (ii) without routing any portion of the order to another market center. Members may specify whether an Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the national best bid price (for sell orders) or below the national best offer price (for buy orders) if, at the time of entry, the order (i) is executable on the Exchange; or (ii) the order is not executable on the Exchange, but would lock or cross the national best bid or offer. If at the time of entry, an Add Liquidity Order would lock or cross one or more non-displayed orders on the Exchange, the Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders). An Add Liquidity Order will only be re-priced once and will be executed at the re-priced price. An Add Liquidity Order will be ranked in the Exchange’s limit order book in accordance with Options 3, Section 10. See Options 3, Section 7(n).

²¹ An OPG order is a Limit Order that can be entered for the opening rotation only. See Options 3, Section 7(o). As discussed later in this filing, the Exchange will relocate the OPG rule into Supplementary Material .02 to Options 3, Section 7.

²² A Limit Order is an order to buy or sell a stated number of options contracts at a specified price or better. See Options 3, Section 7(b).

with existing BX functionality. The Exchange also proposes to add more granularity on how certain order types currently operate on the Exchange today, codify existing order type functionality, and to relocate related rule text within Options 3, Section 7 for better readability. Except with respect to the order type enhancements specified above, none of the proposed order type rule changes will amend current functionality. Rather, these changes are designed to bring greater transparency as to the applicability of certain order types currently available on the Exchange, and to provide greater consistency between the rules of the Exchange and its affiliates.

Market Orders

The Exchange proposes to amend the definition of Market Orders in Options 3, Section 7(a) to introduce a cancel timer feature, which will allow Members to designate Market Orders that do not execute after a certain period of time to be cancelled back to the Member. Specifically, the Exchange proposes to add that Members can designate their Market Orders not executed after a pre-established period of time, as established by the Exchange,²³ will be cancelled back to the Member, once an options series has opened for trading. BX currently has an identical timer feature for BX Market Orders.²⁴ Similar to BX, the proposed timer would be available once the intra-day trading session begins for an options series, as the Exchange already has a separate opening delay timer that provides protection to the market during the Opening Process. In particular, the Exchange would cancel or route orders (consistent with the Member's instructions) if an options series has not opened before the conclusion of the opening delay timer.²⁵ As such, the Exchange is proposing that the pre-established period of time for the proposed timer feature would commence once the intra-day trading session begins for that options series. In other words, while the opening process is on-going, and the intra-day trading session has not commenced, the pre-established period of time for the proposed timer feature would not commence. Further, the Exchange proposes to note that Market Orders on

²³ The Exchange will initially set the pre-established period of time at 4 seconds, identical to BX. This specification will be set out in the GEMX System settings document on a publicly available website. The Exchange would issue an Options Trader Alert notifying all Members if it determined to amend that timeframe.

²⁴ See BX Options 3, Section 7(a)(5).

²⁵ See Options 3, Section 8(k).

the order book would be immediately cancelled if an options series is halted, provided the Member designated the cancellation of Market Orders.²⁶ The proposed changes are intended to make clear that in the event there is a Market Order in a zero bid market with the Market Order was resting on the order book, the Member has an option to designate the cancellation of that Market Order pursuant to the proposed cancel timer feature. In this case, those Market Orders to sell, which were resting on the order book, would immediately cancel upon a trading halt instead of waiting until the end of the pre-established timer period. BX has identical language governing its Market Orders today.²⁷ Like BX, the Exchange believes that the proposed intra-day timer feature will provide additional flexibility for Members that wish to cancel unexecuted Market Orders after a certain period of time. Lastly, the Exchange proposes a non-substantive change to capitalize the term "market orders" in the first sentence of Options 3, Section 7(a) for consistency with the proposed rule text.

Intermarket Sweep Orders

The Exchange proposes to amend the ISO rule in Options 3, Section 7(b)(5), which currently provides that an ISO is limit order that meets the requirements of Options 5, Section 1(h).²⁸ As amended, the ISO rule will provide:

An Intermarket Sweep Order ("ISO") is a limit order that meets the requirements of Options 5, Section 1(h). Orders submitted to the Exchange as ISO are not routable and will ignore the ABBO and trade at allowable prices on the Exchange. ISOs must have a TIF designation of IOC. ISOs may not be submitted during the Opening Process.

The proposed rule text is substantially similar to BX's ISO rule in BX Options

²⁶ Members may make the designation to cancel their Market Orders through their FIX, OTTO, and Precise port settings.

²⁷ See BX Options 3, Section 7(a)(5).

²⁸ Options 5, Section 1(h) provides that an ISO is a limit order for an options series that, simultaneously with the routing of the ISO, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO. A Member may submit an Intermarket Sweep Order to the Exchange only if it has simultaneously routed one or more additional Intermarket Sweep Orders to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or Protected Offer, in the case of a limit order to buy, for an options series with a price that is superior to the limit price of the Intermarket Sweep Order. An ISO may be either an Immediate-Or-Cancel Order or an order that expires on the day it is entered.

3, Section 7(a)(6).²⁹ The Exchange is also proposing to add that ISOs may not be submitted during the Opening Process to reflect current System handling. The Exchange notes that BX similarly prohibits the submission of ISOs before the market opens and therefore proposes to add a similar level of detail in the Exchange's ISO rule.

Other than the stipulation that ISOs must have a TIF³⁰ designation of IOC, the proposed language does not amend the current ISO functionality but rather is intended to add more granularity and more closely align the ISO rule with BX's ISO rule. The Exchange does note that in connection with the System migration, the Exchange proposes to amend the current ISO functionality to only allow ISOs to be entered as IOC. Today, Options 5, Section 1(h) provides that an ISO may either be an IOC or an order that expires on the day it is entered.³¹ The Exchange is proposing to require ISOs to be entered as IOC, which would cause an ISO to cancel in whole or in part upon receipt if the ISO does not execute or does not entirely execute, because an ISO is generally used when trying to sweep a price level across multiple exchanges in an effort to post the balance of an order without locking an away market. The Exchange therefore believes that ISOs have a limited purpose and should be cancelled if they do not execute or do not entirely execute. As noted above, the proposal will align to current BX functionality that similarly only allows ISOs to be entered as IOC on BX.

All-or-None Orders

The Exchange proposes to amend the All-Or-None ("AON") Order rule in Options 3, Section 7(c), which currently provides that an AON Order is a limit or market order that is to be executed in its entirety or not at all, and that an AON Order may only be entered as an IOC Order. As amended, the AON rule will provide:

²⁹ BX's ISO rule also currently states that "ISOs may be entered on the Order Book or into the PRISM Mechanism pursuant to Options 3, Section 13(ii)(K)." See BX Options 3, Section 7(a)(6). The Exchange notes that it intends to file a separate rule filing to add similar language as BX relating to how ISOs may be entered on the Exchange.

³⁰ As discussed later in this filing, the Exchange is proposing to codify the definition of "Time in Force" or "TIF" to mean the period of time that the System will hold an order for potential execution. See proposed Supplementary Material .02 to Options 3, Section 7.

³¹ Because GEMX Options 5 incorporates ISE Options 5 by reference, ISE will file a subsequent ISE rule filing to amend Options 5 to remove the language in Options 5, Section 1(h) that currently allows ISOs to be entered as an order that expires on the day it is entered.

An All-Or-None (“AON”) Order is a limit or market order that is to be executed in its entirety or not at all. An AON Order may only be entered as an Immediate-or-Cancel Order. AON Orders will only execute against multiple, aggregated orders if the executions would occur simultaneously. AON Orders may not be submitted during the Opening Process.

With the proposed changes, the Exchange is not amending current AON functionality; rather, it is memorializing current System behavior in a manner consistent with its affiliates. Today, AON Orders have a size contingency (*i.e.*, executed in its entirety at the entered size or not at all) and must be IOC. The Exchange is specifying that AON Orders will execute against multiple, aggregated orders only if the executions would occur simultaneously to ensure that AON Orders are executed at the specified size while also honoring the priority of all other orders on the order book. The Exchange is adopting this rule text for AON orders to align to substantially similar language on BX.³²

The Exchange notes that the handling of AONs as described in the proposed rule text in Options 3, Section 7(c) is consistent with the Exchange’s allocation methodology in Options 3, Section 10. The additional detail makes clear that because of the size contingency of AON Orders, those orders must be satisfied simultaneously to avoid any priority conflict on the order book, which considers current displayed NBBO prices to avoid locked and crossed markets as well as trade-throughs.

The Exchange is also proposing to add that AON orders may not be submitted during the Opening Process to reflect current System handling. The Exchange notes that BX similarly prohibits the submission of AON orders before the market opens and therefore proposes to add a similar level of detail in the Exchange’s AON rule.³³

Stop Orders

The Exchange proposes to amend its Stop Order rule in Options 3, Section 7(d), which presently provides that a stop order is an order that becomes a market order when the stop price is elected. A stop order to buy is elected when the option is bid or trades on the Exchange at, or above, the specified stop price. A stop order to sell is elected when the option is offered or trades on the Exchange at, or below, the specified

stop price. The Exchange now proposes to add that a Stop Order shall be cancelled if it is immediately electable upon receipt. Stop Orders allow Members increased control and flexibility over their transactions and the prices at which they are willing to execute an order. The purpose of a Stop Order is to not execute upon entry, and instead rest in the System until the market reaches a certain price level, at which time the order could be executed. A Stop Order that is immediately electable upon receipt would therefore negate the purpose of the Stop Order, so the Exchange would cancel such orders today. The Exchange believes that this ensures Members are able to use Stop Orders to achieve their intended purpose. The proposed changes codify current Stop Order handling and are intended to better align the Exchange’s Stop Order rule with that of its affiliate, Phlx.³⁴

The Exchange also proposes to specify that Stop Orders may only be entered through FIX or Precise. This is how Stop Orders are handled today. Because the Exchange offers three order entry protocols today (FIX, Precise, and OTTO),³⁵ the Exchange believes that adding this detail will make clear that Stop Orders are only available to be entered through two of these order entry protocols and reduce any potential confusion.

Stop Limit Orders

The Exchange proposes to amend its Stop Limit Order rule in Options 3, Section 7(e), which presently provides that a stop limit order is an order that becomes a limit order when the stop price is elected. A stop limit order to buy is elected when the option is bid or trades on the Exchange at, or above, the specified stop price. A stop limit order to sell is elected when the option is offered or trades on the Exchange at, or below, the specified stop price. The Exchange now proposes to add that a Stop Limit Order shall be cancelled if it is immediately electable upon receipt. The Exchange would cancel these orders today for the same reasons

³⁴ See Phlx Options 3, Section 7(b)(4).

³⁵ “Ouch to Trade Options” or “OTTO” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (*e.g.*, underlying instruments); (2) System event messages (*e.g.*, start of trading hours messages and start of opening); (3) trading action messages (*e.g.*, halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. See Supplementary Material .03(b) to Options 3, Section 7.

discussed above for Stop Orders. The proposed changes codify current Stop Limit Order handling and are intended to better align the Exchange’s Stop Limit Order rule with that of Phlx.³⁶

The Exchange also proposes to specify that Stop Limit Orders may only be entered through FIX or Precise. This is how Stop Limit Orders are handled today. For the same reasons discussed above for Stop Orders, the Exchange believes that adding this detail will make clear that Stop Limit Orders are only available to be entered through the specified order entry protocols and reduce any potential confusion. Lastly, the Exchange proposes a non-substantive change to correct a punctuation error in the paragraph header.

Cancel and Replace Orders

The Exchange proposes to relocate the rule text governing Cancel and Replace Orders from Supplementary Material .02 to Options 3, Section 7 into Options 3, Section 7(f). The Exchange also proposes non-substantive, clarifying changes to the relocated rule text to update the incorrect cross-cites therein to the System’s price or other reasonability checks. The Exchange also proposes to amend the following portion of the rule, which currently provides: “The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, size is not increased, or in the case of Reserve Orders,³⁷ size is not changed.” The Exchange proposes to make clear that in the case of Reserve Orders, a change in price will also result in a change of priority for the replacement order. The Exchange also proposes to clarify that the reference to the Reserve Order’s size in this Rule is referring to both displayed and non-displayed size. As amended, the rule will provide: “The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, or size is not increased. In the case of Reserve Orders, the replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended or size (displayed and non-displayed) is not changed.” The proposed changes will aid market participants in locating this order type in the main body of the rule, and add more granularity around how the

³⁶ See Phlx Options 3, Section 7(b)(4)(A).

³⁷ As discussed later in this filing, a Reserve Order is defined in Options 3, Section 7(g) as a Limit Order that contains both a displayed portion and a non-displayed portion.

³² See BX Options 3, Section 7(a)(4)(A) (describing Minimum Quantity Orders and AON Orders as Contingency Orders). Unlike BX, the Exchange does not currently offer Minimum Quantity Orders.

³³ See BX Options 3, Section 7(a)(7).

Exchange will treat the cancellation and replacement of Reserve Orders.

Reserve Orders

As described in Options 3, Section 7(g), the Exchange offers Members a Reserve Order, which is a Limit Order that contains both a displayed portion and a non-displayed portion. Both the displayed and non-displayed portions of a Reserve Order are available for potential execution against incoming marketable orders. A non-marketable Reserve Order will rest on the order book. The non-displayed portion of a Reserve Order will be available for execution only after all displayed interest at that price has been executed. Both the displayed and the non-displayed portions of a Reserve Order will be ranked initially by the specified limit price and time of entry, and both the displayed and non-displayed portions of a Reserve Order will trade in accordance with the priority and allocation provisions in Options 3, Section 10.

When the displayed portion of a Reserve Order has been decremented, in whole or in part, it will be refreshed from the non-displayed portion of the resting Reserve Order. If the displayed portion is refreshed in part, the new displayed portion will include the previously displayed portion. Upon any refresh, the entire displayed portion of the order will be ranked at the specified limit price, assigned a new entry time (*i.e.*, the time that the newly displayed portion of the order was refreshed), and given priority in accordance with Options 3, Section 10. Any remaining non-displayed portion of the order will receive the same time stamp as the newly displayed portion of the order.

The Exchange now proposes to enhance the Reserve Order rule by providing more granularity in how Members may elect to refresh the display quantity for the Reserve Order. The Exchange is not proposing to modify the current functionality of Reserve Orders, but rather proposes to augment the definition to clarify current System behavior. Specifically, the Exchange proposes to make clear that Reserve Orders may be entered with an instruction for the displayed portion of the order to be refreshed: (A) upon full execution of the displayed portion or upon any partial execution; and (B) up to the initial size of the displayed portion or with a random refresh quantity within a range determined by

the Member.³⁸ The Exchange believes that this refresh feature for Reserve Orders provides more flexibility and opportunities for Members to add displayed liquidity to the Exchange. The Exchange believes that the proposed changes would add transparency to the operation of Reserve Orders, without altering current functionality. The Exchange notes that other options exchanges like Cboe currently offer similar refresh features on their Reserve Order functionality.³⁹

Finally, the Exchange proposes non-substantive, technical changes in Options 3, Section 7(g) to reformat the paragraph numbering, correct a punctuation error in paragraph (3), and update a cross-cite in proposed paragraph (6).

Attributable Orders

As described in Options 3, Section 7(h), the Exchange currently offers Attributable Orders, which allow Members to voluntarily display their firm IDs on the orders. The rule also provides the Exchange with flexibility to announce which Exchange Systems and class of securities for which the Attributable Order would be available.⁴⁰

The Exchange now proposes to delete existing text that refers to class of securities in Options 3, Section 7(h). Attributable Orders are available for all classes of securities today. The Exchange is therefore deleting this language as inaccurate. The Exchange also proposes a corrective change herein to “an Option Trader Alert.”

Customer Cross Orders

Customer Cross Orders are currently defined in Options 3, Section 7(i). The Exchange proposes to add that such orders will trade in accordance with Options 3, Section 12(a). This is a non-substantive amendment to add a cross-reference to Section 12(a), which currently describes in detail how a Customer Cross Order would execute on the Exchange.

³⁸ See proposed Options 3, Section 7(g)(4). The Exchange will also renumber the paragraphs within this rule accordingly. As it relates to the refresh quantity range, Members must designate a range for the random refresh election when they submit the Reserve Order if they elect a random refresh, otherwise the Reserve Order would be refreshed at a quantity equal to the initial size of the displayed portion. The range must be set at a number between 1 and the initial displayed quantity.

³⁹ See Cboe Rule 5.6(c) (setting forth the random replenishment and fixed replenishment features for Reserve Orders).

⁴⁰ Today, Attributable Orders are not available for the Facilitation, Solicited Order, and Price Improvement Mechanisms.

Qualified Contingent Cross Orders

Qualified Contingent Cross (“QCC”) Orders are currently defined in Options 3, Section 7(j). The Exchange proposes a non-substantive, technical change to add a reference to “QCC” in the first sentence of this rule. The Exchange also proposes to add that QCC Orders will trade in accordance with Options 3, Section 12(c). This is a non-substantive amendment to add a cross-reference to Section 12(c), which currently describes in detail how a QCC Order would execute on the Exchange.

The Exchange further proposes to specify that QCC Orders may only be entered through FIX or Precise. This is how QCC Orders are handled today. Because the Exchange offers three order entry protocols today (FIX, Precise, and OTTO), the Exchange believes that adding this detail will make clear that QCC Orders are only available to be entered through two of these order entry protocols and reduce any potential confusion.

Preferred Orders

The Exchange proposes to include the following definition of a Preferred Order in Options 3, Section 7(l) for ease of reference: “A Preferred Order is as described in Options 2, Section 10.” This is not a new order type, as Preferred Orders are currently described in Options 2, Section 10. While this order type is not currently listed in the order type rule in Options 3, Section 7, the Exchange believes that it will be useful to market participants to have order types centralized within one rule. Phlx similarly lists out Directed Orders (akin to Preferred Orders) in its order type rule in Phlx Options 3, Section 7(b)(11).

Add Liquidity Orders

Add Liquidity Orders (“ALOs”) are currently defined in Options 3, Section 7(n). Today, the Exchange offers ALOs to provide market participants with greater control over the circumstances in which their orders are executed. ALOs are Limit Orders that will only be executed as a “maker” on the Exchange (*i.e.*, when the Member is providing liquidity). Members can choose whether an ALO that is executable on the Exchange upon entry (or that is not executable on the Exchange upon entry, but locks or crosses the NBBO) will be cancelled or re-priced to one MPV above the national best bid (for sell orders) or below the national best offer (for buy orders).

If at the time of entry, an ALO would lock or cross one or more non-displayed orders on the Exchange, the ALO will be cancelled or re-priced to one MPV above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders).⁴¹ Today, an ALO will only be re-priced once and will be executed at the re-priced price. The Exchange notes that without the ability to re-price an ALO in the foregoing manner, under certain circumstances, an incoming ALO could execute against a displayed or non-displayed order resting on the Exchange's limit order book, which would be in direct contravention with the purpose of an ALO (to provide liquidity, not take liquidity).

As part of a concurrent rule filing, the Exchange is proposing to adopt a re-pricing mechanism identical to current BX re-pricing functionality⁴² to avoid certain orders from locking or crossing an away market's price.⁴³ In connection with the proposed adoption of the BX-like re-pricing mechanism in Options 3, Section 5(d) in the Re-Pricing Filing, the Exchange now proposes to make related changes to the ALO rule in Options 3, Section 7(n). In particular, the Exchange proposes that if an ALO would not lock or cross an order or quote on the System but would lock or cross the NBBO, the order will be handled pursuant to Options 3, Section 5(d), which will set forth the new BX-like re-pricing mechanism for non-routable orders.⁴⁴ As noted in Options 3, Section 7(n), ALOs are inherently non-routable. Accordingly, the Exchange is proposing

⁴¹ As discussed in more detail below, the Exchange will amend this sentence to say "orders or quotes" to codify existing ALO behavior.

⁴² Today, BX re-prices certain orders to avoid locking and crossing away markets, consistent with its Trade-Through compliance and Locked or Crossed Markets obligations. See BX Options 3, Section 5(d). See also Securities Exchange Act Release No. 89476 (August 4, 2020), 85 FR 48274 (August 10, 2020) (SR-BX-2020-017) (describing BX re-pricing mechanism in BX Options 3, Section 5).

⁴³ See Securities Exchange Act Release No. 96363 (November 18, 2022) (SR-GEMX-2022-10) ("Re-Pricing Filing"). Specifically in the Re-Pricing Filing, the Exchange is proposing to adopt the following language in Options 3, Section 5(d), which will be identical to BX Options 3, Section 5(d): An order that is designated by a Member as non-routable will be re-priced in order to comply with applicable Trade-Through and Locked and Crossed Markets restrictions. If, at the time of entry, an order that the entering party has elected not to make eligible for routing would cause a locked or crossed market violation or would cause a trade-through violation, it will be re-priced to the current national best offer (for bids) or the current national best bid (for offers) and displayed at one minimum price variance above (for offers) or below (for bids) the national best price.

⁴⁴ *Id.*

to handle ALOs in a consistent manner with the new re-pricing mechanism. Because the new mechanism will allow for continuous re-pricing as discussed above, the Exchange also proposes to remove the current limitation in the ALO rule stipulating that these orders will only be re-priced once and executed at the re-priced price. The proposed order handling for ALOs will be functionally identical to ALO handling on BX today.⁴⁵

The Exchange further proposes a clarifying change in the ALO rule that would not amend current System behavior. The Exchange proposes to add "or quotes" to make clear that if at the time of entry, an ALO would lock or cross one or more non-displayed orders or quotes on the Exchange, the ALO will be cancelled or re-priced to one MPV above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders).

Finally, the Exchange proposes to add that ALOs may only be submitted when an options series is open for trading to make clear that an ALO would not be accepted during the Opening Process when the order book is not available. The proposed rule text is consistent with current functionality, so the Exchange is codifying current ALO behavior with this change and adding the same level of detail currently in BX's ALO rule.⁴⁶

As amended, Options 3, Section 7(n) will provide:

An Add Liquidity Order is a limit order that is to be executed in whole or in part on the Exchange (i) only after being displayed on the Exchange's limit order book; and (ii) without routing any portion of the order to another market center. Members may specify whether an Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the national best bid price (for sell orders) or below the national best offer price (for buy orders) if, at the time of entry, the order (i) is executable on the Exchange; or (ii) the order is not executable on the Exchange, but would lock or cross the national best bid or offer. If at the time of entry, an Add Liquidity Order would lock or cross one or more non-displayed orders or quotes on the Exchange, the Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders). Notwithstanding the aforementioned, if an Add Liquidity Order would not lock or cross an order or quote on the System but would lock or cross the NBBO, the order will be handled pursuant to Options 3, Section

⁴⁵ See BX Options 3, Section 7(a)(12). See also Securities Exchange Act Release No. 93896 (January 4, 2022), 87 FR 1231 (January 10, 2022) (SR-BX-2021-054), which introduced ALOs on BX.

⁴⁶ *Id.*

5(d). An Add Liquidity Order will be ranked in the Exchange's limit order book in accordance with Options 3, Section 10. Add Liquidity Orders may only be submitted when an options series is open for trading.

Opening Sweep

Opening Sweeps are currently defined in Options 3, Section 7(t) as a Market Maker order submitted for execution against eligible interest in the System during the Opening Process pursuant to Options 3, Section 8(b)(1). The Exchange proposes to replace the current definition with the following: "An Opening Sweep is a one-sided order entered by a Market Maker through SQF for execution against eligible interest in the System during the Opening Process. This order type is not subject to any protections listed in Options 3, Section 15, except for Automated Quotation Adjustments. The Opening Sweep will only participate in the Opening Process pursuant to Options 3, Section 8(b)(1) and will be cancelled upon the open if not executed."

The proposed rule text is consistent with current functionality, so the Exchange is providing additional context to the Opening Sweep as currently described in Options 3, Section 8(b) and codifying current Opening Sweep behavior with this change. Specifically, because an Opening Sweep is an IOC order submitted by a Market Maker during the Opening Process, the Exchange is making clear in the proposed rule text that this order type is entered through SQF.⁴⁷ The Exchange is also specifying that Opening Sweeps are not subject to any risk protections in Options 3, Section 15 (except Automated Quotation Adjustments) because the Opening Process itself has boundaries (notably, the Quality Opening Market⁴⁸

⁴⁷ See Supplementary Material .03(c) of Options 3, Section 7, which notes that SQF is an interface that allows Market Makers to submit IOC orders.

⁴⁸ A "Quality Opening Market" is a bid/ask differential applicable to the best bid and offer from all Valid Width Quotes defined in a table to be determined by the Exchange and published on the Exchange's website. The calculation of Quality Opening Market is based on the best bid and offer of Valid Width Quotes. The differential between the best bid and offer are compared to reach this determination. The allowable differential, as determined by the Exchange, takes into account the type of security (for example, Penny versus non-Penny Interval Program issue), volatility, option premium, and liquidity. The Quality Opening Market differential is intended to ensure the price at which the Exchange opens reflects current market conditions. See Options 3, Section 8(a)(7).

and the Opening Quote Range⁴⁹) within which orders will be executed. As it relates to the proposed language relating to Opening Sweep participation in the Opening Process and cancellation upon the open, the Exchange notes that this concept is not new as Opening Sweeps are already described in Options 3, Section 8 today and apply only during the Opening Process. The language merely provides additional context to the order type.

The Exchange notes that the Opening Sweep is functionally identical to the Opening Sweep on Phlx,⁵⁰ so the proposed language will harmonize the Exchange's rule with the current Phlx rule.

Time in Force

Today, the Exchange notes that certain functionality is described as an "order type" in Options 3, Section 7, but would be more precisely described as a TIF attribute that may be added to a particular order type. Accordingly, the Exchange proposes to codify the term "TIF" in proposed Supplementary Material .02 to Options 3, Section 7. The proposed TIF definition will be identical to the TIF definition in BX Options 3, Section 7(b). The Exchange also proposes to relocate various rules into Supplementary Material .02 to centralize the TIFs that are available on the Exchange today. As proposed, the rule text will provide:

.02 *Time in Force.* The term "Time in Force" or "TIF" shall mean the period of time that the System will hold an order for potential execution, and shall include:

(a) *Day.* An order to buy or sell entered with a TIF of "DAY," which, if not executed, expires at the end of the day on which it was entered. All orders by their terms are Day orders unless otherwise specified. Day orders may be entered through FIX, OTTO, or Precise.

(b) *Good-Till-Canceled.* An order to buy or sell entered with a TIF of "GTC" that remains in force until the order is filled, canceled or the option contract expires; provided, however, that GTC orders will be canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. GTC orders may be entered through FIX or Precise.

(c) *Good-Till-Date.* An order to buy or sell entered with a TIF of "GTD," which, if not executed, will be cancelled at the sooner of the end of the expiration date assigned to the order, or the expiration of the series; provided, however, that GTD orders will be

⁴⁹The Opening Quote Range represents the outer boundaries at which the Exchange may open. See Options 3, Section 8(i).

⁵⁰See Phlx Options 3, Section 7(b)(6).

canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. GTD orders may be entered through FIX or Precise.

(d) *Immediate-or-Cancel.* An order entered with a TIF of "IOC" that is to be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled.

(1) Orders entered with a TIF of IOC are not eligible for routing.

(2) IOC orders may be entered through FIX, OTTO, Precise, or SQF, provided that an IOC order entered by a Market Maker through the SQF protocol will not be subject to the Order Price Protection, Market Order Spread Protection, and Size Limitation Protection as defined in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B) respectively.

(3) Block Orders, Facilitation Orders, SOM Orders, PIM Orders, QCC Orders, and Customer Cross Orders are considered to have a TIF of IOC. By their terms, these orders will be: (1) executed either on entry or after an exposure period, or (2) cancelled.

(e) *Opening Only.* An Opening Only ("OPG") order is entered with a TIF of "OPG." This order can only be executed in the Opening Process pursuant to Options 3, Section 8. Any portion of the order that is not executed during the Opening Process is cancelled. OPG orders may not route. This order type is not subject to any protections listed in Options 3, Section 15, except Size Limitation.

The Exchange is relocating rule text governing Day orders from Options 3, Section 7(l) into Supplementary Material .02(a) to specify that orders may be entered with a TIF of DAY. The Exchange also proposes to include additional detail that Day orders may be entered through FIX, OTTO, or Precise. This is how Day orders operate today, and the proposed rule text merely adds the same level of detail currently in BX's Day order rule.⁵¹

The Exchange is relocating rule text governing Good-Till-Canceled ("GTC") orders from Options 3, Section 7(r) into Supplementary Material .02(b) to specify that orders may be entered with a TIF of GTC. The Exchange also proposes to include additional detail that GTC orders may be entered through FIX or Precise. This articulates current GTC behavior.

The Exchange is relocating rule text governing Good-Till-Date ("GTD") orders from Options 3, Section 7(p) into Supplementary Material .02(c) to specify that orders may be entered with a TIF of GTD. The Exchange also proposes a number of changes that do not modify current GTD functionality,

⁵¹See BX Options 3, Section 7(b)(3). BX's rule does not refer to OTTO or Precise because BX does not offer these order entry ports today.

but are intended to align to the GTC rule described above. Today, GTC and GTD orders are intended to be functionally similar except GTC generally persists until it is cancelled by the Member and GTD generally persists until the assigned date. Accordingly, the Exchange seeks to add a similar level of detail to the GTD rule as it is proposing in the GTC rule above. First, the Exchange proposes to remove the word "limit" from the relocated GTD rule text. Similar to GTC orders, GTD orders can also be sent as Market Orders (in addition to Limit Orders) today. The proposed changes will therefore align the rule text with current functionality. Second, the Exchange proposes to add that GTD orders will be canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. This language is copied from current GTC rule text and articulates current GTD behavior. Third, the Exchange proposes to include additional detail that GTD orders may be entered through FIX or Precise. This mirrors the proposed changes for GTC orders and articulates current GTD behavior.

The Exchange is relocating rule text governing IOC orders from Options 3, Section 7(b)(3) into Supplementary Material .02(d) to Options 3, Section 7 to specify that orders may be entered with a TIF of IOC. The Exchange also proposes a number of changes to conform the Exchange's IOC rule with that of BX. None of the proposed changes modify current Exchange IOC functionality. First, the Exchange proposes to remove the word "limit" from the relocated IOC rule text in Supplementary Material .02(d). Today, IOC orders may be sent as either a Market Order or Limit Order. Eliminating the word "limit" from the proposed IOC rule will therefore align the rule text with current functionality.⁵² Second, the Exchange proposes to memorialize current IOC behavior in Supplementary Material .02(d)(1) by stating that orders entered with a TIF of IOC are not eligible for routing.⁵³ Third, the Exchange proposes to codify current IOC behavior in

⁵²BX similarly allows both Market Orders and Limit Orders to be entered as IOC. See BX Options 3, Section 7(b)(2). The Exchange is not specifying Market and Limit Orders in the relocated IOC rule text for consistency with the other TIFs in proposed Supplementary Material .02 to Options 3, Section 7.

⁵³See BX Options 3, Section 7(b)(2)(A) for identical language.

Supplementary Material .02(d)(2) by stating that IOC orders may be entered through FIX, OTTO, Precise, or SQF.⁵⁴

Fourth, the Exchange proposes to note in the same section that an IOC order entered by a Market Maker through SQF will not be subject to the Order Price Protection,⁵⁵ Market Order Spread Protection,⁵⁶ and Size Limitation Protection⁵⁷ as defined in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B), respectively.⁵⁸ Today, the IOC rule explicitly excludes the Limit Order Price Protection and Size Limitation Protection from applying to IOC orders entered through SQF. As discussed later in this filing, the current Limit Order Price Protection will be replaced by a similar risk management tool called the Order Price Protection that will be identical to BX, so the Exchange will likewise reflect that change in the proposed IOC rule. The proposed change to exclude the Market Order Spread Protection from applying to IOC orders entered through SQF is not a change to IOC current functionality, but rather, a change to align the rule with current System behavior and with BX IOC rule.⁵⁹

The Exchange notes while it generally only permits orders (including IOC orders) to be entered into its three order entry protocols, FIX, OTTO, and Precise, it does permit the entry of IOC orders by Market Makers into its quote protocol, SQF. The Exchange has elected not to apply the specified risk protections on IOC orders entered through SQF as it does for IOC orders entered through FIX, OTTO, and Precise because only Market Makers utilize SQF to enter IOC orders. Market Makers are professional traders with their own risk

settings. FIX, OTTO, and Precise, on the other hand, are utilized by all market participants who may not have their own risk settings, unlike Market Makers. Market Makers utilize IOC orders to trade out of accumulated positions and manage their risk when providing liquidity on the Exchange. The Exchange understands that proper risk management, including using these IOC orders to offload risk, is vital for Market Makers, and allows them to maintain tight markets and meet their quoting and other obligations to the market. Market Makers handle a large amount of risk when quoting and in addition to the risk protections required by the Exchange, Market Makers utilize their own risk management parameters when entering orders, minimizing the likelihood of a Market Maker's erroneous order from being entered. The Exchange believes that Market Makers, unlike other market participants, have the ability to manage their risk when submitting IOC orders through SQF and should be permitted to elect this method of order entry to obtain efficiency and speed of order entry, particularly in light of the quoting obligations that the Exchange imposes on these participants, unlike other market participants.⁶⁰ The Exchange believes that allowing Market Makers to submit IOC orders through their preferred protocol increases their efficiency in submitting such orders and thereby allows them to maintain quality markets to the benefit of all market participants that trade on the Exchange. For the foregoing reasons, the Exchange has opted to not offer the Order Price Protection, Market Order Spread Protection, and Size Limitation for IOC orders entered through SQF because Market Makers have more sophisticated infrastructures than other market participants and are able to manage their risk.

The Exchange also proposes to add substantially similar language in Supplementary Material .03(c), which governs the SQF protocol. Specifically, the Exchange proposes to add: "Immediate-or-Cancel Orders entered into SQF are not subject to the Order Price Protection, Market Order Spread Protection, and Size Limitation Protection in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B) respectively." Adding these exceptions to the SQF rule as well as the IOC rule will make clear that these order protections will not apply to IOC orders entered through SQF.

The Exchange further proposes to specify in Supplementary Material .02(d)(3) that Block Orders, Facilitation

Orders, SOM Orders, PIM Orders, QCC Orders, and Customer Cross Orders are considered to have a TIF of IOC. By their terms, these orders will be: (1) executed either on entry or after an exposure period, or (2) cancelled.⁶¹ The proposed changes in Supplementary Material .02(d)(3) memorialize current System behavior and are intended to bring greater transparency in how these order types operate today.

The Exchange is relocating rule text governing OPG orders from Options 3, Section 7(o) into Supplementary Material .02(e) to specify that orders may be entered with a TIF of OPG. The Exchange also proposes a number of changes to conform the Exchange's OPG rule with that of BX. Other than as specified below, the proposed changes do not modify current Exchange OPG functionality. The Exchange proposes to remove the word "limit" from the relocated OPG rule text in Supplementary Material .02(e) in order to reflect that the Exchange will now allow both Market and Limit OPG Orders. As noted above, this is a proposed functionality change to align with current BX OPG functionality.⁶² The Exchange also proposes non-substantive changes to replace the current references to the opening rotation with the term "Opening Process" as defined in Options 3, Section 8. The Exchange further proposes to codify current OPG behavior by stating that OPG orders may not route.⁶³ Lastly, the Exchange proposes to memorialize current OPG behavior by indicating that OPG orders are not subject to any protections listed in Options 3, Section 15, except Size Limitation.⁶⁴ Today, the Exchange does not apply any of the risk protections in Options 3, Section 15 (except Size Limitation) because the Opening Process itself has boundaries within which orders will be executed.⁶⁵

Opening Process

In connection with the technology migration, the Exchange proposes several enhancements to its Opening Process in Options 3, Section 8. The Exchange first proposes to remove the current limitation that only allows routable Public Customer⁶⁶ interest to route during the Opening Process.

⁶¹ See BX Options 3, Section 7(b)(2)(C) for substantially similar language for PRISM orders.

⁶² See BX Options 3, Section 7(b)(1).

⁶³ See BX Options 3, Section 7(b)(1) for identical language.

⁶⁴ *Id.*

⁶⁵ See Options 3, Section 8.

⁶⁶ The term "Public Customer" means a person or entity that is not a broker or dealer in securities. See Option 1, Section 1(a)(41).

⁵⁴ See BX Options 3, Section 7(b)(2)(B) for substantially similar language. BX's rule does not refer to OTTO or Precise because BX does not offer these ports today.

⁵⁵ The current IOC rule references the Limit Order Price Protection as set forth in Options 3, Section 15(a)(1)(A). As discussed later in this filing, the Exchange is proposing to replace the existing Limit Order Price Protection with a similar risk management tool called Order Price Protection. See proposed Options 3, Section 15(a)(1)(A).

⁵⁶ Market Orders will be rejected if the NBBO is wider than a preset threshold at the time the order is received by the System. Market Order Spread Protection shall not apply to the Opening Process or during a trading halt. The Exchange may establish different thresholds for one or more series or classes of options. See Options 3, Section 15(a)(1)(B).

⁵⁷ There is a limit on the number of contracts an incoming order or quote may specify. Orders or quotes that exceed the maximum number of contracts are rejected. The maximum number of contracts, which shall not be less than 10,000, is established by the Exchange from time-to-time. See Options 3, Section 15(a)(2)(B).

⁵⁸ See BX Options 3, Section 7(b)(2)(B) for substantially similar language.

⁵⁹ See BX Options 3, Section 7(b)(2)(B).

⁶⁰ See Options 2, Section 5(e).

Instead, all routable market participant interest will be allowed to route to align the Exchange's opening functionality with BX.⁶⁷ Like BX, the Exchange believes that it will be beneficial to provide all market participants with the opportunity to have their interest executed on away markets during the Opening Process. To effectuate the foregoing, the Exchange proposes to amend Options 3, Section 8(b) to remove the sentence providing that only Public Customer interest is routable during the Opening Process. The Exchange further proposes to make a related change in Options 3, Section 8(i)(7), which currently provides that the System will route routable Public Customer interest pursuant to Options 3, Section 10(c)(1)(A). Specifically, the Exchange proposes to remove the reference to Public Customer to indicate all routable interest will route in accordance with the Exchange's priority rule. The Exchange will also update the cross-cite to Options 3, Section 10(c)(1)(A), currently pointing to the Priority Customer priority overlay, to the more general priority rule in Options 3, Section 10(c). The Exchange further proposes to amend Options 3, Section 8(j)(6) to remove the references to "Public Customer." As amended, Section 8(j)(6) will provide: "The System will execute orders at the Opening Price that have contingencies (such as, without limitation, Reserve Orders) and non-routable orders, such as "Do-Not-Route" or "DNR" Orders, to the extent possible. The System will only route non-contingency orders, except that Reserve Orders may route up to their full volume."

In addition, the Exchange proposes to amend Options 3, Section 8(g)(1), which currently describes how the Potential Opening Price would be calculated when there is more than one Potential

Opening Price.⁶⁸ Today, Section 8(g)(1) provides that when two or more Potential Opening Prices would satisfy the maximum quantity criterion and leave no contracts unexecuted, the System takes the highest and lowest of those prices and takes the mid-point; if such mid-point is not expressed as a permitted minimum price variation, it will be rounded to the minimum price variation that is closest to the closing price for the affected series from the immediately prior trading session. If there is no closing price from the immediately prior trading session, the System will round up to the minimum price variation to determine the Opening Price. The Exchange now proposes to no longer round in the direction of the previous trading day's closing price and simply round up to the minimum price variation if the mid-point of the high/low is not expressed as a permitted minimum price variation. The proposed changes are intended to simplify and bring greater transparency to the Opening Process, as market participants can now have a better sense of how the Potential Opening Price will be calculated without having to account for the closing price of each options series.

The Exchange further proposes to amend Options 3, Section 8(i)(3), which currently describes the determination of Opening Quote Range ("OQR") boundaries in certain scenarios.⁶⁹ Specifically, the Exchange proposes to replace "are marketable against the ABBO" with "cross the ABBO" to more precisely describe the specified scenario within in this rule. The Exchange notes that this is not a System change, but rather a clarifying change around the applicability of the rule text. Lastly, the Exchange proposes a non-substantive change in paragraph (a)(1)(2) of Options 3, Section 8 to remove the extra instance of "market" from the first sentence.

Auction and Crossing Mechanisms Facilitation and Solicited Order Mechanisms

The Exchange first proposes to make clarifying changes in Options 3, Section 11 (Auction Mechanisms). Today, Supplementary Material .02 to Options 3, Section 11 states that Responses⁷⁰

represent non-firm interest that can be canceled at any time prior to execution, and that Responses are not displayed to any market participants. The Exchange now proposes a non-substantive change to relocate this language into the introductory paragraph of Options 3, Section 11 after the definition of "Response" for better readability. The Exchange also proposes to add "or modified" after the "canceled" to indicate that auction Responses may be canceled or modified at any time prior to execution. This is not a change to current System behavior, but rather a clarification that better aligns the rule text to existing functionality.

Crossing Orders

The Exchange proposes a non-substantive change to the description of QCC Orders in Options 3, Section 12(c)(2) by removing "in" for better readability.

Price Improvement Mechanism

The Exchange proposes a number of changes to Options 3, Section 13 (Price Improvement Mechanism for Crossing Transactions), some of which are System changes to align with existing BX Price Improvement Mechanism ("BX PRISM") functionality and others that are non-System changes that add greater clarity to current PIM behavior. The Exchange proposes to amend Options 3, Section 13(b)(4) to add clarifying rule text to the current sentence, which states, "The Crossing Transaction⁷¹ may not be canceled, but the price of the Counter-Side Order may be improved during the exposure period." The Exchange proposes to add "or modified" after the word "canceled" to make clear that the Crossing Transaction may not be canceled or modified, but the Counter-Side Order may be improved during the exposure period. This proposed change would not amend the current System, rather it would bring greater clarity to the rule text that modifications are not permitted unless the Counter-Side Order is being improved during the exposure period.

The Exchange proposes to add rule text within Options 3, Section 13(b)(5) which states, "Crossing Transactions submitted at or before the opening of

message. A "broadcast message" is an electronic message sent by the Exchange to all Members upon entry of an order into one of the auction mechanisms listed within Options 3, Section 11 (i.e., Block, Facilitation, or Solicited Order Mechanisms).

⁷¹ A "Crossing Transaction" is comprised of the order the Electronic Access Member represents as agent (the "Agency Order") and a counter-side order for the full size of the Agency Order (the "Counter-Side Order"). See Options 3, Section 13(b).

⁶⁷ See BX Options 3, Section 8. See also Securities Exchange Act Release No. 89731 (September 1, 2020), 85 FR 55524 (September 8, 2020) (SR-BX-2020-016) (noting throughout that BX permits all market participants to route during its Opening Process). At the end of the Opening Process, pursuant to GEMX Options 3, Section 8(j)(6) and subsection (i), the System will execute orders at the Opening Price that have contingencies (such as, without limitation, Reserve Orders) and non-routable orders, such as a 'Do-Not-Route' or 'DNR' Orders, to the extent possible. The System will only route non-contingency Public Customer orders, except that Public Customer Reserve Orders may route up to their full volume. For contracts that are not routable, pursuant to GEMX Options 3, Section 8(j)(6), such as DNR Orders and orders priced through the Opening Price, the System will cancel (1) any portion of a Do-Not-Route order that would otherwise have to be routed to the exchange(s) disseminating the ABBO for an opening to occur, or (2) any order or quote that is priced through the Opening Price. All other interest will be eligible for trading after opening.

⁶⁸ The Potential Opening Price indicates a price where the System may open once all other Opening Process criteria is met.

⁶⁹ OQR is an additional type of boundary used in the Opening Process, and is intended to limit the opening price to a reasonable, middle ground price, thus reducing the potential for erroneous trades during the Opening Process.

⁷⁰ For purposes of Options 3, Section 11, a "Response" means an electronic message that is sent by Members in response to a broadcast

trading are not eligible to initiate an auction and will be rejected.” The Exchange notes that this rule text represents current System behavior. BX has a similar provision within BX Options 3, Section 13(i)(E). The Exchange notes that this rule text will bring greater clarity to when a Crossing Transaction would be eligible to initiate a PIM.

The Exchange proposes to amend the current PIM functionality within Options 3, Section 13(c)(3). Today, during the exposure period, Improvement Orders⁷² may not be canceled, however, Improvement Orders may be modified to (i) increase the size at the same price, or (ii) improve the price of the Improvement Order for any size up to the size of the Agency Order. The Exchange proposes to amend this functionality so that Improvement Orders may be canceled or modified similar to functionality on BX PRISM today within BX Options 3, Section 13(ii)(A)(8). The modification and cancellation of an Improvement Order through OTTO will be similar to the manner in which a Cancel and Replace Order⁷³ would be handled outside of the auction process. For Improvement Orders through SQF, the modification and cancellation of such orders will be handled by sending new Improvement Orders that overwrite the existing Improvement Order with updated price/quantity instructions.

Next, the Exchange proposes to amend Options 3, Section 13(d)(5), which currently states, “If a trading halt is initiated after an order is entered into the Price Improvement Mechanism, such auction will be automatically terminated without execution.” The Exchange proposes to instead provide, “If a trading halt is initiated after an order is entered into the Price

Improvement Mechanism, such auction will be automatically terminated with execution solely with the Counter-Side Order.” In the event of a trading halt, since the Counter-Side Order has guaranteed that an execution will occur at the same price as the Crossing Transaction or better, and Improvement Orders offer no such guarantee, the Counter-Side Order is the only valid price at which to execute the Crossing Transaction. This is similar to functionality on BX PRISM at BX Options 3, Section 13(ii)(C).⁷⁴

The Exchange also proposes a System change to adopt a new same side execution price check for PIM, which will be described in new subsection (d)(6) of Options 3, Section 13 and will be functionally identical to BX PRISM. As proposed, Options 3, Section 13(d)(6) will provide that if the PIM execution price would be the same or better than an order on the limit order book on the same side of the market as the Agency Order, the Agency Order may only be executed at a price that is at least \$0.01 better than the resting order’s limit price. If such resting order’s limit price is equal to or crosses the initiating Crossing Transaction price, then the entire Agency Order will trade at the initiating Crossing Transaction price with all better priced counter-side interest being considered for execution at the initiating Crossing Transaction price. As noted above, this price check will be functionally identical to the same side execution price check on BX PRISM today.⁷⁵ Like BX, the proposed price check is designed to ensure that the Exchange would not trade at prices that would lock or cross interest on the same side

of the market as the Agency Order where limit orders have rested and obtained priority to execute at that price. In the event where a limit order arrives on the same side of the market as the Agency Order and is at the same or better price than the initiating Crossing Transaction price, the Exchange would execute the entire PIM order at the initiating Crossing Transaction price. The execution takes place at this price because the PIM is guaranteed an execution and the PIM agency side instructions would not allow an execution to take place at a higher (lower) price than submitted for a buying (selling) agency side PIM order. Considering that the limit order has arrived either at or better on the same side as the Agency Order than the agency side price, the initiating Crossing Transaction price is the only price at which the guaranteed execution can take place.

The following examples illustrate how the proposed PIM execution price check would work:

Example: PIM executes with Improvement Order at \$0.01 better than a limit order on the same side of the market as the Agency Order.

Firm Limit order to buy @1.40 arrives prior to the PIM auction beginning.

GEMX BBO: 1.40 × 2.00.

PIM Agency Order to buy 20 @1.50 arrives with an auto-match price of 1.50 indicated.

PIM Improvement Order⁷⁶ to sell 20 @ 1.40 arrives.

Auction concludes after timer and PIM Agency Order trades 20 with PIM Improvement Order @1.41; the Counter-Side Order⁷⁷ cancels.

Example: PIM executes at Agency Price with all better priced interest when limit order on same side equals or crosses the initiating Crossing Transaction price.

Assume GEMX BBO: 1.00 × 2.00.

PIM Agency Order to buy 20 @1.50 arrives with an auto-match price of 1.50 indicated.

PIM Improvement Order to sell 20 @ 1.40 arrives.

During the exposure period, Firm Limit order to buy @1.50 arrives.

Auction concludes after timer and PIM Agency Order trades 12 with PIM Improvement Order @1.50 and 8 with

⁷² Improvement Orders are responses entered by Members to indicate the size and price at which they want to participate in the execution of the Agency Order. See Options 3, Section 13(c)(1).

⁷³ Cancel and Replace Orders shall mean a single message for the immediate cancellation of a previously received order and the replacement of that order with a new order. If the previously placed order is already filled partially or in its entirety, the replacement order is automatically canceled or reduced by the number of contracts that were executed. The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, size is not increased, or in the case of Reserve Orders, size is not changed. If the replacement portion of a Cancel and Replace Order does not satisfy the System’s price or other reasonability checks (e.g., Options 3, Section 15(b)(1)(A) and Options 3, Section 15(b)(1)(B)) the existing order shall be cancelled and not replaced. See Supplementary Material .02 to Options 3, Section 7 (as described above, the current definition will be moved to proposed Options 3, Section 7(f) with no substantive changes).

⁷⁴ BX Options 3, Section 13(ii)(C) provides that if the situations described in sub-paragraphs (B)(2) or (3) above occur, the entire PRISM Order will be executed at: (1) in the case of the BX BBO crossing the PRISM Order stop price, the best response price(s) or, if the stop price is the best price in the Auction, at the stop price, unless the best response price is equal to or better than the price of a limit order resting on the Order Book on the same side of the market as the PRISM Order, in which case the PRISM Order will be executed against that response, but at a price that is at least \$0.01 better than the price of such limit order at the time of the conclusion of the Auction; or (2) in the case of a trading halt on the Exchange in the affected series, the stop price, in which case the PRISM Order will be executed solely against the Initiating Order. Any unexecuted PAN responses will be cancelled.

⁷⁵ BX Options 3, Section 13(ii)(I) provides that if the execution price of the PRISM Auction would be the same or better than an order on the limit order book on the same side of the market as the PRISM Order, the PRISM Order may only be executed at a price that is at least \$0.01 better than the resting order’s limit price. If such resting order’s limit price is equal to or crosses the stop price, then the entire PRISM Order will trade at the stop price with all better priced interest being considered for execution at the stop price.

⁷⁶ “Improvement Orders” are responses sent by Members during the PIM’s exposure period in response to the PIM that indicate the size and price at which they want to participate in the execution of the Agency Order. See Options 3, Section 13(c)(1).

⁷⁷ The “Counter-Side Order” is the counter-side order for the full size of the Agency Order that is entered into the PIM by the initiating Electronic Access Member. See Options 3, Section 13(b).

the Counter-Side Order @1.50 (*i.e.*, the guaranteed execution price) because all better priced interest must trade at the initiating Crossing Transaction price when the limit order on the same side equals or crosses the initiating Crossing Transaction price.⁷⁸ The remainder of the Counter-Side Order and the remainder of the PIM Improvement Order cancel. The execution takes place at 1.50 because the PIM is guaranteed an execution, and the PIM agency side instructions would not allow an execution to take place at a higher price than the submitted 1.50 buying price for the agency side PIM order.

Finally, the Exchange proposes to amend Supplementary Material .02 to Options 3, Section 13 to add the following sentence: “It will be considered a violation of this Rule and will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Options 9, Section 1 if an Electronic Access Member submits a PIM Order (initiating an auction) and also submits its own Improvement Order in the same auction.” BX has a similar prohibition within BX Options 3, Section 13(iii). The proposed new rule is intended to provide guidance to Members where certain behavior within a PIM will not be considered a bona fide transaction.

Order Price Protection

The Exchange currently has a Limit Order Price Protection in Options 3, Section 15(a)(1)(A), which is a “fat finger” check designed to address risks to market participants of human error in entering certain orders at unintended prices. Specifically, there is a limit on the amount by which incoming limit orders to buy may be priced above the Exchange’s best offer and by which incoming limit orders to sell may be priced below the Exchange’s best bid. Limit orders that exceed the pricing limit are rejected. The limit is established by the Exchange from time-to-time for orders to buy (sell) as the greater of the Exchange’s best offer (bid) plus (minus): (i) an absolute amount not to exceed \$2.00, or (ii) a percentage of the Exchange’s best bid/offer not to exceed 10%.

The Exchange proposes to replace the existing risk protection with an Order Price Protection (“OPP”) that would similarly prevent the execution of limit orders at prices outside pre-set parameters. The proposed

OPP will be functionally similar to the OPP functionality currently offered by BX.⁷⁹ In particular, proposed Options 3, Section 15(a)(1)(A) will provide that OPP is a feature of the System that prevents limit orders at prices outside of pre-set standard limits from being accepted by the System. Further, OPP will reject incoming orders that exceed certain parameters according to the following algorithm set forth in proposed Options 3, Section 15(a)(1)(A)(ii):

(a) If the better of the NBBO or the internal market BBO (the “Reference BBO”) on the contra-side of an incoming order is greater than \$1.00, orders with a limit more than the greater of the below will cause the order to be rejected by the System upon receipt.

(1) 50% less (greater) than such contra-side Reference Best Bid (Offer); or

(2) a configurable dollar amount not to exceed \$1.00 less (greater) than such contra-side Reference Best Bid (Offer) as specified by the Exchange announced via an Options Trader Alert.

(b) If the Reference BBO on the contra-side of an incoming order is less than or equal to \$1.00, orders with a limit more than the greater of the below will cause the order to be rejected by the System upon receipt.

(1) 100% less (greater) than such contra-side Reference Best Bid (Offer); or

(2) a configurable dollar amount not to exceed \$1.00 less (greater) than such contra-side Reference Best Bid (Offer) as specified by the Exchange announced via an Options Trader Alert.

The proposed OPP will be calculated using the better of the NBBO or the internal market BBO (*i.e.*, the Reference BBO) instead of the Exchange BBO as currently used today, which will align to current BX functionality.⁸⁰ Like BX, the Exchange believes that calculating OPP on the basis of the better of the NBBO or the internal market BBO protects investors and the public interest where the internal market BBO is better than the NBBO. In addition, the proposed OPP parameters will be the greater of a percentage threshold or fixed dollar amount, similar to today’s limit order price protection that uses the greater of a percentage or fixed dollar threshold. The proposed parameters are identical to BX’s OPP.⁸¹ The Exchange believes that the proposed algorithm for OPP would continue to provide a

⁷⁹ BX’s OPP is currently memorialized in BX Options 3, Section 15(a)(1), which provides that OPP is a feature of the System that prevents certain day limit, good til cancelled, and immediate or cancel orders at prices outside of pre-set standard limits from being accepted by the System. BX’s rule also provides that OPP applies to all options but does not apply to market orders. As described above, the Exchange is proposing to adopt an OPP rule that more accurately describes this functionality than BX’s current OPP rule. BX will file a separate rule change to conform its OPP rule with the Exchange’s proposed rule text.

⁸⁰ See BX Options 3, Section 15(a)(1)(B).

⁸¹ *Id.* The Exchange will initially set the fixed dollar configuration at \$0.05, identical to BX.

reasonable limit to the range where orders will be accepted.

As set forth in proposed Options 3, Section 15(a)(1)(A)(i), OPP will be operational each trading day after the opening until the close of trading, except during trading halts, which will be identical to current functionality.⁸² The Exchange also proposes in this paragraph to add identical language as BX, which will provide the Exchange with discretion to temporarily deactivate OPP from time to time on an intra-day basis if it is determined that unusual market conditions warranted deactivation in the interest of a fair and orderly market. Like BX, the Exchange believes that it will be useful to have the flexibility to temporarily disable OPP intra-day in response to an unusual market event (for example, if dissemination of data was delayed and resulted in unreliable underlying values needed for the Reference BBO). Members would be notified of intra-day OPP deactivation and any subsequent reactivation by the Exchange through the issuance of System status messages. Specifically, the Exchange proposes to add in Options 3, Section 15(a)(1)(A)(i) that OPP may be temporarily deactivated on an intra-day basis at the Exchange’s discretion.

The following examples illustrate the application of the proposed OPP thresholds:

Example: An option priced less than or equal to \$1.00.

For a penny MPV option with a BBO on GEMX of \$0.01 × \$0.02, consider that the configurable dollar amount is set to \$0.05.

If the incoming order was less than \$1.00, and the Reference BBO is the internal market BBO, the System will reject buy orders priced higher than the greater of (i) \$0.04 (100% greater than the contra-side Reference Best Offer of \$0.02) or (ii) \$0.07 (\$0.02 offer + \$0.05 configuration).

Example: An option priced greater than \$1.00.

For a penny MPV option with a BBO on GEMX of \$1.01 × \$1.02, consider that the configurable dollar amount is set to \$0.05.

If the incoming order was more than \$1.00, and the Reference BBO is the internal market BBO, the System will reject buy orders priced higher than the greater of (i) \$1.53 (50% greater than the contra-side Reference Best Offer of \$1.02) or (ii) \$1.07 (\$1.02 offer + \$0.05 configuration).

⁸² See Options 3, Section 15(a)(1)(A) (currently providing that the limit order price protection does not apply to the opening process or during a trading halt).

⁷⁸ The order is allocated pursuant to Options 3, Section 13(d)(3) where the Counter-Side Order will be allocated the greater of 1 contract or 40%, which, in this case, equates to 8 contracts out of the 20 contracts. Thus, in this case, the Improvement Order is allocated 12 contracts to fully execute the 20 contracts of the original PIM Agency Order.

Post-Only Quoting Protection

The Exchange proposes to adopt an optional quoting protection for Market Makers that will be identical to current BX functionality.⁸³ This optional risk protection would allow Market Makers to prevent their quotes from removing liquidity from the Exchange's order book upon entry.

Specifically, the Exchange proposes to adopt the new risk protection in Options 3, Section 15(a)(3)(C). As proposed, Market Makers may elect to configure their SQF protocols to prevent their quotes from removing liquidity ("Post-Only Quote Configuration"). A Post-Only Quote Configuration would re-price or cancel a Market Maker's quote that would otherwise lock or cross any resting order or quote⁸⁴ on the order book upon entry. Market Makers may elect whether to re-price or cancel their quotes with this functionality. When configured for re-price, quotes would be re-priced and displayed by the System to one MPV below the current best offer (for bids) or above the current best bid (for offers). Notwithstanding the aforementioned, if a quote with a Post-Only Quote Configuration would not lock or cross an order or quote on the System but would lock or cross the NBBO, the quote will be handled pursuant to Options 3, Section 4(b)(6).⁸⁵ When configured for cancel, Market Makers will have their quotes cancelled whenever the quote would lock or cross the NBBO or be placed on the book at a price other than its limit price. Finally, the Exchange notes that similar to BX, this risk protection will not apply during an Opening Process because the order book is established once options series are open for trading.

Below are some examples of the Post-Only Quote Configuration functionality.

Re-Priced Post-Only Quote Configuration—Penny Interval Program Display and Execution Example

- Penny Interval Program MPV in open trading state.

⁸³ See BX Options 3, Section 15(c)(3).

⁸⁴ This would include any re-priced orders as described in the Re-Pricing Filing as proposed Options 3, Section 5(d), ALOs as described in proposed Options 3, Section 7(n), and any re-priced quotes as described in Options 3, Section 4(b)(6). As described above, ALOs may re-price.

⁸⁵ Options 3, Section 4(b)(6) provides that a quote will not be executed at a price that trades through another market or displayed at a price that would lock or cross another market. If, at the time of entry, a quote would cause a locked or crossed market violation or would cause a trade-through violation, it will either be re-priced and displayed at one minimum price variance above (for offers) or below (for bids) the national best price, or immediately cancelled, as configured by the Member.

- Market Makers A and C do not have Post-Only Quote Configuration risk protection configured.

- Market Maker B is configured for Post-Only Quote Configuration re-price.

- Market Maker A quote \$0.98 (10) × \$1.00 (10).

- ABBO \$0.96 × \$1.03.

- Market Maker B quote \$1.00 (10) × \$1.01 (10) arrives.

- Bid side of quote re-prices onto order book @ 0.99 and sets displayed NBBO to 10 quantity.

- Offer side rests at 1.01 without issue.

- Market Maker C quote \$0.97 (20) × \$0.98 (20) arrives.

- Trades 10 with Market Maker B @ \$0.99 and 10 with Market Maker A @ \$0.98.

Market Maker B avoids taking liquidity while Market Maker C, who chose not to be configured for such, removes liquidity by interacting with re-priced interest on the Exchange's order book.

Re-Priced Post-Only Quote Configuration—Non-Penny Interval Program Display and Execution Example

- Non-Penny Interval Program MPV in open trading state.

- Market Maker A quote \$0.95 (10) × \$1.00 (10).

- ABBO \$0.85 × \$1.05.

- Market Maker B (configured for Post-Only Quote Configuration and selection of re-price upon quote) quote arrives \$1.00 (5) × \$1.05 (5).

- Bid side quote re-prices on order book to \$0.95.

- Displays on order book @ \$0.95 (bid), which now shows (15 quantity).

- Offer side quote books and displays in Depth of Market Fe.ed at \$1.05

- Order to sell 10 contracts arrives @ \$0.95.

- 7 contracts execute with Market Maker A @ \$0.95.

- 3 contracts execute with Market Maker B @ \$0.95.

In this example, the Market Maker avoided taking liquidity by deploying the Post-Only Quote Configuration with re-price.

Kill Switch

As set forth in Options 3, Section 17, the Exchange offers an order cancellation Kill Switch, which is an optional tool that allows Members to initiate a message to the System to promptly cancel and restrict their order activity on the Exchange, or across both the Exchange and its affiliate, ISE. Members may submit a Kill Switch request to the System for certain identifier(s) ("Identifier") on either a

user or group level.⁸⁶ Today, Members can log in through a graphical user interface ("GUI") to send a message to the Exchange to initiate the order cancellation Kill Switch.⁸⁷ As an alternative to the GUI Kill Switch, Members may also send a message through one of the Exchange's order entry ports (*i.e.*, FIX, Precise, and OTTO) to initiate the order cancellation Kill Switch.⁸⁸ Once a Member initiates the Kill Switch (either through the GUI or an order entry port), it will result in the cancellation of all existing orders for the requested Identifier(s). The Member will be unable to enter any additional orders for the affected Identifier(s) until the Member sends a re-entry request to the Exchange.⁸⁹

Due to the lack of demand for the GUI Kill Switch by Members, the Exchange proposes to decommission this optional tool with the planned technology migration.⁹⁰ With the proposed changes, the Exchange seeks to streamline its product offerings and to reallocate Exchange resources to other business and risk management initiatives. While the Exchange will no longer offer this optional risk protection to Members through the GUI, it will continue to offer this functionality through FIX, Precise, and OTTO.

In addition, all Members may contact the Exchange's market operations staff to request that the Exchange cancel any of their existing bids, offers, or orders in any series of options.⁹¹ Furthermore, the Exchange will continue to have System-enforced risk mechanisms that automatically remove orders for the Member once certain pre-set thresholds or conditions are met. This includes risk protections such as the market wide risk protection⁹² and cancel on disconnect.⁹³

⁸⁶ Identifiers include Exchange accounts, ports, and/or mnemonics. Thus, a Member using Kill Switch may elect to cancel orders for an individual Identifier (*e.g.*, mnemonic) or any group of Identifiers (*e.g.*, all mnemonics within one Member firm). Permissible groups must reside within a single Member firm. See Options 3, Section 17(a).

⁸⁷ See Options 3, Section 17(a)(2).

⁸⁸ See Options 3, Section 17(a)(1).

⁸⁹ See Options 3, Section 17(a)(3).

⁹⁰ No Members have used the GUI Kill Switch for order cancellation in 2022. The Exchange will provide prior notice of the decommission to Members via Options Trader Alert.

⁹¹ See Options 3, Section 19.

⁹² The market wide risk protection automatically removes Member orders on the Exchange, or across both the Exchange and ISE, in either case as set by the Member, when certain firm-set thresholds are met. Once the thresholds are triggered, the Member must send a re-entry indicator to re-enter the System. See Options 3, Section 15(a)(1)(C).

⁹³ When the OTTO or FIX Port detects the loss of communication with a Member's Client Application because the Exchange's server does not receive a Heartbeat message for a certain time period ("nn"

To effect the proposed decommission of the GUI Kill Switch for order cancellation, the Exchange proposes to amend Options 3, Section 17 by eliminating paragraph (a)(2) and related cross-cites within this rule. The Exchange will also renumber the paragraphs in this rule accordingly.

The Exchange notes that it previously amended its rules to decommission the quote removal Kill Switch that was available to Market Makers through the GUI.⁹⁴ The Exchange noted in SR–GEMX–2021–09 that Market Makers did not use the GUI Kill Switch to remove their quotes, but rather, utilized other means such as the mass purge request through SQF. In this case, the Exchange similarly notes that no Members use the GUI Kill Switch to cancel their orders but rather, utilize other means like the port Kill Switch through FIX, Precise, and OTTO to purge their existing orders from the System. As such, the Exchange believes that eliminating the GUI Kill Switch all together (including for orders as proposed herein) will streamline the Exchange’s risk protection offerings in a manner that reflects Member use.

Data Feeds and TradeInfo

In connection with the technology migration, the Exchange proposes a number of enhancements to its current data feed offerings in Options 3, Section 23(a), many of which are intended to conform with current BX functionality, as specified below.

As set forth in Options 3, Section 23(a)(1), the Exchange offers the Nasdaq GEMX Depth of Market Data Feed (“Depth of Market Feed”), which currently provides aggregate quotes and orders at the top five price levels on GEMX, and provides subscribers with a consolidated view of tradable prices beyond the BBO, showing additional liquidity and enhancing transparency for GEMX traded options. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on the Exchange and identifies if the series is available for closing transactions only. In addition, subscribers are provided with total aggregate quantity, Public Customer aggregate quantity, Priority

seconds), the Exchange will automatically logoff the Member’s affected Client Application and if the Member has elected to have its orders cancelled pursuant to Section 18(f) (for OTTO) or Section 18(g) (for FIX) automatically cancel all orders. See Options 3, Section 18(c) and (d).

⁹⁴ See Securities Exchange Act Release No. 93010 (September 15, 2021), 86 FR 52518 (September 21, 2021) (SR–GEMX–2021–09).

Customer aggregate quantity, price, and side (*i.e.*, bid/ask). This information is provided for each of the top five price levels on the Depth Feed. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to no longer provide book information for the top five price levels, and instead provide full depth-of-book information. As such, the Exchange will delete language that relates to top five price level information in the rule text. The Exchange also proposes to add more specificity around what would be provided in the opening/reopening order imbalance information (namely, the size of matched contracts and size of the imbalance). The Exchange further proposes a technical change to correct an erroneous reference to “ISE” within the rule text. The proposed changes will closely align the information provided on the Exchange’s Depth of Market Feed with that of BX’s Depth of Market Feed, except the Exchange will not offer auction and exposure notifications on its Depth of Market Feed like BX does today.⁹⁵ The Exchange already offers auction and exposure notifications on the Nasdaq GEMX Order Feed as described below.⁹⁶ As amended, Options 3, Section 23(a)(1) would provide:

Nasdaq GEMX Depth of Market Data Feed (“Depth of Market Feed”) is a data feed that provides full order and quote depth information for individual orders and quotes on the Exchange book and last sale information for trades executed on the Exchange. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on the Exchange and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance).

As set forth in Options 3, Section 23(a)(2), the Exchange offers the Nasdaq GEMX Order Feed (“Order Feed”), which currently provides information on new orders resting on the book (*e.g.* price, quantity and market participant capacity). In addition, the feed also announces all auctions. The data provided for each option series includes

⁹⁵ See BX Options 3, Section 23(a)(1). As discussed below, the Exchange is instead proposing to offer these notifications on the Nasdaq GEMX Order Feed. BX does not have a comparable order feed today.

⁹⁶ BX does not have a comparable order feed today. However, the proposed data elements in the GEMX Order Feed already exist in the rules or technical specifications (for the Attributable Order content) of other options exchanges, as described below.

the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to update the information that would be available on the Order Feed. In particular, the Exchange would include Attributable Order tags⁹⁷ (as provided by the Member) and related data content around displayed order types and specified order attributes (*e.g.*, OCC account number, give-up information, CMTA information).⁹⁸ The Exchange also proposes to add more specificity around what would be provided in the opening/reopening order imbalance information (namely, the size of matched contracts and size of the imbalance). This specifically aligns to the data elements in both BX’s Depth of Market Feed in BX Options 3, Section 23(a)(1) and the Exchange’s proposed Depth of Market Feed in proposed Options 3, Section 23(a)(1). The Exchange will continue to provide auction notifications on the Order Feed, but will relocate the existing language to the end of the rule and adopt new content by providing that the proposed Order Feed will provide exposure notifications as well.⁹⁹ As amended, Options 3, Section 23(a)(2) would provide:

Nasdaq GEMX Order Feed (“Order Feed”) provides information on new orders resting on the book (*e.g.* price, quantity, market participant capacity and Attributable Order

⁹⁷ As discussed above, an Attributable Order is a market or limit order which displays the user firm ID for purposes of electronic trading on the Exchange. See Options 3, Section 7(h).

⁹⁸ The Exchange notes that Cboe has similar attributable order functionality in Cboe Rule 5.6(c) as an order a user designates for display (price and size) that includes the user’s executing firm ID or other unique identifier. While Cboe does not have a comparable data feed rule, Cboe’s technical specifications indicate that it currently has Participant ID and Client ID tags available on its Multicast PITCH data feed. See Section 4.6 in https://cdn.cboe.com/resources/membership/US_EQUITIES_OPTIONS_MULTICAST_PITCH_SPECIFICATION.pdf (relating to Participant ID or Client ID as optionally specified values).

⁹⁹ BX’s Depth of Market Feed currently has identical content relating to auction and exposure notifications in BX Options 3, Section 23(a)(1). Exposure notifications are new with the introduction of routing and the removal of flash functionality in the Routing Filing. An exposure notification informs the market of an order that has arrived marketable against an ABBO and has a routing timer pursuant to the changes introduced to Options 5, Section 4 in the Routing Filing, while an auction notification is the notification of an auction for a Block, Facilitation, Solicited Order, or PIM auction.

tags when provided by a Member). The data provided for each option series includes the symbols (series and underlying security), displayed order types, order attributes (e.g., OCC account number, give-up information, CMTA information), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance), auction and exposure notifications.

As set forth in Options 3, Section 23(a)(3), the Exchange offers the Nasdaq GEMX Top Quote Feed, which currently calculates and disseminates GEMX's best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable order and quote interest in the System. The feed also provides last trade information along with opening price, daily trading volume, high and low prices for the day. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to harmonize certain features of this feed with BX's Top of Market Feed while retaining certain intended differences as specified below.¹⁰⁰ The Exchange first proposes to rename the Nasdaq GEMX Top Quote Feed to the Nasdaq GEMX Top of Market Feed ("Top Feed") to match the BX feed name. In addition, the Exchange proposes to make conforming changes to rename the Top Feed throughout Options 7, Section 6.C(iii) and Section 7.B. The Exchange further proposes to no longer provide information for opening price, daily trading volume, high and low prices for the day. These are conforming changes that would align the information provided on the Exchange's Top Feed with information on BX's Top Feed.¹⁰¹ The Exchange will continue to provide aggregated size information as a legacy holdover, which will be different than current BX functionality. Similarly, the Exchange will continue to provide opening/reopening order imbalance information on its Top Feed unlike BX.

As amended, Options 3, Section 23(a)(3) will provide:

Nasdaq GEMX Top of Market Feed ("Top Feed") calculates and disseminates GEMX's best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable order and quote interest in the System. The feed also provides last trade information and for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

As set forth in Options 3, Section 23(a)(4), the Exchange offers the Nasdaq GEMX Trades Feed ("Trades Feed"), which currently displays last trade information along with opening price, daily trading volume, high and low prices for the day. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only. The Exchange proposes to no longer provide information for opening price, daily trading volume, high and low prices for the day to align to the changes proposed for the Top Feed described above. As amended, Options 3, Section 23(a)(4) will provide:

Nasdaq GEMX Trades Feed ("Trades Feed") displays last trade information. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on GEMX and identifies if the series is available for closing transactions only.

In addition, the Exchange proposes to no longer offer TradeInfo, which is a user interface set forth in Options 3, Section 23(b)(2) that permits Members to: (i) search all orders submitted in a particular security or all orders of a particular type, regardless of their status (open, canceled, executed, etc.); (ii) view orders and executions; and (iii) download orders and executions for recordkeeping purposes. TradeInfo users may also cancel open orders at the order, port or firm mnemonic level through TradeInfo. Due to the lack of demand for this interface by Members,¹⁰² the Exchange seeks to decommission the TradeInfo interface when the Exchange migrates over to the enhanced Nasdaq platform with the

technology migration.¹⁰³ The Exchange notes that FIX, FIX DROP,¹⁰⁴ and the Clearing Trade Interface ("CTI"),¹⁰⁵ which are available to all Members, can be used today to obtain order information that is currently available within TradeInfo, and FIX can be used to cancel orders today.

In connection with its proposal to retire TradeInfo, the Exchange also proposes to eliminate all references to TradeInfo in Options 7 (Pricing Schedule). Today, as set forth in Options 7, Section 6.C(ii)(3), the Exchange does not charge any fees for TradeInfo. With the proposed changes, the Exchange will amend Options 7 to delete Section 6.C(ii)(3) in its entirety.

Optional Risk Protections

The Exchange proposes to introduce optional quantity and notional value checks in new Options 3, Section 28, entitled "Optional Risk Protections." The proposed optional order risk protections will be functionally identical to the protections currently offered by BX.¹⁰⁶ Members may use this voluntary functionality through their FIX or Precise protocols to limit the quantity and notional value they can send per order and on aggregate for the day. Specifically, Members may establish limits for the following parameters, as set forth in proposed subparagraphs (a)(1)–(4):

(1) Notional dollar value per order, which will be calculated as quantity multiplied by limit price multiplied by number of underlying shares;

¹⁰³ The Exchange will provide prior notice of the decommission to all Members through an Options Trader Alert.

¹⁰⁴ FIX DROP is a real-time order and execution update message that is sent to a Member after an order been received/modified or an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) executions; (ii) cancellations; (iii) modifications to an existing order; and (iv) busts or post-trade corrections. See Options 3, Section 23(b)(3).

¹⁰⁵ CTI is a real-time cleared trade update message that is sent to a Member after an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement ("CMTA") or The Options Clearing Corporation ("OCC") number; (ii) badge or mnemonic; (iii) account number; (iv) information which identifies the transaction type (e.g., auction type) for billing purposes; and (v) market participant capacity. See Options 3, Section 23(b)(1).

¹⁰⁶ See BX Options 3, Section 28. While BX's rule does not contain the level of granularity as proposed in the Exchange's rule, including how orders are rejected if any of the optional risk protection values are exceeded, the Exchange understands that BX's optional risk protections operate in the same manner. In addition, BX's rule does not include Precise as this order entry port is not available on BX today.

¹⁰⁰ See BX Options 3, Section 23(a)(2).

¹⁰¹ *Id.*

¹⁰² No Members logged into TradeInfo in 2022.

(2) Daily aggregate notional dollar value;

(3) Quantity per order; and

(4) Daily aggregate quantity

Proposed paragraph (b) will provide that Members may elect one or more of the above optional risk protections by contacting Market Operations and providing a per order value (for (a)(1) and (a)(3)) or daily aggregate value (for (a)(2) and (a)(4)) for each order protection. Members may modify their settings through Market Operations. Proposed paragraph (c) will provide that the System will reject all incoming aggregated Member orders for any of the (a)(2) and (a)(4) risk protections after the value configured by the Member is exceeded. Proposed paragraph (d) will provide that the System will reject all incoming Member orders for any of the (a)(1) and (a)(3) risk protections upon arrival if the value configured by the Member is exceeded by the incoming order. The Exchange notes that the difference in handling between aggregate and individual order protections is necessary to allow for complete processing of the final order that puts a Member's configured value over the aggregate values configured. While individual orders can be directly measured against the configured values for (a)(1) and (a)(3), the aggregate values must be calculated after complete processing of an order and thus the rejection of orders begins upon the arrival of the next order after the aggregate values in (a)(2) or (a)(4) have been exceeded.

The following example shows how the System will reject all subsequent incoming aggregated orders after the (a)(2) or (a)(4) values configured by the Member have been exceeded:

Aggregate Quantity Limit = 800.

1. Member enters an Order to Buy 500—Accepted.

2. Member enters an Order to Buy 400—Accepted (Member did not meet the configured limit of 800 with the first order of 500 at the time Member entered the second order).

3. Member enters an Order to Buy 1—Rejected (Member already exceeded the configured limit of 800 with the second order of 400).

The following example shows how the System will reject all incoming orders upon arrival if the (a)(1) or (a)(3) values configured by the Member have been exceeded by the arriving order:

Quantity Per Order Limit = 800.

1. Member enters an Order to Buy 801—Rejected (Member exceeded the Quantity per order limit upon arrival with the order to buy 801 contracts).

Proposed paragraph (e) will provide that if a Member sets a notional dollar

value, a Market Order would not be accepted from that Member. This is because notional dollar value is calculated by using an order's specified limit price, and Market Orders by definition are priced at the best available price upon execution. Lastly, proposed paragraph (f) will provide that the proposed risk protections are only available for orders entered through FIX or Precise. Additionally, all of the proposed settings will be firm-level.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰⁸ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. As it relates to the elimination of fees for flash functionality and TradeInfo, the Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹⁰ 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.

Generally, the Exchange's proposal is intended to add or align certain System functionality with functionality currently offered on BX in order to provide a more consistent technology offering across affiliated Nasdaq options exchanges. A more harmonized technology offering, in turn, will simplify technology implementation, changes, and maintenance by market participants of the Exchange that are also participants on Nasdaq affiliated options exchanges. The Exchange's proposal also seeks to provide greater harmonization between the rules of the Exchange and its affiliates, which would result in greater uniformity, and less burdensome and more efficient regulatory compliance by market participants. As such, the proposal would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and

perfect the mechanism of a free and open market and a national market system. The Exchange believes that more consistent rules will increase the understanding of the Exchange's operations for market participants that are also participants on the Nasdaq affiliated options exchanges, thereby contributing to the protection of investors and the public interest. The proposal also seeks to memorialize existing functionality and add more granularity in the Exchange's rules to describe how existing functionality operates today. The Exchange believes that such changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes would promote transparency in Exchange rules and reducing potential confusion, thereby ensuring that Members, regulators, and the public can more easily navigate the Exchange's Rulebook and better understand how options trading is conducted on the Exchange.

Routing Changes

The Exchange believes that the proposed amendments throughout Options 3 and Options 7 to conform to the Routing Filing is consistent with the Act. As discussed above, the Routing Filing harmonizes the Exchange's routing functionality with that of BX.¹¹¹ As part of this harmonization, the Routing Filing adopts or harmonizes routing strategies on the Exchange that are substantially identical to BX, (DNR, FIND, and SRCH), and eliminates existing Exchange routing functionality that BX does not offer today (flash functionality and Sweep Orders). The proposed changes to Options 3 and Options 7 herein will therefore ensure that the Rules conform to the amendments in the Routing Filing by removing references to flash functionality and Sweep Orders, eliminating do-not-route orders as an order type and describing it instead as a DNR routing strategy to harmonize with BX, and also making clear which routing strategies may now be utilized when submitting an order type. The Exchange believes that the proposed changes will bring greater clarity to the Rulebook, which would benefit market participants and investors by reducing potential confusion.

The Exchange's proposal to remove pricing related to flash functionality

¹¹¹ As discussed above, the Routing Filing was filed by ISE to amend ISE Options 5. Because GEMX Options 5 incorporates ISE Options 5 by reference, amendments to ISE Options 5 are accordingly integrated as amendments to GEMX Options 5. See *supra* note 3.

¹⁰⁷ 15 U.S.C. 78f(b).

¹⁰⁸ 15 U.S.C. 78f(b)(5).

¹⁰⁹ 15 U.S.C. 78f(b).

¹¹⁰ 15 U.S.C. 78f(b)(4) and (5).

from Options 7 is reasonable, equitable, and not unfairly discriminatory because flash functionality would no longer be available to any Member. It is reasonable to remove the fees related to flash orders and the references to flash orders from the Exchange's Pricing Schedule as the Exchange is removing this functionality from its Rulebook. Additionally, it is equitable and not unfairly discriminatory to remove the fees related to flash orders and the references to flash orders from the Pricing Schedule because no Member would be able to utilize the flash functionality once it is removed from the System.

Bulk Message

The Exchange believes that its proposal to memorialize its bulk message functionality is consistent with the Act as it will codify existing functionality, thereby promoting transparency in the Exchange's rules and reducing any potential confusion.¹¹² This functionality provides Market Makers with an additional tool to meet their various quoting obligations in a manner they deem appropriate, consistent with the purpose of the bulk message functionality to facilitate Market Makers' provision of liquidity. By providing Market Makers with additional control over the quotes they use to provide liquidity to the Exchange, this tool may benefit all investors through additional execution opportunities at potentially improved prices. As noted above, other options exchanges like Cboe currently offer similar bulk messaging functionality that allow their market participants to submit block quantity quotes in a single electronic message.¹¹³

The Exchange does not believe that the offering the bulk message functionality to only Market Makers would permit unfair discrimination. Market Makers play a unique and critical role in the options market by providing liquidity and active markets, and are subject to various quoting obligations (which other market participants are not, including obligations to maintain active markets, update quotes in response to changed market conditions, to compete with other Market Makers in its appointed classes, and to provide intra-day quotes in its appointed classes.¹¹⁴ Bulk message functionality provides Market

Makers with a means to help them satisfy these obligations.

Order Types

The Exchange believes that the proposed changes to the rules governing Exchange order types are consistent with the Act. As discussed above, the proposed changes consist of several functional enhancements to align the Exchange's order types to existing BX order types, and rule adjustments that add more specificity and clarity to existing order types.

Market Orders

The Exchange believes that the proposed changes to the definition of Market Orders in Options 3, Section 7(a) are consistent with the Act. The proposed intra-day cancel timer feature mirrors existing BX functionality in BX Options 3, Section 7(a)(5), and would provide Members with additional flexibility and control to bring the Market Order back to the Member so they can get an execution on another venue by canceling unexecuted Market Orders after a certain period of time. The Exchange believes it is appropriate to offer this feature intra-day because the Exchange already has a separate opening delay timer that provides protection to the market during the Opening Process as discussed above.

Intermarket Sweep Orders

The Exchange believes that the proposed changes to the definition of ISOs in Options 3, Section 7(b)(5) are consistent with the Act. As discussed above, the proposed changes are intended to add more granularity and more closely align the level of detail in the ISO rule with BX's ISO rule in BX Options 3, Section 7(a)(6) by specifying how the Exchange would handle ISOs, including how ISOs may be submitted and when. As such, the Exchange believes that its proposal will promote transparency in the Exchange's rules and consistency across the rules of the Nasdaq affiliated options exchanges.¹¹⁵

Furthermore, the proposed changes do not amend current ISO functionality except for the proposed stipulation that ISOs must have a TIF designation of IOC. Today, Options 5, Section 1(h) provides that ISOs may be either an IOC or an order that expires on the day it is entered. The Exchange believes it is appropriate to no longer allow non-IOC

ISOs, as an ISO is generally used when trying to sweep a price level across multiple exchanges in an effort to post the balance of an order without locking an away market. The Exchange therefore believes that ISOs have a limited purpose and should be cancelled if they do not execute or do not entirely execute. This is also consistent with how BX currently handles ISOs in that BX only allows ISOs to be entered as IOC.

All-or-None Orders

The Exchange believes that the proposed changes to the definition of AON Orders in Options 3, Section 7(c) are consistent with the Act. As discussed above, the Exchange is memorializing current System behavior by specifying how AON Orders will execute against multiple, aggregated orders to align with the level of detail in BX Options 3, Section 7(a)(4)(A). The proposed description of the handling of AON Orders is consistent with the Exchange's allocation methodology in Options 3, Section 10 by making clear that because of the size contingency of the AON Order (*i.e.*, executed in its entirety or not at all), those orders must be satisfied simultaneously to avoid any priority conflict on the order book, which considers current displayed NBBO prices to avoid locked and crossed markets as well as trade-throughs. Finally, the proposed changes to add that AON Orders may not be submitted during the Opening Process will better articulate current System behavior, and aligns to the level of detail currently in BX's AON rule at BX Options 3, Section 7(a)(7).

Stop and Stop Limit Orders

The Exchange believes that the proposed changes to the definition of Stop Orders and Stop Limit Orders in Options 3, Sections 7(d) and 7(e), respectively, are consistent with the Act. The Exchange is proposing to codify current System behavior by adding that Stop Orders and Stop Limit Orders will be cancelled if they are immediately electable upon receipt. As discussed above, the purpose of each of these order types is to not execute upon entry, and instead rest in the System until the market reaches a certain price level, at which time the order could be executed. A Stop Order or Stop Limit Order that is immediately electable upon receipt would therefore negate the purpose of this order type, so the Exchange believes it is appropriate to cancel such orders to ensure that Members are able to use these order types to achieve their intended purpose. As noted above, the proposed changes

¹¹² As discussed above, this existing functionality is currently described in the Exchange's publicly available technical specifications. *See supra* note 13.

¹¹³ *See supra* note 16.

¹¹⁴ *See* Options 2, Sections 4 and 5.

¹¹⁵ As noted above, BX's ISO rule also currently states that "ISOs may be entered on the Order Book or into the PRISM Mechanism pursuant to Options 3, Section 13(ii)(K)." The Exchange will file a separate rule change to add similar language as BX relating to how ISOs may be entered on the Exchange.

to codify current Stop and Stop Limit Order handling will align the Exchange's rules with Phlx's Stop and Stop Limit Order rules.¹¹⁶

The Exchange believes that the proposed changes to specify current System functionality that Stop and Stop Limit Orders may only be entered into FIX or Precise will make clear that these order types are only available to be entered through two of the three order entry protocols offered by the Exchange (*i.e.*, FIX, Precise, and OTTO). As such, the proposed changes will promote transparency in the Exchange's rules and reduce any potential confusion.

Cancel and Replace Orders

The Exchange believes that the proposed changes to the rule governing Cancel and Replace Orders would promote clarity and make the rules easier to navigate. As discussed above, these are non-substantive changes to relocate the rule from Supplementary Material .02 to Options 3, Section 7 into the main body of the order types rule at Options 3, Section 7(f), updating incorrect cross-cites therein, and adding more granularity around how the Exchange will treat the cancellation and replacement of Reserve Orders.

Reserve Orders

The Exchange believes that the proposed changes to the Reserve Order rule at Options 3, Section 7(g) are consistent with the Act. The Exchange is proposing to add more granularity around how Members may elect to refresh the display quantity for the Reserve Order. The Exchange notes that the new rule text does not have any impact on the priority rules of the displayed or non-displayed portion of the Reserve Order. This refresh feature for Reserve Orders is intended to provide more flexibility and opportunities for Members to add displayed liquidity to the Exchange, which, in turn, benefits all market participants through more trading opportunities and enhanced price discovery. As discussed above, the proposed changes do not amend current functionality, but rather is intended to promote transparency around the current operation of Reserve Orders. Further, the Exchange believes that the non-substantive changes in the Reserve Order rule to renumber and reformat the paragraphs therein, and make corrective changes as described above, are consistent with the protection of investors and the public interest because they will simply make the Exchange's rules easier to navigate,

thereby reducing any potential confusion. As noted above, other options exchanges like Cboe currently offer Reserve Orders that have similar refresh features.¹¹⁷

Attributable Orders

The Exchange believes that it is consistent with the Act to delete existing rule text in Options 3, Section 7(h), which currently indicates that Attributable Orders may be available for specified classes of securities, and to make a corrective change to "an Options Trader Alert." Because Attributable Orders are available for all classes of securities today, the Exchange is deleting this language as inaccurate. The Exchange believes that the proposed changes will promote transparency in the Exchange's rules.

Customer Cross Orders

The Exchange believes that the non-substantive amendment in Options 3, Section 7(i) to add that Customer Cross Orders may trade in accordance with Options 3, Section 12(a) is consistent with the protection of investors and the public interest because the proposal will simply add a cross reference in the Customer Cross Order rule to Section 12(a), which currently describes in detail how this order type would execute on the Exchange, thereby adding clarity to how Customer Cross Orders function today.

Qualified Contingent Cross Orders

The Exchange believes that the proposed changes to the QCC Order rule in Options 3, Section 7(j) to add a reference to "QCC" and to provide that QCC Orders will trade in accordance with Options 3, Section 12(c) are consistent with the Act because the changes are merely intended to add greater clarity to how QCC Orders function today. The Exchange further believes that specifying that QCC Orders may only be entered through FIX or Precise will better articulate current System behavior, and will make clear that QCC Orders are available to be entered through only two of the three order entry protocols currently offered by the Exchange (*i.e.*, FIX, Precise, and OTTO), thereby reducing any potential confusion.

Preferred Orders

The Exchange believes that its proposal to add a definition of Preferred Orders in Options 3, Section 7(l) is consistent with the Act. While Preferred Orders are currently described in Options 2, Section 10, the

Exchange believes that it would be useful to have order types centralized within one rule to make the Rulebook easier to navigate for market participants. As noted above, Phlx similarly lists out Directed Orders (akin to Preferred Orders) in its order types rule at Phlx Options 3, Section 7(b)(11).

Add Liquidity Orders

The Exchange believes that the proposed changes to the ALO rule in Options 3, Section 7(n) are consistent with the Act. As discussed above, the Exchange is enhancing current ALO functionality to reflect that the Exchange will handle ALOs in a consistent manner with the new continuous re-pricing mechanism that is being proposed concurrently in the Re-Pricing Filing as proposed Options 3, Section 5(d) in situations where the ALO would not lock or cross an order or quote on the System, but would lock or cross the NBBO.¹¹⁸ The Exchange therefore believes that the proposed changes will make clear how the Exchange will handle ALOs under the new re-pricing mechanism. The ALO order type was adopted to provide market participants greater control over the circumstances in which their orders are executed. As noted above, the purpose of an ALO is to provide liquidity. For investors and market participants that elect only to provide liquidity in certain circumstances, such as to receive a maker fee (or rebate) upon execution of an order, the Exchange continues to believe that ALOs, as amended under this proposal, will continue to accommodate this strategy. The proposed order handling for ALOs is consistent with how ALOs are handled on BX today.¹¹⁹

The Exchange also believes that adding "or quotes" in the ALO rule at Options 3, Section 7(n) is consistent with the Act. Today, if at the time of entry, an ALO would lock or cross one or more non-displayed orders or quotes on the Exchange, the ALO will be cancelled or re-priced in the manner specified within the ALO rule. Adding this rule text will bring greater clarity around current ALO behavior.

The Exchange further believes that the proposed addition that ALOs may only be submitted when an options series is open for trading will make clear ALOs will not be accepted during the Opening Process as the order book is not available. The proposed changes codify existing System behavior, and will therefore promote transparency in the Exchange's rules.

¹¹⁸ See *supra* note 43.

¹¹⁹ See BX Options 3, Section 7(a)(12).

¹¹⁶ See *supra* notes 34 and 36.

¹¹⁷ See *supra* note 39.

Opening Sweep

The Exchange believes that the proposed changes to the Opening Sweep rule in Options 3, Section 7(t) are consistent with the Act. As discussed above, the Exchange is codifying current System behavior and providing additional context to the rule in a manner that is consistent with Phlx's Opening Sweep rule in Phlx Options 3, Section 7(b)(6). The Exchange therefore believes that the proposed changes promote greater transparency in the Exchange's rules and consistency across the rules of the Nasdaq affiliated options exchanges. Specifically, because an Opening Sweep is an IOC order submitted by a Market Maker during the Opening Process, the Exchange is making clear that Opening Sweeps are entered through SQF in the proposed rule text. The Exchange also believes that it is appropriate to specify that Opening Sweeps are not subject to any risk protections in Options 3, Section 15 (except Automated Quotation Adjustments) because the Opening Process itself has boundaries (notably, the Quality Opening Market and the Opening Quote Range) within which orders will be executed. Finally, the proposed language relating to Opening Sweep participation in the Opening Process and cancellation upon the open merely provides additional context in the order type rule. As noted above, Opening Sweeps are already described in the opening rule today in Options 3, Section 8, and apply only during the Opening Process.

Time in Force

The Exchange believes that the proposed changes to the TIF rules are consistent with the Act. As discussed above, the Exchange believes that certain existing functionality currently described as an "order type" in Options 3, Section 7 would be more precisely described as a TIF attribute that designates the basic parameters of an order type. Relocating and centralizing the existing TIF rules into proposed Supplementary Material .02 to Options 3, Section 7 will therefore clearly delineate these order attributes and make the proposed rules easier to navigate. Codifying the definition of "TIF" in proposed Supplementary Material .02 will add greater clarity and transparency to the Exchange's rules in a manner consistent with BX Options 3, Section 7(b).

The Exchange believes that the adjustments in proposed Supplementary Material .02(a) to Options 3, Section 7 to add that Day orders may be entered through FIX, OTTO, or Precise will add

further granularity and clarity to the Exchange's rules. The proposed changes provide additional detail about current functionality in a manner that is consistent with the level of detail in BX's Day order.¹²⁰

The Exchange believes that the adjustments to the relocated GTC and GTD rules in proposed Supplementary Material .02(b) and (c) will add further granularity and clarity to how these TIFs operate today. The Exchange further believes that aligning the level of detail in the GTD rule to the GTC rule, as described above, is appropriate because these two TIFs are meant to be functionally similar except the manner in which they persist in the System.

The Exchange believes that the proposed changes to the relocated IOC rule in proposed Supplementary Material .02(d) will promote greater transparency in the Exchange's rules by providing more granularity to current IOC functionality. Further, the changes conform the Exchange's IOC rule to BX's IOC rule, thereby promoting consistency across the rules of the Nasdaq affiliated options exchanges. Specifically, the proposed changes to remove the word "limit" will make clear that IOC orders may be sent as either a Market or Limit Order today, identical to BX IOC orders.¹²¹ The proposed changes to state that IOC orders are not eligible for routing, and that IOC orders may be entered through FIX, OTTO, Precise, or SQF, will codify current IOC behavior in a manner that is consistent with BX's IOC rule.¹²²

As it relates to the proposed changes to memorialize the various risk protections that are excluded from applying to Market Maker IOC orders entered through SQF, the Exchange believes this is appropriate because only Market Makers utilize SQF to enter IOC orders. As discussed above, Market Makers are professional traders with more sophisticated infrastructures than other market participants, and are able to manage their risk through their own risk settings in addition to the risk protections required by the Exchange. The Exchange will continue to apply the specified risk protections on IOC orders entered through FIX, OTTO, and Precise, which are used by the other market participants. The proposed changes will harmonize the Exchange's IOC rule with BX's IOC rule.¹²³ Further, the proposal to add substantially similar exclusionary language into the SQF rule itself at Supplementary Material .03(c)

to Options 3, Section 7 will make clear that these risk protections will not apply to IOC orders entered through SQF.

Specifying in the proposed IOC rule that orders entered into the Exchange's various auction and crossing mechanisms are considered to have a TIF of IOC memorializes current System behavior, and is intended to bring greater transparency in how these order types are handled today. As noted above, BX currently has substantially similar language in its IOC rule for BX PRISM orders in BX Options 3, Section 7(b)(2).

Lastly, the Exchange believes that the adjustments to the relocated OPG rule in proposed Supplementary Material .02(e) to Options 3, Section 7 will add granularity and clarity to how OPG orders operate, and will conform the OPG rule with the level of detail currently in BX's OPG rule in BX Options 3, Section 7(b)(1). As discussed above, the Exchange is proposing to enhance OPG functionality to allow both Market and Limit OPG orders whereas today, only Limit OPG orders are allowed. This harmonizes OPG functionality with BX OPG functionality. The other modifications to replace "opening rotation" with "Opening Process," stating OPG orders may not route, and indicating that OPG orders are not subject to the protections listed in Options 3, Section 15 (except Size Limitation) all memorialize current OPG behavior, and align to the current BX OPG rule. As discussed above, the Exchange does not apply any of the risk protections in Options 3, Section 15 (except Size Limitation) because the Opening Process itself has boundaries within which orders will be executed.

Opening Process

The Exchange believes that the proposed changes to the Opening Process in Options 3, Section 8 are consistent with the Act. As discussed above, the Exchange is proposing to remove the current limitation that only allows Public Customers interest to route during the opening, and will instead allow all market participant interest to route. The proposed changes will serve to more closely align the Exchange's Opening Process with BX's Opening Process. Like BX, the Exchange believes that it will be beneficial to provide all market participants with the opportunity to have their interest executed on away markets during the Opening Process. The Exchange further believes that the related changes to remove references to "Public Customer" throughout Options 3, Section 8, and to update the cross-cite currently pointing to the Priority Customer priority overlay

¹²⁰ See *supra* note 51.

¹²¹ See *supra* note 52.

¹²² See *supra* notes 53–54.

¹²³ See *supra* notes 58–59.

to the more general priority rule, will add clarity, transparency, and internal consistency to Exchange rules regarding the proposed handling of routable interest during the Opening Process.

The Exchange believes that its proposal to no longer round in the direction of the previous trading day's closing price and simply round up to the MPV, if the mid-point of the highest and lowest of the Potential Opening Prices is not expressed as a permitted MPV, will simplify and bring greater transparency to the Opening Process, to the benefit of investors. Market participants can now have a better sense of how the Potential Opening Price will be calculated without having to account for the closing price of each options series. The Exchange believes this may promote greater efficiency in the marketplace especially in view of the continued growth in the number of options today.

The Exchange further believes that the proposed changes to replace "are marketable against the ABBO" with "cross the ABBO" will better articulate how the Exchange currently determines the OQR boundaries in the scenario specified in Options 3, Section 8(i)(3). Lastly, the Exchange believes that the non-substantive change in paragraph (a)(1)(2) of Options 3, Section 8 will bring greater clarity to the Rulebook.

Auction and Crossing Mechanisms Facilitation and Solicited Order Mechanisms

The Exchange believes that its proposal to relocate the rule text relating to Responses from Supplementary Material .02 to Options 3, Section 11 into the introductory paragraph of Options 3, Section 11, and adding that Responses can be modified, is consistent with the Act. The Exchange is relocating this language into the introductory paragraph of Options 3, Section 11 after the definition of "Response" for better readability. The proposed change to add "or modified" to indicate that Responses may be canceled or modified any time prior to execution better aligns the rule text to current System behavior.

Crossing Orders

The Exchange believes that the non-substantive change to the description of QCC Orders in Options 3, Section 12(c)(2) will bring greater clarity to the Rulebook.

Price Improvement Mechanism

The Exchange's proposal to amend Options 3, Section 13(b)(4) to clarify the current rule text by adding the words "or modified" after "canceled" is

consistent with the Act because the additional text will make clear that a Crossing Transaction may not be modified unless the Counter-Side Order is being improved during the exposure period.

The Exchange's proposal to add clarifying rule text within Options 3, Section 13(b)(5) which states, "Crossing Transactions submitted at or before the opening of trading are not eligible to initiate an Auction and will be rejected" is consistent with the Act because it will bring greater clarity to when a Crossing Transaction is currently eligible to initiate a PIM. The PIM considers both the NBBO and local book for its entry price validation and therefore requires an opening for the PIM to begin.

The Exchange's proposal to amend the current PIM functionality within Options 3, Section 13(c)(3) to permit Improvement Orders to be canceled or modified is consistent with the Act. The Exchange proposes to amend this functionality so that Improvement Orders may be canceled or modified similar to functionality on BX today within Options 3, Section 13(ii)(a)(8). Today, during the exposure period, Improvement Orders may not be canceled and Improvement Orders may be modified to (i) increase the size at the same price, or (ii) improve the price of the Improvement Order for any size up to the size of the Agency Order. The modification and cancellation of an Improvement Order through OTTO will be similar to the manner in which a Cancel and Replace Order would be handled outside of the auction process. For Improvement Orders through SQF, the modification and cancellation of such orders will be handled by sending new Improvement Orders that overwrite the existing Improvement Order with updated price/quantity instructions. Improvement Orders are not visible to other auction participants, including the Agency Order. The Exchange believes that providing responders with flexibility to cancel or modify their Improvement Orders may encourage market participants to respond to more auctions, including PIM.

The proposal to amend Options 3, Section 13(d)(5) to permit an auction to automatically terminate upon the occurrence of a trading halt with execution solely with the Counter-Side Order is consistent with the Act. This functionality would be similar to rule text within BX Options 3, Section 13(ii)(C). The Exchange believes that utilizing the price of the Counter-Side Order to execute the Crossing Transaction promotes just and equitable principles of trade, and fosters cooperation and coordination with

persons engaged in facilitating transactions in securities since the Counter-Side Order has guaranteed that an execution will occur at the same price as the Crossing Transaction, or better, prior to the trading halt, and Improvement Orders offer no such guarantee, the Counter-Side Order is the only valid price at which to execute the Crossing Transactions, and the Counter-Side Order is the appropriate contra-side.¹²⁴

The Exchange believes that the proposed System change to adopt a new same side execution price check for PIM in new subsection (d)(6) of Options 3, Section 13 is consistent with the Act. As discussed above, this feature would be functionally identical to BX PRISM in BX Options 3, Section 13(ii)(I). Like BX, the proposed price check is designed to ensure that the Exchange would not trade at prices that would lock or cross interest on the same side of the market as the Agency Order where limit orders have rested and obtained priority to execute at that price. In the event where a limit order arrives on the same side of the market as the Agency Order and is at the same or better price than the initiating Crossing Transaction price, the Exchange would execute the entire PIM transaction at the initiating Crossing Transaction price. The execution takes place at this price because the PIM is guaranteed an execution and the PIM agency side instructions would not allow an execution to take place at a higher (lower) price than submitted for a buying (selling) agency side PIM order. Considering that the limit order has arrived either at or better on the same side as the Agency Order than the agency side price, the initiating Crossing Transaction price is the only price at which the guaranteed execution can take place.

Finally, the proposal to amend Supplementary Material .02 to Options 3, Section 15 to add a sentence which provides, "It will be considered a violation of this Rule and will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Options 9, Section 1 if an Electronic Access Member submits a PIM Order (initiating an auction) and also submits its own Improvement Order in the same auction," is consistent with the Act. BX has a similar prohibition within Options 3, Section 13(iii). The proposed new rule is designed to prevent fraudulent and

¹²⁴ The Exchange notes that trading on the Exchange in any option contract will be halted whenever trading in the underlying security has been paused or halted by the primary listing market.

manipulative acts and practices, to promote just and equitable principles of trade, by providing guidance to Members where certain behavior within a PIM will not be considered a bona fide transaction.

Order Price Protection

The Exchange believes that its proposal to replace its current Limit Order Price Protection with a similar “fat finger” check called Order Price Protection in Options 3, Section 15(a)(1)(A) is consistent with the Act. The proposed OPP would similarly prevent the execution of limit orders at prices outside pre-set numerical or percentage parameters, and is designed to prevent limit orders entered at clearly unintended prices from executing in the System to the detriment of market participants. The proposed risk protection is also functionally similar to BX’s OPP in BX Options 3, Section 15(a)(1), and therefore is not novel.¹²⁵ Similar to BX, the Exchange believes that the proposed fixed dollar amount and percentage parameters will protect against erroneous executions, while also allowing orders to execute within a reasonable range.

The Exchange believes that using the Reference BBO (*i.e.*, better of the NBBO or the internal market BBO) to calculate the proposed OPP, identical to current BX OPP functionality, will similarly protect investors and the public interest where the internal market BBO is better than the NBBO.

The Exchange further believes that its proposal to add language allowing Exchange discretion to temporarily deactivate OPP on an intra-day basis is consistent with the Act. BX has identical language today in BX Options 3, Section 15(a)(1)(A)(i), and similar to BX, the Exchange believes that having this discretion will be useful if the Exchange determined that unusual market conditions warranted deactivation in the interest of a fair and orderly market. Like BX, the Exchange believes that it will be useful to have the flexibility to temporarily disable OPP intra-day in response to an unusual market event (*e.g.*, if dissemination of data was delayed and resulted in unreliable underlying values needed for the Reference BBO) to maintain a fair and orderly market. This will promote just and equitable principles of trade and ultimately protect investors.

¹²⁵ As noted above, the Exchange is proposing to adopt an OPP rule that more accurately describes the proposed functionality than BX’s current OPP rule, so BX will align its current OPP rule to the Exchange’s proposed rule text in a separate rule filing.

Post-Only Quoting Protection

The Exchange’s proposal to adopt a new Post-Only Quote Configuration in Options 3, Section 15(a)(3)(C) to permit Market Makers to prevent their quotes from removing liquidity from the Exchange’s order book promotes equitable principles of trade and protects investors and the public interest by enhancing the risk protections available to Market Makers. This optional risk protection would enable Market Maker to better manage their risk when quoting on the Exchange. As noted above, BX offers identical functionality today in BX Options 3, Section 15(c)(3).

The proposed risk protection allows Market Makers the ability to avoid removing liquidity from the Exchange’s order book if their quote would otherwise lock or cross any resting order or quote on the Exchange’s order book upon entry, thereby protecting investors and the general public as Market Makers transact a large number of orders on the Exchange and bring liquidity to the marketplace. Market Makers would utilize the proposed risk protection to avoid unintentionally taking liquidity with resting interest¹²⁶ on the order book. As a result of taking liquidity, Market Makers would incur a taker fee that may impact the Market Maker’s ability to provide liquidity and meet quoting obligations. Market Makers are required to add liquidity on the Exchange and, in turn, are rewarded with lower pricing¹²⁷ and enhanced allocations.¹²⁸ Specifically, the risk protection would permit Market Makers to add liquidity only and avoid removing resting interest on the order book, which will lead to enhanced liquidity on the Exchange and in turn will benefit and protect investors and the public interest through the potential for greater volumes of orders and executions on the Exchange.

The Exchange does not believe that introducing this Post-Only Quote Configuration will unfairly discriminate among market participants. Today, all Members may utilize the existing Add Liquidity Order type to prevent orders from removing liquidity from the Exchange’s order book upon entry. The Post-Only Quote Configuration is available to Market Makers only as a risk protection. Unlike other market

¹²⁶ As noted above, this would include any re-priced orders as described in the Re-Pricing Filing as proposed Options 3, Section 5(d), ALOs as described in proposed Options 3, Section 7(n), and any re-priced quotes as described in Options 3, Section 4(b)(6). As discussed above, ALOs may re-price.

¹²⁷ See Options 7, Section 3.

¹²⁸ See Options 3, Section 10.

participants, Market Makers have certain obligations on the market, such as requirements to provide continuous two-sided quotes on a daily basis¹²⁹ and are subject to various obligations associated with providing liquidity on the market.¹³⁰ Market Makers are liquidity providers on the Exchange and, therefore, are offered certain quote risk protections noted to allow them to manage their risk more effectively.¹³¹ The proposed Post-Only Quote Configuration is another risk protection afforded to Market Makers to assist them in managing their risk while continuing to comply with their obligations. The Exchange notes that enhancing the ability of Market Makers to add liquidity and avoid taking liquidity from the order book promotes just and equitable principles of trade on the Exchange and protects investors and the public interest, thereby enhancing market structure by allowing Market Makers to add liquidity only. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. Also, an increase in the activity of Market Makers in turn facilitates tighter spreads.

Kill Switch

The Exchange does not believe that the proposed decommission of the GUI Kill Switch for order cancellation will affect the protection of investors or the public interest or the maintenance of a fair and orderly market because no Members have used the GUI Kill Switch risk protection in 2022.¹³² The Exchange does not charge any fees for the GUI Kill Switch. In addition, the Exchange notes that the use of this tool is completely optional, and the Exchange will continue to offer substantially similar Kill Switch functionality through FIX, Precise, and OTTO. As set forth in the Kill Switch rule, the GUI Kill Switch allows for the cancellation and restriction of orders for the requested Identifier(s) on a user or group level, whereas the port Kill Switch allows for cancellation and restriction of orders for the requested Identifier(s) on a user level.¹³³ While the GUI Kill Switch had more optionality around how Members may combine the Kill Switch request by Identifier(s), no

¹²⁹ See Options 2, Section 5(e).

¹³⁰ See Options 2, Section 4.

¹³¹ Options 3, Section 15(a)(3) currently sets forth the Anti-Internalization and Quotation Adjustments Protections that are available today to Market Makers.

¹³² As noted above, the Exchange will provide prior notice of the decommission to all Members via Options Trader Alert.

¹³³ See Options 3, Section 17(a)(1) and (2).

Members have used the GUI Kill Switch risk protection this year. Furthermore, Members will retain the ability to contact market operations staff to manually purge their orders from the market. In addition, the Exchange will continue to implement System-enforced risk mechanisms that automatically remove orders for the Member once certain pre-set thresholds or conditions are met (*i.e.*, market wide risk protection and cancel on disconnect).

Also, the Exchange believes that the low usage rate for the GUI Kill Switch does not warrant the continuous resources necessary for System support of such tools. As a result, the Exchange believes that the proposal will remove impediments to and perfect the mechanism of a free and open market and a national market system by allowing the Exchange to reallocate System capacity and resources currently used to maintain this functionality to the development and maintenance of other business initiatives and risk management products.

As noted above, the Exchange previously amended its rules to decommission the quote removal Kill Switch that was available to Market Makers through the GUI.¹³⁴ Similar to the GUI Kill Switch for quote removal, the Exchange has found that no Members use the GUI Kill Switch to cancel their orders, but rather, utilize other means to purge their existing orders from the System. The Exchange therefore believes that eliminating the GUI Kill Switch all together (including for orders as proposed herein) will streamline the Exchange's risk protection offerings in a manner that reflects Member use.

Data Feeds and Trade Information

The Exchange believes that the proposed changes to the current data feed offerings in Options 3, Section 23(a) are consistent with the Act. Specifically, the Exchange believes that the proposed changes to its Depth of Market Feed to provide full depth-of-market information will serve to more closely align the information provided on the Exchange's Depth of Market Feed with that of BX's Depth of Market Feed in BX Options 3, Section 23(a)(1), thereby ensuring a more consistent technology offering across the Nasdaq affiliated options exchanges. The Exchange also believes that the modified Depth of Market Feed will help to protect a free and open market by providing additional data to the marketplace. The Exchange further believes that the proposed changes to

add more specificity around what would be provided in the opening/reopening order imbalance information, and to correct an erroneous reference to "ISE" in the Depth of Market Feed rule will promote transparency and clarity in the Exchange's rules.

The Exchange believes that the proposed changes to the Order Feed around what type of information would be available on this data feed offering, as further described above, will promote clarity and transparency in the Exchange's rules. Furthermore, the proposed data elements in the Order Feed are based on data elements that currently exist on other markets. For instance, the specificity around what would be provided in the opening/reopening order imbalance information, as well as the auction and exposure notifications are identical to the content within BX's Depth of Market Feed in BX Options 3, Section 23(a)(1). As noted above, the Attributable Order content is similar to the data elements on Cboe's current multicast PITCH feed.¹³⁵

The Exchange believes that the proposed changes to the existing Top Quote Feed to rebrand into the Top Feed, to no longer provide information for opening price, daily trading volume, and high and low prices for the day, will serve to further align the Exchange's Top Feed with BX's Top Feed in BX Options 3, Section 23(a)(2), thereby ensuring a more consistent technology offering across the Nasdaq affiliated options exchanges.

The proposed changes to the Trades Feed to no longer provide information for opening price, daily trading volume, and high and low prices for the day are intended to align to the proposed changes to the Top Feed described above. The Exchange believes that removing this language will promote clarity and transparency in the Exchange's rules.

The Exchange believes that it is consistent with the Act to no longer offer TradeInfo when the Exchange migrates over the enhanced Nasdaq functionality, as there is a lack of demand from Members.¹³⁶ The Exchange does not assess a fee for TradeInfo. As noted above, Members use FIX, FIX DROP, and CTI to obtain order information currently available in TradeInfo, and to cancel orders through FIX. The Exchange further believes that the proposed decommission of TradeInfo will remove impediments to

and perfect the mechanism of a free and open market and a national market system by allowing the Exchange to reallocate System capacity and resources currently used to maintain this functionality to the development and maintenance of other business initiatives and risk management products.

The Exchange's proposal to eliminate TradeInfo pricing from Options 7, Section 6.C(ii)(3) in its entirety is reasonable, equitable, and not unfairly discriminatory because TradeInfo would no longer be available to any Member. It is reasonable to remove all references to TradeInfo pricing from the Exchange's Pricing Schedule as the Exchange is removing this functionality from its Rulebook. As discussed above, the Exchange does not assess a fee for TradeInfo today. Additionally, it is equitable and not unfairly discriminatory to remove the references to TradeInfo pricing from the Pricing Schedule because no Member would be able to utilize this functionality once it is removed from the System.

Optional Risk Protections

The Exchange believes that introducing the optional quantity and notional value risk protections as described above will protect investors and the public interest, and maintain fair and orderly markets, by providing market participants with another tool to manage their order risk. As noted above, BX offers functionally identical optional risk protections in BX Options 3, Section 28.¹³⁷ In addition, providing Members with more tools for managing risk will facilitate transactions in securities because Members will have more confidence that risk protections are in place. As a result, the new functionality has the potential to promote just and equitable principles of trade.

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. The Exchange operates in a competitive market and regularly competes with other options exchanges for order flow. As discussed above, the Exchange is re-

¹³⁷ As noted above, while the proposed rule text in Options 3, Section 28 adds more granularity, including around how orders are rejected when the value thresholds for the options risk protections are exceeded, the Exchange understands that the BX optional risk protections operate in the same manner. In addition, BX's rule does not include Precise as this order entry port is not available on BX today.

¹³⁴ See *supra* note 94.

¹³⁵ See *supra* note 98.

¹³⁶ As noted above, the Exchange provided notice of the decommission to all Members through an Options Trader Alert. See Options Trader Alert #2022-29.

platforming its System in connection with the technology migration to enhanced Nasdaq functionality, which the Exchange believes would promote competition among options exchanges by potentially attracting additional order flow to the Exchange with the enhanced trading platform.

As it relates to the elimination of fees for flash functionality and TradeInfo from Options 7, the Exchange believes that its proposal does not impose an undue burden on competition because the flash functionality and TradeInfo would no longer be available to any Members.

The basis for the majority of the proposed rule changes are the rules of the Nasdaq affiliated options exchanges, which have been previously filed with the Commission as consistent with the Act. As it relates to bulk messaging for quotes as proposed in Options 3, Section 4(b)(3), the Exchange notes that Cboe similarly allows for bulk messaging in Cboe Rule 1.1, except Cboe also allows bulk messaging for orders, unlike the Exchange. As it relates to the proposal in Options 3, Section 7(g)(4) to codify the refresh features into the Exchange's Reserve Order rule, the Exchange notes that Cboe's Reserve Order functionality has similar refresh features in Cboe Rule 5.6(c). As it relates to the proposal in Options 3, Section 23(a) to add Attributable Order content in the Order Feed, Cboe currently has similar data elements available on its Multicast PITCH feed.¹³⁸

The proposed rule changes are based on the following rules of the Nasdaq affiliated exchanges:

- The Market Order proposal in Options 3, Section 7(a) will be materially identical to BX's Market Orders in BX Options 3, Section 7(a)(5).

- The ISO proposal in Options 3, Section 7(b)(5) will be substantially similar to BX's ISO in BX Option 3, Section 7(a)(6). Unlike BX, the Exchange's ISO proposal will not refer to how ISOs may be entered on the Exchange as the Exchange intends address that in a separate rule filing.

- The Exchange's AON proposal will be substantially similar to BX's Contingency Order rule in BX Options 3, Section 7(a)(4)(A) (except BX's rule also describes Minimum Quantity Orders, which the Exchange does not offer today) and BX's AON rule in BX Options 3, Section 7(a)(7).

- The Stop Order proposal in Options 3, Section 7(d) will be substantially similar to Phlx Options 3, Section 7(b)(4), except Phlx does not currently explicitly state that Phlx Stop Orders

may only be entered through FIX or Precise because Phlx only offers one order entry protocol (FIX), unlike the Exchange, which offers three (FIX, Precise, and OTTO).

- The Stop Limit Order proposal in Options 3, Section 7(e) will be substantially similar to Phlx Options 3, Section 7(b)(4)(A), except Phlx does not currently explicitly state that Phlx Stop Limit Orders may only be entered through FIX or Precise for the same reasons stated for Stop Orders above.

- The Preferred Order proposal in Options 3, Section 7(l) will be materially identical to Phlx's Directed Order rule in Phlx Options 3, Section 7(b)(11).

- The ALO proposal in Options 3, Section 7(n) will be materially identical to BX ALOs in BX Options 3, Section 7(a)(12).

- The Opening Sweep proposal in Options 3, Section 7(t) will be materially identical to the Phlx Opening Sweep in Phlx Options 3, Section 7(b)(6).

- The Day order proposal in Supplementary Material .02(a) to Options 3, Section 7 will be substantially similar to BX Options 3, Section 7(b)(3), except BX's rule does not refer to OTTO or Precise because BX does not offer OTTO or Precise functionality today.

- The IOC proposal in Supplementary Material .02(d) to Options 3, Section 7 will be substantially similar to BX's IOC in BX Options 3, Section 7(b)(2), except the BX rule does not refer to OTTO or Precise as BX does not offer these features today.

- The OPG proposal in Supplementary Material .02(e) to Options 3, Section 7 will be materially identical to BX's OPG in BX Options 3, Section 7(b)(1).

- The Opening Process proposal in Options 3, Section 8 to allow all market participant interest to route will be identical to BX's Opening Process in BX Options 3, Section 8.

- The following proposed changes to PIM are based on BX PRISM: (1) proposed Options 3, Section 13(b)(5) will be materially identical to BX Options 3, Section 13(i)(E); (2) proposed Options 3, Section 13(c)(3) will be materially identical to BX Options 3, Section 13(ii)(A)(8); (3) proposed Options 3, Section 13(d)(5) will be functionally similar to BX Options 3, Section 13(ii)(C); (4) proposed Options 3, Section 13(d)(6) will be functionally similar to BX Options 3, Section 13(ii)(I); and (5) proposed Supplementary Material .02 to Options 3, Section 13 will be materially identical to BX Options 3, Section 13(iii).

- The proposed OPP risk protection in Options 3, Section 15(a)(1)(A) will be functionally similar to BX OPP in BX Options 3, Section 15(a)(1).¹³⁹

- The proposed Post-Only Quote Configuration in Options 3, Section 15(a)(3)(C) will be functionally identical to the BX Post-Only Quote Configuration in BX Options 3, Section 15(c)(3).

- The Depth of Market Feed proposal in Option 3, Section 23(a)(1) will be substantially similar to the BX Depth of Market Feed in BX Options 3, Section 23(a)(1), except the Exchange will not offer auction and exposure notifications on its Depth of Market Feed like BX does today.

- The Order Feed proposal in Options 3, Section 23(a)(2) will contain data elements that are identical to those on BX's Depth of Market Feed in BX Options 3, Section 23(a)(1), specifically around what would be provided in the opening/reopening order imbalance information (*i.e.*, the size of matched contracts and size of the imbalance), and auction and exposure notifications.

- The Top Feed proposal in Options 3, Section 23(a)(3) will be substantially similar to the BX Top Feed in BX Options 3, Section 23(a)(2), except the Exchange will continue to provide aggregated size information unlike BX.

- The proposed optional quantity and notional value risk protections in Options 3, Section 28 will be functionally identical to the protections in BX Options 3, Section 28.¹⁴⁰

The Exchange reiterates that the proposed rule change is being proposed in the context of the technology migration to enhanced Nasdaq functionality. The Exchange further believes the proposed rule change will benefit Members by providing a more consistent technology offering, as well as consistent rules, for market participants on the Nasdaq affiliated options exchanges. In addition, the proposed rule change relates to adding clarity and consistency in the Exchange's Rulebook, and are designed to reduce any potential investor confusion as to the features and applicability of certain functionality presently available on the Exchange.

¹³⁹ As noted above, BX will file a separate rule change to conform its OPP rule to the Exchange's proposed rule.

¹⁴⁰ As noted above, while the proposed rule text in Options 3, Section 28 adds more granularity, including around how orders are rejected when the value thresholds for the options risk protections are exceeded, the Exchange understands that the BX optional risk protections operate in the same manner. In addition, BX's rule does not include Precise as this order entry port is not available on BX today.

¹³⁸ See *supra* note 98.

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as the majority of the proposed changes will apply to all Members. As it relates to the proposed rule change relating to bulk message functionality, while the Exchange currently offers this functionality to Market Makers only, bulk messaging is intended to provide Market Makers with an additional tool to meet their various quoting obligations in a manner they deem appropriate. As such, the Exchange believes that this functionality may facilitate Market Makers' provision of liquidity, thereby benefiting all market participants through additional execution opportunities at potentially improved prices. Furthermore, while the Exchange will offer the proposed Post-Only Quote Configuration to Market Makers only, the proposed risk protection will enhance the ability of Market Makers to add liquidity and avoid removing liquidity from the Exchange's order book in the manner described above. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. The Exchange also does not believe that the proposed decommission of the GUI Kill Switch for order cancellation will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange previously amended its rules to decommission the quote removal Kill Switch that was available to Market Makers through the GUI.¹⁴¹ The Exchange therefore believes that eliminating the GUI Kill Switch for order cancellation will streamline the Exchange's risk protection offerings in a manner that reflects Member use. The Exchange will continue to offer substantially similar Kill Switch functionality through FIX, Precise and OTTO.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public

interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴² and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴³

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 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-GEMX-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-GEMX-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

¹⁴² 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2023-02 and should be submitted on or before March 3, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02821 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96827; File No. SR-MRX-2022-29]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Withdrawal of Proposed Rule Change To Amend Options 7, Section 6 To Add Port Fees

February 7, 2023.

On December 16, 2022, Nasdaq MRX, LLC ("MRX") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934¹ and Rule 19b-4 thereunder,² a proposed rule change to assess port fees. The proposed rule change was published for comment in the **Federal Register** on December 28, 2022.³

On February 2, 2023, MRX withdrew the proposed rule change (SR-MRX-2022-29).

¹⁴⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 96563 (December 21, 2022), 87 FR 7924.

¹⁴¹ See *supra* note 94.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02949 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold an Open Meeting on Wednesday, February 15, 2023 at 10:00 a.m.

PLACE: The meeting will be webcast on the Commission's website at www.sec.gov.

STATUS: The meeting will begin at 10:00 a.m. (ET) and will be open to the public via webcast on the Commission's website at www.sec.gov.

MATTERS TO BE CONSIDERED:

1. The Commission will consider whether to adopt rules and rule amendments under the Securities Exchange Act of 1934 to shorten the standard settlement cycle for most securities transactions. The proposed rules and rule amendments would be applicable to broker-dealers and certain clearing agencies. The Commission also will consider whether to adopt rule amendments under the Investment Advisers Act of 1940 to require investment advisers to maintain certain related records.

2. The Commission will consider whether to propose to amend and redesignate rule 206(4)-2 under the Investment Advisers Act of 1940 ("Advisers Act") related to the safeguarding of client assets. The Commission also will consider proposing corresponding amendments to the investment adviser recordkeeping rule and to Form ADV under the Advisers Act.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

Authority: 5 U.S.C. 552b.

Dated: February 8, 2023.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2023-03014 Filed 2-8-23; 4:15 pm]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-019, OMB Control No. 3235-0012]

Submission for OMB Review; Comment Request; Extension: Rule 15b1-1/Form BD

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 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rule 15b1-1 (17 CFR 240.15b1-1) and Form BD (17 CFR 249.501) under the Securities Exchange Act of 1934 (17 U.S.C. 78a *et seq.*).

Form BD is the application form used by firms to apply to the Commission for registration as a broker-dealer, as required by Rule 15b1-1. Form BD also is used by firms other than banks and registered broker-dealers to apply to the Commission for registration as a municipal securities dealer or a government securities broker-dealer. In addition, Form BD is used to change information contained in a previous Form BD filing that becomes inaccurate.

The total industry-wide annual time burden imposed by Form BD is approximately 3,703 hours, based on approximately 9,842 responses (175 initial filings + 9,667 amendments). Each application filed on Form BD requires approximately 2.75 hours to complete and each amended Form BD requires approximately 20 minutes to complete. (175 × 2.75 hours = 481 hours; 9,667 × 0.33333333 hours = 3,222 hours; 481 hours + 3,222 hours = 3,703 hours.) The staff believes that a broker-dealer would have a Compliance Manager complete and file both applications and amendments on Form BD at a cost of \$344/hour. Consequently, the staff estimates that the total internal cost of compliance associated with the annual time burden is approximately \$1,273,832 per year (\$344 × 3,703).

The Commission uses the information disclosed by applicants in Form BD: (1) to determine whether the applicant meets the standards for registration set forth in the provisions of the Exchange Act; (2) to develop a central information resource where members of the public

may obtain relevant, up-to-date information about broker-dealers, municipal securities dealers, and government securities broker-dealers, and where the Commission, other regulators, and SROs may obtain information for investigatory purposes in connection with securities litigation; and (3) to develop statistical information about broker-dealers, municipal securities dealers, and government securities broker-dealers. Without the information disclosed in Form BD, the Commission could not effectively implement policy objectives of the Exchange Act with respect to its investor protection function.

Completing and filing Form BD is mandatory to engage in broker-dealer activity. Compliance with Rule 15b1-1 does not involve the collection of confidential information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent by March 13, 2023 to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: February 6, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02831 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

⁴ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96830; File No. SR-BOX-2023-07]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility To Reflect Adjustments to FINRA Registration Fees and Fingerprinting Processing Fees

February 7, 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 31, 2023, BOX Exchange LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A)(ii) of the Act,³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend the Fee Schedule to amend the Fee Schedule [sic] to reflect adjustments to FINRA Registration Fees and Fingerprinting Processing Fees on the BOX Options Market LLC (“BOX”) options facility. While changes to the fee schedule pursuant to this proposal will be effective upon filing, the Exchange designates that the FINRA Annual System Processing Fee Assessed only during Renewals become operative on January 2, 2024.⁵ The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room and also on the Exchange’s

internet website at <https://rules.boxexchange.com/rulefilings>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for trading on BOX to reflect adjustments to FINRA Registration Fees and Fingerprinting Processing Fees.

This proposal amends BOX’s Fee Schedule to reflect adjustments to FINRA Registration Fees and Fingerprinting Processing Fees.⁶ The FINRA fees are collected and retained by FINRA via Web CRD for the registration of employees of BOX members and member organizations that are not FINRA members (“Non-FINRA members”). The Exchange is merely listing these fees on its Fee Schedule. The Exchange does not collect or retain these fees.

The Exchange proposes to amend: (1) the \$110 fee for the additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification or one or more disclosure events or proceedings to \$155; (2) the \$45 FINRA Annual System Processing Fee Assessed only during Renewals to \$70; and (3) the \$15 Second Submission (Electronic) Fingerprinting Processing Fee to \$20. Each of these fees are listed within Section II.A of the BOX Fee Schedule. These amendments are being made in accordance with a FINRA rule change to adjust to its fees.⁷

⁶ FINRA operates Web CRD, the central licensing and registration system for the U.S. securities industry. FINRA uses Web CRD to maintain the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

⁷ See note 5. FINRA noted in its rule change that it was adjusting its fees to provide sustainable funding for FINRA’s regulatory mission.

The Exchange also proposes to amend the following Fingerprinting Processing Fees: (1) the \$29.50 Initial Submission (Electronic) fee to \$31.25;⁸ (2) the \$44.50 Initial Submission (non-electronic) fee to \$41.25;⁹ (3) the \$29.50 Third Submission (Electronic) fee to \$31.25;¹⁰ and (4) the \$44.50 Third Submission (non-electronic) fee to \$41.25.¹¹ Specifically, today, the FBI fingerprint charge is \$11.25¹² and the FINRA electronic Fingerprinting Processing Fee has increased from \$15 to \$20 in 2023.¹³ While FINRA did not amend the non-electronic Fingerprinting Processing Fee, previously the FBI Fee was reduced from \$14.50 to \$11.25.¹⁴ The non-electronic Fingerprinting Processing Fees are not currently reflecting the amount assessed by FINRA.¹⁵ The amendment to the non-electronic Fingerprinting Processing Fees will conform these fees with those of FINRA.

The FINRA Web 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. Accordingly, the proposed fees mirror those currently assessed by FINRA.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5) of the Act,¹⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and

⁸ This fee includes a \$20.00 FINRA fee and \$11.25 FBI fee. See <https://www.finra.org/registration-exams-ce/classic-crd/fingerprints/fingerprint-fees>.

⁹ This fee includes a \$30.00 FINRA Fee and a \$11.25 FBI fee. See <https://www.finra.org/registration-exams-ce/classic-crd/fingerprints/fingerprint-fees>.

¹⁰ This fee includes a \$20 FINRA fee and \$11.25 FBI fee. See <https://www.finra.org/registration-exams-ce/classic-crd/fingerprints/fingerprint-fees>.

¹¹ This fee includes a \$30 FINRA Fee and a \$11.25 FBI fee. See <https://www.finra.org/registration-exams-ce/classic-crd/fingerprints/fingerprint-fees>.

¹² See Securities Exchange Act Release No. 67247 (June 25, 2012) 77 FR 38866 (June 29, 2012) (SR-FINRA-2012-030) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Sections 4 and 6 of Schedule A to the FINRA By-Laws Regarding Fees Relating to the Central Registration Depository) (“2012 Rule Change”).

¹³ See note 5.

¹⁴ See 2012 Rule Change at note 12. The FBI does not charge its fee on a second fingerprint transaction when it identifies the first set of fingerprints as illegible for the same individual.

¹⁵ The fees for the non-electronic first card submission and non-electronic third card submission are the only non-electronic fees impacted by FINRA’s fee change.

¹⁶ 15 U.S.C. 78f(b)(4) and (5).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ See Securities Exchange Act Release No. 90176 (October 14, 2020), 85 FR 66592 (October 20, 2020) (SR-FINRA-2020-032) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adjust FINRA Fees To Provide Sustainable Funding for FINRA’s Regulatory Mission).

does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes it is reasonable to increase: (1) the \$110 fee for the additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification or one or more disclosure events or proceedings to \$155; (2) the \$45 FINRA Annual System Processing Fee Assessed only during Renewals to \$70; and (3) the electronic Fingerprinting Processing Fees for second submissions from \$15 to \$20 in accordance with an adjustment to FINRA's fees¹⁷ because the proposed fees are identical to those adopted by FINRA for use of Web CRD for disclosure and the registration of FINRA members and their associated persons.

These costs are borne by FINRA when a Non-FINRA member uses Web CRD. The Exchange's rule text will reflect the current registration and electronic fingerprint rates that are assessed by FINRA for the additional processing of each initial or amended Form U4, Form U5 or Form BD and Second Submission (Electronic) Fingerprinting Processing Fee and the registration rates that will be assessed by FINRA as of January 2, 2024 for the FINRA Annual System Processing Fee Assessed only during Renewals.¹⁸

The Exchange believes it is reasonable to correct the non-electronic Fingerprinting Processing Fees to reflect the reduced FBI Fee of \$11.25.¹⁹ The amendments to the non-electronic Fingerprinting Processing Fees will provide all BOX members and member organizations with the correct fees.

The Exchange believes it is equitable and not unfairly discriminatory to increase: (1) the \$110 fee for the additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification or one or more disclosure events or proceedings to \$155; (2) the \$45 FINRA Annual System Processing Fee Assessed only during Renewals to \$70; and (3) the electronic Fingerprinting Processing Fees from \$15 to \$20 in accordance with an adjustment to FINRA's fees²⁰ because the Exchange will not be collecting or retaining these fees,

therefore, the Exchange will not be in a position to apply them in an inequitable or unfairly discriminatory manner. Similarly, the Exchange believes it is equitable and not unfairly discriminatory to correct the non-electronic Fingerprinting Processing Fees to reflect the reduced FBI Fee of \$11.25²¹ because the Exchange will not be collecting or retaining these fees, therefore, the Exchange will not be in a position to apply them in an inequitable or unfairly discriminatory manner.

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. The Exchange believes that its proposal to increase: (1) the \$110 fee for the additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification or one or more disclosure events or proceedings to \$155; (2) the \$45 FINRA Annual System Processing Fee Assessed only during Renewals to \$70; and (3) the electronic Fingerprinting Processing Fees for the second card submission from \$15 to \$20 in accordance with an adjustment to FINRA's fees²² does not impose an undue burden on competition because the Exchange will not be collecting or retaining these fees, therefore, the Exchange will not be in a position to apply them in an inequitable or unfairly discriminatory manner. Similarly, the Exchange believes it does not impose an undue burden on competition to correct the non-electronic Fingerprinting Processing Fees to reflect the reduced FBI Fee of \$11.25 because the Exchange will not be collecting or retaining these fees, therefore, the Exchange will not be in a position to apply them in an inequitable or unfairly discriminatory manner.

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.

²¹ See 2012 Rule Change at note 12. The FBI does not charge its fee on a second fingerprint transaction when it identifies the first set of fingerprints as illegible for the same individual.

²² The \$20 FINRA Fee is in addition to the \$11.25 FBI Fee except for the second fingerprint transaction.

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 Exchange Act²³ and Rule 19b-4(f)(2) thereunder,²⁴ because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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-BOX-2023-07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BOX-2023-07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent 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

¹⁷ The \$20 FINRA Fee is in addition to the \$11.25 FBI Fee except for the second fingerprint transaction.

¹⁸ See note 5.

¹⁹ See 2012 Rule Change at note 12. The FBI does not charge its fee on a second fingerprint transaction when it identifies the first set of fingerprints as illegible for the same individual.

²⁰ The \$20 FINRA Fee is in addition to the \$11.25 FBI Fee except for the second fingerprint transaction.

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BOX-2023-07, and should be submitted on or before March 3, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02950 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-629, OMB Control No. 3235-0718]

Submission for OMB Review; Comment Request; Extension: Regulation SBSR

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 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rules 901, 902, 903(a), 904, 905, 906, 907, and 908 of Regulation SBSR (17 CFR 242.901, 902, 903(a), 904, 905, 906, 907, and 908) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Regulation SBSR consists of ten rules, Rules 900 to 909 under the Exchange Act. Regulation SBSR provides generally for the reporting of security-based swap information to a registered security-based swap data repository ("registered SDRs") or to the Commission, and for the public

dissemination of security-based swap transaction, volume, and pricing information by registered SDRs. Rule 901 specifies, with respect to each reportable event pertaining to covered transactions, who is required to report, what data must be reported, when it must be reported, where it must be reported, and how it must be reported. Rule 901(a)(1) of Regulation SBSR requires a platform to report to a registered SDR a security-based swap executed on such platform that will be submitted to clearing. Rule 901(a)(2)(i) of Regulation SBSR requires a registered clearing agency to report to a registered SDR any security-based swap to which it is a counterparty. Rules 902 to 909 of Regulation SBSR provide additional details as to how such reporting and public dissemination is to occur.

The Commission estimates that a total of approximately 30,348 entities will be impacted by Regulation SBSR, including registered SDRs, registered security-based swap dealers, registered major securities-based swap participants, registered clearing agencies, platforms, and reporting sides and other market participants. The Commission estimates that the total annual hour burden for Regulation SBSR, for all respondents, is approximately 3,539,483 hours per year. In addition, the Commission estimates that the total annual cost burden for Regulation SBSR for all respondents is approximately \$47,728,783 per year. A detailed break-down of the burdens applicable to each type of entity is provided in the supporting statement.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent by March 13, 2023 to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: February 6, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02830 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96820; File No. SR-NYSEARCA-2022-80]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of Proposed Rule Change To Amend Rule 7.19-E Concerning Pre-Trade Risk Controls

February 7, 2023.

On December 8, 2022, NYSE Arca, Inc. ("NYSE Arca") filed with the Securities and Exchange Commission (the "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")¹ and Rule 19b-4 thereunder² a proposed rule change to add additional pre-trade risk controls to Rule 7.19-E. The proposed rule change was published for comment on December 20, 2022.³ On February 1, 2023, NYSE Arca withdrew the proposed rule change (SR-NYSEARCA-2022-80).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02954 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-448, OMB Control No. 3235-0507]

Submission for OMB Review; Comment Request; Extension: Rule 19b-5 and Form PILOT

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 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 96499 (December 14, 2022), 87 FR 77907 (December 20, 2022). Comments received on the proposal are available on the Commission's website at: <https://www.sec.gov/comments/sr-nysearca-2022-80/srnysearca202280.htm>.

⁴ 17 CFR 200.30-3(a)(12).

²⁵ 17 CFR 200.30-3(a)(12).

(“SEC”) has submitted to the Office of Management and Budget (“OMB”) a request for approval of extension of the previously approved collection of information provided for in Rule 19b–5 (17 CFR 240.19b–5) and Form PILOT (17 CFR 249.821) under the Securities Exchange Act of 1934 (“Exchange Act”) (15 U.S.C. 78a *et seq.*).

Rule 19b–5 provides a temporary exemption from the rule-filing requirements of Section 19(b) of the Exchange Act (15 U.S.C. 78s(b)) to self-regulatory organizations (“SROs”) wishing to establish and operate pilot trading systems. Rule 19b–5 permits an SRO to develop a pilot trading system and to begin operation of such system shortly after submitting an initial report on Form PILOT to the SEC. During operation of any such pilot trading system, the SRO must submit quarterly reports of the system’s operation to the SEC, as well as timely amendments describing any material changes to the system. Within two years of operating such pilot trading system under the exemption afforded by Rule 19b–5, the SRO must submit a rule filing pursuant to Section 19(b)(2) of the Exchange Act (15 U.S.C. 78s(b)(2)) to obtain permanent approval of the pilot trading system from the SEC.

The collection of information is designed to allow the SEC to maintain an accurate record of all new pilot trading systems operated by SROs and to determine whether an SRO has properly availed itself of the exemption afforded by Rule 19b–5, is operating a pilot trading system in compliance with the Exchange Act, and is carrying out its statutory oversight obligations under the Exchange Act.

The respondents to the collection of information are national securities exchanges and national securities associations.

There are 24 SROs which could avail themselves of the exemption under Rule 19b–5 and the use of Form PILOT. The SEC estimates that approximately one of these SROs each year will file on Form PILOT one initial report (*i.e.*, 1 report total, for an estimated annual burden of 24 hours total), four quarterly reports (*i.e.*, 4 reports total, for an estimated annual burden of 12 hours total (3 hours per report)), and two amendments (*i.e.*, 2 reports total, for an estimated annual burden of 6 hours total (3 hours per report)). Thus, the estimated annual time burden resulting from Form PILOT is 42 hours for the estimated sole SRO respondent. The SEC estimates that the aggregate annual internal cost of compliance for the sole SRO respondent is approximately \$12,880 (42 hours at an average of \$306.67 per hour). In

addition, the SEC estimates that the sole SRO respondent will incur, in the aggregate, printing, supplies, copying, and postage expenses of \$2,287 per year for filing initial reports, \$1,142 per year for filing quarterly reports, and \$571 per year for filing notices of material systems changes, for a total annual cost burden of \$4,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Written comments and recommendations for the proposed information collection should be sent by March 13, 2023 to

(i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: February 6, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–02832 Filed 2–9–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96821; File No. SR–NYSENAT–2022–26]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Withdrawal of Proposed Rule Change To Amend Rule 7.19 Concerning Pre-Trade Risk Controls

February 7, 2023.

On December 8, 2022, NYSE National, Inc. (“NYSE National”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”) ¹ and Rule 19b–4 thereunder ² a proposed rule change to add additional pre-trade risk controls to Rule 7.19. The proposed rule change was published for comment on December 19, 2022.³ On February 1,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 96487 (December 13, 2022), 87 FR 77662 (December 19, 2022). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysenat-2022-26/srnyesenat202226.htm>.

2023, NYSE National withdrew the proposed rule change (SR–NYSENAT–2022–26).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–02952 Filed 2–9–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96818; File No. SR–ISE–2023–06]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Rules in Connection With a Technology Migration to Enhanced Nasdaq, Inc. (“Nasdaq”) Functionality

February 6, 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 February 3, 2023, Nasdaq ISE, LLC (“ISE” 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 its rules in connection with a technology migration to enhanced Nasdaq, Inc. (“Nasdaq”) functionality.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

www.sec.gov/comments/sr-nysenat-2022-26/srnyesenat202226.htm.

⁴ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

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

In connection with a technology migration to enhanced Nasdaq functionality that will result in higher performance, scalability, and more robust architecture, the Exchange proposes to amend its rules to adopt certain trading functionality currently utilized at Nasdaq affiliate options exchanges. As further discussed below, the Exchange is proposing to adopt such functionality substantially in the same form as currently on the Nasdaq affiliated options exchanges, while retaining certain intended differences between it and its affiliates. The Exchange also proposes a number of changes to memorialize existing functionality, add more granularity in its rules to describe how existing functionality operates today, and to harmonize the Exchange's rules where appropriate with the rules of its affiliated options exchanges by using consistent language to describe identical functionality.

The Exchange intends to begin implementation of the proposed rule change by Q4 2023. The Exchange would commence its implementation with a limited symbol migration and continue to migrate symbols over several weeks. The Exchange will issue an Options Trader Alert to Members to provide notification of the symbols that will migrate and the relevant dates.

Bulk Message

The Exchange proposes to codify existing functionality that allows Market Makers to submit their quotes to the Exchange in block quantities as a single bulk message. In other words, a Market Maker may submit a single message to the Exchange, which may contain bids and offers in multiple series. The Exchange does not permit bulk messaging for orders today. The Exchange has historically provided Market Makers with information regarding bulk messaging in its publicly available technical specifications.³ To

promote greater transparency, the Exchange is seeking to codify this functionality in its Rulebook. Specifically, the Exchange proposes to amend Options 3, Section 4(b)(3) to memorialize that quotes may be submitted as a bulk message. The Exchange also proposes to add a definition of "bulk message" in new subparagraph (i) of Options 3, Section 4(b)(3), which will provide that a bulk message means a single electronic message submitted by a Market Maker to the Exchange which may contain a specified number of quotations as designated by the Exchange.⁴ The bulk message, submitted via SQF,⁵ may enter, modify, or cancel quotes. Bulk messages are handled by the System in the same manner as it handles a single quote message.

The Exchange notes that other exchanges like Cboe Options Exchange ("Cboe") currently offer similar bulk messaging functionality that allow their market participants to submit block quantity quotes in a single electronic message.⁶

Order Types

The Exchange proposes to make several enhancements to certain order types in Options 3, Section 7 in connection with the technology migration to Nasdaq enhanced functionality. Specifically in connection with the migration, the Exchange proposes to: (1) introduce an intra-day cancel timer feature for Market Orders,⁷

specifications note in other places the manner in which a Member can send such quote block messages.

⁴ See *id.* As noted above, quote bulk messages can presently contain up to 200 quotes per message. This is the maximum amount that is permitted in a bulk message. The Exchange would announce any change to these specifications in an Options Technical Update distributed to all Members.

⁵ "Specialized Quote Feed" or "SQF" is an interface that allows Market Makers to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (*e.g.*, underlying and complex instruments); (2) System event messages (*e.g.*, start of trading hours messages and start of opening); (3) trading action messages (*e.g.*, halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Market Maker. Market Makers may only enter interest into SQF in their assigned options series. See Supplementary Material .03(c) to Options 3, Section 7.

⁶ See definition of "bulk message" in Cboe Rule 1.1. Unlike Cboe, which also allows bulk messaging for orders, the Exchange's bulk message functionality only applies to quotes as discussed above.

⁷ A market order is an order to buy or sell a stated number of options contracts that is to be executed

(2) eliminate non-Immediate-or-Cancel ("IOC")⁸ Intermarket Sweep Orders ("ISOs"),⁹ (3) introduce BX-like re-pricing to Add Liquidity Orders ("ALOs"),¹⁰ and (4) allow Market Orders to be entered as Opening Only ("OPG")¹¹ orders (currently only allowed for Limit Orders).¹² As discussed below, the proposed enhancements are intended to align with existing BX functionality. The Exchange also proposes to add more granularity on how certain order types currently operate on the Exchange today, codify existing order type functionality, and to relocate related rule text within Options 3, Section 7 for better readability. Except with respect to the order type enhancements specified above, none of the proposed order type rule changes will amend current functionality. Rather, these changes are designed to bring greater transparency as to the applicability of certain order types currently available on the Exchange, and to provide greater consistency between the rules of the Exchange and its affiliates.

at the best price obtainable when the order reaches the Exchange. See Options 3, Section 7(a).

⁸ An IOC order must be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled. See Options 3, Section 7(b)(3). As discussed later in this filing, the Exchange will relocate the IOC rule into Supplementary Material .02 to Options 3, Section 7.

⁹ An ISO is a limit order that meets the requirements of Options 5, Section 1(h). See Options 3, Section 7(b)(5).

¹⁰ An Add Liquidity Order is a limit order that is to be executed in whole or in part on the Exchange (i) only after being displayed on the Exchange's limit order book; and (ii) without routing any portion of the order to another market center. Members may specify whether an Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the national best bid price (for sell orders) or below the national best offer price (for buy orders) if, at the time of entry, the order (i) is executable on the Exchange; or (ii) the order is not executable on the Exchange, but would lock or cross the national best bid or offer. If at the time of entry, an Add Liquidity Order would lock or cross one or more non-displayed orders on the Exchange, the Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders). An Add Liquidity Order will only be re-priced once and will be executed at the re-priced price. An Add Liquidity Order will be ranked in the Exchange's limit order book in accordance with Options 3, Section 10. See Options 3, Section 7(n).

¹¹ An OPG order is a Limit Order that can be entered for the opening rotation only. See Options 3, Section 7(o). As discussed later in this filing, the Exchange will relocate the OPG rule into Supplementary Material .02 to Options 3, Section 7.

¹² A Limit Order is an order to buy or sell a stated number of options contracts at a specified price or better. See Options 3, Section 7(b).

³ See https://www.nasdaq.com/docs/2022/05/17/SQF_8.2b.pdf (specifying for bulk quoting of up to 200 quotes per quote block message). The

Market Orders

The Exchange proposes to amend the definition of Market Orders in Options 3, Section 7(a) to introduce a cancel timer feature, which will allow Members to designate Market Orders that do not execute after a certain period of time to be cancelled back to the Member. Specifically, the Exchange proposes to add that Members can designate their Market Orders not executed after a pre-established period of time, as established by the Exchange,¹³ will be cancelled back to the Member, once an options series has opened for trading. BX currently has an identical timer feature for BX Market Orders.¹⁴ Similar to BX, the proposed timer would be available once the intra-day trading session begins for an options series, as the Exchange already has a separate opening delay timer that provides protection to the market during the Opening Process. In particular, the Exchange would cancel or route orders (consistent with the Member's instructions) if an options series has not opened before the conclusion of the opening delay timer.¹⁵ As such, the Exchange is proposing that the pre-established period of time for the proposed timer feature would commence once the intra-day trading session begins for that options series. In other words, while the opening process is on-going, and the intra-day trading session has not commenced, the pre-established period of time for the proposed timer feature would not commence. Further, the Exchange proposes to note that Market Orders on the order book would be immediately cancelled if an options series is halted, provided the Member designated the cancellation of Market Orders.¹⁶ The proposed changes are intended to make clear that in the event there is a Market Order in a zero bid market with the Market Order resting on the order book, the Member has an option to designate the cancellation of that Market Order pursuant to the proposed cancel timer feature. In this case, those Market Orders to sell, which were resting on the order book, would immediately cancel upon a trading halt instead of waiting until the end of the pre-established

¹³ The Exchange will initially set the pre-established period of time at 4 seconds, identical to BX. This specification will be set out in the ISE System settings document on a publicly available website. The Exchange would issue an Options Trader Alert notifying all Members if it determined to amend that timeframe.

¹⁴ See BX Options 3, Section 7(a)(5).

¹⁵ See Options 3, Section 8(k).

¹⁶ Members may make the designation to cancel their Market Orders through their FIX, OTTO, and Precise port settings.

timer period. BX has identical language governing its Market Orders today.¹⁷ Like BX, the Exchange believes that the proposed intra-day timer feature will provide additional flexibility for Members that wish to cancel unexecuted Market Orders after a certain period of time. Lastly, the Exchange proposes a non-substantive change to capitalize the term "market orders" in the first sentence of Options 3, Section 7(a) for consistency with the proposed rule text.

Intermarket Sweep Orders

The Exchange proposes to amend the ISO rule in Options 3, Section 7(b)(5), which currently provides that an ISO is limit order that meets the requirements of Options 5, Section 1(h).¹⁸ As amended, the ISO rule will provide:

An Intermarket Sweep Order ("ISO") is a limit order that meets the requirements of Options 5, Section 1(h). Orders submitted to the Exchange as ISO are not routable and will ignore the ABBO and trade at allowable prices on the Exchange. ISOs must have a TIF designation of IOC. ISOs may not be submitted during the Opening Process.

The proposed rule text is substantially similar to BX's ISO rule in BX Options 3, Section 7(a)(6).¹⁹ The Exchange is also proposing to add that ISOs may not be submitted during the Opening Process to reflect current System handling. The Exchange notes that BX similarly prohibits the submission of ISOs before the market opens and therefore proposes to add a similar level of detail in the Exchange's ISO rule.

Other than the stipulation that ISOs must have a TIF²⁰ designation of IOC,

¹⁷ See BX Options 3, Section 7(a)(5).

¹⁸ Options 5, Section 1(h) provides that an ISO is a limit order for an options series that, simultaneously with the routing of the ISO, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO. A Member may submit an Intermarket Sweep Order to the Exchange only if it has simultaneously routed one or more additional Intermarket Sweep Orders to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or Protected Offer, in the case of a limit order to buy, for an options series with a price that is superior to the limit price of the Intermarket Sweep Order. An ISO may be either an Immediate-Or-Cancel Order or an order that expires on the day it is entered.

¹⁹ BX's ISO rule also currently states that "ISOs may be entered on the Order Book or into the PRISM Mechanism pursuant to Options 3, Section 13(ii)(K)." See BX Options 3, Section 7(a)(6). The Exchange notes that it intends to file a separate rule filing to add similar language as BX relating to how ISOs may be entered on the Exchange.

²⁰ As discussed later in this filing, the Exchange is proposing to codify the definition of "Time in

the proposed language does not amend the current ISO functionality but rather is intended to add more granularity and more closely align the ISO rule with BX's ISO rule. The Exchange does note that in connection with the System migration, the Exchange proposes to amend the current ISO functionality to only allow ISOs to be entered as IOC. Today, Options 5, Section 1(h) provides that an ISO may either be an IOC or an order that expires on the day it is entered. The Exchange proposes to delete this sentence entirely from Options 5, Section 1(h) as ISOs may only be IOC with the System migration, and this will be articulated in proposed Options 3, Section 7(b)(3).

The Exchange is proposing to require ISOs to be entered as IOC, which would cause an ISO to cancel in whole or in part upon receipt if the ISO does not execute or does not entirely execute, because an ISO is generally used when trying to sweep a price level across multiple exchanges in an effort to post the balance of an order without locking an away market. The Exchange therefore believes that ISOs have a limited purpose and should be cancelled if they do not execute or do not entirely execute. As noted above, the proposal will align to current BX functionality that similarly only allows ISOs to be entered as IOC on BX.

All-or-None Orders

The Exchange proposes to amend the All-Or-None ("AON") Order rule in Options 3, Section 7(c), which currently provides that an AON Order is a limit or market order that is to be executed in its entirety or not at all, and that an AON Order may only be entered as an IOC Order. As amended, the AON rule will provide:

An All-Or-None ("AON") Order is a limit or market order that is to be executed in its entirety or not at all. An AON Order may only be entered as an Immediate-or-Cancel Order. AON Orders will only execute against multiple, aggregated orders if the executions would occur simultaneously. AON Orders may not be submitted during the Opening Process.

With the proposed changes, the Exchange is not amending current AON functionality; rather, it is memorializing current System behavior in a manner consistent with its affiliates. Today, AON Orders have a size contingency (*i.e.*, executed in its entirety at the entered size or not at all) and must be

Force" or "TIF" to mean the period of time that the System will hold an order for potential execution. See proposed Supplementary Material .02 to Options 3, Section 7.

IOC. The Exchange is specifying that AON Orders will execute against multiple, aggregated orders only if the executions would occur simultaneously to ensure that AON Orders are executed at the specified size while also honoring the priority of all other orders on the order book. The Exchange is adopting this rule text for AON orders to align to substantially similar language on BX.²¹

The Exchange notes that the handling of AONs as described in the proposed rule text in Options 3, Section 7(c) is consistent with the Exchange's allocation methodology in Options 3, Section 10. The additional detail makes clear that because of the size contingency of AON Orders, those orders must be satisfied simultaneously to avoid any priority conflict on the order book, which considers current displayed NBBO prices to avoid locked and crossed markets as well as trade-throughs.

The Exchange is also proposing to add that AON orders may not be submitted during the Opening Process to reflect current System handling. The Exchange notes that BX similarly prohibits the submission of AON orders before the market opens and therefore proposes to add a similar level of detail in the Exchange's AON rule.²²

Stop Orders

The Exchange proposes to amend its Stop Order rule in Options 3, Section 7(d), which presently provides that a stop order is an order that becomes a market order when the stop price is elected. A stop order to buy is elected when the option is bid or trades on the Nasdaq ISE at, or above, the specified stop price. A stop order to sell is elected when the option is offered or trades on the Nasdaq ISE at, or below, the specified stop price. The Exchange now proposes to add that a Stop Order shall be cancelled if it is immediately electable upon receipt. Stop Orders allow Members increased control and flexibility over their transactions and the prices at which they are willing to execute an order. The purpose of a Stop Order is to not execute upon entry, and instead rest in the System until the market reaches a certain price level, at which time the order could be executed. A Stop Order that is immediately electable upon receipt would therefore negate the purpose of the Stop Order, so the Exchange would cancel such orders today. The Exchange believes that this

²¹ See BX Options 3, Section 7(a)(4)(A) (describing Minimum Quantity Orders and AON Orders as Contingency Orders). Unlike BX, the Exchange does not currently offer Minimum Quantity Orders.

²² See BX Options 3, Section 7(a)(7).

ensures Members are able to use Stop Orders to achieve their intended purpose. The proposed changes codify current Stop Order handling and are intended to better align the Exchange's Stop Order rule with that of its affiliate, Phlx.²³

The Exchange also proposes to specify that Stop Orders may only be entered through FIX or Precise.²⁴ This is how Stop Orders are handled today. Because the Exchange offers three order entry protocols today (FIX, Precise, and OTTO),²⁵ the Exchange believes that adding this detail will make clear that Stop Orders are only available to be entered through two of these order entry protocols and reduce any potential confusion.

Stop Limit Orders

The Exchange proposes to amend its Stop Limit Order rule in Options 3, Section 7(e), which presently provides that a stop limit order is an order that becomes a limit order when the stop price is elected. A stop limit order to buy is elected when the option is bid or trades on the Nasdaq ISE at, or above, the specified stop price. A stop limit order to sell is elected when the option is offered or trades on the Nasdaq ISE at, or below, the specified stop price. The Exchange now proposes to add that a Stop Limit Order shall be cancelled if it is immediately electable upon receipt. The Exchange would cancel these orders today for the same reasons discussed above for Stop Orders. The

²³ See Phlx Options 3, Section 7(b)(4).

²⁴ "Nasdaq Precise" or "Precise" is a front-end interface that allows Electronic Access Members and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (e.g., parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (e.g., NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (e.g., kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (e.g., order history and done away trade reports). See Supplementary Material .03(d) to Options 3, Section 7. See General 1, Section 1(a)(6) for the definition of Electronic Access Member and Supplementary Material .02 to Options 3, Section 21 for the definition of Sponsored Customer.

²⁵ "Ouch to Trade Options" or "OTTO" is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying and complex instruments); (2) System event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. See Supplementary Material .03(b) to Options 3, Section 7.

proposed changes codify current Stop Limit Order handling and are intended to better align the Exchange's Stop Limit Order rule with that of Phlx.²⁶

The Exchange also proposes to specify that Stop Limit Orders may only be entered through FIX or Precise. This is how Stop Limit Orders are handled today. For the same reasons discussed above for Stop Orders, the Exchange believes that adding this detail will make clear that Stop Limit Orders are only available to be entered through the specified order entry protocol and reduce any potential confusion. Lastly, the Exchange proposes a non-substantive change to correct a punctuation error in the paragraph header.

Cancel and Replace Orders

The Exchange proposes to relocate the rule text governing Cancel and Replace Orders from Supplementary Material .02 to Options 3, Section 7 into Options 3, Section 7(f). The Exchange also proposes non-substantive, clarifying changes to the relocated rule text to update the incorrect cross-cites therein to the System's price or other reasonability checks. The Exchange also proposes to amend the following portion of the rule, which currently provides: "The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, size is not increased, or in the case of Reserve Orders,²⁷ size is not changed." The Exchange proposes to make clear that in the case of Reserve Orders, a change in price will also result in a change of priority for the replacement order. The Exchange also proposes to clarify that the reference to the Reserve Order's size in this Rule is referring to both displayed and non-displayed size. As amended, the rule will provide: "The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, or size is not increased. In the case of Reserve Orders, the replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended or size (displayed and non-displayed) is not changed." The proposed changes will aid market participants in locating this order type in the main body of the rule, and add more granularity around how the

²⁶ See Phlx Options 3, Section 7(b)(4)(A).

²⁷ As discussed later in this filing, a Reserve Order is defined in Options 3, Section 7(g) as a Limit Order that contains both a displayed portion and a non-displayed portion.

Exchange will treat the cancellation and replacement of Reserve Orders.

Reserve Orders

As described in Options 3, Section 7(g), the Exchange offers Members a Reserve Order, which is a Limit Order that contains both a displayed portion and a non-displayed portion. Both the displayed and non-displayed portions of a Reserve Order are available for potential execution against incoming marketable orders. A non-marketable Reserve Order will rest on the order book. The non-displayed portion of a Reserve Order will be available for execution only after all displayed interest at that price has been executed. Both the displayed and the non-displayed portions of a Reserve Order will be ranked initially by the specified limit price and time of entry, and both the displayed and non-displayed portions of a Reserve Order will trade in accordance with the priority and allocation provisions in Options 3, Section 10.

When the displayed portion of a Reserve Order has been decremented, in whole or in part, it will be refreshed from the non-displayed portion of the resting Reserve Order. If the displayed portion is refreshed in part, the new displayed portion will include the previously displayed portion. Upon any refresh, the entire displayed portion of the order will be ranked at the specified limit price, assigned a new entry time (*i.e.*, the time that the newly displayed portion of the order was refreshed), and given priority in accordance with Options 3, Section 10. Any remaining non-displayed portion of the order will receive the same time stamp as the newly displayed portion of the order.

The Exchange now proposes to enhance the Reserve Order rule by providing more granularity in how Members may elect to refresh the display quantity for the Reserve Order. The Exchange is not proposing to modify the current functionality of Reserve Orders, but rather proposes to augment the definition to clarify current System behavior. Specifically, the Exchange proposes to make clear that Reserve Orders may be entered with an instruction for the displayed portion of the order to be refreshed: (A) upon full execution of the displayed portion or upon any partial execution; and (B) up to the initial size of the displayed portion or with a random refresh quantity within a range determined by the Member.²⁸ The Exchange believes

that this refresh feature for Reserve Orders provides more flexibility and opportunities for Members to add displayed liquidity to the Exchange. The Exchange believes that the proposed changes would add transparency to the operation of Reserve Orders, without altering current functionality. The Exchange notes that other options exchanges like Cboe currently offer similar refresh features on their Reserve Order functionality.²⁹

Finally, the Exchange proposes non-substantive, technical changes in Options 3, Section 7(g) to reformat the paragraph numbering, make a corrective change to “non-displayed portions” in proposed paragraph (6), and update a cross-cite in proposed paragraph (6).

Attributable Orders

As described in Options 3, Section 7(h), the Exchange currently offers Attributable Orders, which allow Members to voluntarily display their firm IDs on the orders. The rule also provides the Exchange with flexibility to announce which Exchange Systems and class of securities for which the Attributable Order would be available.³⁰

The Exchange now proposes to delete existing text that refers to class of securities in Options 3, Section 7(h). Attributable Orders are available for all classes of securities today. The Exchange is therefore deleting this language as inaccurate. The Exchange also proposes a corrective change herein to “an Option Trader Alert.”

Customer Cross Orders

Customer Cross Orders are currently defined in Options 3, Section 7(i). The Exchange proposes to add that such orders will trade in accordance with Options 3, Section 12(a). This is a non-substantive amendment to add a cross-reference to Section 12(a), which currently describes in detail how a Customer Cross Order would execute on the Exchange.

Qualified Contingent Cross Orders

Qualified Contingent Cross (“QCC”) Orders are currently defined in Options 3, Section 7(j). The Exchange proposes a non-substantive, technical change to

quantity range, Members must designate a range for the random refresh election when they submit the Reserve Order if they elect a random refresh, otherwise the Reserve Order would be refreshed at a quantity equal to the initial size of the displayed portion. The range must be set at a number between 1 and the initial displayed quantity.

²⁹ See Cboe Rule 5.6(c) (setting forth the random replenishment and fixed replenishment features for Reserve Orders).

³⁰ Today, Attributable Orders are not available for the Facilitation, Solicited Order, and Price Improvement Mechanisms.

add a reference to “QCC” in the first sentence of this rule. The Exchange also proposes to add that QCC Orders will trade in accordance with Options 3, Section 12(c). This is a non-substantive amendment to add a cross-reference to Section 12(c), which currently describes in detail how a QCC Order would execute on the Exchange.

The Exchange further proposes to specify that QCC Orders may only be entered through FIX or Precise. This is how QCC Orders are handled today. Because the Exchange offers three order entry protocols today (FIX, Precise, and OTTO), the Exchange believes that adding this detail will make clear that QCC Orders are only available to be entered through two of these order entry protocols and reduce any potential confusion.

Preferred Orders

The Exchange proposes to include the following definition of a Preferred Order in Options 3, Section 7(l) for ease of reference: “A Preferred Order is as described in Options 2, Section 10.” This is not a new order type, as Preferred Orders are currently described in Options 2, Section 10. While this order type is not currently listed in the order type rule in Options 3, Section 7, the Exchange believes that it will be useful to market participants to have order types centralized within one rule. Phlx similarly lists out Directed Orders (akin to Preferred Orders) in its order type rule in Phlx Options 3, Section 7(b)(11).

Add Liquidity Orders

Add Liquidity Orders (“ALOs”) are currently defined in Options 3, Section 7(n).

Today, the Exchange offers ALOs to provide market participants with greater control over the circumstances in which their orders are executed. ALOs are Limit Orders that will only be executed as a “maker” on the Exchange (*i.e.*, when the Member is providing liquidity). Members can choose whether an ALO that is executable on the Exchange upon entry (or that is not executable on the Exchange upon entry, but locks or crosses the NBBO) will be cancelled or re-priced to one MPV above the national best bid (for sell orders) or below the national best offer (for buy orders). If at the time of entry, an ALO would lock or cross one or more non-displayed orders on the Exchange, the ALO will be cancelled or re-priced to one MPV above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy

²⁸ See proposed Options 3, Section 7(g)(4). The Exchange will also renumber the paragraphs within this rule accordingly. As it relates to the refresh

orders).³¹ Today, an ALO will only be re-priced once and will be executed at the re-priced price. The Exchange notes that without the ability to re-price an ALO in the foregoing manner, under certain circumstances, an incoming ALO could execute against a displayed or non-displayed order resting on the Exchange's limit order book, which would be in direct contravention with the purpose of an ALO (to provide liquidity, not take liquidity).

As part of a concurrent rule filing, the Exchange is proposing to adopt a re-pricing mechanism identical to current BX re-pricing functionality³² to avoid certain orders from locking or crossing an away market's price.³³ In connection with the proposed adoption of the BX-like re-pricing mechanism in Options 3, Section 5(d) in the Re-Pricing Filing, the Exchange now proposes to make related changes to the ALO rule in Options 3, Section 7(n). In particular, the Exchange proposes that if an ALO would not lock or cross an order or quote on the System but would lock or cross the NBBO, the order will be handled pursuant to Options 3, Section 5(d), which will set forth the new BX-like re-pricing mechanism for non-routable orders.³⁴ As noted in Options 3, Section 7(n), ALOs are inherently non-routable. Accordingly, the Exchange is proposing to handle ALOs in a consistent manner with the new re-pricing mechanism. Because the new mechanism will allow for continuous re-pricing as discussed above, the Exchange also proposes to remove the current limitation in the ALO rule stipulating that these orders will only be re-priced once and

executed at the re-priced price. The proposed order handling for ALOs will be functionally identical to ALO handling on BX today.³⁵

The Exchange further proposes a clarifying change in the ALO rule that would not amend current System behavior. The Exchange proposes to add "or quotes" to make clear that if at the time of entry, an ALO would lock or cross one or more non-displayed orders or quotes on the Exchange, the ALO will be cancelled or re-priced to one MPV above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders).

Finally, the Exchange proposes to add that ALOs may only be submitted when an options series is open for trading to make clear that an ALO would not be accepted during the Opening Process when the order book is not available. The proposed rule text is consistent with current functionality, so the Exchange is codifying current ALO behavior with this change and adding the same level of detail currently in BX's ALO rule.³⁶

As amended, Options 3, Section 7(n) will provide:

An Add Liquidity Order is a limit order that is to be executed in whole or in part on the Exchange (i) only after being displayed on the Exchange's limit order book; and (ii) without routing any portion of the order to another market center. Members may specify whether an Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the national best bid price (for sell orders) or below the national best offer price (for buy orders) if, at the time of entry, the order (i) is executable on the Exchange; or (ii) the order is not executable on the Exchange, but would lock or cross the national best bid or offer. If at the time of entry, an Add Liquidity Order would lock or cross one or more non-displayed orders or quotes on the Exchange, the Add Liquidity Order shall be cancelled or re-priced to the minimum price variation above the best non-displayed bid price (for sell orders) or below the best non-displayed offer price (for buy orders). Notwithstanding the aforementioned, if an Add Liquidity Order would not lock or cross an order or quote on the System but would lock or cross the NBBO, the order will be handled pursuant to Options 3, Section 5(d). An Add Liquidity Order will be ranked in the Exchange's limit order book in accordance with Options 3, Section 10. Add Liquidity Orders may only be submitted when an options series is open for trading.

QCC With Stock Orders

The Exchange proposes a non-substantive change to correct a cross-

cite in the QCC with Stock Order rule in Options 3, Section 7(t). The current citation to Options 3, Section 12(c) in the description of this order type should instead be Options 3, Section 12(e).

Opening Sweep

Opening Sweeps are currently defined in Options 3, Section 7(u) as a Market Maker order submitted for execution against eligible interest in the System during the Opening Process pursuant to Options 3, Section 8(b)(1). The Exchange proposes to replace the current definition with the following: "An Opening Sweep is a one-sided order entered by a Market Maker through SQF for execution against eligible interest in the System during the Opening Process. This order type is not subject to any protections listed in Options 3, Section 15, except for Automated Quotation Adjustments. The Opening Sweep will only participate in the Opening Process pursuant to Options 3, Section 8(b)(1) and will be cancelled upon the open if not executed."

The proposed rule text is consistent with current functionality, so the Exchange is providing additional context to the Opening Sweep as currently described in Options 3, Section 8(b) and codifying current Opening Sweep behavior with this change. Specifically, because an Opening Sweep is an IOC order submitted by a Market Maker during the Opening Process, the Exchange is making clear in the proposed rule text that this order type is entered through SQF.³⁷ The Exchange is also specifying that Opening Sweeps are not subject to any risk protections in Options 3, Section 15 (except Automated Quotation Adjustments) because the Opening Process itself has boundaries (notably, the Quality Opening Market³⁸ and the Opening Quote Range³⁹) within

³⁷ See Supplementary Material .03(c) of Options 3, Section 7, which notes that SQF is an interface that allows Market Makers to submit IOC orders.

³⁸ A "Quality Opening Market" is a bid/ask differential applicable to the best bid and offer from all Valid Width Quotes defined in a table to be determined by the Exchange and published on the Exchange's website. The calculation of Quality Opening Market is based on the best bid and offer of Valid Width Quotes. The differential between the best bid and offer are compared to reach this determination. The allowable differential, as determined by the Exchange, takes into account the type of security (for example, Penny versus non-Penny Interval Program issue), volatility, option premium, and liquidity. The Quality Opening Market differential is intended to ensure the price at which the Exchange opens reflects current market conditions. See Options 3, Section 8(a)(7).

³⁹ The Opening Quote Range represents the outer boundaries at which the Exchange may open. See Options 3, Section 8(i).

³¹ As discussed in more detail below, the Exchange will amend this sentence to say "orders or quotes" to codify existing ALO behavior.

³² Today, BX re-prices certain orders to avoid locking and crossing away markets, consistent with its Trade-Through compliance and Locked or Crossed Markets obligations. See BX Options 3, Section 5(d). See also Securities Exchange Act Release No. 89476 (August 4, 2020), 85 FR 48274 (August 10, 2020) (SR-BX-2020-017) (describing BX re-pricing mechanism in BX Options 3, Section 5).

³³ See Securities Exchange Act Release No. 96362 (November 18, 2022) (SR-ISE-2022-25) ("Re-Pricing Filing"). Specifically in the Re-Pricing Filing, the Exchange is proposing to adopt the following language in Options 3, Section 5(d), which will be identical to BX Options 3, Section 5(d): An order that is designated by a Member as non-routable will be re-priced in order to comply with applicable Trade-Through and Locked and Crossed Markets restrictions. If, at the time of entry, an order that the entering party has elected not to make eligible for routing would cause a locked or crossed market violation or would cause a trade-through violation, it will be re-priced to the current national best offer (for bids) or the current national best bid (for offers) and displayed at one minimum price variance above (for offers) or below (for bids) the national best price.

³⁴ *Id.*

³⁵ See BX Options 3, Section 7(a)(12). See also Securities Exchange Act Release No. 93896 (January 4, 2022), 87 FR 1231 (January 10, 2022) (SR-BX-2021-054), which introduced ALOs on BX.

³⁶ *Id.*

which orders will be executed. As it relates to the proposed language relating to Opening Sweep participation in the Opening Process and cancellation upon the open, the Exchange notes that this concept is not new as Opening Sweeps are already described in Options 3, Section 8 today and apply only during the Opening Process. The language merely provides additional context to the order type.

The Exchange notes that the Opening Sweep is functionally identical to the Opening Sweep on Phlx,⁴⁰ so the proposed language will harmonize the Exchange's rule with the current Phlx rule.

Time in Force

Today, the Exchange notes that certain functionality is described as an "order type" in Options 3, Section 7, but would be more precisely described as a TIF attribute that may be added to a particular order type. Accordingly, the Exchange proposes to codify the term "TIF" in proposed Supplementary Material .02 to Options 3, Section 7. The proposed TIF definition will be identical to the TIF definition in BX Options 3, Section 7(b). The Exchange also proposes to relocate various rules into Supplementary Material .02 to centralize the TIFs that are available on the Exchange today. As proposed, the rule text will provide:

.02 *Time in Force.* The term "Time in Force" or "TIF" shall mean the period of time that the System will hold an order for potential execution, and shall include:

(a) *Day.* An order to buy or sell entered with a TIF of "DAY," which, if not executed, expires at the end of the day on which it was entered. All orders by their terms are Day orders unless otherwise specified. Day orders may be entered through FIX, OTTO, or Precise.

(b) *Good-Till-Canceled.* An order to buy or sell entered with a TIF of "GTC" that remains in force until the order is filled, canceled or the option contract expires; provided, however, that GTC orders will be canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. GTC orders may be entered through FIX or Precise.

(c) *Good-Till-Date.* An order to buy or sell entered with a TIF of "GTD," which, if not executed, will be cancelled at the sooner of the end of the expiration date assigned to the order, or the expiration of the series; provided, however, that GTD orders will be canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. GTD orders may be entered through FIX or Precise.

(d) *Immediate-or-Cancel.* An order entered with a TIF of "IOC" that is to be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled.

(1) Orders entered with a TIF of IOC are not eligible for routing.

(2) IOC orders may be entered through FIX, OTTO, Precise, or SQF, provided that an IOC order entered by a Market Maker through the SQF protocol will not be subject to the (A) Order Price Protection, Market Order Spread Protection, and Size Limitation Protection as defined in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B) respectively, for single leg orders, or (B) Complex Order Price Protection as defined in Options 3, Section 16(c)(1) for Complex Orders.

(3) Block Orders, Facilitation Orders, Complex Facilitation Orders, SOM Orders, Complex SOM Orders, PIM Orders, Complex PIM Orders, QCC Orders, QCC Complex Orders, Customer Cross Orders, and Customer Cross Complex Orders are considered to have a TIF of IOC. By their terms, these orders will be: (1) executed either on entry or after an exposure period, or (2) cancelled.

(e) *Opening Only.* An Opening Only ("OPG") order is entered with a TIF of "OPG." This order can only be executed in the Opening Process pursuant to Options 3, Section 8. Any portion of the order that is not executed during the Opening Process is cancelled. OPG orders may not route. This order type is not subject to any protections listed in Options 3, Section 15, except Size Limitation.

The Exchange is relocating rule text governing Day orders from Options 3, Section 7(l) into Supplementary Material .02(a) to specify that orders may be entered with a TIF of DAY. The Exchange also proposes to include additional detail that Day orders may be entered through FIX, OTTO, or Precise. This is how Day orders operate today, and the proposed rule text merely adds the same level of detail currently in BX's Day order rule.⁴¹

The Exchange is relocating rule text governing Good-Till-Canceled ("GTC") orders from Options 3, Section 7(r) into Supplementary Material .02(b) to specify that orders may be entered with a TIF of GTC. The Exchange also proposes to include additional detail that GTC orders may be entered through FIX or Precise. This articulates current GTC behavior.

The Exchange is relocating rule text governing Good-Till-Date ("GTD") orders from Options 3, Section 7(p) into Supplementary Material .02(c) to specify that orders may be entered with a TIF of GTD. The Exchange also proposes a number of changes that do not modify current GTD functionality, but are intended to align to the GTC rule described above. Today, GTC and GTD orders are intended to be functionally similar except GTC generally persists until it is cancelled by the Member and

⁴¹ See BX Options 3, Section 7(b)(3). BX's rule does not refer to OTTO or Precise because BX does not offer these order entry ports today.

GTD generally persists until the assigned date. Accordingly, the Exchange seeks to add a similar level of detail to the GTD rule as it is proposing in the GTC rule above. First, the Exchange proposes to remove the word "limit" from the relocated GTD rule text. Similar to GTC orders, GTD orders can also be sent as Market Orders (in addition to Limit Orders) today. The proposed changes will therefore align the rule text with current functionality. Second, the Exchange proposes to add that GTD orders will be canceled in the event of a corporate action that results in an adjustment to the terms of an option contract. This language is copied from current GTC rule text and articulates current GTD behavior. Third, the Exchange proposes to include additional detail that GTD orders may be entered through FIX or Precise. This mirrors the proposed changes for GTC orders and articulates current GTD behavior.

The Exchange is relocating rule text governing IOC orders from Options 3, Section 7(b)(3) into Supplementary Material .02(d) to Options 3, Section 7 to specify that orders may be entered with a TIF of IOC. The Exchange also proposes a number of changes to conform the Exchange's IOC rule with that of BX. None of the proposed changes modify current Exchange IOC functionality. First, the Exchange proposes to remove the word "limit" from the relocated IOC rule text in Supplementary Material .02(d). Today, IOC orders may be sent as either a Market Order or Limit Order. Eliminating the word "limit" from the proposed IOC rule will therefore align the rule text with current functionality.⁴² Second, the Exchange proposes to memorialize current IOC behavior in Supplementary Material .02(d)(1) by stating that orders entered with a TIF of IOC are not eligible for routing.⁴³ Third, the Exchange proposes to codify current IOC behavior in Supplementary Material .02(d)(2) by stating that IOC orders may be entered through FIX, OTTO, Precise, or SQF.⁴⁴

Fourth, the Exchange proposes to note in the same section that an IOC order entered by a Market Maker through SQF

⁴² BX similarly allows both Market Orders and Limit Orders to be entered as IOC. See BX Options 3, Section 7(b)(2). The Exchange is not specifying Market and Limit Orders in the relocated IOC rule text for consistency with the other TIFs in proposed Supplementary Material .02 to Options 3, Section 7.

⁴³ See BX Options 3, Section 7(b)(2)(A) for identical language.

⁴⁴ See BX Options 3, Section 7(b)(2)(B) for substantially similar language. BX's rule does not refer to OTTO or Precise because BX does not offer these ports today.

⁴⁰ See Phlx Options 3, Section 7(b)(6).

will not be subject to the (A) Order Price Protection,⁴⁵ Market Order Spread Protection,⁴⁶ and Size Limitation Protection⁴⁷ as defined in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B), respectively, for single leg orders, or (B) Complex Order Price Protection⁴⁸ as defined in Options 3, Section 16(c)(1) for Complex Orders.⁴⁹ Today, the IOC rule explicitly excludes the Limit Order Price Protection (for single leg and Complex Orders) and Size Limitation Protection from applying to IOC orders entered through SQF. As discussed later in this filing, the current Limit Order Price Protection for single leg orders will be replaced by a similar risk management tool called the Order Price Protection that will be identical to BX, so the Exchange will likewise reflect that change in the proposed IOC rule. The proposed change to exclude the Market Order Spread Protection from applying to IOC orders entered through SQF is not a change to IOC current functionality, but rather, a change to align the rule with current System behavior and with BX IOC rule.⁵⁰

The Exchange notes while it generally only permits orders (including IOC orders) to be entered into its three order entry protocols, FIX, OTTO, and Precise, it does permit the entry of IOC orders by Market Makers into its quote protocol, SQF. The Exchange has elected not to apply the specified risk protections on IOC orders entered through SQF as it does for IOC orders entered through FIX, OTTO, and Precise because only Market Makers utilize SQF to enter IOC orders. Market Makers are

professional traders with their own risk settings. FIX, OTTO, and Precise, on the other hand, are utilized by all market participants who may not have their own risk settings, unlike Market Makers. Market Makers utilize IOC orders to trade out of accumulated positions and manage their risk when providing liquidity on the Exchange. The Exchange understands that proper risk management, including using these IOC orders to offload risk, is vital for Market Makers, and allows them to maintain tight markets and meet their quoting and other obligations to the market. Market Makers handle a large amount of risk when quoting and in addition to the risk protections required by the Exchange, Market Makers utilize their own risk management parameters when entering orders, minimizing the likelihood of a Market Maker's erroneous order from being entered. The Exchange believes that Market Makers, unlike other market participants, have the ability to manage their risk when submitting IOC orders through SQF and should be permitted to elect this method of order entry to obtain efficiency and speed of order entry, particularly in light of the quoting obligations that the Exchange imposes on these participants, unlike other market participants.⁵¹ The Exchange believes that allowing Market Makers to submit IOC orders through their preferred protocol increases their efficiency in submitting such orders and thereby allows them to maintain quality markets to the benefit of all market participants that trade on the Exchange. For the foregoing reasons, the Exchange has opted to not offer the Order Price Protection, Market Order Spread Protection, and Size Limitation (for single leg orders), or the Complex Order Price Protection (for Complex Orders), for IOC orders entered through SQF because Market Makers have more sophisticated infrastructures than other market participants and are able to manage their risk.

The Exchange also proposes to add substantially similar language in Supplementary Material .03(c), which governs the SQF protocol. Specifically, the Exchange proposes to add: "Immediate-or-Cancel Orders entered into SQF are not subject to the (i) Order Price Protection, Market Order Spread Protection, and Size Limitation Protection in Options 3, Section 15(a)(1)(A), (1)(B), and (2)(B) respectively, for single leg orders, or (ii) Complex Order Price Protection as defined in Options 3, Section 16(c)(1) for Complex Orders." Adding these exceptions to the SQF rule as well as the

IOC rule will make clear that these order protections will not apply to IOC orders entered through SQF.

The Exchange further proposes to specify in Supplementary Material .02(d)(3) that Block Orders, Facilitation Orders, Complex Facilitation Orders, SOM Orders, Complex SOM Orders, PIM Orders, Complex PIM Orders, QCC Orders, QCC Complex Orders, Customer Cross Orders, and Customer Cross Complex Orders are considered to have a TIF of IOC. By their terms, these orders will be: (1) executed either on entry or after an exposure period, or (2) cancelled.⁵² The proposed changes in Supplementary Material .02(d)(3) memorialize current System behavior and are intended to bring greater transparency in how these order types operate today.

The Exchange is relocating rule text governing OPG orders from Options 3, Section 7(o) into Supplementary Material .02(e) to specify that orders may be entered with a TIF of OPG. The Exchange also proposes a number of changes to conform the Exchange's OPG rule with that of BX. Other than as specified below, the proposed changes do not modify current Exchange OPG functionality. The Exchange proposes to remove the word "limit" from the relocated OPG rule text in Supplementary Material .02(e) in order to reflect that the Exchange will now allow both Market and Limit OPG Orders. As noted above, this is a proposed functionality change to align with current BX OPG functionality.⁵³ The Exchange also proposes non-substantive changes to replace the current references to the opening rotation with the term "Opening Process" as defined in Options 3, Section 8. The Exchange further proposes to codify current OPG behavior by stating that OPG orders may not route.⁵⁴ Lastly, the Exchange proposes to memorialize current OPG behavior by indicating that OPG orders are not subject to any protections listed in Options 3, Section 15, except Size Limitation.⁵⁵ Today, the Exchange does not apply any of the risk protections in Options 3, Section 15 (except Size Limitation) because the Opening Process itself has boundaries within which orders will be executed.⁵⁶

⁴⁵ The current IOC rule references the Limit Order Price Protection as set forth in Options 3, Section 15(a)(1)(A). As discussed later in this filing, the Exchange is proposing to replace the existing Limit Order Price Protection with a similar risk management tool called Order Price Protection. See proposed Options 3, Section 15(a)(1)(A).

⁴⁶ Market Orders will be rejected if the NBBO is wider than a preset threshold at the time the order is received by the System. Market Order Spread Protection shall not apply to the Opening Process or during a trading halt. The Exchange may establish different thresholds for one or more series or classes of options. See Options 3, Section 15(a)(1)(B).

⁴⁷ There is a limit on the number of contracts an incoming order or quote may specify. Orders or quotes that exceed the maximum number of contracts are rejected. The maximum number of contracts, which shall not be less than 10,000, is established by the Exchange from time-to-time. See Options 3, Section 15(a)(2)(B).

⁴⁸ This risk protection is currently called the Limit Order Price Protection in Options 3, Section 16(c)(1). The Exchange will rename this risk protection in a subsequent filing to the Complex Order Price Protection.

⁴⁹ See BX Options 3, Section 7(b)(2)(B) for substantially similar language. BX's rule does not refer to the Complex Order Price Protection because BX does not offer complex functionality today.

⁵⁰ See BX Options 3, Section 7(b)(2)(B).

⁵¹ See Options 2, Section 5(e).

⁵² See BX Options 3, Section 7(b)(2)(C) for substantially similar language for PRISM orders.

⁵³ See BX Options 3, Section 7(b)(1).

⁵⁴ See BX Options 3, Section 7(b)(1) for identical language.

⁵⁵ *Id.*

⁵⁶ See Options 3, Section 8.

Opening Process

In connection with the technology migration, the Exchange proposes several enhancements to its Opening Process in Options 3, Section 8. The Exchange first proposes to remove the current limitation that only allows routable Public Customer⁵⁷ interest to route during the Opening Process. Instead, all routable market participant interest will be allowed to route to align the Exchange's opening functionality with BX.⁵⁸ Like BX, the Exchange believes that it will be beneficial to provide all market participants with the opportunity to have their interest executed on away markets during the Opening Process. To effectuate the foregoing, the Exchange proposes to amend Options 3, Section 8(b) to remove the sentence providing that only Public Customer interest is routable during the Opening Process. The Exchange further proposes to make a related change in Options 3, Section 8(i)(7), which currently provides that the System will route routable Public Customer interest pursuant to Options 3, Section 10(c)(1)(A). Specifically, the Exchange proposes to remove the reference to Public Customer to indicate all routable interest will route in accordance with the Exchange's priority rule. The Exchange will also update the cross-cite to Options 3, Section 10(c)(1)(A), currently pointing to the Priority Customer priority overlay, to the more general priority rule in Options 3, Section 10(c). The Exchange further proposes to amend Options 3, Section 8(j)(6) to remove the references to "Public Customer." As amended, Section 8(j)(6) will provide: "The System will execute orders at the Opening Price that have contingencies

⁵⁷ The term "Public Customer" means a person or entity that is not a broker or dealer in securities. See Option 1, Section 1(a)(42).

⁵⁸ See BX Options 3, Section 8. See also Securities Exchange Act Release No. 89731 (September 1, 2020), 85 FR 55524 (September 8, 2020) (SR-BX-2020-016) (noting throughout that BX permits all market participants to route during its Opening Process). At the end of the Opening Process, pursuant to ISE Options 3, Section 8(j)(6) and subsection (A), the System will execute orders at the Opening Price that have contingencies (such as, without limitation, Reserve Orders) and non-routable orders, such as a 'Do-Not-Route' or 'DNR' Orders, to the extent possible. The System will only route non-contingency Public Customer orders, except that Public Customer Reserve Orders may route up to their full volume. For contracts that are not routable, pursuant to ISE Options 3, Section 8(j)(6), such as DNR Orders and orders priced through the Opening Price, the System will cancel (1) any portion of a Do-Not-Route order that would otherwise have to be routed to the exchange(s) disseminating the ABBO for an opening to occur, or (2) any order or quote that is priced through the Opening Price. All other interest will be eligible for trading after opening.

(such as, without limitation, Reserve Orders) and non-routable orders, such as "Do-Not-Route" or "DNR" Orders, to the extent possible. The System will only route non-contingency orders, except that Reserve Orders may route up to their full volume."

In addition, the Exchange proposes to amend Options 3, Section 8(g)(1), which currently describes how the Potential Opening Price would be calculated when there is more than one Potential Opening Price.⁵⁹ Today, Section 8(g)(1) provides that when two or more Potential Opening Prices would satisfy the maximum quantity criterion and leave no contracts unexecuted, the System takes the highest and lowest of those prices and takes the mid-point; if such mid-point is not expressed as a permitted minimum price variation, it will be rounded to the minimum price variation that is closest to the closing price for the affected series from the immediately prior trading session. If there is no closing price from the immediately prior trading session, the System will round up to the minimum price variation to determine the Opening Price. The Exchange now proposes to no longer round in the direction of the previous trading day's closing price and simply round up to the minimum price variation if the mid-point of the high/low is not expressed as a permitted minimum price variation. The proposed changes are intended to simplify and bring greater transparency to the Opening Process, as market participants can now have a better sense of how the Potential Opening Price will be calculated without having to account for the closing price of each options series.

The Exchange further proposes to amend Options 3, Section 8(i)(3), which currently describes the determination of Opening Quote Range ("OQR") boundaries in certain scenarios.⁶⁰ Specifically, the Exchange proposes to replace "are marketable against the ABBO" with "cross the ABBO" to more precisely describe the specified scenario within in this rule. The Exchange notes that this is not a System change, but rather a clarifying change around the applicability of the rule text. Lastly, the Exchange proposes a non-substantive change in paragraph (j)(3)(B) of Options

⁵⁹ The Potential Opening Price indicates a price where the System may open once all other Opening Process criteria is met.

⁶⁰ OQR is an additional type of boundary used in the Opening Process, and is intended to limit the opening price to a reasonable, middle ground price, thus reducing the potential for erroneous trades during the Opening Process.

3, Section 8 to remove the extra instance of "which is" from the second sentence.

Auction Mechanisms

Facilitation and Solicited Order Mechanisms

The Exchange first proposes to make clarifying changes in Options 3, Section 11 (Auction Mechanisms). Today, Supplementary Material .02 to Options 3, Section 11 states that Responses⁶¹ represent non-firm interest that can be canceled at any time prior to execution, and that Responses are not displayed to any market participants. The Exchange now proposes a non-substantive change to relocate this language into the introductory paragraph of Options 3, Section 11 after the definition of "Response" for better readability. The Exchange also proposes to add "or modified" after the "canceled" to indicate that auction Responses may be canceled or modified at any time prior to execution. This is not a change to current System behavior, but rather a clarification that better aligns the rule text to existing functionality. The Exchange also notes that the rules for the complex Facilitation and Solicited Order Mechanisms in Options 3, Sections 11(c)(7) and (e)(4), respectively, already provide for this concept.⁶²

Price Improvement Mechanism

The Exchange proposes a number of changes to Options 3, Section 13 (Price Improvement Mechanism for Crossing Transactions), some of which are System changes to align with existing BX Price Improvement Mechanism ("BX PRISM") functionality and others that are non-System changes that add greater clarity to current PIM behavior. The Exchange proposes to amend Options 3, Section 13(b)(4) to add clarifying rule text to the current sentence, which states, "The Crossing Transaction⁶³ may not be canceled, but the price of the Counter-Side Order may be improved

⁶¹ For purposes of Options 3, Section 11, a "Response" means an electronic message that is sent by Members in response to a broadcast message. A "broadcast message" is an electronic message sent by the Exchange to all Members upon entry of an order into one of the auction mechanisms listed within Options 3, Section 11 (*i.e.*, Block, Facilitation, or Solicited Order Mechanisms).

⁶² Specifically, these provisions state that Responses submitted by Members shall not be visible to other auction participants during the exposure period and can be modified or deleted before the exposure period has ended.

⁶³ A "Crossing Transaction" is comprised of the order the Electronic Access Member represents as agent (the "Agency Order") and a counter-side order for the full size of the Agency Order (the "Counter-Side Order"). See Options 3, Section 13(b).

during the exposure period.” The Exchange proposes to add “or modified” after the word “canceled” to make clear that the Crossing Transaction may not be canceled or modified, but the Counter-Side Order may be improved during the exposure period. This proposed change would not amend the current System, rather it would bring greater clarity to the rule text that modifications are not permitted unless the Counter-Side Order is being improved during the exposure period.

The Exchange proposes to add rule text within Options 3, Section 13(b)(5) which states, “Crossing Transactions submitted at or before the opening of trading are not eligible to initiate an auction and will be rejected.” The Exchange notes that this rule text represents current System behavior. BX has a similar provision within BX Options 3, Section 13(i)(E). The Exchange notes that this rule text will bring greater clarity to when a Crossing Transaction would be eligible to initiate a PIM.

The Exchange proposes to amend the current PIM functionality within Options 3, Section 13(c)(3). Today, during the exposure period, Improvement Orders⁶⁴ may not be canceled, however, Improvement Orders may be modified to (i) increase the size at the same price, or (ii) improve the price of the Improvement Order for any size up to the size of the Agency Order. The Exchange proposes to amend this functionality so that Improvement Orders may be canceled or modified similar to functionality on BX PRISM today within BX Options 3, Section 13(ii)(A)(8). The modification and cancellation of an Improvement Order through OTTO will be similar to the manner in which a Cancel and Replace Order⁶⁵ would be handled outside of

⁶⁴ Improvement Orders are responses entered by Members to indicate the size and price at which they want to participate in the execution of the Agency Order. See Options 3, Section 13(c)(1).

⁶⁵ Cancel and Replace Orders shall mean a single message for the immediate cancellation of a previously received order and the replacement of that order with a new order. If the previously placed order is already filled partially or in its entirety, the replacement order is automatically canceled or reduced by the number of contracts that were executed. The replacement order will retain the priority of the cancelled order, if the order posts to the Order Book, provided the price is not amended, size is not increased, or in the case of Reserve Orders, size is not changed. If the replacement portion of a Cancel and Replace Order does not satisfy the System’s price or other reasonability checks (e.g. Options 3, Section 15(b)(1)(A) and (b)(1)(B); and Supplementary Material .07 (a)(1)(A), (b) and (c)(1) to Options 8, Section 14) the existing order shall be cancelled and not replaced. See Supplementary Material .02 to Options 3, Section 7 (as described above, the current definition will be moved to proposed

the auction process. For Improvement Orders through SQF, the modification and cancellation of such orders will be handled by sending new Improvement Orders that overwrite the existing Improvement Order with updated price/quantity instructions.

Next, the Exchange proposes to amend Options 3, Section 13(d)(5), which currently states, “If a trading halt is initiated after an order is entered into the Price Improvement Mechanism, such auction will be automatically terminated without execution.” The Exchange proposes to instead provide, “If a trading halt is initiated after an order is entered into the Price Improvement Mechanism, such auction will be automatically terminated with execution solely with the Counter-Side Order.” In the event of a trading halt, since the Counter-Side Order has guaranteed that an execution will occur at the same price as the Crossing Transaction or better, and Improvement Orders offer no such guarantee, the Counter-Side Order is the only valid price at which to execute the Crossing Transaction. This is similar to functionality on BX PRISM at BX Options 3, Section 13(ii)(C).⁶⁶

The Exchange also proposes a System change to adopt a new same side execution price check for PIM, which will be described in new subsection (d)(6) of Options 3, Section 13 and will be functionally identical to BX PRISM. As proposed, Options 3, Section 13(d)(6) will provide that if the PIM execution price would be the same or better than an order on the limit order book on the same side of the market as the Agency Order, the Agency Order may only be executed at a price that is at least \$0.01 better than the resting order’s limit price. If such resting order’s limit price is equal to or crosses the initiating Crossing Transaction price, then the entire Agency Order will trade at the initiating Crossing Transaction price with all better priced

Options 3, Section 7(f) with no substantive changes).

⁶⁶ BX Options 3, Section 13(ii)(C) provides that if the situations described in sub-paragraphs (B)(2) or (3) above occur, the entire PRISM Order will be executed at: (1) in the case of the BX BBO crossing the PRISM Order stop price, the best response price(s) or, if the stop price is the best price in the Auction, at the stop price, unless the best response price is equal to or better than the price of a limit order resting on the Order Book on the same side of the market as the PRISM Order, in which case the PRISM Order will be executed against that response, but at a price that is at least \$0.01 better than the price of such limit order at the time of the conclusion of the Auction; or (2) in the case of a trading halt on the Exchange in the affected series, the stop price, in which case the PRISM Order will be executed solely against the Initiating Order. Any unexecuted PAN responses will be cancelled.

counter-side interest being considered for execution at the initiating Crossing Transaction price. As noted above, this price check will be functionally identical to the same side execution price check on BX PRISM today.⁶⁷ Like BX, the proposed price check is designed to ensure that the Exchange would not trade at prices that would lock or cross interest on the same side of the market as the Agency Order where limit orders have rested and obtained priority to execute at that price. In the event where a limit order arrives on the same side of the market as the Agency Order and is at the same or better price than the initiating Crossing Transaction price, the Exchange would execute the entire PIM order at the initiating Crossing Transaction price. The execution takes place at this price because the PIM is guaranteed an execution and the PIM agency side instructions would not allow an execution to take place at a higher (lower) price than submitted for a buying (selling) agency side PIM order. Considering that the limit order has arrived either at or better on the same side as the Agency Order than the agency side price, the initiating Crossing Transaction price is the only price at which the guaranteed execution can take place.

The following examples illustrate how the proposed PIM execution price check would work:

Example: PIM executes with Improvement Order at \$0.01 better than a limit order on the same side of the market as the Agency Order

Firm Limit order to buy @ 1.40 arrives prior to the PIM auction beginning

ISE BBO: 1.40 × 2.00

PIM Agency Order to buy 20 @ 1.50 arrives with an auto-match price of 1.50 indicated

PIM Improvement Order⁶⁸ to sell 20 @ 1.40 arrives

Auction concludes after timer and PIM Agency Order trades 20 with PIM

⁶⁷ BX Options 3, Section 13(ii)(I) provides that if the execution price of the PRISM Auction would be the same or better than an order on the limit order book on the same side of the market as the PRISM Order, the PRISM Order may only be executed at a price that is at least \$0.01 better than the resting order’s limit price. If such resting order’s limit price is equal to or crosses the stop price, then the entire PRISM Order will trade at the stop price with all better priced interest being considered for execution at the stop price.

⁶⁸ “Improvement Orders” are responses sent by Members during the PIM’s exposure period in response to the PIM that indicate the size and price at which they want to participate in the execution of the Agency Order. See Options 3, Section 13(c)(1).

Improvement Order @ 1.41; the Counter-Side Order⁶⁹ cancels
Example: PIM executes at Agency Price with all better priced interest when limit order on same side equals or crosses the initiating Crossing Transaction price

Assume ISE BBO: 1.00 × 2.00
 PIM Agency Order to buy 20 @ 1.50 arrives with an auto-match price of 1.50 indicated

PIM Improvement Order to sell 20 @ 1.40 arrives

During the exposure period, Firm Limit order to buy @ 1.50 arrives

Auction concludes after timer and PIM Agency Order trades 12 with PIM Improvement Order @ 1.50 and 8 with the Counter-Side Order @ 1.50 (*i.e.*, the guaranteed execution price) because all better priced interest must trade at the initiating Crossing Transaction price when the limit order on the same side equals or crosses the initiating Crossing Transaction price.⁷⁰ The remainder of the Counter-Side Order and the remainder of the PIM Improvement Order cancel. The execution takes place at 1.50 because the PIM is guaranteed an execution, and the PIM agency side instructions would not allow an execution to take place at a higher price than the submitted 1.50 buying price for the agency side PIM order.

Further, the Exchange proposes amendments to Complex PIM, some of which are similar to the amendments proposed for simple PIM. Similar to simple PIM, the Exchange proposes to amend Options 3, Section 13(e)(4)(ii) to state, “During the exposure period, Improvement Complex Orders may be canceled or modified.”⁷¹ The Exchange proposes to amend this functionality so that Improvement Orders may be canceled or modified similar to functionality on BX today within BX Options 3, Section 13(ii)(A)(8).⁷²

⁶⁹The “Counter-Side Order” is the counter-side order for the full size of the Agency Order that is entered into the PIM by the initiating Electronic Access Member. See Options 3, Section 13(b).

⁷⁰The order is allocated pursuant to Options 3, Section 13(d)(3) where the Counter-Side Order will be allocated the greater of 1 contract or 40%, which, in this case, equates to 8 contracts out of the 20 contracts. Thus, in this case, the Improvement Order is allocated 12 contracts to fully execute the 20 contracts of the original PIM Agency Order.

⁷¹Options 3, Section 13(e)(4)(ii) currently states, “During the exposure period, Improvement Complex Orders may not be canceled, but may be modified to (1) increase the size at the same price, or (2) improve the price of the Improvement Complex Order for any size.”

⁷²BX Options 3, Section 13(ii)(A)(8) provides that a PAN response must be equal to or better than the displayed NBBO at the time of receipt of the PAN response. PAN responses may be modified or cancelled during the Auction. A PAN response submitted with a price that is outside the NBBO will be rejected.

The Exchange also proposes to relocate the last sentence of Options 3, Section 13(e)(3) into Options 3, Section 13(e)(4)(iv) at new “(E)”. The Exchange proposes similar rule text within simple PIM to indicate that an exposure period would automatically terminate if a trading halt is initiated after the order is entered into a Complex PIM. The relocation would add the rule text to a more logical place within the Complex PIM rule.

The Exchange further proposes in the same rule to memorialize another scenario in which the exposure period for a Complex PIM would early terminate today. Specifically, the Exchange proposes to amend Options 3, Section 13(e)(4)(iv) at new “(D)” to provide that the exposure period will automatically terminate when a resting Complex Order in the same complex strategy on either side of the market becomes marketable against the Complex Order book or bids and offers for the individual legs. The Exchange believes that the proposed codification will detail for market participants the situations in which early termination would occur for Complex PIMs today, and align the Exchange’s rules with current System behavior. The Exchange notes that the exposure period for a Complex Order Exposure likewise early terminates today when a resting Complex Order becomes marketable against the Complex Order book or bids and offers for the individual legs.⁷³ Accordingly, the proposed language closely tracks existing Complex Order Exposure language. The Exchange believes that it is appropriate to early terminate Complex PIM under these circumstances for the following reasons. When the resting Complex Order is on the same side as the Agency Complex Order, interest that becomes marketable against the resting Complex Order would also be marketable against the Complex PIM order. Therefore, early terminating the Complex PIM would allow the Complex PIM order to interact with this interest given that the Complex PIM order is at a superior price

⁷³Supplementary Material .01(b)(ii) of ISE Options 3, Section 14 provides that the exposure period for a Complex Order will end immediately: (A) upon the receipt of a Complex Order for the same complex strategy on either side of the market that is marketable against the Complex Order book or bids and offers for the individual legs; (B) upon the receipt of a non-marketable Complex Order for the same complex strategy on the same side of the market that would cause the price of the exposed Complex Order to be outside of the best bid or offer for the same complex strategy on the Complex Order book; or (C) when a resting Complex Order for the same complex strategy on either side of the market becomes marketable against interest on the Complex Order book or bids and offers for same individual legs of the complex strategy.

compared to the resting Complex Order, thus providing an opportunity for price improvement for the Agency Complex Order. Additionally, when the resting Complex Order is on the opposite side of the Agency Complex Order, interest that arrives marketable against the resting Complex Order is now at a superior price to the Agency Complex Order. The Exchange would therefore early terminate in this scenario and execute the Complex PIM order with its contra side order because it is no longer at top of book.

The Exchange also proposes to codify existing System behavior in the Complex PIM rule at Options 3, Section 13(e)(5), which currently provides that when a marketable Complex Order on the opposite side of the Agency Complex Order ends the exposure period, it will participate in the execution of the Agency Complex Order at the price that is mid-way between the best counter-side interest and the same side best bid or offer on the Complex Order book or net price from ISE best bid or offer on individual legs, whichever is better, so that both the marketable Complex Order and the Agency Complex Order receive price improvement. Specifically, the Exchange proposes to add that transactions will be rounded, when necessary, to the \$0.01 increment that favors the Agency Complex Order. As noted above, this is not a functionality change, but rather is intended to better articulate current System behavior. The Exchange also notes that the simple PIM rule already articulates that the mid-way price will be rounded to the \$0.01 increment that favors the Agency Order in Options 3, Section 13(d)(4). The rounding for Complex PIM currently operates the same way as simple PIM in this respect, so the proposed Complex PIM language closely tracks the simple PIM language.

Finally, the Exchange proposes to amend Supplementary Material .02 to Options 3, Section 13 to add the following sentence: “It will be considered a violation of this Rule and will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Options 9, Section 1 if an Electronic Access Member submits a PIM Order (initiating an auction) and also submits its own Improvement Order in the same auction.” BX has a similar prohibition within BX Options 3, Section 13(iii). The proposed new rule is intended to provide guidance to Members where certain behavior within a PIM will not be considered a bona fide transaction.

Order Price Protection

The Exchange currently has a Limit Order Price Protection in Options 3, Section 15(a)(1)(A), which is a “fat finger” check designed to address risks to market participants of human error in entering certain orders at unintended prices. Specifically, there is a limit on the amount by which incoming limit orders to buy may be priced above the Exchange’s best offer and by which incoming limit orders to sell may be priced below the Exchange’s best bid. Limit orders that exceed the pricing limit are rejected. The limit is established by the Exchange from time-to-time for orders to buy (sell) as the greater of the Exchange’s best offer (bid) plus (minus): (i) an absolute amount not to exceed \$2.00, or (ii) a percentage of the Exchange’s best bid/offer not to exceed 10%.

The Exchange proposes to replace the existing risk protection with an Order Price Protection (“OPP”) that would similarly prevent the execution of limit orders at prices outside pre-set parameters. The proposed OPP will be functionally similar to the OPP functionality currently offered by BX.⁷⁴ In particular, proposed Options 3, Section 15(a)(1)(A) will provide that OPP is a feature of the System that prevents limit orders at prices outside of pre-set standard limits from being accepted by the System. Further, OPP will reject incoming orders that exceed certain parameters according to the following algorithm set forth in proposed Options 3, Section 15(a)(1)(A)(ii):

(a) If the better of the NBBO or the internal market BBO (the “Reference BBO”) on the contra-side of an incoming order is greater than \$1.00, orders with a limit more than the greater of the below will cause the order to be rejected by the System upon receipt.

(1) 50% less (greater) than such contra-side Reference Best Bid (Offer); or

(2) a configurable dollar amount not to exceed \$1.00 less (greater) than such contra-side Reference Best Bid (Offer) as specified by the Exchange announced via an Options Trader Alert.

(b) If the Reference BBO on the contra-side of an incoming order is less than or equal to \$1.00, orders with a limit more than the

greater of the below will cause the order to be rejected by the System upon receipt.

(1) 100% less (greater) than such contra-side Reference Best Bid (Offer); or

(2) a configurable dollar amount not to exceed \$1.00 less (greater) than such contra-side Reference Best Bid (Offer) as specified by the Exchange announced via an Options Trader Alert.

The proposed OPP will be calculated using the better of the NBBO or the internal market BBO (*i.e.*, the Reference BBO) instead of the Exchange BBO as currently used today, which will align to current BX functionality.⁷⁵ Like BX, the Exchange believes that calculating OPP on the basis of the better of the NBBO or the internal market BBO protects investors and the public interest where the internal market BBO is better than the NBBO. In addition, the proposed OPP parameters will be the greater of a percentage threshold or fixed dollar amount, similar to today’s limit order price protection that uses the greater of a percentage or fixed dollar threshold. The proposed parameters are identical to BX’s OPP.⁷⁶ The Exchange believes that the proposed algorithm for OPP would continue to provide a reasonable limit to the range where orders will be accepted.

As set forth in proposed Options 3, Section 15(a)(1)(A)(i), OPP will be operational each trading day after the opening until the close of trading, except during trading halts, which will be identical to current functionality.⁷⁷ The Exchange also proposes in this paragraph to add identical language as BX, which will provide the Exchange with discretion to temporarily deactivate OPP from time to time on an intra-day basis if it is determined that unusual market conditions warranted deactivation in the interest of a fair and orderly market. Like BX, the Exchange believes that it will be useful to have the flexibility to temporarily disable OPP intra-day in response to an unusual market event (for example, if dissemination of data was delayed and resulted in unreliable underlying values needed for the Reference BBO). Members would be notified of intra-day OPP deactivation and any subsequent reactivation by the Exchange through the issuance of System status messages. Specifically, the Exchange proposes to add in Options 3, Section 15(a)(1)(A)(i) that OPP may be temporarily

deactivated on an intra-day basis at the Exchange’s discretion.

The following examples illustrate the application of the proposed OPP thresholds:

Example: An option priced less than or equal to \$1.00

For a penny MPV option with a BBO on ISE of \$0.01 × \$0.02, consider that the configurable dollar amount is set to \$0.05

If the incoming order was less than \$1.00, and the Reference BBO is the internal market BBO, the System will reject buy orders priced higher than the greater of (i) \$0.04 (100% greater than the contra-side Reference Best Offer of \$0.02) or (ii) \$0.07 (\$0.02 offer + \$0.05 configuration)

Example: An option priced greater than \$1.00

For a penny MPV option with a BBO on ISE of \$1.01 × \$1.02, consider that the configurable dollar amount is set to \$0.05

If the incoming order was more than \$1.00, and the Reference BBO is the internal market BBO, the System will reject buy orders priced higher than the greater of (i) \$1.53 (50% greater than the contra-side Reference Best Offer of \$1.02) or (ii) \$1.07 (\$1.02 offer + \$0.05 configuration)

Post-Only Quoting Protection

The Exchange proposes to adopt an optional quoting protection for Market Makers that will be identical to current BX functionality.⁷⁸ This optional risk protection would allow Market Makers to prevent their quotes from removing liquidity from the Exchange’s order book upon entry.

Specifically, the Exchange proposes to adopt the new risk protection in Options 3, Section 15(a)(3)(C). As proposed, Market Makers may elect to configure their SQF protocols to prevent their quotes from removing liquidity (“Post-Only Quote Configuration”). A Post-Only Quote Configuration would re-price or cancel a Market Maker’s quote that would otherwise lock or cross any resting order or quote⁷⁹ on the order book upon entry. Market Makers may elect whether to re-price or cancel their quotes with this functionality. When configured for re-price, quotes would be re-priced and displayed by the System to one MPV below the current best offer (for bids) or above the current best bid (for offers). Notwithstanding the

⁷⁴ BX’s OPP is currently memorialized in BX Options 3, Section 15(a)(1), which provides that OPP is a feature of the System that prevents certain day limit, good til cancelled, and immediate or cancel orders at prices outside of pre-set standard limits from being accepted by the System. BX’s rule also provides that OPP applies to all options but does not apply to market orders. As described above, the Exchange is proposing to adopt an OPP rule that more accurately describes this functionality than BX’s current OPP rule. BX will file a separate rule change to conform its OPP rule with the Exchange’s proposed rule text.

⁷⁵ See BX Options 3, Section 15(a)(1)(B).

⁷⁶ *Id.* The Exchange will initially set the fixed dollar configuration at \$0.05, identical to BX.

⁷⁷ See Options 3, Section 15(a)(1)(A) (currently providing that the limit order price protection does not apply to the opening process or during a trading halt).

⁷⁸ See BX Options 3, Section 15(c)(3).

⁷⁹ This would include any re-priced orders as described in the Re-Pricing Filing as proposed Options 3, Section 5(d), ALOs as described in proposed Options 3, Section 7(n), and any re-priced quotes as described in Options 3, Section 4(b)(6). As described above, ALOs may re-price.

aforementioned, if a quote with a Post-Only Quote Configuration would not lock or cross an order or quote on the System but would lock or cross the NBBO, the quote will be handled pursuant to Options 3, Section 4(b)(6).⁸⁰ When configured for cancel, Market Makers will have their quotes cancelled whenever the quote would lock or cross the NBBO or be placed on the book at a price other than its limit price. Finally, the Exchange notes that similar to BX, this risk protection will not apply during an Opening Process because the order book is established once options series are open for trading.

Below are some examples of the Post-Only Quote Configuration functionality.

Re-Priced Post-Only Quote Configuration—Penny Interval Program Display and Execution Example

- Penny Interval Program MPV in open trading state
- Market Makers A and C do not have Post-Only Quote Configuration risk protection configured
- Market Maker B is configured for Post-Only Quote Configuration re-price
- Market Maker A quote \$0.98 (10) × \$1.00 (10)
- ABBO \$0.96 × \$1.03
- Market Maker B quote \$1.00 (10) × \$1.01 (10) arrives
 - Bid side of quote re-prices onto order book @ 0.99 and sets displayed NBBO to 10 quantity
 - Offer side rests at 1.01 without issue
- Market Maker C quote \$0.97 (20) × \$0.98 (20) arrives
 - Trades 10 with Market Maker B @ \$0.99 and 10 with Market Maker A @ \$0.98

Market Maker B avoids taking liquidity while Market Maker C, who chose not to be configured for such, removes liquidity by interacting with re-priced interest on ISE's order book.

Re-Priced Post-Only Quote Configuration—Non-Penny Interval Program Display and Execution Example

- Non-Penny Interval Program MPV in open trading state
- Market Maker A quote \$0.95 (10) × \$1.00 (10)
- ABBO \$0.85 × \$1.05

⁸⁰Options 3, Section 4(b)(6) provides that a quote will not be executed at a price that trades through another market or displayed at a price that would lock or cross another market. If, at the time of entry, a quote would cause a locked or crossed market violation or would cause a trade-through violation, it will either be re-priced and displayed at one minimum price variance above (for offers) or below (for bids) the national best price, or immediately cancelled, as configured by the Member.

- Market Maker B (configured for Post-Only Quote Configuration and selection of re-price upon quote) quote arrives \$1.00 (5) × \$1.05 (5)
 - Bid side quote re-prices on order book to \$0.95
 - Displays on order book @ \$0.95 (bid), which now shows (15 quantity)
 - Offer side quote books and displays in Depth of Market Feed at \$1.05
- Order to sell 10 contracts arrives @ \$0.95
 - 7 contracts execute with Market Maker A @ \$0.95
 - 3 contracts execute with Market Maker B @ \$0.95

In this example, the Market Maker avoided taking liquidity by deploying the Post-Only Quote Configuration with re-price.

Kill Switch

As set forth in Options 3, Section 17, the Exchange offers an order cancellation Kill Switch, which is an optional tool that allows Members to initiate a message to the System to promptly cancel and restrict their order activity on the Exchange, or across both the Exchange and its affiliate, Nasdaq GEMX, LLC. Members may submit a Kill Switch request to the System for certain identifier(s) (“Identifier”) on either a user or group level.⁸¹ Today, Members can log in through a graphical user interface (“GUI”) to send a message to the Exchange to initiate the order cancellation Kill Switch.⁸² As an alternative to the GUI Kill Switch, Members may also send a message through one of the Exchange's order entry ports (*i.e.*, FIX, Precise, and OTTO) to initiate the order cancellation Kill Switch.⁸³ Once a Member initiates the Kill Switch (either through the GUI or an order entry port), it will result in the cancellation of all existing orders for the requested Identifier(s). The Member will be unable to enter any additional orders for the affected Identifier(s) until the Member sends a re-entry request to the Exchange.⁸⁴

Due to the lack of demand for the GUI Kill Switch by Members, the Exchange proposes to decommission this optional tool with the planned technology migration.⁸⁵ With the proposed changes,

⁸¹Identifiers include Exchange accounts, ports, and/or mnemonics. Thus, a Member using Kill Switch may elect to cancel orders for an individual Identifier (*e.g.*, mnemonic) or any group of Identifiers (*e.g.*, all mnemonics within one Member firm). Permissible groups must reside within a single Member firm. See Options 3, Section 17(a).

⁸²See Options 3, Section 17(a)(2)

⁸³See Options 3, Section 17(a)(1).

⁸⁴See Options 3, Section 17(a)(3).

⁸⁵No Members have used the GUI Kill Switch for order cancellation in 2022. The Exchange will

the Exchange seeks to streamline its product offerings and to reallocate Exchange resources to other business and risk management initiatives. While the Exchange will no longer offer this optional risk protection to Members through the GUI, it will continue to offer this functionality through FIX, Precise, and OTTO.

In addition, all Members may contact the Exchange's market operations staff to request that the Exchange cancel any of their existing bids, offers, or orders in any series of options.⁸⁶ Furthermore, the Exchange will continue to have System-enforced risk mechanisms that automatically remove orders for the Member once certain pre-set thresholds or conditions are met. This includes risk protections such as the market wide risk protection⁸⁷ and cancel on disconnect.⁸⁸

To effect the proposed decommission of the GUI Kill Switch for order cancellation, the Exchange proposes to amend Options 3, Section 17 by eliminating paragraph (a)(2) and related cross-cites within this rule. The Exchange will also renumber the paragraphs in this rule accordingly.

The Exchange notes that it previously amended its rules to decommission the quote removal Kill Switch that was available to Market Makers through the GUI.⁸⁹ The Exchange noted in SR–ISE–2021–19 that Market Makers did not use the GUI Kill Switch to remove their quotes, but rather, utilized other means such as the mass purge request through SQF. In this case, the Exchange similarly notes that no Members use the GUI Kill Switch to cancel their orders but rather, utilize other means like the port Kill Switch through FIX, Precise and OTTO to purge their existing orders from the System. As such, the Exchange believes that eliminating the GUI Kill Switch all together (including for orders as proposed herein) will streamline the

provide prior notice of the decommission to Members via Options Trader Alert.

⁸⁶See Options 3, Section 19.

⁸⁷The market wide risk protection automatically removes Member orders when certain firm-set thresholds are met. Once the thresholds are triggered, the Member must send a re-entry indicator to re-enter the System. See Options 3, Section 15(a)(1)(C).

⁸⁸When the OTTO or FIX Port detects the loss of communication with a Member's Client Application because the Exchange's server does not receive a Heartbeat message for a certain time period (“nn” seconds), the Exchange will automatically logoff the Member's affected Client Application and if the Member has elected to have its orders cancelled pursuant to Section 18(f) (for OTTO) or Section 18(g) (for FIX) automatically cancel all orders. See Options 3, Section 18(c) and (d).

⁸⁹See Securities Exchange Act Release No. 93017 (September 16, 2021), 86 FR 52700 (September 22, 2021) (SR–ISE–2021–19).

Exchange's risk protection offerings in a manner that reflects Member use.

Data Feeds and TradeInfo

In connection with the technology migration, the Exchange proposes a number of enhancements to its current data feed offerings in Options 3, Section 23(a), many of which are intended to conform with current BX functionality, as specified below.

As set forth in Options 3, Section 23(a)(1), the Exchange offers the Nasdaq ISE Depth of Market Data Feed ("Depth of Market Feed"), which currently provides aggregate quotes and orders at the top five price levels on ISE, and provides subscribers with a consolidated view of tradable prices beyond the BBO, showing additional liquidity and enhancing transparency for ISE traded options. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on the Exchange and identifies if the series is available for closing transactions only. In addition, subscribers are provided with total aggregate quantity, Public Customer aggregate quantity, Priority Customer aggregate quantity, price, and side (*i.e.*, bid/ask). This information is provided for each of the top five price levels on the Depth Feed. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to no longer provide book information for the top five price levels, and instead provide full depth-of-book information. As such, the Exchange will delete language that relates to top five price level information in the rule text. The Exchange also proposes to add more specificity around what would be provided in the opening/reopening order imbalance information (namely, the size of matched contracts and size of the imbalance). The proposed changes will closely align the information provided on the Exchange's Depth of Market Feed with that of BX's Depth of Market Feed, except the Exchange will not offer auction and exposure notifications on its Depth of Market Feed like BX does today.⁹⁰ The Exchange already offers auction and exposure notifications on the Nasdaq ISE Order Feed as described below.⁹¹ As

⁹⁰ See BX Options 3, Section 23(a)(1). As discussed below, the Exchange is instead proposing to offer these notifications on the Nasdaq ISE Order Feed. BX does not have a comparable order feed today.

⁹¹ BX does not have a comparable order feed today. However, the proposed data elements in the

amended, Options 3, Section 23(a)(1) would provide:

Nasdaq ISE Depth of Market Data Feed ("Depth of Market Feed") is a data feed that provides full order and quote depth information for individual orders and quotes on the Exchange book and last sale information for trades executed on the Exchange. The data provided for each options series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance).

As set forth in Options 3, Section 23(a)(2), the Exchange offers the Nasdaq ISE Order Feed ("Order Feed"), which currently provides information on new orders resting on the book (*e.g.*, price, quantity and market participant capacity). In addition, the feed also announces all auctions. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to update the information that would be available on the Order Feed. In particular, the Exchange would include Attributable Order tags⁹² (as provided by the Member) and related data content around displayed order types and specified order attributes (*e.g.*, OCC account number, give-up information, CMTA information).⁹³ The Exchange also proposes to add more specificity around what would be provided in the opening/reopening order imbalance information (namely, the size of matched contracts and size of the

ISE Order Feed already exist in the rules or technical specifications (for the Attributable Order content) of other options exchanges, as described below.

⁹² As discussed above, an Attributable Order is a market or limit order which displays the user firm ID for purposes of electronic trading on the Exchange. See Options 3, Section 7(h).

⁹³ The Exchange notes that Cboe has similar attributable order functionality in Cboe Rule 5.6(c) as an order a user designates for display (price and size) that includes the user's executing firm ID or other unique identifier. While Cboe does not have a comparable data feed rule, Cboe's technical specifications indicate that it currently has Participant ID and Client ID tags available on its Multicast PITCH data feed. See Section 4.6 in https://cdn.cboe.com/resources/membership/US_EQUITIES_OPTIONS_MULTICAST_PITCH_SPECIFICATION.pdf (relating to Participant ID or Client ID as optionally specified values).

imbalance). This specifically aligns to the data elements in both BX's Depth of Market Feed in BX Options 3, Section 23(a)(1) and the Exchange's proposed Depth of Market Feed in proposed Options 3, Section 23(a)(1). The Exchange will continue to provide auction notifications on the Order Feed, but will relocate the existing language to the end of the rule and adopt new content by providing that the proposed Order Feed will provide exposure notifications as well.⁹⁴ As amended, Options 3, Section 23(a)(2) would provide:

Nasdaq ISE Order Feed ("Order Feed") provides information on new orders resting on the book (*e.g.*, price, quantity, market participant capacity and Attributable Order tags when provided by a Member). The data provided for each option series includes the symbols (series and underlying security), displayed order types, order attributes (*e.g.*, OCC account number, give-up information, CMTA information), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening (size of matched contracts and size of the imbalance), auction and exposure notifications.

As set forth in Options 3, Section 23(a)(3), the Exchange offers the Nasdaq ISE Top Quote Feed, which currently calculates and disseminates ISE's best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable order and quote interest in the System. The feed also provides last trade information along with opening price, daily trading volume, high and low prices for the day. The data provided for each option series includes the symbols (series and underlying

⁹⁴ BX's Depth of Market Feed currently has identical content relating to auction and exposure notifications in BX Options 3, Section 23(a)(1). Exposure notifications are new with the introduction of routing and the removal of flash functionality in SR-ISE-2022-11. See Securities Exchange Act Release No. 94897 (May 12, 2022), 87 FR 30294 (May 18, 2022) (SR-ISE-2022-11) ("Routing Filing"). An exposure notification informs the market of an order that has arrived marketable against an ABBO and has a routing timer pursuant to the changes introduced to Options 5, Section 4 in the Routing Filing, while an auction notification is the notification of an auction for a Block, simple/complex Facilitation, simple/complex Solicited Order, simple/complex PIM auction, or a complex exposure auction pursuant to Supplementary Material .01 to Options 3, Section 14.

security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

The Exchange now proposes to harmonize certain features of this feed with BX's Top of Market Feed while retaining certain intended differences as specified below.⁹⁵ The Exchange first proposes to rename the Nasdaq ISE Top Quote Feed to the Nasdaq ISE Top of Market Feed ("Top Feed") to match the BX feed name. In addition, the Exchange proposes to make conforming changes to rename the Top Feed in Options 7, Section 7.C(iii) and Section 10.H. The Exchange will also make a corrective change in Options 7, Section 7.C(iii) to update an incorrect cross-reference to the Market Data pricing in Section 10.

The Exchange further proposes to no longer provide information for opening price, daily trading volume, high and low prices for the day. These are conforming changes that would align the information provided on the Exchange's Top Feed with information on BX's Top Feed.⁹⁶ The Exchange will continue to provide aggregated size information as a legacy holdover, which will be different than current BX functionality. Similarly, the Exchange will continue to provide opening/reopening order imbalance information on its Top Feed unlike BX. As amended, Options 3, Section 23(a)(3) will provide:

Nasdaq ISE Top of Market Feed ("Top Feed") calculates and disseminates ISE's best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable order and quote interest in the System. The feed also provides last trade information and for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The feed also provides order imbalances on opening/reopening.

As set forth in Options 3, Section 23(a)(4), the Exchange offers the Nasdaq ISE Trades Feed ("Trades Feed"), which currently displays last trade information along with opening price, daily trading volume, high and low prices for the day. The data provided for each option series includes the symbols (series and underlying security), put or call

indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only. The Exchange proposes to no longer provide information for opening price, daily trading volume, high and low prices for the day to align to the changes proposed for the Top Feed described above. As amended, Options 3, Section 23(a)(4) will provide:

Nasdaq ISE Trades Feed ("Trades Feed") displays last trade information. The data provided for each option series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on ISE and identifies if the series is available for closing transactions only.

As set forth in Options 3, Section 23(a)(5), the Exchange offers the Nasdaq ISE Spread Feed ("Spread Feed"), which currently is a feed that consists of: (1) options orders for all Complex Orders (*i.e.*, spreads, buy-writes, delta neutral strategies, etc.); (2) data aggregated at the top five price levels (BBO) on both the bid and offer side of the market; (3) last trades information. The Spread Feed provides updates, including prices, side, size and capacity, for every Complex Order placed on the Complex Order book. The Spread Feed shows: (1) aggregate bid/ask quote size; (2) aggregate bid/ask quote size for Professional Customer Orders; and (3) aggregate bid/ask quote size for Priority Customer Orders for ISE traded options. The feed also provides Complex Order auction notifications.

Similar to the proposed changes to the Depth of Market Feed above, the Exchange now proposes in the Spread Feed to no longer provide book information for the top five price levels, and instead provide full depth-of-book information. As such, the Exchange will delete language that relates to top five price level information in the rule text, and replace it with full depth language that is substantively similar to the language in the current BX Depth of Market Feed in BX Options 3, Section 23(a)(1) and in the Exchange's proposed Depth of Market Feed in Options 3, Section 23(a)(1), except the proposed language herein will be tailored to complex functionality. The Exchange also proposes to add Attributable Complex Order⁹⁷ tags (when provided by the Member) into the Spread Feed.⁹⁸

⁹⁷ An Attributable Complex Order is a Market or Limit Complex Order that is designated as an Attributable Order as provided in Options 3, Section 7(h). See Options 3, Section 14(b)(4).

⁹⁸ Cboe currently allows complex orders to be designated as Attributable. See Cboe Rule

The Exchange also proposes to delete the following sentence: "The Spread Feed provides updates, including prices, side, size and capacity, for every Complex Order placed on the ISE Complex Order book. The Spread Feed shows: (1) aggregate bid/ask quote size; (2) aggregate bid/ask quote size for Professional Customer Orders; and (3) aggregate bid/ask quote size for Priority Customer Orders for ISE traded options." The Exchange proposes instead to incorporate these concepts into the amended Spread Feed rule in a manner that is more consistent with the other amended rules in Options 3, Section 23(a).

As amended, Options 3, Section 23(a)(5) will provide:

Nasdaq ISE Spread Feed ("Spread Feed") is a feed that consists of: (1) options orders for all Complex Orders (*i.e.*, spreads, buy-writes, delta neutral strategies, etc.); (2) full Complex Order depth information, including prices, side, size, capacity, Attributable Complex Order tags when provided by a Member, and order attributes (*e.g.*, OCC account number, give-up information, CMTA information), for individual Complex Orders on the Exchange book; (3) last trades information; and (4) calculating and disseminating ISE's complex best bid and offer position, with aggregated size (including total size in aggregate, for Professional Order size in the aggregate and Priority Customer Order size in the aggregate), based on displayable Complex Order interest in the System. The feed also provides Complex Order auction notifications.

In addition, the Exchange proposes to no longer offer TradeInfo, which is a user interface set forth in Options 3, Section 23(b)(2) that permits Members to: (i) search all orders submitted in a particular security or all orders of a particular type, regardless of their status (open, canceled, executed, etc.); (ii) view orders and executions; and (iii) download orders and executions for recordkeeping purposes. TradeInfo users may also cancel open orders at the order, port or firm mnemonic level through TradeInfo. Due to the lack of demand for this interface by Members,⁹⁹ the Exchange seeks to decommission the TradeInfo interface when the Exchange migrates over to the enhanced Nasdaq platform with the technology

5.33(b)(3). While Cboe does not have a comparable data feed rule, Cboe's technical specifications indicate that it currently has Participant ID and Client ID tags available on its Complex Multicast PITCH data feed. See Section 3.8 in https://cdn.cboe.com/resources/membership/US_OPTIONS_COMPLEX_MULTICAST_PITCH_SPECIFICATION.pdf (relating to Participant ID or Client ID as optionally specified values).

⁹⁹ No Members logged into TradeInfo in 2022.

⁹⁵ See BX Options 3, Section 23(a)(2).

⁹⁶ *Id.*

migration.¹⁰⁰ The Exchange notes that FIX, FIX DROP,¹⁰¹ and the Clearing Trade Interface (“CTI”),¹⁰² which are available to all Members, can be used today to obtain order information that is currently available within TradeInfo, and FIX can be used to cancel orders today.

In connection with its proposal to retire TradeInfo, the Exchange also proposes to eliminate all references to TradeInfo in Options 7 (Pricing Schedule). Today, as set forth in Options 7, Section 7.C(ii)(3), the Exchange does not charge any fees for TradeInfo. With the proposed changes, the Exchange will amend Options 7 to delete Section 7.C(ii)(3) in its entirety.

Optional Risk Protections

The Exchange proposes to introduce optional quantity and notional value checks in new Options 3, Section 28, entitled “Optional Risk Protections.” The proposed optional order risk protections will be functionally identical to the protections currently offered by BX.¹⁰³ Members may use this voluntary functionality through their FIX or Precise protocols to limit the quantity and notional value they can send per order and on aggregate for the day. Specifically, Members may establish limits for the following parameters, as set forth in proposed subparagraphs (a)(1)–(4):

(1) Notional dollar value per order, which will be calculated as quantity multiplied by limit price multiplied by number of underlying shares;

¹⁰⁰ The Exchange will provide prior notice of the decommission to all Members through an Options Trader Alert.

¹⁰¹ FIX DROP is a real-time order and execution update message that is sent to a Member after an order has been received/modified or an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) executions; (ii) cancellations; (iii) modifications to an existing order; and (iv) busts or post-trade corrections. See Options 3, Section 23(b)(3).

¹⁰² CTI is a real-time cleared trade update message that is sent to a Member after an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement (“CMTA”) or The Options Clearing Corporation (“OCC”) number; (ii) badge or mnemonic; (iii) account number; (iv) information which identifies the transaction type (e.g., auction type) for billing purposes; and (v) market participant capacity. See Options 3, Section 23(b)(1).

¹⁰³ See BX Options 3, Section 28. While BX’s rule does not contain the level of granularity as proposed in the Exchange’s rule, including how orders are rejected if any of the optional risk protection values are exceeded, the Exchange understands that BX’s optional risk protections operate in the same manner. In addition, BX’s rule does not include Precise as this order entry port is not available on BX today.

(2) Daily aggregate notional dollar value;

(3) Quantity per order; and

(4) Daily aggregate quantity

Proposed paragraph (b) will provide that Members may elect one or more of the above optional risk protections by contacting Market Operations and providing a per order value (for (a)(1) and (a)(3)) or daily aggregate value (for (a)(2) and (a)(4)) for each order protection. Members may modify their settings through Market Operations. Proposed paragraph (c) will provide that the System will reject all incoming aggregated Member orders for any of the (a)(2) and (a)(4) risk protections after the value configured by the Member is exceeded. Proposed paragraph (d) will provide that the System will reject all incoming Member orders for any of the (a)(1) and (a)(3) risk protections upon arrival if the value configured by the Member is exceeded by the incoming order. The Exchange notes that the difference in handling between aggregate and individual order protections is necessary to allow for complete processing of the final order that puts a Member’s configured value over the aggregate values configured. While individual orders can be directly measured against the configured values for (a)(1) and (a)(3), the aggregate values must be calculated after complete processing of an order and thus the rejection of orders begins upon the arrival of the next order after the aggregate values in (a)(2) or (a)(4) have been exceeded.

The following example shows how the System will reject all subsequent incoming aggregated orders after the (a)(2) or (a)(4) values configured by the Member have been exceeded:

Aggregate Quantity Limit = 800.

1. Member enters an Order to Buy 500—Accepted
2. Member enters an Order to Buy 400—Accepted (Member did not meet the configured limit of 800 with the first order of 500 at the time Member entered the second order)
3. Member enters an Order to Buy 1—Rejected (Member already exceeded the configured limit of 800 with the second order of 400)

The following example shows how the System will reject all incoming orders upon arrival if the (a)(1) or (a)(3) values configured by the Member have been exceeded by the arriving order:

Quantity Per Order Limit = 800.

1. Member enters an Order to Buy 801—Rejected (Member exceeded the Quantity per order limit upon arrival with the order to buy 801 contracts)

Proposed paragraph (e) will provide that if a Member sets a notional dollar value, a Market Order would not be accepted from that Member. This is because notional dollar value is calculated by using an order’s specified limit price, and Market Orders by definition are priced at the best available price upon execution. Lastly, proposed paragraph (f) will provide that the proposed risk protections are only available for orders entered through FIX or Precise. Additionally, all of the proposed settings will be firm-level.

Corrective Changes

The Exchange proposes a few corrective changes in Options 3. First, the Exchange proposes to amend Supplementary Material .04 to Options 3, Section 7.¹⁰⁴ This rule presently states that orders may be entered on the Exchange with a routing strategy of FIND or SRCH, or, in the alternative, an order may be marked as DNR as provided in Options 5, Section 4 through FIX only. The Exchange now proposes to add “or Precise” after FIX to indicate that Members may also use Precise to route their orders using FIND or SRCH, or mark orders as DNR. The Exchange notes that FIX and Precise are the only order entry protocols on the Exchange that permit routing today. As such, this corrective change will make clear that the listed routing strategies in Supplementary Material .04 will be available for orders entered through FIX or Precise only.

Second, the Exchange proposes to fix an incorrect cross-reference set forth in Options 3, Section 10(b)(1). Specifically, the cross-reference therein to the minimum trading increment rule will be updated to Options 3, Section 3.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. As it relates to the elimination of fees for TradeInfo, the

¹⁰⁴ The Exchange notes that it recently added Supplementary Material .04 to Options 3 Section 7 in the Routing Filing, which is effective but not yet operative. The proposed changes herein to Supplementary Material .04 to Options 3, Section 7 therefore assumes that the rule changes in the Routing Filing are effective prior to the effectiveness of this filing.

¹⁰⁵ 15 U.S.C. 78f(b).

¹⁰⁶ 15 U.S.C. 78f(b)(5).

Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰⁸ 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.

Generally, the Exchange's proposal is intended to add or align certain System functionality with functionality currently offered on BX in order to provide a more consistent technology offering across affiliated Nasdaq options exchanges. A more harmonized technology offering, in turn, will simplify technology implementation, changes, and maintenance by market participants of the Exchange that are also participants on Nasdaq affiliated options exchanges. The Exchange's proposal also seeks to provide greater harmonization between the rules of the Exchange and its affiliates, which would result in greater uniformity, and less burdensome and more efficient regulatory compliance by market participants. As such, the proposal would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that more consistent rules will increase the understanding of the Exchange's operations for market participants that are also participants on the Nasdaq affiliated options exchanges, thereby contributing to the protection of investors and the public interest. The proposal also seeks to memorialize existing functionality and add more granularity in the Exchange's rules to describe how existing functionality operates today. The Exchange believes that such changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes would promote transparency in Exchange rules and reducing potential confusion, thereby ensuring that Members, regulators, and the public can more easily navigate the Exchange's Rulebook and better understand how options trading is conducted on the Exchange.

¹⁰⁷ 15 U.S.C. 78f(b).

¹⁰⁸ 15 U.S.C. 78f(b)(4) and (5).

Bulk Message

The Exchange believes that its proposal to memorialize its bulk message functionality is consistent with the Act as it will codify existing functionality, thereby promoting transparency in the Exchange's rules and reducing any potential confusion.¹⁰⁹ This functionality provides Market Makers with an additional tool to meet their various quoting obligations in a manner they deem appropriate, consistent with the purpose of the bulk message functionality to facilitate Market Makers' provision of liquidity. By providing Market Makers with additional control over the quotes they use to provide liquidity to the Exchange, this tool may benefit all investors through additional execution opportunities at potentially improved prices. As noted above, other options exchanges like Choe currently offer similar bulk messaging functionality that allow their market participants to submit block quantity quotes in a single electronic message.¹¹⁰

The Exchange does not believe that the offering the bulk message functionality to only Market Makers would permit unfair discrimination. Market Makers play a unique and critical role in the options market by providing liquidity and active markets, and are subject to various quoting obligations (which other market participants are not, including obligations to maintain active markets, update quotes in response to changed market conditions, to compete with other Market Makers in its appointed classes, and to provide intra-day quotes in its appointed classes.¹¹¹ Bulk message functionality provides Market Makers with a means to help them satisfy these obligations.

Order Types

The Exchange believes that the proposed changes to the rules governing Exchange order types are consistent with the Act. As discussed above, the proposed changes consist of several functional enhancements to align the Exchange's order types to existing BX order types, and rule adjustments that add more specificity and clarity to existing order types.

Market Orders

The Exchange believes that the proposed changes to the definition of

¹⁰⁹ As discussed above, this existing functionality is currently described in the Exchange's publicly available technical specifications. See *supra* note 3.

¹¹⁰ See *supra* note 6.

¹¹¹ See Options 2, Sections 4 and 5.

Market Orders in Options 3, Section 7(a) are consistent with the Act. The proposed intra-day cancel timer feature mirrors existing BX functionality in BX Options 3, Section 7(a)(5), and would provide Members with additional flexibility and control to bring the Market Order back to the Member so they can get an execution on another venue by canceling unexecuted Market Orders after a certain period of time. The Exchange believes it is appropriate to offer this feature intra-day because the Exchange already has a separate opening delay timer that provides protection to the market during the Opening Process as discussed above.

Intermarket Sweep Orders

The Exchange believes that the proposed changes to the definition of ISOs in Options 3, Section 7(b)(5) are consistent with the Act. As discussed above, the proposed changes are intended to add more granularity and more closely align the level of detail in the ISO rule with BX's ISO rule in BX Options 3, Section 7(a)(6) by specifying how the Exchange would handle ISOs, including how ISOs may be submitted and when. As such, the Exchange believes that its proposal will promote transparency in the Exchange's rules and consistency across the rules of the Nasdaq affiliated options exchanges.¹¹²

Furthermore, the proposed changes do not amend current ISO functionality except for the proposed stipulation that ISOs must have a TIF designation of IOC. Today, Options 5, Section 1(h) provides that ISOs may be either an IOC or an order that expires on the day it is entered. The Exchange believes it is appropriate to no longer allow non-IOC ISOs, as an ISO is generally used when trying to sweep a price level across multiple exchanges in an effort to post the balance of an order without locking an away market. The Exchange therefore believes that ISOs have a limited purpose and should be cancelled if they do not execute or do not entirely execute. This is also consistent with how BX currently handles ISOs in that BX only allows ISOs to be entered as IOC.

All-or-None Orders

The Exchange believes that the proposed changes to the definition of AON Orders in Options 3, Section 7(c) are consistent with the Act. As

¹¹² As noted above, BX's ISO rule also currently states that "ISOs may be entered on the Order Book or into the PRISM Mechanism pursuant to Options 3, Section 13(ii)(K)." The Exchange will file a separate rule change to add similar language as BX relating to how ISOs may be entered on the Exchange.

discussed above, the Exchange is memorializing current System behavior by specifying how AON Orders will execute against multiple, aggregated orders to align with the level of detail in BX Options 3, Section 7(a)(4)(A). The proposed description of the handling of AON Orders is consistent with the Exchange's allocation methodology in Options 3, Section 10 by making clear that because of the size contingency of the AON Order (*i.e.*, executed in its entirety or not at all), those orders must be satisfied simultaneously to avoid any priority conflict on the order book, which considers current displayed NBBO prices to avoid locked and crossed markets as well as trade-throughs. Finally, the proposed changes to add that AON Orders may not be submitted during the Opening Process will better articulate current System behavior, and aligns to the level of detail currently in BX's AON rule at BX Options 3, Section 7(a)(7).

Stop and Stop Limit Orders

The Exchange believes that the proposed changes to the definition of Stop Orders and Stop Limit Orders in Options 3, Sections 7(d) and 7(e), respectively, are consistent with the Act. The Exchange is proposing to codify current System behavior by adding that Stop Orders and Stop Limit Orders will be cancelled if they are immediately electable upon receipt. As discussed above, the purpose of each of these order types is to not execute upon entry, and instead rest in the System until the market reaches a certain price level, at which time the order could be executed. A Stop Order or Stop Limit Order that is immediately electable upon receipt would therefore negate the purpose of this order type, so the Exchange believes it is appropriate to cancel such orders to ensure that Members are able to use these order types to achieve their intended purpose. As noted above, the proposed changes to codify current Stop and Stop Limit Order handling will align the Exchange's rules with Phlx's Stop and Stop Limit Order rules.¹¹³

The Exchange believes that the proposed changes to specify current System functionality that Stop and Stop Limit Orders may only be entered into FIX or Precise will make clear that these order types are only available to be entered through two of the three order entry protocols offered by the Exchange (*i.e.*, FIX, Precise, and OTTO). As such, the proposed changes will promote transparency in the Exchange's rules and reduce any potential confusion.

Cancel and Replace Orders

The Exchange believes that the proposed changes to the rule governing Cancel and Replace Orders would promote clarity and make the rules easier to navigate. As discussed above, these are non-substantive changes to relocate the rule from Supplementary Material .02 to Options 3, Section 7 into the main body of the order types rule at Options 3, Section 7(f), updating incorrect cross-cites therein, and adding more granularity around how the Exchange will treat the cancellation and replacement of Reserve Orders.

Reserve Orders

The Exchange believes that the proposed changes to the Reserve Order rule at Options 3, Section 7(g) are consistent with the Act. The Exchange is proposing to add more granularity around how Members may elect to refresh the display quantity for the Reserve Order. The Exchange notes that the new rule text does not have any impact on the priority rules of the displayed or non-displayed portion of the Reserve Order. This refresh feature for Reserve Orders is intended to provide more flexibility and opportunities for Members to add displayed liquidity to the Exchange, which, in turn, benefits all market participants through more trading opportunities and enhanced price discovery. As discussed above, the proposed changes do not amend current functionality, but rather is intended to promote transparency around the current operation of Reserve Orders. Further, the Exchange believes that the non-substantive changes in the Reserve Order rule to renumber and reformat the paragraphs therein, and make corrective changes as described above, are consistent with the protection of investors and the public interest because they will simply make the Exchange's rules easier to navigate, thereby reducing any potential confusion. As noted above, other options exchanges like Cboe currently offer Reserve Orders that have similar refresh features.¹¹⁴

Attributable Orders

The Exchange believes that it is consistent with the Act to delete existing rule text in Options 3, Section 7(h), which currently indicates that Attributable Orders may be available for specified classes of securities, and to make a corrective change to "an Options Trader Alert." Because Attributable Orders are available for all classes of securities today, the Exchange is

deleting this language as inaccurate. The Exchange believes that the proposed changes will promote transparency in the Exchange's rules.

Customer Cross Orders

The Exchange believes that the non-substantive amendment in Options 3, Section 7(i) to add that Customer Cross Orders may trade in accordance with Options 3, Section 12(a) is consistent with the protection of investors and the public interest because the proposal will simply add a cross reference in the Customer Cross Order rule to Section 12(a), which currently describes in detail how this order type would execute on the Exchange, thereby adding clarity to how Customer Cross Orders function today.

Qualified Contingent Cross Orders

The Exchange believes that the proposed changes to the QCC Order rule in Options 3, Section 7(j) to add a reference to "QCC" and to provide that QCC Orders will trade in accordance with Options 3, Section 12(c) are consistent with the Act because the changes are merely intended to add greater clarity to how QCC Orders function today. The Exchange further believes that specifying that QCC Orders may only be entered through FIX or Precise will better articulate current System behavior, and will make clear that QCC Orders are available to be entered through only two of the three order entry protocols currently offered by the Exchange (*i.e.*, FIX, Precise, and OTTO), thereby reducing any potential confusion.

Preferred Orders

The Exchange believes that its proposal to add a definition of Preferred Orders in Options 3, Section 7(l) is consistent with the Act. While Preferred Orders are currently described in Options 2, Section 10, the Exchange believes that it would be useful to have order types centralized within one rule to make the Rulebook easier to navigate for market participants. As noted above, Phlx similarly lists out Directed Orders (akin to Preferred Orders) in its order types rule at Phlx Options 3, Section 7(b)(11).

Add Liquidity Orders

The Exchange believes that the proposed changes to the ALO rule in Options 3, Section 7(n) are consistent with the Act. As discussed above, the Exchange is enhancing current ALO functionality to reflect that the Exchange will handle ALOs in a consistent manner with the new continuous re-pricing mechanism that is

¹¹³ See *supra* notes 23 and 26.

¹¹⁴ See *supra* note 29.

being proposed concurrently in the Re-Pricing Filing as proposed Options 3, Section 5(d) in situations where the ALO would not lock or cross an order or quote on the System, but would lock or cross the NBBO.¹¹⁵ The Exchange therefore believes that the proposed changes will make clear how the Exchange will handle ALOs under the new re-pricing mechanism. The ALO order type was adopted to provide market participants greater control over the circumstances in which their orders are executed. As noted above, the purpose of an ALO is to provide liquidity. For investors and market participants that elect only to provide liquidity in certain circumstances, such as to receive a maker fee (or rebate) upon execution of an order, the Exchange continues to believe that ALOs, as amended under this proposal, will continue to accommodate this strategy. The proposed order handling for ALOs is consistent with how ALOs are handled on BX today.¹¹⁶

The Exchange also believes that adding “or quotes” in the ALO rule at Options 3, Section 7(n) is consistent with the Act. Today, if at the time of entry, an ALO would lock or cross one or more non-displayed orders or quotes on the Exchange, the ALO will be cancelled or re-priced in the manner specified within the ALO rule. Adding this rule text will bring greater clarity around current ALO behavior.

The Exchange further believes that the proposed addition that ALOs may only be submitted when an options series is open for trading will make clear ALOs will not be accepted during the Opening Process as the order book is not available. The proposed changes codify existing System behavior, and will therefore promote transparency in the Exchange’s rules.

QCC With Stock Orders

The Exchange believes that the non-substantive change to correct a cross-cite in the QCC with Stock Order rule in Options 3, Section 7(t) will promote clarity in the Exchange’s rules.

Opening Sweep

The Exchange believes that the proposed changes to the Opening Sweep rule in Options 3, Section 7(u) are consistent with the Act. As discussed above, the Exchange is codifying current System behavior and providing additional context to the rule in a manner that is consistent with Phlx’s Opening Sweep rule in Phlx Options 3, Section 7(b)(6). The Exchange therefore

believes that the proposed changes promote greater transparency in the Exchange’s rules and consistency across the rules of the Nasdaq affiliated options exchanges. Specifically, because an Opening Sweep is an IOC order submitted by a Market Maker during the Opening Process, the Exchange is making clear that Opening Sweeps are entered through SQF in the proposed rule text. The Exchange also believes that it is appropriate to specify that Opening Sweeps are not subject to any risk protections in Options 3, Section 15 (except Automated Quotation Adjustments) because the Opening Process itself has boundaries (notably, the Quality Opening Market and the Opening Quote Range) within which orders will be executed. Finally, the proposed language relating to Opening Sweep participation in the Opening Process and cancellation upon the open merely provides additional context in the order type rule. As noted above, Opening Sweeps are already described in the opening rule today in Options 3, Section 8, and apply only during the Opening Process.

Time in Force

The Exchange believes that the proposed changes to the TIF rules are consistent with the Act. As discussed above, the Exchange believes that certain existing functionality currently described as an “order type” in Options 3, Section 7 would be more precisely described as a TIF attribute that designates the basic parameters of an order type. Relocating and centralizing the existing TIF rules into proposed Supplementary Material .02 to Options 3, Section 7 will therefore clearly delineate these order attributes and make the proposed rules easier to navigate. Codifying the definition of “TIF” in proposed Supplementary Material .02 will add greater clarity and transparency to the Exchange’s rules in a manner consistent with BX Options 3, Section 7(b).

The Exchange believes that the adjustments in proposed Supplementary Material .02(a) to Options 3, Section 7 to add that Day orders may be entered through FIX, OTTO, or Precise will add further granularity and clarity to the Exchange’s rules. The proposed changes provide additional detail about current functionality in a manner that is consistent with the level of detail in BX’s Day order.¹¹⁷

The Exchange believes that the adjustments to the relocated GTC and GTD rules in proposed Supplementary Material .02(b) and (c) will add further

granularity and clarity to how these TIFs operate today. The Exchange further believes that aligning the level of detail in the GTD rule to the GTC rule, as described above, is appropriate because these two TIFs are meant to be functionally similar except the manner in which they persist in the System.

The Exchange believes that the proposed changes to the relocated IOC rule in proposed Supplementary Material .02(d) will promote greater transparency in the Exchange’s rules by providing more granularity to current IOC functionality. Further, the changes conform the Exchange’s IOC rule to BX’s IOC rule, thereby promoting consistency across the rules of the Nasdaq affiliated options exchanges. Specifically, the proposed changes to remove the word “limit” will make clear that IOC orders may be sent as either a Market or Limit Order today, identical to BX IOC orders.¹¹⁸ The proposed changes to state that IOC orders are not eligible for routing, and that IOC orders may be entered through FIX, OTTO, Precise, or SQF, will codify current IOC behavior in a manner that is consistent with BX’s IOC rule.¹¹⁹

As it relates to the proposed changes to memorialize the various risk protections that are excluded from applying to Market Maker IOC orders entered through SQF, the Exchange believes this is appropriate because only Market Makers utilize SQF to enter IOC orders. As discussed above, Market Makers are professional traders with more sophisticated infrastructures than other market participants, and are able to manage their risk through their own risk settings in addition to the risk protections required by the Exchange. The Exchange will continue to apply the specified risk protections on IOC orders entered through FIX, OTTO, and Precise, which are used by the other market participants. The proposed changes will harmonize the Exchange’s IOC rule with BX’s IOC rule.¹²⁰ Further, the proposal to add substantially similar exclusionary language into the SQF rule itself at Supplementary Material .03(c) to Options 3, Section 7 will make clear that these risk protections will not apply to IOC orders entered through SQF.

Specifying in the proposed IOC rule that orders entered into the Exchange’s various auction and crossing mechanisms are considered to have a TIF of IOC memorializes current System behavior, and is intended to bring greater transparency in how these order types are handled today. As noted

¹¹⁵ See *supra* note 33.

¹¹⁶ See BX Options 3, Section 7(a)(12).

¹¹⁷ See *supra* note 41.

¹¹⁸ See *supra* note 42.

¹¹⁹ See *supra* notes 43–44.

¹²⁰ See *supra* notes 49–50.

above, BX currently has substantially similar language in its IOC rule for BX PRISM orders in BX Options 3, Section 7(b)(2).

Lastly, the Exchange believes that the adjustments to the relocated OPG rule in proposed Supplementary Material .02(e) to Options 3, Section 7 will add granularity and clarity to how OPG orders operate, and will conform the OPG rule with the level of detail currently in BX's OPG rule in BX Options 3, Section 7(b)(1). As discussed above, the Exchange is proposing to enhance OPG functionality to allow both Market and Limit OPG orders whereas today, only Limit OPG orders are allowed. This harmonizes OPG functionality with BX OPG functionality. The other modifications to replace "opening rotation" with "Opening Process," stating OPG orders may not route, and indicating that OPG orders are not subject to the protections listed in Options 3, Section 15 (except Size Limitation) all memorialize current OPG behavior, and align to the current BX OPG rule. As discussed above, the Exchange does not apply any of the risk protections in Options 3, Section 15 (except Size Limitation) because the Opening Process itself has boundaries within which orders will be executed.

Opening Process

The Exchange believes that the proposed changes to the Opening Process in Options 3, Section 8 are consistent with the Act. As discussed above, the Exchange is proposing to remove the current limitation that only allows Public Customers interest to route during the opening, and will instead allow all market participant interest to route. The proposed changes will serve to more closely align the Exchange's Opening Process with BX's Opening Process. Like BX, the Exchange believes that it will be beneficial to provide all market participants with the opportunity to have their interest executed on away markets during the Opening Process. The Exchange further believes that the related changes to remove references to "Public Customer" throughout Options 3, Section 8, and to update the cross-cite currently pointing to the Priority Customer priority overlay to the more general priority rule, will add clarity, transparency, and internal consistency to Exchange rules regarding the proposed handling of routable interest during the Opening Process.

The Exchange believes that its proposal to no longer round in the direction of the previous trading day's closing price and simply round up to the MPV, if the mid-point of the highest and lowest of the Potential Opening

Prices is not expressed as a permitted MPV, will simplify and bring greater transparency to the Opening Process, to the benefit of investors. Market participants can now have a better sense of how the Potential Opening Price will be calculated without having to account for the closing price of each options series. The Exchange believes this may promote greater efficiency in the marketplace especially in view of the continued growth in the number of options today.

The Exchange further believes that the proposed changes to replace "are marketable against the ABBO" with "cross the ABBO" will better articulate how the Exchange currently determines the OQR boundaries in the scenario specified in Options 3, Section 8(i)(3). Lastly, the Exchange believes that the non-substantive change in paragraph (j)(3)(B) of Options 3, Section 8 will bring greater clarity to the Rulebook.

Auction Mechanisms

Facilitation and Solicited Order Mechanisms

The Exchange believes that its proposal to relocate the rule text relating to Responses from Supplementary Material .02 to Options 3, Section 11 into the introductory paragraph of Options 3, Section 11, and adding that Responses can be modified, is consistent with the Act. The Exchange is relocating this language into the introductory paragraph of Options 3, Section 11 after the definition of "Response" for better readability. The proposed change to add "or modified" to indicate that Responses may be canceled or modified any time prior to execution better aligns the rule text to current System behavior. As noted above, the rules for the complex Facilitation and Solicited Order Mechanisms in Options 3, Section 11(c)(7) and (e)(4), respectively, already provide for this concept.

Price Improvement Mechanism

The Exchange's proposal to amend Options 3, Section 13(b)(4) to clarify the current rule text by adding the words "or modified" after "canceled" is consistent with the Act because the additional text will make clear that a Crossing Transaction may not be modified unless the Counter-Side Order is being improved during the exposure period.

The Exchange's proposal to add clarifying rule text within Options 3, Section 13(b)(5) which states, "Crossing Transactions submitted at or before the opening of trading are not eligible to initiate an Auction and will be rejected"

is consistent with the Act because it will bring greater clarity to when a Crossing Transaction is currently eligible to initiate a PIM. The PIM considers both the NBBO and local book for its entry price validation and therefore requires an opening for the PIM to begin.

The Exchange's proposal to amend the current PIM functionality within Options 3, Section 13(c)(3) to permit Improvement Orders to be canceled or modified is consistent with the Act. The Exchange proposes to amend this functionality so that Improvement Orders may be canceled or modified similar to functionality on BX today within Options 3, Section 13(ii)(a)(8). Today, during the exposure period, Improvement Orders may not be canceled and Improvement Orders may be modified to (i) increase the size at the same price, or (ii) improve the price of the Improvement Order for any size up to the size of the Agency Order. The modification and cancellation of an Improvement Order through OTTO will be similar to the manner in which a Cancel and Replace Order would be handled outside of the auction process. For Improvement Orders through SQF, the modification and cancellation of such orders will be handled by sending new Improvement Orders that overwrite the existing Improvement Order with updated price/quantity instructions. Improvement Orders are not visible to other auction participants, including the Agency Order. The Exchange believes that providing responders with flexibility to cancel or modify their Improvement Orders may encourage market participants to respond to more auctions, including PIM.

The proposal to amend Options 3, Section 13(d)(5) to permit an auction to automatically terminate upon the occurrence of a trading halt with execution solely with the Counter-Side Order is consistent with the Act. This functionality would be similar to rule text within BX Options 3, Section 13(ii)(C). The Exchange believes that utilizing the price of the Counter-Side Order to execute the Crossing Transaction promotes just and equitable principles of trade, and fosters cooperation and coordination with persons engaged in facilitating transactions in securities since the Counter-Side Order has guaranteed that an execution will occur at the same price as the Crossing Transaction, or better, prior to the trading halt, and Improvement Orders offer no such guarantee, the Counter-Side Order is the only valid price at which to execute the Crossing Transactions, and the Counter-

Side Order is the appropriate contra-side.¹²¹

The Exchange believes that the proposed System change to adopt a new same side execution price check for PIM in new subsection (d)(6) of Options 3, Section 13 is consistent with the Act. As discussed above, this feature would be functionally identical to BX PRISM in BX Options 3, Section 13(ii)(I). Like BX, the proposed price check is designed to ensure that the Exchange would not trade at prices that would lock or cross interest on the same side of the market as the Agency Order where limit orders have rested and obtained priority to execute at that price. In the event where a limit order arrives on the same side of the market as the Agency Order and is at the same or better price than the initiating Crossing Transaction price, the Exchange would execute the entire PIM transaction at the initiating Crossing Transaction price. The execution takes place at this price because the PIM is guaranteed an execution and the PIM agency side instructions would not allow an execution to take place at a higher (lower) price than submitted for a buying (selling) agency side PIM order. Considering that the limit order has arrived either at or better on the same side as the Agency Order than the agency side price, the initiating Crossing Transaction price is the only price at which the guaranteed execution can take place.

The Exchange's proposal to amend Options 3, Section 13(e)(4)(ii) to permit Improvement Complex Orders to be canceled or modified is consistent with the Act. Further, similar to the proposed change for simple PIM, the Exchange notes that the modification and cancellation of an Improvement Complex Order will be similar to the manner in which a Cancel and Replace Order would be handled outside of the auction process. Improvement Complex Orders are not visible to other auction participants, including the Agency Complex Order. Further, similar to the proposed changes for simple PIM, the Exchange believes that providing responders with flexibility to cancel or modify their Improvement Complex Orders may encourage market participants to respond to more auctions, including Complex PIM.

The Exchange's proposal to amend Options 3, Section 13(e)(4)(iv) at new "(D)" to provide that the exposure period for a Complex PIM will

automatically terminate when a resting Complex Order in the same complex strategy on either side of the market becomes marketable against the Complex Order book or bids and offers for the individual legs is consistent with the Act. The proposed changes will codify current System behavior and will provide greater transparency to market participants for situations in which early termination would occur for Complex PIMs today. As noted above, Complex Order Exposure currently early terminates in similar situations, so the proposed language for Complex PIM closely tracks existing Complex Exposure language in Supplementary Material .01(b)(ii) to Options 3, Section 14.¹²² The Exchange believes that it is appropriate to early terminate Complex PIM under these circumstances for the following reasons. When the resting Complex Order is on the same side as the Agency Complex Order, interest that becomes marketable against the resting Complex Order would also be marketable against the Complex PIM order. Therefore, early terminating the Complex PIM would allow the Complex PIM order to interact with this interest given that the Complex PIM order is at a superior price compared to the resting Complex Order, thus providing an opportunity for price improvement for the Agency Complex Order. Additionally, when the resting Complex Order is on the opposite side of the Agency Complex Order, interest that arrives marketable against the resting Complex Order is now at a superior price to the Agency Complex Order. The Exchange would therefore early terminate in this scenario and execute the Complex PIM order with its contra side order because it is no longer at top of book.

The Exchange's proposal to relocate the last sentence of Options 3, Section 13(e)(3) into Options 3, Section 13(e)(4)(iv) at new "(E)" is consistent with the Act. This non-substantive amendment will relocate the rule text to a more logical place within the Complex PIM rule.

¹²² Supplementary Material .01(b)(ii) of ISE Options 3, Section 14 provides that exposure period for a Complex Order will end immediately: (A) upon the receipt of a Complex Order for the same complex strategy on either side of the market that is marketable against the Complex Order book or bids and offers for the individual legs; (B) upon the receipt of a non-marketable Complex Order for the same complex strategy on the same side of the market that would cause the price of the exposed Complex Order to be outside of the best bid or offer for the same complex strategy on the Complex Order book; or (C) when a resting Complex Order for the same complex strategy on either side of the market becomes marketable against interest on the Complex Order book or bids and offers for same individual legs of the complex strategy.

The Exchange believes that its proposal to codify existing Complex PIM behavior in Options 3, Section 13(e)(5) to articulate that the complex mid-way price will be rounded to the \$0.01 increment that favors the Agency Complex Order will promote clarity and transparency in the Exchange's rules by better aligning the rule text with the current operation of the System. As noted above, the simple PIM rule already articulates that the mid-way price will be rounded to the \$0.01 increment that favors the Agency Order in Options 3, Section 13(d)(4). The rounding for Complex PIM currently operates the same way as simple PIM in this respect, so the proposed Complex PIM language closely tracks the simple PIM language.

Finally, the proposal to amend Supplementary Material .02 to Options 3, Section 15 to add a sentence which provides, "It will be considered a violation of this Rule and will be deemed conduct inconsistent with just and equitable principles of trade and a violation of Options 9, Section 1 if an Electronic Access Member submits a PIM Order (initiating an auction) and also submits its own Improvement Order in the same auction," is consistent with the Act. BX has a similar prohibition within Options 3, Section 13(iii). The proposed new rule is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, by providing guidance to Members where certain behavior within a PIM will not be considered a bona fide transaction.

Order Price Protection

The Exchange believes that its proposal to replace its current Limit Order Price Protection with a similar "fat finger" check called Order Price Protection in Options 3, Section 15(a)(1)(A) is consistent with the Act. The proposed OPP would similarly prevent the execution of limit orders at prices outside pre-set numerical or percentage parameters, and is designed to prevent limit orders entered at clearly unintended prices from executing in the System to the detriment of market participants. The proposed risk protection is also functionally similar to BX's OPP in BX Options 3, Section 15(a)(1), and therefore is not novel.¹²³ Similar to BX, the Exchange believes that the proposed fixed dollar amount

¹²³ As noted above, the Exchange is proposing to adopt an OPP rule that more accurately describes the proposed functionality than BX's current OPP rule, so BX will align its current OPP rule to the Exchange's proposed rule text in a separate rule filing.

¹²¹ The Exchange notes that trading on the Exchange in any option contract will be halted whenever trading in the underlying security has been paused or halted by the primary listing market.

and percentage parameters will protect against erroneous executions, while also allowing orders to execute within a reasonable range.

The Exchange believes that using the Reference BBO (*i.e.*, better of the NBBO or the internal market BBO) to calculate the proposed OPP, identical to current BX OPP functionality, will similarly protect investors and the public interest where the internal market BBO is better than the NBBO.

The Exchange further believes that its proposal to add language allowing Exchange discretion to temporarily deactivate OPP on an intra-day basis is consistent with the Act. BX has identical language today in BX Options 3, Section 15(a)(1)(A)(i), and similar to BX, the Exchange believes that having this discretion will be useful if the Exchange determined that unusual market conditions warranted deactivation in the interest of a fair and orderly market. Like BX, the Exchange believes that it will be useful to have the flexibility to temporarily disable OPP intra-day in response to an unusual market event (*e.g.*, if dissemination of data was delayed and resulted in unreliable underlying values needed for the Reference BBO) to maintain a fair and orderly market. This will promote just and equitable principles of trade and ultimately protect investors.

Post-Only Quoting Protection

The Exchange's proposal to adopt a new Post-Only Quote Configuration in Options 3, Section 15(a)(3)(C) to permit Market Makers to prevent their quotes from removing liquidity from the Exchange's order book promotes equitable principles of trade and protects investors and the public interest by enhancing the risk protections available to Market Makers. This optional risk protection would enable Market Maker to better manage their risk when quoting on the Exchange. As noted above, BX offers identical functionality today in BX Options 3, Section 15(c)(3).

The proposed risk protection allows Market Makers the ability to avoid removing liquidity from the Exchange's order book if their quote would otherwise lock or cross any resting order or quote on the Exchange's order book upon entry, thereby protecting investors and the general public as Market Makers transact a large number of orders on the Exchange and bring liquidity to the marketplace. Market Makers would utilize the proposed risk protection to avoid unintentionally taking liquidity

with resting interest¹²⁴ on the order book. As a result of taking liquidity, Market Makers would incur a taker fee that may impact the Market Maker's ability to provide liquidity and meet quoting obligations. Market Makers are required to add liquidity on the Exchange and, in turn, are rewarded with lower pricing¹²⁵ and enhanced allocations.¹²⁶ Specifically, the risk protection would permit Market Makers to add liquidity only and avoid removing resting interest on the order book, which will lead to enhanced liquidity on the Exchange and in turn will benefit and protect investors and the public interest through the potential for greater volumes of orders and executions on the Exchange.

The Exchange does not believe that introducing this Post-Only Quote Configuration will unfairly discriminate among market participants. Today, all Members may utilize the existing Add Liquidity Order type to prevent orders from removing liquidity from the Exchange's order book upon entry. The Post-Only Quote Configuration is available to Market Makers only as a risk protection. Unlike other market participants, Market Makers have certain obligations on the market, such as requirements to provide continuous two-sided quotes on a daily basis¹²⁷ and are subject to various obligations associated with providing liquidity on the market.¹²⁸ Market Makers are liquidity providers on the Exchange and, therefore, are offered certain quote risk protections noted to allow them to manage their risk more effectively.¹²⁹ The proposed Post-Only Quote Configuration is another risk protection afforded to Market Makers to assist them in managing their risk while continuing to comply with their obligations. The Exchange notes that enhancing the ability of Market Makers to add liquidity and avoid taking liquidity from the order book promotes just and equitable principles of trade on the Exchange and protects investors and the public interest, thereby enhancing market structure by allowing Market Makers to add liquidity only. Greater liquidity

benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. Also, an increase in the activity of Market Makers in turn facilitates tighter spreads.

Kill Switch

The Exchange does not believe that the proposed decommission of the GUI Kill Switch for order cancellation will affect the protection of investors or the public interest or the maintenance of a fair and orderly market because no Members have used the GUI Kill Switch risk protection in 2022.¹³⁰ The Exchange does not charge any fees for the GUI Kill Switch. In addition, the Exchange notes that the use of this tool is completely optional, and the Exchange will continue to offer substantially similar Kill Switch functionality through FIX, Precise, and OTTO. As set forth in the Kill Switch rule, the GUI Kill Switch allows for the cancellation and restriction of orders for the requested Identifier(s) on a user or group level, whereas the port Kill Switch allows for cancellation and restriction of orders for the requested Identifier(s) on a user level.¹³¹ While the GUI Kill Switch had more optionality around how Members may combine the Kill Switch request by Identifier(s), no Members have used the GUI Kill Switch risk protection this year. Furthermore, Members will retain the ability to contact market operations staff to manually purge their orders from the market. In addition, the Exchange will continue to implement System-enforced risk mechanisms that automatically remove orders for the Member once certain pre-set thresholds or conditions are met (*i.e.*, market wide risk protection and cancel on disconnect).

Also, the Exchange believes that the low usage rate for the GUI Kill Switch does not warrant the continuous resources necessary for System support of such tools. As a result, the Exchange believes that the proposal will remove impediments to and perfect the mechanism of a free and open market and a national market system by allowing the Exchange to reallocate System capacity and resources currently used to maintain this functionality to the development and maintenance of other business initiatives and risk management products.

As noted above, the Exchange previously amended its rules to decommission the quote removal Kill

¹²⁴ As noted above, this would include any re-priced orders as described in the Re-Pricing Filing as proposed Options 3, Section 5(d), ALOs as described in proposed Options 3, Section 7(n), and any re-priced quotes as described in Options 3, Section 4(b)(6). As discussed above, ALOs may re-price.

¹²⁵ See Options 7, Section 3.

¹²⁶ See Options 3, Section 10.

¹²⁷ See Options 2, Section 5(e).

¹²⁸ See Options 2, Section 4.

¹²⁹ Options 3, Section 15(a)(3) currently sets forth the Anti-Internalization and Quotation Adjustments Protections that are available today to Market Makers.

¹³⁰ As noted above, the Exchange will provide prior notice of the decommission to all Members via Options Trader Alert.

¹³¹ See Options 3, Section 17(a)(1) and (2).

Switch that was available to Market Makers through the GUI.¹³² Similar to the GUI Kill Switch for quote removal, the Exchange has found that no Members use the GUI Kill Switch to cancel their orders, but rather, utilize other means to purge their existing orders from the System. The Exchange therefore believes that eliminating the GUI Kill Switch all together (including for orders as proposed herein) will streamline the Exchange's risk protection offerings in a manner that reflects Member use.

Data Feeds and Trade Information

The Exchange believes that the proposed changes to the current data feed offerings in Options 3, Section 23(a) are consistent with the Act. Specifically, the Exchange believes that the proposed changes to its Depth of Market Feed to provide full depth-of-market information will serve to more closely align the information provided on the Exchange's Depth of Market Feed with that of BX's Depth of Market Feed in BX Options 3, Section 23(a)(1), thereby ensuring a more consistent technology offering across the Nasdaq affiliated options exchanges. The Exchange also believes that the modified Depth of Market Feed will help to protect a free and open market by providing additional data to the marketplace. The Exchange further believes that the proposed changes to add more specificity around what would be provided in the opening/reopening order imbalance information, and to correct an erroneous reference to "ISE" in the Depth of Market Feed rule will promote transparency and clarity in the Exchange's rules.

The Exchange believes that the proposed changes to the Order Feed around what type of information would be available on this data feed offering, as further described above, will promote clarity and transparency in the Exchange's rules. Furthermore, the proposed data elements in the Order Feed are based on data elements that currently exist on other markets. For instance, the specificity around what would be provided in the opening/reopening order imbalance information, as well as the auction and exposure notifications are identical to the content within BX's Depth of Market Feed in BX Options 3, Section 23(a)(1). As noted above, the Attributable Order content is similar to the data elements on Cboe's current multicast PITCH feed.¹³³

The Exchange believes that the proposed changes to the existing Top

Quote Feed to rebrand into the Top Feed, to no longer provide information for opening price, daily trading volume, and high and low prices for the day, will serve to further align the Exchange's Top Feed with BX's Top Feed in BX Options 3, Section 23(a)(2), thereby ensuring a more consistent technology offering across the Nasdaq affiliated options exchanges.

The proposed changes to the Trades Feed to no longer provide information for opening price, daily trading volume, and high and low prices for the day are intended to align to the proposed changes to the Top Feed described above. The Exchange believes that removing this language will promote clarity and transparency in the Exchange's rules.

The proposed changes to the Spread Feed to provide full depth-of-book information rather than at the first five price levels are intended to align to the proposed changes to the Depth of Market Feed described above. The proposed full depth language will also be substantially similar to the full depth language in BX's Depth of Market Feed in BX Options 3, Section 23(a)(1) and in the Exchange's proposed Depth of Market Feed in proposed Options 3, Section 23(a)(1), except the proposed language herein will be tailored to complex functionality. Furthermore, the proposed Attributable Complex Order content is similar to the content currently on Cboe's Complex Multicast PITCH feed.¹³⁴ The Exchange believes that the modified Spread Feed will help to protect a free and open market by providing additional data to the marketplace. The Exchange also believes that the proposed changes to reorganize and incorporate existing concepts in the Spread Feed rule a manner that is more consistent with the other amended data feed rules in Options 3, Section 23(a) will make the rules easier to navigate for market participants.

The Exchange believes that it is consistent with the Act to no longer offer TradeInfo when the Exchange migrates over the enhanced Nasdaq functionality, as there is a lack of demand from Members.¹³⁵ The Exchange does not assess a fee for TradeInfo. As noted above, Members use FIX, FIX DROP, and CTI to obtain order information currently available in TradeInfo, and to cancel orders through FIX. The Exchange further believes that the proposed decommission of

TradeInfo will remove impediments to and perfect the mechanism of a free and open market and a national market system by allowing the Exchange to reallocate System capacity and resources currently used to maintain this functionality to the development and maintenance of other business initiatives and risk management products.

The Exchange's proposal to eliminate TradeInfo pricing from Options 7, Section 7.C(ii)(3) in its entirety is reasonable, equitable, and not unfairly discriminatory because TradeInfo would no longer be available to any Member. It is reasonable to remove all references to TradeInfo pricing from the Exchange's Pricing Schedule as the Exchange is removing this functionality from its Rulebook. As discussed above, the Exchange does not assess a fee for TradeInfo today. Additionally, it is equitable and not unfairly discriminatory to remove the references to TradeInfo pricing from the Pricing Schedule because no Member would be able to utilize this functionality once it is removed from the System.

Optional Risk Protections

The Exchange believes that introducing the optional quantity and notional value risk protections as described above will protect investors and the public interest, and maintain fair and orderly markets, by providing market participants with another tool to manage their order risk. As noted above, BX offers functionally identical optional risk protections in BX Options 3, Section 28.¹³⁶ In addition, providing Members with more tools for managing risk will facilitate transactions in securities because Members will have more confidence that risk protections are in place. As a result, the new functionality has the potential to promote just and equitable principles of trade.

Corrective Changes

The Exchange believes that the proposed changes to Supplementary Material .04 to Options 3, Section 7 to add Precise will make clear that Members may also use Precise (in addition to FIX) to route their orders using FIND or SRCH, or mark orders as DNR. The Exchange therefore believes that the proposed changes will add

¹³⁶ As noted above, while the proposed rule text in Options 3, Section 28 adds more granularity, including around how orders are rejected when the value thresholds for the options risk protections are exceeded, the Exchange understands that the BX optional risk protections operate in the same manner. In addition, BX's rule does not include Precise as this order entry port is not available on BX today.

¹³⁴ See *supra* note 98.

¹³⁵ As noted above, the Exchange will provide prior notice of the decommission to all Members through an Options Trader Alert.

¹³² See *supra* note 89.

¹³³ See *supra* note 93.

greater transparency to the Rulebook, which would benefit market participants and investors by reducing potential confusion. The Exchange similarly believes that the technical change to fix the incorrect cross-reference to the minimum trading increment rule in Options 3, Section 10(b)(1) will add greater transparency to the Rulebook and reduce any potential confusion.

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. The Exchange operates in a competitive market and regularly competes with other options exchanges for order flow. As discussed above, the Exchange is re-platforming its System in connection with the technology migration to enhanced Nasdaq functionality, which the Exchange believes would promote competition among options exchanges by potentially attracting additional order flow to the Exchange with the enhanced trading platform.

As it relates to the elimination of fees for TradeInfo from Options 7, the Exchange believes that its proposal does not impose an undue burden on competition because TradeInfo would no longer be available to any Members.

The basis for the majority of the proposed rule changes are the rules of the Nasdaq affiliated options exchanges, which have been previously filed with the Commission as consistent with the Act. As it relates to bulk messaging for quotes as proposed in Options 3, Section 4(b)(3), the Exchange notes that Cboe similarly allows for bulk messaging in Cboe Rule 1.1, except Cboe also allows bulk messaging for orders, unlike the Exchange. As it relates to the proposal in Options 3, Section 7(g)(4) to codify the refresh features into the Exchange's Reserve Order rule, the Exchange notes that Cboe's Reserve Order functionality has similar refresh features in Cboe Rule 5.6(c). As it relates to the proposal in Options 3, Section 23(a) to add Attributable Order and Attributable Complex Order content in the Order Feed and Spread Feed, respectively, Cboe currently has similar data elements available on its Multicast PITCH feed and Complex Multicast PITCH feed.¹³⁷

The proposed rule changes are based on the following rules of the Nasdaq affiliated exchanges:

- The Market Order proposal in Options 3, Section 7(a) will be materially identical to BX's Market Orders in BX Options 3, Section 7(a)(5).
- The ISO proposal in Options 3, Section 7(b)(5) will be substantially similar to BX's ISO in BX Option 3, Section 7(a)(6). Unlike BX, the Exchange's ISO proposal will not refer to how ISOs may be entered on the Exchange as the Exchange intends address that in a separate rule filing.
- The Exchange's AON proposal will be substantially similar to BX's Contingency Order rule in BX Options 3, Section 7(a)(4)(A) (except BX's rule also describes Minimum Quantity Orders, which the Exchange does not offer today) and BX's AON rule in BX Options 3, Section 7(a)(7).
- The Stop Order proposal in Options 3, Section 7(d) will be substantially similar to Phlx Options 3, Section 7(b)(4), except Phlx does not currently explicitly state that Phlx Stop Orders may only be entered through FIX or Precise because Phlx only offers one order entry protocol (FIX), unlike the Exchange, which offers three (FIX, Precise, and OTTO).
- The Stop Limit Order proposal in Options 3, Section 7(e) will be substantially similar to Phlx Options 3, Section 7(b)(4)(A), except Phlx does not currently explicitly state that Phlx Stop Limit Orders may only be entered through FIX or Precise for the same reasons stated for Stop Orders above.
- The Preferred Order proposal in Options 3, Section 7(l) will be materially identical to Phlx's Directed Order rule in Phlx Options 3, Section 7(b)(11).
- The ALO proposal in Options 3, Section 7(n) will be materially identical to BX ALOs in BX Options 3, Section 7(a)(12).
- The Opening Sweep proposal in Options 3, Section 7(u) will be materially identical to the Phlx Opening Sweep in Phlx Options 3, Section 7(b)(6).
- The Day order proposal in Supplementary Material .02(a) to Options 3, Section 7 will be substantially similar to BX Options 3, Section 7(b)(3), except BX's rule does not refer to OTTO or Precise because BX does not offer OTTO or Precise functionality today.
- The IOC proposal in Supplementary Material .02(d) to Options 3, Section 7 will be substantially similar to BX's IOC in BX Options 3, Section 7(b)(2), except the BX rule does not refer to OTTO, Precise, or Complex Order Price Protection as BX does not offer these features today.
- The OPG proposal in Supplementary Material .02(e) to Options 3, Section 7 will be materially identical to BX's OPG in BX Options 3, Section 7(b)(1).
- The Opening Process proposal in Options 3, Section 8 to allow all market participant interest to route will be identical to BX's Opening Process in BX Options 3, Section 8.
- The following proposed changes to PIM are based on BX PRISM: (1) proposed Options 3, Section 13(b)(5) will be materially identical to BX Options 3, Section 13(i)(E); (2) proposed Options 3, Section 13(c)(3) will be materially identical to BX Options 3, Section 13(ii)(A)(8); (3) proposed Options 3, Section 13(d)(5) will be functionally similar to BX Options 3, Section 13(ii)(C); (4) proposed Options 3, Section 13(d)(6) will be functionally similar to BX Options 3, Section 13(ii)(I); (5) proposed Options 3, Section 13(e)(4)(ii) will be functionally similar to BX Options 3, Section 13(ii)(A)(8) with respect to the ability to cancel or modify PIM responses (Improvement Orders); and (6) proposed Supplementary Material .02 to Options 3, Section 13 will be materially identical to BX Options 3, Section 13(iii).
- The proposed OPP risk protection in Options 3, Section 15(a)(1)(A) will be functionally similar to BX OPP in BX Options 3, Section 15(a)(1).¹³⁸
- The proposed Post-Only Quote Configuration in Options 3, Section 15(a)(3)(C) will be functionally identical to the BX Post-Only Quote Configuration in BX Options 3, Section 15(c)(3).
- The Depth of Market Feed proposal in Option 3, Section 23(a)(1) will be substantially similar to the BX Depth of Market Feed in BX Options 3, Section 23(a)(1), except the Exchange will not offer auction and exposure notifications on its Depth of Market Feed like BX does today.
- The Order Feed proposal in Options 3, Section 23(a)(2) will contain data elements that are identical to those on BX's Depth of Market Feed in BX Options 3, Section 23(a)(1), specifically around what would be provided in the opening/reopening order imbalance information (*i.e.*, the size of matched contracts and size of the imbalance), and auction and exposure notifications.
- The Top Feed proposal in Options 3, Section 23(a)(3) will be substantially similar to the BX Top Feed in BX Options 3, Section 23(a)(2), except the

¹³⁸ As noted above, BX will file a separate rule change to conform its OPP rule to the Exchange's proposed rule.

¹³⁷ See *supra* notes 93 and 98.

Exchange will continue to provide aggregated size information unlike BX.

- The Spread Feed proposal in Options 3, Section 23(a)(5) will contain full depth language that is substantially similar to BX's Depth of Market Feed in BX Options 3, Section 23(a)(1), except the proposed language in the Spread Feed will be tailored to complex functionality.

- The proposed optional quantity and notional value risk protections in Options 3, Section 28 will be functionally identical to the protections in BX Options 3, Section 28.¹³⁹

The Exchange reiterates that the proposed rule change is being proposed in the context of the technology migration to enhanced Nasdaq functionality. The Exchange further believes the proposed rule change will benefit Members by providing a more consistent technology offering, as well as consistent rules, for market participants on the Nasdaq affiliated options exchanges. In addition, the proposed rule change relates to adding clarity and consistency in the Exchange's Rulebook, and are designed to reduce any potential investor confusion as to the features and applicability of certain functionality presently available on the Exchange.

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as the majority of the proposed changes will apply to all Members. As it relates to the proposed rule change relating to bulk message functionality, while the Exchange currently offers this functionality to Market Makers only, bulk messaging is intended to provide Market Makers with an additional tool to meet their various quoting obligations in a manner they deem appropriate. As such, the Exchange believes that this functionality may facilitate Market Makers' provision of liquidity, thereby benefiting all market participants through additional execution opportunities at potentially improved prices. Furthermore, while the Exchange will offer the proposed Post-Only Quote Configuration to Market Makers only, the proposed risk protection will enhance the ability of Market Makers to add liquidity and avoid removing

liquidity from the Exchange's order book in the manner described above. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. The Exchange also does not believe that the proposed decommission of the GUI Kill Switch for order cancellation will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange previously amended its rules to decommission the quote removal Kill Switch that was available to Market Makers through the GUI.¹⁴⁰ The Exchange therefore believes that eliminating the GUI Kill Switch for order cancellation will streamline the Exchange's risk protection offerings in a manner that reflects Member use. The Exchange will continue to offer substantially similar Kill Switch functionality through FIX, Precise, and OTTO.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴¹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴²

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 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-ISE-2023-06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2023-06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2023-06 and should be submitted on or before March 3, 2023.

¹³⁹ As noted above, while the proposed rule text in Options 3, Section 28 adds more granularity, including around how orders are rejected when the value thresholds for the options risk protections are exceeded, the Exchange understands that the BX optional risk protections operate in the same manner. In addition, BX's rule does not include Precise as this order entry port is not available on BX today.

¹⁴⁰ See *supra* note 89.

¹⁴¹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴³

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-02820 Filed 2-9-23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96824; File No. SR-MRX-2023-05]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Options 7, Section 6

February 7, 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 February 2, 2023, Nasdaq MRX, LLC (“MRX” 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 MRX’s Pricing Schedule at Options 7, Section 7.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

MRX proposes to amend its Pricing Schedule at Options 7, Section 6, Ports and Other Services, to assess port fees, which were not assessed until this year. Prior to this year, MRX did not assess its Members any port fees. MRX launched its options market in 2016³ and Members did not pay any port fees until 2022.

Newly-opened exchanges often charge no fees for certain services, such as ports, in order to attract order flow to an exchange, and later amend their fees to charge for those services.⁴ The proposed port fees within Options 7, Section 6, Ports and Other Services, are described below.

The Exchange proposes to amend fees for the following ports within Options 7, Section 6: (1) FIX,⁵ (2) SQF,⁶ (3) SQF

³The Exchange initially filed the proposed pricing changes on May 2, 2022 (SR-MRX-2022-04) instituting fees for membership, ports and market data. On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership, ports and market data. SR-MRX-2022-06 replaced the port fees set forth in SR-MRX-2022-04. On July 1, 2022, SR-MRX-2022-06 was withdrawn and replaced with SR-MRX-2022-09. On August 25, 2022, SR-MRX-2022-09 was withdrawn and replaced with SR-MRX-2022-12. On October 11, 2022, SR-MRX-2022-12 was withdrawn and replaced with SR-MRX-2022-20. On December 8, 2022, SR-MRX-2022-20 was withdrawn and replaced with SR-MRX-2022-28. On December 16, 2022, SR-MRX-2022-28 was withdrawn and replaced with SR-MRX-2022-29. On February 2, 2023, SR-MRX-2022-29 was withdrawn and replaced with the instant filing.

⁴ See, e.g., Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt the Initial Fee Schedule and Other Fees for MEMX LLC).

⁵ “Financial Information eXchange” or “FIX” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders to the Exchange. Features include the following: (1) execution messages; (2) order messages; (3) risk protection triggers and cancel notifications; and (4) post trade allocation messages. See Supplementary Material .03(a) to Options 3, Section 7.

⁶ “Specialized Quote Feed” or “SQF” is an interface that allows Market Makers to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying and complex instruments); (2) system event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Market Maker. Market Makers may only enter interest into SQF in their assigned options series. See Supplementary Material .03(c) to Options 3, Section 7.

Purge;⁷ (4) OTTO;⁸ (5) CTI;⁹ (6) FIX DROP;¹⁰ and Disaster Recovery Ports.¹¹ Currently, no fees are being assessed for these ports.

The Exchange proposes to assess no fee for the first FIX Port obtained by an Electronic Access Member¹² or the first

⁷ SQF Purge is a specific port for the SQF interface that only receives and notifies of purge requests from the Market Maker. Dedicated SQF Purge Ports enable Market Makers to seamlessly manage their ability to remove their quotes in a swift manner. The SQF Purge Port is designed to assist Market Makers in the management of, and risk control over, their quotes. Market Makers may utilize a purge port to reduce uncertainty and to manage risk by purging all quotes in their assigned options series. Of note, Market Makers may only enter interest into SQF in their assigned options series. Additionally, the SQF Purge Port may be utilized by a Market Maker in the event that the Member has a system issue and determines to purge its quotes from the order book.

⁸ “Ouch to Trade Options” or “OTTO” is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (e.g., underlying and complex instruments); (2) system event messages (e.g., start of trading hours messages and start of opening); (3) trading action messages (e.g., halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. See Supplementary Material .03(b) to Options 3, Section 7. Unlike FIX, which offers routing capability, OTTO does not permit routing.

⁹ Clearing Trade Interface (“CTI”) is a real-time cleared trade update message that is sent to a Member after an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement (“CMTA”) or The Options Clearing Corporation (“OCC”) number; (ii) badge or mnemonic; (iii) account number; (iv) information which identifies the transaction type (e.g., auction type) for billing purposes; and (v) market participant capacity. See Options 3, Section 23(b)(1). CTI Ports are not required for an MRX Member to meet its regulatory obligations. Members receive free daily reports listing trade executions from the Exchange.

¹⁰ FIX DROP is a real-time order and execution update message that is sent to a Member after an order been received/modified or an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) executions; (ii) cancellations; (iii) modifications to an existing order; and (iv) busts or post-trade corrections. See Options 3, Section 23(b)(3). FIX DROP Ports are not required for an MRX Member to meet its regulatory obligations. Members receive free daily reports listing open orders and trade executions from the Exchange.

¹¹ Disaster Recovery ports provide connectivity to the Exchange’s disaster recovery data center, to be utilized in the event the Exchange should failover during a trading day.

¹² The first FIX Port would be provided to each Electronic Access Member. The term “Electronic Access Member” or “EAM” means a Member that is approved to exercise trading privileges associated with EAM Rights. See General 1, Section 1(a)(6). Also, the first SQF Port would be provided to each Market Maker. The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market

Continued

¹⁴³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

SQF Port obtained by a Market Maker.¹³ The Exchange proposes to assess a FIX Port Fee of \$650 per port, per month, per account number¹⁴ for each subsequent port beyond the first port. The Exchange proposes to assess an SQF Port Fee of \$1,250 per port, per month for each subsequent port beyond the first port.¹⁵ The Exchange proposes to assess an SQF Purge Port Fee of \$1,250 per port, per month. The Exchange proposes to assess an OTTO Port Fee of \$650 per port, per month, per account number. The Exchange proposes to assess a CTI Port Fee and a FIX Drop Port Fee of \$650 per port, per month.

The Exchange proposes to assess no fee for the first FIX Disaster Recovery Port obtained by an Electronic Access Member¹⁶ or the first SQF Disaster Recovery Port obtained by a Market

Makers" collectively. See Options 1, Section 1(a)(21). The term "Competitive Market Maker" means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term "Primary Market Maker" means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(35).

¹³ The first SQF Port would be provided to each Market Maker. The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21). The term "Competitive Market Maker" means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term "Primary Market Maker" means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(35).

¹⁴ An "account number" shall mean a number assigned to a Member. Members may have more than one account number. See Options 1, Section 1(a)(1). Account numbers are free on MRX.

¹⁵ SQF's Port Fees are assessed a higher dollar fee as compared to FIX and OTTO ports (\$1,250 vs. \$650) because the Exchange has to maintain options assignments within SQF and manage quoting traffic. Market Makers may utilize SQF Ports in their assigned options series. Market Maker badges are assigned to specific SQF ports to manage the option series in which a Market Maker may quote. Additionally, because of quoting obligations provided for within Options 2, Section 5, Market Makers are required to provide liquidity in their assigned options series which generates quote traffic. The Exchange notes because of the higher fee, SQF ports are billed per port, per month while FIX and OTTO ports are billed per port, per month, per account number. Members may have more than one account number.

¹⁶ The first FIX Port would be provided to each Electronic Access Member. The term "Electronic Access Member" or "EAM" means a Member that is approved to exercise trading privileges associated with EAM Rights. See General 1, Section 1(a)(6). Also, the first SQF Port would be provided to each Market Maker. The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21). The term "Competitive Market Maker" means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term "Primary Market Maker" means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(35).

Maker.¹⁷ The Exchange proposes to assess each additional FIX Disaster Recovery Port and each additional SQF Disaster Recovery Port a fee of \$50 per port, per month, per account number. Additionally, the Exchange proposes to assess a Disaster Recovery Fee for SQF Purge and OTTO Ports of \$50 per port, per month, per account number. Finally, the Exchange proposes to assess a Disaster Recovery Fee for CTI Ports and FIX DROP Ports of \$50 per port, per month.

The OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports¹⁸ are available to all Electronic Access Members, and will be subject to a monthly cap of \$7,500.

The SQF Port and the SQF Purge Port are available to all Market Makers, and will be subject to a monthly cap of \$17,500.¹⁹

The Exchange is not amending the Nasdaq MRX Depth of Market, Nasdaq MRX Order Feed, Nasdaq MRX Top Quote Feed, Nasdaq MRX Trades Feed, or Nasdaq MRX Spread Feed Ports; all of these aforementioned ports will continue to be assessed no fees. Additionally, as is the case today, the Disaster Recovery Ports for the Nasdaq MRX Depth of Market, Nasdaq MRX Order Feed, Nasdaq MRX Top Quote Feed, Nasdaq MRX Trades Feed and Nasdaq MRX Spread Feed Ports will not be assessed a fee.

Order and Quote Entry Protocols

Only one FIX order protocol is required for an MRX Member to submit orders into MRX and to meet its regulatory requirements.²⁰ The Exchange will provide each Electronic Access Member²¹ the first FIX Port at no cost to submit orders into MRX. Only one account number is necessary to transact an options business on MRX

¹⁷ The first SQF Port would be provided to each Market Maker. The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21). The term "Competitive Market Maker" means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term "Primary Market Maker" means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(35).

¹⁸ This includes FIX, SQF, SQF Purge, OTTO, CTI and FIX Drop Disaster Recovery Ports.

¹⁹ Only Market Makers may quote on MRX. The Exchange is proposing non-substantive technical amendments to add commas within the "Production" column of the proposed rule text to separate terms.

²⁰ MRX Members have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations.

²¹ A Market Maker who is also an Electronic Access Member would receive both one free FIX Port and one free SQF Port.

and account numbers are available to Members at no cost.

Only one SQF quote protocol is required for an MRX Market Maker to submit quotes into MRX and to meet its regulatory requirements.²² The Exchange will provide each Market Maker the first SQF Port at no cost to submit quotes into MRX. A quoting protocol, such as SQF, is only required to the extent an MRX Member has been appointed as a Market Maker in an options series pursuant to Options 2, Section 1.

Only MRX Members may utilize ports on MRX. Any market participant that sends orders to a Member would not need to utilize a port. The Member can send all orders, proprietary and agency, through one port to MRX. Members may elect to obtain multiple account numbers to organize their business, however only one account number and one port for orders and one port for quotes is necessary for a Member to trade on MRX. All other ports offered by MRX are not required for an MRX Member to meet its regulatory obligations.

MRX also offers an OTTO protocol.²³ MRX Members utilizing the first FIX Port offered at no cost do not need to purchase an OTTO Port to meet their regulatory obligations.

Further, while only one FIX protocol is necessary to submit orders into MRX, Members may choose to purchase a greater number of order entry ports, depending on that Member's business model.²⁴ To the extent that Electronic Access Members chose to utilize more than one FIX Port, the Electronic Access Member would be assessed \$650 per port, per month, per account number for each subsequent port beyond the first port. To the extent that Market Makers chose to utilize more than one SQF Port, the Market Maker would be assessed \$1,250 per port, per month for each subsequent port beyond the first port. Additionally, to the extent a Member expended more than \$7,500 for FIX Ports or more than \$17,500 for SQF Ports, the Exchange would not charge an MRX Member for additional FIX or SQF Ports, respectively, beyond the cap.

²² MRX Market Makers have intra-day quoting requirements. See Options 2, Section 5(e). Additionally, PMMs must submit a Valid Width Quote each day to open their assigned options series. See Options 3, Section 8(c)(1) and 8(c)(3).

²³ See note 8, *supra*.

²⁴ For example, a Member may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Member.

Other Protocols

The Exchange's proposal to offer an SQF Purge Port²⁵ for \$1,250 per port, per month is not required for an MRX Member to meet its regulatory obligations.

Disaster Recovery Ports

With respect to Disaster Recovery Ports, the Exchange proposes to assess no fee for the first FIX Disaster Recovery Port obtained by an Electronic Access Member or the first SQF Disaster Recovery Port obtained by a Market Maker. The Exchange proposes to assess no fees for these ports to provide Members with continuous access to MRX in the event of a failover at no cost. Electronic Access Members only require one FIX Disaster Recovery Port to submit orders in the event of a failover. Market Makers only require one SQF Disaster Recovery Port to submit quotes in the event of a failover.²⁶ Electronic Access Members may elect to purchase additional FIX Disaster Recovery Ports for \$50 per port, per month, per account number. Market Makers may elect to purchase additional SQF Disaster Recovery Ports for \$50 per port, per month, per account number. The additional FIX and SQF Disaster Recovery Ports are not necessary to connect to the Exchange in the event of a failover because the Exchange has provided Members with a FIX Disaster Recovery Port and an SQF Disaster Recovery Port at no cost. Additional FIX and SQF Disaster Recovery Ports are not necessary for an MRX Member to meet its regulatory obligations.²⁷

The Exchange's proposal to offer Disaster Recovery Ports for SQF Purge Ports and OTTO Ports for \$50 per port, per month, per account number and Disaster Recovery Ports for CTI Ports and FIX DROP Ports for \$50 per port, per month is not required for an MRX Member to meet its regulatory obligations. The proposed Disaster Recovery Port fees are intended to encourage Members to be efficient when purchasing Disaster Recovery Ports.

Finally, in the event that an MRX Member elects to subscribe to multiple ports, the Exchange offers a monthly cap beyond which a Member would be assessed no additional port fees in a given month. As noted above, the SQF Port and the SQF Purge Port are subject to a monthly cap of \$17,500 and the

OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports are subject to a monthly cap of \$7,500.

These different protocols are not all necessary to conduct business on MRX; a Member may choose among protocols based on their business workflow. The Exchange's proposal to offer the first FIX and SQF Port at no cost as well as the first FIX and SQF Disaster Recovery Ports at no cost would allow MRX Members to submit orders and quotes into MRX at no cost while meeting their regulatory obligations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁹ 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.

MRX proposes to amend its Pricing Schedule at Options 7, Section 6, Ports and Other Services, to assess port fees, which were not assessed until this year. Prior to this year, MRX did not assess its Members any port fees. MRX launched its options market in 2016³⁰ and Members did not pay any port fees until 2022. Of the 16 operating options exchanges, MRX has the smallest market share at 1.37% as of November 2022.

The Exchange notes that, as of May 2, 2022, one MRX Member, who was also a Market Maker, cancelled all of their ports (1 SQF Port and 1 OTTO Port) to avoid being assessed any MRX port fees.³¹ As of July 1, 2022, the Exchange did not assess MRX Members for their first SQF Port or FIX Port. Further, in October 2022, an additional MRX

Member, who is also a Market Maker, cancelled 3 SQF Ports.³²

Proposed Port Fees Are Reasonable, Equitable and Not Unfairly Discriminatory

Only one FIX order protocol is required for an MRX Member to submit orders into MRX and to meet its regulatory requirements³³ at no cost while meeting its regulatory requirements. The Exchange will provide each Electronic Access Member the first FIX Port at no cost to submit orders into MRX. Only one account number is necessary to transact an options business on MRX and account numbers are available to Members at no cost.

Only one SQF quote protocol is required for an MRX Market Maker to submit quotes into MRX and to meet its regulatory requirements³⁴ at no cost while meeting its regulatory requirements. The Exchange will provide each Market Maker the first SQF Port at no cost to submit quotes into MRX. A quoting protocol, such as SQF, is only required to the extent an MRX Member has been appointed as a Market Maker in an options series pursuant to Options 2, Section 1.

The Exchange proposes to offer each Electronic Access Member the first FIX Port and first FIX Disaster Recovery Port at no cost and it proposes to offer each Market Maker the first SQF Port and first SQF Disaster Recovery Port at no cost to meet their regulatory requirements. As noted above, Members may freely choose to rely on one or many ports, depending on their business model.

The Exchange's proposal is reasonable, equitable and not unfairly discriminatory as MRX is providing MRX Electronic Access Members the first FIX Port to submit orders and MRX Market Makers the first SQF Port to submit quotes to MRX, at no cost, in addition to providing the first FIX Disaster Recovery Port and the first SQF Disaster Recovery Port at no cost. These

²⁸ See 15 U.S.C. 78f(b).

²⁹ See 15 U.S.C. 78f(b)(4) and (5).

³⁰ The Exchange initially filed the proposed pricing changes on May 2, 2022 (SR-MRX-2022-04) instituting fees for membership, ports and market data. On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership, ports and market data. SR-MRX-2022-06 replaced the port fees set forth in SR-MRX-2022-04. On July 1, 2022, SR-MRX-2022-06 was withdrawn and replaced with SR-MRX-2022-09. On August 25, 2022, SR-MRX-2022-09 was withdrawn and replaced with SR-MRX-2022-12. On October 11, 2022, SR-MRX-2022-12 was withdrawn and replaced with SR-MRX-2022-20. On December 8, 2022, SR-MRX-2022-20 was withdrawn and replaced with SR-MRX-2022-28. The instant filing replaces SR-MRX-2022-28 which was withdrawn on December 16, 2022.

³¹ MRX originally filed to assess a fee for all FIX Ports.

³² This Member informed the Exchange that they elected to utilize less ports in response to the current port pricing. This Member had a total of 8 SQF Ports at the time they instructed MRX to cancel 3 of those ports.

³³ MRX Members have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations. See Rule 611 of Regulation NMS; 17 CFR 242.611 and FINRA Rule 5310.

³⁴ MRX Members have trade-through requirements under Regulation NMS as well as broker-dealers' best execution obligations. MRX Market Makers have intra-day quoting requirements. See Options 2, Section 5(e). PMMs must submit a Valid Width Quote each day to open their assigned options series. See Options 3, Section 8(c)(1) and 8(c)(3).

²⁵ See note 7, *supra*.

²⁶ The Exchange proposes to provide each Electronic Access Member the first FIX Disaster Recovery Port at no cost. The Exchange also proposes to provide each Market Maker the first SQF Disaster Recovery Port at no cost.

²⁷ See MRX General 2, Section 12(b) (this provision implements Rule 1000 of Regulation SCI).

ports, which are offered at no cost, would allow an MRX Member to meet its regulatory requirements. All other ports offered by MRX are not required for an MRX Member to meet its regulatory obligations. Therefore, for the foregoing reasons, it is reasonable to assess no fee for the first FIX Port obtained by an Electronic Access Member or the first SQF Port obtained by a Market Maker as an MRX Member is able to meet its regulatory requirements with these ports.

Further it is equitable and not unfairly discriminatory to assess no fee for the first FIX Port to Electronic Access Members as all Electronic Access Members would be entitled to the first FIX Port at no cost. Also, it is equitable and not unfairly discriminatory to assess no fee for the first SQF Port to Market Makers as all Market Makers would be entitled to the first SQF Port at no cost. With this proposal, MRX Members may organize their business in such a way as to submit orders and/or quotes continuously to MRX at no cost.

The Exchange's proposal to assess Members \$650 per port, per month, per account number for FIX Ports beyond the first port and \$1,250 per port, per month for SQF Ports beyond the first port is reasonable because these ports are not required for a member to meet its regulatory requirements. Members only require one FIX Port to submit orders to MRX and one SQF Port to submit quotes to MRX. Members electing to subscribe to more than one FIX or SQF Port are choosing the additional ports to accommodate their business model. Additionally, to the extent a Member expended more than \$7,500 for FIX Ports or more than \$17,500 for SQF Ports, the Exchange would not charge an MRX Member for additional FIX or SQF Ports beyond the cap. The fees for the proposed additional FIX and SQF Ports are equitable and not unfairly discriminatory because any Member may elect to subscribe to additional ports. Electronic Access Members would be subject to the same fees for FIX Ports and Market Makers would be subject to the same fees for SQF Ports. Unlike other market participants, Market Makers are required to provide continuous two-sided quotes on a daily basis,³⁵ and are subject to various obligations associated with providing liquidity.³⁶ Also, as noted herein, account numbers are available on MRX at no cost.

The Exchange's proposal to assess \$650 per port, per month, per account

number for an OTTO Port is reasonable because OTTO is not required for a member to meet its regulatory requirements. The Exchange is offering the first FIX Port at no cost to submit orders to MRX. In addition to the FIX Port, all Members may elect to purchase OTTO to submit orders to MRX. MRX Members utilizing the FIX Port, which is offered at no cost, do not need to utilize OTTO.

The Exchange's proposal to offer an SQF Purge Port for \$1,250 per port, per month is reasonable because this port is not required for a member to meet its regulatory requirements. The SQF Purge Port is designed to assist Market Makers in the management of, and risk control over, their quotes. Market Makers may utilize a purge port to reduce uncertainty and to manage risk by purging all quotes in their assigned options series. The proposed SQF Purge Port is equitable and not unfairly discriminatory because any Market Maker may elect to purchase an SQF Purge Port and would be subject to the same fee.

The Exchange's proposal to assess \$650 per port, per month for CTI Ports and FIX DROP Ports is reasonable because these ports are not required for a member to meet its regulatory requirements. The proposed CTI and FIX DROP Ports are equitable and not unfairly discriminatory because any Member may elect to purchase an additional CTI Port or FIX DROP Port and would be subject to the same fee.

The Exchange's proposal to assess no fee for the first FIX Disaster Recovery Port or the first SQF Disaster Recovery Port is reasonable because it will provide Members with continuous access to MRX in the event of a failover, at no cost and allow MRX Members to meet their regulatory obligations. Further it is equitable and not unfairly discriminatory to assess no fee for the first FIX Disaster Recovery Port to Electronic Access Members as all Electronic Access Members would be entitled to the first FIX Disaster Recovery Port at no cost. Also, it is equitable and not unfairly discriminatory to assess no fee for the first SQF Disaster Recovery Port to Market Makers as all Market Makers would be entitled to the first SQF Disaster Recovery Port at no cost.

The Exchange's proposal to assess Members \$50 per port, per month, per account number for additional FIX Disaster Recovery Ports beyond the first port offered at no cost and \$50 per port, per month, per account number for additional SQF Disaster Recovery Ports beyond the first port at no cost is reasonable because these additional

ports are not required for MRX Members to meet their regulatory obligations. Members only require one FIX Disaster Recovery Port to submit orders to MRX in the event of a failover and one SQF Disaster Recovery Port to submit quotes to MRX in the event of a failover. Additionally, to the extent a Member expended more than \$7,500 for Disaster Recovery Ports, the Exchange would not charge an MRX Member for additional Disaster Recovery Ports beyond the cap. The fees for the proposed additional FIX and SQF Disaster Recovery Ports are equitable and not unfairly discriminatory because any Member may elect additional ports and would be subject to the same fees.

The Exchange's proposal to offer Disaster Recovery Ports for SQF Purge Ports, and OTTO Ports at \$50 per port, per month, per account number and CTI Ports, and FIX DROP Ports for \$50 per port, per month is reasonable because these additional ports are not required for MRX Members to meet their regulatory obligations. The proposed Disaster Recovery Port fees are intended to encourage Members to be efficient when purchasing Disaster Recovery Ports. The proposed Disaster Recovery Ports are equitable and not unfairly discriminatory because any Member may elect to purchase an additional Disaster Recovery Port and would be subject to the same fee, depending on the port.

Finally, in the event that an MRX Member elects to subscribe to multiple ports, the Exchange offers a monthly cap beyond which a Member would be assessed no additional fees for month. As noted above, the SQF Port and the SQF Purge Port are subject to a monthly cap of \$17,500 and the OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports are subject to a monthly cap of \$7,500. These caps are reasonable because they allow Members to limit their fees beyond a certain level if they elect to purchase multiple ports in a given month. The caps are also equitable and not unfairly discriminatory because any Member will be subject to the cap, provided they exceeded the appropriate dollar amount in a given month.

The proposed port fees are comparable, and in some cases lower than fees assessed today by other options exchanges. The proposed port fees are similar to fees assessed today by GEMX, except that GEMX does not offer the first FIX and SQF Port at no cost, nor does GEMX offer the first FIX Disaster Recovery Port or the first SQF

³⁵ See MRX Options 2, Section 5.

³⁶ See MRX Options 2, Section 4.

Disaster Recovery Port at no cost.³⁷ By way of comparison, ISE assessed fees for ports³⁸ in 2019 while offering the same suite of functionality as MRX, with a limited exception.³⁹ Cboe⁴⁰ port fees are within the range of the proposed fees. While Cboe does not offer the first order and quote entry port at no cost or Disaster Recovery Ports at no cost, it tiers its BOE and FIX Logical ports and each subsequent port fee is lower than MRX's port fees. MRX's FIX DROP Port Fee is lower than Cboe's DROP Logical Port Fee.⁴¹ Cboe does not cap its ports as MRX has proposed herein. BOX port fees⁴² are within the range of the proposed fees. While BOX does not offer the first order and quote entry port at no cost or Disaster Recovery Ports at no cost, it tiers its FIX and SAIL port fees and each subsequent port fee is lower than MRX's port fees, although the fees are not capped as proposed herein. MRX's FIX DROP Port Fee is higher than BOX's Drop Copy Port Fee.⁴³ MIAX port fees⁴⁴ are within the range of the

³⁷ See GEMX Options 7, Section 6.C. (Ports and Other Services).

³⁸ Since 2019, ISE has assessed the following port fees: a FIX Port Fee of \$300 per port, per month, per mnemonic, an SQF Port Fee and SQF Purge Port Fee of \$1,100 per port, per month, an OTTO Port Fee of \$400 per port, per month, per mnemonic with a monthly cap of \$4,000, a CTI Port Fee and FIX DROP Port Fee of \$500 per port, per month, per mnemonic. See Securities Exchange Act Release No. 82568 (January 23, 2018), 83 FR 4086 (January 29, 2018) (SR-ISE-2018-07) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Assess Fees for OTTO Port, CTI Port, FIX Port, FIX Drop Port and Disaster Recovery Port Connectivity). Of note, ISE assessed port fees prior to 2019 as well.

³⁹ See note 41, *supra*.

⁴⁰ Cboe assesses a fee of \$750 per port up to 5 BOE/FIX Logical Ports, and \$800 per port for over 5 BOE/FIX Logical Ports. See Cboe's Fees Schedule.

⁴¹ Cboe assesses \$750 for Drop Logical Ports and \$850 for Purge Ports. See Cboe's Fees Schedule.

⁴² BOX assesses tiered FIX Port Fees as follows: \$500 per port per month for the first FIX Port, \$250 per port per month for FIX Ports 2–5 and \$150 per port per month for over 5 FIX Ports. BOX assesses \$1000 per month for all SAIL Ports for Market Making and \$500 per month per port up to 5 ports for order entry and \$150 per month for each additional port. See BOX's Fee Schedule.

⁴³ BOX assesses Drop Copy Port Fees of \$500 per port per month for each month a Participant is credentialed to use a Drop Copy Port. Drop Copy Port Fees will be capped at \$2,000 per month. See BOX's Fee Schedule.

⁴⁴ MIAX tiers its FIX Port fees as follows: \$550 per month for the 1st FIX Port, \$350 per month per port for the FIX Ports 2 through 5 and \$150 per month for over 5 FIX Ports. MIAX tiers its MEI Port Fees and assesses fees per number of classes and as a percentage of National Average Daily Volume. MEI Port fees range from \$5,000 to \$20,500 per month. The applicable fee rate is the lesser of either the per class basis or percentage of total national average daily volume measurement. However, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by The Options Clearing Corporation in the market maker account type for MIAX-listed option classes for that

proposed fees. MRX MEI Port users are allocated two (2) Full Service MEI Ports and two (2) Limited Service MEI Ports per matching engine to which they connect.⁴⁵ A MIAX Market Maker may request and be allocated two (2) Purge Ports per matching engine to which it connects via a Full Service MEI Port.⁴⁶ MIAX assesses a Real-Time Clearing Trade Drop Port Fee of \$0.0030 per executed contract side per month.⁴⁷ MIAX assesses a FIX Drop Copy Port fee of \$500 per month⁴⁸ which is lower than MRX's proposed fee. NYSE Arca port fees⁴⁹ are within the range of the proposed fees. For each order/quote entry port utilized, NYSE Arca Market Makers may utilize, free of charge, one port dedicated to quote cancellation or "quote takedown," which port(s) will not be included in the count of order/quote entry ports utilized.⁵⁰ NYSE Arca assesses a DROP Copy Port fee of \$500 per port per month⁵¹ which is lower than MRX's proposed fee.⁵²

month, then the fee will be \$14,500 instead of the fee otherwise applicable. MIAX will assess monthly MEI Port Fees on Market Makers in each month the Member has been credentialed to use the MEI Port in the production environment and has been assigned to quote in at least one class. See MIAX's Fee Schedule.

⁴⁵ MEI Port Fees include MEI Ports at the Primary, Secondary and Disaster Recovery data centers. MIAX Market Makers may request additional Limited Service MEI Ports for which MIAX will assess MIAX Market Makers \$100 per month per additional Limited Service MEI Port for each engine. See MIAX's Fee Schedule.

⁴⁶ For each month in which the MIAX Market Maker has been credentialed to use Purge Ports in the production environment and has been assigned to quote in at least one class, the Exchange will assess the MIAX Market Maker a flat fee of \$1,500 per month, regardless of the number of Purge Ports allocated to the MIAX Market Maker. The MEI Port Fee for a Market Maker that trades solely in Proprietary Products is waived until December 31, 2022. See MIAX's Fee Schedule.

⁴⁷ See MIAX's Fee Schedule.

⁴⁸ See MIAX's Fee Schedule.

⁴⁹ NYSE Arca assesses a tiered order/quote entry port fee of \$450 for the first 40 ports and \$150 per port per month for the 41 ports or greater. For purpose of calculating the number of order/quote entry ports and quote takedown ports, NYSE Arca aggregates the ports of affiliates. See NYSE Arca Options Fees and Charges.

⁵⁰ Any quote takedown port utilized by a NYSE Arca Market Maker that is in excess of the number of order/quote entry ports utilized will be counted and charged as an order/quote entry port. See NYSE Arca Options Fees and Charges.

⁵¹ Only one fee per drop copy port shall apply, even if receiving drop copies from multiple order/quote entry ports and/or from NYSE Arca Equities). For the backup datacenter port, no fee shall apply if configured such that it is duplicative of another drop copy port of the same user. See NYSE Arca Options Fees and Charges.

⁵² NYSE ARCA capped fees for Order/Quote Entry Ports, Quote Takedown Ports, and Drop Copy Ports are based on the total number of such ports an OTP Holder or OTP Firm is billed for in the month preceding the beginning of the NYSE ARCA's migration to the Pillar platform, during the Pillar Migration.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any intermarket burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Nothing in the proposal burdens inter-market competition because MRX's proposal to offer the first FIX and SQF Ports for free, as well as the first Disaster Recovery version of these ports, permits MRX to set fees, similar to other options markets, while continuing to allow MRX Members to meet their regulatory obligations. MRX's offering would permit Electronic Access Members and Market Makers the ability to submit orders and quote to MRX at no cost. The remainder of the port offerings (additional FIX and SQF Ports, additional FIX and SQF Disaster Recovery Ports, SQF Purge Port, OTTO Port, CTI Port, FIX DROP Port and Disaster Recovery Ports for SQF Purge Ports, OTTO Ports, CTI Ports, and FIX DROP Ports) are not required for MRX Members to meet their regulatory obligations. The proposed port fees are similar to port fees assessed by other options markets as noted in this proposal.

Nothing in the proposal burdens intra-market competition because the Exchange would uniformly assess the port fees to all Members, as applicable, and would uniformly apply monthly caps. With respect to the higher fees assessed for SQF Ports and SQF Purge Ports, the Exchange notes that only Market Makers may utilize these ports. Market Makers are required to provide continuous two-sided quotes on a daily basis,⁵³ and are subject to various obligations associated with providing liquidity.⁵⁴ As a result of these quoting obligations, the SQF Port and SQF Purge Port are designed to handle higher throughput to permit Market Makers to bundle orders to meet their obligations. The technology to permit Market Makers to submit a greater number of quotes, in addition to the various risk protections⁵⁵ afforded to these market participants when quoting, accounts for the higher SQF Port and SQF Purge Port fees.

⁵³ See MRX Options 2, Section 5.

⁵⁴ See MRX Options 2, Section 4.

⁵⁵ See MRX Options 3, Section 15(a)(3). Market Makers are offered risk protections to permit them to manage their risk more effectively.

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.⁵⁶

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-MRX-2023-05 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-MRX-2023-05. 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-MRX-2023-05 and should be submitted on or before March 3, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁷

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02946 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96829; File No. SR-NYSEARCA-2022-82]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of Proposed Rule Change To Amend Rule 6.40P-O Concerning Pre-Trade Risk Controls

February 7, 2023.

On December 14, 2022, NYSE Arca, Inc. ("NYSE Arca") filed with the Securities and Exchange Commission (the "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")¹ and Rule 19b-4 thereunder² a proposed rule change to add additional pre-trade risk controls to Rule 6.40P-O. The proposed rule change was published for comment on December 21, 2022.³ On February 6, 2023, NYSE Arca withdrew the proposed rule change (SR-NYSEARCA-2022-82).

⁵⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 96504 (December 15, 2022), 87 FR 78166 (December 21, 2022). Comments received on the proposal are available on the Commission's website at: <http://www.sec.gov/comments/sr-nysearca-2022-82/srnysearca202282.htm>.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-02953 Filed 2-9-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34828; File No. 812-15367]

Constitution Capital Access Fund, LLC, et al.

February 7, 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 ("BDCs") and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

Applicants: Constitution Capital Access Fund, LLC, Constitution Capital PM, L.P., Constitution Capital Equity Partners, L.P., Constitution Capital Credit Partners, L.P., Ironsides Partnership Fund VI, L.P., Ironsides Offshore Partnership Fund VI, L.P., Ironsides Co-Investment Fund VI, L.P., Ironsides Offshore Co-Investment Fund VI, L.P., Ironsides Opportunities Fund II, L.P., Ironsides Opportunities Offshore Fund II, L.P., Ironsides Partnership Fund IV, L.P., Ironsides Direct Investment Fund IV, L.P., Ironsides Partnership Fund V, L.P., Ironsides Direct Investment Fund V, L.P., and Ironsides Direct Investment Fund V—Parallel A, L.P.

Filing Dates: The application was filed on July 12, 2022, and amended on October 17, 2022 and January 13, 2023.

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

⁴ 17 CFR 200.30-3(a)(12).

⁵⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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 March 6, 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: Joshua Deringer, joshua.deringer@faegredrinker.com.

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Senior Counsel, or Lisa Reid Ragen, 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 January 13, 2023, 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, <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. 2023–02956 Filed 2–9–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17779 and #17780; North Dakota Disaster Number ND–00106]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of North Dakota

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major

disaster for Public Assistance only for the State of North Dakota (FEMA–4686–DR), dated 02/05/2023.

Incident: Severe Winter Storm, Snowstorm, and Straight-line Winds.

Incident Period: 11/09/2022 through 11/11/2022.

DATES: Issued on 02/05/2023.

Physical Loan Application Deadline Date: 04/06/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 11/06/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President’s major disaster declaration on 02/05/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Dickey, Kidder, Mercer, Nelson, Ransom, Sargent, Wells.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
<i>For Economic Injury:</i>	
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 17779 B and for economic injury is 17780 O.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator Office of Disaster Recovery & Resilience.

[FR Doc. 2023–02847 Filed 2–9–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17759 and #17760; Alabama Disaster Number AL–00128]

Presidential Declaration Amendment of a Major Disaster for the State of Alabama

AGENCY: Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Alabama (FEMA–4684–DR), dated 01/15/2023.

Incident: Severe Storms, Straight-line Winds, and Tornadoes.

Incident Period: 01/12/2023.

DATES: Issued on 02/03/2023.

Physical Loan Application Deadline Date: 03/16/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 10/16/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President’s major disaster declaration for the State of Alabama, dated 01/15/2023, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Mobile, Morgan.

Contiguous Counties (Economic Injury Loans Only):

Alabama: Baldwin, Cullman, Lawrence, Limestone, Madison, Marshall, Washington.

Mississippi: George, Greene, Jackson.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Recovery & Resilience.

[FR Doc. 2023–02845 Filed 2–9–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE**[Public Notice: 11979]****30-Day Notice of Proposed Information Collection: JADE Act Questionnaire**

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to March 13, 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.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrea Lage, who may be reached on PRA_BurdenComments@state.gov or at 202-485-7586.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* JADE Act Questionnaire.
- *OMB Control Number:* 1405-0236.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* CA/VO.
- *Form Number:* DS-5537.
- *Respondents:* Burmese Application for U.S. Visas.
- *Estimated Number of Respondents:* 20,500.
- *Estimated Number of Responses:* 20,500.
- *Average Time per Response:* 30 minutes.
- *Total Estimated Burden Time:* 10,250 hours.
- *Frequency:* Once per application.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act of 2008, Public Law 110-286, renders certain individuals involved in specified Burmese organizations or activities ineligible for U.S. visas, including: leaders of the State Peace and Development Council (SPDC), the Burmese military, or the Union Solidarity Development Association (USDA); officials of the SPDC, the Burmese military, or the USDA involved in human rights violations and impeding democracy in Burma; and Burmese persons who provided substantial economic or political support to the SPDC, Burmese military, or USDA. Immediate family members of these individuals are also ineligible for U.S. visas. Department of State consular officers will use the information provided to evaluate and adjudicate the individual applicant’s eligibility for a visa consistent with this law.

Methodology

All Burmese nationals applying for a U.S. visa will be required to complete and submit the JADE Act questionnaire. Consular officers will use the form to identify potential visa ineligibility under the JADE Act.

Julie M. Stufft,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2023-02886 Filed 2-9-23; 8:45 am]

BILLING CODE 4710-06-P

DEPARTMENT OF STATE**[Delegation of Authority No. 514-1]****Delegation of Authorities; Certain Congressional Reporting Functions**

By virtue of the authority vested in the Secretary of State by the laws of the

United States, including section 1(a)(4) of the State Department Basic Authorities Act (22 U.S.C. 2651a(a)(4)), I hereby delegate to Assistant Secretary Alaina Teplitz, to the extent authorized by law and subject to the limitation below, the authority of the Secretary of State to approve submission of one-time or recurring reports to the Congress.

This delegation shall not be construed to authorize waivers, certifications, determinations, findings, or other such statutorily required substantive actions that may be called for in connection with the submission of a report. Assistant Secretary Teplitz shall be responsible for referring to the Secretary, the Deputy Secretary, or the Deputy Secretary for Management and Resources any matter on which action should appropriately be taken by such official.

The Secretary, Deputy Secretary, Deputy Secretary for Management and Resources, and the Under Secretary for Management may exercise any function or authority delegated herein. This delegation of authority does not modify any other delegation of authority currently in effect.

This delegation shall expire upon the entry upon duty of a confirmed Deputy Secretary of State for Management and Resources, unless sooner revoked, and shall be published in the **Federal Register**.

Dated: February 3, 2023.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2023-02829 Filed 2-9-23; 8:45 am]

BILLING CODE 4710-10-P

DEPARTMENT OF STATE**[Public Notice: 11989]****Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: “Women Defining Women in Contemporary Art of the Middle East and Beyond” Exhibition**

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition “Women Defining Women in Contemporary Art of the Middle East and Beyond” at the Los Angeles County Museum of Art, Los Angeles, California, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as

aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6471; email: section2459@state.gov). The mailing address is U.S. Department of State, L/PD, 2200 C Street, NW (SA-5), Suite 5H03, Washington, DC 20522-0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Stacy E. White,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023-02874 Filed 2-9-23; 8:45 am]

BILLING CODE 4710-05-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36663]

Yak Rail LLC—Modified Rail Certificate

On January 27, 2023, Yak Rail LLC (Yak Rail),¹ a noncarrier, filed a notice for a modified certificate of public convenience and necessity under 49 CFR part 1150 subpart C—*Modified Certificate of Public Convenience and Necessity*, to lease and operate a line of railroad owned by Yakima County, originating at BNSF Railway Company (BNSF) milepost 73.6 at Wesley Junction near Toppenish² and extending west 20.56 miles to White Swan (the Line), and an additional 1.63 miles of industrial spur near White Swan, for a total distance of 22.19 miles in Yakima County, Wash.

The Line was authorized for abandonment by the Board's predecessor agency, the Interstate Commerce Commission, in *Washington Central Railroad—Abandonment Exemption—in Yakima County, Wash.*, AB 326X (ICC served Aug. 24, 1992).

¹ Yak Rail is a new entity formed as a limited liability company under the laws of the State of Washington.

² The lease agreement refers to this point as milepost 0.0. (See Verified Notice, Ex. B at 1.)

Although authorized for abandonment, the Line was subsequently acquired by the State of Washington pursuant to an offer of financial assistance in *Washington Central Railroad—Abandonment Exemption—in Yakima County, Wash.*, AB 326X (ICC served March 18, 1993), and according to Yak Rail, transferred to Yakima County (the County). Previously, the Line was operated by three other carriers under modified rail certificates.³

Pursuant to a lease agreement, Yak Rail and the County have agreed that Yak Rail will commence freight rail operation on or after January 27, 2023, for an initial term of 10 years, which may be extended, upon the occurrence of certain conditions, for an additional five years. Under the agreement, the parties may terminate the lease earlier upon the occurrence of certain events (*i.e.*, a final and non-appealable order by the Board, court, or other administrative agency that terminates Yak Rail's authority or ability to provide rail freight services on the Line). (See Verified Notice, Ex. B at 9.)⁴

This transaction is related to the verified notice of exemption filed in *CWW LLC—Continuance in Control Exemption—Yak Rail LLC*, Docket No. FD 36664, in which CWW LLC seeks to continue in control of Yak Rail, upon Yak Rail's becoming a Class III rail carrier.

The Line qualifies for a modified certificate of public convenience and necessity. See *Common Carrier Status of States, State Agencies & Instrumentalities & Pol. Subdivs.*, FD 28990F (ICC served July 16, 1981); 49 CFR 1150.22.

Yak Rail states that no entity is subsidizing Yak Rail's freight operations on the Line and that there are no preconditions for shippers to meet in order to receive rail service from Yak Rail. Yak Rail also states that the agreement requires it to obtain liability insurance coverage.

This notice will be served on the Association of American Railroads (Car Service Division), as agent for all railroads subscribing to the car-service

³ See *Yakima Valley Rail & Steam Museum Ass'n.—Modified Rail Certificate*, FD 32487 (ICC served Apr. 28, 1994); *Cent. Wash. R.R.—Modified Rail Certificate*, FD 34804 (STB served Jan. 4, 2006); *YCR Corp.—Modified Rail Certificate—in Yakima Cnty., Wash.*, FD 35336 (STB served Jan. 15, 2010).

⁴ As operator of the Line, Yak Rail will provide rail freight service over the Line's only interline connection with BNSF at BNSF milepost 73.6, at Toppenish. Yak Rail advises the Board that it intends to enter into an interchange agreement with BNSF, imposing no interchange commitment. Yak Rail states that it will advise the Board in the event that the final interchange agreement differs from what it represented here.

and car-hire agreement, at 425 Third Street SW, Suite 1000, Washington, DC 20024; and on the American Short Line and Regional Railroad Association at 50 F Street NW, Suite 500, Washington, DC 20001.

Board decisions and notices are available at www.stb.gov.

Decided: February 7, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2023-02875 Filed 2-9-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36664]

CWW LLC—Continuance in Control—Yak Rail LLC

CWW LLC (CWW), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(2) to continue in control of Yak Rail LLC (Yak Rail), upon Yak Rail's becoming a Class III carrier.

This transaction is related to a concurrently filed notice of modified certificate of public convenience and necessity in *Yak Rail LLC—Modified Rail Certificate*, Docket No. FD 36663, for Yak Rail to lease and operate a line of railroad owned by Yakima County, originating at BNSF Railway Company (BNSF) milepost 73.6 at Wesley Junction near Toppenish¹ and extending west 20.56 miles to White Swan (the Line), and an additional 1.63 miles of industrial spur near White Swan, for a total distance of 22.19 miles in Yakima County, Wash.²

This transaction may be consummated on or after February 26, 2023, the effective date of the exemption (30 days after the exemption is filed).

According to the verified notice, CWW is under the ownership and control of Paul Didelius, who also controls YCR; CCET LLC, a Class III carrier that operates a rail line in Ohio; and three Class III carriers—WRL LLC, RYAL LLC, and KET LLC—that operate rail lines in Washington.

CWW represents that: (1) the rail properties operated and controlled by CWW and its corporate affiliates do not physically connect, (2) there are no plans to acquire additional rail lines for

¹ This point is also referred to as milepost 0.0. (See Verified Notice 3.)

² The Line was previously leased to YCR Corporation (YCR), a Class III carrier, pursuant to a modified rail certificate. See *YCR Corp.—Modified Rail Certificate—in Yakima, Cnty., Wash.*, FD 35336 (STB served Jan. 15, 2010).

the purpose of making a connection, and (3) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. See 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III carriers. Because this transaction involves Class III carriers only, the Board may not impose labor protective conditions here.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than February 17, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36664, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing at 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on CWW's representative, James H.M. Savage, 22 Rockingham Court, Germantown, MD 20874.

Board decisions and notices are available at www.stb.gov.

Decided: February 7, 2023.

By the Board,

Mai T. Dinh,

Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023-02876 Filed 2-9-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 290 (Sub-No. 4)]

Railroad Cost Recovery Procedures—Productivity Adjustment

AGENCY: Surface Transportation Board.

ACTION: Presentation of the Board's calculation for the change in railroad productivity for the 2017–2021 averaging period.

SUMMARY: In a decision served on February 10, 2023, the Board proposed to adopt 1.028 (2.8% per year) as the measure of average (geometric mean) change in railroad productivity for the

2017–2021 (five-year) period. The Board's February 10, 2023 decision stated that comments may be filed addressing any perceived data and computational errors in the Board's calculation. The decision also stated that, unless a further order is issued postponing the effective date, the decision will take effect on March 1, 2023.

DATES: Comments are due by February 27, 2023.

ADDRESSES: Comments may be filed via e-filing on the Board's website at www.stb.gov. Comments must be served on all parties appearing on the service list.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez at (202) 245-0333. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision, which is available at www.stb.gov.

Decided: February 6, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2023-02915 Filed 2-9-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 558 (Sub-No. 26)]

Railroad Cost of Capital—2022

AGENCY: Surface Transportation Board.

ACTION: Notice.

SUMMARY: The Board is instituting a proceeding to determine the railroad industry's cost of capital for 2022. The decision solicits comments on the following issues: the railroads' 2022 current cost of debt capital, the railroads' 2022 current cost of preferred equity capital (if any), the railroads' 2022 cost of common equity capital, and the 2022 capital structure mix of the railroad industry on a market value basis.

DATES: Notices of intent to participate are due by March 21, 2023. Statements of the railroads are due by April 11, 2023. Statements of other interested persons are due by May 2, 2023. Rebuttal statements by the railroads are due by May 23, 2023.

ADDRESSES: Comments may be filed with the Board via e-filing on the Board's website.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez at (202) 245-0333. If you

require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: The decision in this proceeding is posted at www.stb.gov.

Authority: 49 U.S.C. 10704(a).

Decided: February 7, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023-02928 Filed 2-9-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21104]

Van Pool Transportation LLC—Acquisition of Control—Local Motion, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: On January 13, 2023, Van Pool Transportation LLC (Van Pool or Applicant), a noncarrier, filed an application for Van Pool to acquire control of an interstate passenger motor carrier, Local Motion, Inc. (Local Motion), by acquiring all of the outstanding equity shares of the shareholders of Local Motion: Bruce E. Barrows, William J. Carragher, and John R. Eaton (collectively, Sellers). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by March 27, 2023. If any comments are filed, Van Pool may file a reply by April 11, 2023. If no opposing comments are filed by March 27, 2023, this notice shall be effective on March 28, 2023.

ADDRESSES: Comments may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423-0001. In addition, send one copy of comments to Van Pool's representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: According to the application, Van Pool is a limited liability company organized under

Delaware law and headquartered in Wilbraham, Mass. (Appl. 2.) Van Pool states that it indirectly owns and controls all of the equity and voting interest in the following interstate passenger motor carriers (collectively, the Affiliate Regulated Carriers) that hold interstate passenger motor carrier authority, (*id.* at 2–6):¹

- NRT Bus, Inc., which primarily provides non-regulated student school bus transportation services in Massachusetts (Essex, Middlesex, Norfolk, Suffolk, and Worcester counties), and occasional charter services;
- Trombly Motor Coach Service, Inc., which primarily provides non-regulated school bus transportation services in Massachusetts (Essex and Middlesex counties), and occasional charter services;
- Salter Transportation, Inc., which primarily provides non-regulated school bus transportation services in Massachusetts (Essex County) and southern New Hampshire, and occasional charter services;
- Easton Coach Company, LLC, which provides (i) intrastate paratransit, shuttle, and line-run services under contracts with regional transportation authorities and other organizations, primarily in New Jersey and eastern Pennsylvania, and (ii) private charter motor coach and shuttle services (interstate and intrastate), primarily in eastern Pennsylvania;
- F.M. Kuzmeskus, Inc., which provides (i) non-regulated school bus transportation services in western Massachusetts and southern Vermont, (ii) intrastate and interstate motor coach and limousine charter services, and (iii) limited intrastate and interstate charter services;
- Alltown Bus Service, Inc., which primarily provides non-regulated school bus transportation services in the metropolitan area of Chicago, Ill., and occasional charter services; and
- DS Bus Lines, Inc., which primarily provides non-regulated school bus transportation services in Kansas (Beloit, Kansas City, Lincoln, Olathe, and Shawnee), Missouri (Belton and Smithville), Colorado (the metropolitan area of Denver), and Oklahoma (the metropolitan area of Tulsa), and intrastate employee shuttle services in Colorado and Texas.

According to the application, Van Pool also has operating subsidiaries that

provide transportation services that do not involve regulated interstate transportation or require interstate passenger authority (together with the Affiliate Regulated Carriers, the Applicant Subsidiaries), primarily in the northeastern portion of the United States. (Appl. 2–3; *id.* at Ex. B.) Van Pool states that it is indirectly owned and controlled by investment funds affiliated with Audax Management Company, LLC, a Delaware limited liability company. (*Id.* at 8.)²

The application explains that Local Motion, the carrier being acquired, is a Massachusetts corporation that provides the following services: (i) non-regulated school bus transportation services under contracts with schools in the metropolitan area of Boston, Mass. (Greater Boston); (ii) motor coach and mini-bus charter services to the traveling public in Greater Boston; (iii) contract shuttle services for employers and colleges in Greater Boston; and (iv) transportation services for students attending summer camps, all originating in Greater Boston. (*Id.* at 6–7.) The application states that, in providing its services, Local Motion utilizes approximately 20 motor coaches, 130 school buses, 10 mini-buses, and 12 vans, and approximately 185 drivers. (*Id.* at 7.) The application further states that Local Motion holds interstate carrier operating authority under FMCSA Docket No. MC–338541 and has a safety rating of “Satisfactory.” (*Id.* at 6.) According to the application, all the Sellers are individuals domiciled in Massachusetts, none of the Sellers is a carrier, and none of the Sellers has control of any federally regulated passenger motor carrier other than Local Motion. (*Id.*) Van Pool represents that, through this transaction, it will acquire all the outstanding equity shares from Sellers, the effect of which will be to place Local Motion under the control of Van Pool. (*Id.* at 1, 8.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) the effect of the proposed transaction on the adequacy of transportation to the public, (2) the total fixed charges that result from the proposed transaction, and (3) the interest of affected carrier employees. Van Pool has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest

under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5). (*See* Appl. 9–14.)

Van Pool asserts that the proposed transaction will not have a material, detrimental impact on the adequacy of transportation services available to the public. (*Id.* at 10.) Van Pool states that Local Motion will continue to provide the same services it currently provides under the same name, but will operate as a subsidiary of Van Pool, which is experienced in passenger transportation operations. (*Id.*) Van Pool explains that it is experienced in the same market segments served by Local Motion (school bus transportation, private charter transportation, employer and college shuttle services, and summer camp transportation), and that the transaction is expected to result in improved operating efficiencies, increased equipment utilization rates, and cost savings derived from economies of scale, all of which will help ensure the provision of adequate service to the public. (*Id.*) Van Pool also asserts that adding Local Motion to its corporate family will enhance the viability of Van Pool’s organization and the Applicant Subsidiaries. (*Id.*)

Van Pool claims that neither competition nor the public interest will be adversely affected by the proposed transaction. (*Id.* at 11–14.) Van Pool explains that the school bus transportation market is very competitive in eastern Massachusetts, and there are a large number of school bus service providers in that market area. (*Id.* at 13 (listing multiple competitors).) As to charter services, Van Pool states that there are a number of passenger transportation arrangers or brokers for charter services that operate and serve Greater Boston, including Academy Bus Charter, Cavalier Coach, Bloom Bus, and Paul Revere Bus. (*Id.*) Van Pool notes that all charter service providers, including Local Motion, also compete with other modes of passenger transportation, including rail, low-cost airlines, and passenger transportation network companies. (*Id.*) In addition, Van Pool explains that Local Motion competes with a number of providers of employer and college shuttle services in Greater Boston, and competes with many of the school bus service providers and charter service providers in providing transportation services for summer camps. (*Id.*) Van Pool also notes that the Local Motion service areas are

¹ Additional information about these motor carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (*See id.* at 2–6; *id.* at Ex. A.)

² Further information about the Applicant’s corporate structure and ownership can be found in the application. (*See* Appl. 8; *id.* at Ex. B.)

generally geographically “dispersed” from the service areas of the Affiliate Regulated Carriers in regard to their respective service offerings, and states that there is virtually no overlap in the service areas and/or customer bases among the Affiliate Regulated Carriers and Local Motion. (*Id.*)

Van Pool states that the proposed transaction will increase fixed charges in the form of interest expenses because funds will be borrowed to assist in financing the transaction; however, Van Pool maintains that the increase will not impact the provision of transportation services to the public. (*Id.* at 11.) Van Pool also asserts that it does not expect the transaction to have substantial impacts on employees or labor conditions, and it does not anticipate a measurable reduction in force or changes in compensation levels or benefits at Local Motion. (*Id.*) Van Pool submits, however, that staffing redundancies could result in limited downsizing of back-office and/or managerial-level personnel. (*Id.*)

Based on Van Pool’s representations, the Board finds that the acquisition as proposed in the application is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 CFR 1182.6. If no opposing comments are filed by expiration of the comment period, this notice will take effect automatically and will be the final Board action in this proceeding.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective March 28, 2023, unless opposing comments are filed by March 27, 2023. If any comments are filed, Applicant may file a reply by April 11, 2023.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530;

and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: February 7, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2023–02927 Filed 2–9–23; 8:45 am]

BILLING CODE 4915–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Commission Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will conduct its regular business meeting on March 16, 2023 in Harrisburg, Pennsylvania. Details concerning the matters to be addressed at the business meeting are contained in the Supplementary Information section of this notice. Also the Commission published a document in the **Federal Register** on January 11, 2023, concerning its public hearing on February 2, 2023, in Harrisburg, Pennsylvania.

DATES: The meeting will be held on Thursday, March 16, 2023, at 9 a.m.

ADDRESSES: This public meeting will be conducted in person and digitally from the Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, Pennsylvania 17110.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: 717–238–0423; fax: 717–238–2436.

SUPPLEMENTARY INFORMATION: The business meeting will include actions or presentations on the following items: (1) approval of contracts, grants and agreements; (2) a motion to release a proposed general permit for public comment (3) and actions on 18 regulatory program projects.

This agenda is complete at the time of issuance, but other items may be added, and some stricken without further notice. The listing of an item on the agenda does not necessarily mean that the Commission will take final action on it at this meeting. When the Commission does take final action, notice of these actions will be published in the **Federal Register** after the meeting. Any actions specific to projects will also be provided in writing directly to project sponsors.

The meeting will be conducted both in person at the Susquehanna River Basin Commission Harrisburg headquarters and digitally. The public is invited to attend the Commission’s business meeting. You can access the Business Meeting remotely via Zoom: <https://us02web.zoom.us/j/82472805136?pwd=VlpHaElpeWF2U0RhWVFQRHhTbU40UT09>; Meeting ID 824 7280 5136; Passcode: SRBC4423! or via telephone: 309–205–3325 or 312–626–6799; Meeting ID 824 7280 5136.

Written comments pertaining to items on the agenda at the business meeting may be mailed to the Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pennsylvania 17110–1788, or submitted electronically through www.srb.com/about/meetings-events/business-meeting.html. Such comments are due to the Commission on or before February 13, 2023. Comments will not be accepted at the business meeting noticed herein.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: February 6, 2023.

Jason E. Oyler,
General Counsel and Secretary to the Commission.

[FR Doc. 2023–02819 Filed 2–9–23; 8:45 am]

BILLING CODE 7040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Conforming and Technical Amendments: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: This notice makes one conforming amendment and one technical amendment to the reinstated exclusions in the Section 301 investigation of China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation.

DATES: The conforming amendment announced in Annex I to this notice applies as of January 1, 2023. The technical amendment announced in Annex II to this notice is retroactive to the date of publication of the original exclusion.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Associate General Counsel Philip Butler or Assistant General

Counsel Rachel Hasandras at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact traderemedy@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

A. Background

The U.S. Trade Representative has taken actions under Section 301 of the Trade Act of 1974, as amended, in the form of additional duties on products of China in the investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation. The China 301 actions are set out in notes to the Harmonized Tariff Schedule of the United States (HTSUS). *See, e.g.*, 87 FR 26797 (Section A—summarizing the trade actions and modifications). The U.S. Trade Representative modified these actions by issuing product specific exclusions. Certain exclusions were extended in 2019 and 2020, but most exclusions expired at the end of 2020. In March 2022, USTR reinstated certain previously extended exclusions. These reinstated exclusions were recently extended through September 30, 2023. *See* 87 FR 78187 (December 21, 2022).

B. Conforming Amendment

Effective January 1, 2023, the United States International Trade Commission, in cooperation with the interagency Committee for Statistical Annotation of Tariff Schedules, implemented certain changes in ten-digit statistical reporting categories of the HTSUS and in Schedule B under section 484(f) of the Tariff Act of 1930, 19 U.S.C. 1484(f). One of the reinstated product exclusions set out at 87 FR 17380 (March 28, 2022), is based on one of the amended statistical reporting categories. To maintain the pre-existing product coverage of the China 301 actions, a conforming amendment to the corresponding note provision in the HTSUS is required.

Annex I to this notice makes a conforming amendment to U.S. note 20 subdivision (tt)(iv)(42), as set out in the Annex to the notice published at 87 FR 17380 (March 28, 2022) in the above-titled investigation under Section 301.

C. Technical Amendment

Annex II to this notice makes a technical amendment to U.S. note subdivisions 20(qq)(20), 20(iii)(50) and 20(tt)(iii)(36) to subchapter III of chapter 99 of the HTSUS, as set out in the Annexes of the notices published at 85 FR 6674 (February 5, 2020), 85 FR 48600 (August 11, 2020), and 87 FR 17380 (March 28, 2022), to correct the

description of the articles covered by one of the reinstated exclusions.

Like all exclusions under this Section 301 investigation, the amendments in this notice apply to entries of goods that are not liquidated or to entries that are liquidated, but not final. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

Annex I

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on January 1, 2023, note 20(tt)(iv)(42) to subchapter III of chapter 99 of the HTSUS is modified by deleting “9404.90.1000” and by inserting “9404.90.1000 prior to January 1, 2023; described in statistical reporting number 9404.90.1060 or statistical reporting number 9404.90.1090 effective January 1, 2023” in lieu thereof.

Annex II

1. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 24, 2018, and through August 7, 2020, U.S. note 20(qq)(20) to subchapter III of chapter 99 of the HTSUS is modified by deleting “cuprous oxide and” and by inserting “copper oxide or” in lieu thereof.

2. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 7, 2020, and through December 31, 2020, U.S. note 20(iii)(50) to subchapter III of chapter 99 of the HTSUS is modified by deleting “cuprous oxide and” and by inserting “copper oxide or” in lieu thereof.

3. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on October 12, 2021, and through September 30, 2023, U.S. note 20(tt)(iii)(36) to subchapter III of chapter 99 of the HTSUS is modified by deleting “cuprous oxide and” and by inserting “copper oxide or” in lieu thereof.

Greta Peisch,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2023–02835 Filed 2–9–23; 8:45 am]

BILLING CODE 3390–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Meeting of the National Parks Overflights Advisory Group

ACTION: Notice of meeting.

SUMMARY: The Federal Aviation Administration (FAA) and the National Park Service (NPS), in accordance with the National Parks Air Tour Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group (NPOAG). This notification provides the date, location, and agenda for the meeting.

DATES: The NPOAG will meet on March 8–9, 2023.

ADDRESSES: The meeting will take place in the Room C210 located in the Georgia World Congress Center, 285 Andrew Young International Blvd. NW, Atlanta, GA 30313. The meeting will be held from 1:00 p.m. to 5:00 p.m. on March 8 and from 8:30 a.m. to 12:30 p.m. on March 9, 2023. This NPOAG meeting will be open to the public.

FOR FURTHER INFORMATION CONTACT:

Sandi Fox, Environmental Protection Specialist, Federal Aviation Administration, Office of Environment and Energy, 800 Independence Ave. SW, Suite 900W, Washington, DC 20591, telephone: (202) 267–0928, email: sandra.y.fox@faa.gov.

SUPPLEMENTARY INFORMATION: The National Parks Air Tour Management Act of 2000 (NPATMA), enacted on April 5, 2000, as Public Law 106–181, required the establishment of the NPOAG within one year after its enactment. The Act requires that the NPOAG be a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairperson of the advisory group.

The duties of the NPOAG include providing advice, information, and recommendations to the FAA Administrator and the NPS Director on; implementation of Public Law 106–181; quiet aircraft technology; other measures that might accommodate interests to visitors of national parks; and at the request of the Administrator and the Director, on safety, environmental, and other issues related to commercial air tour operations over national parks or Tribal lands.

Agenda for the March 8–9, 2023 NPOAG Meeting

The agenda for the meeting will include, but is not limited to, an update on ongoing park specific air tour management plans or voluntary agreements, status of agency implementation of court approved plan/schedule, update on environmental review process and special purpose law consultations, and public comment review process.

Attendance at the Meeting and Submission of Written Comments

Although this is not a public meeting, interested persons may attend. Because seating is limited, if you plan to attend please contact the person listed under **FOR FURTHER INFORMATION CONTACT** no later than February 22, 2023 so that meeting space may be made to accommodate all attendees. Written comments regarding the meeting will be accepted directly from attendees or may be sent to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Record of the Meeting

If you cannot attend the NPOAG meeting, a summary record of the meeting will be made available under the NPOAG section of the FAA ATMP website at: http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/minutes.cfm or through the Office of Environment and Energy, 800 Independence Ave. SW, Suite 900W, Washington, DC 20591, telephone: (202) 267–0928.

Issued in Washington, DC, on February 7, 2023.

Sandra Fox,

Environmental Protection Specialist, Office of Environment and Energy.

[FR Doc. 2023–02913 Filed 2–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0042; Notice 2]

Continental Tire the Americas, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of petition.

SUMMARY: Continental Tire the Americas, LLC (CTA), has determined that certain Altimax RT 43 replacement

passenger car tires do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 139, *New Pneumatic Radial Tires for Light Vehicles*. CTA filed a noncompliance report dated April 20, 2021, and subsequently petitioned National Highway Traffic Safety Administration (NHTSA or the “Agency”) on May 13, 2021, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the denial of CTA’s petition.

FOR FURTHER INFORMATION CONTACT:

Jayton Lindley, Office of Vehicle Safety Compliance, NHTSA, (325) 655–0547.

SUPPLEMENTARY INFORMATION:

I. Overview

CTA has determined that certain Altimax RT43 replacement passenger car tires do not fully comply with the requirements of paragraph S5.5.1(b) of FMVSS No. 139, *New Pneumatic Radial Tires for Light Vehicles* (49 CFR 571.139). CTA filed a noncompliance report dated April 20, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. CTA subsequently petitioned NHTSA on May 13, 2021, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

Notice of receipt of CTA’s petition was published with a 30-day public comment period, on June 9, 2022, in the **Federal Register** (87 FR 35283). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number “NHTSA–2021–0042.”

II. Tires Involved

Approximately three (3) Altimax RT43 replacement passenger car tires, size 175/65R14 82T, manufactured between March 8, 2020, and March 14, 2020, are potentially involved.

III. Noncompliance

CTA explains that the noncompliance is due to a mold error in which the subject tires contain a tire identification number (TIN) that omits the 3-digit plant code and the 6-symbol manufacturer’s identification mark as

required by paragraph S5.5.1(b) of FMVSS No. 139 and 49 CFR 574.5(b). Specifically, CTA should have labeled the subject tires “DOT 036 0F934V 1020” on the outboard sidewall and “DOT 036 0F934V” on the inboard sidewall, but CTA instead labeled “DOT 1020”¹ on the outboard sidewall and “DOT” on the inboard sidewall.

IV. Rule Requirements

Paragraph S5.5.1(b) of FMVSS No. 139 includes the following requirements, which are relevant to this petition:

- For tires manufactured on or after September 1, 2009, each tire must be labeled with the TIN required by 49 CFR part 574 on the intended outboard sidewall of the tire.
- If a tire does not have an intended outboard sidewall, the tire must be labeled with the TIN required by 49 CFR part 574 on one sidewall and with either the TIN or a partial TIN, containing all characters in the TIN except for the date code and, at the discretion of the manufacturer, any optional code, on the other sidewall.²

V. Summary of CTA’s Petition

The following views and arguments presented in this section, “V. Summary of CTA’s Petition,” are the views and arguments provided by CTA in support of its petition. They do not reflect the views of the Agency. CTA describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

CTA says that in most instances, it “tests its tires to standards which exceed the FMVSS minimums.” CTA asserts that “the subject tires contain all the necessary sidewall markings to show compliance with FMVSS testing” and that other than the incorrect TIN marking, the tires “meet or exceed” FMVSS No. 139’s performance and labeling requirements.

According to CTA, the serial sidewall of the subject tires displays the correct DOT production week and year, and when combined with other markings available on the subject tires, the tires can be uniquely identified.

CTA cites the following previous inconsequentiality petitions to support its argument:

a. Michelin North America, Inc., 85 FR 37495 (June 22, 2020).

¹ Blank spaces in this quoted label are representative of how the labeling error appears on CTA’s subject tires.

² This specific requirement does not apply to retreaded tires, but notably, the subject tires are not retreaded tires.

b. Cooper Tire & Rubber Company, 82 FR 52966 (November 15, 2017).

c. Cooper Tire & Rubber Company, 82 FR 17510 (April 11, 2017).

CTA states that it is not aware of any tire failures related to performance that resulted in an accident, injury, property damage, customer complaint, or any field reports associated with the mislabeling.

CTA says that it has quarantined its current inventory of the noncompliant tires—leaving three tires remaining in the market.

CTA concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

VI. NHTSA's Analysis

In determining inconsequentiality of a noncompliance, NHTSA focuses on the safety risk to individuals who experience the type of event against which a recall would otherwise protect.³ In general, NHTSA does not consider the absence of complaints or injuries when determining if a noncompliance is inconsequential to safety. The absence of complaints does not mean vehicle occupants have not experienced a safety issue, nor does it mean that there will not be safety issues in the future.⁴

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected also do not justify granting an inconsequentiality petition.⁵ Similarly, mere assertions that

only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance are unpersuasive. The percentage of potential occupants that could be adversely affected by a noncompliance is not relevant to whether the noncompliance poses an inconsequential risk to safety. Rather, NHTSA focuses on the consequence to an occupant who is exposed to the consequence of that noncompliance.⁶ The Safety Act is preventive, and manufacturers cannot and should not wait for deaths or injuries to occur in their vehicles before they carry out a recall.⁷ Indeed, the very purpose of a recall is to protect individuals from risk.⁸

NHTSA has evaluated the merits of the petition submitted by CTA and is denying CTA's request for relief from notification and remedy.

The purpose of the TIN is to provide a means by which tire manufacturers may notify purchasers of defective or nonconforming tires.

CTA cited three prior petitions in support of their own petition. In the Michelin North America, Inc., 85 FR 37495 (June 22, 2020) petition the subject tires contained a TIN, however, the symbol "DOT" was incorrectly placed after the 1st grouping of TIN characters. For the Cooper Tire & Rubber Company, 82 FR 52966 (November 15, 2017) and Cooper Tire & Rubber Company, 82 FR 17510 (April 11, 2017) petitions the manufacturer incorrectly used the wrong characters for the plant code portion of the TIN on one sidewall. The Agency does not find the petitions CTA cited as relevant to this petition. In each of the petitions cited by CTA, the tires contain a full TIN on at least 1 sidewall of the tire that can be utilized for the purposes of identification in the event of a recall. The tires that are the subject of this petition do not have a full or partial TIN on either sidewall.

Denial of Petition for Decision of Inconsequential Noncompliance, 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

⁶ See *Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance*, 64 FR 29408, 29409 (June 1, 1999).

⁷ See, e.g., *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977).

⁸ *Id.*

Furthermore, NHTSA disagrees with CTA's assertion that the date code is sufficient to register and uniquely identify a tire. Without a TIN, there is no means by which purchasers can register the subject tires. In the event of a recall, CTA may be unable to timely notify purchasers of a potential safety issue, and consumers and other drivers will be at risk. If an original purchaser of a subject tire previously sold or will sell their vehicle to a different consumer, it is unlikely that CTA will be able to timely notify the subsequent consumer of potential safety issues. Additionally, it may not even be possible for CTA to determine how to contact a subsequent consumer. For these reasons, the Agency is denying this petition for relief from notification and remedy.

VII. NHTSA's Decision

In consideration of the foregoing, NHTSA has decided that CTA has not met its burden of persuasion that the subject FMVSS No. 139 noncompliance is inconsequential to motor vehicle safety. Accordingly, CTA's petition is hereby denied and CTA is consequently obligated to provide notification of and free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Anne L. Collins,

Associate Administrator for Enforcement.

[FR Doc. 2023-02813 Filed 2-9-23; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Revision; Submission for OMB Review; Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions With Total Consolidated Assets of \$250 Billion or More Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC).

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). In accordance with the requirements of the

³ See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

⁴ See *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016); see also *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it "results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future").

⁵ See *Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance*, 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.;*

PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC proposed revisions to a regulatory reporting requirement for national banks and Federal savings associations titled, "Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of \$250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act," and is now seeking comment on the final version of those revisions. The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by March 13, 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, 1557–0319, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Fax:* (571) 465–4326.

Instructions: You must include "OCC" as the agency name and "1557–0319" in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. You can find this particular information collection at that website by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

On December 5, 2022, the OCC published a notice for 60 days of comment concerning this collection, 87 FR 74470. You may review comments and other related materials that pertain

to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

• *Viewing Comments Electronically:* Go to www.reginfo.gov. Hover over the "Information Collection Review" tab and click on "Information Collection Review" drop-down menu. From the "Currently under Review" drop-down menu, select "Department of Treasury" and then click "submit." This information collection can be located by searching by OMB control number "1557–0319" or "Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of \$250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act." Upon finding the appropriate information collection, click on the related "ICR Reference Number." On the next screen, select "View Supporting Statement and Other Documents" and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT:

Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th St. SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

In addition, copies of the templates referenced in this notice can be found on the OCC's website under News and Issuances (<http://www.occ.treas.gov/tools-forms/forms/bank-operations/stress-test-reporting.html>).

SUPPLEMENTARY INFORMATION:

The OCC is requesting comment on the following revision to an approved information collection:

Title: Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of \$250 Billion or More under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

OMB Control No.: 1557–0319.

Description: Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (Dodd-Frank Act) requires certain financial companies, including national banks and federal savings associations, to conduct annual stress tests² and

requires the primary financial regulatory agency³ of those financial companies to issue regulations implementing the stress test requirements.⁴ Under section 165(i)(2), a covered institution is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a report at such time, in such form, and containing such information as the primary financial regulatory agency may require.⁵

On October 9, 2012, the OCC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirement.⁶ This rule describes the reports and information collections required to meet the reporting requirements under section 165(i)(2). These information collections will be given confidential treatment (5 U.S.C. 552(b)(4)) to the extent permitted by law.

In 2012, the OCC first implemented the reporting templates referenced in the final rule. See 77 FR 49485 (August 16, 2012) and 77 FR 66663 (November 6, 2012). The OCC uses the data collected to assess the reasonableness of the stress test results of covered institutions and to provide forward-looking information to the OCC regarding a covered institution's capital adequacy. The OCC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered institution. The stress test results are expected to support ongoing improvement in a covered institution's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning. The OCC proposed new changes to these templates on October 27, 2021.⁷

The OCC recognizes that many covered institutions with total consolidated assets of \$250 billion or more are required to submit reports using reporting form FR Y–14A.⁸ The OCC also recognizes the Board has made modifications to the FR Y–14A and, to the extent practical, the OCC is keeping its reporting requirements consistent with the Board's FR Y–14A to minimize burden on covered institutions. Therefore, the OCC is revising its reporting requirements to mirror the

³ 12 U.S.C. 5301(12).

⁴ 12 U.S.C. 5365(i)(2)(C).

⁵ 12 U.S.C. 5365(i)(2)(B).

⁶ 77 FR 61238 (October 9, 2012) (codified at 12 CFR part 46).

⁷ 87 FR 52560 (August 26, 2022).

⁸ <http://www.federalreserve.gov/reportforms>.

¹ Public Law 111–203, 124 Stat. 1376, July 2010.

² 12 U.S.C. 5365(i)(2)(A).

Board's FR Y-14A for covered institutions with total consolidated assets of \$250 billion or more.

The OCC's changes include only limited updates to reflect the changes made by the Board, and the OCC reporting forms will substantially resemble the forms used by the OCC last year. Many of the changes made by the Board are inapplicable to OCC-regulated institutions and involve new items that would not be collected by the OCC under the changes. The OCC's changes include the minimal adjustments necessary to align line items with placement on the 2022 FR Y-14A. The OCC is also changing the description of covered institutions required to complete the trading and counterparty credit risk (CCR) sub-schedules under the Global Market Shock (GMS) scenario to more closely align with the Board's description. The OCC does not expect these changes to impact the group of banks that have been required to submit under the GMS in prior years. The OCC's new reporting forms and instructions are available on the OCC's website at <https://www.occ.treas.gov/publications-and-resources/forms/dodd-frank-act-stress-test/index-dodd-frank-act-stress-test.html>.

Type of Review: Revision. *Affected Public:* Businesses or other for-profit.

Estimated Number of Respondents: 4 annually and 4 biennially. *Estimated Total Annual Burden:* 3,558 hours.

The OCC believes that the systems that covered institutions use to prepare the FR Y-14 reporting templates and submit to the Board will also be used to prepare the reporting templates described in this notice. On December 5, 2022, the OCC published a notice for 60 days of comment concerning this collection as revised, 87 FR 74470. No comments were received. Comments continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility; (b) The accuracy of the OCC's estimate of the burden of the collection of information; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; (d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2023-02873 Filed 2-9-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Special Bond of Indemnity By Purchaser of United States Savings Bonds/Notes Involved in a Chain Letter Scheme

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning Special Bond of Indemnity By Purchaser of United States Savings Bonds/Notes Involved in a Chain Letter Scheme.

DATES: Written comments should be received on or before April 11, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006-A, P.O. Box 1328, Parkersburg, WV 26106-1328, or bruce.sharp@fiscal.treasury.gov.

SUPPLEMENTARY INFORMATION:

Title: Special Bond of Indemnity By Purchaser of United States Savings Bonds/Notes Involved in a Chain Letter Scheme.

OMB Number: 1530-0030.

Form Number: FS Form 2966.

Abstract: The information is requested to support a request for refund of the purchase price of savings bonds purchased in a chain letter scheme.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 240.

Estimated Time per Respondent: 8 minutes.

Estimated Total Annual Burden Hours: 32.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. 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; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: February 6, 2023.

Bruce A. Sharp,

Bureau PRA Clearance Officer.

[FR Doc. 2023-02866 Filed 2-9-23; 8:45 am]

BILLING CODE 4810-AS-P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Offering of U.S. Mortgage Guaranty Insurance Company Tax and Loss Bonds

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Offering of U.S. Mortgage Guaranty Insurance Company Tax and Loss Bonds.

DATES: Written comments should be received on or before April 11, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006-A, P.O. Box 1328, Parkersburg, WV 26106-1328, or bruce.sharp@fiscal.treasury.gov.

SUPPLEMENTARY INFORMATION:

Title: Offering of U.S. Mortgage Guaranty Insurance Company Tax and Loss Bonds.

OMB Number: 1530–0051.

Abstract: Chapter 31 of Title 31 of the United States Code authorizes the Secretary of the Treasury to prescribe the terms and conditions, including the form, of United States Treasury bonds, notes and bills. The information collected is essential to establish and maintain Tax and Loss Bond accounts (31 CFR part 343). This regulation governs issues, reissues and redemptions of Tax and Loss bonds. The information requested will be used to issue a Statement of Account to the entity, establish issue and maturity dates for the bonds, and provide electronic payment routing instructions for the proceeds.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 50.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 13.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: 1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. 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; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: February 6, 2023.

Bruce A. Sharp,

Bureau PRA Clearance Officer.

[FR Doc. 2023–02850 Filed 2–9–23; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY**Bureau of the Fiscal Service****Proposed Collection of Information: Agreement and Request for Disposition of a Decedent's Treasury Securities**

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Agreement and Request for Disposition of a Decedent's Treasury Securities.

DATES: Written comments should be received on or before April 11, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, Room #4006–A, P.O. Box 1328, Parkersburg, WV 26106–1328, or bruce.sharp@fiscal.treasury.gov.

SUPPLEMENTARY INFORMATION:

Title: Agreement and Request for Disposition of a Decedent's Treasury Securities.

OMB Number: 1530–0046.

Form Number: FS Form 5394.

Abstract: The information is necessary for the disposition of Treasury securities and/or payments to the entitled person(s) when the decedent's estate was formally administered through the court and has been closed, or the estate is being settled in accordance with State statute without the necessity of the court appointing a legal representative.

Current Actions: Extension of a currently approved collection.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 18,500.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 9,250.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. 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; and 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: February 6, 2023.

Bruce A. Sharp,

Bureau PRA Clearance Officer.

[FR Doc. 2023–02867 Filed 2–9–23; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0099]

Agency Information Collection Activity Under OMB Review: Dependent's Request for Change of Program or Place of Training

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection revision should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Refer to "OMB Control No. 2900–0099."

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance

Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266-4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900-0099” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 3034(a), 3034(b), 3323(a), 3323(b), 3471, 3513, 3521, and 3691.

Title: Dependent’s Request for Change of Program or Place of Training.

OMB Control Number: 2900-0099.

Type of Review: Revision of a currently approved collection.

Abstract: VA uses the information collection to determine (1) if the claimant continues to qualify for education benefits when taking a different program of training and (2) to verify that a new place of training is approved for benefits. The information on the form can be obtained only from the individual claimant. VA cannot make an eligibility determination without this information. There is a decrease in the number of burden hours due to a decrease in the average number of forms received for periods 2019, 2020 and 2021.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 87 FR 74698 on December 6, 2022, page 74698.

Affected Public: Individuals and households.

Estimated Annual Burden: 11,358 hours.

Estimated Average Burden Time per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 45,434.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023-02846 Filed 2-9-23; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-XXXX]

Agency Information Collection Activity Under OMB Review: Request for Entitlement Restoration Due to Facility Closure, Program of Training or Course Disapproval

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection, its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Refer to “OMB Control No. 2900-XXXX.”

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266-4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900-XXXX” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 501(a), and (38 U.S.C. 3699(c)(2)).

Title: Request for Entitlement Restoration Due to Facility Closure, Program of Training or Course Disapproval (Chapter 31—Veteran Readiness and Employment).

OMB Control Number: 2900-XXXX.

Type of Review: Request for approval of a new collection.

Abstract: A Service member or Veteran will use VAF 28-10281 to request restoration of entitlement due to a Facility closure, or due to the disapproval of a program of training or course. The VR&E program subsequently uses the information on this form to determine if a Service member or Veteran qualifies for restoration of entitlement. Without the information gathered on this form, the VR&E program would be unable to verify that the Service member or Veteran meets the criteria for restoration of entitlement. Furthermore, the VR&E program requests approval of this information collection in order to carry out the implementation of the law which requires VA to immediately accept applications to restore education benefits for Facility closures and disapprovals of programs of training or courses.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at insert citation date: 87 FRN 74473 on December 5, 2022, pages 74473-74474.

Affected Public: Individuals or Households.

Estimated Annual Burden: 16,167 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 97,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023-02885 Filed 2-9-23; 8:45 am]

BILLING CODE 8320-01-P



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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Sunrise Wind Offshore Wind Farm Project Offshore New York; Proposed Rule

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 217**

[Docket No. 230201–0034]

RIN 0648–BL67

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Sunrise Wind Offshore Wind Farm Project Offshore New York

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

ACTION: Proposed rule; proposed letter of authorization; request for comments.

SUMMARY: NMFS has received a request from Sunrise Wind, LLC (Sunrise Wind), a 50/50 joint venture between Ørsted North America, Inc. (Ørsted) and Eversource Investment, LLC, for Incidental Take Regulations (ITR) and an associated Letter of Authorization (LOA) pursuant to the Marine Mammal Protection Act (MMPA). The requested regulations would govern the authorization of take, by Level A harassment and/or Level B harassment, of small numbers of marine mammals over the course of 5 years (2023–2028) incidental to construction of the Sunrise Wind Offshore Wind Farm Project offshore of New York in a designated lease area on the Outer Continental Shelf (OCS–A–0487). Project activities likely to result in incidental take include pile driving (impact and vibratory), potential unexploded ordnance or munitions and explosives of concern (UXO/MEC) detonation, and vessel-based site assessment surveys using high-resolution geophysical (HRG) equipment. NMFS requests comments on this proposed rule. NMFS will consider public comments prior to making any final decision on the promulgation of the requested ITR and issuance of the LOA; agency responses to public comments will be summarized in the final rule, if issued. The proposed regulations, if adopted, would be effective November 20, 2023–November 19, 2028.

DATES: Comments and information must be received no later than March 13, 2023.

ADDRESSES: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov and enter NOAA–NMFS–2023–0012 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: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:**Availability**

A copy of Sunrise Wind’s application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>. In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This proposed rule, if adopted, would provide a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to construction of the Sunrise Wind Offshore Wind Farm Project within the Bureau of Ocean Energy Management (BOEM) Renewable Energy Lease Area OCS–A 0487 and along an export cable corridor to a landfall location in New York. NMFS received a request from Sunrise Wind for 5-year regulations and an LOA that would authorize take of individuals of 16 species of marine mammals by harassment only (four species by Level A harassment and Level B harassment and 12 species by Level B harassment) incidental to Sunrise Wind’s construction activities. No mortality or serious injury is anticipated or proposed for authorization. Please see the *Estimated Take of Marine Mammals* section below for definitions of harassment.

Legal Authority for the Proposed Action

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, regulations are promulgated, and public notice and an opportunity for public comment are provided.

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 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 below.

Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for proposing and, if appropriate, issuing 5-year regulations and an associated LOA. This proposed rule also establishes required mitigation, monitoring, and reporting requirements for Sunrise Wind’s activities.

Summary of Major Provisions Within the Proposed Rule

The major provisions within this proposed rule are as follows:

- Establishing a seasonal moratorium on impact pile driving during the months of highest North Atlantic right whale (*Eubalaena glacialis*) presence in the project area (January 1–April 30);
- Establishing a seasonal moratorium on any UXO/MEC detonations during the months of highest North Atlantic right whale present in the project area (December 1–April 30).
- Requiring that any UXO/MEC detonations may occur only during hours of daylight and not during hours of darkness or night.
- Conducting both visual and passive acoustic monitoring by trained, NOAA

Fisheries-approved Protected Species Observers (PSOs) and Passive Acoustic Monitoring (PAM) operators before, during, and after the in-water construction activities;

- Requiring the use of sound attenuation device(s) during all impact pile driving and UXO/MEC detonations to reduce noise levels;

- Delaying the start of pile driving if a North Atlantic right whale is observed at any distance by the PSO on the pile driving or dedicated PSO vessels;

- Delaying the start of pile driving if other marine mammals are observed entering or within their respective clearance zones;

- Shutting down pile driving (if feasible) if a North Atlantic right whale is observed or if other marine mammals enter their respective shut down zones;

- Implementing soft-starts for impact pile driving and using the least hammer energy possible;

- A requirement to implement noise abatement system(s) during all impact pile driving and UXO/MEC detonations;

- Implementing ramp-up for HRG site characterization survey equipment;

- Requiring PSOs to continue to monitor for 30 minutes after any impact pile driving occurs and for any and after all UXO/MEC detonations;

- Increasing awareness of North Atlantic right whale presence through monitoring of the appropriate networks and Channel 16 as well as reporting any sightings to the sighting network;

- Implementing vessel strike avoidance measures;

- Sound field verification requirements during impact pile driving and UXO/MEC detonation to measure *in situ* noise levels for comparison against the model results; and

- Implementing best management practices during fisheries monitoring surveys such as removing gear from the water if marine mammals are considered at-risk or are interacting with gear.

Under Section 105(a)(1) of the MMPA, failure to comply with these requirements or any other requirements in a regulation or permit implementing the MMPA may result in civil monetary penalties. Pursuant to 50 CFR 216.106, violations may also result in suspension or withdrawal of the Letter of Authorization (LOA) for the project. Knowing violations may result in criminal penalties under Section 105(b) of the MMPA.

National Environmental Policy Act (NEPA)

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 evaluate the proposed action (*i.e.*, promulgation of regulations and subsequent issuance of a 5-year LOA) and alternatives with respect to potential impacts on the human environment.

Accordingly, NMFS proposes to adopt BOEM's Environmental Impact Statement (EIS), provided our independent evaluation of the document finds that it includes adequate information analyzing the effects of promulgating the proposed regulations and LOA issuance on the human environment. NMFS is a cooperating agency on BOEM's EIS. BOEM's draft EIS (Sunrise Wind Draft Environmental Impact Statement (DEIS) for Commercial Wind Lease OCS–A 0487) was made available for public comment on December 16, 2022 (87 FR 77136), beginning the 60-day comment period ending on February 14, 2023. Additionally, BOEM held three virtual public hearings on January 18, January 19, and January 23, 2023.

Information contained within Sunrise Wind's incidental take authorization (ITA) application and this proposed rule provide the environmental information related to these proposed regulations and associated 5-year LOA for public review and comment. NMFS will review all comments submitted in response to this proposed rule prior to concluding the NEPA process or making a final decision on the requested 5-year ITR and LOA.

Fixing America's Surface Transportation Act (FAST–41)

This project is covered under Title 41 of the Fixing America's Surface Transportation Act, or "FAST–41." FAST–41 includes a suite of provisions designed to expedite the environmental review for covered infrastructure projects, including enhanced interagency coordination as well as milestone tracking on the public-facing Permitting Dashboard. FAST–41 also places a 2-year limitations period on any judicial claim that challenges the validity of a Federal agency decision to issue or deny an authorization for a FAST–41 covered project. 42 U.S.C. 4370m–6(a)(1)(A).

Sunrise Wind's proposed project is listed on the Permitting Dashboard, where milestones and schedules related to the environmental review and permitting for the project can be found: <https://www.permits.performance.gov/permitting-project/sunrise-wind-farm>.

Summary of Request

On November 10, 2021, Sunrise Wind submitted a request for the

promulgation of regulations and issuance of an associated 5-year LOA to take marine mammals incidental to construction activities associated with implementation of the Sunrise Wind Offshore Wind Farm Project (herein "SWF") offshore of New York in the BOEM Lease Area OCS–A–0487. Sunrise Wind's request is for the incidental, but not intentional, taking of a small number of 16 marine mammal species (comprising 16 stocks) by Level B harassment (for all 16 species or stocks) and by Level A harassment (for 4 species or stocks). Neither Sunrise Wind nor NMFS expects serious injury or mortality to result from the specified activities nor is any proposed for authorization.

In response to our questions and comments and following extensive information exchange between Sunrise Wind and NMFS, Sunrise Wind submitted a final revised application on May 9, 2022, which NMFS deemed adequate and complete on May 10, 2022. This final application is available on NMFS' website at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sunrise-wind-llc-construction-and-operation-sunrise-wind>.

On June 2, 2022, NMFS published a notice of receipt (NOR) of Sunrise Wind's adequate and complete application in the **Federal Register** (87 FR 33470), requesting comments and soliciting information related to Sunrise Wind's request during a 30-day public comment period. During the NOR public comment period, NMFS received comment letters from two environmental non-governmental organizations: Clean Ocean Action and Oceana. NMFS has reviewed all submitted material and has taken the material into consideration during the drafting of this proposed rule. Subsequently, in June 2022, new scientific information was released regarding marine mammal densities (Robert and Halpin, 2022) and, as such, Sunrise Wind submitted a final Updated Density and Take Estimation Memo to NMFS on December 15, 2022 that included updated marine mammal densities and take estimates. This memo is available on our website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sunrise-wind-llc-construction-and-operation-sunrise-wind>.

NMFS previously issued four Incidental Harassment Authorizations (IHAs) to Ørsted for the taking of marine mammals incidental to marine site characterization surveys (using HRG equipment) of the Sunrise Wind's BOEM Lease Area (OCS–A 0487) and

surrounding BOEM Lease Areas (OCS–A 0486, OCS–A 0500) (see 84 FR 52464, October 2, 2019; 85 FR 63508, October 8 14, 2020; 87 FR 756, January 6, 2022; and 87 FR 61575, October 12, 2022). To date, Ørsted has complied with all IHA requirements (e.g., mitigation, monitoring, and reporting). Information regarding Ørsted’s monitoring results may be found in the Estimated Take of Marine Mammals section, and the full monitoring reports can be found on NMFS’ website: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered North Atlantic right whales from vessel collisions, which are a leading cause of the species’ decline and a primary factor in an ongoing Unusual Mortality Event (87 FR 46921). Should a final vessel speed rule be issued and become effective during the effective period of this ITR (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than

those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule would become effective immediately upon the effective date of any final vessel speed rule and, when notice is published of the effective date, NMFS would also notify Sunrise Wind if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer required.

Description of the Specified Activity

Overview

Sunrise Wind has proposed to construct and operate a 924 to 1,034 megawatt (MW) wind energy facility (known as Sunrise Wind Farm (SRWF)) in state and Federal waters in the Atlantic Ocean in lease area OCS–A–0487, located within the Massachusetts and Rhode Island Wind Energy Area (RI/MA WEA). Sunrise Wind’s project would consist of several different types of permanent offshore infrastructure, including wind turbine generators (WTGs) and associated foundations, an offshore converter substation (OCS–DC), offshore substation array cables, and substation interconnector cables. Specifically, activities to construct the project include the installation of up to 94 WTGs (at 102 potential locations) and 1 OCS–DC via impact pile driving; impact and vibratory pile driving at the cable landfall site; trenching, laying, and burial activities associated with the installation of the export cable route from the OCS–DC to the shore-based converter station and inter-array cables between turbines; site preparation work

(e.g., boulder removal); placement of scour protection around foundations; HRG vessel-based site characterization surveys using active acoustic sources with frequencies of less than 180 kHz; detonating up to three UXO/MEC of different charge weights; and several types of fishery and ecological monitoring surveys. Vessels would transit within the project area and between ports and the wind farm to transport crew, supplies, and materials to support pile installation. All offshore cables will connect to onshore export cables, substations, and grid connections, which would be located on Long Island. Marine mammals exposed to elevated noise levels during impact and vibratory pile driving, detonations of UXOs, or site characterization surveys may be taken by Level A harassment and/or Level B harassment depending on the specified activity.

Dates and Duration

Sunrise Wind anticipates that activities with the potential to result in harassment of marine mammals would occur throughout all 5 years of the proposed regulations which, if promulgated, would be effective from November 20, 2023 through November 19, 2028.

The estimated schedule, including dates and duration, for various activities is provided in Table 1 (also see Table 4 and Figure 6 in Sunrise Wind’s application); however, this proposed rule considers the potential for activity schedules to shift. Detailed information about the activities themselves may be found in the *Detailed Description of Specific Activity* subsection.

TABLE 1—ESTIMATED ACTIVITY SCHEDULE TO CONSTRUCT AND OPERATE THE SUNRISE WIND PROJECT

Project area	Project activity	Expected timing and duration
Sunrise Wind Farm (SRWF) Construction.	WTG Foundation Installation	Q3–Q4 2024; 4–5 months.
	OCS–DC Foundation Installation	Q4 2024; 2–3 days (48–72 hours).
	<i>WTG Installation</i>	Q4 2024–Q2 2025; 9 months.
	<i>Seafloor preparation</i>	Q1–Q2 2024
	<i>Array Cable Installation</i>	Q2–Q3 2025; 7 months.
Sunrise Wind Export Corridor (SRWEC) Construction.	UXO/MEC detonation	Q2 2024; 3 days.
	Cable Landfall Installation (casing pipe and sheetpile installation and removal, HDD).	Q4 2023–Q1 2024; 16 days.
	Offshore Export Cable Installation.	
	Route clearance	Q2 2024
Operations	EC Installation	Q4 2024 to Q1 2025; 8 months.
	HRG Survey	Q4 2023–Q4 2025; Any time of year.
	HRG Survey	Q4 2024–Q3 2028; Any time of year.

Italicized activities do not have the potential to result in take of marine mammals.

WTG and OCS–DC Foundation Installation

The installation of 94 WTG and 1 OCS–DC foundations would be limited to May through December, given the seasonal restriction on foundation impact pile driving from January 1–April 30. As described previously, Sunrise Wind intends to install all foundations in a single year over the course of 4 to 5 months. However, it is possible that monopile installation would continue into a second year depending on construction logistics and local and environmental conditions that may influence Sunrise Wind's ability to maintain the planned construction schedule.

Installation of a single monopile foundation is expected to require a maximum of 4 hours of active impact hammering, which can occur either in a continuous 4-hour interval or intermittently over a longer time period. Installation of a single piled jacket foundation is estimated to require approximately 48 hours of pile driving per jacket (which includes up to 6 hours of pile driving per pile). It is assumed that the pile driving would occur within a 72-hour window (~ 3 days) including wait time in between pile installation. Pile driving activity will include a 20-minute soft-start at the beginning of each pile installation.

Sunrise Wind has provided five scenarios for how many piles may be installed on a given day. Piles may be installed consecutively (one at a time) or concurrently (multiple piles at the same time). Potential daily pile driving scenarios include:

- Consecutive installation of two WTG monopiles or four OCS–DC pin piles consecutively in 1 day for 53 days;
- Consecutive installation of three WTG monopiles or four OCS–DC pin piles consecutively in 1 day for 36 days;
- Concurrent installation of four WTG monopiles in 1 day, two each by two different installation vessels operating concurrently in close proximity to each other ("Proximal", *i.e.* 3 nautical miles apart) for 25.5 days, plus 4 OCS–DC pin piles per day for 2 days;
- Concurrent installation of four WTG monopiles in 1 day, two each by two different installation vessels operating concurrently at long distances from each other ("Distal", *i.e.* opposite ends of the SRWF) for 25.5 days plus four OCS–DC pin piles per day for 2 days; or
- Concurrent installation of two WTG monopiles by one vessel and four OCS–DC pin piles by a second vessel for 2 days followed by two WTG monopiles per day by a single vessel for 49 days.

Sunrise Wind anticipates that the first WTGs would become operational in Q3

2025 after installation is completed and all necessary components, such as array cables, OCS–DC, export cable routes, and onshore substations are installed. Turbines would be commissioned individually by personnel on location, so the number of commissioning teams would dictate how quickly turbines would become operational. Sunrise Wind expects that all turbines will be commissioned by Q4 2025.

UXO/MEC Detonations

Based on preliminary survey data, Sunrise Wind estimates a maximum of 3 days of UXO/MEC detonation may occur with up to one UXO/MEC being detonated per day. Any UXO/MEC detonation would occur during daylight hours only after proper marine mammal monitoring is conducted (see Proposed Monitoring and Reporting section). Sunrise Wind anticipates UXO/MEC detonation would be limited to Q2 2024. Sunrise Wind would not detonate UXOs/MECs between December and April.

Cable Landfall Construction

Cable landfall construction is one of the first activities scheduled to occur, sometime between Q4 2023–Q1 2024. In their application, Sunrise Wind indicated they would install and remove up to two casing pipes and supporting goal posts over 36 days; however, the project has been refined such that only one casing pipe and goal posts would be installed and removed over 16 days. Installation of the single casing pipe may take up to 3 hours of pneumatic hammering on each of 2 days for installation. Removal of the casing pipe is anticipated to require approximately the same amount of pneumatic hammering and overall time, or less, meaning the pneumatic pipe ramming tool may be used for up to 3 hours per day over 4 days. Up to 22 sheet piles may be installed to support the work. Sheet pile may require up to 2 hours of vibratory piling and up to 4 sheet piles may be installed per day (total of 8 hours of vibratory pile driving per day). Removal of the goal posts may also involve the use of a vibratory hammer and likely require approximately the same amount of time as installation (6 days total). Thus, use of a vibratory pile driver to install and remove sheet piles may occur on up to 12 days at the landfall location.

HRG Surveys

High-resolution geophysical site characterization surveys would occur annually throughout the 5 years the rule and LOA would be effective with duration dependent on the activities

occurring in that year (*i.e.*, construction versus non-construction year). HRG surveys would utilize up to a maximum of four vessels working concurrently in different sections of the Lease Area and SRWEC corridor. During the first year of construction (when the majority of foundations and cables are installed), Sunrise Wind estimates that a total of 12,275 km may be surveyed over 175 vessel days within the Lease Area and along the SRWEC corridor in water depths ranging from 2 m (6.5 ft) to 55 m (180 ft). During non-construction years (Yrs 3–5), Sunrise Wind estimates 6,311.2 km would be surveyed over 90.2 vessel days per year. Each day that a survey vessel covers 70 km (44 miles) of survey trackline is considered vessel day. For example, Sunrise Wind would consider two vessels operating concurrently, with each surveying 70 km (44 miles), two vessel days. Sunrise Wind anticipates that each vessel would survey an average of 70 km (44 miles) per day, assuming a 4 km/hour (2.16 knots) vessel speed and 24-hour operations. In some cases, vessels may conduct daylight-only 12-hour nearshore surveys covering half that distance (35 km or 22 miles). Over the course of 5 years, HRG surveys would be conducted at any time of year for a total of 48,484 km over 622 vessel days. In this schedule, Sunrise Wind accounted for periods of down-time due to inclement weather or technical malfunctions.

Specific Geographic Region

Sunrise Wind would construct the SRWF in Federal waters offshore of New York (Figure 1). The lease area OCS–A 0487 is part of the Rhode Island/Massachusetts Wind Energy Area (RI–MA WEA). The Lease Area covers approximately 86,823 acres (351 km²) and is located approximately 18.9 statute miles (mi) (16.4 nautical miles (nmi), 30.4 kilometers (km)) south of Martha's Vineyard, Massachusetts; approximately 30.5 mi (26.5 nmi, 48.1 km) east of Montauk, New York; and 16.7 mi (14.5 nmi, 26.8 km) from Block Island, Rhode Island. Water depths in the Lease Area range from 35 to 62 m (115–203 ft), averaging 49 m (160.8 ft), while water depths along the SRWEC corridor range from 5.7 to 67 m (18.7 to 219.8 ft). The cable landfall construction area would be approximately 5.7 m (18.7 ft) in depth. Cables would come ashore at the Smith Point County Park.

Sunrise Wind's specified activities would occur in the Northeast U.S. Continental Shelf Large Marine Ecosystem (NES LME), an area of approximately 260,000 km² from Cape Hatteras in the south to the Gulf of

Maine in the north. Specifically, the lease area and cable corridor are located within the Mid-Atlantic Bight subarea of the NES LME, which extends between Cape Hatteras, North Carolina, and Martha's Vineyard, Massachusetts, extending westward into the Atlantic to the 100-m isobath. In the Mid-Atlantic Bight, which extends from Massachusetts to North Carolina, the pattern of sediment distribution is relatively simple. The continental shelf south of New England is broad and flat, dominated by fine grained sediments. Most of the surficial sediments on the continental shelf are sands and gravels. Silts and clays predominate at and beyond the shelf edge, with most of the slope being 70–100 percent mud. Fine sediments are also common in the shelf valleys leading to the submarine canyons, as well as in areas such as the "Mud Patch" south of Rhode Island. There are some larger materials, including boulders and rocks, left on the seabed by retreating glaciers, along the coast of Long Island and to the north and east.

In support of the Rhode Island Ocean Special Area Management Plan development process, Codiga and Ullman (2011) reviewed and summarized the physical oceanography of coastal waters off Rhode Island. Conditions off the coast of Rhode Island

are shaped by a complex interplay among wind-driven variability, tidal processes, and density gradients that arise from combined effects of interaction with adjacent estuaries, solar heating, and heat flux through the air-sea interface. In winter and fall, the stratification is minimal and circulation is a weak upwelling pattern directed offshore at shallow depths and onshore near the seafloor. In spring and summer strong stratification develops due to an important temperature contribution, and a system of more distinct currents occurs, including a narrow flow that proceeds counterclockwise around the perimeter of RIS likely in association with a tidal mixing front.

The waters in the vicinity of the SRWF and SRWEC are transitional waters positioned between the continental slope and the coastal environments of Long Island Sound and Narragansett Bay. The region is generally characterized by predominantly mobile sandy substrate, and the associated benthic communities are adopted to survive in a dynamic environment. The WEAs are composed of a mix of soft and hard bottom environments as defined by the dominant sediment grain size and composition (Continental Margin Mapping Program [Department of the Interior 2020]; usSEABED [USGS 2020]).

The benthic environment of the RI-MA WEA is dominated by sandy sediments that ranged from very fine to medium sand; very fine sands tend to be more prevalent in deeper, lower energy areas (*i.e.*, the southern portion of the MA WEA), whereas coarser sediments, including gravels (*e.g.*, patchy cobbles and boulders) were found in shallower areas (Bay State Wind 2019, Deepwater Wind South Fork, LLC 2019; DWW Rev I, LLC 2020; Stokesbury 2014; LaFrance *et al.* 2010; McMaster 1960; Popper *et al.* 2014). The species that inhabit the benthic habitats of the OCS are typically described as infaunal species, those living in the sediments (*e.g.*, polychaetes, amphipods, mollusks), and epifaunal species, those living on the seafloor surface (mobile, *e.g.*, sea stars, sand dollars, sand shrimp) or attached to substrates (sessile, *e.g.*, barnacles, anemones, tunicates). Further detail on the benthic habitats found at the SRWF and along the SRWEC, including the results of site-specific benthic habitat assessments, can be found within COP section 4.4.2, COP Appendices M1—Benthic Resources Characterization Report—Federal Waters, M2—Benthic Resources Characterization Report—New York State Waters, and M3—Benthic Habitat Mapping Report.

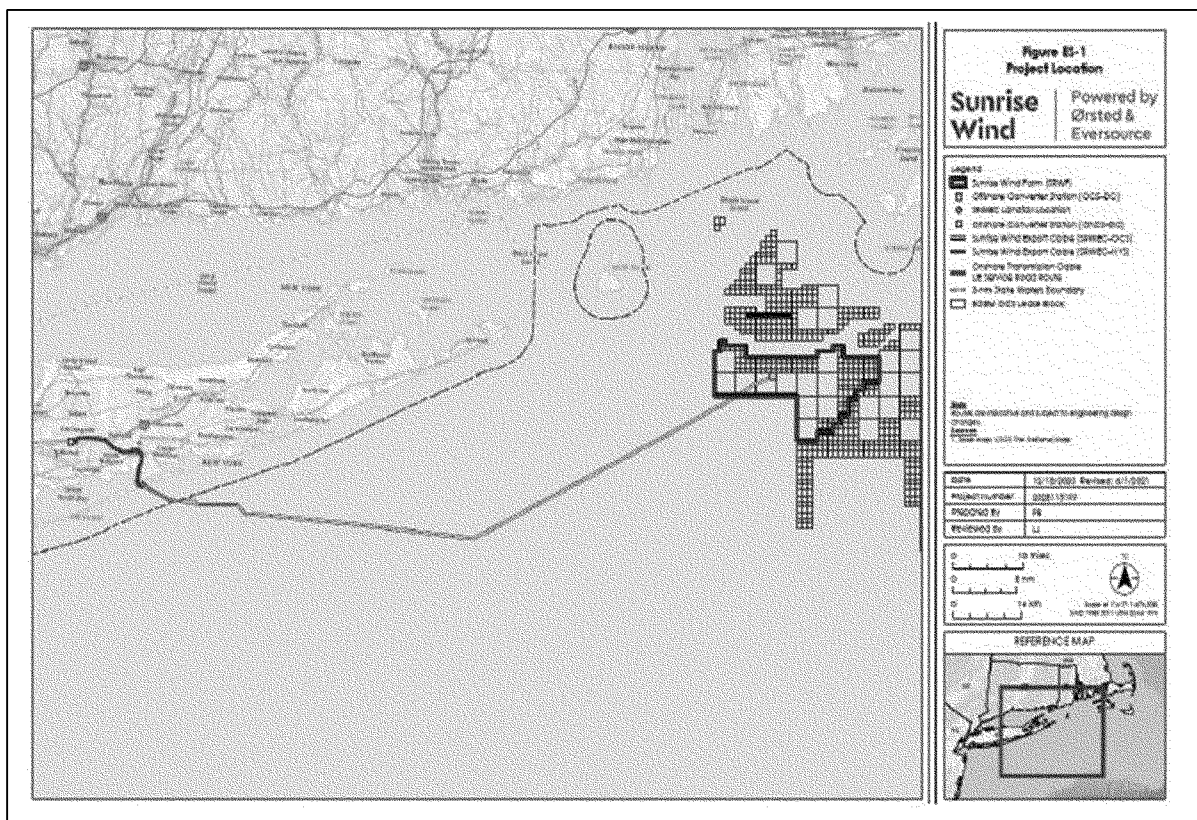


Figure 1. Sunrise Wind Project Location.

Detailed Description of Specific Activity

Below, we provide detailed descriptions of Sunrise Wind's activities, explicitly noting those that are anticipated to result in the take of marine mammals and for which incidental take authorization is requested. Additionally, a brief explanation is provided for those activities that are not expected to result in the take of marine mammals.

Installation of WTG Foundations

Sunrise Wind plans to install up to 94 WTG monopile foundations with a maximum diameter tapering from 7 m above the waterline to 12 m (39 ft) below the waterline (7/12 m monopile (see Figure 3 in Sunrise Wind's application)) in lease area OCS-0487 spaced in a 1 nmi x 1 nmi grid pattern. The Project will generate between 924 to 1,034 MW of renewable energy. Although up to 94 WTGs are expected to be installed, Sunrise Wind has accounted for up to 8 potential locations where WTG installation is begun but unable to be completed due to environmental or engineering constraints (*i.e.*, only 94 WTGs will be installed but within 102 potential locations).

Figure 3 in Sunrise Wind's application provides a conceptual example of the WTG support structures (*i.e.*, towers and foundations), which will be designed to withstand 500-year hurricane wind and wave conditions, and the external platform level will be designed above the 1,000-year wave scenario. A WTG monopile foundation typically consists of a single steel tubular section with several sections of rolled steel plate welded together. Secondary structures on each WTG monopile foundation will include a boat landing or alternative means of safe access (*e.g.*, Get Up Safe—a motion compensated hoist system allowing vessel to foundation personnel transfers without a boat landing), ladders, a crane, and other ancillary components.

A typical monopile installation sequence begins with the monopiles transported directly to the Sunrise Wind Farm for installation or to the construction staging port by an installation vessel or a feeding barge. At the foundation location, the main installation vessel upends the monopile in a vertical position in the pile gripper mounted on the side of the vessel. The hammer is then lifted on top of the pile and pile driving commences with a soft-

start and proceeds to completion. Piles are driven until the target embedment depth is met (up to 50 m), then the pile hammer is removed and the monopile is released from the pile gripper. Once installation of the monopile is complete, the vessel moves to the next installation location.

Monopiles would be installed using a 4,000 kJ impact pile driver (although, in general, only up to 3,200 kJ will be necessary except for potentially 1 strike at 4,000 kJ) to a maximum penetration depth of 50 m (164 ft). Installation of each monopile will include a 20-minute soft-start where lower hammer energy is used at the beginning of each pile installation. Under normal conditions, after completion of the 20-minute soft-start period, installation of a single monopile foundation is estimated to require 1–4 hours of active pile driving; however, breaks may be necessary such that 1–4 hours of pile driving occurs over several more hours (up to 12 hours). Sunrise Wind anticipates it would then take approximately 4 hours to move to the next piling location. Once at the new location, a 1-hour monitoring period would occur such that there would be no less than 5 hours between each pile installation. In total,

376 hours (94 WTGs × 4 hours each) would be the maximum amount of time impact monopile driving would occur over the course of 1 year. Sunrise Wind is proposing to install foundations consecutively or concurrently (see Dates and Duration section). Impact pile driving associated with WTG foundation installation would be limited to the months of May through December and is currently scheduled to be conducted during Q3 and Q4 2024. Installation of WTG foundations is anticipated to result in the take of marine mammals due to noise generated during pile driving.

Sunrise Wind has proposed to conduct pile driving 24-hours per day. Once construction begins, Sunrise Wind would proceed as rapidly as possible, while meeting all required mitigation and monitoring measures, to reduce the total duration of construction. Orsted, the parent company of Sunrise Wind, is currently analyzing data from pilot projects investigating the efficacy of technology to monitor (visually and acoustically) marine mammals during nighttime and reduced visibility conditions. NMFS acknowledges the benefits of completing construction quickly during times when North Atlantic right whales are unlikely to be in the area but also recognizes challenges associated with monitoring during reduced visibility conditions such as night. Should Sunrise Wind submit a NMFS-approved Alternative Monitoring Plan, pile driving may be initiated at night. NMFS intends to condition the final rule, if issued, identifying if initiating pile driving at night may occur.

Offshore Converter Station (OCS–DC)

Sunrise Wind would install a single OCS–DC for the project on a jacket foundation (see Figure 4 in Sunrise Wind's application). A piled jacket foundation is formed of a steel lattice construction (comprising tubular steel members and welded joints) secured to the seabed by means of hollow steel pin piles attached to the jacket. The piled jacket foundation will have four legs with two pin piles per leg (eight piles total). The platform height will be up to 26.8 m (88 ft) with a leg diameter of up to 4.6 m (15 ft) and a pile diameter of up to 4 m (13 ft). Installation of OCS–DC jacket foundation pin piles (two per leg, eight total) will be performed using an impact pile driver with a maximum hammer energy of 4,000-kJ to a maximum penetration depth of 90 m (295 ft). It is assumed that installation of the jacket foundation would require 48 hours of pile driving total (6 hours per pile), which would occur over 3

days. The current schedule estimates the OCS–DC jacket foundation would be installed in Q4 2024. Installation of the OCS–DC jacket foundation is anticipated to result in the take of marine mammals due to noise generated during pile driving.

The OCS–DC requires the withdrawal of raw seawater through a cooling water intake structure (CWIS) to dissipate heat produced through the AC to DC conversion and then discharge this water as thermal effluent to the marine receiving waters. It includes intake pipes and sweater lift pumps (SWLP), course filters, electrochlorination system, heat exchange system, and a dump caisson. The OCS–DC would discharge non-contact cooling water (NCCW) and non-contact stormwater to the marine receiving waters. The design intake flow (DIF) for the OCS–DC is 8.1 million gallons per day (MGD); however, the Average Flow Intake (AFI) will generally range from 4.0 MGD to 5.3 MGD. The rate at which seawater would be taken (e.g. maximum through-screen velocity [TSV]) is 0.1525 m/s [0.5 ft/s]). The dump caisson consists of a single outlet vertical pipe oriented downward in the water column. The dump caisson is the primary discharge point for the OCS–DC. Pollutants discharged at the dump caisson will include NCCW and residual chlorine. The temperature of the water exiting the heat exchange system will depend on the ambient air temperature, ambient water temperature, power output, and other factors. Sunrise Wind indicated the maximum temperature under all operating scenarios and conditions will not exceed 32 °C (90 °F) and the thermal plume is not expected to extend beyond 30 m of the dump caisson. No take of marine mammals would occur due to water withdrawal or thermal discharge.

Cable Landfall Construction

Installation of the SRWF export cable landfall will be accomplished using a horizontal directional drilling (HDD) methodology. HDD will be used to connect the SRWEC offshore cable to the Onshore Transmission Cable at the landfall location and to cross the Intercoastal Waterway (ICW) from Fire Island to mainland Long Island. The drilling equipment will be located onshore and used to create a borehole, one for each cable, from shore to an exit point on the seafloor approximately 0.5 mi (800 m) offshore. At the seaward exit site for each borehole, construction activities may include the temporary installation of a casing pipe, supported by sheet pile goal posts, to collect drilling mud from the borehole exit point. Additionally, 10 sheet piles may

be used to support the casing pipe and help to anchor/stabilize the vessel which will be collecting drilling fluid. Installation of up to two casing pipes (one at each HDD exit pit location) would be completed using pneumatic pipe ramming equipment while installation of sheet pile for goal posts would be completed using a vibratory pile driving hammer. These activities would not occur simultaneously as some of the same equipment on the barge is necessary to conduct both types of installations. All installation activities would occur during daylight periods.

Sunrise Wind would install a single casing pipe at an 11–12-degree angle with the seabed so that the casing pipe creates a straight alignment between the point of penetration at the seabed and the construction barge. Casing pipe installation will occur from the construction barge and be accomplished using a pneumatic pipe ramming tool (e.g., Grundoram Taurus or similar) with a hammer energy of up to 18 kJ. If necessary, additional sections of casing pipe may be welded together on the barge to extend the length of the casing pipe from the barge to the penetration depth in the seabed.

Installation of the single casing pipe may take up to 3 hours of pneumatic hammering on each of the 2 days for installation. Installation time will be dependent on the number of pauses required to weld additional sections onto the casing pipe. Removal of the casing pipe is anticipated to require approximately the same amount of pneumatic hammering and overall time, or less, meaning the pneumatic pipe ramming tool may be used for up to 3 hours per day on up to 4 days.

Up to six goal posts may be installed to support the casing pipe between the barge and the penetration point on the seabed. Each goal post would be composed of two vertical sheet piles installed using a vibratory hammer such as an American Pile Equipment (APE) model 300 (or similar). A horizontal cross beam connecting the two sheet piles would then be installed to provide support to the casing pipe. Up to 10 additional sheet piles may be installed to help anchor the barge and support the construction activities. This results in a total of up to 22 sheet piles. Installation of the goal posts would require up to 6 days. Sheet pile may require up to 2 hours of vibratory piling and up to four sheet piles may be installed per day (total of 8 hours of vibratory pile driving per day). Removal of the goal posts may also involve the use of a vibratory hammer and likely require approximately the same amount of time

as installation (6 days total). Thus, use of a vibratory pile driver to install and remove sheet piles may occur on up to 12 days at the landfall locations. Installation and removal of the casing pipe and goal posts is anticipated to result in the take of marine mammals due to noise generated during pile driving.

UXO/MEC Detonations

Sunrise Wind anticipates the potential for construction activities to encounter UXO/MECs on the seabed within the SRWF and along the SRWEC corridor. UXO/MECs include explosive munitions such as bombs, shells, mines, torpedoes, *etc.*, that did not explode when they were originally deployed or were intentionally discarded in offshore munitions dump sites to avoid land-based detonations. The risk of incidental detonation associated with conducting seabed-altering activities, such as cable laying and foundation installation in proximity to UXO/MECs, jeopardizes the health and safety of project participants (Sunrise Wind 2022). Sunrise Wind follows an industry standard As Low as Reasonably Practicable (ALARP) process that minimizes the number of potential detonations (COP Appendix G2, (Sunrise-Wind 2021).

For UXO/MECs that are positively identified in proximity to planned activities on the seabed, several alternative strategies will be considered prior to in-situ UXO/MEC disposal. These may include (1) relocating the activity away from the UXO/MEC (avoidance), (2) moving the UXO/MEC away from the activity (lift and shift), (3) cutting the UXO/MEC open to apportion large ammunition or deactivate fused munitions, using shaped charges to reduce the net explosive yield of a UXO/MEC (low-order detonation), or (4) using shaped charges to ignite the explosive materials and allow them to burn at a slow rate rather than detonate instantaneously (deflagration). Only after these alternatives are considered would in-situ high-order UXO/MEC detonation be pursued. To detonate a UXO/MEC, a small charge would be placed on the UXO/MEC and ignited, causing the UXO/MEC to then detonate, which could result in the take of marine mammals.

To better assess the likelihood of encountering UXO/MECs during project construction, Sunrise Wind has and will continue to conduct HRG surveys to identify potential UXO/MECs that have not been previously mapped. As these surveys and analysis of data from them are still underway, the exact number and type of UXO/MECs in the project

area are not yet known. However, Sunrise Wind assumes that up to three UXO/MEC 454-kg (1000 pounds; lbs) charges, which is the largest charge that is reasonably expected to be encountered, may require *in situ* detonation. Although it is highly unlikely that all three charges would weigh 454 kg, this approach was determined to be the most conservative for the purposes of impact analysis. If necessary, these detonations would occur on up to 3 different days (*i.e.*, only one detonation would occur per day). In the event that high-order removal (detonation) is determined to be the preferred and safest method of disposal, all detonations would occur during daylight hours. Sunrise Wind would avoid detonating UXO/MECs from December 1 through April 30 to provide protection for North Atlantic right whales during the timeframe they are expected to occur more frequently in the project area. UXO/MEC detonation is anticipated to result in the take of marine mammals due to noise.

HRG Surveys

HRG surveys would be conducted to identify any seabed debris and to support micro-siting of the WTG and OCS-DC foundations and cable routes. These surveys may utilize active acoustic equipment such as multibeam echosounders, side scan sonars, shallow penetration sub-bottom profilers (SBPs) (*e.g.*, Compressed High-Intensity Radiated Pulses (CHIRPs) non-parametric SBP), medium penetration sub-bottom profilers (*e.g.*, sparkers and boomers), ultra-short baseline positioning equipment, and marine magnetometers, some of which are expected to result in the take of marine mammals. Equipment may be mounted to the survey vessel or Sunrise Wind may use autonomous surface vehicles (SFV) to carry out this work. Surveys would occur annually, with durations dependent on the activities occurring in that year (*i.e.*, construction years versus operational years).

As summarized previously, HRG surveys will be conducted using up to four vessels. On average, 70-line km will be surveyed per vessel each survey day at approximately 7.4 km/hour (4 knots) on a 24-hour basis although some vessels may only operate during daylight hours (~12-hour survey vessels). During the construction phase (Yr1 and Yr2), an estimated 24,550 survey line km, plus in-fill and re-surveys, may be necessary to survey the inter-array cables and the Sunrise Wind Export Cable in water depths ranging from 2 m (6.5 ft) to 55 m (180 ft). HRG surveys are anticipated to operate at any

time of year for a maximum of 351 active sound source days over the 2 years of construction. During the operations phase (Yrs 3–5), an estimated 6,311 km per year for 3 years (18,933 km total) may be surveyed in the Sunrise Wind Farm and along the Sunrise Wind Export Cable. Using the same estimate of 70 km of survey completed each day per vessel, approximately 90 days of survey would occur each year for a total of up to 270 active sound source days over the 3-year operations period. In total, across all 5 years, a total of 43,484 kms of trackline may be surveyed.

Of the HRG equipment types proposed for use, the following sources have the potential to result in take of marine mammals:

- Shallow penetration sub-bottom profilers (SBPs) to map the near-surface stratigraphy (top 0 to 5 m (0 to 16 ft) of sediment below seabed). A CHIRP system emits sonar pulses that increase in frequency over time. The pulse length frequency range can be adjusted to meet project variables. These are typically mounted on the hull of the vessel or from a side pole.

- Medium penetration SBPs (boomers) to map deeper subsurface stratigraphy as needed. A boomer is a broad-band sound source operating in the 3.5 Hz to 10 kHz frequency range. This system is typically mounted on a sled and towed behind the vessel.

- Medium penetration SBPs (sparkers) to map deeper subsurface stratigraphy as needed. A sparker creates acoustic pulses from 50 Hz to 4 kHz omni-directionally from the source that can penetrate several hundred meters into the seafloor. These are typically towed behind the vessel with adjacent hydrophone arrays to receive the return signals.

Table 2 identifies all the representative survey equipment that operate below 180 kilohertz (kHz) (*i.e.*, at frequencies that are audible and have the potential to disturb marine mammals) that may be used in support of planned geophysical survey activities and are likely to be detected by marine mammals given the source level, frequency, and beamwidth of the equipment. Equipment with operating frequencies above 180 kHz and equipment that does not have an acoustic output (*e.g.*, magnetometers) will also be used but are not discussed further because they are outside the general hearing range of marine mammals likely to occur in the project area or do not produce noise. Hence, no harassment is reasonably expected to occur from the operation of these sources.

TABLE 2—SUMMARY OF REPRESENTATIVE HRG SURVEY EQUIPMENT

Equipment type	Representative model	Operating frequency (kHz)	Source level SPLrms (dB)	Source level 0-pk (dB)	Pulse duration (ms)	Repetition rate (Hz)	Beamwidth (degrees)	Source
Sub-bottom profiler	EdgeTech 216	2–16	195	-	20	6	24	MAN
	EdgeTech 424	4–24	176	-	3.4	2	71	CF
	Edgetech 512	0.7–12	179	-	9	8	80	CF
	GeoPulse 5430A	2–17	196	-	50	10	55	MAN
	Teledyn Benthos CHIRP III—TTV 170	2–17	197	-	60	15	100	MAN
Sparker	Applied Acoustics Dura-Spark UHD (400 tips, 500 J).	0.3–1.2	203	211	1.1	4	Omni	CF
	Applied Acoustics triple plate S-Boom (700–1,000 J).	0.1–5	205	211	0.6	4	80	CF

- = not applicable; ET = EdgeTech; J = joule; kHz = kilohertz; dB = decibels; SL = source level; UHD = ultra-high definition; AA = Applied Acoustics; rms = root-mean square; μPa = microPascals; re = referenced to; SPL = sound pressure level; PK = zero-to-peak pressure level; Omni = omnidirectional source.

^aThe Dura-spark measurements and specifications provided in Crocker and Fratantonio (2016) were used for all sparker systems proposed for the survey. These include variants of the Dura-spark sparker system and various configurations of the GeoMarine Geo-Source sparker system. The data provided in Crocker and Fratantonio (2016) represent the most applicable data for similar sparker systems with comparable operating methods and settings when manufacturer or other reliable measurements are not available.

^bCrocker and Fratantonio (2016) provide S-Boom measurements using two different power sources (CSP–D700 and CSP–N). The CSP–D700 power source was used in the 700 J measurements but not in the 1,000 J measurements. The CSP–N source was measured for both 700 J and 1,000 J operations but resulted in a lower SL; therefore, the single maximum SL value was used for both operational levels of the S-Boom.

Cable Laying and Installation

Cable burial operations would occur both in SRWF for the inter-array cables connecting the 94 WTGs to single OCS–DC and in the SRWEC corridor for cables carrying power from the OCS–DC to shore. The offshore export and inter-array cables would be buried in the seabed at a target depth of up to 1.2 to 2.8 m (4 to 6 ft) and buried onshore up to the transition joint bays. All cable burial operations would follow installation of the monopile foundations as the foundations must be in place to provide connection points for the export cable and inter-array cables. Cable laying, cable installation, and cable burial activities planned to occur during the construction of the Sunrise Wind project may include the following: jetting; vertical injection; leveling; mechanical cutting; plowing (with or without jet-assistance); pre-trenching; boulder removal; and controlled flow excavation.

Some dredging may be required prior to cable laying due to the presence of sandwaves. Sandwave clearance may be undertaken where cable exposure is predicted over the lifetime of the Project due to seabed mobility. This facilitates cable burial below the reference seabed. Alternatively, sandwave clearance may be undertaken where slopes become greater than approximately 10 degrees (17.6 percent), which could cause instability to the burial tool. The work could be undertaken by traditional dredging methods such as a trailing suction hopper. Alternatively, controlled flow excavation or a sandwave removal plough could be used. In some cases, multiple passes may be required. The method of sandwave clearance Sunrise Wind chooses would be based on the results

from the site investigation surveys and cable design.

As the noise levels generated from cable laying and installation work are low, the potential for take of marine mammals to result is discountable. Sunrise Wind is not requesting, and NMFS is not proposing to authorize, take associated with cable laying activities. Therefore, cable laying activities are not analyzed further in this document.

Temporary Pier Construction

Construction of the cable landfall at Smith Point County Park parking lot will require equipment and materials to transit from Long Island to Fire Island. The Smith Point Bridge, the only vehicle access to the Smith Point County Park parking lot, has had its posted weight limitation of 15 tons gross weight due to structural condition issues and concerns over accelerated aging. Due to these weight limitations, Sunrise Wind will utilize a transport barge and temporary landing structure (pier) to transport the heavy construction equipment and materials necessary to construct the Sunrise Wind Farm Project across the Intracoastal Waterway (ICW) to Smith Point County Park. The materials moved using the barge and temporary equipment are required to construct the Project and includes equipment needed to complete the HDD work and onshore civil works that are otherwise too heavy to travel across the Smith Point Bridge. In addition to the temporary pier on Fire Island, temporary mooring and breasting dolphins will be installed near the boat ramp at the Smith Point Marina on the Long Island side of the ICW to facilitate safe loading and unloading of the barge at the Smith Point Marina boat launch on Long Island.

The temporary pier will require the installation of up to 26 total production piles that will remain the entire time the temporary pier is in place. Temporary piles may be used to support a steel-framed template used to ensure installation of the bent production piles in the correct positions. The temporary piles may include up to 24 H-shaped or cylinder piles of the same size as the production piles. Therefore, a total of 50 piles (up to 26 production piles and up to 24 temporary piles) may be installed, and in some cases removed, during construction.

Installation and removal of the up to 24 temporary piles would be completed using only vibratory pile driving equipment. The up to 26 production piles would first be driven using a vibratory hammer followed by an impact hammer. Both production and temporary piles will be removed using vibratory pile driving. It is anticipated that installation of the pier will occur over approximately 3 to 4 weeks in and around December 2023. Installation of up to 26 production piles may result in a total of up to 351 minutes (5 hours 51 min) of vibratory pile driving (26 × 13.5 min) and 39 minutes of impact pile driving (26 × 1.5 min). Installation and removal of up to 24 temporary piles may require up to 720 minutes (16 hours) of vibratory pile driving only (2 × 24 × 15 min). The maximum total pile driving time for installation is therefore 1,071 min (17 hours 51 min) of vibratory pile driving and 39 minutes of impact pile driving. Following completion of the landfall construction work on Fire Island, the temporary pier is expected to be removed in approximately April or May of 2025. Removal of the temporary pier would involve the removal of all 26 production piles using a vibratory hammer. Thus, the total duration of

vibratory pile driving during pier removal may be up to 390 min (6 hours 30 min; 26 × 15 min).

While pile driving would result in Level B harassment isopleths up to approximately 750 m from the piles (as described in Sunrise Wind’s Temporary Pier Memo (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>), the very short duration of pile driving, the limited harassment area, the location of the harassment area (in an area where marine mammals are not typically present), and the implementation of monitoring and mitigation measures (see Proposed Mitigation and Proposed Monitoring and Reporting sections), Sunrise Wind is not requesting, and NMFS is not proposing to authorize, take of marine mammals incidental to temporary pier and breasting and mooring dolphin construction activities.

Vessel Operation

Sunrise Wind will utilize various types of vessels over the course of the 5-year proposed regulations. Sunrise Wind is evaluating the potential use of several existing port facilities located in New York, Connecticut, Maryland, Massachusetts, New Jersey, Rhode Island, and Virginia to support offshore construction, assembly and fabrication, crew transfer and logistics. The primary construction ports that are expected to be used during construction include: Albany and/or Coeymans, New York;

Port of New London, Connecticut; and Port of Dainsville-Quonset Point, Rhode Island.

The largest vessels are expected to be used during the WTG installation phase with floating/jackup crane barges, cable-laying vessels, supply/crew vessels, and associated tugs and barges transporting construction equipment and materials. Large work vessels (e.g., jack-up installation vessels and cable-laying vessels) for foundation and WTG installation will generally transit to the work location and remain in the area until installation time is complete. These large vessels will move slowly over a short distance between work locations. Transport vessels will travel between several ports and the SRWF over the course of the construction period following mandatory vessel speed restrictions (see Proposed Mitigation section). These vessels will range in size from smaller crew transport boats to tug and barge vessels. However, construction crews responsible for assembling the WTGs will hotel onboard installation vessels at sea, thus limiting the number of crew vessel transits expected during the installation of the SRWF.

As part of various vessel-based construction activities, including cable laying and construction material delivery, dynamic positioning thrusters may be utilized to hold vessels in position or move slowly. Sound produced through use of dynamic positioning thrusters is similar to that

produced by transiting vessels, and dynamic positioning thrusters are typically operated either in a similarly predictable manner or used for short durations around stationary activities. Sound produced by dynamic positioning thrusters would be preceded by, and associated with, sound from ongoing vessel noise and would be similar in nature; thus, any marine mammals in the vicinity of the activity would be aware of the vessel’s presence. Construction-related vessel activity, including the use of dynamic positioning thrusters, is not expected to result in take of marine mammals. Sunrise Wind did not request, and NMFS does not propose to authorize, any take associated with vessel activity.

During operation, up to three crew transfer vessels and a service operation vessel will be used to conduct maintenance activities. Sunrise Wind has also included potential for helicopters to be used in lieu of crew transfer vessels. The use of helicopters is included in Table 3 below; however, it is important to note that Sunrise Wind has indicated that there are a number of uncertainties regarding the how many trips will be made using helicopters, the number of passengers to be carried, and the vessels to which those passengers would be transported. Therefore, the total number of vessel trips shown in Table 3 has not been reduced based on the anticipated helicopter flights. As such, the number of crew transfer vessel trips may be less than depicted here.

TABLE 3—TYPE AND NUMBER OF VESSELS AND NUMBER OF VESSEL TRIPS ANTICIPATED DURING CONSTRUCTION AND OPERATIONS

Vessel types	Max number of simultaneous vessels	Max annual number of return trips
Wind Turbine Foundation Installation (Yrs 1–2)		
Heavy Lift Installation Vessel	2	20
Heavy Transport Vessel	4	50
Platform Supply Vessel	2	80
In-field support tug	2	50
Vessel for Bubble Curtain	1	30
Crew Transport Vessel	1	50
Monitoring Vessel	4	102
Completion Vessel	1	50
Fall Pipe Vessel	1	6
Turbine Installation (Yrs 1–2)		
Installation Vessel	1	26
Support Vessel	1	9
Array Cable Installation (Yrs 1–2)		
Pre-Lay Grapnel Run	1	5
Boulder Clearance Vessel	1	5
Sandwave Clearance Vessel	1	3
Cable Laying Vessel	3	3

TABLE 3—TYPE AND NUMBER OF VESSELS AND NUMBER OF VESSEL TRIPS ANTICIPATED DURING CONSTRUCTION AND OPERATIONS—Continued

Vessel types	Max number of simultaneous vessels	Max annual number of return trips
Cable Burial Vessel	2	3
Walk to Work Vessel (SOV)	1	6
Crew Transport Vessel	1	260
Survey Vessel	4	8
Construction Vessel	2	4
Fall Pipe Vessel	2	10
Offshore Converter Station Installation (Yrs 1–2)		
Primary Installation Vessel	3	3
Transport Vessel	2	2
Support Vessels	11	5
Fall Pipe Vessel	1	2
Offshore Export Cable Installation (Yrs 1–2)		
Pre-Lay Grapnel Run	1	1
Boulder Clearance Vessel	1	1
Sandwave Clearance Vessel	1	1
Cable Laying Vessel	3	6
Cable Burial Vessel	2	4
Tugs	4	8
Crew Transport Vessel	1	260
Guard Vessel/Scout Vessel	5	9
Survey Vessel	2	6
Fall Pipe Vessel	1	2
Construction Vessel	2	2
All Construction Activities (Yrs 1–2)		
Safety Vessel	2	114
Crew Transport Vessel	3	300
Jack-up/Lift Boat	1	1
Supply Vessel	1	10
Service Operation Vessel	1	6
Helicopter	2	350
Operations Vessels (Yrs 3–5)		
Crew Transport Vessel	3	300
Service Operation Vessel	1	40

Helicopters may be used during Sunrise Wind Farm construction and operation phases for crew transfer activities to provide a reduction in the overall transfer time as well as to reduce the number of vessels on the water. Sunrise Wind estimates crew transfer time could be decreased by 92 percent (16 to 30 minutes via a helicopter versus 3.5 to 6 hours using a vessel). However, use of helicopters may be limited by many factors, such as logistical constraints (e.g., ability to land on the vessels) and weather conditions that affect flight operations. Helicopter use also adds significant health, safety and environment (HSE) risk to personnel and therefore, requires substantially more crew training and additional safety procedures. These factors can result in significant limitations to helicopter usage. The use of helicopters to conduct

crew transfers is likely to provide an overall benefit to marine mammals in the form of reduced vessel activity. Project-related aircraft would only occur at low altitudes over water during takeoff and landing at an offshore location where one or more vessels are located. Helicopters produce sounds that can be audible to marine mammals; however, most sound energy from aircraft reflects off the air-water interface as only sound radiated downward within a 26-degree cone penetrates below the surface water (Urick 1972). Due to the intermittent nature and the small area potentially ensounded by this sound source, Sunrise Wind did not request, and NMFS is not proposing to authorize, take of marine mammals incidental to helicopter flights; therefore, it will not be discussed further.

Seafloor Preparation
 For export cable installation, seafloor preparation will include required sand wave leveling, boulder clearance, and removal of any out of service cables. Boulder clearance trials may be performed prior to wide-scale seafloor preparation activities to evaluate efficacy of boulder clearing techniques. Additionally, pre-lay grapnel runs (PLGR) will be undertaken to remove any seafloor debris along the export cable route. A specialized vessel will tow a grapnel rig along the centerline of each cable to recover any debris to the deck for appropriate licensed disposal ashore. Rock berm or concrete mattress separation layers will also be installed at the eight known tele-communications cables crossed by the SRWEC and/or inter-array cable (IAC) routes prior to cable installation for both in-service

assets as well as out-of-service assets that cannot be safely removed and pose a risk to the SRWEC or IAC.

For monopile and jacket pile installation, seafloor preparation will include required boulder clearance and removal of any obstructions within the seafloor preparation area at each foundation location. Scour protection installation will occur prior to installation and will involve a rock dumping vessel placing scour at each foundation location.

Boulder clearance may be required in targeted locations to clear boulders along the SRWEC, inter-array cable (IAC) routes, and/or foundations prior to installation. Boulder removal can be performed using a combination of methods to optimize clearance of boulder debris of varying size and frequency. Removal is based on pre-surveys to identify location, size, and density of boulders. The size of boulders that can be relocated is dependent on a number of factors including the boulder weight, dimensions, embedment, density and ground conditions. Typically, boulders with dimensions less than 8 ft (2.5 m) can be relocated with standard tools and equipment. Where required, Sunrise Wind has assumed the route would be cleared of boulders up to 98 feet (30-m) in width along the final SRWEC and IAC centerlines. Around the foundations, Sunrise Wind assumes boulder clearance will occur within a 722-ft (220-m) radius centered on the foundations to ensure safe foundation installation as well as safe vessel jack-up.

Boulder removal would occur prior to installation and would be completed by a support vessel based on pre-construction surveys. A boulder grab or a boulder plow may be used to complete boulder removal prior to installation. A boulder grab involves a grab most likely deployed from a dynamic positioning offshore support vessel being lowered to the seabed over the targeted boulder. Once “grabbed”, the boulder is relocated away from the cable route and/or foundation location. Boulder clearance using a boulder plow is completed by a high-bollard pull vessel with a towed plow generally forming an extended V-shaped configuration splaying from the rear of the main chassis. The V-shaped configuration displaces any boulders to the extremities of the plow, thus clearing the corridor. A tracked plow with a front blade similar to a bulldozer may also be used to push boulders away from the corridor.

Sand leveling (inclusive of leveling of sand accumulation areas) may be

required during seafloor preparation activities prior to installation of the SRWEC. Two installation methods may be used to complete sand leveling including Suction Hopper Dredging and controlled flow excavation (CFE). The dredging technique consists of one or more suction downpipes equipped with a seafloor drag head. The drag head is towed over the sand wave by the vessel while a pump system sucks fluidized sand into the vessel’s storage hopper. Any sediment removed would be relocated within the local sand wave field along the SRWEC and IAC using continuous overflow from the vessel. Alternatively, the removed sediment can be caught in the hopper storage and the vessel can relocate to a designated storage or disposal area and either offload material through a hatch in the vessel’s hull or more carefully position material subsea using a downpipe. CFE is a contactless dredging tool, providing a method of clearing loose sediment below submarine cables, enabling burial. CFE utilizes thrust to direct waterflow into sediment, creating liquefaction and subsequent dispersal. The CFE tool draws in seawater from the sides and then jets this water out from a vertical down pipe at a specified pressure and volume, which is then positioned over the cable alignment, enabling the stream of water to fluidize the sands around the cable. This allows the cable to settle into the trench under its own weight.

NMFS does not expect site preparation work, including boulder removal and sand leveling, to generate noise levels that would cause take of marine mammals. Underwater noise associated with these activities is expected to be similar in nature to the sound produced by the dynamic positioning (DP) cable lay vessels used during cable installation activities within the SRWEC. Sound produced by DP vessels is considered non-impulsive and is typically more dominant than mechanical or hydraulic noises produced from the cable trenching or boulder removal vessels and equipment. Therefore, noise produced by the high bollard pull vessel with a towed plow or a support vessel carrying a boulder grab would be comparable to or less than the noise produced by DP vessels, so impacts are also expected to be similar. Boulder clearance is a discreet action occurring over a short duration resulting in short term direct effects. Additionally, sound produced by boulder clearance vessels and equipment would be preceded by, and associated with, sound from ongoing

vessel noise and would be similar in nature.

NMFS expects that marine mammals would not be exposed to sounds levels or durations from seafloor preparation work that would disrupt behavioral patterns. Therefore, the potential for take of marine mammals to result from these activities is discountable and Sunrise Wind did not request, and NMFS does not propose to authorize, any takes associated with seafloor preparation work and these activities are not analyzed further in this document.

Fisheries and Benthic Monitoring

Fisheries and benthic monitoring surveys have been designed for the Project in accordance with recommendations set forth in “Guidelines for Providing Information on Fisheries for Renewable Energy Development on the Atlantic Outer Continental Shelf” (BOEM 2019). Sunrise Wind would conduct trawl surveys, acoustic telemetry studies, benthic habitat monitoring using a remotely operated vehicle (ROV), video surveillance, grab surveys, and Habcam surveys using towed video surveillance. Because the gear types and equipment used for the acoustic telemetry study, benthic habitat monitoring, and Habcam surveys do not have components with which marine mammals are likely to interact (*i.e.*, become entangled in or hooked by), these activities are unlikely to have any impacts on marine mammals. Therefore, only trawl surveys, in general, have the potential to result in harassment to marine mammals. However, Sunrise Wind would implement mitigation and monitoring measures to avoid taking marine mammals, including, but not limited to, monitoring for marine mammals before and during trawling activities, not deploying or pulling trawl gear in certain circumstances, limiting tow times, and fully repairing nets. A full description of mitigation measures can be found in the Proposed Mitigation section.

With the implementation of these measures, Sunrise Wind does not anticipate, and NMFS is not proposing to authorize, take of marine mammals incidental to research trawl surveys. Any lost gear associated with the fishery surveys will be reported to the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division as soon as possible. Given no take is anticipated from these surveys, impacts from fishery surveys will not be discussed further in this document.

Description of Marine Mammals in the Area of Specified Activities

Thirty-nine marine mammal species (comprising 40 stocks) have geographic ranges within the western North Atlantic OCS (Hayes et al., 2022). However, for reasons described below, Sunrise Wind has requested, and NMFS proposes to authorize, take of only 16 species (comprising 16 stocks) of marine mammals. Sections 3 and 4 of Sunrise Wind’s application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species (Sunrise Wind, 2021). NMFS fully considered all of this information, and we refer the reader to these descriptions in the application, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS’s Stock Assessment Reports (SARs; <https://www.fisheries.noaa.gov/national/>

marine-mammal-protection/marine-mammal-stock-assessments) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS’s website (<https://www.fisheries.noaa.gov/find-species>).

Table 4 lists all species and stocks for which take is expected and proposed to be authorized for this action 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) level, where known. The MMPA defines PBR 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” (16 U.S.C. 1362(20)) PBR values are identified in NMFS’s SARs. While no mortality is anticipated or proposed to be authorized, PBR and annual serious injury and mortality

from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS’s stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some stocks, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS’s U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 4 are the most recent available at the time of publication and are available in NMFS’ 2021 SARs (Hayes et al., 2022) available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>.

TABLE 4—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY SUNRISE WIND’S ACTIVITIES

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Artiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
<i>Family Balaenidae:</i>						
North Atlantic right whale ...	<i>Eubalaena glacialis</i>	Western Atlantic	E, D, Y	368 (0; 364; 2019) ⁵	0.7	7.7
<i>Family Balaenopteridae (rorquals)</i>						
Blue whale	<i>Balaenoptera musculus</i>	Western North Atlantic	E, D, Y	UNK (UNK; 402; 1980–2008).	0.8	0
Fin whale	<i>Balaenoptera physalus</i>	Western North Atlantic	E, D, Y	6,802 (0.24; 5,573; 2016)	11	1.8
Sei whale	<i>Balaenoptera borealis</i>	Nova Scotia	E, D, Y	6,292 (1.02; 3,098; 2016)	6.2	0.8
Minke whale	<i>Balaenoptera acutorostrata</i>	Canadian Eastern Coastal	-, -, N	21,968 (0.31; 17,002; 2016).	170	10.6
Humpback whale	<i>Megaptera novaeangliae</i>	Gulf of Maine	-, -, Y	1,396 (0; 1,380; 2016)	22	12.15
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
<i>Family Physeteridae:</i>						
Sperm whale	<i>Physeter macrocephalus</i>	North Atlantic	E, D, Y	4,349 (0.28; 3,451; 2016)	3.9	0
<i>Family Delphinidae</i>						
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	Western North Atlantic	-, -, N	93,233 (0.71; 54,433; 2016).	544	27
Atlantic spotted dolphin	<i>Stenella frontalis</i>	Western North Atlantic	-, -, N	39,921 (0.27; 32,032; 2016).	320	0
Common bottlenose dolphin	<i>Tursiops truncatus</i>	Western North Atlantic Offshore	-, -, N	62,851 (0.23; 51,914; 2016).	519	28
Long-finned pilot whales	<i>Globicephala melas</i>	Western North Atlantic	-, -, N	39,215 (0.3; 30,627; 2016).	306	29
Common dolphin (short-beaked).	<i>Delphinus delphis</i>	Western North Atlantic	-, -, N	172,974 (0.21; 145,216; 2016).	1,452	390
Risso’s dolphin	<i>Grampus griseus</i>	Western North Atlantic	-, -, N	35,215 (0.19; 30,051; 2016).	301	34
<i>Family Phocoenidae (porpoises):</i>						
Harbor porpoise	<i>Phocoena</i>	Gulf of Maine/Bay of Fundy	-, -, N	95,543 (0.31; 74,034; 2016).	851	16
Order Carnivora—Superfamily Pinnipedia						
<i>Family Phocidae (earless seals)</i>						
Gray seal ⁴	<i>Halichoerus grypus</i>	Western North Atlantic	-, -, N	27,300 (0.22; 22,785; 2016).	1,389	4,453

TABLE 4—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY SUNRISE WIND’S ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Harbor seal	<i>Phoca vitulina</i>	Western North Atlantic	-, -, N	61,336 (0.08; 57,637; 2018).	1,729	339

¹ 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: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments (Hayes *et al.*, 2022). CV is the coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

³ These values, found in NMFS’ SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.*, commercial fisheries, ship strike).

⁴ NMFS’ stock abundance estimate (and associated PBR value) applies to the U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

⁵ The values represent abundance estimates from NMFS 2021 Stock Assessment Report (Hayes *et al.*, 2022). On Monday, October 24, 2022, the North Atlantic Right Whale Consortium announced that the North Atlantic right whale population estimate for 2021 was 340 individuals. NMFS’ website also indicates that less than 350 animals remain (<https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>).

Of the 40 marine mammal species and/or stocks with geographic ranges that include the western North Atlantic OCS (Table 5 in Sunrise Wind ITA application), 24 are not expected to be present or are considered rare or unexpected in the project area based on sighting and distribution data; they are, therefore, not discussed further beyond the explanation provided here. The following species are not expected to occur in the project area due to the location of preferred habitat outside the SRWF and SRWEC based on the best scientific information available: Dwarf and pygmy sperm whales (*Kogia sima* and *K breviceps*), northern bottlenose whale (*hyperoodon ampullatus*), cuvier’s beaked whale (*Ziphius cavirostris*), four species of Mesoplodont beaked whales (*Mesoplodon densirostris*, *M. europaeus*, *M. mirus*, and *M. bidens*), killer whale (*Orcinus orca*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuate*), short-finned pilot whale (*Globicephalus macrohynchus*), melon-headed whale (*Peponocephala electra*), Fraser’s dolphin (*Lagenodelphis hosei*), white-beaked dolphin (*Lagenorhynchus albirostris*), pantropical spotted dolphin (*Stenella attenuata*), Clymene dolphin (*Stenella clymene*), striped dolphin (*Stenella coeruleoalba*), spinner dolphin (*Stenella longirostris*), rough-toothed dolphin (*Steno bredanensis*), and the northern migratory coastal stock of common bottlenose dolphins (*Tursiops truncatus truncatus*). The following species may occur in the project area but at such low densities that take is not anticipated: hooded seal (*Cystophora cristata*) and harp seal (*Pagophilus groenlandica*).

In addition, the Florida manatees (*Trichechus manatus*; a sub-species of the West Indian manatee) has been previously documented as an occasional

visitor to the Northeast region during summer months (U.S. Fish and Wildlife Service (USFWS, 2019). However, manatees are managed by the USFWS and are not considered further in this document.

Between October 2011 and June 2015, a total of 76 aerial surveys were conducted throughout the MA and RI/MA WEAs (the SRWF is contained within the RI/MA WEA along with several other offshore renewable energy Lease Areas). Between November 2011 and March 2015, Marine Autonomous Recording Units (MARU; a type of static passive acoustic monitoring (PAM) recorder) were deployed at nine sites in the MA and RI/MA WEAs. The goal of the study was to collect visual and acoustic baseline data on distribution, abundance, and temporal occurrence patterns of marine mammals (Kraus *et al.*, 2016). The New England Aquarium conducted additional aerial surveys throughout the MA and RI/MA WEAs from February 2017 through July 2018 (38 surveys), October 2018 through August 2019 (40 surveys), and March 2020 through July 2021 (12 surveys) (Quintana and Kraus, 2019; O’Brien *et al.*, 2021a; O’Brien *et al.*, 2021b). The lack of detections of any of the 24 species listed above during these surveys reinforces the fact that they are not expected to occur in the project area. In addition, none of these species were observed during HRG surveys conducted by Orsted in from 2018 to 2021. As these species are not expected to occur in the project area during the proposed activities, NMFS does not propose to authorize take of these species, and they are not discussed further in this document.

As indicated above, all 16 species and stocks in Table 4 temporally and spatially co-occur with the activity to the degree that take is reasonably likely

to occur. Five of the marine mammal species for which take is requested are listed as threatened or endangered under the ESA: North Atlantic right, blue, fin, sei, and sperm whales. In addition to what is included in Sections 3 and 4 of Sunrise Wind’s ITA application (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-sunrise-wind-llc-construction-and-operation-sunrise-wind>), the SARs (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>), and NMFS’ website (<https://www.fisheries.noaa.gov/species-directory/marine-mammals>), we provide further detail below informing the baseline for select species (*e.g.*, information regarding current Unusual Mortality Events (UME) and known important habitat areas, such as Biologically Important Areas (BIAs) (Van Parijs, 2015)). There are no ESA-designated critical habitats for any species within the project area.

Under the MMPA, a UME is defined as “a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response” (16 U.S.C. 1421h(6)). As of November 7, 2022, seven UMEs are active. Five of these UMEs are occurring along the U.S. Atlantic coast for various marine mammal species; of these, the most relevant to the Sunrise Wind project are the minke whale, North Atlantic right whale, humpback whale, and harbor and gray seal UMEs given the prevalence of these species in the project area. More information on UMEs, including all active, closed, or pending, can be found on NMFS’ website at <https://www.fisheries.noaa.gov/national/marine-life-distress/>

active-and-closed-unusual-mortality-events.

Below we include information for a subset of the species that presently have an active or recently closed UME occurring along the Atlantic coast or for which there is information available related to areas of biological significance. For the majority of species potentially present in the specific geographic region, NMFS has designated only a single generic stock (e.g., “western North Atlantic”) for management purposes. This includes the “Canadian east coast” stock of minke whales, which includes all minke whales found in U.S. waters and is also a generic stock for management purposes. For humpback and sei whales, NMFS defines stocks on the basis of feeding locations (*i.e.*, Gulf of Maine and Nova Scotia, respectively). However, references to humpback whales and sei whales in this document refer to any individuals of the species that are found in the project area. Any areas of known biological importance (including the BIAs identified in LaBrecque *et al.*, 2015) that overlap spatially with the project area are addressed in the species sections below.

North Atlantic Right Whale

The North Atlantic right whale has been listed as Endangered since the ESA’s enactment in 1973. The species was recently uplisted from Endangered to Critically Endangered on the International Union for Conservation of Nature (IUCN) Red List of Threatened Species (Cooke, 2020). The uplisting was due to a decrease in population size (Pace *et al.*, 2017), an increase in vessel strikes and entanglements in fixed fishing gear (Daoust *et al.*, 2017; Davis & Brilliant, 2019; Knowlton *et al.*, 2012; Knowlton *et al.*, 2022; Moore *et al.*, 2021; Sharp *et al.*, 2019), and a decrease in birth rate (Pettis *et al.*, 2021; Reed *et al.*, 2022). The Western Atlantic stock is considered depleted under the MMPA (Hayes *et al.*, 2022). There is a recovery plan (NOAA Fisheries, 2005) for the North Atlantic right whale, and NMFS completed 5-year reviews of the species in 2012 and 2017 (NOAA Fisheries, 2012; NOAA Fisheries, 2017). In February 2022, NMFS initiated a subsequent 5-year review process (<https://www.fisheries.noaa.gov/action/initiation-5-year-review-north-atlantic-right-whale>). Designated by NMFS as a Species in the Spotlight, the North Atlantic right whale is considered among the species with the greatest risk of extinction in the near future (<https://www.fisheries.noaa.gov/topic/endangered-species-conservation/species-in-the-spotlight>).

The North Atlantic right whale population had only a 2.8 percent recovery rate between 1990 and 2011 and an overall abundance decline of 23.5 percent from 2011–2019 (Hayes *et al.* 2022). Since 2010, the North Atlantic right whale population has been in decline (Pace *et al.*, 2017; Pace *et al.*, 2021), with a 40 percent decrease in calving rate (Kraus *et al.*, 2016; Moore *et al.*, 2021). North Atlantic right whale calving rates dropped from 2017 to 2020 with zero births recorded during the 2017–2018 season. The 2020–2021 calving season had the first substantial calving increase in 5 years with 20 calves born followed by 15 calves during the 2021–2022 calving season. However, mortalities continue to outpace births, and best estimates indicate fewer than 100 reproductively active females remain in the population. Presently, the best available peer-reviewed population estimate for North Atlantic right whales is 368 per the 2021 SARs (Hayes *et al.*, 2022). As of this writing, the draft 2022 SARs have yet to be released; however, as reflected on NMFS’ species web page, new estimates indicate that the right whale population has continued to decline to fewer than 350 animals (<https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>). We note that the application of either abundance estimate in our analysis would not change the estimated take of right whales or the take NMFS has proposed to authorize as take estimates are based on the habitat-density models (Roberts and Halpin 2022).

Since 2017, dead, seriously injured, or sublethally injured or ill North Atlantic right whales along the U.S. and Canadian coasts have been documented, necessitating a UME declaration and investigation. The leading category for the cause of death for this ongoing UME is “human interaction,” specifically from entanglements or vessel strikes. As of January 12, 2023, there have been 35 confirmed mortalities (dead stranded or floaters; 21 in Canada; 14 in the United States) and 22 seriously injured free-swimming whales for a total of 57 whales. Beginning on October 14, 2022, the UME also considers animals with sublethal injury or illness bringing the total number of whales in the UME to 94. Approximately 42 percent of the population is known to be in reduced health (Hamilton *et al.*, 2021) likely contributing to smaller body sizes at maturation, making them more susceptible to threats and reducing fecundity (Moore *et al.*, 2021; Reed *et al.*, 2022; Stewart *et al.*, 2022). More information about the North Atlantic

right whale UME is available online at www.fisheries.noaa.gov/national/marine-life-distress/2017–2021-north-atlantic-right-whale-unusual-mortality-event.

North Atlantic right whale presence in the project area is predominately seasonal; however, year-round occurrence is documented with irregular occurrence during summer months (O’Brien *et al.*, 2022, Quintano-Rizzo *et al.*, 2021). As a result of recent years of aerial surveys and PAM deployments within the RI/MA WEA, we have confidence that North Atlantic right whales are expected in the project area with higher numbers of animals present in winter and spring followed by decreasing abundance into summer and early fall (e.g., O’Brien *et al.*, 2022, Quintano-Rizzo *et al.*, 2021). The project area both spatially and temporally overlaps a portion of the migratory corridor BIA within which North Atlantic right whales migrate south to calving grounds generally in November and December, followed by a northward migration into feeding areas east and north of the project area in March and April (LaBrecque *et al.*, 2015; Van Parijs *et al.*, 2015). While the project does not overlap previously identified critical feeding habitat or a feeding BIA, it is located west of a more recently described important feeding area south of Martha’s Vineyard and Nantucket along the western side of Nantucket Shoals. Finally, the project overlaps the currently established November 1 through April 30th Block Island Seasonal Management Area (SMA) (73 FR 60173, October 10, 2008) and the proposed November 1 through May 30th Atlantic Seasonal Speed Zone (87 FR 46921, August 1, 2022), which may be used by North Atlantic right whales for various activities, including feeding and migration. Due to the current status of North Atlantic right whales and the overlap of the proposed project with areas of biological significance (*i.e.*, a migratory corridor, SMA), the potential impacts of the proposed project on North Atlantic right whales warrant particular attention.

Southern New England and New York waters are both a migratory corridor in the spring and early winter and a primary feeding habitat for North Atlantic right whales during late winter through spring. North Atlantic right whales feed primarily on the copepod *Calanus finmarchicus*, a species whose availability and distribution has changed both spatially and temporally over the last decade due to an oceanographic regime shift that has been ultimately linked to climate change (Meyer-Gutbrod *et al.*, 2021;

Record *et al.*, 2019; Sorochan *et al.*, 2019). This distribution change in prey availability has led to shifts in North Atlantic right whale habitat-use patterns within the region over the same time period (Davis *et al.*, 2020; Meyer-Gutbrod *et al.*, 2022; Quintano-Rizzo *et al.*, 2021, O'Brien *et al.*, 2022). Since 2010, North Atlantic right whales have reduced their use of foraging habitats in the Great South Channel and Bay of Fundy while increasing their use of habitat within Cape Cod Bay as well as a region south of Martha's Vineyard and Nantucket Islands to the east of the SRWF and SRWEC corridor (Stone *et al.*, 2017; Mayo *et al.*, 2018; Ganley *et al.*, 2019; Record *et al.*, 2019; Meyer-Gutbrod *et al.*, 2021). Pendleton *et al.* (2022) found that peak use of North Atlantic right whale foraging habitat in Cape Cod Bay has shifted over the past 20 years to later in the spring, likely due to variations in seasonal conditions. However, initial sightings of individual North Atlantic right whales in Cape Cod Bay have started earlier, indicating that they may be using regional water temperature as a cue for migratory movements between habitats (Ganley *et al.* 2022). North Atlantic right whales have recently been observed feeding year-round in the region south of Martha's Vineyard and Nantucket (Quintana-Rizzo *et al.*, 2021) with larger numbers in this area in the winter making it the only known winter foraging habitat for the species (Leiter *et al.*, 2017). North Atlantic right whale use of habitats, such as in the Gulf of St. Lawrence and East Coast mid-Atlantic waters of the United States., have also increased over time (Davis *et al.*, 2017; Davis and Brillant, 2019; Crowe *et al.*, 2021; Quintana-Rizzo *et al.*, 2021). Simard *et al.* (2019) documented the presence of North Atlantic right whales in the southern Gulf of St. Lawrence foraging habitat from late April through mid-January annually from 2010–2018 using passive acoustics with occurrences peaking in the area from August through November each year (Simard *et al.*, 2019). Observations of these transitions in North Atlantic right whale habitat use, variability in seasonal presence in identified core habitats, and utilization of habitat outside of previously focused survey effort prompted the formation of a NMFS' Expert Working Group, which identified current data collection efforts, data gaps, and provided recommendations for future survey and research efforts (Oleson *et al.*, 2020).

Around November, a portion of the North Atlantic right whale population (including pregnant females) typically

departs the feeding grounds in the North Atlantic, move south along the migratory corridor BIA, including through the project area, to North Atlantic right whale calving grounds off Georgia and Florida. However, recent research indicates understanding of their movement patterns remains incomplete and not all of the population undergoes a consistent annual migration (Davis *et al.*, 2017; Gowan *et al.*, 2019; Krzystan *et al.*, 2018). The results of multistate temporary emigration capture-recapture modeling, based on sighting data collected over the past 22 years, indicate that non-calving females may remain in the feeding grounds during the winter in the years preceding and following the birth of a calf to increase their energy stores (Gowen *et al.*, 2019).

Within the project area, North Atlantic right whales have primarily been observed during the winter and spring seasons through recent visual surveys (Kraus *et al.*, 2016; Quintana-Rizzo *et al.*, 2021). During aerial surveys conducted in the RI/MA and MA WEAs from 2011–2015, the highest number of North Atlantic right whale sightings occurred in March (n=21), with sightings also occurring in December (n=4), January (n=7), February (n=14), and April (n=14), and no sightings in any other months (Kraus *et al.*, 2016). There was not significant variability in sighting rate among years, indicating consistent annual seasonal use of the area by North Atlantic right whales. Despite the lack of visual detection, North Atlantic right whales were acoustically detected in 30 out of the 36 recorded months (Kraus *et al.*, 2016). Since 2017, whales have been sighted in the southern New England area nearly every month with peak sighting rates between late winter and spring. Model outputs suggest that 23 percent of the North Atlantic right whale population is present from December through May, and the mean residence time has tripled to an average of 13 days during these months (Quintano-Rizzo *et al.*, 2021).

North Atlantic right whale distribution can also be derived from acoustic data. A review of passive acoustic monitoring data from 2004 to 2014 collected throughout the western North Atlantic demonstrated nearly continuous year-round North Atlantic right whale presence across their entire habitat range with a decrease in summer months, including in locations previously thought of as migratory corridors suggesting that not all of the population undergoes a consistent annual migration (Davis *et al.*, 2017). To describe seasonal trends in North Atlantic right whale presence, Estabrook

et al. (2022) analyzed North Atlantic right whale acoustic detections collected between 2011–2015 during winter (January–March), spring (April–June), summer (July–September), and autumn (October–December). Winter had the highest presence (75percent array-days, n = 193), and summer had the lowest presence (10percent array-days, n = 27). Spring and autumn were similar, where 45percent (n = 117) and 51percent (n = 121) of the array-days had detections, respectively. Across all years, detections were consistently lowest in August and September. In Massachusetts Bay and Cape Cod Bay, located outside of the project area, acoustic detections of North Atlantic right whales increased in more recent years in both the peak season of late winter through early spring and in summer and fall, likely reflecting broadscale regional habitat changes (Charif *et al.*, 2020). NMFS' Passive Acoustic Cetacean Map (PACM) contains up-to-date acoustic data that contributes to our understanding of when and where specific whales (including North Atlantic right whales), dolphin, and other cetacean species are acoustically detected in the North Atlantic. These data support the findings of the aforementioned literature.

While density data from Roberts *et al.* (2022) confirm that the highest average density of North Atlantic right whales in the project area (both the lease area and SRWEC corridor) occurs in May (0.0018 whales/km²), which aligns with available sighting and acoustic data, it is clear that that habitat use is changing and North Atlantic right whales are present to some degree in or near the project area throughout the year, most notably south of Martha's Vineyard and Nantucket Islands (Leiter *et al.*, 2017; Stone *et al.*, 2017; Oleson *et al.*, 2020, Quintano-Rizzo *et al.*, 2021). Since 2010, North Atlantic right whale abundances have increased in Southern New England waters, south of Martha's Vineyard and Nantucket Islands. O'Brien *et al.* (2022) detected significant increases in North Atlantic right whale abundance during winter and spring seasons from 2013–2019 likely due to changes in prey availability. Since 2017, North Atlantic right whales were also detected in small numbers during summer and fall, suggesting that southern New England waters provide year-round habitat for North Atlantic right whales (O'Brien *et al.*, 2022).

NMFS' regulations at 50 CFR 224.105 designate nearshore waters of the Mid-Atlantic Bight as the Mid-Atlantic U.S. SMAs for North Atlantic right whales in 2008. These specific SMAs were

developed to reduce the threat of collisions between ships and North Atlantic right whales around their migratory route and calving grounds. As mentioned previously, the Block Island SMA overlaps spatially with the proposed project area (<https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html>). The SMA is currently active from November 1 through April 30 of each year and may be used by North Atlantic right whales for feeding (although to a lesser extent than the area to the east near Nantucket Shoals) and/or migrating. As noted above, NMFS is proposing changes to the North Atlantic right whale speed rule (87 FR 46921; August 1, 2022).

Humpback Whale

Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. On September 8, 2016, NMFS divided the once single species into 14 distinct population segments (DPS), removed the species-level listing, and, in its place, listed 4 DPSs as endangered and 1 DPS as threatened (81 FR 62259, September 8, 2016). The remaining nine DPSs were not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whales that is expected to occur in the project area. Bettridge *et al.* (2015) estimated the size of the West Indies DPS population at 12,312 (95 percent CI 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.*, 2003; Smith *et al.*, 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.*, 2015).

In New England waters, feeding is the principal activity of humpback whales, and their distribution in this region has been largely correlated to abundance of prey species (Payne *et al.*, 1986, 1990). Humpback whales are frequently piscivorous when in New England waters, feeding on herring (*Clupea harengus*), sand lance (*Ammodytes spp.*), and other small fishes, as well as euphausiids in the northern Gulf of Maine (Paquet *et al.*, 1997). Kraus *et al.* (2016) observed humpbacks in the RI/MA & MA WEAs and surrounding areas during all seasons but most often during spring and summer months with a peak from April to June. Acoustic data indicate that this species may be present within the RI/MA WEA year-round with the highest rates of acoustic detections in the winter and spring (Kraus *et al.*, 2016).

The project area does not overlap any ESA-designated critical habitat, BIAs, or other important areas for the humpback whales. A humpback whale feeding BIA extends throughout the Gulf of Maine, Stellwagen Bank, and Great South Channel from May through December, annually (LeBrecque *et al.*, 2015). However, this BIA is located further east and north of, and thus, does not overlap, the project area.

Since January 2016, elevated humpback whale mortalities along the Atlantic coast from Maine to Florida led to the declaration of a UME. As of January 12, 2023, 174 humpback whales have stranded as part of this UME. Partial or full necropsy examinations have been conducted on approximately half of the 161 known cases (as of November 7, 2022). Of the whales examined, about 50 percent had evidence of human interaction, either ship strike or entanglement. While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. More information is available at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast>.

Fin Whale

Fin whales typically feed in the Gulf of Maine and the waters surrounding New England, but their mating and calving (and general wintering) areas are largely unknown (Hain *et al.* 1992, Hayes *et al.* 2022). Acoustic detections of fin whale singers augment and confirm these visual sighting conclusions for males. Recordings from Massachusetts Bay, New York Bight, and deep-ocean areas have detected some level of fin whale singing from September through June (Watkins *et al.* 1987, Clark and Gagnon 2002, Morano *et al.* 2012). These acoustic observations from both coastal and deep-ocean regions support the conclusion that male fin whales are broadly distributed throughout the western North Atlantic for most of the year (Hayes *et al.* 2022).

Kraus *et al.* (2016) suggest that, compared to other baleen whale species, fin whales have a high multi-seasonal relative abundance in the RI/MA & MA WEAs and surrounding areas. Fin whales were observed in the MA WEA

in spring and summer. This species was observed primarily in the offshore (southern) regions of the RI/MA & MA WEAs during spring and was found closer to shore (northern areas) during the summer months (Kraus *et al.*, 2016). Calves were observed three times and feeding was observed nine times during the Kraus *et al.* (2016) study. Although fin whales were largely absent from visual surveys in the RI/MA & MA WEAs in the fall and winter months (Kraus *et al.*, 2016), acoustic data indicated that this species was present in the RI/MA & MA WEAs during all months of the year.

New England waters represent a major feeding ground for fin whales. Almost the entire lease area (351 km²) overlaps approximately 12 percent of a relatively small fin whale feeding BIA (2,933 km²) offshore of Montauk Point, New York from March to October (Hain *et al.*, 1992; LaBrecque *et al.* 2015). A separate larger year-round feeding BIA (18,015 km²) located far to the northeast in the southern Gulf of Maine does not overlap with the project area and would thus not be impacted by project activities.

Minke Whale

Minke whale occurrence is common and widespread in New England from spring to fall, although the species is largely absent in the winter (Hayes *et al.*, 2022; Risch *et al.*, 2013). Surveys conducted in the RI/MA WEAs from October 2011 through June 2015 reported 103 minke whale sightings within the area, predominantly in the spring followed by summer and fall (Kraus *et al.*, 2016). Recent surveys conducted in the RI/MA WEAs from February 2017 through July 2018, October 2018 through August 2019, and March 2020 through July 2021 documented minke whales as the most common rorqual (baleen whales with pleated throat grooves) sighted in the WEAs. Surveys also reported a shift in the greatest seasonal abundance of minke whales from spring (2017–2018) (Quintana and Kraus, 2018) to summer (2018–2019 and 2020–2021) (O'Brien *et al.*, 2021a, b).

There are two minke whale feeding BIAs identified in the southern and southwestern section of the Gulf of Maine, including Georges Bank, the Great South Channel, Cape Cod Bay and Massachusetts Bay, Stellwagen Bank, Cape Anne, and Jeffreys Ledge from March through November, annually (LeBrecque *et al.*, 2015). However, these BIAs do not overlap the project area as they are located further east and north. A migratory route for minke whales transiting between northern feeding grounds and southern breeding areas

may exist to the east of the proposed project area as minke whales may track warmer waters along the continental shelf while migrating (Risch *et al.*, 2014).

Since January 2017, elevated minke whale mortalities detected along the Atlantic coast from Maine through South Carolina resulted in the declaration of a UME. As of January 12 2023, a total of 136 minke whales have stranded during this UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease, but these findings are not consistent across all of the minke whales examined, so more research is needed. More information is available at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-minke-whale-unusual-mortality-event-along-atlantic-coast>.

Phocid Seals

Since June 2022, elevated numbers of harbor seal and gray seal mortalities have occurred across the southern and central coast of Maine. This event has been declared a UME. Preliminary testing of samples has found some harbor and gray seals positive for highly pathogenic avian influenza. While the UME is not occurring in the Sunrise Wind project area, the populations

affected by the UME are the same as those potentially affected by the project.

The above event was preceded by a different UME, occurring from 2018–2020 (closure of the 2018–2020 UME is pending). Beginning in July 2018, elevated numbers of harbor seal and gray seal mortalities occurred across Maine, New Hampshire, and Massachusetts. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation encompassed all seal strandings from Maine to Virginia. A total of 3,152 reported strandings (of all species) occurred from July 1, 2018, through March 13, 2020. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME, which is pending closure. Information on this UME is available online at: www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to

anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.*, Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 5.

TABLE 5—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.

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Sixteen marine mammal species (14 cetacean species (6 mysticetes and 8 odontocetes) and 2 pinniped species (both phocid)) have

the reasonable potential to co-occur with the proposed project activities (Table 4).

NMFS notes that in 2019, Southall *et al.* recommended new names for hearing groups that are widely recognized. However, this new hearing group classification does not change the weighting functions or acoustic thresholds (*i.e.*, the weighting functions and thresholds in Southall *et al.* (2019) are identical to NMFS 2018 Revised Technical Guidance). When NMFS updates our Technical Guidance, we will be adopting the updated Southall *et al.* (2019) hearing group classification.

Potential Effects of Specified Activities to Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals 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 of Marine Mammals section, and the Proposed Mitigation

section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. General background information on marine mammal hearing was provided previously (see the Description of Marine Mammals in the Area of Specified Activities section). Here, the potential effects of sound on marine mammals are discussed.

Sunrise Wind has requested authorization to take marine mammals incidental to construction activities associated with in the Sunrise Wind project area. In the ITA application, Sunrise Wind presented analyses of potential impacts to marine mammals from use of acoustic and explosive sources. NMFS carefully reviewed the information provided by Sunrise Wind and independently reviewed applicable scientific research and literature and other information to evaluate the potential effects of Sunrise Wind's activities on marine mammals.

The proposed activities would result in placement of up to 95 permanent foundations (94 WTGs and 1 OCS-DC) and a temporary casing pipe in the marine environment. Up to three UXO/MEC detonations may occur during construction if any found UXO/MEC cannot be removed by other means. There are a variety of types and degrees of effects to marine mammals, prey species, and habitat that could occur as a result of the project. Below we provide a brief description of the types of sound sources that would be generated by the project, the general impacts from these types of activities, and an analysis of the anticipated impacts on marine mammals from the project in consideration of the proposed mitigation measures.

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) as well as the Discovery of Sound in the Sea (DOSITS) website at <https://dosits.org/>.

Sound is a vibration that travels as an acoustic wave through a medium such as a gas, liquid or solid. Sound waves

alternately compress and decompress the medium as the wave travels. These compressions and decompressions are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones (underwater microphones). In water, sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam (narrow beam or directional sources) or sound beams may radiate in all directions (omnidirectional sources).

Sound travels in water more efficiently than almost any other form of energy, making the use of acoustics ideal for the aquatic environment and its inhabitants. In seawater, sound travels at roughly 1,500 meters per second (m/s). In air, sound waves travel much more slowly at about 340 m/s. However, the speed of sound can vary by a small amount based on characteristics of the transmission medium such as water temperature and salinity.

The basic components of a sound wave 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 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. The intensity (or amplitude) of sounds are measured in decibels (dB), which are a relative unit of measurement that is used to express the ratio of one value of a power or field to another. Decibels are measured on a logarithmic scale, so a small change in dB corresponds to large changes in sound pressure. For example, a 10 dB increase is a ten-fold increase in acoustic power. A 20 dB increase is then a 100-fold increase in power and a 30 dB increase is a 1000-fold increase in power. However, a ten-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder. Decibels are a relative unit comparing two pressures; therefore, a reference pressure must always be indicated. For underwater sound, this is 1 microPascal (μPa). For in-air sound, the reference pressure is 20 microPascal (μPa). The amplitude of a sound can be presented in various ways; however, NMFS typically considers three metrics.

Sound exposure level (SEL) represents the total energy in a stated frequency band over a stated time interval or event and considers both

amplitude and duration of exposure (represented as dB re $1 \mu\text{Pa}^2\text{-s}$). SEL is a cumulative metric; it can be accumulated over a single pulse (for pile driving this is often referred to as single-strike SEL; SEL_{ss}) or calculated over periods containing multiple pulses (SEL_{cum}). Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. The SEL metric is useful because it allows sound exposures of different durations to be related to one another in terms of total acoustic energy. The duration of a sound event and the number of pulses, however, should be specified as there is no accepted standard duration over which the summation of energy is measured. Sounds are typically classified by their spectral and temporal properties.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square 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.

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. Along with SEL, this metric is used in evaluating the potential for PTS (permanent threshold shift) and TTS (temporary threshold shift). Peak pressure is also used to evaluate the potential for gastrointestinal tract injury (Level A harassment) from explosives.

For explosives, an impulse metric (Pa-s), which is the integral of a transient sound pressure over the duration of the pulse, is used to evaluate the potential for mortality (*i.e.*, severe lung injury) and slight lung injury. These impulse metric thresholds account for animal mass and depth.

Sounds can be either impulsive or non-impulsive. 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 NMFS *et al.* (2018) and Southall *et al.* (2007,

2019) for an in-depth discussion of these concepts. Impulsive sound sources (e.g., airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than 1 second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) 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. Impulsive sounds are typically intermittent in nature.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of pulses (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.

Sounds are also characterized by their temporal component. Continuous sounds are those whose sound pressure level remains above that of the ambient sound with negligibly small fluctuations in level (NIOSH, 1998; ANSI, 2005) while intermittent sounds are defined as sounds with interrupted levels of low or no sound (NIOSH, 1998). NMFS identifies Level B harassment thresholds based on if a sound is continuous or intermittent.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.*, 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 kHz (ICES, 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 sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human 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. Underwater ambient sound in the Atlantic Ocean southeast of Rhode Island comprises sounds produced by a number of natural and anthropogenic sources. Human-generated sound is a significant contributor to the acoustic environment in the project location.

Potential Effects of Underwater Sound on Marine Mammals and Their Habitat

Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life from none or minor to potentially severe responses depending on received levels, duration of exposure, behavioral context, and various other factors. Broadly, underwater sound from active acoustic

sources, such as those in the Sunrise Wind project, can potentially result in one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.*, 1995; Gordon *et al.*, 2003; Nowacek *et al.*, 2007; Southall *et al.*, 2007; Götz *et al.*, 2009). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (e.g., change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007; Zimmer and Tyack, 2007; Tal *et al.*, 2015). Potential effects from explosive sound sources can range in severity from behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.*, 1973).

In general, the degree of effect of an acoustic exposure is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure, in addition to the contextual factors of the receiver (e.g., behavioral state at time of exposure, age class, *etc.*). In general, sudden, high level sounds can cause hearing loss as can longer exposures to lower level sounds. Moreover, any temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We describe below the specific manifestations of acoustic effects that may occur based on the activities proposed by Sunrise Wind.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur in relation to distance from a source and assuming that the signal is within an animal's hearing range. First (at the greatest distance) is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone (closer to the receiving animal) corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. The third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain

extent is the area within which masking (*i.e.*, when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

Below, we provide additional detail regarding potential impacts on marine mammals and their habitat from noise in general, starting with hearing impairment, as well as from the specific activities Sunrise Wind plans to conduct, to the degree it is available (noting that there is limited information regarding the impacts of offshore wind construction on marine mammals).

Threshold Shift

Marine mammals exposed to high-intensity sound or to lower-intensity sound for prolonged periods can experience hearing threshold shift (TS), which NMFS defines 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 expressed in decibels (NMFS, 2018). Threshold shifts can be permanent, in which case there is an irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range or temporary, in which there is reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range and the animal's hearing threshold would fully recover over time (Southall *et al.*, 2019). Repeated sound exposure that leads to TTS could cause PTS.

When PTS occurs, there can be physical damage to the sound receptors in the ear (*i.e.*, tissue damage) whereas TTS represents primarily tissue fatigue and is reversible (Henderson *et al.*, 2008). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward, 1997; Southall *et al.*, 2019). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans. However, such relationships are assumed to be similar to those in humans and other terrestrial mammals. Noise exposure can result in either a permanent shift in hearing thresholds from baseline (PTS; a 40 dB threshold shift approximates a PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller, 1974; Henderson *et al.*, 2008) or a temporary, recoverable shift in hearing that returns to baseline (a 6 dB

threshold shift approximates a TTS onset; *e.g.*, Southall *et al.*, 2019). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds, expressed in the unweighted peak sound pressure level metric (PK), for impulsive sounds (such as impact pile driving pulses) are at least 6 dB higher than the TTS thresholds and the weighted PTS cumulative sound exposure level thresholds are 15 (impulsive sound) to 20 (non-impulsive sounds) dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.*, 2019). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, PTS is less likely to occur as a result of these activities, but it is possible and a small amount has been proposed for authorization for several species.

TTS is the mildest form of hearing impairment that can occur during exposure to sound, with a TTS of 6 dB 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; Finneran *et al.*, 2002). 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. There is data on sound levels and durations necessary to elicit mild TTS for marine mammals, but recovery is complicated to predict and dependent on multiple factors.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. 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 depending on the degree of interference of marine mammals hearing. 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 occurs during a time 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 (*e.g.* for successful mother/calf

interactions, consistent detection of prey) could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocaena asiaeorientalis*)) and six species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, ring seal, spotted seal, bearded seal, and California sea lion (*Zalophus californianus*)) that were exposed to a limited number of sound sources (*i.e.*, mostly tones and octave-band noise with limited number of exposure to impulsive sources such as seismic airguns or impact pile driving) in laboratory settings (Southall *et al.*, 2019). There is currently no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS or PTS in marine mammals or for further discussion of TTS or PTS onset thresholds, please see Southall *et al.* (2019), and NMFS (2018).

Recent studies with captive odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale) have observed increases in hearing threshold levels when individuals received a warning sound prior to exposure to a relatively loud sound (Nachtigall and Supin, 2013, 2015, Nachtigall *et al.*, 2016a,b,c, Finneran, 2018, Nachtigall *et al.*, 2018). These studies suggest that captive animals have a mechanism to reduce hearing sensitivity prior to impending loud sounds. Hearing change was observed to be frequency dependent and Finneran (2018) suggests hearing attenuation occurs within the cochlea or auditory nerve. Based on these observations on captive odontocetes, the authors suggest that wild animals may have a mechanism to self-mitigate the impacts of noise exposure by dampening their hearing during prolonged exposures of loud sound or if conditioned to anticipate intense sounds (Finneran, 2018, Nachtigall *et al.*, 2018).

Behavioral Disturbance

Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.*, 2007). A review of marine mammal responses

to anthropogenic sound was first conducted by Richardson (1995). More recent reviews (Nowacek *et al.*, 2007; DeRuiter *et al.*, 2012 and 2013; Ellison *et al.*, 2012; Gomez *et al.*, 2016) address studies conducted since 1995 and focused on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated. Gomez *et al.* (2016) conducted a review of the literature considering the contextual information of exposure in addition to received level and found that higher received levels were not always associated with more severe behavioral responses and vice versa. Southall *et al.* (2021) states that results demonstrate that some individuals of different species display clear yet varied responses, some of which have negative implications while others appear to tolerate high levels and that responses may not be fully predictable with simple acoustic exposure metrics (*e.g.*, received sound level). Rather, the authors state that differences among species and individuals along with contextual aspects of exposure (*e.g.*, behavioral state) appear to affect response probability. Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately predisposed to respond to certain sounds in certain ways) (Southall *et al.*, 2019). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), the similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.*, calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.*, 2007, DeRuiter *et al.*, 2013). Individuals (of different age, gender, reproductive status, *etc.*) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.*, proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of

a nearby vessel, may be more relevant to the animal's response than the received level alone. Overall, the variability of responses to acoustic stimuli depends on the species receiving the sound, the sound source, and the social, behavioral, or environmental contexts of exposure (*e.g.*, DeRuiter *et al.*, 2012). For example, Goldbogen *et al.* (2013) demonstrated that individual behavioral state was critically important in determining response of blue whales to sonar, noting that some individuals engaged in deep (greater than 50 m) feeding behavior had greater dive responses than those in shallow feeding or non-feeding conditions. Some blue whales in the Goldbogen *et al.* (2013) study that were engaged in shallow feeding behavior demonstrated no clear changes in diving or movement even when received levels were high (~160 dB re 1 μ Pa) for exposures to 3–4 kHz sonar signals, while deep feeding and non-feeding whales showed a clear response at exposures at lower received levels of sonar and pseudorandom noise. Southall *et al.* 2011 found that blue whales had a different response to sonar exposure depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

With respect to distance influencing disturbance, DeRuiter *et al.* (2013) examined behavioral responses of Cuvier's beaked whales to MF sonar and found that whales responded strongly at low received levels (89–127 dB re 1 μ Pa) by ceasing normal fluking and echolocation, swimming rapidly away, and extending both dive duration and subsequent non-foraging intervals when the sound source was 3.4–9.5 km away. Importantly, this study also showed that whales exposed to a similar range of received levels (78–106 dB re 1 μ Pa) from distant sonar exercises (118 km away) did not elicit such responses, suggesting that context may moderate reactions. Thus, distance from the source is an important variable in influencing the type and degree of behavioral response and this variable is independent of the effect of received levels (*e.g.*, DeRuiter *et al.*, 2013; Dunlop *et al.*, 2017a; Dunlop *et al.*, 2017b; Falcone *et al.*, 2017; Dunlop *et al.*, 2018; Southall *et al.*, 2019).

Ellison *et al.* (2012) outlined an approach to assessing the effects of sound on marine mammals that incorporates contextual-based factors. The authors recommend considering not just the received level of sound but also the activity the animal is engaged in at the time the sound is received, the nature and novelty of the sound (*i.e.*, is

this a new sound from the animal's perspective), and the distance between the sound source and the animal. They submit that this "exposure context," as described, greatly influences the type of behavioral response exhibited by the animal. Forney *et al.* (2017) also point out that an apparent lack of response (*e.g.*, no displacement or avoidance of a sound source) may not necessarily mean there is no cost to the individual or population, as some resources or habitats may be of such high value that animals may choose to stay, even when experiencing stress or hearing loss. Forney *et al.* (2017) recommend considering both the costs of remaining in an area of noise exposure such as TTS, PTS, or masking, which could lead to an increased risk of predation or other threats or a decreased capability to forage, and the costs of displacement, including potential increased risk of vessel strike, increased risks of predation or competition for resources, or decreased habitat suitable for foraging, resting, or socializing. This sort of contextual information is challenging to predict with accuracy for ongoing activities that occur over large spatial and temporal expanses. However, distance is one contextual factor for which data exist to quantitatively inform a take estimate, and the method for predicting Level B harassment in this rule does consider distance to the source. Other factors are often considered qualitatively in the analysis of the likely consequences of sound exposure where supporting information is available.

Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. However, individuals may be able to compensate for some types and degrees of shifts in behavior, preserving their health and thus their vital rates and population dynamics. For example, New *et al.*, 2013 developed a model simulating the complex social, spatial, behavioral and motivational interactions of coastal bottlenose dolphins in the Moray Firth, Scotland, to assess the biological significance of increased rate of behavioral disruptions caused by vessel traffic. Despite a modeled scenario in which vessel traffic increased from 70 to 470 vessels a year (a sixfold increase in vessel traffic) in response to the construction of a proposed offshore renewables' facility, the dolphins' behavioral time budget, spatial distribution, motivations and social structure remained unchanged.

Similarly, two bottlenose dolphin populations in Australia were also modeled over 5 years against a number of disturbances, (Reed *et al.*, 2020) and results indicate that habitat/noise disturbance had little overall impact on population abundances in either location, even in the most extreme impact scenarios modeled.

Friedlaender *et al.* (2016) provided the first integration of direct measures of prey distribution and density variables incorporated into across-individual analyses of behavior responses of blue whales to sonar and demonstrated a fivefold increase in the ability to quantify variability in blue whale diving behavior. These results illustrate that responses evaluated without such measurements for foraging animals may be misleading, which again illustrates the context-dependent nature of the probability of response.

The following subsections provide examples of behavioral responses that give an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound, contextual factors, and the wide range of potential acoustic sources to which a marine mammal may be exposed. Behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists, along with contextual factors.

Avoidance and Displacement

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 or humpback whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from airgun surveys (Malme *et al.*, 1984; Dunlop *et al.*, 2018). Avoidance is qualitatively different from the flight response but also differs in the magnitude of the response (*i.e.*, directed movement, rate of travel, *etc.*). 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; Dähne *et al.*, 2013; Russel *et al.*, 2016; Malme *et al.*, 1984). 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; Forney *et al.*, 2017). Avoidance of marine mammals during the construction of offshore wind facilities (specifically, impact pile driving) has been documented in the literature with some significant variation in the temporal and spatial degree of avoidance and with most studies focused on harbor porpoises as one of the most common marine mammals in European waters (*e.g.*, Tougaard *et al.*, 2009; Dähne *et al.*, 2013; Thompson *et al.*, 2013; Russell *et al.*, 2016; Brandt *et al.*, 2018).

Available information on impacts to marine mammals from pile driving associated with offshore wind is limited to information on harbor porpoises and seals, as the vast majority of this research has occurred at European offshore wind projects where large whales and other odontocete species are uncommon. Harbor porpoises and harbor seals are considered to be behaviorally sensitive species (*e.g.*, Southall *et al.*, 2007) and the effects of wind farm construction in Europe on these species has been well documented. These species have received particular attention in European waters due to their abundance in the North Sea (Hammond *et al.*, 2002; Nachtsheim *et al.*, 2021). A summary of the literature on documented effects of wind farm construction on harbor porpoise and harbor seals is described below.

Brandt *et al.* (2016) summarized the effects of the construction of eight offshore wind projects within the German North Sea (*i.e.*, Alpha Ventus, BARD Offshore I, Borkum West II, DanTysk, Global Tech I, Meerwind Süd/Ost, Nordsee Ost, and Riffgat) between 2009 and 2013 on harbor porpoises, combining PAM data from 2010–2013 and aerial surveys from 2009–2013 with data on noise levels associated with pile driving. Results of the analysis revealed significant declines in porpoise detections during pile driving when compared to 25–48 hours before pile driving began, with the magnitude of decline during pile driving clearly decreasing with increasing distances to the construction site. During the majority of projects, significant declines in detections (by at least 20 percent) were found within at least 5–10 km of the pile driving site, with declines at up to 20–30 km of the pile driving site documented in some cases. Similar results demonstrating the long-distance displacement of harbor porpoises (18–25 km) and harbor seals (up to 40 km) during impact pile driving have also been observed during the construction

at multiple other European wind farms (Haleters *et al.*, 2015; Lucke *et al.*, 2012; Dähne *et al.*, 2013; Tougaard *et al.*, 2009; Bailey *et al.*, 2010.)

While harbor porpoises and seals tend to move several kilometers away from wind farm construction activities, the duration of displacement has been documented to be relatively temporary. In two studies at Horns Rev II using impact pile driving, harbor porpoise returned within 1–2 days following cessation of pile driving (Tougaard *et al.*, 2009, Brandt *et al.*, 2011). Similar recovery periods have been noted for harbor seals off England during the construction of four wind farms (Carroll *et al.*, 2010; Hamre *et al.*, 2011; Hastie *et al.*, 2015; Russell *et al.*, 2016; Brasseur *et al.*, 2010). In some cases, an increase in harbor porpoise activity has been documented inside wind farm areas following construction (*e.g.*, Lindeboom *et al.*, 2011). Other studies have noted longer term impacts after impact pile driving. Near Dogger Bank in Germany, harbor porpoises continued to avoid the area for over 2 years after construction began (Gilles *et al.* 2009). Approximately 10 years after construction of the Nysted wind farm, harbor porpoise abundance had not recovered to the original levels previously seen, although the echolocation activity was noted to have been increasing when compared to the previous monitoring period (Teilmann and Carstensen, 2012). However, overall, there are no indications for a population decline of harbor porpoises in European waters (*e.g.*, Brandt *et al.*, 2016). Notably, where significant differences in displacement and return rates have been identified for these species, the occurrence of secondary project-specific influences such as use of mitigation measures (*e.g.*, bubble curtains, acoustic deterrent devices (ADDs)) or the manner in which species use the habitat in the project area are likely the driving factors of this variation.

NMFS notes the aforementioned studies from Europe involve installing much smaller piles than Sunrise Wind proposes to install. Therefore, we anticipate noise levels from impact pile driving to be louder. For this reason, we anticipate that the greater distances of displacement observed in harbor porpoise and harbor seals documented in Europe are likely to occur off New York. However, we do not anticipate any greater severity of response due to harbor porpoise and harbor seal habitat use off New York or population level consequences similar to European findings. In many cases, harbor porpoises and harbor seals are resident

to the areas where European wind farms have been constructed. However, off New York, harbor porpoises are transient (with higher abundances in winter when impact pile driving would not occur) and a very small percentage of the large harbor seal population are only seasonally present with no rookeries established. In summary, we anticipate that harbor porpoise and harbor seals will likely respond to pile driving by moving several kilometers away from the source but return to typical habitat use patterns when pile driving ceases. As previously noted, the literature on marine mammal responses to offshore wind farms is limited to species which are known to be more behaviorally sensitive to auditory stimuli than the other species that occur in the project area. Therefore, the documented behavioral responses of harbor porpoises and harbor seals to pile driving in Europe should be considered as a worst-case scenario in terms of the potential responses among all marine mammals to offshore pile driving, and these responses cannot reliably predict the responses that will occur in other marine mammal species.

Some avoidance behavior of other marine mammal species has been documented to be dependent on distance from the source in response to playbacks. As described above, DeRuiter *et al.* (2013) noted that distance from a sound source may moderate marine mammal reactions in their study of Cuvier's beaked whales (an acoustically sensitive species), which showed the whales swimming rapidly and silently away when a sonar signal was 3.4–9.5 km away while showing no such reaction to the same signal when the signal was 118 km away even though the received levels were similar. Tyack *et al.* (1983) conducted playback studies of Surveillance Towed Array Sensor System (SURTASS) low frequency active (LFA) sonar in a gray whale migratory corridor off California. Similar to North Atlantic right whales, gray whales migrate close to shore (approximately +2 kms) and are low frequency hearing specialists. The LFA sonar source was placed within the gray whale migratory corridor (approximately 2 km offshore) and offshore of most, but not all, migrating whales (approximately 4 km offshore). These locations influenced received levels and distance to the source. For the inshore playbacks, not unexpectedly, the louder the source level of the playback (*i.e.*, the louder the received level), whale avoided the source at greater distances. Specifically, when the source level was 170 dB rms

and 178 dB rms, whales avoided the inshore source at ranges of several hundred meters, similar to avoidance responses reported by Malme *et al.* (1983, 1984). Whales exposed to source levels of 185 dB rms demonstrated avoidance levels at ranges of +1 km. Responses to the offshore source broadcasting at source levels of 185 and 200 dB, avoidance responses were greatly reduced. While there was observed deflection from course, in no case did a whale abandon its migratory behavior.

The signal context of the noise exposure has been shown to play an important role in avoidance responses. In the 2007–2008 Bahamas study, playback sounds of a potential predator—a killer whale—resulted in a similar but more pronounced reaction in beaked whales (an acoustically sensitive species), which included longer inter-dive intervals and a sustained straight-line departure of more than 20 km from the area (Boyd *et al.*, 2008; Southall *et al.*, 2009; Tyack *et al.*, 2011). Sunrise Wind does not anticipate, and NMFS is not proposing to authorize, take of beaked whales and, moreover, the sounds produced by Sunrise Wind do not have signal characteristics similar to predators. Therefore, we would not expect such extreme reactions to occur. Southall *et al.* 2011 found that blue whales had a different response to sonar exposure depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

One consequence of behavioral avoidance results in the altered energetic expenditure of marine mammals because energy is required to move and avoid surface vessels or the sound field associated with active sonar (Frid and Dill, 2002). Most animals can avoid that energetic cost by swimming away at slow speeds or speeds that minimize the cost of transport (Miksis-Olds, 2006), as has been demonstrated in Florida manatees (Miksis-Olds, 2006).

Those energetic costs increase, however, when animals shift from a resting state, which is designed to conserve an animal's energy, to an active state that consumes energy the animal would have conserved had it not been disturbed. Marine mammals that have been disturbed by anthropogenic noise and vessel approaches are commonly reported to shift from resting to active behavioral states, which would imply that they incur an energy cost.

Forney *et al.* (2017) detailed the potential effects of noise on marine mammal populations with high site fidelity, including displacement and auditory masking, noting that a lack of

observed response does not imply absence of fitness costs and that apparent tolerance of disturbance may have population-level impacts that are less obvious and difficult to document. Avoidance of overlap between disturbing noise and areas and/or times of particular importance for sensitive species may be critical to avoiding population-level impacts because (particularly for animals with high site fidelity) there may be a strong motivation to remain in the area despite negative impacts. Forney *et al.* (2017) stated that, for these animals, remaining in a disturbed area may reflect a lack of alternatives rather than a lack of effects.

Flight Response

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; Frid and Dill, 2002). 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, beaked whale strandings (Cox *et al.*, 2006; D'Amico *et al.*, 2009). 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. Flight responses of marine mammals have been documented in response to mobile high intensity active sonar (*e.g.*, Tyack *et al.*, 2011; DeRuiter *et al.*, 2013; Wensveen *et al.*, 2019), and more severe responses have been documented when sources are moving towards an animal or when they are surprised by unpredictable exposures (Watkins 1986; Falcone *et al.* 2017). Generally speaking, however, marine mammals would be expected to be less likely to respond with a flight response to either stationary pile driving (which they can sense is stationary and predictable) or significantly lower-level HRG surveys unless they are within the area ensonified above behavioral harassment thresholds at the moment the source is turned on (Watkins, 1986; Falcone *et al.*, 2017). A flight response may also be possible in response to UXO/MEC detonation; however, given a detonation is instantaneous, only one detonation would occur on a given day,

only 3 detonations may occur over 5 years, and the proposed mitigation and monitoring would result in any animals being far from the detonation (*i.e.*, the clearance zone extends 10 km from the UXO/MEC location), any flight response would be spatially and temporally limited.

Alteration of Diving and Foraging

Changes in dive behavior in response to noise exposure can vary widely. They 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, 2013b).

Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.*, foraging) or they may be of little biological significance.

Variations in dive behavior may also expose an animal to potentially harmful conditions (*e.g.*, increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving 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.

Nowacek *et al.* (2004) reported disruptions of dive behaviors in foraging North Atlantic right whales when exposed to an alerting stimulus, an action, they noted, that could lead to an increased likelihood of ship strike. The alerting stimulus was in the form of an 18 minute exposure that included three 2-minute signals played three times sequentially. This stimulus was designed with the purpose of providing signals distinct to background noise that serve as localization cues. However, the whales did not respond to playbacks of either North Atlantic right whale social sounds or vessel noise, highlighting the importance of the sound characteristics in producing a behavioral reaction. All signals were relatively brief in duration, similar to the proposed Sunrise construction and HRG activities.

Although source levels for the proposed pile driving activities may exceed the received level of the alerting stimulus described by Nowacek *et al.* (2004), proposed mitigation strategies (further described in the Proposed Mitigation section) will reduce the severity of any response to proposed pile driving activities. Indo-Pacific humpback dolphins have been observed to dive for longer periods of time in areas where vessels were present and/or approaching (Ng and Leung, 2003). In both of these studies, the influence of the sound exposure cannot be

decoupled from the physical presence of a surface vessel, thus complicating interpretations of the relative contribution of each stimulus to the response. Indeed, the presence of surface vessels, their approach, and speed of approach seemed to be significant factors in the response of the Indo-Pacific humpback dolphins (Ng and Leung, 2003). Low frequency signals of the Acoustic Thermometry of Ocean Climate (ATOC) sound source were not found to affect dive times of humpback whales in Hawaiian waters (Frankel and Clark, 2000) or to overtly affect elephant seal dives (Costa *et al.*, 2003). They did, however, produce subtle effects that varied in direction and degree among the individual seals, illustrating the equivocal nature of behavioral effects and consequent difficulty in defining and predicting them.

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.*, 2006a; Yazvenko *et al.*, 2007; Southall *et al.*, 2019b). An understanding 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 can facilitate the assessment of whether foraging disruptions are likely to incur fitness consequences (Goldbogen *et al.*, 2013; Farmer *et al.*, 2018; Pirota *et al.*, 2018; Southall *et al.*, 2019; Pirota *et al.*, 2021).

Impacts on marine mammal foraging rates from noise exposure have been documented, though there is little data regarding the impacts of offshore turbine construction specifically. Several broader examples follow, and it is reasonable to expect that exposure to noise produced during the 5-years the proposed rule would be effective could have similar impacts.

Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale behavior prior to, during, and following exposure to air gun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array

exposures at 1–13 km (Madsen *et al.*, 2006a; Miller *et al.*, 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the air guns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were six percent lower during exposure than control periods (Miller *et al.*, 2009). Miller *et al.* (2009) noted that more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior.

Balaenopterid whales exposed to moderate low-frequency signals similar to the ATOC sound source demonstrated no variation in foraging activity (Croll *et al.*, 2001) whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.*, 2004). Although the received SPLs were similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. The source levels of the proposed construction and HRG activities exceed the source levels of the signals described by Nowacek *et al.* (2004) and Croll *et al.* (2001), yet noise generated by Sunrise Wind's activities would overlap in frequency with the described signals. Blue whales exposed to mid-frequency sonar in the Southern California Bight were less likely to produce low frequency calls usually associated with feeding behavior (Melcón *et al.*, 2012). However, Melcón *et al.* (2012) were unable to determine if suppression of low frequency calls reflected a change in their feeding performance or abandonment of foraging behavior and indicated that implications of the documented responses are unknown. Further, it is not known whether the lower rates of calling actually indicated a reduction in feeding behavior or social contact since the study used data from remotely deployed, passive acoustic monitoring buoys. Results from the 2010–2011 field season of a behavioral response study in Southern California waters indicated that, in some cases and at low received

levels, tagged blue whales responded to mid-frequency sonar but that those responses were mild and there was a quick return to their baseline activity (Southall *et al.*, 2011; Southall *et al.*, 2012b, Southall *et al.*, 2019b).

Information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal will help better inform a determination of whether foraging disruptions incur fitness consequences. Foraging strategies may impact foraging efficiency, such as by reducing foraging effort and increasing success in prey detection and capture, in turn promoting fitness and allowing individuals to better compensate for foraging disruptions. Surface feeding blue whales did not show a change in behavior in response to mid-frequency simulated and real sonar sources with received levels between 90 and 179 dB *re* 1 μ Pa, but deep feeding and non-feeding whales showed temporary reactions including cessation of feeding, reduced initiation of deep foraging dives, generalized avoidance responses, and changes to dive behavior (DeRuiter *et al.*, 2017; Goldbogen *et al.* (2013b); Sivle *et al.*, 2015). Goldbogen *et al.* (2013b) indicate that disruption of feeding and displacement could impact individual fitness and health. However, for this to be true, we would have to assume that an individual whale could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication this is the case, particularly since unconsumed prey would likely still be available in the environment in most cases following the cessation of acoustic exposure.

Similarly, while the rates of foraging lunges decrease in humpback whales due to sonar exposure, there was variability in the response across individuals with one animal ceasing to forage completely and another animal starting to forage during the exposure (Sivle *et al.*, 2016). In addition, almost half of the animals that demonstrated avoidance were foraging before the exposure but the others were not; the animals that avoided while not feeding responded at a slightly lower received level and greater distance than those that were feeding (Wensveen *et al.*, 2017). These findings indicate the behavioral state of the animal and foraging strategies play a role in the type and severity of a behavioral response. For example, when the prey field was mapped and used as a covariate in

examining how behavioral state of blue whales is influenced by mid-frequency sound, the response in blue whale deep-feeding behavior was even more apparent, reinforcing the need for contextual variables to be included when assessing behavioral responses (Friedlaender *et al.*, 2016).

Breathing

Respiration naturally varies with different behaviors and variations in respiration 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. Mean exhalation rates of gray whales at rest and while diving were found to be unaffected by seismic surveys conducted adjacent to the whale feeding grounds (Gailey *et al.*, 2007). Studies with captive harbor porpoises show increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.*, 2001; Kastelein *et al.*, 2006a) and emissions for underwater data transmission (Kastelein *et al.*, 2005). However, exposure of the same acoustic alarm to a striped dolphin under the same conditions did not elicit a response (Kastelein *et al.*, 2006a), 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.

Vocalizations (Also see the Auditory Masking Section)

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, production of echolocation clicks, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result directly from increased vigilance (also see the *Potential Effects of Behavioral Disturbance on Marine Mammal Fitness* section) or a startle response, or from a need to compete with an increase in background noise (see Erbe *et al.*, 2016 review on communication masking), the latter of which is described more in the Auditory Masking section below.

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; Frstrup *et al.*, 2003; Foote *et al.*, 2004) and blue whales increased song production (Di Iorio and Clark, 2009) while North Atlantic right whales 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 or reduce sound production during production of aversive signals (Bowles *et al.*, 1994; Thode *et al.*, 2020; Cerchio *et al.* (2014); McDonald *et al.* (1995)). Blackwell *et al.* (2015) showed that whales increased calling rates as soon as air gun signals were detectable before ultimately decreasing calling rates at higher received levels.

Orientation

A shift in an animal's resting state or an attentional change via an orienting response represent behaviors that would be considered mild disruptions if occurring alone. As previously mentioned, the responses may co-occur with other behaviors; for instance, an animal may initially orient toward a sound source and then move away from it. Thus, any orienting response should be considered in context of other reactions that may occur.

Habituation and Sensitization

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 having a neutral or positive outcome (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. Both habituation and sensitization require an ongoing learning process. As noted, 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; NRC, 2003; Wartzok *et al.*, 2003; Southall *et al.*, 2019b). Controlled experiments with captive marine mammals have shown pronounced behavioral reactions, including avoidance of loud sound sources (*e.g.*, Ridgway *et al.*, 1997; Finneran *et al.*, 2003; Houser *et al.* (2013a, b); Kastelein *et al.* (2018). Observed responses of wild marine mammals to loud impulsive sound

sources (typically 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; Tougaard *et al.*, 2009; Brandt *et al.*, 2011, Brandt *et al.*, 2012, Dähne *et al.*, 2013; Brandt *et al.*, 2014; Russell *et al.*, 2016; Brandt *et al.*, 2018). However, many delphinids approach low-frequency airgun source vessels with no apparent discomfort or obvious behavioral change (*e.g.*, Barkaszi *et al.*, 2012), indicating the importance of frequency output in relation to the species' hearing sensitivity.

Stress Response

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.*, Lusseau and Bejder, 2007; Romano *et al.*, 2002a; Rolland *et al.*, 2012). 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. Lusseau and Bejder (2007) present data from three long-term studies illustrating the connections between disturbance from whale-watching boats and population-level effects in cetaceans. In Shark Bay, Australia, the abundance of bottlenose dolphins was compared within adjacent control and tourism sites over three consecutive 4.5-year periods of increasing tourism levels. Between the second and third time periods, in which tourism doubled, dolphin abundance decreased by 15 percent in the tourism area and did not change significantly in the control area. In Fiordland, New Zealand, two populations (Milford and Doubtful Sounds) of bottlenose dolphins with tourism levels that differed by a factor of seven were observed and significant increases in traveling time and decreases in resting time were documented for both. Consistent short-term avoidance strategies were observed in response to tour boats until a threshold of disturbance was reached (average 68 minutes between interactions), after which the response switched to a longer-term habitat displacement strategy. For one population, tourism only occurred in a part of the home range. However, tourism occurred throughout the home range of the Doubtful Sound population and once boat traffic increased beyond the 68-minute threshold (resulting in abandonment of their home range/preferred habitat), reproductive success drastically decreased (increased stillbirths) and abundance decreased significantly (from 67 to 56 individuals in a short period).

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, 2017).

Auditory Masking

Sound can disrupt behavior through masking or interfering with an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.*, those used for intraspecific communication and social interactions, prey detection, predator avoidance, or navigation) (Richardson *et al.*, 1995; Erbe and Farmer, 2000; Tyack, 2000; Erbe *et al.*, 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity and may occur whether the sound is natural (*e.g.*, snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.*, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.*, signal-to-noise ratio, temporal variability, direction) in relation to each other, an animal's hearing abilities (*e.g.*, sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age, or TTS hearing loss), and existing ambient noise and propagation conditions. Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations. Masking can lead to behavioral changes, including vocal changes (*e.g.*, Lombard effect, increasing amplitude, or changing frequency), cessation of foraging or lost foraging opportunities, and leaving an area, to both signalers and receivers in an attempt to compensate for noise levels (Erbe *et al.*, 2016) or because sounds that would typically have triggered a behavior were not detected. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, though, the detection of frequencies above those of the masking stimulus decreases also. This principle is expected to apply to marine mammals as well because of common biomechanical cochlear properties across taxa.

Therefore, when the coincident (masking) sound is man-made, it may be considered Level B harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and

PTS, which persist after the sound exposure, from masking, which only occurs during the sound exposure. Because masking (without resulting in threshold shift) 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; Matthews *et al.*, 2016) 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; Cholewiak *et al.*, 2018).

High-frequency sounds may mask the echolocation calls of toothed whales. Human data indicate low-frequency sound can mask high-frequency sounds (*i.e.*, upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, 1993) indicate that some species may use various processes to reduce masking effects (e.g., adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high-frequencies these cetaceans use to echolocate but not at the low-to-moderate frequencies they use to communicate (Zaitseva *et al.*, 1980). A study by Nachtigall and Supin (2008) showed that false killer whales adjust their hearing to compensate for ambient sounds and the intensity of returning echolocation signals.

Impacts on signal detection, measured by masked detection thresholds, are not the only important factors to address when considering the potential effects of masking. As marine mammals use sound to recognize conspecifics, prey, predators, or other biologically significant sources (Branstetter *et al.*, 2016), it is also important to understand the impacts of masked recognition thresholds (often called “informational masking”). Branstetter *et al.* (2016) measured masked recognition thresholds for whistle-like sounds of bottlenose dolphins and observed that they are approximately 4 dB above detection thresholds (energetic masking) for the same signals. Reduced ability to recognize a conspecific call or the acoustic signature of a predator could have severe negative impacts. Branstetter *et al.* (2016) observed that if “quality communication” is set at 90 percent recognition the output of communication space models (which are based on 50 percent detection) would likely result in a significant decrease in communication range.

As marine mammals use sound to recognize predators (Allen *et al.*, 2014; Cummings and Thompson, 1971; Curé *et al.*, 2015; Fish and Vania, 1971), the presence of masking noise may also prevent marine mammals from responding to acoustic cues produced by their predators, particularly if it occurs in the same frequency band. For example, harbor seals that reside in the coastal waters off British Columbia are frequently targeted by mammal-eating killer whales. The seals acoustically discriminate between the calls of mammal-eating and fish-eating killer whales (Deecke *et al.*, 2002), a capability that should increase survivorship while reducing the energy required to attend to all killer whale calls. Similarly, sperm whales (Curé *et al.*, 2016; Isojunno *et al.*, 2016), long-finned pilot whales (Visser *et al.*, 2016), and humpback whales (Curé *et al.*, 2015) changed their behavior in response to killer whale vocalization playbacks; these findings indicate that some recognition of predator cues could be missed if the killer whale vocalizations were masked. The potential effects of masked predator acoustic cues depends on the duration of the masking noise and the likelihood of a marine mammal encountering a predator during the time that detection and recognition of predator cues are impeded.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine

mammals present the test signal and the masking noise from the same direction. The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these sounds by improving the effective signal-to-noise ratio.

Masking affects both senders and receivers of acoustic signals and, at higher levels and longer duration, can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world’s ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009; Cholewiak *et al.*, 2018). All anthropogenic sound sources, but especially chronic and lower-frequency signals (e.g., from commercial vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

In addition to making it more difficult for animals to perceive and recognize acoustic cues in their environment, anthropogenic sound presents separate challenges for animals that are vocalizing. When they vocalize, animals are aware of environmental conditions that affect the “active space” (or communication space) of their vocalizations, which is the maximum area within which their vocalizations can be detected before it drops to the level of ambient noise (Brenowitz, 2004; Brumm *et al.*, 2004; Lohr *et al.*, 2003). Animals are also aware of environmental conditions that affect whether listeners can discriminate and recognize their vocalizations from other sounds, which is more important than simply detecting that a vocalization is occurring (Brenowitz, 1982; Brumm *et al.*, 2004; Dooling, 2004; Marten and Marler, 1977; Patricelli *et al.*, 2006). Most species that vocalize have evolved with an ability to make adjustments to their vocalizations to increase the signal-to-noise ratio, active space, and recognizability/distinguishability of their vocalizations in the face of temporary changes in background noise (Brumm *et al.*, 2004; Patricelli *et al.*, 2006). Vocalizing animals can make adjustments to vocalization characteristics such as the frequency structure, amplitude, temporal structure, and temporal delivery (repetition rate), or ceasing to vocalize.

Many animals will combine several of these strategies to compensate for high levels of background noise.

Anthropogenic sounds that reduce the signal-to-noise ratio of animal vocalizations, increase the masked auditory thresholds of animals' listening for such vocalizations, or reduce the active space of an animal's vocalizations impair communication between animals. Most animals that vocalize have evolved strategies to compensate for the effects of short-term or temporary increases in background or ambient noise on their songs or calls. Although the fitness consequences of these vocal adjustments are not directly known in all instances, like most other trade-offs animals must make, some of these strategies probably come at a cost (Patricelli *et al.*, 2006; Noren *et al.*, 2017; Noren *et al.*, 2020). Shifting songs and calls to higher frequencies may also impose energetic costs (Lambrechts, 1996).

Marine mammals are also known to make vocal changes in response to anthropogenic noise. In cetaceans, vocalization changes have been reported from exposure to anthropogenic noise sources such as sonar, vessel noise, and seismic surveying (see the following for examples: Gordon *et al.*, 2003; Di Iorio and Clark, 2009; Hatch *et al.*, 2012; Holt *et al.*, 2009; Holt *et al.*, 2011; Lesage *et al.*, 1999; McDonald *et al.*, 2009; Parks *et al.*, 2007, Risch *et al.*, 2012, Rolland *et al.*, 2012), as well as changes in the natural acoustic environment (Dunlop *et al.*, 2014). Vocal changes can be temporary or can be persistent. For example, model simulation suggests that the increase in starting frequency for the North Atlantic right whale upcall over the last 50 years resulted in increased detection ranges between North Atlantic right whales. The frequency shift, coupled with an increase in call intensity by 20 dB, led to a call detectability range of less than 3 km to over 9 km (Tennessen and Parks, 2016). Holt *et al.* (2009) measured killer whale call source levels and background noise levels in the one to 40 kHz band and reported that the whales increased their call source levels by one dB SPL for every one dB SPL increase in background noise level. Similarly, another study on St. Lawrence River belugas reported a similar rate of increase in vocalization activity in response to passing vessels (Scheifele *et al.*, 2005). Di Iorio and Clark (2009) showed that blue whale calling rates vary in association with seismic sparker survey activity with whales calling more on days with surveys than on days without surveys. They suggested that the whales called more during seismic survey periods as a way to compensate for the elevated noise conditions.

In some cases, these vocal changes may have fitness consequences, such as an increase in metabolic rates and oxygen consumption, as observed in bottlenose dolphins when increasing their call amplitude (Holt *et al.*, 2015). A switch from vocal communication to physical, surface-generated sounds, such as pectoral fin slapping or breaching, was observed for humpback whales in the presence of increasing natural background noise levels indicating that adaptations to masking may also move beyond vocal modifications (Dunlop *et al.*, 2010).

While these changes all represent possible tactics by the sound-producing animal to reduce the impact of masking, the receiving animal can also reduce masking by using active listening strategies such as orienting to the sound source, moving to a quieter location, or reducing self-noise from hydrodynamic flow by remaining still. The temporal structure of noise (*e.g.*, amplitude modulation) may also provide a considerable release from masking through comodulation masking release (a reduction of masking that occurs when broadband noise, with a frequency spectrum wider than an animal's auditory filter bandwidth at the frequency of interest, is amplitude modulated) (Branstetter and Finneran, 2008; Branstetter *et al.*, 2013). Signal type (*e.g.*, whistles, burst-pulse, sonar clicks) and spectral characteristics (*e.g.*, frequency modulated with harmonics) may further influence masked detection thresholds (Branstetter *et al.*, 2016; Cunningham *et al.*, 2014).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources such as vessels. Several studies have shown decreases in marine mammal communication space and changes in behavior as a result of the presence of vessel noise. For example, North Atlantic right whales were 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) as well as increasing the amplitude (intensity) of their calls (Parks, 2009; Parks *et al.*, 2011). Clark *et al.* (2009) observed that North Atlantic right whales' communication space decreased by up to 84 percent in the presence of vessels. Cholewiak *et al.* (2018) also observed loss in communication space in Stellwagen National Marine Sanctuary for North Atlantic right whales, fin whales, and humpback whales with increased ambient noise and shipping noise. Although humpback whales off Australia did not change the frequency or duration of

their vocalizations in the presence of ship noise, their source levels were lower than expected based on source level changes to wind noise, potentially indicating some signal masking (Dunlop, 2016). Multiple delphinid species have also been shown to increase the minimum or maximum frequencies of their whistles in the presence of anthropogenic noise and reduced communication space (for examples see: Holt *et al.*, 2009; Holt *et al.*, 2011; Gervaise *et al.*, 2012; Williams *et al.*, 2013; Hermannsen *et al.*, 2014; Papale *et al.*, 2015; Liu *et al.*, 2017). While masking impacts are not a concern from lower intensity, higher frequency HRG surveys, some degree of masking would be expected in the vicinity of turbine pile driving and concentrated support vessel operation. However, pile driving is an intermittent sound and would not be continuous throughout a day.

Potential Effects of Behavioral Disturbance on Marine Mammal Fitness

The different ways that marine mammals respond to sound are sometimes indicators of the ultimate effect that exposure to a given stimulus will have on the well-being (survival, reproduction, *etc.*) of an animal. There is little quantitative marine mammal data relating the exposure of marine mammals from sound to effects on reproduction or survival, though data exists for terrestrial species to which we can draw comparisons for marine mammals. Several authors have reported that disturbance stimuli may cause animals to abandon nesting and foraging sites (Sutherland and Crockford, 1993); may cause animals to increase their activity levels and suffer premature deaths or reduced reproductive success when their energy expenditures exceed their energy budgets (Daan *et al.*, 1996; Feare, 1976; Mullner *et al.*, 2004); or may cause animals to experience higher predation rates when they adopt risk-prone foraging or migratory strategies (Frid and Dill, 2002). Each of these studies addressed the consequences of animals shifting from one behavioral state (*e.g.*, resting or foraging) to another behavioral state (*e.g.*, avoidance or escape behavior) because of human disturbance or disturbance stimuli.

Attention is the cognitive process of selectively concentrating on one aspect of an animal's environment while ignoring other things (Posner, 1994). Because animals (including humans) have limited cognitive resources, there is a limit to how much sensory information they can process at any time. The phenomenon called

“attentional capture” occurs when a stimulus (usually a stimulus that an animal is not concentrating on or attending to) “captures” an animal’s attention. This shift in attention can occur consciously or subconsciously (for example, when an animal hears sounds that it associates with the approach of a predator) and the shift in attention can be sudden (Dukas, 2002; van Rij, 2007). Once a stimulus has captured an animal’s attention, the animal can respond by ignoring the stimulus, assuming a “watch and wait” posture, or treat the stimulus as a disturbance and respond accordingly, which includes scanning for the source of the stimulus or “vigilance” (Cowlshaw *et al.*, 2004).

Vigilance is an adaptive behavior that helps animals determine the presence or absence of predators, assess their distance from conspecifics, or to attend cues from prey (Bednekoff and Lima, 1998; Treves, 2000). Despite those benefits, however, vigilance has a cost of time; when animals focus their attention on specific environmental cues, they are not attending to other activities 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 (Saino, 1994; Beauchamp and Livoreil, 1997; Fritz *et al.*, 2002; Purser and Radford, 2011). Animals will spend more time being vigilant, which may translate to less time foraging or resting, when disturbance stimuli approach them more directly, remain at closer distances, have a greater group size (*e.g.*, multiple surface vessels), or when they co-occur with times that an animal perceives increased risk (*e.g.*, when they are giving birth or accompanied by a calf).

The primary mechanism by which increased vigilance and disturbance appear to affect the fitness of individual animals is by disrupting an animal’s time budget and, as a result, reducing the time they might spend foraging and resting (which increases an animal’s activity rate and energy demand while decreasing their caloric intake/energy). In a study of northern resident killer whales off Vancouver Island, exposure to boat traffic was shown to reduce foraging opportunities and increase traveling time (Holt *et al.*, 2021). A simple bioenergetics model was applied to show that the reduced foraging opportunities equated to a decreased energy intake of 18 percent while the increased traveling incurred an increased energy output of 3–4 percent, which suggests that a management

action based on avoiding interference with foraging might be particularly effective.

On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant for fitness if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than 1 day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). It is important to note the difference between behavioral reactions lasting or recurring over multiple days and anthropogenic activities lasting or recurring over multiple days. For example, just because certain activities last for multiple days does not necessarily mean that individual animals will be either exposed to those activity-related stressors (*i.e.*, sonar) for multiple days or further exposed in a manner that would result in sustained multi-day substantive behavioral responses. However, special attention is warranted where longer-duration activities overlay areas in which animals are known to congregate for longer durations for biologically important behaviors.

Stone (2015a) reported data from at-sea observations during 1,196 airgun surveys from 1994 to 2010. When large arrays of airguns (considered to be 500 in 3 or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral responses observed included changes in swimming or surfacing behavior with indications that cetaceans remained near the water surface at these times. Cetaceans were recorded as feeding less often when large arrays were active. Behavioral observations of gray whales during an air gun survey monitored whale movements and respirations pre-, during-, and post-seismic survey (Gailey *et al.*, 2016). Behavioral state and water depth were the best ‘natural’ predictors of whale movements and respiration and after considering natural variation, none of the response variables were significantly associated with survey or vessel sounds.

In order to understand how the effects of activities may or may not impact species and stocks of marine mammals,

it is necessary to understand not only what the likely disturbances are going to be but how those disturbances may affect the reproductive success and survivorship of individuals and then how those impacts to individuals translate to population-level effects. Following on the earlier work of a committee of the U.S. National Research Council (NRC, 2005), New *et al.* (2014), in an effort termed the Potential Consequences of Disturbance (PCoD), outline an updated conceptual model of the relationships linking disturbance to changes in behavior and physiology, health, vital rates, and population dynamics. This framework is a four-step process progressing from changes in individual behavior and/or physiology, to changes in individual health, then vital rates, and finally to population-level effects. In this framework, behavioral and physiological changes can have direct (acute) effects on vital rates, such as when changes in habitat use or increased stress levels raise the probability of mother-calf separation or predation; indirect and long-term (chronic) effects on vital rates, such as when changes in time/energy budgets or increased disease susceptibility affect health, which then affects vital rates; or no effect to vital rates (New *et al.*, 2014). In addition to outlining this general framework and compiling the relevant literature that supports it, the authors chose four example species for which extensive long-term monitoring data exist (southern elephant seals, North Atlantic right whales, Ziphiidae beaked whales, and bottlenose dolphins) and developed state-space energetic models that can be used to effectively forecast longer-term, population-level impacts from behavioral changes. While these are very specific models with very specific data requirements that cannot yet be applied broadly to project-specific risk assessments for the majority of species, they are a critical first step towards being able to quantify the likelihood of a population level effect. Since New *et al.* (2014), several publications have described models developed to examine the long-term effects of environmental or anthropogenic disturbance of foraging on various life stages of selected species (*e.g.*, sperm whale, Farmer *et al.* (2018); California sea lion, McHuron *et al.* (2018); blue whale, Pirota *et al.* (2018a); humpback whale, Dunlop *et al.* (2021)). These models continue to add to refinement of the approaches to the PCoD framework. Such models also help identify what data inputs require further investigation. Pirota *et al.* (2018b) provides a review of the PCoD

framework with details on each step of the process and approaches to applying real data or simulations to achieve each step.

Despite its simplicity, there are few complete PCoD models available for any marine mammal species due to a lack of data available to parameterize many of the steps. To date, no PCoD model has been fully parameterized with empirical data (Pirota *et al.*, 2018a) due to the fact they are data intensive and logistically challenging to complete. Therefore, most complete PCoD models include simulations, theoretical modeling, and expert opinion to move through the steps. For example, PCoD models have been developed to evaluate the effect of wind farm construction on the North Sea harbor porpoise populations (*e.g.*, King *et al.*, 2015; Nabe-Nielsen *et al.*, 2018). These models include a mix of empirical data, expert elicitation (King *et al.*, 2015) and simulations of animals' movements, energetics, and/or survival (New *et al.*, 2014; Nabe-Nielsen *et al.*, 2018). In another example, by integrating different sources of data (*e.g.*, controlled exposure data, activity monitoring, telemetry tracking, and prey sampling) into a theoretical model to predict effects from sonar on a blue whale's daily energy intake, Pirota *et al.* (2021) found that tagged blue whales' activity budgets, lunging rates, and ranging patterns caused variability in their predicted cost of disturbance.

PCoD models may also be approached in different manners. Dunlop *et al.* (2021) modeled migrating humpback whale mother-calf pairs in response to seismic surveys using both a forwards and backwards approach. While a typical forwards approach can determine if a stressor would have population-level consequences, Dunlop *et al.* demonstrated that working backwards through a PCoD model can be used to assess the "worst case" scenario for an interaction of a target species and stressor. This method may be useful for future management goals when appropriate data becomes available to fully support the model. In another example, harbor porpoise PCoD model investigating the impact of seismic surveys on harbor porpoise included an investigation on underlying drivers of vulnerability. Harbor porpoise movement and foraging were modeled for baseline periods and then for periods with seismic surveys as well; the models demonstrated that temporal (*i.e.*, seasonal) variation in individual energetics and their link to costs associated with disturbances was key in predicting population impacts (Gallagher *et al.*, 2021).

Nearly all PCoD studies and experts agree that infrequent exposures of a single day or less are unlikely to impact individual fitness, let alone lead to population level effects (Booth *et al.*, 2016; Booth *et al.*, 2017; Christiansen and Lusseau 2015; Farmer *et al.*, 2018; Wilson *et al.*, 2020; Harwood and Booth 2016; King *et al.*, 2015; McHuron *et al.*, 2018; NAS 2017; New *et al.*, 2014; Pirota *et al.*, 2018; Southall *et al.*, 2007; Villegas-Amtmann *et al.*, 2015). As described through this proposed rule, NMFS expects that any behavioral disturbance that would occur due to animals being exposed to construction activity would be of a relatively short duration, with behavior returning to a baseline state shortly after the acoustic stimuli ceases or the animal moves far enough away from the source. Given this, and NMFS' evaluation of the available PCoD studies, and the required mitigation discussed later, any such behavioral disturbance resulting from Sunrise's activities is not expected to impact individual animals' health or have effects on individual animals' survival or reproduction, thus no detrimental impacts at the population level are anticipated. Marine mammals may temporarily avoid the immediate area but are not expected to permanently abandon the area or their migratory or foraging behavior. Impacts to breeding, feeding, sheltering, resting, or migration are not expected nor are shifts in habitat use, distribution, or foraging success.

Potential Effects From Explosive Sources

With respect to the noise from underwater explosives, the same acoustic-related impacts described above apply and are not repeated here. Noise from explosives can cause hearing impairment if an animal is close enough to the sources; however, because noise from an explosion is discrete, lasting less than approximately 1 second, no behavioral impacts below the TTS threshold are anticipated considering that Sunrise Wind would not detonate more than one UXO/MEC per day and only three during the life of the proposed rule. This section focuses on the pressure-related impacts of underwater explosives, including physiological injury and mortality.

Underwater explosive detonations send a shock wave and sound energy through the water and can release gaseous by-products, create an oscillating bubble, or cause a plume of water to shoot up from the water surface. The shock wave and accompanying noise are of most concern to marine animals. Depending on the

intensity of the shock wave and size, location, and depth of the animal, an animal can be injured, killed, suffer non-lethal physical effects, experience hearing related effects with or without behavioral responses, or exhibit temporary behavioral responses or tolerance from hearing the blast sound. Generally, exposures to higher levels of impulse and pressure levels would result in greater impacts to an individual animal.

Injuries resulting from a shock wave take place at boundaries between tissues of different densities. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill, 1978; Yelverton *et al.*, 1973). Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.*, 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten, 2000). Sound-related damage associated with sound energy from detonations can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If a noise is audible to an animal, it has the potential to damage the animal's hearing by causing decreased sensitivity (Ketten, 1995). Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten, 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, and damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, its sensitivity to the residual noise (Ketten, 1995).

Given the mitigation measures proposed, it is unlikely that any of the

more serious injuries or mortality discussed above are likely to result from any UXO/MEC detonation that Sunrise Wind might need to undertake. PTS, TTS, and brief startle reactions are the most likely impacts to result from this activity, if it occurs (noting detonation is the last method to be chosen for removal).

Potential Effects of Vessel Strike

Vessel collisions with marine mammals, also referred to as vessel strikes or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus, 2001). An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. Lethal interactions are typically associated with large whales, which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.*, 2001; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). Impact forces increase with speed as does the probability of a strike at a given distance (Silber *et al.*, 2010; Gende *et al.*, 2011).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.*, the sperm whale). In addition, some baleen whales seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.*, 2004). These species are primarily large, slow moving whales. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike occurs and, if so, whether it results in injury, serious injury, or mortality (Knowlton and Kraus, 2001; Laist *et al.*, 2001; Jensen and Silber, 2003; Pace and Silber, 2005; Vanderlaan and Taggart, 2007; Conn and Silber 2013). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel

involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 knots.

Jensen and Silber (2003) detailed 292 records of known or probable ship strikes of all large whale species from 1975 to 2002. Of these, vessel speed at the time of collision was reported for 58 cases. Of these 58 cases, 39 (or 67 percent) resulted in serious injury or death (19 of those resulted in serious injury as determined by blood in the water, propeller gashes or severed tailstock, and fractured skull, jaw, vertebrae, hemorrhaging, massive bruising or other injuries noted during necropsy and 20 resulted in death). Operating speeds of vessels that struck various species of large whales ranged from 2 to 51 kn. The majority (79 percent) of these strikes occurred at speeds of 13 kn or greater. The average speed that resulted in serious injury or death was 18.6 kn. Pace and Silber (2005) found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 kn, and exceeded 90 percent at 17 kn. Higher speeds during collisions result in greater force of impact and also appear to increase the chance of severe injuries or death. While modeling studies have suggested that hydrodynamic forces pulling whales toward the vessel hull increase with increasing speed (Clyne, 1999; Knowlton *et al.*, 1995), this is inconsistent with Silber *et al.* (2010), which demonstrated that there is no such relationship (*i.e.*, hydrodynamic forces are independent of speed).

In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 kn. The chances of a lethal injury decline from approximately 80 percent at 15 kn to approximately 20 percent at 8.6 kn. At speeds below 11.8 kn, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward 100 percent above 15 kn.

The Jensen and Silber (2003) report notes that the Large Whale Ship Strike Database represents a minimum number of collisions because the vast majority probably goes undetected or unreported. In contrast, Sunrise Wind's personnel are likely to detect any strike that does occur because of the required personnel training and lookouts, along with the

inclusion of Protected Species Observers (as described in the Proposed Mitigation section), and they are required to report all ship strikes involving marine mammals.

In the Sunrise Wind project area, NMFS has no documented vessel strikes of marine mammals by Sunrise Wind or Orsted during previous site characterization surveys. Given the comprehensive mitigation and monitoring measures (see the Proposed Mitigation and Proposed Monitoring and Reporting section) that would be required of Sunrise Wind, NMFS believes that vessel strike is not likely to occur.

Potential Effects to Marine Mammal Habitat

Sunrise Wind's proposed construction activities could potentially affect marine mammal habitat through the introduction of impacts to the prey species of marine mammals, acoustic habitat (sound in the water column), water quality, and important habitat for marine mammals.

The presence of structures, such as wind turbines, are likely to result in both local and broader oceanographic effects. However, the scale of impacts is difficult to predict and may vary from hundreds of meters for local individual turbine impacts (Schultze *et al.*, 2020) to large-scale dipoles of surface elevation changes stretching hundreds of kilometers (Christiansen *et al.*, 2022).

Effects on Prey

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.*, crustaceans, cephalopods, fish, and zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.*, Zelick *et al.*, 1999; Fay, 2009). The most likely effects on fishes exposed to loud, intermittent, low-frequency sounds are behavioral responses (*i.e.*, flight or avoidance). Short duration, sharp sounds (such as pile driving or air guns) can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to acoustic sources depends on the physiological state of the fish, past exposures, motivation (*e.g.*, feeding, spawning, migration), and other environmental factors. Key impacts to fishes may include

behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality. While it is clear that the behavioral responses of individual prey, such as displacement or other changes in distribution, can have direct impacts on the foraging success of marine mammals, the effects on marine mammals of individual prey that experience hearing damage, barotrauma, or mortality is less clear, though obviously population scale impacts that meaningfully reduce the amount of prey available could have more serious impacts.

Fishes, like other vertebrates, have a variety of different sensory systems to glean information from ocean around them (Astrup and Mohl, 1993; Astrup, 1999; Braun and Grande, 2008; Carroll *et al.*, 2017; Hawkins and Johnstone, 1978; Ladich and Popper, 2004; Ladich and Schulz-Mirbach, 2016; Mann, 2016; Nedwell *et al.*, 2004; Popper *et al.*, 2003; Popper *et al.*, 2005). 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) (terrestrial vertebrates generally only detect pressure). Most marine fishes primarily detect particle motion using the inner ear and lateral line system while some fishes possess additional morphological adaptations or specializations that can enhance their sensitivity to sound pressure, such as a gas-filled swim bladder (Braun and Grande, 2008; Popper and Fay, 2011).

Hearing capabilities vary considerably between different fish species with data only available for just over 100 species out of the 34,000 marine and freshwater fish species (Eschmeyer and Fong, 2016). In order to better understand acoustic impacts on fishes, fish hearing groups are defined by species that possess a similar continuum of anatomical features, which result in varying degrees of hearing sensitivity (Popper and Hastings, 2009a). There are four hearing groups defined for all fish species (modified from Popper *et al.*, 2014) within this analysis, and they include: fishes without a swim bladder (*e.g.*, flatfish, sharks, rays, *etc.*); fishes with a swim bladder not involved in hearing (*e.g.*, salmon, cod, pollock, *etc.*); fishes with a swim bladder involved in hearing (*e.g.*, sardines, anchovy, herring, *etc.*); and fishes with a swim bladder involved in hearing and high-frequency hearing (*e.g.*, shad and menhaden). Most marine mammal fish prey species would not be likely to perceive or hear mid- or high-frequency sonars. While hearing studies have not been done on sardines

and northern anchovies, it would not be unexpected for them to have hearing similarities to Pacific herring (up to 2–5 kHz) (Mann *et al.*, 2005). Currently, less data are available to estimate the range of best sensitivity for fishes without a swim bladder.

In terms of physiology, multiple scientific studies have documented a lack of mortality or physiological effects to fish from exposure to low- and mid-frequency sonar and other sounds (Halvorsen *et al.*, 2012; Jørgensen *et al.*, 2005; Juanes *et al.*, 2017; Kane *et al.*, 2010; Kvadsheim and Sevaldsen, 2005; Popper *et al.*, 2007; Popper *et al.*, 2016; Watwood *et al.*, 2016). Techer *et al.* (2017) exposed carp in floating cages for up to 30 days to low-power 23 and 46 kHz source without any significant physiological response. Other studies have documented either a lack of TTS in species whose hearing range cannot perceive sonar (such as Navy sonar), or for those species that could perceive sonar-like signals, any TTS experienced would be recoverable (Halvorsen *et al.*, 2012; Ladich and Fay, 2013; Popper and Hastings, 2009a, 2009b; Popper *et al.*, 2014; Smith, 2016). Only fishes that have specializations that enable them to hear sounds above about 2,500 Hz (2.5 kHz) such as herring (Halvorsen *et al.*, 2012; Mann *et al.*, 2005; Mann, 2016; Popper *et al.*, 2014) would have the potential to receive TTS or exhibit behavioral responses from exposure to mid-frequency sonar. In addition, any sonar induced TTS to fish whose hearing range could perceive sonar would only occur in the narrow spectrum of the source (*e.g.*, 3.5 kHz) compared to the fish's total hearing range (*e.g.*, 0.01 kHz to 5 kHz).

In terms of behavioral responses, Juanes *et al.* (2017) discuss the potential for negative impacts from anthropogenic noise on fish, but the author's focus was on broader based sounds, such as ship and boat noise sources. Watwood *et al.* (2016) also documented no behavioral responses by reef fish after exposure to mid-frequency active sonar. Doksaeter *et al.* (2009; 2012) reported no behavioral responses to mid-frequency sonar (such as naval sonar) by Atlantic herring; specifically, no escape reactions (vertically or horizontally) were observed in free swimming herring exposed to mid-frequency sonar transmissions. Based on these results (Doksaeter *et al.*, 2009; Doksaeter *et al.*, 2012; Sivle *et al.*, 2012), Sivle *et al.* (2014) created a model in order to report on the possible population-level effects on Atlantic herring from active sonar. The authors concluded that the use of sonar poses little risk to populations of herring regardless of season, even when

the herring populations are aggregated and directly exposed to sonar. Finally, Bruintjes *et al.* (2016) commented that fish exposed to any short-term noise within their hearing range might initially startle, but would quickly return to normal behavior.

Occasional behavioral reactions to activities that produce underwater noise sources are unlikely to cause long-term consequences for individual fish or populations. The most likely impact to fish from impact and vibratory pile driving activities at the project areas would be temporary behavioral avoidance of the area. 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. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected. SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.*, 2012b; Casper *et al.*, 2013). As described in the Proposed Mitigation section below, Sunrise Wind would utilize a sound attenuation device which would reduce potential for injury to marine mammal prey. Other fish that experience hearing loss as a result of exposure to explosions and impulsive sound sources may have a reduced ability to detect relevant sounds such as predators, prey, or social vocalizations. However, PTS has not been known to occur in fishes and any hearing loss in fish may be as temporary as the timeframe required to repair or replace the sensory cells that were damaged or destroyed (Popper *et al.*, 2005; Popper *et al.*, 2014; Smith *et al.*, 2006). It is not

known if damage to auditory nerve fibers could occur, and if so, whether fibers would recover during this process.

It is also possible for fish to be injured or killed by an explosion from UXO/MEC detonation. Physical effects from pressure waves generated by underwater sounds (e.g., underwater explosions) could potentially affect fish within proximity of training or testing activities. The shock wave from an underwater explosion is lethal to fish at close range, causing massive organ and tissue damage and internal bleeding (Keevin and Hempen, 1997). At greater distance from the detonation point, the extent of mortality or injury depends on a number of factors including fish size, body shape, orientation, and species (Keevin and Hempen, 1997; Wright, 1982). At the same distance from the source, larger fish are generally less susceptible to death or injury, elongated forms that are round in cross-section are less at risk than deep-bodied forms, and fish oriented sideways to the blast suffer the greatest impact (Edds-Walton and Finneran, 2006; O'Keeffe, 1984; O'Keeffe and Young, 1984; Wiley *et al.*, 1981; Yelverton *et al.*, 1975). Species with gas-filled organs are more susceptible to injury and mortality than those without them (Gaspin, 1975; Gaspin *et al.*, 1976; Goertner *et al.*, 1994). Barotrauma injuries have been documented during controlled exposure to impact pile driving (an impulsive noise source, as are explosives and air guns) (Halvorsen *et al.*, 2012b; Casper *et al.*, 2013).

Fish not killed or driven from a location by an explosion might change their behavior, feeding pattern, or distribution. Changes in behavior of fish have been observed as a result of sound produced by explosives, with effect intensified in areas of hard substrate (Wright, 1982). Stunning from pressure waves could also temporarily immobilize fish, making them more susceptible to predation. The abundances of various fish (and invertebrates) near the detonation point for explosives could be altered for a few hours before animals from surrounding areas repopulate the area. However, these populations would likely be replenished as waters near the detonation point are mixed with adjacent waters. Repeated exposure of individual fish to sounds from underwater explosions is not likely and are expected to be short-term and localized. Long-term consequences for fish populations would not be expected. Several studies have demonstrated that air gun 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).

UXO/MEC detonations would be dispersed in space and time; therefore, repeated exposure of individual fishes are unlikely. Mortality and injury effects to fishes from explosives would be localized around the area of a given in-water explosion but only if individual fish and the explosive (and immediate pressure field) were co-located at the same time. Fishes deeper in the water column or on the bottom would not be affected by water surface explosions. Repeated exposure of individual fish to sound and energy from underwater explosions is not likely given fish movement patterns, especially schooling prey species. Most acoustic effects, if any, are expected to be short-term and localized. Long-term consequences for fish populations, including key prey species within the project area, would not be expected.

Required soft-starts would allow prey and marine mammals to move away from the source prior to any noise levels that may physically injure prey and the use of the noise attenuation devices would reduce noise levels to the degree any mortality or injury of prey is also minimized. Use of bubble curtains, in addition to reducing impacts to marine mammals, for example, is a key mitigation measure in reducing injury and mortality of ESA-listed salmon on the West Coast. However, we recognize some mortality, physical injury and hearing impairment in marine mammal prey may occur, but we anticipate the amount of prey impacted in this manner is minimal compared to overall availability. Any behavioral responses to pile driving by marine mammal prey are expected to be brief. We expect that other impacts, such as stress or masking, would occur in fish that serve as marine mammals prey (Popper *et al.*, 2019); however, those impacts would be limited to the duration of impact pile driving and during any UXO/MEC detonations and, if prey were to move out the area in response to noise, these impacts would be minimized.

In addition to fish, prey sources such as marine invertebrates could potentially be impacted by noise stressors as a result of the proposed activities. However, most marine invertebrates' ability to sense sounds is limited. Invertebrates appear to be able to detect sounds (Pumphrey, 1950; Frings and Frings, 1967) and are most sensitive to low-frequency sounds (Packard *et al.*, 1990; Budelmann and

Williamson, 1994; Lovell *et al.*, 2005; Mooney *et al.*, 2010). Data on response of invertebrates such as squid, another marine mammal prey species, to anthropogenic sound is more limited (de Soto, 2016; Sole *et al.*, 2017b). Data suggest that cephalopods are capable of sensing the particle motion of sounds and detect low frequencies up to 1–1.5 kHz, depending on the species, and so are likely to detect air gun noise (Kaifu *et al.*, 2008; Hu *et al.*, 2009; Mooney *et al.*, 2010; Samson *et al.*, 2014). Sole *et al.* (2017) reported physiological injuries to cuttlefish in cages placed at-sea when exposed during a controlled exposure experiment to low-frequency sources (315 Hz, 139 to 142 dB *re* 1 μPa^2 and 400 Hz, 139 to 141 dB *re* 1 μPa^2). Fewtrell and McCauley (2012) reported squids maintained in cages displayed startle responses and behavioral changes when exposed to seismic air gun sonar (136–162 *re* 1 $\mu Pa^2 \cdot s$). Jones *et al.* (2020) found that when squid (*Doryteuthis pealeii*) were exposed to impulse pile driving noise, body pattern changes, inking, jetting, and startle responses were observed and nearly all squid exhibited at least one response. However, these responses occurred primarily during the first eight impulses and diminished quickly, indicating potential rapid, short-term habituation. Cephalopods have a specialized sensory organ inside the head called a statocyst that may help an animal determine its position in space (orientation) and maintain balance (Budelmann, 1992). Packard *et al.* (1990) showed that cephalopods were sensitive to particle motion, not sound pressure, and Mooney *et al.* (2010) demonstrated that squid statocysts act as an accelerometer through which particle motion of the sound field can be detected. Auditory injuries (lesions occurring on the statocyst sensory hair cells) have been reported upon controlled exposure to low-frequency sounds, suggesting that cephalopods are particularly sensitive to low-frequency sound (Andre *et al.*, 2011; Sole *et al.*, 2013). Behavioral responses, such as inking and jetting, have also been reported upon exposure to low-frequency sound (McCauley *et al.*, 2000b; Samson *et al.*, 2014). Squids, like most fish species, are likely more sensitive to low frequency sounds and may not perceive mid- and high-frequency sonars. Cumulatively for squid as a prey species, individual and population impacts from exposure to explosives, like fish, are not likely to be significant, and explosive impacts would be short-term and localized.

There is little information concerning potential impacts of noise on

zooplankton populations. However, one recent study (McCauley *et al.*, 2017) investigated zooplankton abundance, diversity, and mortality before and after exposure to air gun noise, finding that the exposure resulted in significant depletion for more than half the taxa present and that there were two to three times more dead zooplankton after air gun exposure compared with controls for all taxa. The majority of taxa present were copepods and cladocerans; for these taxa, the range within which effects on abundance were detected was up to approximately 1.2 km. In order to have significant impacts on r-selected species such as plankton, the spatial or temporal scale of impact must be large in comparison with the ecosystem concerned (McCauley *et al.*, 2017).

The presence of large numbers of turbines has been shown to impact meso- and sub-meso-scale water column circulation, which can affect the density, distribution, and energy content of zooplankton and thereby, their availability as marine mammal prey. The presence and operation of structures such as wind turbines are, in general, likely to result in local and broader oceanographic effects in the marine environment and may disrupt marine mammal prey, such as dense aggregations and distribution of zooplankton through altering the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.*, 2021, Johnson *et al.*, 2021, Christiansen *et al.*, 2022, Dorrell *et al.*, 2022). However, the scale of impacts is difficult to predict and may vary from meters to hundreds of meters for local individual turbine impacts (Schultze *et al.*, 2020) to large-scale dipoles of surface elevation changes stretching hundreds of kilometers (Christiansen *et al.*, 2022).

Sunrise Wind intends to install up to 94 turbines that would be operational towards the end of Year 1. As described above, there is scientific uncertainty around the scale of oceanographic impacts (meters to kilometers) associated with turbine operation. Sunrise Wind is located in an area of the New England that experiences coastal upwelling, a consequence of the predominant wind direction and the orientation of the coastline. Along the coast of Rhode Island and southern Massachusetts, upwelling of deeper, nutrient-rich waters frequently leads to late summer blooms of phytoplankton and subsequently increased biological productivity (Gong *et al.*, 2010; Glenn *et al.*, 2004). However, the project area does not include key foraging grounds

for marine mammals with planktonic diets (*e.g.*, North Atlantic right whale), and prime foraging habitat near Nantucket Shoals is unlikely to be influenced.

These potential impacts on prey could impact the distribution of marine mammals within the project area, potentially necessitating additional energy expenditure to find and capture prey, but at the temporal and spatial scales anticipated for this activity are not expected to impact the reproduction or survival of any individual marine mammals. Although studies assessing the impacts of offshore wind development on marine mammals are limited, the repopulation of wind energy areas by harbor porpoises (Brandt *et al.*, 2016; Lindeboom *et al.*, 2011) and harbor seals (Lindeboom *et al.*, 2011; Russell *et al.*, 2016) following the installation of wind turbines are promising. Overall, any impacts to marine mammal foraging capabilities due to effects on prey aggregation from Sunrise Wind turbine presence and operation during the effective period of the proposed rule is likely to be limited and nearby habitat that is known to support North Atlantic right whale foraging would be unaffected by SWF operation.

In general, impacts to marine mammal prey species are expected to be relatively minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected. The most likely impacts of prey fish from UXO/MEC detonations, if determined to be necessary, are injury or mortality if they are located within the vicinity when detonation occurs. However, given the likely spread of any UXOs/MECs in the project area, the low chance of detonation (as lift-and-shift and deflagration are the primary removal approaches), and that this area is not a biologically important foraging ground, overall effects should be minimal to marine mammal species. NMFS does not expect HRG acoustic sources to impact fish and most sources are likely outside the hearing range of the primary prey species in the project area.

Overall, the combined impacts of sound exposure, explosions, and oceanographic impacts on marine mammal habitat resulting from the proposed activities would not be expected to have measurable effects on populations of marine mammal prey species. Prey species exposed to sound might move away from the sound source, experience TTS, experience masking of biologically relevant sounds, or show no obvious direct effects.

Acoustic Habitat

Acoustic habitat is the soundscape, which encompasses all of the sound present in a particular location and time, as a whole when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics (communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators), and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (*e.g.*, produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of air gun arrays) or for Navy training and testing purposes (as in the use of sonar and explosives and other acoustic sources). Anthropogenic noise varies widely in its frequency, content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please also see the previous discussion on Masking), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber, 2013). For more detail on these concepts see, *e.g.*, Barber *et al.*, 2009; Pijanowski *et al.*, 2011; Francis and Barber, 2013; Lillis *et al.*, 2014.

The term "listening area" refers to the region of ocean over which sources of sound can be detected by an animal at the center of the space. Loss of communication space concerns the area over which a specific animal signal, used to communicate with conspecifics in biologically important contexts (*e.g.*, foraging, mating), can be heard, in noisier relative to quieter conditions

(Clark *et al.*, 2009). Lost listening area concerns the more generalized contraction of the range over which animals would be able to detect a variety of signals of biological importance, including eavesdropping on predators and prey (Barber *et al.*, 2009). Such metrics do not, in and of themselves, document fitness consequences for the marine animals that live in chronically noisy environments. Long-term population-level consequences mediated through changes in the ultimate survival and reproductive success of individuals are difficult to study, and particularly so underwater. However, it is increasingly well documented that aquatic species rely on qualities of natural acoustic habitats with researchers quantifying reduced detection of important ecological cues (*e.g.*, Francis and Barber, 2013; Slabbekoorn *et al.*, 2010) as well as survivorship consequences in several species (*e.g.*, Simpson *et al.*, 2014; Nedelec *et al.*, 2015).

Sound produced from construction activities in the Sunrise Wind project area would be temporary and transitory. The sounds produced during construction activities may be widely dispersed or concentrated in small areas for varying periods. Any anthropogenic noise attributed to construction activities in the project area would be temporary and the affected area would be expected to immediately return to the original state when these activities cease.

Water Quality

Impacts to the immediate substrate during installation of piles 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. Indirect effects of explosives and unexploded ordnance to marine mammals via sediment is possible in the immediate vicinity of the ordnance but through the implementation of the mitigation, is it not anticipated marine mammals would be in the direct area of the explosive source. Further, contamination of water is not anticipated. Degradation products of Royal Demolition Explosive are not toxic to marine organisms at realistic exposure levels (Rosen and Lotufo, 2010). Relatively low solubility of most explosives and their degradation products means that concentrations of these contaminants in the marine environment are relatively low and readily diluted. Furthermore, while explosives and their degradation

products were detectable in marine sediment approximately 6–12 in (0.15–0.3 m) away from degrading ordnance, the concentrations of these compounds were not statistically distinguishable from background beyond 3–6 ft (1–2 m) from the degrading ordnance. Sunrise Wind anticipates that, at most, they would detonate up to three UXO/MECs during the effective period of the rule. As such, no water quality concerns exist.

Equipment used by Sunrise Wind within the project area, including ships and other marine vessels, potentially aircrafts, and other equipment, are also potential sources of by-products. All equipment is properly maintained in accordance with applicable legal requirements. All such operating equipment meets Federal water quality standards, where applicable.

Reef Effects

The presence of the SRWF foundations, scour protection, and cable protection will result in a conversion of the existing sandy bottom habitat to a hard bottom habitat with areas of vertical structural relief (Sunrise Wind 2022). This could potentially alter the existing habitat by creating an “artificial reef effect” that results in colonization by assemblages of both sessile and mobile animals within the new hard-bottom habitat (Wilhelmsson *et al.* 2006; Reubens *et al.* 2013; Bergström *et al.* 2014; Coates *et al.* 2014).

Artificial structures can create increased habitat heterogeneity important for species diversity and density (Langhamer 2012). The WTG and OCS–DC foundations will extend through the water column, which may serve to increase settlement of meroplankton or planktonic larvae on the structures in both the pelagic and benthic zones (Boehlert and Gill 2010). Fish and invertebrate species are also likely to aggregate around the foundations and scour protection which could provide increased prey availability and structural habitat (Boehlert and Gill 2010; Bonar *et al.* 2015).

Numerous studies have documented significantly higher fish concentrations including species like cod and pouting (*Trisopterus luscus*), flounder (*Platichthys flesus*), eelpout (*Zoarces viviparus*), and eel (*Anguilla anguilla*) near in-water structures than in surrounding soft bottom habitat (Langhamer and Wilhelmsson 2009; Bergström *et al.* 2013; Reubens *et al.* 2013). In the German Bight portion of the North Sea, fish were most densely congregated near the anchorages of jacket foundations, and the structures

extending through the water column were thought to make it more likely that juvenile or larval fish encounter and settle on them (RI–CRMC 2010; Krone *et al.* 2013). In addition, fish can take advantage of the shelter provided by these structures while also being exposed to stronger currents created by the structures, which generate increased feeding opportunities and decreased potential for predation (Wilhelmsson *et al.* 2006). The presence of the foundations and resulting fish aggregations around the foundations is expected to be a long-term habitat impact, but the increase in prey availability could potentially be beneficial for some marine mammals.

The most likely impact to marine mammal habitat from the project is expected to be from impact and vibratory pile driving and UXO/MEC detonations, which may affect marine mammal food sources such as forage fish and could also affect acoustic habitat (see the *Auditory Masking* section) effects on marine mammal prey (*e.g.*, fish).

Potential Effects From Offshore Wind Farm Operational Noise

Although this proposed rulemaking primarily covers the noise produced from construction activities relevant to the Sunrise Wind offshore wind facility, operational noise was a consideration in NMFS’ analysis of the project, as all 94 turbines would become operational within the effective dates of the rule, beginning no sooner than Q2 2024. It is expected that all turbines would be operational by Q4 2024. Once operational, offshore wind turbines are known to produce continuous, non-impulsive underwater noise, primarily below 8 kHz.

In both newer, quieter, direct-drive systems (such as what has been proposed for Sunrise Wind) and older generation, geared turbine designs, recent scientific studies indicate that operational noise from turbines is on the order of 110 to 125 dB re 1 μ Pa root-mean-square sound pressure level (SPL_{rms}) at an approximate distance of 50 m (Tougaard *et al.*, 2020). Tougaard *et al.* (2020) further noted that sound levels could reach as high as 128 dB re 1 μ Pa SPL_{rms} in the 10 Hz to 8 kHz range. However, the Tougaard *et al.* (2020) study assumed that the largest WTG was 3.6 MW, which is much smaller than those being considered for the Sunrise Wind project. Tougaard further stated that the operational noise produced by WTGs is static in nature and lower than noise produced by passing ships. This is a noise source in this region to which marine mammals

are likely already habituated. Furthermore, operational noise levels are likely lower than those ambient levels already present in active shipping lanes, such that operational noise would likely only be detected in very close proximity to the WTG (Thomsen *et al.*, 2006; Tougaard *et al.*, 2020). In addition, Madsen *et al.* (2006) found the intensity of noise generated by operational wind turbines to be much less than the noises present during construction, although this observation was based on a single turbine with a maximum power of 2 MW. Other studies by Jansen and de Jong (2016) and Tougaard *et al.* (2009) determined that, while marine mammals would be able to detect operational noise from offshore wind farms (again, based on older 2 MW models) for several thousand kilometer, they expected no significant impacts on individual survival, population viability, marine mammal distribution, or the behavior of the animals considered in their study (harbor porpoises and harbor seals).

More recently, Stöber and Thomsen (2021) used monitoring data and modeling to estimate noise generated by more recently developed, larger (10 MW) direct-drive WTGs. Their findings, similar to Tougaard *et al.* (2020), demonstrate that there is a trend that operational noise increases with turbine size. Their study found noise levels could exceed 170 (to 177 dB *re* 1 μ Pa SPL_{rms} for a 10 MW WTG); however, those noise levels were generated by geared turbines, but newer turbines operate with direct drive technology. The shift from using gear boxes to direct drive technology is expected to reduce the sound level by 10 dB. The findings in the Stöber and Thomsen (2021) study have not been validated. Sunrise Wind did not request, and NMFS is not proposing to authorize, take incidental to operational noise from WTGs. Therefore, the topic is not discussed or analyzed further herein.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through these regulations, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment);

or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise from impact and vibratory pile driving, HRG surveys, and UXO/MEC detonations could result in behavioral disturbance. Impacts such as masking and TTS can contribute to behavior disturbances. There is also some potential for auditory injury (Level A harassment) of mysticetes (fin whales, humpback whales, minke whales, sei whales), high frequency cetaceans (harbor porpoises), and phocids (gray seals and harbor seals) due to their hearing sensitivities and the nature of the activities. As described below, the larger distances to the PTS thresholds, when considering marine mammal weighting functions, demonstrate this potential. For mid-frequency hearing sensitivities, when thresholds and weighting and the associated PTS zone sizes are considered, the potential for PTS from the noise produced by the project is negligible. Similarly, non-auditory injury (Level A harassment) resulting from UXO/MEC detonation is considered unlikely, given the thresholds, associated impact zone sizes, and required mitigation, and none is anticipated or proposed for authorization. While NMFS is proposing to authorize Level A harassment and Level B harassment, the proposed mitigation and monitoring measures are expected to minimize the amount and severity of such taking to the extent practicable (see Proposed Mitigation).

As described previously, no serious injury or mortality is anticipated or proposed to be authorized incidental to Sunrise Wind's specified activities. Pile driving does not inherently have the potential to elicit marine mammal mortality or serious injury. While mortality and serious injury of marine mammals could occur from vessel strikes or UXO/MEC detonation if an animal is close enough to the source, the mitigation and monitoring measures contained within this proposed rule would avoid this manner of take. Hence, no mortality or serious injury is anticipated or proposed to be authorized. The proposed mitigation and monitoring measures are expected to minimize the amount and severity of the taking proposed to be authorized to the maximum extent practicable. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, we estimate take by considering: (1) acoustic thresholds above which the best scientific information available 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.

In this case, as described below, there are multiple lines of data with which to address density or occurrence and, for each species and activity, the largest value resulting from the three take estimation methods described below (*i.e.*, density-based, PSO-based, or mean group size) was carried forward as the amount of requested take by Level B harassment. The amount of requested take by Level A harassment reflects the density-based exposure estimates and for some species and activities, consideration of the effectiveness of mitigation measures to avoid or minimize the potential for injury.

Below, we describe the acoustic thresholds NMFS uses, discuss the marine mammal density and occurrence information used, and then describe the modeling and methodologies applied to estimate take for each of Sunrise Wind's proposed construction activities. NMFS has carefully considered all information and analysis presented by the applicant as well as all other applicable information and, based on the best scientific information available, concurs that the applicant's estimates of the types and amounts of take for each species and stock are reasonable and is what NMFS is proposing to authorize. NMFS notes the take estimates described herein for foundation installation can be considered conservative as the estimates do not reflect the implementation of clearance and shutdown zones for any marine mammal species or stock, with the exception of the North Atlantic right whale. In the case of North Atlantic right whales, the potential for Level A harassment (PTS) has been determined to be reduced to a de minimis likelihood due to the enhanced mitigation and monitoring measures. The amount of Level B harassment take proposed to be

authorized for North Atlantic right whales does not consider the implementation of the enhanced mitigation measures (except for use of sound attenuation devices) and therefore, is considered conservative.

Marine Mammal 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). Thresholds have also been developed to identify the pressure levels above which animals may incur different types of tissue damage (non-auditory injury or mortality) from exposure to pressure waves from explosive detonation. A summary of all NMFS' thresholds can be found at (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>).

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, ambient noise, and the receiving animals (hearing, motivation, experience, demography, behavior at time of exposure, life stage, depth)) and can be difficult to predict (e.g., Southall *et al.*, 2007, 2021; Ellison *et al.*, 2012). Based on what the best scientific information available 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 the received root-mean-square sound pressure levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous (e.g., vibratory pile-driving, drilling) and above the received RMS SPL 160 dB re: 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources (Table 6). 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.

TABLE 6—UNDERWATER LEVEL B HARASSMENT ACOUSTIC THRESHOLDS [NMFS, 2005]

Source type	Level B harassment threshold (RMS SPL)
Continuous	120 dB re 1 μ Pa.
Non-explosive impulsive or intermittent	160 dB re 1 μ Pa.

Sunrise Wind's construction activities include the use of continuous (e.g., vibratory pile driving), intermittent (e.g., impact pile driving, HRG acoustic sources), and impulsive (e.g., UXO/MEC detonations) sources, and, therefore, the 120 and 160 dB re 1 μ Pa (rms) thresholds are applicable.

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). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (i.e., metric resulting in the largest isopleth). Sunrise Wind's

proposed activities include the use of both impulsive and non-impulsive sources.

These thresholds are provided in Table 7 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 7—ONSET OF PERMANENT THRESHOLD SHIFT (PTS) [NMFS, 2018]

Hearing group	PTS onset thresholds* (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	<i>Cell 1:</i> $L_{p,0-pk,flat}$: 219 dB; $L_{E,p,LF,24h}$: 183dB	<i>Cell 2:</i> $L_{E,p,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	<i>Cell 3:</i> $L_{p,0-pk,flat}$: 230 dB; $L_{E,p,MF,24h}$: 185 dB	<i>Cell 4:</i> $L_{E,p,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	<i>Cell 5:</i> $L_{p,0-pk,flat}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	<i>Cell 6:</i> $L_{E,p,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	<i>Cell 7:</i> $L_{p,0-pk,flat}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	<i>Cell 8:</i> $L_{E,p,PW,24h}$: 201 dB.

* Dual metric 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 are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0-pk}$) has a reference value of 1 μ Pa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1 μ Pa²s. In this table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO, 2017). The subscript “flat” is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.*, 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted 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 thresholds will be exceeded.

Explosive Sources acoustic and pressure thresholds the onset of behavioral harassment, TTS, PTS, tissue damage, and mortality.
 Based on the best scientific information available, NMFS uses the indicated in Tables 8 and 9 to predict

TABLE 8—PTS ONSET, TTS ONSET, FOR UNDERWATER EXPLOSIVES [NMFS, 2018]

Hearing group	PTS impulsive thresholds	TTS impulsive thresholds	Behavioral threshold (multiple detonations)
Low-Frequency (LF) Cetaceans	Cell 1: $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB ..	Cell 2: $L_{pk,flat}$: 213 dB; $L_{E,LF,24h}$: 168 dB ..	Cell 3: $L_{E,LF,24h}$: 163 dB.
Mid-Frequency (MF) Cetaceans	Cell 4: $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	Cell 5: $L_{pk,flat}$: 224 dB; $L_{E,MF,24h}$: 170 dB	Cell 6: $L_{E,MF,24h}$: 165 dB.
High-Frequency (HF) Cetaceans	Cell 7: $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB ..	Cell 8: $L_{pk,flat}$: 196 dB; $L_{E,HF,24h}$: 140 dB ..	Cell 9: $L_{E,HF,24h}$: 135 dB.
Phocid Pinnipeds (PW) (Underwater)	Cell 10: $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	Cell 11: $L_{pk,flat}$: 212 dB; $L_{E,PW,24h}$: 170 dB	Cell 12: $L_{E,PW,24h}$: 165 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS/TTS onset.
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, ANSI defines peak sound pressure 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 overall marine mammal 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 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.

Additional thresholds for non-auditory injury to lung and gastrointestinal (GI) tracts from the blast shock wave and/or onset of high peak pressures are also relevant (at relatively close ranges) as UXO/MEC detonations, in general, have potential to result in mortality and non-auditory injury

(Table 9). Marine mammal lung injury criteria have been developed by the U.S. Navy (DoN (U.S. Department of the Navy), 2017) and are based on the mass of the animal and the depth at which it is present in the water column due to blast pressure. This means that specific decibel levels for each hearing group are

not provided and instead, the criteria are presented as equations that allow for incorporation of specific mass and depth values. The GI tract injury threshold is based on peak pressure. The modified Goertner equations below represent the potential onset of lung injury and GI tract injury (Table 9).

TABLE 9—LUNG AND G.I. TRACT INJURY THRESHOLDS [DoN, 2017]

Hearing group	Mortality (severe lung injury) *	Slight lung injury *	G.I. tract injury
All Marine Mammals	Cell 1: Modified Goertner model; Equation 1	Cell 2: Modified Goertner model; Equation 2	Cell 3: $L_{pk,flat}$: 237 dB.

* Lung injury (severe and slight) thresholds are dependent on animal mass (Recommendation: Table C.9 from DoN (2017) based on adult and/or calf/pup mass by species).
Note: Peak sound pressure (L_{pk}) has a reference value of 1 μ Pa. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, ANSI defines peak sound pressure 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 overall marine mammal generalized hearing range.
 Modified Goertner Equations for severe and slight lung injury (pascal-second):
 Equation 1: $103M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.
 Equation 2: $47.5M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.
M animal (adult and/or calf/pup) mass (kg) (Table C.9 in DoN, 2017).
D animal depth (meters).

Below, we describe, in detail, the assumptions and methodologies used to estimate take, in consideration of acoustic thresholds and appropriate marine mammal density and occurrence information for WTG and OCS–DC foundation installation and landfall construction activities. Details on the methodologies used to estimate take for HRG surveys and UXO/MEC detonation can be found in the activity-specific subsection below. Resulting distances to thresholds, densities used, activity-

specific exposure estimates (as relevant to the analysis), and activity-specific take estimates can be found in each activity subsection below. At the end of this section, we present the total annual and 5-year take estimates that Sunrise Wind requested, and NMFS proposes to authorize.

Acoustic Modeling

As described above, underwater noise associated with the construction of offshore components of the SRWF will

predominantly result from impact pile driving for the monopile and jacket foundations while noise from cable landfall construction will primarily result from impact pile driving for the casing pipe and vibratory pile driving of the goal posts. Sunrise Wind employed JASCO to conduct acoustic and animal movement exposure modeling to better understand sound fields produced during these activities and to estimate exposures (Küsel *et al* 2022). For installation of foundation piles, animal

movement modeling was used to estimate exposures. The basic modeling approach is to characterize the sounds produced by the source, determine how the sounds propagate within the surrounding water column, and then estimate species-specific exposure probability by considering the range- and depth-dependent sound fields in relation to animal movement in simulated representative construction scenarios.

JASCO's Pile Driving Source Model (PDSM), a physical model of pile vibration and near-field sound radiation (MacGillivray 2014), was used in conjunction with the GRLWEAP 2010 wave equation model (GRLWEAP, Pile Dynamics 2010) to predict source levels associated with impact pile driving activities (WTG and OCS-DC foundation installation and casing pipe installation). The PDSM physical model computes the underwater vibration and sound radiation of a pile by solving the theoretical equations of motion for axial and radial vibrations of a cylindrical shell. Piles are modeled as a vertical installation using a finite-difference structural model of pile vibration based on thin-shell theory. To model the sound emissions from the piles, the force of the pile driving hammers also had to be modeled. The force at the top of each 7/12 m monopile, jacket foundation pile, and casing pipe was computed using the GRLWEAP 2010 wave equation model (GRLWEAP, Pile Dynamics 2010), which includes a large database of simulated hammers. The forcing functions from GRLWEAP were used as inputs to the finite difference model to compute the resulting pile vibrations. The sound radiating from the pile itself was simulated using a vertical array of discrete point sources. These models account for several parameters that describe the operation—pile type, material, size, and length—the pile driving equipment, and approximate pile penetration depth. The model assumed direct contact between the representative hammers, helmets, and piles (*i.e.*, no cushioning material).

Sunrise Wind would employ a noise attenuation system during all impact pile driving of monopile and jacket foundations. Noise attenuation systems, such as bubble curtains, are sometimes

used to decrease the sound levels radiated from a source. Hence, hypothetical broadband attenuation levels of 0 dB, 6 dB, 10 dB, 15 dB, and 20 dB were incorporated into the foundation source models to gauge effects on the ranges to thresholds given these levels of attenuation. Although five attenuation levels were evaluated, Sunrise Wind and NMFS anticipates that the noise attenuation system ultimately chosen will be capable of reliably reducing source levels by 10 dB; therefore, modeling results assuming 10 dB attenuation are carried forward in this analysis for WTG and OCS-DC foundation installation. See the Proposed Mitigation section for more information regarding the justification for the 10 dB assumption.

To estimate sound propagation during foundation installation, JASCO's used the Full Waveform Range-dependent Acoustic Model (FWRAM) (Küsel *et al.* 2022, Appendix E.4) to combine the outputs of the source model with spatial and temporal environmental factors (*e.g.*, location, oceanographic conditions, and seabed type) to get time-domain representations of the sound signals in the environment and estimate sound field levels. Because the foundation pile is represented as a linear array and FWRAM employs the array starter method to accurately model sound propagation from a spatially distributed source (MacGillivray and Chapman, 2012), using FWRAM ensures accurate characterization of vertical directivity effects in the near-field zone. Due to seasonal changes in the water column, sound propagation is likely to differ at different times of the year. To capture this variability, acoustic modeling was conducted using an average sound speed profile for a "summer" period including the months of May through November, and a "winter" period including December through April. FWRAM computes pressure waveforms via Fourier synthesis of the modeled acoustic transfer function in closely spaced frequency bands. This model is used to estimate the energy distribution per frequency (source spectrum) at a close distance from the source (10 m). Examples of decidecade spectral levels

for each foundation pile type, hammer energy, and modeled location, using average summer sound speed profile are provided in Küsel *et al.* (2022).

Sounds produced by installation of the 7/12 m WTG monopiles were modeled at two locations: one in the northwest section of the SRWF area and one in the southeast section (Figure 8 in Sunrise Wind's application). The two WTG locations were selected to represent the relatively shallow (44.9 m; ID-97) northwest section of the SRWF and the somewhat deeper (56.6 m; ID-259) southeast section. The installation of pin piles to secure the OCS-DC jacket foundation were modeled at one location in the central portion of the SRWF area (50.6 m water depth; ID-200). All piles were assumed to be vertical and driven to a maximum expected penetration depth of 50 m for the WTG monopiles and 90 m for the OCS-DC jacket foundation pin piles monopiles.

For the 7/12 m WTG monopiles, 10,398 total hammer strikes were assumed, with hammer energy varying from 1,000 to 3,200 kJ. A single strike at 4,000 kJ on a 7/12 m WTG monopile was also modeled in case the use of the maximum hammer energy is required during some installations. The smaller 4 m pin piles for the OCS-DC jacket foundation were assumed to require 17,088 total strikes with hammer energy ranging from 300 to 4,000 kJ during the installation. Representative hammering schedules (Table 10), including increasing hammer energy with increasing penetration depth, were modeled for both foundation types because maximum sound levels usually occur during the last stage of impact pile driving, where the great resistance is typically encountered (Betke, 2008). Sediment types with greater resistance (*e.g.*, gravel versus sand) require hammers that deliver higher energy strikes and/or an increased number of strikes relative to installations in softer sediment. The project area includes a predominantly sandy bottom habitat, which is a softer sediment and the model accounted for this. Additional details on modeling inputs and assumptions are described in Appendix A in Sunrise Wind's application.

TABLE 10—HAMMER ENERGY SCHEDULES FOR MONOPILE AND JACKET FOUNDATION INSTALLATION

WTG monopile foundations (7/12-m diameter)			OCS-DC jacket foundations (4-m diameter)		
Hammer: IHC S-4000			Hammer: IHC S-4000		
Energy level (kilojoule, kJ) ^a	Strike count	Pile penetration depth (m)	Energy level (kilojoule, kJ)	Strike count	Pile penetration depth
1,000	3,015	0-14	Assume pile self-setting .....	.....	0-4
1,500	2,140	14-24	300	1,336	4-12
2,000	2,084	24-34	750	2,182	12-25
2,500	1,843	34-43	1,000	4,437	25-43
3,200	1,316	43-50	2,000	4,058	43-63
4,000 ^a	1	50	3,000	3,272	63-80
.....	.....	.....	4,000	1,803	80-90
Total	10,398	50	Total	17,088	90

^a Though not included in the exposure analysis, the 7/12 m monopile was additionally modeled at the highest hammer energy of 4,000 kJ, by considering just one strike at the maximum seabed penetration depth (50 m), and a penetration rate similar to that of the 3,200 kJ energy level, implying penetration to refusal. Results for the 4,000 kJ energy level are presented in Appendices G.1, G.2, and G.3 of the JASCO report (Kusel *et al.*, 2022) for single-strike PK, SEL and SPL, respectively, since only one strike was considered.

The proposed casing pipe would be installed at an angle towards the exiting drill using a pipe ramming method with a Grundoram pneumatic hammer. The source modeling assumed the parameters identified in Table 11 while sound fields were modeled at one

representative location along the SRWEC route near to the HDD exit pit locations (ID-01), which represents a location approximately 0.5 mi (800 m) offshore of the landfall site. The modeling used a winter sound speed profile and assumed up to 3 hours of

pneumatic hammer use per day for 2 days to install each casing pipe. Assuming 180 strikes per minute over 3 hours of operations results in up to 32,400 total strikes per day.

TABLE 11—CASING PIPE INSTALLATION ACOUSTIC MODELING ASSUMPTIONS AND INPUTS

Parameter	Model input
Hammer	Grundoram Taurus (impact).
Impact Hammer Energy	18 kJ.
Strike Rate (min ⁻¹)	180.
Strikes Per Pile (and Per Day)	32,400.
Total Number of Casing Pipes	1.
Maximum Piles Installed Per Day	0.5.
Pile Diameter	1.2 m.
Pile Length	137.16 m.
Pile Wall Thickness	25.4 millimeter (mm).
Seabed Penetration	10 m.
Angle of Installation (Relative to Horizontal)	11-12 degrees.

For vibratory driving activities of the goal post sheet piles at the cable landfall site, source levels were modeled using decidecade band SEL levels obtained from vibratory pile driving measurements available in the literature

(Illingworth & Rodkin 2017). The SEL band levels were corrected for spherical spreading (+20 dB, corresponding to 10 m range) to generate a source level spectrum (Kusel *et al.* 2022; Figure 2.2-2). These levels represent the sheet pile

as a point source located in the middle of the water column. Assumptions associated with the source level modeling are found in Table 12.

TABLE 12—SHEET PILE INSTALLATION ACOUSTIC MODELING ASSUMPTIONS

Parameter	Model input
Vibratory Hammer	APE 300.
Pile Type	Sheet Piles.
Pile Length	30 m.
Pile Width	600 mm.
Pile Wall Thickness	25 mm.
Seabed Penetration	10 m.
Time to Install One Pile	2 hours.
Number of Piles Per Day	4.
Total Number of Piles	44.

Sounds fields produced during vibratory pile driving of goal post sheet piles were predicted by propagating measured spectra as a noise-radiating point source in the middle of the water column using JASCO's Marine Operations Noise Model (MONM–BELLHOP; see Appendix E.3 of Küsel *et al.* 2022). At frequencies less than 2 kHz, MONM computes acoustic propagation via a wide-angle parabolic equation (PE) solution to the acoustic wave equation based on a version of the U.S. Naval Research Laboratory's Range-dependent Acoustic Model (RAM) modified to account for an elastic seabed. MONM–RAM incorporates bathymetry, underwater sound speed as a function of depth, and a geo-acoustic profile based on seafloor composition, and accounts for source horizontal directivity. The PE method has been extensively benchmarked and is widely employed in the underwater acoustics community, and MONM–RAM's predictions have been validated against experimental data in several underwater acoustic measurement programs conducted by JASCO. At frequencies greater than 2 kHz, MONM accounts for increased sound attenuation due to volume absorption at higher frequencies with the widely used BELLHOP Gaussian beam ray-trace propagation model. This modeling component incorporates bathymetry and underwater sound speed as a function of depth with a simplified representation of the sea bottom, as sub-bottom layers have a negligible influence on the propagation of acoustic waves with frequencies above 1 kHz. MONM–BELLHOP accounts for horizontal directivity of the source and vertical variation of the source beam pattern. Both FWAM and MONM–BELLHOP propagation models account for full exposure from a direct acoustic wave as well as exposure from acoustic wave reflections and refractions (*i.e.*, multi-path arrivals at the receiver).

Animal Movement Modeling

To estimate the probability of exposure of animals to sound above NMFS' harassment thresholds during foundation installation, JASCO's Animal Simulation Model Including Noise Exposure (JASMINE) was used to integrate the sound fields generated from the source and propagation models described above with species-typical behavioral parameters (*e.g.*, dive patterns). Sound exposure models such as JASMINE use simulated animals (animats) to sample the predicted 3-D sound fields with movement rules derived from animal observations. Animats that exceed NMFS' acoustic

thresholds are identified and the range for the exceedances determined. The output of the simulation is the exposure history for each animat within the simulation, and the combined history of all animats gives a probability density function of exposure during the project. The number of animals expected to exceed the regulatory thresholds is determined by scaling the probability of exposure by the species-specific density of animals in the area. By programming animats to behave like marine species that may be present near the SRWF, the sound fields are sampled in a manner similar to that expected for real animals. The parameters used for forecasting realistic behaviors (*e.g.*, diving, foraging, and surface times) were determined and interpreted from marine species studies (*e.g.*, tagging studies) where available, or reasonably extrapolated from related species (Küsel *et al.* 2022, Appendix I).

Specifically, the sound level estimates are calculated from three-dimensional sound fields and then, at each horizontal sampling range, the maximum received level that occurs within the water column is used as the received level at that range. These maximum-over-depth (R_{\max}) values are then compared to predetermined threshold levels to determine exposure and acoustic ranges to Level A harassment and Level B harassment threshold isopleths. However, the ranges to a threshold typically differ among radii from a source and also might not be continuous along a radii because sound levels may drop below threshold at some ranges and then exceed threshold at farther ranges. To minimize the influence of these inconsistencies, 5 percent of the farthest such footprints were excluded from the model data. The resulting range, $R_{95\text{percent}}$, was chosen to identify the area over which marine mammals may be exposed above a given threshold because, regardless of the shape of the maximum-over-depth footprint, the predicted range encompasses at least 95 percent of the horizontal area that would be exposed to sound at or above the specified threshold. The difference between R_{\max} and $R_{95\text{percent}}$ depends on the source directivity and the heterogeneity of the acoustic environment. $R_{95\text{percent}}$ excludes ends of protruding areas or small isolated acoustic foci not representative of the nominal ensonified zone.

As described in Section 2.8 of JASCO's acoustic modeling report for Sunrise Wind, for modeled animals that have received enough acoustic energy to exceed a given harassment threshold, the exposure range for each animal is defined as the closest point of approach

(CPA) to the source made by that animal while it moved throughout the modeled sound field, accumulating received acoustic energy. The resulting exposure range for each species is the 95th percentile of the CPA distances for all animals that exceeded threshold levels for that species (termed the 95 percent exposure range ($ER_{95\text{percent}}$)). The $ER_{95\text{percent}}$ ranges are species-specific rather than categorized only by any functional hearing group, which allows for the incorporation of more species-specific biological parameters (*e.g.*, dive durations, swim speeds, *etc.*) for assessing the impact ranges into the model. Furthermore, because these $ER_{95\text{percent}}$ ranges are species-specific, they can be used to develop mitigation monitoring or shutdown zones.

We note that Sunrise Wind also calculated acoustic ranges, which represent the distance to a harassment threshold based on sound propagation through the environment (*i.e.*, independent of any receiver) while exposure range considers received levels in consideration of how an animal moves through the environment which influences the duration of exposure. As described above, applying animal movement and behavior within the modeled noise fields allows for a more realistic indication of the distances at which PTS acoustic thresholds are reached that considers the accumulation of sound over different durations. The acoustic ranges to the SEL_{cum} Level A harassment thresholds for WTG and OCS–DC foundation installation can be found in Tables 15 and 16 of Sunrise Wind's application but will not be discussed further in this analysis. Because NMFS Level B harassment threshold is an instantaneous exposure, acoustic ranges are more relevant to the analysis and are used to derive mitigation and monitoring measures. Acoustic ranges to the Level B harassment threshold for each activity are provided in the activity-specific subsections below.

Sunrise Wind proposed five different construction schedules involving either consecutive (*i.e.*, sequential) foundation installation (schedule 1–2) or concurrent foundation installation (*i.e.*, schedules 3–5) as described in the Dates and Duration section. JASMINE was run for a representative seven-day period for each scenario. Each of the five construction schedules includes a combination of scenarios that assume either fully sequential operations or a combination of sequential and concurrent operations. For each scenario, a subset of simulated sites was chosen to capture the range of acoustic variability across the lease area.

For concurrent operations, different sites were modeled on each day of the simulation. For one monopile per day, 7 representative locations were selected in the lease area (one location for each day). Similarly, for two monopiles per day, 14 locations were selected, and 21 locations were selected for three monopiles per day. For jacket foundations, 7 representative locations were chosen. Animats were exposed to only one sound field at a time. Received levels were summed over each animat's track over a 24-hour time window to derive sound exposure levels (SEL). Single-exposure metrics (e.g., SPL) were recorded at each simulation time step, and the maximum received level is reported. For each pile type and each exposure modeling location the closest modeled sound field was used.

Concurrent operations were handled slightly differently to best capture the effects of installing piles spatially close to each other (proximal) or further apart (distal). The sites chosen for exposure modeling for concurrent operations were repeated each day for all seven days (see Figure 1.2–4 in Sunrise Wind's application). When simulating concurrent operations in JASMINE, sound fields from separate sources may be overlapping. For cumulative metrics (SEL), received energy from each source is summed over a 24-hour time window. For SPL, received levels are summed within each simulation time step and the resultant maximum SPL over all time steps is reported. Sources are summed such that receiving two equally loud sounds results in a 3 dB increase (incoherent summation). The installation schedules for concurrent scenarios are as follows:

- Construction Schedule 3 includes a concurrent scenario, simulating two vessels, each installing two monopiles per day. The first vessel installs both monopiles in the southeast corner of the lease area (purple circle markers). The second vessel installs both monopiles at the proximal location (light blue circle markers).
- Construction Schedule 4 also includes a concurrent scenario with two vessels installing two monopiles per day. In this case, the first vessel installs both monopiles in the southeast corner, while the second vessel installs both monopiles at the distal location (green circle markers).
- Construction Schedule 5 includes a concurrent scenario with two vessels,

one installing two monopiles per day, and a second installing 4 jacket pin piles per day. In this case, the jacket foundation pin piles are installed at a single location (yellow square marker), while the monopile foundations are installed at two proximal locations (yellow circle markers).

Whether sequential or concurrent operations are done, the resulting cumulative or maximum receive levels are then compared to the NMFS' thresholds criteria within each analysis period.

Marine Mammal Density and Occurrence

In this section we provide the information about marine mammal presence, density, or group dynamics that will inform the take calculations for all activities. Sunrise Wind applied the Duke University Marine Geospatial Ecology Laboratory 2022 marine mammal habitat-based density models (<https://seamap.env.duke.edu/models/Duke/EC/>) to estimate take from WTG and OCS–DC foundation installation, casing pipe and goal post installation, UXO/MEC detonations, and site characterization surveys. On May 10, 2022 Sunrise Wind submitted their adequate and complete application; however, on June 20, 2022, the Duke Marine Geospatial Ecology Laboratory released a updated set of density models for all marine mammals along the East Coast of the United States (Roberts *et al.*, 2016; Roberts and Halpin, 2022). Subsequently, Sunrise Wind provided revised take estimates based on the updated density models, where appropriate. Sunrise Wind also incorporated revisions (relative to the ITA application) to how the density data were selected from the model output for each activity based on discussions with NMFS. Specifically, the width of the perimeter around the activity area used to select density data is now based on the largest exposure range (typically the Level B harassment range) applicable to that activity and then rounded up to the nearest 5-km increment, (which reflects the spatial resolution of the Roberts and Halpin (2022) density models). For example, if the largest exposure range was 7.1 km, a 10-km perimeter around the lease area was created and used to calculate densities used in foundation installation take estimates. All information provided by Sunrise Wind since submission of their adequate and

complete application is contained within the memo (referred to as the Updated Density and Take Estimation Memo) submitted to NMFS on December 15, 2022. The Updated Density and Take Estimation Memo is available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-sunrise-wind-llc-construction-and-operation-sunrise-wind>.

For some species and activities, observational data from Protected Species Observers (PSOs) aboard HRG and geotechnical (GT) survey vessels indicate that the density-based exposure estimates may be insufficient to account for the number of individuals of a species that may be encountered during the planned activities. PSO data from geophysical and geotechnical surveys conducted in the area surrounding the Sunrise Wind Lease Area and SWEC route from October 2018 through February 2021 (AIS-Inc., 2019; Bennett, 2021; Stevens *et al.*, 2021; Stevens and Mills, 2021) were analyzed to determine the average number of individuals of each species observed per vessel day. For each species, the total number of individuals observed (including the “proportion of unidentified individuals”) was divided by the number of vessel days during which observations were conducted in 2018–2021 HRG surveys (407 survey days) to calculate the number of individuals observed per vessel day, as shown in the final columns of Tables 7 and 8 as found in the Updated Density and Take Estimation Memo.

For other less-common species, the predicted densities from Roberts and Halpin (2022) are very low and the resulting density-based exposure estimate is less than a single animal or a typical group size for the species. In such cases, the mean group size was considered as an alternative to the density-based or PSO data-based take estimates to account for potential impacts on a group during an activity. Mean group sizes for each species were calculated from recent aerial and/or vessel-based surveys, as shown in Table 13. Additional detail regarding the density and occurrence as well as the methodology used to estimate take for specific activities is included in the activity-specific subsections below.

TABLE 13—MEAN GROUP SIZES OF SPECIES FOR WHICH INCIDENTAL TAKE IS BEING REQUESTED

Marine mammal species	Individuals	Sightings	Mean group size	Information source
<i>Mysticetes:</i>				
Blue whale *	3	3	1.0	Palka <i>et al.</i> (2017).
Fin whale *	155	86	1.8	Kraus <i>et al.</i> (2016).
Humpback whale	160	82	2.0	Kraus <i>et al.</i> (2016).
Minke whale	103	83	1.2	Kraus <i>et al.</i> (2016).
North Atlantic right whale *	145	60	2.4	Kraus <i>et al.</i> (2016).
Sei whale *	41	25	1.6	Kraus <i>et al.</i> (2016).
<i>Odontocetes:</i>				
Atlantic spotted dolphin	1,335	46	29.0	Palka <i>et al.</i> (2017).
Atlantic white-sided dolphin	223	8	27.9	Kraus <i>et al.</i> (2016).
Bottlenose dolphin	259	33	7.8	Kraus <i>et al.</i> (2016).
Common dolphin	2,896	83	34.9	Kraus <i>et al.</i> (2016).
Harbor porpoise	121	45	2.7	Kraus <i>et al.</i> (2016).
Pilot whales	117	14	8.4	Kraus <i>et al.</i> (2016).
Risso's dolphin	1,215	224	5.4	Palka <i>et al.</i> (2017).
Sperm whale *	208	138	1.5	Palka <i>et al.</i> (2017).
<i>Pinnipeds:</i>				
Seals (harbor and gray)	201	144	1.4	Palka <i>et al.</i> (2017).

* Denotes species listed under the Endangered Species Act.

Alternative Density-Based Take Estimate Method

In addition to conducting the JASMINE exposure modeling described above to estimate both Level A harassment and Level B harassment from foundation installation, Sunrise Wind estimated the potential for Level B harassment from foundation installation using a simplified “static” method wherein the take estimates are the product of density, ensonified area, and number of days of installation. Take estimates from landfall construction activities, HRG surveys, and UXOs/MECs detonations were also calculated based on the static method (animal movement modeling was not conducted for these activities).

The “static” take estimates are calculated by multiplying the expected densities of marine mammals in the activity area(s) by the area of water likely to be ensonified above the NMFS defined threshold levels in a single day (24-hour period). For foundation installation, the maximum monthly density is multiplied by the total ensonified area (highest between summer or winter) for the first month of construction of WTG monopile installation. The second highest monthly density is multiplied by the

total ensonified area (highest between summer or winter) for the second month of WTG monopile installation. Lastly, the maximum monthly density is multiplied by the total ensonified area for OCS–DC installation. These three values are then summed together to come up with the “static” take estimate value for all foundation installation. Total ensonified area is calculated by multiplying the single pile ensonified area by the total number of piles installed within the first and second month of construction. For example, if 56 WTG monopiles were assumed to be installed during the month with the highest density (e.g., July) and 46 were installed in the month with the second highest density (e.g., August), the resulting equation would be:

$$\begin{aligned} & \text{max monthly density [July]} \times \text{total} \\ & \text{ensonified area for first month} \\ & [\text{summer WTG monopile}] + 2\text{nd} \\ & \text{highest monthly density [August]} \times \\ & \text{total ensonified area for the 2nd} \\ & \text{month [summer WTG monopile]} + \\ & \text{max monthly density [July]} \times \text{total} \\ & \text{ensonified area for first month} \\ & [\text{summer OCS–DC}] = \text{Total “static”} \\ & \text{take estimate} \end{aligned}$$

In some cases, the exposure estimates from the animal movement modeling methods described above directly

informed the take estimates; in other cases, adjustments were made based on previously collected monitoring data or average group size as described above. In all cases, Sunrise Wind requested, and NMFS proposes to authorize, take based on the highest amount of exposures estimated from any given method.

Below we present the distances to NMFS thresholds and take estimates associated with each activity as a result of exposure modeling (WTG and OCS–DC foundation installation) or the static method as described above.

WTG and OCS–DC Foundation Installation

To complete the project, Sunrise proposed five total pile installation schedules, as construction schedules cannot be fully predicted due to uncontrollable environmental factors (e.g., weather) and installation schedules include variability (e.g., due to drivability). Table 14 demonstrates the assumptions in each scenario with regard to how piles are installed relative to each other as well as the amount of pile driving time (days) allocated to each month. As described previously,

TABLE 14—SUNRISE WIND’S FIVE POTENTIAL FOUNDATION INSTALLATION SCHEDULES

Schedule analyzed	Installation details	Foundation structure	Configuration	1st highest species density month		2nd highest species density month	
				Days of piling	Total piles	Days of piling	Total piles
Schedule 1	Sequential operations; assumptions for WTG (one vessel installing two monopiles per day) foundations and the OCS–DC foundation.	OCS–DC ...	Jacket pin pile, 4 per day.	2	8	0	0
		WTG	Monopile, 2 per day.	28	56	23	46

TABLE 14—SUNRISE WIND’S FIVE POTENTIAL FOUNDATION INSTALLATION SCHEDULES—Continued

Schedule analyzed	Installation details	Foundation structure	Configuration	1st highest species density month		2nd highest species density month	
				Days of piling	Total piles	Days of piling	Total piles
Schedule 2	Sequential operations; assumptions for WTG (one vessel installing three monopiles per day) foundations and the OCS–DC foundation.	OCS–DC ...	Jacket pin pile, 4 per day.	2	8	0	0
		WTG	Monopile, 3 per day.	28	84	6	18
Schedule 3	Concurrent operations; proximal assumptions for concurrent piling of WTG (two vessels, each installing two monopiles per day) foundations, and the OCS–DC foundation.	OCS–DC ...	Jacket pin pile, 4 per day.	2	8	-	-
		WTG	2 vessels, each 2 per day.	25.5	102	-	-
Schedule 4	Concurrent operations; distal assumptions for concurrent piling of WTG (two vessels, each installing two monopiles per day) foundations, and the OCS–DC foundation.	OCS–DC ...	Jacket pin pile, 4 per day.	2	8	-	-
		WTG	2 vessels, each 2 per day.	25.5	102	-	-
Schedule 5	Concurrent operations; proximal assumptions for concurrent piling of WTG (one vessel installing two monopiles per day) and the OCS–DC foundation (one vessel installing four pin piles per day), and remaining WTG foundations.	OCS–DC & WTG.	Jacket pin pile, 4 per day + Monopile, 2 per day.	2	8 (pin) + 4 (monopile)	0	0
		WTG	Monopile, 2 per day.	28	60	21	42

* **Note:** No specific installation Schedule was carried forward; however, the highest Level A and Level B exposure estimates produced from across all five installation Schedules was selected and summarized as the most conservative for analysis purposes, given uncertainty in the exact construction approach at this stage of the project.
 - not applicable.

Sunrise Wind assumed that a maximum of three (if consecutive installation) or four (if concurrent installation) WTG monopile foundations and four pin piles related to the jacket foundation for the OCS–DC may be driven in 24 hours. It is unlikely that this installation rate would be consistently possible throughout the SRWF construction phase, but this schedule was considered to have the greatest potential for Level A harassment (*i.e.*, PTS) and was, therefore, carried forward into take estimation. Exposure ranges (ER95percent) to Level A SELcum thresholds resulting from animal exposure modeling assuming various consecutive pile installation scenarios

and 10 dB of attenuation by a NAS are summarized in Table 15. In the event two installation vessels are able to work simultaneously, exposure ranges (ER95percent) to Level A SELcum thresholds from the three concurrent pile installation scenarios summarized in Section 6.3 and 10 dB of attenuation by a NAS are summarized in Table 16. Comparison of the results in Table 15 and Table 16 show that the scenario assuming consecutive installation of 2 WTG monopiles per day (which assumes the piles are located close to each other) and concurrent installation of 4 WTG monopiles per day at distant locations yield very similar results. This makes logical sense because the close proximity of the two piles installed at

each location in the concurrent scenario is very similar to the 2 piles installed in the consecutive installation scenario and animals are unlikely to occur in both locations in the concurrent scenarios when they are far apart. Exposure ranges from the “Proximal” concurrent installation scenario (assuming close distances between concurrent pile installations) are slightly greater than from the “Distal” concurrent installation scenario (assuming long distances between concurrent pile installations) reflecting the fact that animals may be exposed to slightly higher cumulative sound levels when concurrent pile installations occur close to each other.

Table 15 -- Exposure ranges (ER95percent) to Level A cumulative sound exposure level (SEL_{cum}) thresholds for marine mammals from consecutive installation of two and three 7/12 m WTG monopiles (10,398 strikes each) and four 4-m OCS-DC jacket foundation pin piles (17,088 strikes each) in 1 day during the summer and winter seasons using a IHC S-4000 hammer and assuming 10 dB of broadband noise attenuation

Hearing Group	SEL _{cum} Threshold (dB re 1 μ Pa ² ·s)	Range (km)					
		WTG Monopile 2-Piles/Day		WTG Monopile 3-Piles/Day		OCS-DC Jacket 4 piles/Day	
		Summer	Winter	Summer	Winter	Summer	Winter
Low-frequency	183						
Fin Whale*		3.91	4.19	3.68	4.24	5.55	6.42
Humpback Whale		3.63	3.8	3.4	3.82	5.13	3.2
Minke Whale		1.98	2.12	1.86	2.02	2.88	6.03
NA Right Whale*		2.66	2.81	2.51	2.9	3.62	4.06
Sei Whale*		2.69	3.09	2.67	3.01	4.22	4.73
Mid-frequency	185	0	0	0	0	0	0
High-frequency	155	0	0	0	0	0.81	0.59
Phocid pinnipeds	185	<0.01	<0.01	0.03	0.03	1.72	1.73

Table 16 -- Exposure ranges (ER95percent) to Level A cumulative sound exposure level (SEL_{cum}) thresholds for marine mammals from concurrent installation scenarios including up to four 7/12 m WTG monopiles (10,398 strikes each) per day in close proximity to each other (“Proximal”) and distant from each other (“Distal”) or two 7/12 m WTG monopiles and four 4-m OCS-DC jacket foundation pin piles (17,088 strikes each) in 1 day during the summer and winter seasons using a IHC S-4000 hammer and assuming 10 dB of broadband noise attenuation

Hearing Group	SEL _{cum} Threshold (dB re 1 μ Pa ² ·s)	Range (km)					
		Proximal WTG Monopiles 4-Piles/Day		Distal WTG Monopiles 4-Piles/Day		2 WTG Monopiles and 4 OCS-DC Jacket	
		Summer	Winter	Summer	Winter	Summer	Winter
Low-frequency	183						
Fin Whale*		4.23	4.83	3.8	3.8	5.25	6.21
Humpback Whale		4.02	4.32	3.66	3.66	4.83	5.68
Minke Whale		2.17	2.37	1.96	1.96	2.71	3.07
NA Right Whale*		2.94	3.31	2.61	2.61	3.49	3.85
Sei Whale*		3.18	3.37	2.74	2.74	3.97	4.65
Mid-frequency	185	0	0	0	0	0	0
High-frequency	155	0	0	0	0	0.61	0.57
Phocid pinnipeds	185	0.22	0.16	0.22	0.22	1.62	1.74

As described previously, Sunrise Wind also modeled acoustic ranges to NMFS harassment thresholds. Because the Level B harassment threshold is instantaneous, the acoustic range to the

160dB thresholds is the more appropriate and conservative method used in this analysis (although NMFS notes the differences between the exposure ranges calculated assuming

animal movement modeling and acoustic ranges are negligible). Table 17 presents the acoustic ranges resulting from JASCO’s source and propagation models.

TABLE 17—ACOUSTIC RANGES (R95PERCENT) IN KM TO THE LEVEL B, 160 dB RE 1 μPa SOUND PRESSURE LEVEL (SPLRMS) THRESHOLD FOR IMPACT PILE DRIVING DURING 7/12 M WTG MONOPILE AND OCS–DC JACKET FOUNDATION PIN PILE (4 M) INSTALLATION USING AN IHC S–4000 HAMMER AND ASSUMING 10 dB OF BROADBAND NOISE ATTENUATION.

Range					
WTG monopile foundation (3,200 kJ)		OCS–DC jacket foundation (4,000 kJ)			
Summer	Winter	Summer	Winter	Summer	Winter
6.07	6.5	6.49	6.97	6.47	6.63

Sunrise Wind modeled potential Level A harassment and Level B harassment density-based exposure estimates for all five foundation installation scenarios: consecutive pile driving (Schedules 1 and 2) and concurrent pile driving (Schedules 3, 4, and 5). For both WTG monopile and OCS–DC jacket foundation installation, mean monthly densities for all species were calculated by first selecting density data from 5 × 5 km (3.1 × 3.1 mile) grid cells (Roberts *et al.*, 2016; Roberts and Halpin, 2022) both within the Lease Area and out to 10 km (6.2 mi) from the perimeter of the Lease Area. This is a reduction from the 50 km (31 mi) perimeter used in the adequate &

complete ITR application from May 2022. The relatively large area selected for density estimation encompasses and extends approximately to the largest estimated exposure acoustic range (ER_{95percent} to the isopleth corresponding to Level B harassment, assuming 10 dB of noise attenuation) for all hearing groups using the unweighted threshold of 160 dB re 1 μPa (rms). Please see Figure 11 in Sunrise Wind’s Updated Density and Take Estimation Memo for an example of a density map showing the Roberts and Halpin (2022) density grid cells overlaid on a map of the SRWF.

For monopile installation, the exposure calculations assumed 84 WTG

monopiles would be installed in the highest density month and that the remaining 18 WTG monopiles would be installed within the second highest density month for each marine mammal species (excluding January–April). Sunrise Wind assumed that the OCS–DC jacket foundation would be installed in the month with the highest density for each species. Due to differences in the seasonal migration and occurrence patterns, the month selected for each species differs. Table 18 identifies the months and density values used in the exposure estimate models for foundation installation.

TABLE 18—MAXIMUM AVERAGE MONTHLY MARINE MAMMAL DENSITIES DURING FOUNDATION PILE INSTALLATION

Marine mammal species	Maximum monthly (May–December) density (individual/km ²)	Maximum density month	2nd highest monthly density (individual/km ²)	2nd highest density month
<i>Mysticetes:</i>				
Blue whale *	N/A	Annual	N/A	Annual.
Fin whale *	0.0043	July	0.037	August.
Humpback whale *	0.0025	May	0.0024	June.
Minke whale	0.0180	May	0.0137	June.
North Atlantic right whale *	0.0018	May	0.0015	December.
Sei whale *	0.0017	May	0.0007	November.
<i>Odontocetes:</i>				
Atlantic spotted dolphin	0.0030	October	0.0015	September.
Atlantic white-sided dolphin	0.0270	May	0.0234	June.
Bottlenose dolphin	0.0162	August	0.0160	July.
Common dolphin	0.1816	September	0.1564	October.
Harbor porpoise	0.0529	May	0.0451	December.
Pilot whales	0.0018	Annual	0.0018	Annual.
Risso’s dolphin	0.0021	December	0.0010	November.
Sperm whale *	0.0006	August	0.0004	September.
<i>Phocid (Pinnipeds):</i>				
Seals (Harbor and Gray)	0.1712	May	0.1668	December.

* Denotes species listed under the Endangered Species Act.

For some species, modifications to the densities used were necessary; these are described here. The estimated monthly density of seals provided in Roberts and

Halpin (2022) includes all seal species present in the region as a single guild. To split the resulting “seal” density-based exposure estimate by species

(harbor and gray seals), the estimate was multiplied by the proportion of the combined abundance attributable to each species. Specifically, the SAR N_{best}

abundance estimates (Hayes *et al.*, 2021) for the two species (gray seal = 27,300, harbor seal = 61,336; total = 88,636) were summed and divided the total by the estimate for each species to get the proportion of the total for each species (gray seal = 0.308; harbor seal = 0.692). The total estimated exposure from the pooled seal density provided by Roberts and Halpin (2022) was then multiplied by these proportions to get the species specific exposure estimates. Monthly densities were unavailable for pilot whales, so the annual mean density was used instead. The blue whale density was considered too low to be carried into exposure estimation so the amount of blue whale take that Sunrise Wind requests (see Estimated Take) is instead based on group size. Table 18 shows the first and second maximum average monthly densities by species that were incorporated in exposure modeling to obtain conservative exposure estimates.

No single schedule resulted in the greatest amount of potential for injury or behavioral harassment. Sunrise Wind identified the following trends when looking across all construction schedules:

- Schedule 2 (consecutive installation) resulted in the highest number of Level B harassment exposures.
- Schedule 3 (concurrent proximal monopile installation) resulted in slightly higher Level A harassment exposures than sequential operations or other types of concurrent operations. This is likely because marine mammals would be exposed to two sources at the same moment and as one event rather than by two separate and distinct construction events.

- There were no SEL injury exposures at any attenuation level for any construction schedule.

- Harbor porpoise Level A harassment exposures were consistent regardless of the construction schedule.

- Schedule 3 tended to result in a reduced amount of take than other construction schedules for phocid pinnipeds.

- Construction Schedule 5 has similar results to Construction Schedule 1.

These two schedules are almost identical except that the 2 days of sequential operations in Construction Schedule 1 would be replaced by 2 days of concurrent operations in Construction Schedule 5 while the remaining 28 days of operations would remain the same.

As several of these schedules assume nearby concurrent operations, modeling efforts found that, because of the SEL metric used to evaluate PTS and the greater energy accumulated from multiple sources over a larger footprint, concurrent nearby operations may marginally increase the total number of injurious takes of marine mammals by PTS (Level A harassment) even though the number of days of operations goes down in these situations. Alternately, while the footprint ensonified above the behavioral harassment threshold by two concurrent installations may be larger than that of a single operation, because the behavioral harassment threshold is based on SPL and not accumulated energy, the number of behavioral disruptions of marine mammals (Level B harassment) are reduced when the number of days of pile driving is reduced. The fact that concurrent operations will likely result in the construction activities being completed

in a shorter amount of time (fewer days), this is also considered a benefit, and more broadly, in the context of how repeated or longer total duration activities may impact marine mammals and their habitat.

As described above, no single schedule was carried forward specifically for take estimates. Sunrise Wind compiled the maximum amount of take modeled for each species from each construction schedule to consider in their take estimates. Moreover, as described above, other factors influenced Sunrise Wind's take request. However, we note that final take estimates and the amount of take NMFS proposes to authorize, represent the maximum amount of take from any method considered (exposure modeling, static Level B harassment calculations (*i.e.*, density × ensonified area × days of pile driving), PSO data, or group size. Tables 19 and 20 represent take estimates from all methods for consecutive and concurrent pile driving schedules. Table 19 represents the highest amount of take from all methods and all schedules, which was used in the total take tables representing all activities presented later in this section.

As previously discussed, only 94 WTG foundations would be permanently installed for the Sunrise Wind project; however, Sunrise Wind has considered the possibility that some piles may be started but not fully installed in some locations due to installation feasibility issues. Therefore, the take estimates reflect pile driving activities associated with 102 foundations to account for up to 8 piles that may be started but then re-driven at another position.

TABLE 19—CONSECUTIVE SCHEDULES—ESTIMATED LEVEL A AND LEVEL B HARASSMENT TAKE FROM INSTALLATION OF 102 WTG MONOPILE FOUNDATIONS^a AND 1 OCS—DC PILED JACKET FOUNDATION AMONG SCHEDULES 1 AND 2, ASSUMING 10 dB OF NOISE ATTENUATION

Marine mammal species	Exposure modeling take estimate		Static Level B take estimates ^b	PSO data take estimates	Mean group size	Highest take by Level B harassment
	Level A (SPL _{cum})	Level B (SPL _{rms})				
<i>Mysticetes:</i>						
Blue whale *	N/A	N/A	0.2	.....	1.0	1
Fin whale *	17.8	38.3	57.7	20.3	1.8	58
Humpback whale *	13.6	27.3	34.4	60.5	2.0	61
Minke whale	114.6	354.6	237.0	7.4	1.2	355
North Atlantic right whale *	7.8	21.1	24.5	1.8	2.4	25
Sei whale *	6.0	16.3	20.8	0.5	1.6	21
<i>Odontocetes:</i>						
Atlantic spotted dolphin	0.0	8.2	37.1	.....	29.0	38
Atlantic white-sided dolphin	0.0	533.3	363.0	5.9	27.9	534
Bottlenose dolphin	0.0	237.6	222.0	66.0	7.8	238
Common dolphin	0.0	5,049.4	2,750.6	1,680.6	34.9	5,050
Harbor porpoise	3.9	631.2	726.2	1.7	2.7	727
Pilot whales	0.0	33.4	25.3	.....	8.4	34
Risso's dolphin	0.0	28.5	25.8	4.6	5.4	29

TABLE 19—CONSECUTIVE SCHEDULES—ESTIMATED LEVEL A AND LEVEL B HARASSMENT TAKE FROM INSTALLATION OF 102 WTG MONOPILE FOUNDATIONS^a AND 1 OCS–DC PILED JACKET FOUNDATION AMONG SCHEDULES 1 AND 2, ASSUMING 10 dB OF NOISE ATTENUATION—Continued

Marine mammal species	Exposure modeling take estimate		Static Level B take estimates ^b	PSO data take estimates	Mean group size	Highest take by Level B harassment
	Level A (SPL _{cum})	Level B (SPL _{rms})				
Sperm whale*	0.0	7.1	7.9	.....	1.5	8
<i>Phocid (Pinnipeds):</i>						
Gray Seal	2.1	453.9	765.4	4.6	1.4	766
Harbor Seal	7.5	1,261.7	1,719.7	5.9	1.4	1,720

* Denotes species listed under the Endangered Species Act.

^aOnly 94 WTG foundations would be installed but to account for up to 8 pilesthat may have to be re-installed at a different position, Sunrise Wind has estimated take from installation of 102 WTG foundations.

^b“Static” Level B take estimates are from the standard density × area × number of days method, not from exposure modeling.

TABLE 20—CONCURRENT SCHEDULES—ESTIMATED LEVEL A AND LEVEL B HARASSMENT TAKE FROM INSTALLATION OF 102 WTG MONOPILE FOUNDATIONS^a AND 1 OCS–DC PILED JACKET FOUNDATION AMONG SCHEDULES 3, 4, AND 5, ASSUMING 10 dB OF NOISE ATTENUATION

Marine mammal species	Proximal WTG monopiles (4 piles/day)		Distal WTG monopiles (4 piles/day)		2 WTG monopiles and 4 OCS–DC jacket pin piles		Maximum among all three schedules	
	Level A harassment (SPL _{cum})	Level B harassment (SPL _{rms})	Level A harassment (SPL _{cum})	Level B harassment (SPL _{rms})	Level A harassment (SPL _{cum})	Level B harassment (SPL _{rms})	Level A harassment (SPL _{cum})	Level B harassment (SPL _{rms})
<i>Mysticetes:</i>								
Blue whale*	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Fin whale*	18.9	33.2	18.5	37.1	18.7	37.7	18.9	37.7
Humpback whale*	13.2	22.1	11.9	24.4	13.8	25.8	13.8	25.8
Minke whale	130.1	287.1	118.4	363.2	122.5	361.6	130.1	363.2
North Atlantic right whale*	8.4	16.8	8.3	21.8	7.3	20.1	8.4	21.8
Sei whale*	6.6	14.7	6.6	17.4	6.3	17.5	6.6	17.5
<i>Odontocetes:</i>								
Atlantic spotted dolphin	0.0	18.9	0.0	18.2	0.0	10.2	0.0	18.9
Atlantic white-sided dolphin	0.0	421.6	0.0	537.0	0.0	522.7	0.0	537.0
Bottlenose dolphin	0.0	191.5	0.0	226.3	0.0	233.0	0.0	233.0
Common dolphin	0.0	4,109.4	0.0	5,151.1	0.0	5,196.9	0.0	5,196.9
Harbor porpoise	3.9	522.5	3.9	628.1	4.0	621.1	4.0	628.1
Pilot whales	0.0	26.5	0.0	33.0	0.0	32.5	0.0	33.0
Risso's dolphin	0.0	23.7	0.0	31.4	0.0	29.8	0.0	31.4
Sperm whale*	0.0	5.8	0.0	6.9	0.0	7.1	0.0	7.1
<i>Phocid (Pinnipeds):</i>								
Gray Seal	1.6	354.1	2.0	409.9	1.7	416.6	2.0	416.6
Harbor Seal	6.9	1,068.9	8.7	1,238.2	7.8	1,157.5	8.7	1,238.2

* Denotes species listed under the Endangered Species Act.

^aOnly 94 WTG foundations would be installed but to account for up to 8 pilesthat may have to be re-installed at a different position, Sunrise Wind has estimated take from installation of 102 WTG foundations.

Table 21 presents the maximum amount exposures among all five schedule modeled (see Küsel *et al.*, 2022 for exposure estimates for each schedule), results from a static approach to calculate Level B harassment take, other available data to consider (mean group size and PSO data), and importantly, the amount of take Sunrise Wind requested and NMFS proposes to authorize incidental to installing WTG and OCS–DC foundations. NMFS notes that in its application, Sunrise Wind requested take by Level A harassment for humpback whales only as this was based on the largest predicted exposure range for this specific species. However, the new Roberts and Halpin (2022) density estimates resulted in Level A harassment takes for other marine mammal species’ (*i.e.*, fin whale,

humpback whale, minke whale, sei whale, harbor porpoise, gray seal, harbor seal) during foundation installation, which led to a reevaluation of how Level A harassment takes were determined during the foundation installation associated with the Sunrise Wind proposed project. As it is possible for some animals to occur within the relevant distances for durations long enough to result in Level A harassment, additional take was evaluated and requested. Although Sunrise Wind expects that most species will temporarily avoid the area during the foundation installation activities, and in combination with the proposed mitigation and monitoring measures, the potential for Level A harassment is very low. However, there may be some situations where pile driving cannot be

stopped due to safety concerns related to pile instability. To estimate the potential for PTS, Sunrise Wind assumed that some animals may go undetected near the outer perimeter of the largest modeled exposure range (approximately within 500 m). Given the area of the water is represented by a band that is around 500-m wide on the inside of the modeled exposure ranges, it was estimated that this made up approximately 20 to 25 percent of the total area of the exposure range. Because of these reasons, Sunrise Wind evaluated that up to 20 percent of the model-predicted Level A harassment take (except North Atlantic right whales) could occur. Therefore, Sunrise Wind requested and NMFS proposed to authorize, take in the amount of 20 percent of the modeled PTS exposures

for each species. However, due to the enhanced mitigation measures for North Atlantic right whales (see Proposed Mitigation section), no Level A harassment takes are requested for this

species nor is NMFS proposing to authorize any.

Per Sunrise Wind’s estimated schedule, it is anticipated that all foundations would be installed in Year

1; therefore, Table 21 represents the maximum amount of take that would occur in any given year from foundation installation; however, NMFS notes construction schedules may shift.

TABLE 21—MAXIMUM ESTIMATED AMOUNT OF LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKE FROM INSTALLATION OF 102 WTG MONOPILE FOUNDATIONS^a AND 1 OCS–DC PILED JACKET FOUNDATION AMONG ALL FIVE SCHEDULES, ASSUMING 10 dB OF NOISE ATTENUATION

Marine mammal species	Exposure modeling take estimate		Static level B take estimates ^b	PSO data take estimates	Mean group size	Proposed level A take	Proposed level B take
	Level A (SPL _{cum})	Level B (SPL _{rms})					
<i>Mysticetes:</i>							
Blue whale *	n/a	n/a	0.2	.....	1.0	.....	1
Fin whale *	18.9	37.7	59.3	20.3	1.8	4	60
Humpback whale *	13.8	25.8	34.8	60.5	2.0	3	61
Minke whale	130.1	363.2	247.1	7.4	1.2	27	364
North Atlantic right whale *	8.4	21.8	24.6	1.8	2.4	0	25
Sei whale *	6.6	17.5	23.3	0.5	1.6	2	24
<i>Odontocetes:</i>							
Atlantic spotted dolphin	0.0	18.9	40.6	.....	29.0	0	41
Atlantic white-sided dolphin	0.0	537.0	371.7	5.9	27.9	0	537
Bottlenose dolphin	0.0	237.6	222.4	66.0	7.8	0	238
Common dolphin	0.0	5,196.9	2,876.9	1,680.6	34.9	0	5,197
Harbor porpoise	4.0	628.1	728.5	1.7	2.7	1	729
Pilot whales	0.0	33.4	25.3	.....	8.4	0	34
Risso’s dolphin	0.0	31.4	28.5	4.6	5.4	0	32
Sperm whale *	0.0	7.1	8.4	.....	1.5	0	9
<i>Phocid (Pinnipeds):</i>							
Gray Seal	2.0	449.8	765.4	4.6	1.4	1	766
Harbor Seal	8.7	1,242.1	1,719.7	5.9	1.4	2	1,720

* Denotes species listed under the Endangered Species Act.

^a Only 94 WTG foundations would be installed but to account for up to 8 pilesthat may have to be re-installed at a different position, Sunrise Wind has estimated take from installation of 102 WTG foundations.

^b “Static” Level B take estimates are from the standard density × area × number of days method, not from exposure modeling.

Export Cable Landfall Construction

We previously described Sunrise Wind’s acoustic modeling methodologies and identified that Sunrise Wind applied the static method to estimate take (i.e., no exposure modeling was conducted for cable landfall construction work). Here, we present the results from that modeling. Table 22 identifies the modeled acoustic ranges to the PTS (SEL_{cum}) thresholds from impact pile driving (via pneumatic hammering) of the casing pipe. Level A

harassment (SPL_{pk}) thresholds were not exceeded in the model and therefore, will not be discussed further. The modeled Level B harassment threshold distance is 920 m (Table 22).

Modeled distances to PTS thresholds are larger than distances to the Level B harassment threshold due to the high strike rate of the pneumatic hammer (Table 22). However, low-frequency cetaceans are not expected to occur frequently close to this nearshore site and individuals of any species

(including seals) are not expected to remain within the estimated SEL_{cum} threshold distances for the entire 3-hour duration of piling in a day. Furthermore, with the implementation of planned monitoring and mitigation (see Proposed Mitigation and Monitoring section), the potential for PTS incidental to pneumatic hammering is not anticipated. Sunrise Wind did not request nor is NMFS proposing to authorize Level A harassment incidental to installation of the casing pipe.

TABLE 22—ACOUSTIC RANGES (R_{95percent}) IN METERS TO LEVEL A HARASSMENT (PTS) AND LEVEL B HARASSMENT THRESHOLDS FROM IMPACT PILE DRIVING DURING CASING PIPE INSTALLATION FOR MARINE MAMMAL FUNCTIONAL HEARING GROUPS, ASSUMING A WINTER SOUND SPEED PROFILE

Marine mammal hearing group	R _{95percent} (m)	
	Level A harassment SEL _{cum} thresholds (dB re 1 μPa ² -s)	Level B harassment SPL _{rms} threshold (120 dB re 1 μPa)
Low-frequency cetaceans	3,870	920
Mid-frequency cetaceans	230	.....
High-frequency cetaceans	3,950	.....
Phocid pinnipeds	1,290	.....

Each casing pipe would be supported by six goal posts to allow the borehole exit point to remain clear of mud. Each goal post would be supported by two

vertical sheet piles (a total of 12 sheet piles) that would be installed using a vibratory hammer (i.e., an American Piledriving Equipment model 300 or

similar), with a potential for up to 10 additional sheet piles being installed to support ongoing construction activities (a total of 22 sheet piles). Sunrise Wind

anticipates installing the 22 sheet piles over 6 days (approximately four piles per day). Each sheet pile would take up to 2 hours to install for a total of 8 hours per day. Removal timelines would be similar (up to six days total), equating to a total of 12 days for both installation and removal.

Similar to the modeling approach for impact pile driving, distances to harassment thresholds are reported as $R_{95\text{percent}}$ values (Table 23). Given the nature of vibratory pile driving and the very small distances to Level A harassment thresholds (5–190 m), which accounts for eight hours of vibratory

pile driving per day, vibratory driving is not expected to result in Level A harassment. Sunrise Wind did not request nor is NMFS proposing to authorize any Level A harassment incidental to installation or removal of sheet piles.

TABLE 23—ACOUSTIC RANGES ($R_{95\text{percent}}$) IN METERS TO LEVEL A HARASSMENT (PTS) AND LEVEL B HARASSMENT THRESHOLDS FROM VIBRATORY PILE DRIVING DURING SHEET PILE INSTALLATION FOR MARINE MAMMAL FUNCTIONAL HEARING GROUPS, ASSUMING A WINTER SOUND SPEED PROFILE

Marine mammal hearing group	$R_{95\text{percent}}$ (m)	
	Level A harassment SEL _{cum} thresholds (dB re 1 μ Pa ² -s)	Level B harassment SPL _{rms} threshold (120 dB re 1 μ Pa)
Low-frequency cetaceans	50	9,740
Mid-frequency cetaceans .....	.....	.....
High-frequency cetaceans	190	.....
Phocid pinnipeds	10	.....

The acoustic ranges to the Level B harassment threshold were used to calculate the ensonified area around the cable landfall construction site. The Ensonified Area is calculated as the following:

$$\text{Ensonified Area} = \pi \times r^2,$$

where r is the linear acoustic range distance from the source to the isopleth to the Level B harassment thresholds.

Based on the duration of both the installation/removal of the sheet piles and the casing pipe, different daily ensonified values are necessary to pull into this calculation for the cable landfall take analysis. For the vibratory pile driving associated with the sheet pile installation and removal, it was assumed that the daily ensonified area

was 149 km² (57.53 mi²) or a total ensonified area of 1,788 km² (1,111 mi²). For impact pile driving associated with the casing pipe by the pneumatic hammer, it was assumed that the daily ensonified area was 0.92 km² (0.36 mi²) with a total ensonified area of 10.6 km² (6.58 mi²) to result.

To estimate marine mammal density around the nearshore landfall site, the greatest ensonified area plus a 10-km buffer was then intersected with the density grid cells for each individual species to select all of those grid cells that the buffer intersects (Figure 10 in Sunrise Wind’s Updated Density and Take Estimation Memo). Since the timing of landfall construction activities may vary somewhat from the proposed

schedule, the highest average monthly density from January through December for each species was selected and used to estimate exposures from landfall construction (Table 24).

For some species where little density information is available (*i.e.*, blue whales, pilot whales), the annual density was used instead. Given overlap with the pinniped density models as the Roberts and Halpin (2022) dataset does not distinguish between species, a collective “pinniped” density was used and then split based on the relative abundance for each species for the estimated take (Roberts *et al.*, 2016). These approaches were the same as described in the WTG and OCS–DC Foundation Installation section.

TABLE 24—MAXIMUM AVERAGE MONTHLY MARINE MAMMAL DENSITIES IN AND NEAR THE LANDFALL LOCATION AND THE MONTH IN WHICH EACH MAXIMUM DENSITY OCCURS

Marine mammal species	Maximum monthly density (individual/km ²)	Maximum density month
<i>Mysticetes:</i>		
Blue whale *	0.000	Annual.
Fin whale *	0.0013	January.
Humpback whale *	0.0016	December.
Minke whale	0.0072	May.
North Atlantic right whale *	0.0009	February.
Sei whale *	0.0006	December.
<i>Odontocetes:</i>		
Atlantic Spotted Dolphin	0.000	September.
Atlantic White-sided Dolphin	0.0040	May.
Bottlenose Dolphin	0.0540	July.
Common Dolphin	0.0336	November.
Harbor Porpoise	0.0384	January.
Pilot Whales	0.0000	Annual.
Risso’s Dolphin	0.0001	December.
Sperm Whale *	0.0002	November.
<i>Phocid (Pinnipeds):</i>		
Seals (Harbor and Gray)	0.3789	June.

* Denotes species listed under the Endangered Species Act.

To calculate exposures, the average marine mammal densities from Table 24 were multiplied by the daily ensonified area (149 km²) for installation/removal of sheet piles and for the installation/removal of the casing pipe (0.92 km²). Given that use of the vibratory hammer during sheet pile installation and removal may occur on up to 12 days, the daily estimated take (which is the product of density × ensonified area) was multiplied by 12 to produce the

results shown in Table 25. The same approach was undertaken for the use of the pneumatic hammer for the casing pipe with the exception that the 8 total days was used.

To be conservative, Sunrise Wind has requested take by Level B harassment based on the highest exposures predicted by the density-based, PSO based, or average group size-based estimates, and the take proposed for authorization is indicated in the last

column of Table 25. As described above, given the small distances to Level A harassment isopleths, Level A harassment incidental to this activity is not anticipated, even absent mitigation, although mitigation measures are proposed that would further reduce the risk. Therefore, Sunrise Wind is not requesting and NMFS is not proposing to authorize Level A harassment related to cable landfall construction activities.

TABLE 25—ESTIMATE LEVEL B HARASSMENT FROM EXPORT CABLE LANDFALL CONSTRUCTION

Marine mammal species	Density-based take estimate		Total density-based take estimate	PSO data take estimate	Mean group size	Highest level B takes
	Sheet piles	Casing pipe				
<i>Mysticetes:</i>						
Blue whale *	0.0	0.0	0.0	.....	1.0	1
Fin whale	2.3	0.0	2.3	3.1	1.8	4
Humpback whale	2.8	0.0	2.9	9.3	2.0	10
Minke whale	12.8	0.1	12.9	1.1	1.2	13
North Atlantic right whale *	1.7	0.0	1.7	0.3	2.4	3
Sei whale *	1.0	0.0	1.0	0.1	1.6	2
<i>Odontocetes:</i>						
Atlantic spotted dolphin	0.1	0.0	0.1	.....	29.0	29
Atlantic white-sided dolphin	7.2	0.0	7.2	0.9	27.9	28
Bottlenose dolphin	96.6	0.6	97.2	10.2	7.8	98
Common dolphin	60.0	0.4	60.4	258.5	34.9	259
Harbor porpoise	68.7	0.4	69.1	0.3	2.7	70
Pilot whales	0.0	0.0	0.0	.....	8.4	9
Risso's dolphin	0.2	0.0	0.2	0.7	5.4	6
Sperm whale *	0.3	0.0	0.3	.....	1.5	2
<i>Phocid (Pinnipeds):</i>						
Gray Seal	208.7	1.2	209.9	0.7	1.4	210
Harbor Seal	468.9	2.8	471.7	0.9	1.4	472

* Denotes species listed under the Endangered Species Act.

UXO/MEC Detonation

Sunrise Wind may detonate up to three UXO/MECs within the project's Lease Area over the 5-year effective period of the proposed rule. Charge weights of 2.3 kgs, 9.1 kgs, 45.5 kgs, 227 kgs, and 454 kgs, were modeled to determine acoustic ranges to mortality, gastrointestinal injury, lung injury, PTS, and TTS thresholds. To do this, the source pressure function used for estimating peak pressure level and impulse metrics was calculated with an empirical model that approximates the rapid conversion of solid explosive to gaseous form in a small bubble under high pressure, followed by exponential pressure decay as that bubble expands (Hannay and Zykov, 2022). This initial empirical model is only valid close to the source (within tens of meters), so alternative formulas were used beyond those distances to a point where the sound pressure decay with range transitions to the spherical spreading model. The SEL thresholds occur at distances of many water depths in the

relatively shallow waters of the Project (Hannay and Zykov, 2022). As a result, the sound field becomes increasingly influenced by the contributions of sound energy reflected from the sea surface and sea bottom multiples times. To account for this, propagation modeling was carried out in decade frequency bands using JASCO's MONM, as described in the WTG and OCS-DC Foundation Installation section above. This model applies a parabolic equation approach for frequencies below 4 kHz and a Gaussian beam ray trace model at higher frequencies (Hannay and Zykov, 2022). In Sunrise Wind project's location, sound speed profiles generally change little with depth, so these environments do not have strong seasonal dependence (see Figure 2 in the Sunrise Wind Underwater Acoustic Modeling of UXO/MEC report on NMFS' website). The propagation modeling for UXO/MEC detonations was performed using an average sound speed profile for "September", which is representative of the most likely time of year UXO/MEC detonation activities

would occur for Sunrise Wind's proposed action in the Lease Area. Please see the supplementary report for Sunrise Wind's ITA application titled "Underwater Acoustic Modeling of Detonations of Unexploded Ordnance (UXO) for Orsted Wind Farm Construction, US East Coast", as found on NMFS' website (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-sunrise-wind-llc-construction-and-operation-sunrise-wind>) for more technical details about the modeling methods, assumptions and environmental parameters used as inputs (Hannay and Zykov, 2022).

The exact type and net explosive weight of UXO/MECs that may be detonated are not known at this time; however, they are likely to fall into one of the bins identified in Table 26. To capture a range of potential UXO/MECs, five categories or "bins" of net explosive weight, as established by the U.S. Navy (2017a), were selected for acoustic modeling (Table 26).

TABLE 26—NAVY “BINS” AND CORRESPONDING MAXIMUM CHARGE WEIGHTS (EQUIVALENT TNT) MODELED

Navy bin designation	Maximum equivalent (kg)	Weight (TNT) (lbs)
E4	2.3	5
E6	9.1	20
E8	45.5	100
E10	227	500
E12	454	1,000

These charge weights were modeled at four different locations off Rhode Island, consisting of different depths, including: 12 m (Site S1), 20 m (Site S2), 30 m (Site S3), and 45 m (Site S4). Sites S3 (30 m depth) and S4 (45 m depth) were deemed to be representative of the Sunrise Wind Lease Area where detonations could occur (see Figure 1 in Hannay and Zykov, 2022).

All distances to isopleths modeled can be found in Hannay and Zykov (2022). It is not currently known how easily Sunrise Wind would be able to identify the size and charge weights of UXOs/MECs in the field. Therefore, NMFS has proposed to require Sunrise Wind to implement mitigation measures assuming the largest E12 charge weight as a conservative approach. As such, distances to PTS and TTS thresholds for only the 454 kg UXO/MEC is presented in Table 27 and 28, respectively, as this size UXO has the greatest potential for these impacts and is what is used to estimate take. NMFS notes that it is extremely unlikely that all three of the UXO/MECs found and needed to be detonated for the Sunrise Wind project would consist of this 454 kg charge weight. If Sunrise Wind is able to reliably demonstrate that they can easily and accurately identify charge weights in the field, NMFS will consider mitigation and monitoring zones based on UXO/MEC charge weight for the final rulemaking rather than assuming the largest charge weight in every situation.

To further reduce impacts to marine mammals, Sunrise Wind would deploy a noise attenuation system during detonation events similar to that described for monopile installation and expects that this system would be able to achieve 10 dB attenuation. This expectation is based on an assessment of UXO/MEC clearance activities in European waters as summarized by Bellman and Betke (2021). Because Sunrise Wind committed to using a noise abatement system during any UXO/MEC denotation event, attenuated acoustic ranges were applied to the take estimates.

Given the impact zone sizes and the required mitigation and monitoring measures, neither mortality nor non-auditory injury are considered likely to result from the activity. NMFS preliminarily concurs with Sunrise Wind’s analysis and does not expect or propose to authorize any non-auditory injury, serious injury, or mortality of marine mammals from UXO/MEC detonation. The modeled distances, assuming 10 dB of sound attenuation, to the mortality threshold for all UXO/MECs sizes for all animal masses are small (*i.e.*, 5–353 m; see Tables 35–38 in Sunrise Wind’s supplemental UXO/MEC modeling report; Hannay and Zykov, 2022), as compared to the distance/area that can be effectively monitored. The modeled distances to non-auditory injury thresholds range from 5–648 m, assuming 10 dB of sound attenuation (see Tables 30–34 in Sunrise

Wind’s supplemental UXO/MEC modeling report; Hannay and Zykov, 2022). Sunrise Wind would be required to conduct extensive monitoring using both PSOs and PAM operators and clear an area of marine mammals prior to any detonation of UXOs/MECs. Given that Sunrise Wind would be employing multiple platforms to visually monitor marine mammals as well as passive acoustic monitoring, it is reasonable to assume that marine mammals would be reliably detected within approximately 660 m of the UXO/MEC being detonated, the potential for mortality or non-auditory injury is *de minimis*.

Sunrise Wind did not request and NMFS is not proposing to authorize take by mortality or non-auditory injury. For this reason, we are not presenting all modeling results here; however, they can be found in Sunrise Wind’s UXO/MEC acoustic modeling report (Hannay and Zykov, 2022).

To estimate the maximum ensonified zones that could result from UXO/MEC detonations, the largest acoustic range ($R_{95\text{percent}}$; assuming 10dB attenuation) to PTS and TTS thresholds of a E12 UXO/MEC charge weight were used as radii to calculate the area of a circle ($\pi \times r^2$; where r is the range to the threshold level) for each marine mammal hearing group. The results represent the largest area potentially ensonified above threshold levels from a single detonation within the Sunrise Wind Lease Area (Tables 27 and 28).

TABLE 27—LARGEST SEL-BASED $R_{95\text{percent}}$ PTS-ONSET RANGES (IN METERS) SITE S3 (LEASE AREA) MODELED DURING UXO/MEC DETONATION, ASSUMING 10 dB SOUND REDUCTION

Marine mammal hearing group	Representative site used for modeling	Distance (m) to PTS threshold during E12 (454 kg) detonation		Maximum ensonified zone (km ²)
		R_{max}	$R_{95\text{percent}}$	
Low-frequency cetaceans	Site S3	3,900	3,610	40.9
Mid-frequency cetaceans	Site S3	484	412	0.53
High-frequency cetaceans	Site S3	6,840	6,190	12.0
Phocid pinnipeds (in water)	Site S3	1,600	1,480	6.88

TABLE 28—LARGEST SEL-BASED R_{95percent} TTS-ONSET RANGES (IN METERS) FROM SITE S4 (LEASE AREA) MODELED DURING UXO/MEC DETONATION, ASSUMING 10 dB SOUND REDUCTION

Marine mammal hearing group	Representative site used for modeling	Distance (m) to TTS threshold during E12 (454 kg) detonation		Maximum ensouffied zone (km ²)
		R _{max}	R _{95percent}	
Low-frequency cetaceans	Site S4	13,500	11,800	437
Mid-frequency cetaceans	Site S4	2,730	2,480	19.3
High-frequency cetaceans	Site S4	15,600	13,700	589
Phocid pinnipeds (in water)	Site S4	7,820	7,020	155

Regarding the marine mammal density and occurrence data used in the take estimates for UXO/MECs, to avoid any *in situ* detonations of UXO/MECs during periods when North Atlantic right whale densities are highest in and near the SWEC corridor and Lease Area, Sunrise Wind has opted for a seasonal temporal restriction to not detonate in Federal waters from December 1 through April 30 annually. Accordingly, for each species they selected the

highest average monthly marine mammal density between May and November from Roberts and Halpin (2022) to conservatively estimate exposures from UXO/MEC detonation for a given species in any given year (*i.e.*, assumed all three UXO/MECs would be detonated in the month with the greatest average monthly density). Furthermore, given that UXOs/MECs detonations have the potential to occur anywhere within the Lease Area, a 10

km (6.21 mi) perimeter was applied around the Lease Area. In some cases where monthly densities were unavailable, annual densities were used instead for some species (*i.e.*, blue whales, pilot whale *spp.*).

Table 29 provides those densities and the associated months in which the species-specific densities are highest for the Sunrise Wind Lease Area.

TABLE 29—MAXIMUM AVERAGE MONTHLY MARINE MAMMAL DENSITIES (INDIVIDUALS/KM²) WITHIN 10 km OF THE SUNRISE WIND WIND FARM LEASE AREA FROM MAY THROUGH NOVEMBER, AND THE MONTH IN WHICH THE MAXIMUM DENSITY OCCURS

Marine mammal species	Maximum average monthly density (individual/km ²)	Maximum density month
<i>Mysticetes:</i>		
Blue whale *	0.0000	Annual.
Fin whale *	0.0042	July.
Humpback whale	0.0025	May.
Minke whale	0.0178	May.
North Atlantic right whale *	0.0018	May.
Sei whale *	0.0017	May.
<i>Odontocetes:</i>		
Atlantic spotted dolphin	0.0033	October.
Atlantic white-sided dolphin	0.0268	May.
Bottlenose dolphin	0.0160	August.
Common dolphin	0.1824	September.
Harbor porpoise	0.0517	May.
Pilot whales	0.0018	Annual.
Risso's dolphin	0.0020	December.
Sperm whale *	0.0006	August.
<i>Phocid Pinnipeds:</i>		
Seals (Harbor and Gray)	0.1730	May.

* Denotes species listed under the Endangered Species Act.

To estimate take incidental to UXO/MEC detonations in the Sunrise Wind Lease Area, the maximum ensouffied areas based on the largest R_{95percent} to Level A harassment (PTS) and Level B harassment (TTS) thresholds (assuming 10 dB attenuation) from a single detonation (assuming the largest UXO/MEC charge weight) in the Lease Area, as shown in Tables 27 and 28, were multiplied by three (the maximum number of UXOs/MECs that are expected to be detonated in the Sunrise Wind Lease Area) and then multiplied

by the marine mammal densities shown in Table 29, resulting in the take estimates in Table 30. As described above, Sunrise Wind based the amount of requested take on the number of exposures estimated assuming 10 dB attenuation using a NAS because they believe consistent, successful implementation of this mitigation measure would be possible.

As shown below in Table 30, the likelihood of marine mammal exposures above the PTS threshold is low, especially considering the instantaneous

nature of the acoustic signal and the fact that there will be no more than three. Further, Sunrise Wind has proposed mitigation and monitoring measures intended to avoid the potential for PTS for most marine mammal species, and the extent and severity of Level B harassment (see Proposed Mitigation and Proposed Monitoring and Reporting sections below). However, given the relatively large distances to the high-frequency cetacean Level A harassment (PTS, SEL_{cum}) isopleth applicable to harbor porpoises and the difficulty

detecting this species at sea, Sunrise Wind is requesting and NMFS is proposing to authorize 19 Level A harassment takes of harbor porpoise from UXO/MEC detonations. Similarly, seals are difficult to detect at longer

ranges, and although the distance to the phocid hearing group SEL PTS threshold is not as large as those for high-frequency cetaceans, it may not be possible to detect all seals within the PTS threshold distances even with the

proposed monitoring measures. Therefore, Sunrise Wind requested and NMFS is proposing to authorize take by Level A harassment of 2 gray seals and 3 harbor seals incidental to UXO/MEC detonation.

TABLE 30—ESTIMATED LEVEL A HARASSMENT (PTS) AND LEVEL B HARASSMENT (TTS, BEHAVIOR) TAKES PROPOSED TO BE AUTHORIZED FROM ALL POTENTIAL UXO/MEC DETONATIONS¹ ASSUMING 10 dB NOISE ATTENUATION FOR THE SUNRISE WIND PROJECT

Marine mammal species	Total Level A density-based take estimate	Total Level B density-based take estimate	PSO data take estimate	Mean group size	Requested Level A take	Requested Level B take
<i>Mysticetes:</i>						
Blue whale *	0.0	0.0	.....	1.0	0	1
Fin whale *	0.5	5.5	0.6	1.8	0	6
Humpback whale	0.3	3.3	1.7	2.0	0	4
Minke whale	2.2	23.4	0.2	1.2	0	24
North Atlantic right whale *	0.2	2.3	0.1	2.4	0	3
Sei whale *	0.2	2.2	0.0	1.6	0	3
<i>Odontocetes:</i>						
Atlantic spotted dolphin	0.0	0.2	.....	29.0	0	29
Atlantic white-sided dolphin	0.0	1.6	0.2	27.9	0	28
Bottlenose dolphin	0.0	0.9	1.9	7.8	0	8
Common dolphin	0.3	10.6	48.5	34.9	0	49
Harbor porpoise	18.7	91.4	0.0	2.7	19	92
Pilot whales	0.0	0.1	.....	8.4	0	9
Risso's dolphin	0.0	0.1	0.1	5.4	0	6
Sperm whale *	0.0	0.0	.....	1.5	0	2
<i>Phocid Pinnipeds:</i>						
Gray seal	1.1	24.8	0.1	0.4	2	25
Harbor seal	2.5	55.6	0.2	1.0	3	56

* Denotes species listed under the Endangered Species Act.

¹ Sunrise Wind only expects up to three UXO/MECs to necessitate high-order removal (detonation) and only expects that these would be found in the Lease Area, not the export cable corridor.

HRG Surveys

Sunrise Wind's proposed HRG survey activity includes the use of impulsive

(i.e., boomers and sparkers) and non-impulsive (e.g., CHIRP SBPs) sources (Table 31).

TABLE 31—REPRESENTATIVE HRG SURVEY EQUIPMENT AND OPERATING FREQUENCIES

Equipment type	Representative equipment model	Operating frequency (kHz)
Sub-bottom profiler	EdgeTech 216	2–16
	EdgeTech 424	4–24
	EdgeTech 512	0.7–12
	GeoPulse 5430A	2–17
	Teledyne Benthos Chirp III—TTV 170	2–7
Sparker	Applied Acoustics Dura-spark UHD (400 tip, 500 J)	0.3–1.2
Boomer	Applied Acoustics triple plate S-Boom (700–1,000 J)	0.1–5

Authorized takes would be by Level B harassment only in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated, even absent mitigation, nor proposed to be authorized. Therefore, the potential for Level A harassment is not evaluated further in this document. Sunrise Wind did not request, and NMFS is not proposing to authorize, take by Level A

harassment incidental to HRG surveys. Please see Sunrise Wind's application for details of a quantitative exposure analysis (i.e., calculated distances to Level A harassment isopleths and Level A harassment exposures). No serious injury or mortality is anticipated to result from HRG survey activities.

Specific to HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has developed a tool for determining the sound pressure level (SPL_{rms}) at the 160 dB isopleth for the purposes of estimating the extent of Level B harassment isopleths associated with

HRG survey equipment (NMFS, 2020). This methodology incorporates frequency-dependent absorption and some directionality to refine estimated ensonified zones. Sunrise Wind used NMFS' methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources that operate with different beamwidths, the maximum beam width was used, and the lowest frequency of the source was used when calculating the frequency-dependent absorption coefficient.

NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best scientific information available on source levels associated with HRG equipment and therefore, recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate ranges to the Level A harassment and Level B harassment isopleths. In cases when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used or in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Sunrise Wind utilized the following criteria for selecting the appropriate inputs into the NMFS User Spreadsheet Tool (NMFS, 2018):

(1) For equipment that was measured in Crocker and Fratantonio (2016), the reported SL for the most likely operational parameters was selected.

(2) For equipment not measured in Crocker and Fratantonio (2016), the best available manufacturer specifications were selected. Use of manufacturer specifications represent the absolute maximum output of any source and do not adequately represent the operational source. Therefore, they should be considered an overestimate of the sound propagation range for that equipment.

(3) For equipment that was not measured in Crocker and Fratantonio (2016) and did not have sufficient manufacturer information, the closest proxy source measured in Crocker and Fratantonio (2016) was used.

The Dura-spark measurements and specifications provided in Crocker and Fratantonio (2016) were used for all sparker systems proposed for the HRG surveys. These included variants of the Dura-spark sparker system and various configurations of the GeoMarine Geo-Source sparker system. The data provided in Crocker and Fratantonio (2016) represent the most applicable data for similar sparker systems with comparable operating methods and settings when manufacturer or other

reliable measurements are not available. Crocker and Fratantonio (2016) provide S-Boom measurements using two different power sources (CSP-D700 and CSP-N). The CSP-D700 power source was used in the 700 joules (J) measurements but not in the 1,000 J measurements. The CSP-N source was measured for both 700 J and 1,000 J operations but resulted in a lower source level; therefore, the single maximum source level value was used for both operational levels of the S-Boom.

Table 32 identifies all the representative survey equipment that operates below 180 kHz (*i.e.*, at frequencies that are audible and have the potential to disturb marine mammals) that may be used in support of planned survey activities and are likely to be detected by marine mammals given the source level, frequency, and beamwidth of the equipment. This table also provides all operating parameters used to calculate the distances to threshold for marine mammals.

TABLE 32—SUMMARY OF REPRESENTATIVE HRG SURVEY EQUIPMENT AND OPERATING PARAMETERS

Equipment type	Representative equipment model	Operating frequency (kHz)	Source level SPL rms (dB)	Source level O-pk (dB)	Pulse duration (rms)	Repetition rate (Hz)	Beamwidth (degrees)	Information source
Sub-bottom Profiler	EdgeTech 216	2–16	195	-	20	6	24	MAN.
	EdgeTech 424	4–24	176	-	3.4	2	71	CF.
	EdgeTech 512	0.7–12	179	-	9	8	80	CF.
	GeoPulse 5430A	2–17	196	-	50	10	55	MAN.
Sparker	Teledyn Benthos Chirp III—TTV 170	2–17	197	-	60	15	100	MAN.
	Applied Acoustics DuraSpark UHD (400 tips, 500 J).	0.3–1.2	203	211	1.1	4	Omni	CF.
Boomer	Applied Acoustics triple plate S-Boom (700–1,000 J).	0.1–5	205	211	0.6	4	80	CF.

- = not applicable; CF = Crocker and Fraitanonio (2016); MAN = Manufactures Specifications. Source Levels are given in dB re 1 μ Pa @ 1m.

Results of modeling using the methodology described above indicated that, of the HRG equipment planned for use by Sunrise Wind that has the potential to result in Level B harassment of marine mammals, sound produced by the Applied Acoustics sparkers and Applied Acoustics triple-plate S-boom would propagate furthest to the Level B

harassment isopleth (141 m; Table 33). For the purposes of take estimation, it was conservatively assumed that sparkers and/or boomers would be the dominant acoustic source for all survey days (although, again, this may not always be the case). Thus, the range to the isopleth corresponding to the threshold for Level B harassment for

and the boomer and sparkers (141 m) was used as the basis of take calculations for all marine mammals. This is a conservative approach as the actual sources used on individual survey days or during a portion of a survey day may produce smaller distances to the Level B harassment isopleth.

TABLE 33—DISTANCES TO THE LEVEL B HARASSMENT THRESHOLDS FOR EACH HRG SOUND SOURCE OR COMPARABLE SOUND SOURCE CATEGORY FOR EACH MARINE MAMMAL HEARING GROUP

Equipment type	Representative model	Level B harassment threshold (m)
		All (SPL _{rms})
Sub-bottom profiler	EdgeTech 216	9
	EdgeTech 424	4
	EdgeTech 512	6
	GeoPulse 5430A	21
	Teledyn Benthos Chirp III—TTV 170	48
Sparker	Applied Acoustics Dura-Spark UHD (700 tips, 1,000 J)	34
	Applied Acoustics Dura-Spark UHD (400 tips, 500 J)	141
Boomer	Applied Acoustics triple plate S-Boom (700–1,000 J)	141

To estimate densities for the HRG surveys occurring both within the lease area and within the SWEC based on Roberts and Halpin (2022), a 5-km (3.11 mi) perimeter was applied around each

area (see Figures 34 and 35 of the Updated Density and Take Estimation Memo for Sunrise Wind) using GIS (ESRI, 2017). Given that HRG surveys could occur at any point year-round, the

annual average density for each species was calculated using average monthly densities from January through December (Table 34).

TABLE 34—ANNUAL AVERAGE MARINE MAMMAL DENSITIES ALONG THE EXPORT CABLE CORRIDOR AND SUNRISE WIND LEASE AREA ¹

Marine mammal species	SWEC corridor annual average density (individual per km ²)	Lease area annual average density (individual per km ²)
<i>Mysticetes:</i>		
Blue whale*	0.0000	0.0000
Fin Whale*	0.0022	0.0020
Humpback Whale	0.0011	0.0012
Minke Whale	0.0052	0.0051
North Atlantic Right Whale*	0.0004	0.0016
Sei Whale*	0.0004	0.0005
<i>Odontocetes:</i>		
Atlantic Spotted Dolphin	0.0006	0.0005
Atlantic White-sided Dolphin	0.0117	0.0144
Bottlenose Dolphin	0.0127	0.0091
Common Dolphin	0.0827	0.0802
Harbor Porpoise	0.0297	0.0372
Pilot Whales	0.0011	0.0021
Risso's Dolphin	0.0005	0.0005
Sperm Whale*	0.0001	0.0002
<i>Phocid (pinnipeds):</i>		
Seals (Harbor and Gray)	0.0910	0.0917

* Denotes species listed under the Endangered Species Act.

¹ Values presented in this table are from the Sunrise Wind Updated Density and Take Estimation Memo, which can be found on NMFS' website.

The maximum range (141 m) to the Level B harassment threshold and the estimated trackline distance traveled per day by a given survey vessel (*i.e.*, 70 km) were then used to calculate the daily

ensonified area or zone of influence (ZOI) around the survey vessel.

The ZOI is a representation of the maximum extent of the ensonified area around a HRG sound source over a 24-

hr period. The ZOI for each piece of equipment operating at or below 180 kHz was calculated per the following formula:

$$ZOI = (Distance/day \times 2r) + \pi r^2$$

Where *r* is the linear distance from the source to the harassment isopleth.

The largest daily ZOI (19.8 km² (7.64 mi²)), associated with the proposed use of boomers, was applied to all planned survey days.

Overall, Sunrise Wind estimated approximately a length of 12,604 km (7,831.76 mi) of surveys will occur within the Lease Area and 11,946 km (7,422.9 mi) would occur within the

SWEC corridor. Potential Level B density-based harassment exposures are estimated by multiplying the average annual density of each species within the survey area by the daily ZOI. That product was then multiplied by the number of planned survey days in each sector during the approximately 2-year construction timeframe (171 days in the SWEC corridor and 180 days in the Lease Area), and the product was

rounded to the nearest whole number. This assumed a total ensonified area of 3,566 km² (1,376.84 mi²) in the Lease Area and 3,380 km² (1,305.03 mi²) along the SWEC corridor. Given that the HRG surveys are anticipated to occur over 2 years of construction activities, the total survey effort and associated ensonified areas were split equally across 2 years. These results can be found in Table 35.

TABLE 35—ESTIMATE TAKE, BY LEVEL B HARASSMENT, INCIDENTAL TO HRG SURVEYS DURING THE 2-YEAR CONSTRUCTION PERIOD (WITH INFORMATION PRESENTED FOR BOTH YEARS OF CONSTRUCTION ACTIVITIES)

Marine mammal species	Year 1 construction phase take by survey		Year 2 construction phase take by survey		Total density-based take estimate	PSO data take estimate	Mean group size	Highest annual level B take for year 1	Highest annual level B take for year 2
	SRWF lease area	SRWF EC corridor	SRWF lease area	SRWF EC corridor					
<i>Mysticetes:</i>									
Blue Whale *	0.0	0.0	0.0	0.0	0.0	.....	1.0	1	1
Fin Whale *	3.6	3.7	3.6	3.7	7.3	5.3	1.8	8	8
Humpback Whale	2.1	1.9	2.1	1.9	4.0	13.2	2.0	14	14
Minke Whale	9.0	8.7	9.0	8.7	17.8	4.8	1.2	18	18
North Atlantic Right Whale *	2.8	0.7	2.8	0.7	3.5	.....	2.4	4	4
Sei Whale *	0.9	0.7	0.9	0.7	1.5	.....	1.6	2	2
<i>Odontocetes:</i>									
Atlantic Spotted Dolphin	0.9	1.1	0.9	1.1	2.0	.....	29.0	29	29
Atlantic White-sided Dolphin	25.6	19.8	25.6	19.8	45.4	.....	27.9	46	46
Bottlenose Dolphin	16.2	21.5	16.2	21.5	37.8	80.3	7.8	81	81
Common Dolphin	143.0	139.8	143.0	139.8	282.8	1,887.3	34.9	1,888	1,888
Harbor Porpoise	66.3	50.1	66.3	50.1	116.4	.....	2.7	117	117
Pilot Whales	3.7	1.9	3.7	1.9	5.6	.....	8.4	9	9
Risso's Dolphin	1.0	0.9	1.0	0.9	1.8	1.9	5.4	6	6
Sperm Whale *	0.4	0.2	0.4	0.2	0.6	.....	1.5	2	2
<i>Phocid (pinnipeds):</i>									
Gray Seal	50.3	47.4	50.3	47.4	97.7	5.7	1.4	98	98
Harbor Seal	113.1	106.4	113.1	106.4	219.5	9.0	0.0	220	220

* Denotes species listed under the Endangered Species Act.

As mentioned previously, HRG surveys would also routinely be carried out during the period of time following construction of the Sunrise Wind Lease Area and SWEC corridor, which, for the purposes of exposure modeling, Sunrise Wind assumed to be 3 years. Generally, Sunrise followed the same approach as described above for HRG surveys occurring during the 2 years of construction activities with the only modification during the 3-year operations years being a difference in the survey effort. During the 3 years of operations, Sunrise Wind estimates that

HRG surveys would cover 2,898 km (1,800.73 mi) within the Lease Area and 3,413 km (2,120.74 mi) along the SRWEC corridor annually. Maintaining that 70 km (43.5 mi) are surveyed per day, this amounts to 41.4 days of survey activity in the Lease Area and 48.8 days of survey activity along the SRWEC corridor each year or 270.6 days total for the three-year timeframe following the 2 years of construction activities. Density-based take was estimated using the same approach outlined above by multiplying the daily ZOI by the annual average densities and separately by the number

of survey days planned for the SWEC and Sunrise Wind Lease Area. Using the same approach described above, Sunrise Wind estimated a conservative amount of annual take by Level B harassment based on the highest exposures predicted by the density-based, PSO based, or average group size-based estimates. The highest predicted exposure value was multiplied by three to yield the amount of take Sunrise Wind requested and that is proposed for authorization, as shown in Table 36 below.

TABLE 36—ESTIMATE TAKE, BY LEVEL B HARASSMENT, INCIDENTAL TO HRG SURVEYS DURING THE 3-YEAR OPERATIONS PERIOD

Marine mammal species	Annual operations phase take by survey area		Annual total density-based take estimate	Annual PSO Data take estimate	Mean group size	Highest annual Level B take	Total Level B take over 3 years of HRG surveys
	SRWF lease area	SRWF EC corridor					
<i>Mysticetes:</i>							
Blue Whale *	0.0	0.0	0.0	.....	1.0	1	3
Fin Whale *	1.6	2.1	3.7	2.7	1.8	4	12
Humpback Whale	1.0	1.1	2.0	6.8	2.0	7	21
Minke Whale	4.2	5.0	9.1	2.4	1.2	10	30
North Atlantic Right Whale *	1.3	0.4	1.7	.....	2.4	3	9
Sei Whale *	0.4	0.4	0.8	.....	1.6	2	6
<i>Odontocetes:</i>							
Atlantic Spotted Dolphin	0.4	0.6	1.0	.....	29.0	29	87
Atlantic White-sided Dolphin	11.8	11.3	23.1	.....	27.9	28	84

TABLE 36—ESTIMATE TAKE, BY LEVEL B HARASSMENT, INCIDENTAL TO HRG SURVEYS DURING THE 3-YEAR OPERATIONS PERIOD—Continued

Marine mammal species	Annual operations phase take by survey area		Annual total density-based take estimate	Annual PSO Data take estimate	Mean group size	Highest annual Level B take	Total Level B take over 3 years of HRG surveys
	SRWF lease area	SRWF EC corridor					
Bottlenose Dolphin	7.5	12.3	19.8	41.3	7.8	42	126
Common Dolphin	65.8	79.9	145.7	970.4	34.9	971	2,913
Harbor Porpoise	30.5	28.6	59.1	.....	2.7	60	180
Pilot Whales	1.7	1.1	2.8	.....	8.4	9	27
Risso's Dolphin	0.4	0.5	0.9	1.0	5.4	6	18
Sperm Whale*	0.2	0.1	0.3	.....	1.5	2	6
<i>Phocid (pinnipeds):</i>							
Gray Seal	23.3	27.1	50.2	2.9	1.4	51	153
Harbor Seal	52.0	60.8	112.8	4.6	1.4	113	339

* Denotes species listed under the Endangered Species Act.

Total Proposed Take Across All Activities

Level A harassment and Level B harassment proposed take numbers for the combined activities of impact pile driving (assuming 10 dB of sound attenuation) during the impact installation of monopile, OCS–DC foundations, and casing pipe installation; vibratory pile driving for sheet pile installation and removal; HRG surveys; and potential UXO/MEC detonations are provided by year in Table 37. NMFS also presents the 5-year total amount of take for each species in Table 38. The mitigation and monitoring measures provided in the Proposed Mitigation and Proposed Monitoring and Reporting sections are activity-specific and are designed to minimize acoustic exposures to marine mammal species.

Table 37 below depicts the proposed annual take for authorization, given that

specific activities are expected to occur within specific years. Sunrise Wind is currently planning for all construction activities related to permanent structures (*i.e.*, WTG foundations, OCS–DC foundation installation, cable landfall structures) to occur within the first year of the project. HRG surveys are expected to occur, with varying effort, across all 5-years of the proposed rulemaking’s effective duration. More specifically, as a conservative assumption, the Year 1 proposed take includes the installation of all WTGs and OCS–DC foundations, cable landfall construction, one year of HRG surveys, and up to three high-order detonations of UXOs/MECs (at a rate of one per day for up to three days). Take for years 2–5 accounts for HRG surveys. NMFS notes that while HRG surveys are expected to occur across all 5years (2023–2028) of the effective period of the rulemaking (a total of 621 days

across all 5 years), survey effort will vary. As such, during the first 2 years, up to 180 days of survey effort in the Lease Area and 171 days in the export cable corridor would occur and during the three post-construction/operation years of Sunrise Wind, up to 41.4 days of survey activity in the Lease Area and 48.8 days of survey activity along the SWEC corridor would occur annually, equating to a total of 270.6 days during the last 3 years of the rulemaking. All activities are expected to be completed by early 2028, equating to the 5 years of activities as described in this preamble.

Based on the distribution of activities over the five-year period described above and the annual take estimates shown in Tables 21, 25, 30, 35, and 36 above, Tables 37 and 38 below summarize the total (across all activities) yearly and five-year take proposed for authorization.

TABLE 37—PROPOSED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED DURING THE CONSTRUCTION AND DEVELOPMENT OF THE SUNRISE WIND OFFSHORE WIND ENERGY FACILITY OVER 5 YEARS. YEAR 1 REPRESENTS THE MAXIMUM AMOUNT OF TAKE THAT WOULD BE AUTHORIZED ANNUALLY

Marine mammal species	NMFS stock abundance	Year 1		Year 2		Year 3		Year 4		Year 5	
		Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
<i>Mysticetes:</i>											
Blue whale *	4,412	0	4	0	1	0	1	0	0	1	0
Fin whale *	6,802	4	78	0	8	0	4	0	0	4	0
Humpback whale	1,396	3	89	0	14	0	7	0	0	7	0
Mink whale	21,968	27	419	0	18	0	10	0	0	10	0
North Atlantic Right whale *	368	0	35	0	4	0	3	0	0	3	0
Sei whale *	6,292	2	31	0	2	0	2	0	0	2	0
<i>Odontocetes:</i>											
Atlantic spotted dolphin	39,921	0	114	0	15	0	29	0	0	29	0
Atlantic white-sided dolphin	93,221	0	639	0	46	0	28	0	0	28	0
Bottlenose dolphin	62,851	0	425	0	81	0	42	0	0	42	0
Common dolphin	172,974	0	7,393	0	1,888	0	971	0	0	971	0
Harbor porpoise	95,543	20	1,008	0	117	0	60	0	0	60	0
Pilot whales	68,139	0	58	0	6	0	9	0	0	9	0
Risso's dolphin	35,215	0	47	0	3	0	6	0	0	6	0
Sperm whale *	4,349	0	14	0	1	0	2	0	0	2	0
<i>Phocid (pinnipeds):</i>											
Gray seal	27,300	3	1,099	0	98	0	51	0	0	51	0
Harbor Seal	61,336	5	2,468	0	220	0	113	0	0	113	0

* Denotes species listed under the Endangered Species Act.

^a The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our preliminary small numbers determination.

TABLE 38—TOTAL 5-YEAR PROPOSED TAKES OF MARINE MAMMALS (BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED DURING THE CONSTRUCTION AND DEVELOPMENT OF THE SUNRISE WIND OFFSHORE WIND ENERGY PROJECT

Marine mammal species	NMFS stock abundance	5-Year totals		
		Proposed Level A harassment	Proposed Level B harassment	5-Year sum (Level A + Level B)
<i>Mysticetes:</i>				
Blue whale *	^a 402	0	7	7
Fin whale *	6,802	4	97	101
Humpback whale	1,396	3	123	126
Minke whale	21,968	27	467	494
North Atlantic Right whale *	368	0	47	47
Sei whale *	6,292	2	39	41
<i>Odontocetes:</i>				
Atlantic Spotted dolphin	39,921	0	215	215
Atlantic White-sided dolphin	93,221	0	768	768
Bottlenose dolphin	62,851	0	631	631
Common dolphin	172,974	0	12,193	12,193
Harbor porpoise	95,543	20	1,304	1,324
Pilot whales	68,139	0	91	91
Risso's dolphin	35,215	0	68	68
Sperm whale *	4,349	0	21	21
<i>Phocid (pinnipeds):</i>				
Gray seal	27,300	3	1,350	1,353
Harbor seal	61,336	5	3,027	3,032

* Denotes species listed under the Endangered Species Act.

^a The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our preliminary small numbers determination.

To inform both the negligible impact analysis and the small numbers determination, NMFS assesses the greatest amount of proposed take of marine mammals that could occur within any given year (which in the case of this rule is based on the predicted

Year 1 for all species). In this calculation, the maximum estimated number of Level A harassment takes in any one year is summed with the maximum estimated number of Level B harassment takes in any one year for each species to yield the highest number

of estimated take that could occur in any year. Table 39 also depicts the amount of take proposed relative to each stock assuming that each individual is taken only once, which specifically informs the small numbers determination.

TABLE 39—MAXIMUM NUMBER OF PROPOSED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) THAT COULD OCCUR IN ANY ONE YEAR OF THE PROJECT RELATIVE TO STOCK POPULATION SIZE ASSUMING EACH TAKE IS OF A DIFFERENT INDIVIDUAL

Marine mammal species	NMFS stock abundance	Maximum annual take proposed for authorization			
		Maximum Level A harassment ^b	Maximum Level B harassment ^c	Maximum annual take ^d	Total percent stock taken based on maximum annual take ^e
<i>Mysticetes:</i>					
Blue Whale *	^a 412	0	4	4	0.97
Fin Whale *	6,802	4	78	82	1.21
Humpback Whale	1,396	3	89	92	6.59
Minke Whale	21,968	27	419	446	2.03
North Atlantic Right Whale *	368	0	35	35	9.51
Sei Whale *	6,292	2	31	33	0.52
<i>Odontocetes:</i>					
Atlantic Spotted Dolphin	39,921	0	114	114	0.29
Atlantic White-sided Dolphin	93,221	0	639	639	0.69
Bottlenose Dolphin	62,851	0	425	425	0.68
Common Dolphin	172,974	0	7,393	7,393	4.27
Harbor Porpoise	95,543	20	1,008	1,028	1.08
Pilot Whales	68,139	0	58	58	0.09
Risso's Dolphin	35,215	0	47	47	0.13
Sperm Whale *	4,349	0	14	14	0.32
<i>Phocid (pinnipeds):</i>					
Gray Seal	27,300	3	1,099	1,102	4.04
Harbor Seal	61,336	5	2,468	2,473	4.03

* Denotes species listed under the Endangered Species Act.

^aThe minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our preliminary small numbers determination.

^bThese values are based on the activities occurring in Year 1 of the project, as these are conservatively estimated to cause the highest numbers of Level A harassment takes of marine mammals.

^cThese values are based on the activities occurring in Year 1 of the project, as these are conservatively estimated to cause the highest numbers of Level C harassment takes of marine mammals.

^dCalculations of the maximum annual take are based on the maximum requested Level A harassment take in any one year + the total requested Level B harassment take in any one year.

^eCalculations of percentage of stock taken are based on the maximum requested Level A harassment take in any one year + the total requested Level B harassment take in any one year and then compared against the best available abundance estimate as shown in Table 5. For this proposed action, the best available abundance estimates are derived from the NMFS Stock Assessment Reports (Hayes *et al.*, 2022).

Proposed Mitigation

In order to promulgate a rulemaking 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, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation strategies described below are consistent with those required

and successfully implemented under previous incidental take authorizations issued in association with in-water construction activities (*e.g.*, soft-start, establishing shutdown zones). Additional measures have also been incorporated to account for the fact that the proposed construction activities would occur offshore. Modeling was performed to estimate harassment zones, which were used to inform mitigation measures for pile driving activities to minimize Level A harassment and Level B harassment to the extent practicable while providing estimates of the areas within which Level B harassment might occur.

Generally speaking, the measures considered and proposed here fall into three categories: temporal (seasonal and daily) work restrictions, real-time measures (shutdown, clearance zones, and vessel strike avoidance), and noise abatement/reduction measures. Seasonal work restrictions are designed to avoid or minimize operations when marine mammals are concentrated or engaged in behaviors that make them more susceptible, or make impacts more likely) in order to reduce both the number and severity of potential takes, and are effective in reducing both chronic (longer-term) and acute effects. Real-time measures, such as shutdown and pre-clearance zones, and vessel strike avoidance measures are intended to reduce the probability or scope of near-term acute impacts by taking steps in real time once a higher-risk scenario is identified (*i.e.*, once animals are detected within an impact zone). Noise abatement measures, such as bubble curtains, are intended to reduce the noise at the source, which reduces both acute impacts as well as the contribution to aggregate and cumulative noise that results in longer term chronic impacts.

Below, we describe training, coordination, and vessel strike avoidance measures that apply to all activity types, and then in the following subsections, we describe the measures that apply specifically to WTG and OCS-DC foundation installation, sheet pile or casing pipe scenario installation and removal, UXO/MEC detonations,

HRG surveys, and fishery monitoring surveys.

Training and Coordination

Sunrise Wind would be required to instruct all project personnel regarding the authority of the marine mammal monitoring team(s). For example, the HRG acoustic equipment operator, pile driving personnel, *etc.*, would be required to immediately comply with any call for a delay or shutdown by the Lead PSO. Any disagreement between the Lead PSO and the project personnel would only be discussed after delay or shutdown has occurred. All relevant personnel and the marine mammal monitoring team would be required to participate in joint, onboard briefings that would be led by Sunrise Wind project personnel and the Lead PSO prior to the beginning of project activities. This would serve to ensure that all relevant responsibilities, communication procedures, marine mammal monitoring and mitigation protocols, reporting protocols, safety, operational procedures, and ITA requirements are clearly understood by all involved parties. The briefing would be repeated whenever new relevant personnel (*e.g.*, new PSOs, acoustic source operators, relevant crew) join the operation before work commences.

More information on vessel crew training requirements can be found in the *Vessel Strike Avoidance Measures* section below.

North Atlantic Right Whale Awareness Monitoring

Sunrise Wind must use available sources of information on North Atlantic right whale presence, including daily monitoring of the Right Whale Sightings Advisory System, monitoring of Coast Guard VHF Channel 16 throughout each day to receive notifications of any sightings, and information associated with any regulatory management actions (*e.g.*, establishment of a zone identifying the need to reduce vessel speeds). Maintaining daily awareness and coordination affords increased protection of North Atlantic right whales by understanding North Atlantic right whale presence in the area through

ongoing visual and passive acoustic monitoring efforts and opportunities (outside of Sunrise Wind's efforts) and allows for planning of construction activities, when practicable, to minimize potential impacts on North Atlantic right whales.

Protected Species Observers and PAM Operator Training

Sunrise Wind would employ NMFS-approved PSOs and PAM operators. The PSO field team and PAM team would have a lead member (designated as the "Lead PSO" or "PAM Lead") who would have prior experience observing mysticetes, odontocetes and pinnipeds in the Northwestern Atlantic Ocean on other offshore projects requiring PSOs. Any remaining PSOs and PAM operators must have previous experience observing marine mammals during projects and must have the ability to work with all required and relevant software and equipment. New and/or inexperienced PSOs would be paired with an experienced PSO to ensure that the quality of marine mammal observations and data recording is kept consistent.

All PSOs and PAM operators would be required to complete a Permits and Environmental Compliance Plan (PECP) training as well as a 2-day training and refresher session on monitoring protocols. These trainings would be held with the PSO provider and project compliance representatives and would occur before the start of project activities related to the construction and development of the Sunrise Wind Offshore Wind Farm Project. PSOs would be required during all foundation installations, sheet pile or casing pipe installation/removal activities, UXO/MEC detonations, and HRG surveys. More information on requirements during each activity can be found in the Proposed Monitoring and Reporting section.

Vessel Strike Avoidance Measures

This proposed rule contains numerous vessel strike avoidance measures. Sunrise Wind will be required to comply with these measures except under circumstances when doing so would create an imminent and serious threat to a person or vessel or to the extent that a vessel is unable to maneuver and because of the inability to maneuver, the vessel cannot comply (*e.g.*, due to towing, *etc.*). Vessel operators and crews will receive protected species identification training prior to the start of in-water construction activities. This training will cover information about marine mammals and other protected species

known to occur or which have the potential to occur in the project area. It will include training on making observations in both good weather conditions (*i.e.*, clear visibility, low wind, and low sea state) and bad weather conditions (*i.e.*, fog, high winds and high sea states, in glare). Training will not only include identification skills but will also include information and resources available regarding applicable Federal laws and regulations for protected species.

Sunrise Wind will abide by the following vessel strike avoidance measures:

- All vessel operators and crews must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course (as appropriate) to avoid striking any marine mammal.

- During any vessel transits within or to/from the Sunrise Wind project area, such as for crew transfers, an observer would be stationed at the best vantage point of the vessel(s) to ensure that the vessel(s) are maintaining the appropriate separation distance from marine mammals.

- Year-round and when a vessel is in transit, all vessel operators will continuously monitor U.S. Coast Guard VHF Channel 16 over which North Atlantic right whale sightings are broadcasted.

- At the onset of transiting and at least once every four hours, vessel operators and/or trained crew members will monitor the project's Situational Awareness System, WhaleAlert, and the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales. Any observations of any large whale by any Sunrise Wind staff or contractors, including vessel crew, must be communicated immediately to PSOs, PAM operator, and all vessel captains to increase situational awareness. Conversely, any large whale observation or detection via a sighting network (*e.g.*, *Mysticetus*) by PSOs or PAM operators will be conveyed to vessel operators and crew.

- All vessels would comply with existing NMFS regulations and speed restrictions and state regulations, as applicable, for North Atlantic right whales.

- In the event that any Slow Zone (designated as a DMA) is established that overlaps with an area where a project-associated vessel would operate, that vessel, regardless of size, will transit that area at 10 knots or less.

- Between November 1st and April 30th, all vessels, regardless of size, would operate port to port (specifically from ports in New Jersey, New York, Maryland, Delaware, and Virginia) at 10

knots or less, except for vessels while transiting in Narragansett Bay or Long Island Sound (which have not been demonstrated by best available science to provide consistent habitat for North Atlantic right whales).

- All vessels, regardless of size, would immediately reduce speed to 10 knots or less when any large whale, mother/calf pairs, or large assemblages of non-delphinid cetaceans are observed near (within 100 m) an underway vessel.

- All vessels, regardless of size, would immediately reduce speed to 10 knots or less when a North Atlantic right whale is sighted, at any distance, by an observer or anyone else on the vessel.

- If a vessel is traveling at greater than 10 knots, in addition to the required dedicated visual observer, real-time PAM of transit corridors must be conducted prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 knots or less for the following 12 hours. Each subsequent detection will trigger a 12-hour reset. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection of North Atlantic right whales in the transit corridor in the past 12 hours.

- All underway vessels (*e.g.*, transiting, surveying) must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard). Visual observers must be equipped with alternative monitoring technology for periods of low visibility (*e.g.*, darkness, rain, fog, *etc.*). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements in this proposed action. Visual observers may be third-party observers (*i.e.*, NMFS-approved PSOs) or crew members and must not have any other duties other than observing for marine mammals. Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of in-water construction activities to distinguish marine mammals from other phenomena and broadly to identify a marine mammal as a North Atlantic right whale, other whale (defined in this context as sperm whales or baleen whales other than North Atlantic right whales), or other marine

mammal. Confirmation of the observers' training and understanding of the ITA requirements must be documented on a training course log sheet and reported to NMFS.

- All vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take appropriate action.

- If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 knots or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale or a large whale that cannot be confirmed as a species other than a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must shift the engine to neutral. Engines will not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take appropriate action.

- All vessels must maintain a minimum separation distance of 100 m from sperm whales and non-North Atlantic right whale baleen whales. If one of these species is sighted within 100 m of an underway vessel, that vessel must shift the engine to neutral. Engines will not be engaged until the whale has moved outside of the vessel's path and beyond 100 m.

- All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all delphinoid cetaceans and pinnipeds with an exception made for those that approach the vessel (*e.g.*, bow-riding dolphins). If a delphinoid cetacean or pinniped is sighted within 50 m of an underway vessel, that vessel must shift the engine to neutral (again, with an exception made for those that approach the vessel). Engines will not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m.

- When a marine mammal(s) is sighted while a vessel is underway, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.*, attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If a marine mammal(s) is sighted within the relevant separation distance,

the vessel must reduce speed and shift the engine to neutral, not engaging the engine(s) until the animal(s) is clear of the area. This does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (*i.e.*, any situation where the vessel is navigationally constrained).

- All vessels underway must not divert or alter course in order to approach any marine mammal.

- For in-water construction heavy machinery activities, other than impact or vibratory pile driving, if a marine mammal is on a path towards or comes within 10 m of equipment, Sunrise Wind must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment.

- Sunrise Wind must submit a North Atlantic right whale vessel strike avoidance plan 180 days prior to commencement of vessel use. The plan would, at minimum, describe how PAM, in combination with visual observations, would be conducted to ensure the transit corridor is clear of right whales. The plan would also provide details on the vessel-based observer protocols on transiting vessels.

WTG and OCS-DC Foundation Installation

For WTG and OCS-DC foundation installation, NMFS is proposing to include the following mitigation requirements, which are described in detail below: seasonal and daily restrictions; the use of noise abatement systems; the use of PSOs and PAM operators; the implementation of clearance and shutdown zones, and the use of soft-start.

Seasonal and Daily Restrictions

No foundation impact pile driving activities would occur January 1 through April 30. Based on the best scientific information available (Roberts and Halpin, 2022), the highest densities of North Atlantic right whales in the project area are expected during the months of January through April. NMFS is requiring this seasonal work restriction to minimize the potential for North Atlantic right whales to be exposed to noise incidental to impact pile driving of monopiles, which is expected to greatly reduce the number of takes of North Atlantic right whales.

No more than three foundation monopiles would be installed per day. Monopiles would be no larger than 15-m in diameter, representing the larger end of the tapered 7/15-m monopile design. For all monopiles, the minimum

amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 4,000 kJ.

Sunrise Wind has requested authorization to initiate pile driving during nighttime when detection of marine mammals is visually challenging. To date, Sunrise Wind has not submitted a plan containing the information necessary, including evidence, that their proposed systems are capable of detecting marine mammals, particularly large whales, at night and at distances necessary to ensure mitigation measures are effective. The available information on traditional night vision technologies demonstrates that there is a high degree of uncertainty in reliably detecting marine mammals at night at the distances necessary for this project (Smultea *et al.*, 2021). Therefore, at this time, NMFS plans to only allow Sunrise Wind to initiate pile driving during daylight hours and prohibit Sunrise Wind from initiating pile driving earlier than one hour after civil sunrise or later than 1.5 hours before civil sunset. We are, however, proposing to encourage and allow Sunrise Wind the opportunity to further investigate and test advanced technology and detection systems to support their request. NMFS is proposing to condition the LOA such that nighttime pile driving would only be allowed if Sunrise Wind submits an Alternative Monitoring Plan (as part of the Pile Driving and Marine Mammal Monitoring Plan) to NMFS for approval that proves the efficacy of their night vision devices (*e.g.*, mounted thermal/IR camera systems, hand-held or wearable night vision devices (NVDs), infrared (IR) spotlights) in detecting protected marine mammals prior to making a determination in the final rule. The plan must include a full description of the proposed technology, monitoring methodology, and supporting data demonstrating the reliability and effectiveness of the proposed technology in detecting marine mammal(s) within the clearance and shutdown zones for monopiles before and during impact pile driving. The Plan should identify the efficacy of the technology at detecting marine mammals in the clearance and shutdowns under all the various conditions anticipated during construction, including varying weather conditions, sea states, and in consideration of the use of artificial lighting.

Noise Abatement Systems

Sunrise Wind would employ noise abatement systems (NAS), also known

as noise attenuation systems, during all impact pile driving of monopiles to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize any acoustic impacts resulting from impact pile driving. Sunrise Wind would be required to employ a big double bubble curtain or a combination of two or more NAS during these activities as well as the adjustment of operational protocols to minimize noise levels.

Two categories of NAS exist: primary and secondary. A primary NAS would be used to reduce the level of noise produced by the pile driving activities at the source, typically through adjustments on to the equipment (*e.g.*, hammer strike parameters). Primary NAS are still evolving and will be considered for use during mitigation efforts when the NAS has been demonstrated as effective in commercial projects. However, as primary NAS are not fully effective at eliminating noise, a secondary NAS would be employed. The secondary NAS is a device or group of devices that would reduce noise as it was transmitted through the water away from the pile, typically through a physical barrier that would reflect or absorb sound waves and therefore, reduce the distance the higher energy sound propagates through the water column. Together, these systems must reduce noise levels to the lowest level practicable with the goal of not exceeding measured ranges to Level A harassment and Level B harassment isopleths corresponding to those modeled assuming 10 dB sound attenuation, pending results of SFV (see the *Acoustic Monitoring for Sound Field and Harassment Isopleth Verification* section).

Noise abatement systems, such as bubble curtains, are used to decrease the sound levels radiated from a source. Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. Small bubble curtains have been measured to reduce sound levels but effective attenuation is highly dependent on depth of water, current, and configuration and operation of the curtain (Austin *et al.*, 2016; Koschinski and Lüdemann, 2013). Bubble curtains vary in terms of the sizes of the bubbles and those with larger bubbles tend to

perform a bit better and more reliably, particularly when deployed with two separate rings (Bellmann, 2014; Koschinski and Lüdemann, 2013; Nehls *et al.*, 2016). Encapsulated bubble systems (*e.g.*, Hydro Sound Dampers (HSDs)), can be effective within their targeted frequency ranges (*e.g.*, 100–800 Hz), and when used in conjunction with a bubble curtain appear to create the greatest attenuation. The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices. Secondary NAS that may be used by Sunrise Wind include a big bubble curtain (BBC), a hydro-sound damper (HSD), or an AdBm Helmholz resonator (Elzinga *et al.*, 2019). See Appendix B (Protected Species Mitigation and Monitoring Plan (PSMMP) of the ITA application for more information on these systems (Sunrise Wind, 2022b). If a single system is used, it must be a double big bubble curtain (dBBC). Other systems (*e.g.*, noise mitigation screens) are not considered feasible for the Sunrise Wind project as they are in their early stages of development and field tests to evaluate performance and effectiveness have not been completed. Should the research and development phase of these newer systems demonstrate effectiveness, as part of adaptive management, Sunrise Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during pile driving.

If a bubble curtain is used (single or double), Sunrise Wind would be required to maintain the following operational parameters: the bubble curtain(s) must distribute air bubbles using a target air flow rate of at least 0.5 m³/(min*m) and must distribute bubbles around 100 percent of the piling perimeter for the full depth of the water column. The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact; no parts of the ring or other objects should prevent full seafloor contact. Sunrise Wind must require that construction contractors train personnel in the proper balancing of airflow to the bubble ring and must require that construction contractors submit an inspection/performance report for approval by Sunrise Wind within 72 hours following the performance test. Corrections to the attenuation device to meet the performance standards must

occur prior to impact driving of monopiles. If Sunrise Wind uses a noise mitigation device in addition to a BBC, similar quality control measures would be required.

The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices. Dähne *et al.* (2017) found that single bubble curtains that reduce sound levels by 7 to 10 dB reduced the overall sound level by approximately 12 dB when combined as a double bubble curtain for 6-m steel monopiles in the North Sea. During installation of monopiles (~8 m) for more than 150 WTGs in comparable water depths (>25 m) and conditions in Europe indicate that attenuation of 10 dB is readily achieved (Bellmann, 2019; Bellmann *et al.*, 2020) using single BBCs for noise attenuation. Designed to gather additional data regarding the efficacy of BBCs, the Coastal Virginia Offshore Wind (CVOW) pilot project systematically measured noise resulting from the impact driven installation of two 7.8-m monopiles, one installation using a dBBC and the other installation using no noise abatement system (CVOW, unpublished data). Although many factors contributed to variability in received levels throughout the installation of the piles (*e.g.*, hammer energy, technical challenges during operation of the dBBC), reduction in broadband SEL using the dBBC (comparing measurements derived from the mitigated and the unmitigated monopiles) ranged from approximately 9–15 dB. Again, NMFS would require Sunrise Wind to apply a dBBC or a single BBC coupled with an additional noise mitigation device to ensure sound generated from the project does not exceed that modeled (assuming 10 dB reduction) at given ranges to harassment isopleths and to minimize noise levels to the lowest level practicable. Double BBCs are successfully and widely applied across European wind development efforts and are known to reduce noise levels more than single BBC alone (*e.g.*, Bellman *et al.*, 2020). Sunrise Wind anticipates and NMFS agrees that the use of a noise abatement system would likely produce field measurements of the isopleth distances to the Level A harassment and Level B harassment thresholds that accord with those modeled assuming 10 dB of attenuation for impact pile driving of monopiles (refer back to the Estimated Take, Proposed Mitigation, and

Proposed Monitoring and Reporting sections).

Use of PSOs and PAM Operators

As described above, Sunrise Wind would be required to use PSOs and acoustic PSOs (*i.e.*, PAM operators) during all foundation installation activities. At minimum, four PSOs would be actively observing marine mammals before, during, and after pile driving. At least two PSOs would be stationed on the pile driving vessel and at least two PSOs would be stationed on a secondary, dedicated PSO vessel. The dedicated PSO vessel would be located at the outer edge of the 2.3 km (in the summer; 4.4 km in the winter) large whale clearance zone (unless modified by NMFS based on SFV). Concurrently, at least one PAM operator would be actively monitoring for marine mammals before, during, and after pile driving. More details on PSO and PAM operator requirements can be found in the Proposed Monitoring and Reporting section.

Furthermore, all crew and personnel working on the Sunrise Wind project would be required to maintain situational awareness of marine mammal presence (discussed further above) and would be required to report any sightings to the PSOs.

Clearance and Shutdown Zones

NMFS is proposing to require the establishment of both clearance and shutdown zones during all impact pile driving of WTG and OCS-DC foundation piles, which would be monitored by visual PSOs and PAM operators before, during and after pile driving. Prior to the start of impact pile driving activities, Sunrise Wind would clear the area of marine mammals, per the clearance zones in Table 40, to minimize the potential for and degree of harassment.

The purpose of “clearance” of a particular zone is to prevent potential instances of auditory injury and more severe behavioral disturbance or in the case of North Atlantic right whales, avoid and minimize behavioral disturbance to the maximum extent practicable (for North Atlantic right whales, the clearance and shutdown zones are set to any distance; see Table 40) by delaying the commencement of impact pile driving if marine mammals are detected within certain pre-defined distances from the pile being installed.

PSOs would visually monitor for marine mammals for a minimum of 60 minutes immediately prior to commencement of pile driving while

PAM operators would review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes immediately prior to pile driving. Prior to initiating soft-start procedures, all clearance zones must be visually confirmed to be free of marine mammals for 30 minutes immediately prior to starting a soft-start of pile driving. If a marine mammal is observed entering or within the relevant clearance zone prior to the initiation of impact pile driving activities, pile driving must be delayed and will not begin until either the marine mammal(s) has voluntarily left the specific clearance zones and have been visually or acoustically confirmed beyond that clearance zone or when specific time periods have elapsed with no further sightings or acoustic detections have occurred (*i.e.*, 15 minutes for small odontocetes and 30 minutes for all other marine mammal species).

Mitigation zones related to impact pile driving activities were created around two different seasonal periods in consideration of the different seasonal sound speed profiles that were used in JASCO’s underwater sound propagation modeling, including summer (May through November) and winter (December) (Table 40). In addition to the clearance and shutdown zones that would be monitored both visually and acoustically, NMFS is proposing to establish a minimum visibility zone to ensure that marine mammals are visually detected prior to commencement of pile driving. The minimum visibility zone would extend 2,300 m from the pile during summer months and 4,400 m during December (Table 40). These values correspond to the maximum low-frequency cetacean (*i.e.*, baleen whale) distances to the Level A harassment isopleths assuming three monopiles are driven in a day, rounded up to the nearest hundred. The entire minimum visibility zone must be visible (*i.e.*, not obscured by dark, rain, fog, *etc.*) for a full 30 minutes immediately prior to commencing impact pile driving. For North Atlantic right whales, there is an additional requirement that the clearance zone may only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred during the 60-minute monitoring period. Any large whale sighted by a PSO or acoustically detected by a PAM operator that cannot be identified as a non-North Atlantic right whale must be treated as if it were a North Atlantic right whale.

The purpose of a shutdown is to prevent a specific acute impact, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity. If a marine mammal is observed entering or within the respective shutdown zone (Table 40) after impact pile driving has begun, the PSO will request a temporary cessation of impact pile driving. In situations when shutdown is called for but Sunrise Wind determines shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal, and a shut-down would lead to a stuck pile which then poses an imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk for individuals. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to “let go.” During these periods of instability, the lead engineer may determine a shutdown is not feasible because the shutdown combined with impending weather conditions may require the piling vessel to “let go”, which then poses an imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk for individuals. In these situations, Sunrise Wind must reduce hammer energy to the lowest level practicable.

After shutdown, impact pile driving may be reinitiated once all clearance zones are clear of marine mammals for the minimum species-specific periods (15 minutes for small odontocetes and 30 minutes for all other marine mammal species). If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale is no longer observed or 30 minutes has elapsed since the last detection. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability, at which time Sunrise Wind must use the lowest hammer energy practicable to maintain stability. Upon re-starting pile driving, soft-start protocols must be followed.

The clearance and shutdown zone sizes vary by species and are shown in Tables 40, 41, and 42. All distances to the perimeter of clearance zones are the radii from the center of the pile.

Pursuant to the proposed adaptive management provisions, Sunrise Wind may request modification to these zone sizes pending results of sound field verification (see Proposed Monitoring

and Reporting section). Any changes to zone size would require NMFS' approval.

TABLE 40—RANGES AND MITIGATION ZONES ^a TO THE LEVEL A AND LEVEL B HARASSMENT THRESHOLDS DURING IMPACT PILE DRIVING OF WTG FOUNDATIONS IN SUMMER AND WINTER

Marine mammal species	WTG foundation impact installation							
	Summer (May through November)			Winter (December only)				
	Level A harassment zone (m; SEL _{cum}) ^c	Level B harassment zone (m) ^f	Clearance zone (m) ^d	Shutdown zone (m) ^d	Level A harassment zone (m; SEL _{cum}) ^c	Level B harassment zone (m) ^f	Clearance zone (m) ^d	Shutdown zone (m) ^d
<i>Low-frequency cetaceans:</i>								
Fin whale [*]	3,680	6,490	3,700	3,700	4,240	6,970	4,300	4,300
Minke whale	1,860	6,490	3,700	3,700	2,020	6,970	4,300	4,300
Sei whale [*]	2,670	6,490	3,700	3,700	3,010	6,970	4,300	4,300
Humpback whale	3,400	6,490	3,700	3,700	3,820	6,970	4,300	4,300
North Atlantic right whale [*]	2,510	6,490	See Table 42	See Table 42	2,900	6,970	See Table 42	See Table 42
Blue whale ^e	3,680	6,490	3,700	3,700	4,240	6,970	4,300	4,300
<i>Mid-frequency cetaceans:</i>								
Sperm whale [*]		6,490	3,700	3,700		6,970	4,300	4,300
Atlantic spotted dolphin		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
Atlantic white-sided dolphin		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
Common dolphin		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
Risso's dolphin		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
Bottlenose dolphin		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
Long-finned pilot whale		6,490	^b NAS	^b NAS		6,970	^b NAS	^b NAS
<i>High-frequency cetaceans:</i>								
Harbor porpoise		6,490	200	200		6,970	^b NAS	^b NAS
<i>Phocid Pinnipeds:</i>								
Gray seal	30	6,490	100	100	30	6,970	100	100
Harbor seal	80	6,490	100	100	80	6,970	100	100

^{*} Denotes species listed under the Endangered Species Act.

^a Zones were made on the assumptions that 7/12-m tapered monopiles would be installed at a rate of 3 monopiles per day with 10 dB of noise attenuation from a noise attenuation system.

^b NAS (noise abatement system) means the perimeter of the NAS will serve as the clearance and shutdown zone for species where NAS is indicated.

^c The Level A zone represents the exposure ranges of species derived from animal movement modeling.

^d The pre-start clearance and shutdown zone for large whales, porpoise, and seals is based upon the maximum Level A zone rounded up for PSO clarity.

^e As no Level A exposures were calculated for blue whales (meaning no Level A exposure ranges were calculated), the exposure range for fin whales was used as a proxy.

^f All zone monitoring would be achieved through visual observations and passive acoustic monitoring.

^g Sunrise Wind's proposed mitigation and monitoring distances are found in Tables 7 and 8 in Sunrise Wind's Protected Species Mitigation and Monitoring Plan; however, NMFS has slightly rounded/modified some of these ranges for PSO clarity.

^h The minimum visibility zone would extend 2,300 m from the pile during summer months and 4,400 m during December.

TABLE 41—RANGES AND MITIGATION ZONES ^a TO THE LEVEL A AND LEVEL B HARASSMENT THRESHOLDS DURING IMPACT PILE DRIVING OF PILES FOR THE OCS-DC IN SUMMER AND WINTER

Marine mammal species	OCS-DC impact installation							
	Summer (May through November)			Winter (December only)				
	Level A harassment zone (m; SEL _{cum}) ^c	Level B harassment zone (m) ^f	Clearance zone (m) ^d	Shutdown zone (m) ^d	Level A harassment zone (m; SEL _{cum}) ^c	Level B harassment zone (m) ^f	Clearance zone (m) ^d	Shutdown zone (m) ^d
<i>Low-frequency cetaceans:</i>								
Fin whale [*]	5,550	6,470	5,600	5,600	6,420	6,630	6,500	6,500
Minke whale	2,880	6,470	5,600	5,600	3,200	6,630	6,500	6,500
Sei whale [*]	4,220	6,470	5,600	5,600	4,730	6,630	6,500	6,500
Humpback whale	5,130	6,470	5,600	5,600	6,030	6,630	6,500	6,500
North Atlantic right whale [*]	3,620	6,470	See Table 42	See Table 42	4,060	6,630	See Table 42	See Table 42
Blue whale [*]	5,550	6,470	5,600	5,600	6,420	6,630	6,500	6,500
<i>Mid-frequency cetaceans:</i>								
Sperm whale [*]		6,470	5,600	5,600		6,630	6,500	6,500
Atlantic spotted dolphin		6,470	^b NAS	^b NAS		6,630	^b NAS	^b NAS
Atlantic white-sided dolphin		6,470	^b NAS	^b NAS		6,630	^b NAS	^b NAS

^{*} Denotes species listed under the Endangered Species Act.

^a Zones were made on the assumptions that 7/12-m tapered monopiles would be installed at a rate of 3 monopiles per day with 10 dB of noise attenuation from a noise attenuation system.

^b NAS (noise abatement system) means the perimeter of the NAS will serve as the clearance and shutdown zone for species where NAS is indicated.

^c The Level A zone represents the exposure ranges of species derived from animal movement modeling.

^d The pre-start clearance and shutdown zone for large whales, porpoise, and seals is based upon the maximum Level A zone rounded up for PSO clarity.

^e As no Level A exposures were calculated for blue whales (meaning no Level A exposure ranges were calculated), the exposure range for fin whales was used as a proxy.

^f All zone monitoring would be achieved through visual observations and passive acoustic monitoring.

^g Sunrise Wind's proposed mitigation and monitoring distances are found in Tables 7 and 8 in Sunrise Wind's Protected Species Mitigation and Monitoring Plan; however, NMFS has slightly rounded/modified some of these ranges for PSO clarity.

^h The minimum visibility zone would extend 2,300 m from the pile during summer months and 4,400 m during December.

Common dolphin	.....	6,470	b NAS	.....	6,630	b NAS	b NAS
Bottlenose dolphin	.....	6,470	b NAS	.....	6,630	b NAS	b NAS
Long-finned pilot whale	.....	6,470	b NAS	.....	6,630	b NAS	b NAS
<i>High-frequency cetaceans:</i>							
Harbor porpoise	810	6,470	900	590	6,630	600	600
<i>Phocid Pinnipeds:</i>							
Gray seal	1,720	6,470	1,800	1,730	6,630	1,800	1,800
Harbor seal	690	6,470	1,800	690	6,630	1,800	1,800

* Denotes species listed under the Endangered Species Act.
 a Zones were made on the assumptions that 4-m piled jackets would be installed at a rate of four pin piles per day with 10 dB of noise attenuation from a noise attenuation system.
 b NAS (noise abatement system) means that the zone is small enough that it would be encompassed by the bubble curtain.
 c The Level A zone represents the exposure ranges of species derived from animal movement modeling.
 d The pre-start clearance and shutdown zone for large whales, porpoise, and seals is based upon the maximum Level A zone rounded up for PSO clarity.
 e As no Level A exposures were calculated for blue whales (meaning no Level A exposure ranges were calculated), the exposure range for fin whales was used as a proxy.
 f All zone monitoring would be achieved through visual observations and passive acoustic monitoring.
 g The original mitigation and monitoring distances are found in Tables 9 and 10 in Sunrise Wind's PSMMP; however, NMFS has slightly rounded/modified some of these ranges for PSO clarity.

TABLE 42—CLEARANCE, SHUTDOWN, AND REAL-TIME PAM MONITORING ZONES^a DURING IMPACT PILE DRIVING ACTIVITIES (WTG FOUNDATIONS AND OCS—DC) FOR NORTH ATLANTIC RIGHT WHALES IN THE SUMMER AND WINTER

Marine mammal species	Minimum visibility zone (m) ^b	Visual clearance and shutdown zones (m)	PAM monitoring zone (m)	PAM clearance zone (m) ^c	PAM shutdown zone (m)	Minimum visibility zone (m) ^b	Visual clearance and shutdown zones (m)	PAM monitoring zone (m)	PAM clearance zone (m) ^c	PAM shutdown zone (m)	Winter (December only)	
											PAM monitoring zone (m)	PAM clearance zone (m) ^c
Summer (May through November)												
<i>WTG Foundation Impact Installation:</i>												
North Atlantic right whale [*]	3,700	Any distance	10,000	6,500	3,700	4,300	Any distance	10,000	7,000 ^d	4,300		
<i>OCS-DC Impact Installation:</i>												
North Atlantic right whale [*]	5,600	Any distance	10,000	6,500	5,600	6,500	Any distance	10,000	6,700	6,500		

* Denotes species listed under the Endangered Species Act.
 a Sunrise Wind may request modification of these zones based on the results of sound field verification.
 b The minimum visibility zone is based upon the maximum non-humpback whale Level A harassment zone for the group and rounded up for PSO clarity.
 c The PAM clearance zone is equal to the Level B harassment zone.
 d As the Level A harassment zone for North Atlantic right whales was less than the Level B harassment zone, the Level B harassment zone was used instead for all distances.

Soft-Start

The use of a soft-start procedure is believed to provide additional protection to marine mammals by warning them or providing them with a chance to leave the area prior to the hammer operating at full capacity. Soft-start typically involves initiating hammer operation at a reduced energy level (relative to full operating capacity) followed by a waiting period. Sunrise Wind must utilize a soft-start protocol for impact pile driving of monopiles by performing 4–6 strikes per minute at 10 to 20 percent of the maximum hammer energy for a minimum of 20 minutes. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers. For impact hammers, the actual number of strikes at reduced energy will vary because operating the hammer at less than full power results in “bouncing” of the hammer as it strikes the pile, resulting in multiple “strikes”; however, as mentioned previously, Sunrise Wind will target less than 20 percent of the total hammer energy for the initial hammer strikes during soft-start. A soft-start will be required at the beginning of each day’s monopile installation and at any time following a cessation of impact pile driving of 30 minutes or longer. If a marine mammal is detected within or about to enter the applicable clearance zones prior to the beginning of soft-start procedures, impact pile driving would be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings (*i.e.*, 15 minutes for small odontocetes and 30 minutes for all other species).

Cable Landfall Construction

For sheet pile or casing pipe installation and removal, NMFS is proposing to include the following mitigation requirements, which are

described in detail below: daily restrictions; the use of PSOs; the implementation of clearance and shutdown zones; and the use of soft-start if a pneumatic impact hammer is used. Given the short duration of work, relatively small harassment zones if a pneumatic hammer is used, and lower noise levels during vibratory driving, NMFS is not proposing to require PAM or noise abatement system use during these activities.

Seasonal and Daily Restrictions

Sunrise Wind has proposed to install and remove the sheet piles or casing pipe scenario within the first year of the effective period of the regulations and LOA. NMFS is not requiring any seasonal work restrictions for landfall construction in this proposed rule due to the relatively short duration of work (*i.e.*, low associated impacts). Sunrise Wind would be required, however, to conduct vibratory pile driving associated with sheet pile installation and pneumatic hammering of casing pipes during daylight hours only. Although North Atlantic right whales do migrate in coastal waters, they are not expected to occur in Narragansett Bay where work would be occurring. The distance to the Level B harassment isopleth (9.74 km) for installation of steel sheet piles and the maximum distance to the Level A isopleth (3.95 km) for installation of a casing pipe do not extend beyond the mouth of Narragansett Bay; thus, it is unlikely that right whales (or most species of marine mammals considered here) would be exposed to vibratory pile driving during sheet pile installation at levels close to the 120 dB Level B harassment threshold or pneumatic hammering at Level A harassment thresholds.

Use of PSOs

Prior to the start of vibratory pile driving or pneumatic hammering

activities, at least two PSOs located at the best vantage points would monitor the clearance zone for 30 minutes, continue monitoring during pile driving or pneumatic hammering, and for 30 minutes following cessation of either activity. The clearance zones must be fully visible for at least 30 minutes and all marine mammal(s) must be confirmed to be outside of the clearance zone for at least 30 minutes immediately prior to initiation of either activity.

Clearance and Shutdown Zones

Sunrise Wind would establish clearance and shutdown zones for vibratory pile driving activities associated with sheet pile installation (Table 43.) and pneumatic hammering for casing pipe installation (Table 44.). If a marine mammal is observed entering or is observed within the respective zones, activities will not commence until the animal has exited the zone or a specific amount of time has elapsed since the last sighting (*i.e.*, 30 minutes for large whales and 15 minutes for dolphins, porpoises, and pinnipeds). If a marine mammal is observed entering or within the respective shutdown zone after vibratory pile driving or pneumatic hammering has begun, the PSO will call for a temporary cessation of the activity. Pile driving or hammering must not be restarted until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually confirmed beyond that clearance zone or when specific time periods have elapsed with no further sightings or acoustic detections have occurred (*i.e.*, 15 minutes for small odontocetes and 30 minutes for all other marine mammal species). Because a vibratory hammer can grip a pile without operating, pile instability should not be a concern and no caveat for re-starting pile driving due to pile instability is proposed.

TABLE 43—DISTANCES TO HARASSMENT THRESHOLDS AND MITIGATION ZONES ^a DURING VIBRATORY SHEET PILE DRIVING

Marine mammal species	Level A harassment (SEL _{cum}) (m)	Level B harassment (m)	Clearance zone (m)	Shutdown zone (m)
<i>Low-frequency cetaceans:</i>				
Fin whale *	5	9,740	200	50
Minke whale	5	9,740	200	50
Sei whale *	5	9,740	200	50
Humpback whale	5	9,740	200	50
North Atlantic right whale *	5	9,740	200	50
Blue whale *	5	9,740	200	50
<i>Mid-frequency cetaceans:</i>				
Sperm whale *		9,740	200	50
Atlantic white-sided dolphin		9,740	200	50
Atlantic spotted dolphin		9,740	200	50
Common dolphin		9,740	200	50
Risso’s dolphin		9,740	200	50

TABLE 43—DISTANCES TO HARASSMENT THRESHOLDS AND MITIGATION ZONES^a DURING VIBRATORY SHEET PILE DRIVING—Continued

Marine mammal species	Level A harassment (SEL _{cum}) (m)	Level B harassment (m)	Clearance zone (m)	Shutdown zone (m)
Bottlenose dolphin .....	.....	9,740	200	50
Pilot whales .....	.....	9,740	200	50
<i>High-frequency cetaceans:</i>				
Harbor porpoise	190	9,740	200	200
<i>Phocid Pinnipeds (in water):</i>				
Gray seal	10	9,740	200	10
Harbor seal	10	9,740	200	10

* Denotes species listed under the Endangered Species Act.

^a The original mitigation and monitoring distances are found in Table 18 in Sunrise Wind's PSMMP; however, NMFS has slightly rounded/modified some of these ranges for PSO clarity.

TABLE 44—DISTANCES TO HARASSMENT THRESHOLDS AND MITIGATION ZONES^a DURING IMPACT INSTALLATION OF THE CASING PIPE

Marine mammal species	Level A harassment (SEL _{cum}) (m)	Level B harassment (m)	Clearance zone (m)	Shutdown zone (m)
<i>Low-frequency cetaceans:</i>				
Fin whale*	3,870	920	500	500
Minke whale	3,870	920	500	500
Sei whale*	3,870	920	500	500
Humpback whale	3,870	920	500	500
North Atlantic right whale*	3,870	920	500	500
Blue whale*	3,870	920	500	500
<i>Mid-frequency cetaceans:</i>				
Sperm whale*	230	920	100	100
Atlantic white-sided dolphin	230	920	100	100
Atlantic spotted dolphin	230	920	100	100
Common dolphin	230	920	100	100
Risso's dolphin	230	920	100	100
Bottlenose dolphin	230	920	100	100
Pilot whales	230	920	100	100
<i>High-frequency cetaceans:</i>				
Harbor porpoise	3,950	920	500	500
<i>Phocid Pinnipeds (in water):</i>				
Gray seal	1,290	920	100	100
Harbor seal	1,290	920	100	100

* Denotes species listed under the Endangered Species Act.

UXO/MEC Detonations

For UXO/MEC detonations, NMFS is proposing to include the following mitigation requirements, which are described in detail below: As Low as Reasonably Practical Approach (ALARP); seasonal and daily restrictions; the use of noise abatement systems; the use of PSOs and PAM operators to visually and acoustically monitor for marine mammals; and the implementation of clearance zones.

As Low as Reasonably Practicable (ALARP) Approach

For any UXOs/MECs that require removal, Sunrise Wind would be required to implement the As Low as Reasonably Practicable (ALARP) process. This process would require Sunrise Wind to undertake "lift-and-shift" (*i.e.*, physical removal) and then lead up to *in situ* disposal, which could

include low-order (deflagration) to high-order (detonation) methods of removal. Another potential approach involves the cutting of the UXO/MEC to extract any explosive components. Implementing the ALARP approach would minimize potential impacts to marine mammals as UXOs/MECs would only be detonated as a last resort.

Seasonal and Daily Restrictions

Sunrise Wind would be limited to detonating a total of three UXOs/MECs between May 1 and November 31 to reduce impacts to North Atlantic right whales during peak occurrence periods. Furthermore, UXO/MEC detonation would be limited to daylight hours only to ensure that visual PSOs can confirm appropriate clearance of the site prior to detonation events.

Noise Abatement Systems

Sunrise Wind would be required to use a noise abatement system during all UXO/MEC detonations, should detonations be determined to be necessary. Although the exact level of noise attenuation that can be achieved by noise abatement systems is unknown, available data from Bellmann *et al.* (2020) and Bellmann and Betke (2021) provide a reasonable expectation that the noise abatement systems would be able to achieve at least 10 dB attenuation. SFV would be required for all detonation events to verify the modeled distances, assuming 10 dB attenuation, are representative of the sound fields generated during detonations. This level of noise reduction would provide substantial reductions in impact zones for low-frequency cetaceans, such as the North Atlantic right whale. For example,

assuming the largest UXO/MEC charge weight (454 kg; E12) at a depth of 45 m, 10 dB of attenuation reduces the Level A harassment (PTS) zone from 243 km² to approximately 45 km². The Level B harassment zone, given the same parameters, would be decreased from 1,158 km² to 445 km². However, and as previously stated in this proposed rule, Sunrise Wind does not expect that all 3 of the potential UXOs/MECs would be of the largest charge weight; this weight was used as a conservative option in estimating exposures and take of marine mammals.

Use of PSOs and PAM Operators

PSOs would monitor clearance zones in vessels and when the clearance zone is larger than 5 km, aircraft. Prior to the UXO/MEC detonation, at least two PSOs per observing platform (*i.e.*, vessels, plane) located at the best vantage points would monitor the clearance zone for 60 minutes, continue monitoring during the detonation, and for 30 minutes following the event. The clearance zones must be fully visible for at least 60 minutes and all marine mammal(s) must be confirmed to be outside of the clearance zone for at least 30 minutes immediately prior to initiation of either activity.

In addition to visual monitoring, real-time PAM monitoring is also proposed. A PAM operator would be stationed on at least one of the dedicated monitoring vessels in addition to the PSOs or located remotely/onshore to acoustically monitor a zone that encompasses a minimum of a 10 km radius around the source. PAM would be conducted for at least 60 minutes prior to detonation and the zone must be acoustically clear during this time.

In the case of visual or acoustic detection, the Lead PSO will be responsible for requesting the designated crewmember to implement a delay in UXO detonation.

Clearance Zones

Sunrise Wind proposed to clear a 3.78-km radius zone around the detonation site prior to detonations using both visual and acoustic monitoring methods. This distance represents the modeled Level A (PTS) harassment zone for low-frequency cetaceans (*i.e.*, large whales) assuming the largest 454-kg charge weight and use of a bubble curtain (Table 45.). However, NMFS is proposing to require more protective zone sizes in order to ensure the least practicable adverse impact, which includes minimizing the potential for TTS. As stated above, it is

not currently known how easily Sunrise Wind will be able to identify UXO/MEC charge weights in the field. For this reason, NMFS proposes to require Sunrise Wind to clear a zone extending 10 km for large whales, 2 km for delphinids, 10 km for harbor porpoises, and 5 km for seals (Table 45.). These zones are based on (but not equal to) the largest TTS threshold distances for a 454-kg charge at any site modeled. However, NMFS notes that these zone sizes may be adjusted based on SFV and confirmation of UXO/MEC/doner charge sizes. Moreover, if Sunrise Wind indicates to NMFS they will be able to easily and reliably identify charge weights in the field, NMFS would develop clearance zones in the final rule for each charge weight analyzed.

If a marine mammal is observed entering or within the clearance zone prior to denotation, the activity would be delayed. Only when the marine mammals have been confirmed to have voluntarily left the clearance zones and been visually confirmed to be beyond the clearance zone, or when 60 minutes have elapsed without any redetections for whales (including the North Atlantic right whale) or 30 minutes have elapsed without any subsequent detections of delphinids, harbor porpoises, or seals may detonation of UXOs/MECs occur.

TABLE 45—LARGEST MODELED HARASSMENT AND CLEARANCE ZONES FOR UXO/MEC DETONATION OF E12 (454 kg) CHARGE ASSUMING 10 dB NOISE ABATEMENT

Marine mammal species	Distances to zones for E12 (454 kg) UXO/MEC charge weight ^{a b}		
	Level A harassment zone (m)	Level B harassment zone (m)	Clearance zones (m)
<i>Mysticetes:</i>			
Fin whale *	3,700	11,800	10,000
Minke whale.			
Sei whale *.			
Humpback whale.			
North Atlantic right whale *.			
Blue whale *.			
<i>Odontocetes:</i>			
Sperm whale *	^b 500	2,500	2,000
Atlantic white-sided dolphin.			
Atlantic spotted dolphin.			
Common dolphin.			
Risso's dolphin.			
Bottlenose dolphin.			
Long-finned pilot whale.			
Harbor porpoise	6,200	13,700	10,000
<i>Phocid Pinnipeds (in water):</i>			
Gray seal	1,500	^b 7,100	5,000
Harbor seal.			

* Denotes species listed under the Endangered Species Act.

^a At time of preparing this proposed rule, Sunrise Wind has not provided NMFS evidence they will be able to reliably determine the charge weight of any UXO/MEC that must be detonated; therefore, NMFS assumes all UXO/MECs could be of the largest size modeled. If Sunrise Wind provides information they can detect charge weights in the field prior to issuance of the final rule, if issued, NMFS may modify the clearance zone to ones based on charge weights distances to PTS and TTS. Distances to PTS and TTS thresholds have been identified by Sunrise Wind in Appendix B of their application.

^b The original mitigation and monitoring distances are found in Sunrise Wind's UXO/MEC modeling report (Hannay and Zykov, 2022); however, NMFS has rounded these ranges for PSO clarity.

HRG Surveys

For HRG surveys, NMFS is proposing to include the following mitigation requirements, which are described in detail below, for all HRG survey activities using boomers, sparkers, and CHIRPs: the use of PSOs; the implementation of clearance, shutdown, and vessel separation zones; and ramp-up of survey equipment.

There are no mitigation measures prescribed for sound sources operating at frequencies greater than 180 kHz as these would be expected to fall outside of marine mammal hearing ranges and not result in harassment; however, all HRG survey vessels would be subject to the aforementioned vessel strike avoidance measures described earlier in this section. Furthermore, due to the frequency range and characteristics of some of the sound sources, shutdown, clearance, and ramp-up procedures are not proposed to be conducted during HRG surveys utilizing only non-impulsive sources (e.g., Ultra-Short BaseLine (USBL) and other parametric sub-bottom profilers) with exception to usage of CHIRPS and other non-parametric sub-bottom profilers. PAM would not be required during HRG surveys. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing impacts during HRG survey activities is limited. We have provided a thorough description of our reasoning for not requiring PAM during HRG surveys in several **Federal Register** notices (e.g., 87 FR 40796, July 8, 2022; 87 FR 52913, August 3, 2022; 87 FR 51356, August 22, 2022).

Seasonal and Daily Restrictions

Given the potential impacts to marine mammals from exposure to HRG survey noise sources are relatively minor (e.g., limited to Level B harassment) and that the distances to the Level B harassment isopleth is very small (maximum distance is 141 m), NMFS is not proposing to implement any seasonal or time-of-day restrictions for HRG surveys.

Although no temporal restrictions are proposed, NMFS would require Sunrise Wind to deactivate acoustic sources

during periods where no data is being collected except as determined necessary for testing. Any unnecessary use of the acoustic source would be avoided.

Use of PSOs

During all HRG survey activities using boomers, sparkers, and CHIRPS, one PSO would be required to monitor during daylight hours and two would be required to monitor during nighttime hours per vessel. PSOs would begin visually monitoring 30 minutes prior to the initiation of the specified acoustic source (i.e., ramp-up, if applicable) through 30 minutes after the use of the specified acoustic source has ceased. PSOs would be required to monitor the appropriate clearance and shutdown zones. These zones would be based around the radial distance from the acoustic source and not from the vessel.

Clearance, Shutdown, and Vessel Separation Zones

Sunrise Wind would be required to implement a 30-minute clearance period of the clearance zones (Table 46) immediately prior to the commencing of the survey or when there is more than a 30-minute break in survey activities and PSOs have not been actively monitoring. The clearance zones would be monitored by PSOs using the appropriate visual technology. If a marine mammal is observed within a clearance zone during the clearance period, ramp-up (described below) may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until an additional time period has elapsed with no further sighting (i.e., 15 minutes for small odontocetes and seals, and 30 minutes for all other species). In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (IR/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (i.e., no delay is required) despite periods of inclement weather and/or loss of daylight.

Once the survey has commenced, Sunrise Wind would be required to shut down boomers, sparkers, and CHIRPs if

a marine mammal enters a respective shutdown zone (Table 46). In cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (i.e., no shutdown is required) so long as no marine mammals have been detected. The use of boomers, sparkers, and CHIRPS would not be allowed to commence or resume until the animal(s) has been confirmed to have left the shutdown zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting. Any large whale sighted by a PSO within 1,000 m of the boomers, sparkers, and CHIRPs that cannot be identified as a non-North Atlantic right whale would be treated as if it were a North Atlantic right whale.

The shutdown requirement would be waived for small delphinids of the following genera: *Delphinus*, *Stenella*, *Lagenorhynchus*, and *Tursiops*. Specifically, if a delphinid from the specified genera is visually detected approaching the vessel (i.e., to bow-ride) or towed equipment, shutdown would not be required. Furthermore, if there is uncertainty regarding identification of a marine mammal species (i.e., whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), the PSOs would use their best professional judgment in making the decision to call for a shutdown. Shutdown would be required if a delphinid that belongs to a genus other than those specified is detected in the shutdown zone.

If a boomer, sparker, or CHIRP is shut down for reasons other than mitigation (e.g., mechanical difficulty) for less than 30 minutes, it would be allowed to be activated again without ramp-up only if (1) PSOs have maintained constant observation, and (2) no additional detections of any marine mammal occurred within the respective shutdown zones. If a boomer, sparker, or CHIRP was shut down for a period longer than 30 minutes, then all clearance and ramp-up procedures would be required, as previously described.

TABLE 46—HARASSMENT THRESHOLD RANGES AND MITIGATION ZONES DURING HRG SURVEYS

Marine mammal species	Level B harassment zone (m)		Clearance zone (m)	Shutdown zone (m)
	Boomer/sparker	CHIRPs		
<i>Low-frequency cetaceans:</i>				
Fin whale*	141	48	100	100

TABLE 46—HARASSMENT THRESHOLD RANGES AND MITIGATION ZONES DURING HRG SURVEYS—Continued

Marine mammal species	Level B harassment zone (m)		Clearance zone (m)	Shutdown zone (m)
	Boomer/sparker	CHIRPs		
Minke whale			100	100
Sei whale *			100	100
Humpback whale			100	100
North Atlantic right whale *			500	500
Blue whale *			100	100
<i>Mid-frequency cetaceans:</i>				
Sperm whale *	141	48	100	100
Atlantic white-sided dolphin			100	n/a
Atlantic spotted dolphin			100	n/a
Common dolphin			100	n/a
Risso's dolphin			100	100
Bottlenose dolphin			100	n/a
Long-finned pilot whale			100	100
<i>High-frequency cetaceans:</i>				
Harbor porpoise	141	48	100	100
<i>Phocid Pinnipeds (in water):</i>				
Gray seal	141	48	100	100
Harbor seal				

Note: n/a = no shutdown zone mitigation will be applied as these species are known to bow-ride.
 * Denotes species is listed under the Endangered Species Act.

Ramp-Up

At the start or restart of the use of boomers, sparkers, and/or CHIRPs, a ramp-up procedure would be required unless the equipment operates on a binary on/off switch. A ramp-up procedure, involving a gradual increase in source level output, is required at all times as part of the activation of the acoustic source when technically feasible. Operators would ramp up sources to half power for 5 minutes and then proceed to full power. Prior to a ramp-up procedure starting, the operator would have to notify the Lead PSO of the planned start of the ramp-up. This notification time would not be less than 60 minutes prior to the planned ramp-up activities as all relevant PSOs would need the appropriate 30 minute period to monitor prior to the initiation of ramp-up. Prior to ramp-up beginning, the operator must receive confirmation from the PSO that the clearance zone is clear of any marine mammals. All ramp-ups would be scheduled to minimize the overall time spent with the source being activated. The ramp-up procedure must be used at the beginning of HRG survey activities or after more than a 30-minute break in survey activities using the specified HRG equipment to provide additional protection to marine mammals in or near the survey area by allowing them to vacate the area prior to operation of survey equipment at full power.

Sunrise Wind would not initiate ramp-up until the clearance process has been completed (see Clearance and Shutdown Zones section above). Ramp-

up activities would be delayed if a marine mammal(s) enters its respective clearance zone. Ramp-up would only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until additional time has elapsed with no further sighting (i.e., 15 minutes for small odontocetes and seals, and 30 minutes for all other species).

ASV Use

Should Sunrise Wind use an ASV for HRG survey operations, the following measures would be implemented:

- When in use, the ASV would be within 800 m (2,625 ft) of the primary vessel while conducting survey operations;
- Two PSOs would be stationed aboard the mother vessel at the best vantage points to monitor the clearance and shutdown zones around the ASV;
- A dual thermal/high definition camera would be installed on the mother vessel, facing forward and angled in a direction to provide a field of view ahead of the vessel and around the ASV. PSOs would monitor the real-time camera output on hand-held tablets. A monitor would also be installed on the bridge, displaying the real-time image from the thermal/HD camera installed on the ASV itself, providing an additional forward field of view from the ASV;
- Night-vision goggles with thermal clip-ons, and a hand-held spotlight would be used to monitor the ASV during survey operations during periods

of reduced visibility (e.g., darkness, rain, fog).

Fishery Monitoring Surveys

Training

All crew undertaking the fishery survey activities would be required to receive protected species identification training prior to activities occurring. Marine mammal monitoring must occur prior to, during, and after haul-back and gear must not be deployed if a marine mammal is observed in the area. Trawl operations must only start after 15 minutes of no marine mammal sightings within 1 nm of the sampling station.

Gear-Specific Best Management Practices (BMPs)

Sunrise Wind would be required to undertake BMPs to reduce risks to marine mammals during trawl surveys. These include:

- All captains and crew conducting trawl surveys will be trained in marine mammal detection and identification;
- Survey vessels will adhere to all vessel mitigation measures (see Proposed Mitigation section);
- Marine mammal monitoring will be conducted by the captain and/or a member of the scientific crew before (15 minutes prior to within 1 nm), during, and after haul back;
- Trawl operations will commence as soon as possible once the vessel arrives on station;
- If a marine mammal (other than dolphins and porpoises) is sighted within 1 nm of the planned location in the 15 minutes before gear deployment,

Sunrise Wind will delay setting the trawl until marine mammals have not been resighted for 15 minutes or Sunrise Wind may move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, Sunrise Wind may decide to move again or to skip the station;

- Gear will not be deployed if marine mammals are observed within the area and if a marine mammal is deemed to be at risk of interaction, all gear will be immediately removed;

- Sunrise Wind will maintain visual monitoring effort during the entire period of time that trawl gear is in the water (*i.e.*, throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, Sunrise Wind will take the most appropriate action to avoid marine mammal interaction;

- Limit tow time to 20 minutes and monitoring for marine mammals throughout gear deployment, fishing, and retrieval;

- Sunrise Wind will open the codend of the net close to the deck/sorting area to avoid damage to animals that may be caught in gear;

- Trawl nets will be fully cleaned and repaired (if damaged) before setting again.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures would provide the means of affecting 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 promulgate a rulemaking 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 in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);

- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and/or

- Mitigation and monitoring effectiveness.

Separately, monitoring is also regularly used to support mitigation implementation, which is referred to as mitigation monitoring, and monitoring plans typically include measures that both support mitigation implementation and increase our understanding of the impacts of the activity on marine mammals.

During Sunrise Wind's construction activities, visual monitoring by NMFS-approved PSOs would be conducted before, during, and after impact pile driving, vibratory pile driving and pneumatic hammering, any UXO/MEC detonations, and HRG surveys. PAM would also be conducted during all impact pile driving and UXO/MEC detonations. Observations and acoustic detections by PSOs would be used to support the activity-specific mitigation measures described above. Also, to increase understanding of the impacts of the activity on marine mammals, observers would record all incidents of marine mammal occurrence at any distance from the piling and pneumatic hammering locations, UXO/MEC detonation site, and during active HRG

acoustic sources, and monitors would document all behaviors and behavioral changes, in concert with distance from an acoustic source. The required monitoring is described below, beginning with PSO measures that are applicable to all activities or monitoring and followed by activity-specific monitoring requirements.

Protected Species Observer Requirements

Sunrise Wind would be required to collect sighting data and behavioral response data related to construction activities for marine mammal species observed in the region of the activity during the period in which the activities occur using NMFS-approved visual and acoustic PSOs (see Proposed Mitigation section). All observers must be trained in marine mammal identification and behaviors and are required to have no other construction-related tasks while conducting monitoring. PSOs would monitor all clearance and shutdown zones prior to, during, and following impact pile driving, vibratory pile driving, pneumatic hammering, UXO/MEC detonation, and during HRG surveys using boomers, sparkers, and CHIRPs (with monitoring durations specified further below). PSOs will also monitor the Level B harassment zones and will document any marine mammals observed within these zones, to the extent practicable (noting that some zones are too large to fully observe). Observers would be located at the best practicable vantage points on the pile driving vessel and, where required, on an aerial platform. Full details regarding all marine mammal monitoring must be included in relevant Plans (*e.g.*, Pile Driving and Marine Mammal Monitoring Plan) that, under this proposed action, Sunrise Wind would be required to submit to NMFS for approval at least 180 days in advance of the commencement of any construction activities.

The following measures apply to all visual monitoring efforts:

1. Monitoring must be conducted by NMFS-approved, trained PSOs who would be placed at the primary location relevant to the activity (*i.e.*, pile driving vessel, pneumatic hammering location, UXO/MEC vessel, HRG survey vessel), dedicated PSO vessels (*e.g.*, additional UXO/MEC vessel(s) when the detonation area is larger than 2 km), and aerial survey plane and must be in positions that allow for the best vantage point to monitor for marine mammals and implement the relevant clearance and shutdown procedures, when determined to be applicable;

2. PSO must be independent third-party observers and must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct the relevant vessel crew with regard to the presence of protected species and mitigation requirements;

3. During all observation periods related to pile driving (impact and vibratory), pneumatic hammering, UXO/MEC detonations, and HRG surveys, PSOs would be located at the best vantage point(s) in order to ensure 360° visual coverage of the entire clearance and shutdown zones around the observing platform and as much of the Level B harassment zone as possible while still maintaining a safe work environment;

4. PSOs may not exceed 4 consecutive watch hours, must have a minimum 2-hour break between watches, and may not exceed a combined watch schedule of more than 12 hours in a single 24-hour period;

5. PSOs would be required to use appropriate equipment (specified below) to monitor for marine mammals. During periods of low visibility (*e.g.*, darkness, rain, fog, poor weather conditions, *etc.*), PSOs would be required to use alternative technologies (*i.e.*, infrared or thermal cameras) to monitor the shutdown and clearance zones.

6. PSOs should have the following minimum qualifications:

a. Visual acuity in both eyes (corrected is permissible) sufficient for discernment of moving targets at the water's surface with the ability to estimate the target size and distance. The use of binoculars is permitted and may be necessary to correctly identify the target(s);

b. Ability to conduct field observations and collect data according to the assigned protocols;

c. Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

d. Writing skills sufficient to document observations, including but not limited to: the number and species of marine mammals observed, the dates and times of when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental injury of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior.

e. 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.

Observer teams employed by Sunrise Wind, in satisfaction of the mitigation and monitoring requirements described herein, must meet the following additional requirements:

7. At least one observer must have prior experience working as an observer.

8. Other observers may substitute education (a degree in biological science or a related field) or training for experience;

9. One observer will be designated as lead observer or monitoring coordinator ("Lead PSO"). This Lead PSO would be required to have a minimum of 90 days of at-sea experience working in this role in an offshore environment and would be required to have no more than eighteen months elapsed since the conclusion of their last at-sea experience;

10. At least one PSO located on platforms (either vessel-based or aerial) would be required to have a minimum of 90 days of at-sea experience working in this role in an offshore environment and would be required to have no more than eighteen months elapsed since the conclusion of their last at-sea experience; and

11. All PSOs must be approved by NMFS. Sunrise Wind would be required to submit resumes of the initial set of PSOs necessary to commence the project to NMFS OPR for approval at least 60 days prior to the first day of in-water construction activities requiring PSOs. Resumes would need to include the dates of training and any prior NMFS approval as well as the dates and description of their last PSO experience and must be accompanied by information documenting their successful completion of an acceptable training course. NMFS would allow three weeks to approve PSOs from the time that the necessary information is received by NMFS after which any PSOs that meet the minimum requirements would automatically be considered approved.

Some Sunrise Wind activities may require the use of PAM, which would necessitate the employment of at least one acoustic PSO (aka PAM operator) on duty at any given time. PAM operators would be required to meet several of the specified requirements described above for PSOs, including: 2, 4, 6b–e, 8, 9, 10, and 11. Furthermore, PAM operators would be required to complete a specialized training for operating PAM systems and must demonstrate familiarity with the PAM system on which they would be working.

PSOs would be able to act as both acoustic and visual observers for the

project if the individual(s) demonstrates that they have had the required level and appropriate training and experience to perform each task. However, a single individual would not be allowed to concurrently act in both roles or exceed work hours specified in #4 above.

Sunrise Wind's personnel and PSOs would also be required to use available sources of information on North Atlantic right whale presence to aid in monitoring efforts. This includes:

1. Daily monitoring of the Right Whale Sightings Advisory System;

2. Consulting of the WhaleAlert app; and,

3. Monitoring of the Coast Guard's VHF Channel 16 throughout the day to receive notifications of any sightings and information associated with any Dynamic Management Areas to plan construction activities and vessel routes, if practicable, to minimize the potential for co-occurrence with North Atlantic right whales.

Additionally, whenever multiple project-associated vessels (of any size; *e.g.*, construction survey, crew transfer) are operating concurrently, any visual observations of ESA-listed marine mammals must be communicated to PSOs and vessel captains associated with other vessels to increase situational awareness.

The following are proposed monitoring and reporting measures that NMFS would require specific to each construction activity:

WTG and OCS-DC Foundation Installation

Sunrise Wind would be required to implement the following monitoring procedures during all impact pile driving of WTG and OCS-DC foundations.

During all observations associated with impact pile driving, PSOs would use high magnification (7x) binoculars and the naked eye to search continuously for marine mammals. At least one PSO on the foundation pile driving vessel and secondary dedicated-PSO vessel must be equipped with Big Eye binoculars (*e.g.*, 25 x 50; 2.7 view angle; individual ocular focus; height control) of appropriate quality. These would be pedestal-mounted on the deck at the most appropriate vantage point that provides optimal sea surface observation and PSO safety.

Sunrise Wind would be required to have a minimum of four PSOs actively observing marine mammals before, during, and after (specific times described below) the installation of foundation piles (monopiles). At least two PSOs must be actively observing on the pile driving vessel while at least two

PSOs are actively observing on a secondary, PSO-dedicated vessel. Concurrently, at least one acoustic PSO (*i.e.*, PAM operator) must be actively monitoring for marine mammals before, during and after impact pile driving.

As described in the Proposed Mitigation section, if the minimum visibility zone cannot be visually monitored at all times, pile driving operations may not commence or, if active, must shutdown, unless Sunrise Wind determines shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals.

To supplement visual observation efforts, Sunrise Wind would utilize at least one PAM operator before, during, and after pile installation. This PAM operator would assist the PSOs in ensuring full coverage of the clearance and shutdown zones. All on-duty visual PSOs would remain in contact with the on-duty PAM operator, who would monitor the PAM systems for acoustic detections of marine mammals in the area. In some cases, the PAM operator and workstation may be located onshore or they may be located on a vessel. In either situation, PAM operators would maintain constant and clear communication with visual PSOs on duty regarding detections of marine mammals that are approaching or within the applicable zones related to impact pile driving. Sunrise Wind would utilize PAM to acoustically monitor the clearance and shutdown zones (and beyond for situational awareness), and would record all detections of marine mammals and estimated distance, when possible, to the activity (noting whether they are in the Level A harassment or Level B harassment zones). To effectively utilize PAM, Sunrise Wind would implement the following protocols:

- PAM operators would be stationed on at least one of the dedicated monitoring vessels in addition to the PSOs, or located remotely/onshore.
- PAM operators would have completed specialized training for operating PAM systems prior to the start of monitoring activities, including identification of species-specific mysticete vocalizations (*e.g.*, North Atlantic right whales).
- The PAM operator(s) on-duty would monitor the PAM systems for acoustic detections of marine mammals that are vocalizing in the area.
- Any detections would be conveyed to the PSO team and any PSO sightings would be conveyed to the PAM operator

for awareness purposes, and to identify if mitigation is to be triggered.

- For real-time PAM systems, at least one PAM operator would be designated to monitor each system by viewing data or data products that are streamed in real-time or near real-time to a computer workstation and monitor located on a project vessel or onshore.

- The PAM operator would inform the Lead PSO on duty of marine mammal detections approaching or within applicable ranges of interest to the pile driving activity via the data collection software system (*i.e.*, Mysticetus or similar system), who would be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.*, delay or shutdown).

- Acoustic monitoring during nighttime and low visibility conditions during the day would complement visual monitoring (*e.g.*, PSOs and thermal cameras) and would cover an area of at least the Level B harassment zone around each foundation.

All PSOs and PAM operators would be required to begin monitoring 60 minutes prior to and during all impact pile driving and for 30 minutes after impact driving. However, PAM operators must review acoustic data from the previous 24 hours as well. As described in the Proposed Mitigation section, impact pile driving of monopiles would only commence when the minimum visibility zone (extending 2.3 km from the pile during summer months and 4.4 km during December for WTG foundation installations, and 1.6 km during summer months and 2.7 km during December for OCS-DC foundation installations) is fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of impact pile driving.

For North Atlantic right whales, any visual (regardless of distance) or acoustic detection would trigger a delay to the commencement of pile driving. In the event that a large whale is sighted or acoustically detected that cannot be confirmed as a non-North Atlantic right whale species, it must be treated as if it were a North Atlantic right whale. Following a shutdown, monopile installation may not recommence until the minimum visibility zone is fully visible and the clearance zone is clear of marine mammals for 30 minutes and no marine mammals have been detected acoustically within the PAM clearance zone for 30 minutes.

Sunrise Wind must prepare and submit a Pile Driving and Marine

Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any pile driving. The plans must include final pile driving project design (*e.g.*, number and type of piles, hammer type, noise abatement systems, anticipated start date, *etc.*) and all information related to PAM PSO monitoring protocols for pile-driving and visual PSO protocols for all activities.

Cable Landfall Construction

Sunrise Wind would be required to implement the following procedures during all vibratory pile driving activities associated with sheet pile installation and removal and pneumatic hammering installation and removal of casing pipes.

During all observation periods related to vibratory pile driving or pneumatic hammering, PSOs must use high-magnification (25x), standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals.

Sunrise Wind would be required to have a minimum of two PSOs on active duty during any installation and removal of the temporary sheet piles or casing pipe. These PSOs would always be located at the best vantage point(s) on the vibratory pile driving or pneumatic hammering platform or secondary platform in the immediate vicinity of the primary platforms in order to ensure that appropriate visual coverage is available of the entire visual clearance zone and as much of the Level B harassment zone as possible. NMFS would not require the use of PAM for these activities.

PSOs would monitor the clearance zone for the presence of marine mammals for 30 minutes before, throughout the installation of the sheet piles or casing pipes, and for 30 minutes after the activities have ceased. Sheet pile or casing pipe installation may only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of impact or vibratory pile driving.

UXO/MEC Detonations

Sunrise Wind would be required to implement the following procedures during all UXO/MEC detonations.

During all observation periods related to UXO/MEC detonation, PSOs must use high-magnification (25x), standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. PSOs located on the UXO/MEC monitoring vessel(s) would also

be equipped with “Big Eye” binoculars (*e.g.*, 25 x 150; 2.7 view angle; individual ocular focus; height control). These would be mounted on a pedestal on the deck of the vessel(s) at the most appropriate vantage to provide for optimal sea surface observation, as well as safety of the PSOs.

For detonation zones (based on UXO/MEC charge weight) larger than 2 km, a secondary vessel would be used for marine mammal monitoring. In the event a secondary vessel is needed, two PSOs would be located at an appropriate vantage point on this vessel and would maintain watch during the same time period as the PSOs on the primary monitoring vessel. For detonation zones larger than 5 km, Sunrise Wind would also be required to perform an aerial survey. At least two PSOs must be deployed on the plane during the aerial survey that would occur before, during, and after UXO/MEC detonation events. Sunrise Wind would be required to ensure that the clearance zones are fully (100 percent) monitored prior to, during, and after detonations.

As UXO/MEC detonation would only occur during daylight hours, PSOs would only need to monitor during the period between civil twilight rise and set. All PSOs and PAM operators would be required to begin monitoring 60 minutes prior to the UXO/MEC detonation event, during the event, and after for 30 minutes. Detonation may only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to detonation.

The PAM operator(s) would be stationed on one of the dedicated monitoring vessels but may also potentially be located remotely onshore, although the latter alternative is subject to approval by NMFS. When real-time PAM is used, at least one PAM operator would be designated to monitor each system by viewing the data or data products that would be streamed in real-time or near real-time to a computer workstation and monitor, which would be located either on an Sunrise Wind vessel or onshore. The PAM operator would work in coordination with the visual PSOs to ensure the clearance zone is clear of marine mammals (both visually and acoustically) prior to the detonation. The PAM operator would inform the Lead PSO on-duty of any marine mammal detections approaching or within the clearance zones via the data collection software (*i.e.*, Mysticetus or a similar system), who would then be responsible for requesting the necessary

mitigation procedure (*i.e.*, delay). The PAM operator would monitor the clearance zone for large whales and beyond the zone as possible (dependent on the detection radius of the PAM monitoring equipment).

Sunrise Wind must prepare and submit a UXO/MEC and Marine Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any UXO/MEC. The plans must include final project design and all information related to visual and PAM PSO monitoring protocols for UXO/MEC detonations.

HRG Surveys

Sunrise Wind would be required to implement the following procedures during all HRG surveys.

During all observation periods, PSOs must use standard handheld (7x) binoculars and the naked eye to search continuously for marine mammals.

Between four and six PSOs would be present on every 24-hour survey vessel, and two to three PSOs would be present on every 12-hour survey vessel. Sunrise Wind would be required to have at least one PSO on active duty during HRG surveys that are conducted during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset) and at least two PSOs during HRG surveys that are conducted during nighttime hours.

All PSOs would begin monitoring 30 minutes prior to the activation of boomers, sparkers, or CHIRPs; throughout use of these acoustic sources, and for 30 minutes after the use of the acoustic sources has ceased.

Given that multiple HRG vessels may be operating concurrently, any observations of marine mammals would be required to be communicated to PSOs on all nearby survey vessels.

Ramp-up of boomers, sparkers, and CHIRPs would only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of survey activities utilizing the specified acoustic sources.

During daylight hours when survey equipment is not operating, Sunrise Wind would ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports.

Marine Mammal Passive Acoustic Monitoring

As described previously, Sunrise Wind would be required to utilize a PAM system to supplement visual monitoring for all monopile installations as well as during all UXO/MEC detonations. PAM operators may be on watch for a maximum of four consecutive hours followed by a break of at least two hours between watches. Again, PSOs can act as PAM operators or visual PSOs (but not simultaneously) as long as they demonstrate that their training and experience are sufficient to perform each task.

The PAM system must be monitored by a minimum of one PAM operator beginning at least 60 minutes prior to soft-start of impact pile driving of monopiles and UXO/MEC detonation, at all times during monopile installation and UXO/MEC detonation and 30 minutes post-completion of both activities. PAM operators must immediately communicate all detections of marine mammals at any distance (*i.e.*, not limited to the Level B harassment zones) to visual PSOs, including any determination regarding species identification, distance, and bearing and the degree of confidence in the determination.

PAM systems may be used for real-time mitigation monitoring. The requirement for real-time detection and localization limits the types of PAM technologies that can be used to those systems that are either cabled, satellite, or radio-linked. It is most likely that Sunrise Wind would deploy autonomous or moored-remote PAM devices, including sonobuoy arrays or similar retrievable buoy systems. The system chosen will dictate the design and protocols of the PAM operations. Sunrise Wind is not considering seafloor cabled PAM systems, in part due to high installation and maintenance costs, environmental issues related to cable laying, and the associated permitting complexities. For a review of the PAM systems Sunrise Wind is considering, see Appendix 4 of the Protected Species Mitigation and Monitoring Plan included in Sunrise Wind's ITA application.

Towed PAM systems may be utilized for the Sunrise Wind project only if additional PAM systems are necessary. Towed systems consist of cabled hydrophone arrays that would be deployed from a vessel and then typically monitored from the tow vessel. Notably, several challenges exist when using a towed PAM system (*i.e.*, the tow vessel may not be fit for the purpose as it may be towing other equipment,

operating sound sources, or working in patterns not conducive to effective PAM). Furthermore, detection and localization capabilities for low-frequency cetacean calls (*i.e.*, mysticete species) can be difficult in a commercial deployment setting. Alternatively, these systems have many advantages, as they are often low cost to operate, have high mobility, and are fairly easy and reliable to operate. These types of systems also work well in conjunction with visual monitoring efforts.

Sunrise Wind plans to deploy PAM arrays specific for mitigation and monitoring of marine mammals outside of the shutdown zone to optimize the PAM system's capabilities to monitor for the presence of animals potentially entering these zones. The exact configuration and number of PAM devices would depend on the size of the zone(s) being monitored, the amount of noise expected in the area, and the characteristics of the signals being monitored. More closely spaced hydrophones would allow for more directionality and, perhaps, range to the vocalizing marine mammals; however, this approach would add additional costs and greater levels of complexity to the project. Mysticetes, which would produce relatively loud and lower-frequency vocalizations, may be able to be heard with fewer hydrophones spaced at greater distances. However, detecting smaller cetaceans (such as mid-frequency delphinids; odontocetes) may necessitate that more hydrophones be spaced closer together given the shorter propagation range of the shorter, mid-frequency acoustic signals (*e.g.*, whistles and echolocation clicks). As there are no "perfect fit" single optimal array configurations, these set-ups would need to be considered on a case-by-case basis.

A Passive Acoustic Monitoring (PAM) Plan must be submitted to NMFS for review and approval at least 180 days prior to the planned start of monopile installations. PAM should follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind (Van Parijs *et al.*, 2021). The plan must describe all proposed PAM equipment, procedures, and protocols. However, NMFS considers PAM usage for every project on a case-by-case basis and would continue discussions with Sunrise Wind regarding selection of the PAM system that is most appropriate for the proposed project. The authorization to take marine mammals would be contingent upon NMFS' approval of the PAM Plan.

Acoustic Monitoring for Sound Field and Harassment Isopleth Verification (SFV)

During the installation of the first three monopile foundations and during all UXO/MEC detonations, Sunrise Wind must empirically determine source levels, the ranges to the isopleths corresponding to the Level A harassment and Level B harassment thresholds, and the transmission loss coefficient(s). Sunrise Wind may also estimate ranges to the Level A harassment and Level B harassment isopleths by extrapolating from *in situ* measurements conducted at several distances from the monopile being driven and UXO/MEC being detonated. Sunrise Wind must measure received levels at a standard distance of 750 m from the monopiles and at both the presumed modeled Level A harassment and Level B harassment isopleth ranges or an alternative distance(s) as agreed to in the SFV Plan.

If acoustic field measurements collected during installation of foundation piles or UXO detonation indicate ranges to the isopleths corresponding to Level A harassment and Level B harassment thresholds are greater than the ranges predicted by modeling (assuming 10 dB attenuation), Sunrise Wind must implement additional noise mitigation measures prior to installing the next monopile or detonating any additional UXOs/MECs. Initial additional measures may include improving the efficacy of the implemented noise mitigation technology (*e.g.*, BBC, DBBC) and/or modifying the piling schedule to reduce the sound source. Each sequential modification would be evaluated empirically by acoustic field measurements. In the event that field measurements indicate ranges to isopleths corresponding to Level A harassment and Level B harassment thresholds are greater than the ranges predicted by modeling (assuming 10 dB attenuation), NMFS may expand the relevant harassment, clearance, and shutdown zones and associated monitoring protocols. If harassment zones are expanded beyond an additional 1,500 m, additional PSOs would be deployed on additional platforms with each observer responsible for maintaining watch in no more than 180° and of an area with a radius no greater than 1,500 m.

If acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10 dB attenuation), Sunrise Wind may

request a modification of the clearance and shutdown zones for impact pile driving of monopiles and for detonation of UXOs/MECs. For NMFS to consider a modification request, Sunrise Wind would have had to conduct SFV on three or more monopiles and on all detonated UXOs/MECs thus far to verify that zone sizes are consistently smaller than those predicted by modeling (assuming 10 dB attenuation). In addition, if a subsequent monopile installation location is selected that was not represented by previous three locations (*i.e.*, substrate composition, water depth), SFV would be required. Furthermore, if a subsequent UXO/MEC charge weight is encountered and/or detonation location is selected that was not representative of the previous locations (*i.e.*, substrate composition, water depth), SFV would also be required. Upon receipt of an interim SFV report, NMFS may adjust zones (*i.e.*, Level A harassment, Level B harassment, clearance, shutdown, and/or minimum visibility zone) to reflect SFV measurements. The shutdown and clearance zones for pile driving would be equivalent to the measured range to the Level A harassment isopleths plus 10 percent (shutdown zone) and 20 percent (clearance zone), rounded up to the nearest 100 m for PSO clarity. The minimum visibility zone would be based on the largest measured distance to the Level A harassment isopleth for large whales. Regardless of SFV, a North Atlantic right whale detected at any distance by PSOs would continue to result in a delay to the start of pile driving. Similarly, if pile driving has commenced, shutdown would be called for in the event a right whale is observed at any distance. That is, the visual clearance and shutdown criteria for North Atlantic right whales would not change, regardless of field acoustic measurements. The Level B harassment zone would be equal to the largest measured range to the Level B harassment isopleth.

The SFV plan must also include how operational noise would be monitored. Sunrise Wind would be required to estimate source levels (at 10 m from the operating foundation) based on received levels measured at 50 m, 100 m, and 250 m from each foundation monitored (minimum of 3 WTG and the OCS-DC). These data must be used to identify estimated transmission loss rates. Operational parameters (*e.g.*, direct drive/gearbox information, turbine rotation rate) as well as sea state conditions and information on nearby anthropogenic activities (*e.g.*, vessels

transiting or operating in the area) must be reported.

Sunrise Wind must submit a SFV Plan at least 180 days prior to the planned start of impact pile driving and any UXO/MEC detonation activities. The plan must describe how Sunrise Wind would ensure that the first three monopile foundation installation sites selected and each UXO/MEC detonation scenario (*i.e.*, charge weight, location) selected for SFV are representative of the rest of the monopile installation sites and UXO/MEC scenarios. Sunrise Wind must include information on how additional sites/scenarios would be selected for SFV should it be determined that these sites/scenarios are not representative of all other monopile installation sites and UXO/MEC detonations. The plan must also include the methodology for collecting, analyzing, and preparing SFV data for submission to NMFS. The plan must describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. Sunrise Wind must also provide, as soon as they are available but no later than 48 hours after each installation, the initial results of the SFV measurements to NMFS in an interim report after each monopile for the first three piles and after each UXO/MEC detonation.

In addition to the aforementioned monitoring requirements, Sunrise Wind proposes to conduct a long-term ecological monitoring project using bottom-mounted passive acoustic monitoring equipment during the effective period of the proposed rule to better understand the long term distribution of marine mammals in the project area with a focus on detecting North Atlantic right whales. This long-term study will contribute to the understanding of the potential impacts of the project and inform any potential adaptive management strategies.

Reporting

Prior to any construction activities occurring, Sunrise Wind would provide a report to NMFS (at itp.daly@noaa.gov and pr.itp.monitoringreports@noaa.gov) documenting that all required training for Sunrise Wind personnel (*i.e.*, vessel crews, vessel captains, PSOs, and PAM operators) has been completed.

NMFS would require standardized and frequent reporting from Sunrise Wind during the life of the proposed regulations and LOA. All data collected relating to the Sunrise Wind project would be recorded using industry-standard software (*e.g.*, Mysticetus or a similar software) installed on field laptops and/or tablets. Sunrise Wind would be required to submit weekly,

monthly and annual reports as described below. During activities requiring PSOs, the following information would be collected and reported related to the activity being conducted:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Watch status (*i.e.*, sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);
- PSO who sighted the animal;
- Time of sighting;
- Weather parameters (*e.g.*, wind speed, percent cloud cover, visibility);
- Water conditions (*e.g.*, sea state, tide state, water depth);
- All marine mammal sightings, regardless of distance from the construction activity;
- Species (or lowest possible taxonomic level possible)
- Pace of the animal(s);
- Estimated number of animals (minimum/maximum/high/low/best);
- Estimated number of animals by cohort (*e.g.*, adults, yearlings, juveniles, calves, group composition, *etc.*);
- Description (*i.e.*, as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);
- Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity;
- Animal's closest distance and bearing from the pile being driven, UXO/MEC, or specified HRG equipment and estimated time spent within the Level A harassment and/or Level B harassment zones;
- Construction activity at time of sighting (*e.g.*, vibratory installation/removal, impact pile driving, UXO/MEC detonation, HRG survey), use of any noise abatement device(s), and specific phase of activity (*e.g.*, ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, post-UXO/MEC detonation, *etc.*);
- Description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.*, delay, shutdown, *etc.*) and time and location of the action; and
- Other human activity in the area.

For all real-time acoustic detections of marine mammals, the following must be recorded and included in weekly, monthly, annual, and final reports:

1. Location of hydrophone (latitude & longitude; in Decimal Degrees) and site name;
 2. Bottom depth and depth of recording unit (in meters);
 3. Recorder (model & manufacturer) and platform type (*i.e.*, bottom-mounted, electric glider, *etc.*), and instrument ID of the hydrophone and recording platform (if applicable);
 4. Time zone for sound files and recorded date/times in data and metadata (in relation to UTC. *i.e.*, EST time zone is UTC-5);
 5. Duration of recordings (start/end dates and times; in ISO 8601 format, yyyy-mm-ddTHH:MM:SS.sssZ);
 6. Deployment/retrieval dates and times (in ISO 8601 format);
 7. Recording schedule (must be continuous);
 8. Hydrophone and recorder sensitivity (in dB *re.* 1 μ Pa);
 9. Calibration curve for each recorder;
 10. Bandwidth/sampling rate (in Hz);
 11. Sample bit-rate of recordings; and
 12. Detection range of equipment for relevant frequency bands (in meters).
- For each detection the following information must be noted:
13. Species identification (if possible);
 14. Call type and number of calls (if known);
 15. Temporal aspects of vocalization (date, time, duration, *etc.*, date times in ISO 8601 format);
 16. Confidence of detection (detected, or possibly detected);
 17. Comparison with any concurrent visual sightings;
 18. Location and/or directionality of call (if determined) relative to acoustic rLocation of recorder and construction activities at time of call;
 19. Name and version of detection or sound analysis software used, with protocol reference;
 20. Minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and
 21. Name of PAM operator(s) on duty.
- If a North Atlantic right whale is detected via Sunrise Wind's PAM, the date, time, and location (*i.e.*, latitude and longitude of recorder) of the detection as well as the recording platform that had the detection must be reported to nmfs.pacmdata@noaa.gov as soon as feasible, no longer than 24 hours after the detection. Full detection data and metadata must be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic right whale Passive Acoustic Reporting System website (<https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>).
- If a North Atlantic right whale is observed at any time by PSOs or

personnel on or in the vicinity of any impact or vibratory pile-driving vessel, dedicated PSO vessel, construction survey vessel, during vessel transit, or during an aerial survey, Sunrise Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System (866) 755-6622, to the U.S. Coast Guard via channel 16, and through the WhaleAlert app (<http://www.whalealert.org/>) as soon as feasible but no longer than 24 hours after the sighting. Information reported must include, at a minimum: time of sighting, location, and number of North Atlantic right whales observed.

SFV Interim Report—Sunrise Wind would be required to provide, as soon as they are available but no later than 48 hours after each installation, the initial results of SFV measurements to NMFS in an interim report after each monopile for the first three piles and any subsequent piles monitored. An SFV interim report must also be submitted within 48 hours after each UXO/MEC detonation.

Weekly Report—Sunrise Wind would be required to compile and submit weekly PSO, PAM, and SFV reports to NMFS (PR.ITP.monitoringreports@noaa.gov) that document the daily start and stop of all pile driving, pneumatic hammering, HRG survey, or UXO/MEC detonation activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) used and its performance. Weekly reports would be due on Wednesday for the previous week (Sunday–Saturday). The weekly report would also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, weekly reports would no longer be required.

Monthly Report—Sunrise Wind would be required to compile and submit monthly reports to NMFS (at itp.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, number of UXO/MEC detonations, all detections of marine mammals, and any mitigative actions taken. Monthly reports would be due on the 15th of the month for the previous month. The monthly report

would also identify which turbines become operational and when (a map must be provided). Once foundation pile installation is complete, monthly reports would no longer be required.

Annual Report—Sunrise Wind would be required to submit an annual PSO, PAM, and SFV summary report to NMFS (at itp.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) no later than 90 days following the end of a given calendar year describing, in detail, all of the information required in the monitoring section above. A final annual report would be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments were received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report would be considered final.

Final Report—Sunrise Wind must submit its draft final report(s) to NMFS (at itp.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of NMFS' receipt of the draft report, the report shall be considered final.

Situational Reporting

Specific situations encountered during the development of the Sunrise Wind project would require reporting. These situations and the relevant procedures are described in paragraphs (d)(10)(i) through (v) of this section:

- If a large whale is detected during vessel transit, the following information must be recorded and reported:
 - a. Time, date, and location;
 - b. The vessel's activity, heading, and speed;
 - c. Sea state, water depth, and visibility;
 - d. Marine mammal identification to the best of the observer's ability (e.g., North Atlantic right whale, whale, dolphin, seal);
 - e. Initial distance and bearing to marine mammal from vessel and closest point of approach; and,
 - f. Any avoidance measures taken in response to the marine mammal sighting.
 - If a sighting of a stranded, entangled, injured, or dead marine mammal occurs, the sighting would be reported to NMFS OPR, the NMFS Greater Atlantic Regional Fisheries

Office (GARFO) Marine Mammal and Sea Turtle Stranding & Entanglement Hotline (866-755-6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, Sunrise Wind must immediately cease all 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 the LOA. NMFS may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Sunrise Wind may not resume their activities until notified by NMFS. The report must include the following information:

- a. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- b. Species identification (if known) or description of the animal(s) involved;
- c. Condition of the animal(s) (including carcass condition if the animal is dead);
- d. Observed behaviors of the animal(s), if alive;
- e. If available, photographs or video footage of the animal(s); and
- f. General circumstances under which the animal was discovered.

- In the event of a vessel strike of a marine mammal by any vessel associated with the Sunrise Wind project, Sunrise Wind shall immediately report the strike incident to the NMFS OPR and the GARFO within and no later than 24 hours. Sunrise Wind must immediately cease all 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 the LOA. NMFS may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Sunrise Wind may not resume their activities until notified by NMFS. The report must include the following information:

- a. Time, date, and location (latitude/longitude) of the incident;
- b. Species identification (if known) or description of the animal(s) involved;
- c. Vessel's speed during and leading up to the incident;
- d. Vessel's course/heading and what operations were being conducted (if applicable);
- e. Status of all sound sources in use;
- f. Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

g. Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

h. Estimated size and length of animal that was struck;

i. Description of the behavior of the marine mammal immediately preceding and following the strike;

j. If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

k. Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

l. To the extent practicable, photographs or video footage of the animal(s).

Sound Monitoring Reporting

As described previously, Sunrise Wind would be required to provide the initial results of SFV (including measurements) to NMFS in interim reports after each monopile installation for the first three piles (and any subsequent piles) as soon as they are available, but no later than 48 hours after each installation. Sunrise Wind would also have to provide interim reports after every UXO/MEC detonation as soon as they are available but no later than 48 hours after each detonation. In addition to *in situ* measured ranges to the Level A harassment and Level B harassment isopleths, the acoustic monitoring report must include: hammer energies (pile driving), UXO/MEC weight (including donor charge weight), SPL_{peak} , SPL_{rms} that contains 90 percent of the acoustic energy, single strike sound exposure level, integration time for SPL_{rms} , and 24-hour cumulative SEL extrapolated from measurements. The sound levels reported must be in median and linear average (*i.e.*, average in linear space), and in dB. All these levels must be reported in the form of median, mean, max, and minimum. The SEL and SPL power spectral density and one-third octave band levels (usually calculated as decade band levels) at the receiver locations should be reported. The acoustic monitoring report must also include: a description of the SFV PAM hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, a description of the hydrophones used, hydrophone and water depth, distance to the pile driven, sediment type at the recording location, and local environmental conditions

(*e.g.*, wind speed). In addition, pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern) should be reported. Finally, the report must include a description of the noise abatement system and operational parameters (*e.g.*, bubble flow rate, distance deployed from the pile or UXO/MEC location, *etc.*), and any action taken to adjust the noise abatement system. Final results of SFV must be submitted as soon as possible, but no later than within 90 days following completion of impact pile driving of monopiles and UXOs/MECs detonations.

Adaptive Management

The regulations governing the take of marine mammals incidental to Sunrise Wind's construction activities would contain an adaptive management component. The monitoring and reporting requirements in this proposed rule are designed to provide NMFS with information that helps us better understand the impacts of the specified activities on marine mammals and informs our consideration of whether any changes to mitigation or monitoring are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from Sunrise Wind 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 LOA. During the course of the rule, Sunrise Wind (and other LOA-holders conducting offshore wind development activities) would be required to participate in one or more adaptive management meetings convened by NMFS and/or BOEM, in which the above information would be summarized and discussed in the context of potential changes to the mitigation or monitoring measures.

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" by mortality, serious injury, and Level A harassment or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.*, intensity, duration), the context of any such responses (*e.g.*, critical reproductive time or location, migration) as well as effects on habitat and the likely effectiveness of 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 environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

In the Estimated Take section, we identified the subset of potential effects that would be expected to qualify as takes under the MMPA and then identified the maximum number of takes by Level A harassment and Level B harassment that we estimate are reasonably expected to occur based on the methods described. The impact that any given take would have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.*, the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). In this rule, we evaluate the likely impacts of the enumerated harassment takes that are proposed for authorization in the context of the specific circumstances surrounding these predicted takes. We also collectively evaluate this information as well as other more taxa-

specific information and mitigation measure effectiveness in group-specific discussions that support our negligible impact conclusions for each stock. As also described above, no serious injury or mortality is expected or proposed for authorization for any species or stock.

The Description of the Specified Activities section describes the specified activities proposed by Sunrise Wind that may result in take of marine mammals and an estimated schedule for conducting those activities. Sunrise Wind has provided a realistic construction schedule (*e.g.*, Sunrise Wind's schedule reflects the maximum number of piles they anticipate to be able to drive each month in which pile driving is authorized to occur), although, we recognize schedules may shift for a variety of reasons (*e.g.*, weather or supply delays). However, the total amount of take would not exceed the 5 year totals and maximum annual total in any given year indicated in Tables 38 and 39, respectively.

We base our analysis and negligible impact determination (NID) on the maximum number of takes that would be reasonably expected to occur and are proposed to be authorized in the 5-year LOA, if issued, and extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals and the number and context of the individuals affected. As stated before, the number of takes, both annual and 5-year total, alone are only a part of the analysis. To avoid repetition, we provide some general analysis in this Negligible Impact Analysis and Determination section that applies to all the species listed in Table 4, given that some of the anticipated effects of Sunrise Wind's construction activities on marine mammals are expected to be relatively similar in nature. Then, we subdivide into more detailed discussions for mysticetes, odontocetes, and pinnipeds, which have broad life history traits that support an overarching discussion of some factors considered within the analysis for those groups (*e.g.*, habitat-use patterns, high-level differences in feeding strategies).

Last, we provide a negligible impact determination for each species or stock, providing species or stock-specific information or analysis, where appropriate, for example, for North Atlantic right whales given their population status. Organizing our analysis by grouping species or stocks that share common traits or that would respond similarly to effects of Sunrise Wind's proposed activities and then providing species- or stock-specific information allows us to avoid

duplication while ensuring that we have analyzed the effects of the specified activities on each affected species or stock. It is important to note that in the group or species sections, we base our negligible impact analysis on the maximum annual take that is predicted under the 5-year rule; however, the majority of the impacts are associated with WTG and OCS-DC foundation installation, which would occur largely within a 1-year period. The estimated take in the other years is expected to be notably less, which is reflected in the total take that would be allowable under the rule.

As described previously, no serious injury or mortality is anticipated or proposed for authorization in this rule. The amount of harassment Sunrise Wind has requested and NMFS is proposing to authorize is based on exposure models that consider the outputs of acoustic source and propagation models. Several conservative parameters and assumptions are ingrained into these models, such as assuming forcing functions that consider direct contact with piles (*i.e.*, no cushion allowances) and application of the highest monthly sound speed profile to all months within a given season. The exposure model results do not reflect any mitigation measures or avoidance response. The amount of take proposed to be authorized reflects careful consideration of other data (*e.g.*, PSO data, group size data) and for large whales and Level A harassment potential, the consideration of mitigation measures. For all species, the amount of take proposed to be authorized represents the amount of Level A harassment and Level B harassment that is reasonably expected to occur.

Behavioral Disturbance

In general, NMFS anticipates that impacts on an individual that has been harassed are likely to be more intense when exposed to higher received levels and for a longer duration (though this is in no way a strictly linear relationship for behavioral effects across species, individuals, or circumstances) and less severe impacts result when exposed to lower received levels and for a brief duration. However, there is also growing evidence of the importance of contextual factors, such as distance from a source in predicting marine mammal behavioral response to sound—*i.e.*, sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (*e.g.*, DeRuiter, 2012; Falcone *et al.*, 2017). As

described in the Potential Effects to Marine Mammals and their Habitat section, the intensity and duration of any impact resulting from exposure to Sunrise Wind's activities is dependent upon a number of contextual factors including, but not limited to, sound source frequencies, whether the sound source is moving towards the animal, hearing ranges of marine mammals, behavioral state at time of exposure, status of individual exposed (*e.g.*, reproductive status, age class, health) and an individual's experience with similar sound sources. Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.*, behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources. Harassment of marine mammals may result in behavioral modifications (*e.g.*, avoidance, temporary cessation of foraging or communicating, changes in respiration or group dynamics, masking) or may result in auditory impacts such as hearing loss. In addition, some of the lower level physiological stress responses (*e.g.*, orientation or startle response, change in respiration, change in heart rate) discussed previously would likely co-occur with the behavioral modifications, although these physiological responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect Sunrise Wind's activities to produce conditions of long-term and continuous exposure to noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

In the range of potential behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within 1 day), the less severe end might include exposure to comparatively lower levels of a sound, at a greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time, or breaking off one or a few feeding bouts. More severe effects could occur if an animal gets close enough to the source to receive a comparatively higher level, is exposed

continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Many species perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than 1 day or recur on subsequent days (Southall *et al.*, 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans (Baird *et al.*, 2008, Barlow *et al.*, 2020, Henderson *et al.*, 2016, Schorr *et al.*, 2014). It is important to note the water depth in the Sunrise Wind project area is shallow (5 to 50 m) and deep diving species, such as sperm whales, are not expected to be engaging in deep foraging dives when exposed to noise above NMFS harassment thresholds during the specified activities. Therefore, we do not anticipate impacts to deep foraging behavior to be impacted by the specified activities.

It is also important to identify that the estimated number of takes does not necessarily equate to the number of individual animals Sunrise Wind expects to harass (which is lower) but rather, to the instances of take (*i.e.*, exposures above the Level B harassment thresholds) that are anticipated to occur. These instances may represent either brief exposures (*e.g.*, seconds for UXO/MEC detonation or seconds to minutes for HRG surveys) or in some cases, longer durations of exposure within a day (*e.g.*, pile driving). Some individuals of a species may experience recurring instances of take over multiple days throughout the year while some members of a species or stock may experience one exposure as they move through an area, which means that the number of individuals taken is smaller than the total estimated takes. In short, for species that are more likely to be migrating through the area and/or for which only a comparatively smaller number of takes are predicted (*e.g.*, some of the mysticetes), it is more likely that each take represents a different individual whereas for non-migrating species with larger amounts of predicted take, we expect that the total anticipated takes represent exposures of a smaller

number of individuals of which some would be exposed multiple times.

For the Sunrise Wind project, impact pile driving is most likely to result in a higher magnitude and severity of behavioral disturbance than other activities (*i.e.*, vibratory pile driving, UXO/MEC detonation, and HRG surveys). Impact pile driving has higher source levels than vibratory pile driving and HRG sources. HRG survey equipment also produces much higher frequencies than pile driving, resulting in minimal sound propagation. While UXO/MEC detonations may have higher source levels, impact pile driving is planned for longer durations (*i.e.*, a maximum of three UXO/MEC detonations are planned, which would result in only instantaneous exposures). While impact pile driving is anticipated to be most impactful for these reasons, impacts are minimized through implementation of mitigation measures, including soft-start, use of a sound attenuation system, and the implementation of clearance zones that would facilitate a delay of pile driving if marine mammals were observed approaching or within areas that could be ensounded above sound levels that could result in Level B harassment. Given sufficient notice through the use of soft-start, marine mammals are expected to move away from a sound source prior to becoming exposed to very loud noise levels. The requirement that pile driving can only commence when the full extent of all clearance zones are fully visible to visual PSOs would ensure a higher marine mammal detection, enabling a high rate of success in implementation of clearance zones. Furthermore, Sunrise Wind would be required to utilize PAM prior to and during all clearance periods, during impact pile driving, and after pile driving has ended during the post-piling period. PAM has been shown to be particularly effective when used in conjunction with visual observations, increasing the overall capability to detect marine mammals (Van Parijs *et al.*, 2021). These measures also apply to UXO/MEC detonation(s), which also have the potential to elicit more severe behavioral reactions in the unlikely event that an animal is relatively close to the explosion in the instant that it occurs; hence, severity of behavioral responses are expected to be lower than would be the case without mitigation.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe response, if they are not expected

to be repeated over sequential days, impacts to individual fitness are not anticipated. Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.*, 2018; Harris *et al.*, 2017; King *et al.*, 2015; NAS 2017; New *et al.*, 2014; Southall *et al.*, 2007; Villegas-Amtmann *et al.*, 2015).

Temporary Threshold Shift (TTS)

TTS is one form of Level B harassment that marine mammals may incur through exposure to Sunrise Wind's activities and, as described earlier, the proposed takes by Level B harassment may represent takes in the form of behavioral disturbance, TTS, or both. As discussed in the Potential Effects to Marine Mammals and their Habitat section, in general, TTS can last from a few minutes to days, be of varying degree, and occur across different frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Impact and vibratory pile driving generate sounds in the lower frequency ranges (with most of the energy below 1–2 kHz, but with a small amount energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS is higher in low-frequency cetaceans (*i.e.*, mysticetes) than other marine mammal hearing groups and would be more likely to occur in frequency bands in which they communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species given the frequencies produced by pile driving do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalizations, the frequency range of TTS from Sunrise Wind's pile driving and UXO/MEC detonation activities would not typically span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. However, the mitigation measures proposed by Sunrise Wind and proposed by NMFS, further reduce the potential for TTS in mysticetes.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed

previously (refer back to Table 8). However, source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the proposed mitigation and the nominal speed of the receiving animal relative to the stationary sources such as impact pile driving. The recovery time of TTS is also of importance when considering the potential impacts from TTS. In TTS laboratory studies (as discussed in the Potential Effects to Marine Mammals and their Habitat section), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes) and we note that while the pile driving activities last for hours a day, it is unlikely that most marine mammals would stay in the close vicinity of the source long enough to incur more severe TTS. UXO/MEC detonation also has the potential to result in TTS; however, given the duration of exposure is extremely short (milliseconds), the degree of TTS (*i.e.*, the amount of dB shift) is expected to be small and TTS duration is expected to be short (minutes to hours). Overall, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the unlikely scenario that any TTS overlapped the entirety of a critical hearing range, it is unlikely that TTS of the nature expected to result from Sunrise Wind's activities would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Permanent Threshold Shift (PTS)

Sunrise Wind has requested and NMFS proposed to authorize a very small amount of take by PTS to some marine mammal individuals. The numbers of proposed annual takes by Level A harassment are relatively low for all marine mammal stocks and species: humpback whales (7 takes), harbor porpoises (49 takes), gray seals (7 takes), and harbor seals (16 takes). The only activities we anticipate PTS may result from are exposure to impact pile driving and UXO/MEC detonations, which produce sounds that are both impulsive and primarily concentrated in the lower frequency ranges (below 1 kHz) (David, 2006; Krumpel *et al.*, 2021).

There are no PTS data on cetaceans and only one instance of PTS being induced in an older harbor seals (Reichmuth *et al.*, 2019); however,

available TTS data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds (Southall *et al.*, 2007; NMFS 2018; Southall *et al.*, 2019)) suggest that most threshold shifts occur in the frequency range of the source up to one octave higher than the source. We would anticipate a similar result for PTS. Further, no more than a small degree of PTS is expected to be associated with any of the incurred Level A harassment given it is unlikely that animals would stay in the close vicinity of a source for a duration long enough to produce more than a small degree of PTS.

PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving or instantaneous UXO/MEC detonation (*i.e.*, the low-frequency region below 2 kHz) (Cody and Johnstone, 1981; McFadden, 1986; Finneran, 2015), not severe hearing impairment. If hearing impairment occurs from either impact pile driving or UXO/MEC detonation, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. However, given sufficient notice through use of soft-start prior to implementation of full hammer energy during impact pile driving, marine mammals are expected to move away from a sound source prior to it resulting in severe PTS. Sunrise estimates up to three UXOs/MECs may be detonated and the exposure analysis assumes the worst-case scenario that all of the UXOs/MECs found would consist of the largest charge weight of UXO/MEC (E12; 454 kg). However, it is highly unlikely that all charges would be this maximum size; thus, the amount of Level A harassment that may occur incidental to the detonation of the three UXOs/MECs would likely be less than what is estimated here. Nonetheless, this negligible impact analysis considers the effects of the takes that are conservatively proposed for authorization.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual are similar to those discussed for TTS (*e.g.*, decreased ability to communicate, forage effectively, or detect predators), but an important difference is that masking only occurs during the time of the signal versus TTS, which continues beyond the duration of the signal. Also, though,

masking can result from the sum of exposure to multiple signals, none of which might individually cause TTS. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Also inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency). As our analysis has indicated, for this project we expect that impact pile driving foundations have the greatest potential to mask marine mammal signals, and this pile driving may occur for several, albeit intermittent, hours per day. Masking is fundamentally more of a concern at lower frequencies (which are pile driving dominant frequencies) because low frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower low frequency calls of mysticetes, as well as many non-communication cues related to fish and invertebrate prey, and geologic sounds that inform navigation. However, the area in which masking would occur for all marine mammal species and stocks (*e.g.*, predominantly in the vicinity of the foundation pile being driven) is small relative to the extent of habitat used by each species and stock. In summary, the nature of Sunrise Wind's activities, paired with habitat use patterns by marine mammals, does not support the likelihood that the level of masking that could occur would have the potential to affect reproductive success or survival.

Impacts on Habitat and Prey

Construction activities or UXO/MEC detonation may result in fish and invertebrate mortality or injury very close to the source, and all activities (including HRG surveys) may cause some fish to leave the area of disturbance. It is anticipated that any mortality or injury would be limited to a very small subset of available prey and the implementation of mitigation measures, such as the use of a noise attenuation system during impact pile driving and UXO/MEC detonation, would further limit the degree of impact (again noting UXO/MEC detonation would be limited to 3 events over 5 years). Behavioral changes in prey in

response to construction activities could temporarily impact 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 at any given time (e.g., around a pile being driven), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Cable presence and operation are not anticipated to impact marine mammal habitat as these would be buried, and any electromagnetic fields emanating from the cables are not anticipated to result in consequences that would impact marine mammals prey to the extent they would be unavailable for consumption.

The presence and operation of wind turbines within the lease area could have longer-term impacts on marine mammal habitat, as the project would result in the persistence of the structures within marine mammal habitat for more than 30 years. The presence and operation of an extensive number of structures, such as wind turbines, are, in general, likely to result in local and broader oceanographic effects in the marine environment and may disrupt dense aggregations and distribution of marine mammal zooplankton prey through altering the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.*, 2021, Johnson *et al.*, 2021, Christiansen *et al.*, 2022, Dorrell *et al.*, 2022). However, the scale of impacts is difficult to predict and may vary from hundreds of meters for local individual turbine impacts (Schultze *et al.*, 2020) to large-scale dipoles of surface elevation changes stretching hundreds of kilometers (Christiansen *et al.*, 2022). In 2022, NMFS hosted a workshop to better understand the current scientific knowledge and data gaps around the potential long-term impacts of offshore wind farm operations in the Atlantic Ocean. The report from that workshop is pending, and NMFS will consider its findings in development of the final rule for this action.

As discussed in the Potential Effects to Marine Mammals and Their Habitat section, the SRWF would consist of no more than 94 WTGs (scheduled to be operational by the end of Year 1 of the effective period of the rule) in coastal waters off New York, an area dominated by physical oceanographic patterns of strong seasonal stratification (summer) and turbulence-driven mixing (winter). While there are likely to be local oceanographic impacts from the

presence and operation of the SRWF, meaningful oceanographic impacts relative to stratification and mixing that would significantly affect marine mammal habitat and prey over large areas in key foraging habitats are not anticipated from the Sunrise Wind project. Although this area supports aggregations of zooplankton (baleen whale prey) that could be impacted if long-term oceanographic changes occurred, prey densities are typically significantly less in the Sunrise Wind project area than in known baleen whale foraging habitats to the east and north (e.g., south of Nantucket and Martha's Vineyard, Great South Channel). For these reasons, if oceanographic features are affected by wind farm operation during the course of the proposed rule (approximately end of Year 1 through Year 5), the impact on marine mammal habitat and their prey is likely to be comparatively minor.

Mitigation To Reduce Impacts on All Species

This proposed rulemaking includes a variety of mitigation measures designed to minimize impacts on all marine mammals, with a focus on North Atlantic right whales (the latter is described in more detail below). For impact pile driving of foundation piles, eight overarching mitigation measures are proposed, which are intended to reduce both the number and intensity of marine mammal takes: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection within designated zones triggering delay or shutdown); (3) use of PAM to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering delay or shutdown); (4) implementation of clearance zones; (5) implementation of shutdown zones; (6) use of soft-start; (7) use of noise abatement technology; and, (8) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Sunrise Wind project personnel must be reported to PSOs.

When monopile foundation installation does occur, Sunrise Wind is committed to reducing the noise levels generated by impact pile driving to the lowest levels practicable and ensuring that they do not exceed a noise footprint above that which was modeled, assuming a 10 dB attenuation. Use of a soft-start would allow animals to move away from (i.e., avoid) the sound source prior to the elevation of the hammer energy to the level maximally needed to install the pile (Sunrise Wind would not

use a hammer energy greater than necessary to install piles). Clearance zone and shutdown zone implementation, required when marine mammals are within given distances associated with certain impact thresholds, would reduce the magnitude and severity of marine mammal take.

Sunrise proposed and NMFS would require use a noise attenuation device (likely a big bubble curtain and another technology, such as a hydro-sound damper) during all foundation pile driving to ensure sound generated from the project does not exceed that modeled (assuming 10 dB reduction) distances to harassment isopleths and to minimize noise levels to the lowest level practicable. Double big bubble curtains are successfully and widely applied across European wind development efforts, and are known to reduce noise levels more than a single big bubble curtain alone (e.g., see Bellman *et al.*, 2020).

Mysticetes

Six mysticete species (comprising six stocks) of cetaceans (North Atlantic right whale, humpback whale, fin whale, blue whale, sei whale, and minke whale) are proposed to be taken by harassment. These species, to varying extents, utilize coastal New England waters, including the project area, for the purposes of migration and foraging.

Behavioral data on mysticete reactions to pile driving noise is scant. Kraus *et al.* (2019) predicted that the three main impacts of offshore wind farms on marine mammals would consist of displacement, behavioral disruptions, and stress. Broadly, we can look to studies that have focused on other noise sources such as seismic surveys and military training exercises, which suggest that exposure to loud signals can result in avoidance of the sound source (or displacement if the activity continues for a longer duration in a place where individuals would otherwise have been staying, which is less likely for mysticetes in this area), disruption of foraging activities (if they are occurring in the area), local masking around the source, associated stress responses, and impacts to prey as well as TTS or PTS in some cases.

Mysticetes encountered in the Sunrise Wind project area are expected to be migrating through and/or foraging within the project area; the extent to which an animal engages in these behaviors in the area is species-specific and varies seasonally. Given that extensive feeding BIAs for the North Atlantic right whale, humpback whale, fin whale, sei whale, and minke whale exist to the east and north of the project

area (LaBrecque *et al.*, 2015; Van Parijs *et al.*, 2015), many mysticetes are expected to predominantly be migrating through the project area towards or from these feeding habitats. However, the extent to which particular species are utilizing the project area and nearby habitats (*i.e.*, south of Martha's Vineyard and Nantucket) for foraging or other activities is changing, particularly right whales (*e.g.*, O'Brien *et al.*, 2021; Quintana-Rizzo *et al.*, 2021), thus our understanding of the temporal and spatial occurrence of right whales and other mysticete species is continuing to be informed by ongoing monitoring efforts. While we have acknowledged above that mortality, hearing impairment, or displacement of mysticete prey species may result locally from impact pile driving or UXO/MEC detonation, given the very short duration of UXO/MEC detonation and limited amount over 5 years, and broad availability of prey species in the area and the availability of alternative suitable foraging habitat for the mysticete species most likely to be affected, any impacts on mysticete foraging would be expected to be minor. Whales temporarily displaced from the proposed project area would be expected to have sufficient remaining feeding habitat available to them and would not be prevented from feeding in other areas within the biologically important feeding habitats. In addition, any displacement of whales or interruption of foraging bouts would be expected to be temporary in nature.

The potential for repeated exposures is dependent upon the residency time of whales, with migratory animals unlikely to be exposed on repeated occasions and animals remaining in the area to be more likely exposed repeatedly. Where relatively low amounts of species-specific proposed Level B harassment are predicted (compared to the abundance of each mysticete species or stock, such as is indicated in Table 4) and movement patterns suggest that individuals would not necessarily linger in a particular area for multiple days, each predicted take likely represents an exposure of a different individual. The behavioral impacts would, therefore, be expected to occur within a single day within a year—an amount that would not be expected to impact reproduction or survival. Alternatively, species with longer residence time in the project area may be subject to repeated exposures. In general, for this project, the duration of exposures would not be continuous throughout any given day and pile driving would not occur on all consecutive days within a given year

due to weather delays or any number of logistical constraints Sunrise Wind has identified. Species-specific analysis regarding potential for repeated exposures and impacts is provided below. Overall, we do not expect impacts to whales within project area habitat, including fin whales foraging in the fin whale feeding BIA, to affect the fitness of any large whales.

NMFS is proposing to authorize Level A harassment (in the form of PTS) of fin, minke, humpback, and sei whales incidental to installation of SFWF foundations. As described previously, PTS for mysticetes from impact pile driving may overlap frequencies used for communication, navigation, or detecting prey. However, given the nature and duration of the activity, the mitigation measures, and likely avoidance behavior, any PTS is expected to be of a small degree, would be limited to frequencies where pile driving noise is concentrated (*i.e.*, only a small subset of their expected hearing range) and would not be expected to impact reproductive success or survival.

North Atlantic Right Whales

North Atlantic right whales are listed as endangered under the ESA and as described in the Effects to Marine Mammals and Their Habitat section, are threatened by a low population abundance, higher than average mortality rates, and lower than average reproductive rates. Recent studies have reported individuals showing high stress levels (*e.g.*, Corkeron *et al.*, 2017) and poor health, which has further implications on reproductive success and calf survival (Christiansen *et al.*, 2020; Stewart *et al.*, 2021; Stewart *et al.*, 2022). Given this, the status of the North Atlantic right whale population is of heightened concern and therefore, merits additional analysis and consideration. NMFS proposes to authorize a maximum of 35 takes of North Atlantic right whales by Level B harassment only in any given year (likely Year 1) with no more than 47 takes incidental to all construction activities over the 5-year period of effectiveness of this proposed rule.

As described above, the project area represents part of an important migratory and potential feeding area for right whales. Quintana-Rizzo *et al.* (2021) noted different degrees of residency (*i.e.*, the minimum number of days an individual remained in southern New England) for right whales with individual sighting frequency ranging from 1 to 10 days. The study results indicate that southern New England may, in part, be a stopover site for migrating right whales moving to or

from southeastern calving grounds. The right whales observed during the study period were primarily concentrated in the northeastern and southeastern sections of the MA WEA during the summer (June–August) and winter (December–February) rather than in OCS–A 0487, which is to the west in the RI/MA WEA (see Figure 5 in Quintana-Rizzo *et al.*, 2021). Right whale distribution did shift to the west into the RI/MA WEA in the spring (March–May), although sightings within the Sunrise Wind project area were few compared to other portions of the WEA during this time. Overall, the Sunrise Wind project area contains habitat less frequently utilized by North Atlantic right whales than the more easterly Southern New England region.

In general, North Atlantic right whales in southern New England are expected to be engaging in migratory or foraging behavior (Quintana-Rizzo *et al.*, 2021). Model outputs suggest that 23 percent of the species' population is present in this region from December through May, and the mean residence time has tripled to an average of 13 days during these months. Given the species' migratory behavior in the project area, we anticipate individual whales would be typically migrating through the area during most months when foundation installation and UXO/MEC detonation would occur (given the seasonal restrictions on foundation installation from January through April and UXO/MEC detonation from December through April) rather than lingering for extended periods of time. Other work that involves either much smaller harassment zones (*e.g.*, HRG surveys) or is limited in amount (cable landfall construction) may occur during periods when North Atlantic right whales are using the habitat for both migration and foraging. Therefore, it is likely that many of the exposures would occur to individual whales; however, some may be repeat takes of the same animal across multiple days for some short period of time given residency data (*e.g.*, 13 days during December through May). It is important to note the activities occurring from December through May that may impact North Atlantic right whale would be primarily HRG surveys and cable landfall construction, neither of which would result in very high received levels. Across all years, while it is possible an animal could have been exposed during a previous year, the low amount of take proposed to be authorized during the 5-year period of the proposed rule makes this scenario possible but unlikely. However, if an individual were to be exposed during a

subsequent year, the impact of that exposure is likely independent of the previous exposure given the duration between exposures.

North Atlantic right whales are presently experiencing an ongoing UME (beginning in June 2017). Preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of North Atlantic right whales. Given the current status of the North Atlantic right whale, the loss of even one individual could significantly impact the population. No mortality, serious injury, or injury of North Atlantic right whales as a result of the project is expected or proposed to be authorized. Any disturbance to North Atlantic right whales due to Sunrise Wind's activities is expected to result in temporary avoidance of the immediate area of construction. As no injury, serious injury, or mortality is expected or authorized, and Level B harassment of North Atlantic right whales will be reduced to the level of least practicable adverse impact through use of mitigation measures, the authorized number of takes of North Atlantic right whales would not exacerbate or compound the effects of the ongoing UME in any way.

As described in the general *Mysticetes* section above, impact pile driving of foundation piles has the potential to result in the highest amount of annual take (44 Level B harassment takes) and is of greatest concern given loud source levels. This activity would likely be limited to 1 year, during times when North Atlantic right whales are not present in high numbers and are likely to be primarily migrating to more northern foraging grounds with the potential for some foraging occurring in or near the project area. The potential types, severity, and magnitude of impacts are also anticipated to mirror that described in the general *Mysticetes* section above, including avoidance (the most likely outcome), changes in foraging or vocalization behavior, masking, a small amount of TTS, and temporary physiological impacts (e.g., change in respiration, change in heart rate). Importantly, the effects of the activities proposed by Sunrise Wind are expected to be sufficiently low-level and localized to specific areas as to not meaningfully impact important behaviors such as migratory or foraging behavior of North Atlantic right whales. As described above, no more than 35 takes would occur in any given year (likely Year 1 if all foundations are installed in Year 1) with no more than 47 takes occurring across the 5 years the proposed rule would be effective. If this

number of exposures results in temporary behavioral reactions, such as slight displacement (but not abandonment) of migratory habitat or temporary cessation of feeding, it is unlikely to result in energetic consequences that could affect reproduction or survival of any individuals. As described above, North Atlantic right whales are primarily foraging during December through May when the vast majority of take from impact pile driving would not occur (given the seasonal restriction from January 1–April 30). Overall, NMFS expects that any harassment of North Atlantic right whales incidental to the specified activities would not result in changes to their migration patterns or foraging behavior as only temporary avoidance of an area during construction is expected to occur. As described previously, right whales migrating through and/or foraging in these areas are not expected to remain in this habitat for extensive durations, relative to nearby habitats such as south of Nantucket and Martha's Vineyard or the Great South Channel (known core foraging habitats) (Quintana-Rizzo *et al.*, 2021) and that any temporarily displaced animals would be able to return to or continue to travel through and forage in these areas once activities have ceased.

Although acoustic masking may occur, based on the acoustic characteristics of noise associated with pile driving (e.g., frequency spectra, short duration of exposure) and construction surveys (e.g., intermittent signals), NMFS expects masking effects to be minimal (e.g., impact or vibratory pile driving) to none (e.g., construction surveys). In addition, masking would likely only occur during the period of time that a North Atlantic right whale is in the relatively close vicinity of pile driving, which is expected to be infrequent and brief given time of year restrictions, anticipated mitigation effectiveness, and likely avoidance behaviors. TTS is another potential form of Level B harassment that could result in brief periods of slightly reduced hearing sensitivity affecting behavioral patterns by making it more difficult to hear or interpret acoustic cues within the frequency range (and slightly above) of sound produced during impact pile driving. However, any TTS would likely be of low amount and limited to frequencies where most construction noise is centered (below 2 kHz). NMFS expects that right whale hearing sensitivity would return to pre-exposure levels shortly after migrating through

the area or moving away from the sound source.

As described in the Potential Effects to Marine Mammals and Their Habitat section, the distance of the receiver to the source influences the severity of response with greater distances typically eliciting less severe responses. Additionally, NMFS recognizes North Atlantic right whales migrating could be pregnant females (in the fall) and cows with older calves (in spring) and that these animals may slightly alter their migration course in response to any foundation pile driving. However, as described in the Potential Effects to Marine Mammals and Their Habitat section, we anticipate that course diversion would be of small magnitude. Hence, while some avoidance of the pile driving activities may occur, we anticipate any avoidance behavior of migratory right whales would be similar to that of gray whales (Tyack and Clark, 1983), on the order of hundreds of meters up to 1 to 2 km. This diversion from a migratory path otherwise uninterrupted by Sunrise Wind activities or from lower quality foraging habitat (relative to nearby areas) is not expected to result in meaningful energetic costs that would impact annual rates of recruitment of survival. NMFS expects that North Atlantic right whales would be able to avoid areas during periods of active noise production while not being forced out of this portion of their habitat.

North Atlantic right whale presence in the Sunrise Wind project area is year-round; however, abundance during summer months is lower compared to the winter months with spring and fall serving as “shoulder seasons” wherein abundance waxes (fall) or wanes (spring). Given this year-round habitat usage, in recognition that where and when whales may actually occur during project activities is unknown as it depends on the annual migratory behaviors, Sunrise Wind has proposed and NMFS is proposing to require a suite of mitigation measures designed to reduce impacts to North Atlantic right whales to the maximum extent practicable. These mitigation measures (e.g., seasonal/daily work restrictions, vessel separation distances, reduced vessel speed) would not only avoid the likelihood of ship strikes but also would minimize the severity of behavioral disruptions by minimizing impacts (e.g., through sound reduction using abatement systems and reduced temporal overlap of project activities and North Atlantic right whales). This would further ensure that the number of takes by Level B harassment that are estimated to occur are not expected to

affect reproductive success or survivorship via detrimental impacts to energy intake or cow/calf interactions during migratory transit. However, even in consideration of recent habitat-use and distribution shifts, Sunrise Wind would still be installing monopiles when the presence of North Atlantic right whales is expected to be lower.

As described in the Description of Marine Mammals in the Area of Specified Activities section, Sunrise Wind would be constructed within the North Atlantic right whale migratory corridor BIA, which represent areas and months within which a substantial portion of a species or population is known to migrate. Off the south coast of Massachusetts and Rhode Island, this BIA extends from the coast to beyond the shelf break. The Sunrise Wind lease area is relatively small compared with the migratory BIA area (approximately 351 km² versus the size of the full North Atlantic right whale migratory BIA, 269,448 km²). Because of this, overall North Atlantic right whale migration is not expected to be impacted by the proposed activities. There are no known North Atlantic right whale mating or calving areas within the project area. Impact pile driving, which is responsible for the majority of North Atlantic right whale impacts, would be limited to a maximum of 12 hours per day (three intermittent 4-hour events); therefore, if foraging activity is disrupted due to pile driving, any disruption would be brief as North Atlantic right whales would likely resume foraging after pile driving ceases or when animals move to another nearby location to forage. Prey species are mobile (e.g., calanoid copepods can initiate rapid and directed escape responses) and are broadly distributed throughout the project area (noting again that North Atlantic right whale prey is not particularly concentrated in the project area relative to nearby habitats). Therefore, any impacts to prey that may occur are also unlikely to impact marine mammals.

The most significant measure to minimize impacts to individual North Atlantic right whales during monopile installations is the seasonal moratorium on impact pile driving of monopiles from January 1 through April 30 when North Atlantic right whale abundance in the project area is expected to be highest. NMFS also expects this measure to greatly reduce the potential for mother-calf pairs to be exposed to impact pile driving noise above the Level B harassment threshold during their annual spring migration through the project area from calving grounds to primary foraging grounds (e.g., Cape

Cod Bay). Further, NMFS expects that exposures to North Atlantic right whales would be reduced due to the additional proposed mitigation measures that would ensure that any exposures above the Level B harassment threshold would result in only short-term effects to individuals exposed. Impact pile driving may only begin in the absence of North Atlantic right whales (based on visual and passive acoustic monitoring). If impact pile driving has commenced, NMFS anticipates North Atlantic right whales would avoid the area, utilizing nearby waters to carry on pre-exposure behaviors. However, impact pile driving must be shut down if a North Atlantic right whale is sighted at any distance unless a shutdown is not feasible due to risk of injury or loss of life. Shutdown may occur anywhere if right whales are seen within or beyond the Level B harassment zone, further minimizing the duration and intensity of exposure. NMFS anticipates that if North Atlantic right whales go undetected and they are exposed to impact pile driving noise, it is unlikely a North Atlantic right whale would approach the impact pile driving locations to the degree that they would purposely expose themselves to very high noise levels. These measures are designed to avoid PTS and also reduce the severity of Level B harassment, including the potential for TTS. While some TTS could occur, given the proposed mitigation measures (e.g., delay pile driving upon a sighting or acoustic detection and shutting down upon a sighting or acoustic detection), the potential for TTS to occur is low.

The proposed clearance and shutdown measures are most effective when detection efficiency is maximized, as the measures are triggered by a sighting or acoustic detection. To maximize detection efficiency, Sunrise Wind proposed, and NMFS is proposed to require, the combination of PAM and visual observers (as well as communication protocols with other Sunrise Wind vessels, and other heightened awareness efforts such as daily monitoring of North Atlantic right whale sighting databases) such that as a North Atlantic right whale approaches the source (and thereby could be exposed to higher noise energy levels), PSO detection efficacy would increase, the whale would be detected, and a delay to commencing pile driving or shutdown (if feasible) would occur. In addition, the implementation of a soft-start would provide an opportunity for whales to move away from the source if they are undetected, reducing received levels. Further, Sunrise Wind has committed to not installing two WTG or

OCS-DC foundations simultaneously. North Atlantic right whales would, therefore, not be exposed to concurrent impact pile driving on any given day and the area ensonified at any given time would be limited. We note that Sunrise Wind has requested to install foundation piles at night which does raise concern over detection capabilities. Sunrise Wind is currently conducting detection capability studies using alternative technology and intends to submit the results of these studies to NMFS. In consultation with BOEM, NMFS will review the results and determine whether Sunrise Wind's proposed monitoring plan will be effective at detecting marine mammals in order to implement mitigation.

Although the temporary sheet pile Level B harassment zone is large (9,740 km to the unweighted Level B harassment threshold; Table 27 in the ITA application), the sheet piles would be installed within Narragansett Bay over a short timeframe (56 hours total; 28 hours for installation and 28 hours for removal). Therefore, it is also unlikely that any North Atlantic right whales would be exposed to concurrent vibratory and impact pile installation noises. Any UXO/MEC detonations, if determined to be necessary, would only occur in daylight and if all other low-order methods or removal of the explosive equipment of the device are determined to not be possible. Given that specific locations for the three UXOs/MECs detonations, if they occur, are not presently known, Sunrise Wind has agreed to undertake specific mitigation measures to reduce impacts on any North Atlantic right whales, including the use of a sound attenuation device (i.e., likely a bubble curtain and another device) to achieve a minimum of 10 dB attenuation, and not detonating a UXO/MEC if a North Atlantic right whale is observed within the large whale clearance zone (10 km). Finally, for HRG surveys, the maximum distance to the Level B harassment isopleth is 141 m. The estimated take, by Level B harassment only, associated with HRG surveys is to account for any North Atlantic right whale sightings PSOs may miss when HRG acoustic sources are active. However, because of the short maximum distance to the Level B harassment isopleth (141 m), the requirement that vessels maintain a distance of 500 m from any North Atlantic right whales, the fact whales are unlikely to remain in close proximity to an HRG survey vessel for any length of time, and that the acoustic source would be shutdown if a North Atlantic right whale is observed within

500 m of the source, any exposure to noise levels above the harassment threshold (if any) would be very brief. To further minimize exposures, ramp-up of boomers, sparkers, and CHIRPs must be delayed during the clearance period if PSOs detect a North Atlantic right whale (or any other ESA-listed species) within 500 m of the acoustic source. With implementation of the proposed mitigation requirements, take by Level A harassment is unlikely and, therefore, not proposed for authorization. Potential impacts associated with Level B harassment would include low-level, temporary behavioral modifications, most likely in the form of avoidance behavior. Given the high level of precautions taken to minimize both the amount and intensity of Level B harassment on North Atlantic right whales, it is unlikely that the anticipated low-level exposures would lead to reduced reproductive success or survival.

North Atlantic right whales are listed as endangered under the ESA with a declining population primarily due to vessel strike and entanglement. Again, NMFS is proposing to authorize no more than 35 instances of take, by Level B harassment only, within the a given year with no more than 47 instances of take could occur over the 5-year effective period of the proposed rule, with the likely scenario that each instance of exposure occurs to a different individual (a small portion of the stock), and any individual North Atlantic right whale is likely to be disturbed at a low-moderate level. The magnitude and severity of harassment are not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality, serious injury, or Level A harassment is anticipated or proposed to be authorized. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the proposed authorized take would have a negligible impact on the North Atlantic stock of North Atlantic right whales.

Humpback Whales

Humpback whales potentially impacted by Sunrise Wind's activities do not belong to a DPS that is listed as threatened or endangered under the ESA. However, humpback whales along the Atlantic Coast have been experiencing an active UME as elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January

2016. Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts, and take from ship strike and entanglement is not proposed to be authorized. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS of which the Gulf of Maine stock is a part) remains stable at approximately 12,000 individuals.

Sunrise Wind has requested, and NMFS has proposed to authorize, a limited amount of humpback whale harassment, by Level A harassment and Level B harassment. No mortality or serious injury is anticipated or proposed for authorization. Among the activities analyzed, impact pile driving has the potential to result in the highest amount of annual take of humpback whales (3 takes by Level A harassment and 89 takes by Level B harassment) and is of greatest concern, given the associated loud source levels. Kraus *et al.* (2016) reported humpback whale sightings in the RI-MA WEA during all seasons, with peak abundance during the spring and early summer, but their presence within the region varies between years. Increased presence of sand lance (*Ammodytes* spp.) appears to correlate with the years in which most whales were observed, suggesting that humpback whale distribution and occurrence could largely be influenced by prey availability (Kenney and Vigness-Raposa 2010, 2016). Seasonal abundance estimates of humpback whales in the RI-MA WEA range from 0 to 41 (Kraus *et al.*, 2016), with higher estimates observed during the spring and summer. Davis *et al.* (2020) found the greatest number of acoustic detections in southern New England in the winter and spring, with a noticeable decrease in acoustic detections during most summer and fall months. These data suggest that the 3 and 89 maximum annual instances of predicted take by Level A harassment and Level B harassment, respectively, could consist of individuals exposed to noise levels above the harassment thresholds once during migration through the project area and/or individuals exposed on multiple days if they are utilizing the area as foraging habitat. Based on the observed peaks in humpback whale seasonal distribution in the RI/MA WEA, it is likely that these individuals would primarily be exposed to HRG survey activities, landfall construction activities, and to a lesser extent, impact pile driving and UXO/MEC detonations

(given the seasonal restrictions on the latter two activities). Any such exposures would occur either singly, or intermittently, but not continuously throughout a day.

For all the reasons described in the *Mysticetes* section above, we anticipate any potential PTS or TTS would be small (limited to a few dB) and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of baleen whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above.

Altogether, the low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury is anticipated or proposed to be authorized. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the proposed authorized take would have a negligible impact on the Gulf of Maine stock of humpback whales.

Fin Whale

The western North Atlantic stock of fin whales is listed as endangered under the ESA. The 5-year total amount of take, by Level A harassment and Level B harassment, of fin whales (n= 4 and 97, respectively) that NMFS proposes to authorize is low relative to the stock abundance. Any Level B harassment is expected to be in the form of behavioral disturbance, primarily resulting in avoidance of the project area where pile driving is occurring, and some low-level TTS and masking that may limit the detection of acoustic cues for relatively brief periods of time. Any potential PTS or TTS would be small (limited to a few dB) and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of fin whales. No serious injury or mortality is anticipated or proposed for authorization. As described previously, the project area overlaps approximately 12 percent of a small fin whale feeding BIA (March-October; 2,933 km²) located east of Montauk Point, New York (Figure 2.3 in LaBrecque *et al.*, 2015). Although the SRWF and a portion of the SRWEC would be constructed within the fin whale foraging BIA, the BIA is

considerably larger than the relatively small area within which impacts from monopile installations or UXO/MEC detonations may occur; this difference in scale would provide ample access to foraging opportunities for fin whales within the remaining area of the BIA. In addition, monopile installations and UXO/MEC detonations have seasonal/daily work restrictions, such that the temporal overlap between these project activities and the BIA timeframe does not include the months of March or April. Acoustic impacts from landfall construction would be limited to Narragansett Bay, within which fin whales are not expected to occur. A second larger yearlong feeding BIA (18,015 km²) extends from the Great South Channel (east of the smaller fin whale feeding BIA) north to southern Maine. Any disruption of feeding behavior or avoidance of the western BIA by fin whales from May to October is expected to be temporary, with habitat utilization by fin whales returning to baseline once the construction activities cease. The larger fin whale feeding BIA would provide suitable alternate habitat and ample foraging opportunities consistently throughout the year, rather than seasonally like the smaller, western BIA.

Because of the relatively low magnitude and severity of take proposed for authorization, the fact that no serious injury or mortality is anticipated, the temporary nature of the disturbance, and the availability of similar habitat and resources in the surrounding area, NMFS has preliminarily determined that the impacts of Sunrise Wind's activities on fin whales and the food sources that they utilize are not expected to cause significant impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock.

Blue and Sei Whales

The Western North Atlantic stock of blue whales and the Nova Scotia stock of sei whales are also listed under the ESA. There are no known areas of specific biological importance in or around the project area, nor are there any UMEs. For both species, the actual abundance of each stock is likely significantly greater than what is reflected in each SAR because, as noted in the SARs, the most recent population estimates are primarily based on surveys conducted in U.S. waters and both stocks' range extends well beyond the U.S. EEZ.

The 5-year total amount of take, by Level B harassment, proposed for authorization for blue whales (n=7) and

the 5-year total amount of take, by Level A harassment and Level B harassment proposed for authorization for sei whales (n=2 and 26, respectively) is low. NMFS is not proposing to authorize take by Level A harassment for blue whales. Similar to other mysticetes, we would anticipate the number of takes to represent individuals taken only once or, in rare cases, an individual taken a very small number of times as most whales in the project area would be migrating. To a small degree, sei whales may forage in the project area, although the currently identified foraging habitats (BIAs) are to the east and north of the area in which Sunrise Wind's activities would occur (LaBrecque *et al.* 2015). With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS or TTS would be small (limited to a few dB) and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of blue or sei whales. Any avoidance of the project area due to Sunrise Wind's activities would be expected to be temporary.

Overall, the take by harassment proposed for authorization is of a low magnitude and severity and is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury is anticipated or proposed to be authorized. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the proposed authorized take would have a negligible impact on the Western North Atlantic blue whale stock and the Nova Scotia sei whale stock.

Minke Whales

The Canadian East Coast stock of minke whales is not listed under the ESA. There are no known areas of specific biological importance in or around the project area. Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 21,000

whales. No mortality or serious injury of this stock is anticipated or proposed for authorization.

The 5-year total amount of take, by Level A harassment and Level B harassment proposed for authorization for minke whales (n=27 and 467, respectively) is relatively low. We anticipate the impacts of this harassment to follow those described in the general Mysticete section above. In summary, Level B harassment would be temporary, with primary impacts being temporary displacement of the project area but not abandonment of any migratory or foraging behavior. Overall, the amount of take proposed to be authorized is small and the low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury is anticipated or proposed to be authorized. Any potential PTS or TTS would be small (limited to a few dB) and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of minke whales. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the proposed authorized take would have a negligible impact on the Canadian East Coast stock of minke whales.

Odontocetes

In this section, we include information here that applies to all of the odontocete species and stocks addressed below, which are further divided into the following subsections: sperm whales, dolphins and small whales; and harbor porpoises. These sub-sections include more specific information, as well as conclusions for each stock represented.

The majority of takes by harassment of odontocetes incidental to Sunrise Wind's specified activities are by Level B harassment incidental to pile driving and HRG surveys. We anticipate that, given ranges of individuals (*i.e.*, that some individuals remain within a small area for some period of time), and non-migratory nature of some odontocetes in general (especially as compared to mysticetes), these takes are more likely to represent multiple exposures of a smaller number of individuals than is the case for mysticetes, though some takes may also represent one-time exposures to an individual.

Pile driving, particularly impact pile driving foundation piles, has the potential to disturb odontocetes to the greatest extent, compared to HRG surveys and UXO/MEC detonations. While we do expect animals to avoid the area during pile driving, their habitat range is extensive compared to the area ensounded during pile driving.

As described earlier, Level B harassment may manifest as changes to behavior (e.g., avoidance, changes in vocalizations (from masking) or foraging), physiological responses, or TTS. Odontocetes are highly mobile species and, similar to mysticetes, NMFS expects any avoidance behavior to be limited to the area near the pile being driven. While masking could occur during pile driving, it would only occur in the vicinity of and during the duration of the pile driving, and would not generally occur in a frequency range that overlaps most odontocete communication or echolocation signals. The mitigation measures (e.g., use of sound abatement systems, implementation of clearance and shutdown zones) would also minimize received levels such that the severity of any behavioral response would be expected to be less than exposure to unmitigated noise exposure.

Any masking or TTS effects are anticipated to be of low-severity. First, the frequency range of pile driving, the most impactful activity conducted by Sunrise Wind in terms of response severity, falls within a portion of the frequency range of most odontocete vocalizations. However, odontocete vocalizations span a much wider range than the low frequency construction activities proposed by Sunrise Wind. Further, as described above, recent studies suggest odontocetes have a mechanism to self-mitigate (i.e., reduce hearing sensitivity) the impacts of noise exposure, which could potentially reduce TTS impacts. Any masking or TTS is anticipated to be limited and would typically only interfere with communication within a portion of an odontocete's range and as discussed earlier, the effects would only be expected to be of a short duration and, for TTS, a relatively small degree. Furthermore, odontocete echolocation occurs predominantly at frequencies significantly higher than low frequency construction activities; therefore, there is little likelihood that threshold shift, either temporary or permanent, would interfere with feeding behaviors (noting that take by Level A harassment (PTS) is proposed for only harbor porpoises). For HRG surveys, the sources operate at higher frequencies than pile driving and UXO/MEC detonations; however,

sounds from these sources attenuate very quickly in the water column, as described above; therefore, any potential for TTS and masking is very limited. Further, odontocetes (e.g., common dolphins, spotted dolphins, bottlenose dolphins) have demonstrated an affinity to bow-ride actively surveying HRG surveys; therefore, the severity of any harassment, if it does occur, is anticipated to be minimal based on the lack of avoidance previously demonstrated by these species.

The waters off the coast of New York are used by several odontocete species; however, none (except the sperm whale) are listed under the ESA and there are no known habitats of particular importance. In general, odontocete habitat ranges are far-reaching along the Atlantic coast of the UNITED STATES, and the waters off New York, including the project area, do not contain any particularly unique odontocete habitat features.

Sperm Whale

The Western North Atlantic stock of sperm whales spans the East Coast out into oceanic waters well beyond the U.S. EEZ. Although listed as endangered, the primary threat faced by the sperm whale (i.e., commercial whaling) has been eliminated and, further, sperm whales in the western North Atlantic were little affected by modern whaling (Taylor *et al.*, 2008). Current potential threats to the species globally include vessel strikes, entanglement in fishing gear, anthropogenic noise, exposure to contaminants, climate change, and marine debris. There is no currently reported trend for the stock and, although the species is listed as endangered under the ESA, there are no specific issues with the status of the stock that cause particular concern (e.g., no UMEs). There are no known areas of biological importance (e.g., critical habitat or BIAs) in or near the project area.

No mortality, serious injury or Level A harassment is anticipated or proposed to be authorized for this species. Impacts would be limited to Level B harassment and would occur to only a very small number of individuals (maximum of 14 in any given year (likely year 1) and 21 across all 5 years) incidental to pile driving, UXO/MEC detonation(s), and HRG surveys. Sperm whales are not common within the project area due to the shallow waters, and it is not expected that any noise levels would reach habitat in which sperm whales are common, including deep-water foraging habitat. If sperm whales do happen to be present in the

project area during any activities related to the Sunrise Wind project, they would likely be only transient visitors and not engaging in any significant behaviors. This very low magnitude and severity of effects is not expected to result in impacts on the reproduction or survival of individuals, much less impact annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the take proposed to be authorized would have a negligible impact on sperm whales.

Dolphins and Small Whales (Including Delphinids, Pilot Whales, and Harbor Porpoises)

There are no specific issues with the status of odontocete stocks that cause particular concern (e.g., no recent UMEs). No mortality or serious injury is expected or proposed to be authorized for these stocks. Only Level B harassment is anticipated or proposed for authorization for any dolphin or small whale. A small amount (n= 20) of Level A harassment (in the form of PTS) is proposed to be authorized for harbor porpoises.

The maximum amount of take, by Level B harassment, proposed for authorization within any one year for all odontocetes cetacean stocks ranges from 21 to 12,193 instances, which is less than a maximum of 4.3 percent as compared to the population size for all stocks. As described above for odontocetes broadly, we anticipate that a fair number of these instances of take in a day represent multiple exposures of a smaller number of individuals, meaning the actual number of individuals taken is lower. Although some amount of repeated exposure to some individuals is likely given the duration of activity proposed by Sunrise Wind, the intensity of any Level B harassment combined with the availability of alternate nearby foraging habitat suggests that the likely impacts would not impact the reproduction or survival of any individuals.

Overall, the populations of all dolphins and small whale species and stocks for which we propose to authorize take are stable (no declining population trends), not facing existing UMEs, and the small amount, magnitude and severity of effects is not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the take proposed to be authorized

would have a negligible impact on all dolphin and small whale species and stocks considered in this analysis.

Harbor Porpoises

The Gulf of Maine/Bay of Fundy stock of harbor porpoises is found predominantly in northern U.S. coastal waters (less than 150 m depth) and up into Canada's Bay of Fundy. Although the population trend is not known, there are no UMEs or other factors that cause particular concern for this stock. No mortality or non-auditory injury by UXO/MEC detonations are anticipated or authorized for this stock. NMFS proposes to authorize 49 takes by Level A harassment (PTS; incidental to UXO/MEC detonations) and 1,237 takes by Level B harassment (incidental to multiple activities).

Regarding the severity of takes by behavioral Level B harassment, because harbor porpoises are particularly sensitive to noise, it is likely that a fair number of the responses could be of a moderate nature, particularly to pile driving. In response to pile driving, harbor porpoises are likely to avoid the area during construction, as previously demonstrated in Tougaard *et al.* (2009) in Denmark, in Dahne *et al.* (2013) in Germany, and in Vallejo *et al.* (2017) in the United Kingdom, although a study by Graham *et al.* (2019) may indicate that the avoidance distance could decrease over time. However, pile driving is scheduled to occur when harbor porpoise abundance is low off the coast of New York and, given alternative foraging areas, any avoidance of the area by individuals is not likely to impact the reproduction or survival of any individuals. Given only one UXO/MEC would be detonated on any given day and up to only three UXO/MEC would be detonated over the 5-year effective period of the LOA, any behavioral response would be brief and of a low severity.

With respect to PTS and TTS, the effects on an individual are likely relatively low given the frequency bands of pile driving (most energy below 2 kHz) compared to harbor porpoise hearing (150 Hz to 160 kHz peaking around 40 kHz). Specifically, PTS or TTS is unlikely to impact hearing ability in their more sensitive hearing ranges, or the frequencies in which they communicate and echolocate. Regardless, we have authorized a limited amount of PTS, but expect any PTS that may occur to be within the very low end of their hearing range where harbor porpoises are not particularly sensitive, and any PTS would be of small magnitude. As such, any PTS would not interfere with key

foraging or reproductive strategies necessary for reproduction or survival.

In summary, the amount of take proposed to be authorized across all 5 years is 20 and 1,304 by Level A harassment and Level B harassment, respectively. While harbor porpoises are likely to avoid the area during any construction activity discussed herein, as demonstrated during European wind farm construction, the time of year in which work would occur is when harbor porpoises are not in high abundance, and any work that does occur would not result in the species' abandonment of the waters off New York. The low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, *let alone* have impacts on annual rates of recruitment or survival of this stock. No mortality or serious injury is anticipated or proposed to be authorized. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Sunrise Wind's activities combined, that the proposed authorized take would have a negligible impact on the Gulf of Maine/Bay of Fundy stock of harbor porpoises.

Phocids (Harbor Seals and Gray Seals)

Neither the harbor seal nor gray seal are listed under the ESA. Sunrise Wind requested, and NMFS proposes to authorize that no more than 5 and 2,468 harbor seals and 3 and 1,099 gray seals may be taken by Level A harassment and Level B harassment, respectively, within any one year. These species occur in New Yorkwaters most often in winter, when impact pile driving and UXO/MEC detonations would not occur. Seals are also more likely to be close to shore such that exposure to impact pile driving would be expected to be at lower levels generally (but still above NMFS behavioral harassment threshold). The majority of takes of these species is from monopile installations, vibratory pile driving associated with temporary sheet pile installation and removal, and HRG surveys. Research and observations show that pinnipeds in the water may be tolerant of anthropogenic noise and activity (a review of behavioral reactions by pinnipeds to impulsive and non-impulsive noise can be found in Richardson *et al.* (1995) and Southall *et al.* (2007)). Available data, though limited, suggest that exposures between approximately 90 and 140 dB SPL do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water (Costa *et al.*, 2003; Jacobs and Terhune, 2002; Kastelein *et al.*, 2006c). Although there

was no significant displacement during construction as a whole, Russell *et al.* (2016) found that displacement did occur during active pile driving at predicted received levels between 168 and 178 dB re $1\mu\text{Pa}_{(p-p)}$; however seal distribution returned to the pre-piling condition within two hours of cessation of pile driving. Pinnipeds may not react at all until the sound source is approaching (or they approach the sound source) within a few hundred meters and then may alert, ignore the stimulus, change their behaviors, or avoid the immediate area by swimming away or diving. Effects on pinnipeds that are taken by Level B harassment in the project area would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals would simply move away from the sound source and be temporarily displaced from those areas (see Lucke *et al.*, 2006; Edren *et al.*, 2010; Skeate *et al.*, 2012; Russell *et al.*, 2016). Given their documented tolerance of anthropogenic sound (Richardson *et al.*, 1995; Southall *et al.*, 2007), repeated exposures of individuals of either of these species to levels of sound that may cause Level B harassment are unlikely to significantly disrupt foraging behavior. Given the low anticipated magnitude of impacts from any given exposure, even repeated Level B harassment across a few days of some small subset of individuals, which could occur, is unlikely to result in impacts on the reproduction or survival of any individuals. Moreover, pinnipeds would benefit from the mitigation measures described in the Proposed Mitigation section.

Sunrise Wind requested, and NMFS is proposing to authorize, a small amount of take by PTS (16 harbor seals and 7 gray seals) incidental to UXO/MEC detonations over the 5-year effective period of the proposed rule. As described above, noise from UXO/MEC detonation is low frequency and, while any PTS that does occur would fall within the lower end of pinniped hearing ranges (50 Hz to 86 kHz), PTS would not occur at frequencies where pinniped hearing is most sensitive. In summary, any PTS, would be of small degree and not occur across the entire, or even most sensitive, hearing range. Hence, any impacts from PTS are likely to be of low severity and not interfere with behaviors critical to reproduction or survival.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and occurred across Maine, New Hampshire, and Massachusetts

until 2020. Based on tests conducted so far, the main pathogen found in the seals belonging to that UME was phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. Currently, the only active UME is occurring in Maine with some harbor and gray seals testing positive for highly pathogenic avian influenza (HPAI) H5N1. Although elevated strandings continue, neither UME (alone or in combination) provide cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 75,000 and annual M/SI (350) is well below PBR (2,006) (Hayes *et al.*, 2020). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic, as well as in Canada (Hayes *et al.*, 2020).

Overall, impacts from the Level B harassment take proposed for authorization incidental to Sunrise Wind's specified activities would be of relatively low magnitude and a low severity. Similarly, while some individuals may incur PTS overlapping some frequencies that are used for foraging and communication, given the low degree, the impacts would not be expected to impact reproduction or survival of any individuals. In consideration of all of the effects of Sunrise Wind's activities combined, we have preliminarily determined that the authorized take will have a negligible impact on harbor seals and gray seals.

Preliminary Negligible Impact Determination

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 marine mammal take from all of Sunrise Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the

most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less 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.

NMFS proposes to authorize incidental take (by Level A harassment and Level B harassment) of 16 species of marine mammal (with 16 managed stocks). The maximum number of takes possible within any one year and proposed for authorization relative to the best available population abundance is less than one-third for all species and stocks potentially impacted (*i.e.*, less than 1 percent for 8 stocks and less than 10 percent for the remaining 8 stocks; see Table 39).

Based on the analysis contained herein of the proposed activities (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.

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 promulgation of rulemakings, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NMFS Greater Atlantic Regional Field Office (GARFO).

NMFS is proposing to authorize the take of five marine mammal species which are listed under the ESA: the North Atlantic right, sei, fin, blue, and

sperm whale. The Permit and Conservation Division will request initiation of Section 7 consultation with GARFO for the issuance of this proposed rulemaking. NMFS will conclude ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization. The proposed regulations and any subsequent LOA(s) would be conditioned such that, in addition to measures included in those documents, the applicant would also be required to abide by the reasonable and prudent measures and terms and conditions of a Biological Opinion and Incidental Take Statement, issued by NMFS, pursuant to Section 7 of the Endangered Species Act.

Proposed Promulgation

As a result of these preliminary determinations, NMFS proposes to promulgate an ITA for Sunrise Wind authorizing take, by Level A and B harassment, incidental to construction activities associated with the Sunrise Wind Offshore Wind Farm project offshore of New York for a 5-year period from November 20, 2023 through November 19, 2028, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed rulemaking can be found at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-Sunrise-wind-llc-construction-Sunrise-wind-energy>.

Request for Additional Information and Public Comments

NMFS requests interested persons to submit comments, information, and suggestions concerning Sunrise Wind's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare the final rule and make final determinations on whether to issue the requested authorization. This proposed rule and referenced documents provide all environmental information relating to our proposed action for public review.

Recognizing, as a general matter, that this action is one of many current and future wind energy actions, we invite comment on the relative merits of the IHA, single-action rule/LOA, and programmatic multi-action rule/LOA approaches, including potential marine mammal take impacts resulting from this and other related wind energy actions and possible benefits resulting from regulatory certainty and efficiency.

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. Sunrise Wind is the sole entity that would be subject to the requirements in these proposed regulations, and Sunrise Wind is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Under the RFA, governmental jurisdictions are considered to be small if they are governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOA, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS.

The Coastal Zone Management Act (CZMA) requires Federal actions within and outside the coastal zone that have reasonably foreseeable effects on any coastal use or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program. 16 U.S.C. 1456(c). Additionally, regulations implementing the CZMA require non-Federal applicants for Federal licenses or permits to submit a consistency certification to the state that declares that the proposed activity complies with the enforceable policies of the state's approved management program and will be conducted in a manner consistent with such program. As required, on September 1, 2021, Sunrise Wind submitted a Federal consistency certification to the New

York State Department of State (NYSDOS), Rhode Island Coastal Resources Management Council (RICRMC), Massachusetts Office of Coastal Zone Management (MACZM) for approval of the Construction and Operations Plan (COP) by BOEM and the issuance of an Individual Permit by United States Army Corps of Engineers, under section 10 and 14 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (15 CFR part 930, subpart E). Sunrise Wind expects a decision from NYSDOS on June 13, 2023, RICRMC on April 27, 2023, and MACZM on March 30, 2023.

NMFS has determined that Sunrise Wind's application for an authorization to allow the incidental, but not intentional, take of small numbers of marine mammals on the outer continental shelf is an unlisted activity and, thus, is not, at this time, subject to Federal consistency requirements in the absence of the receipt and prior approval of an unlisted activity review request from the state by the Director of NOAA's Office for Coastal Management.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened species, Exports, Fish, Fisheries, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation, Wildlife.

Dated: February 1, 2023.

Samuel D. Rauch, III,

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

For reasons set forth in the preamble, NMFS proposed to amend 50 CFR part 217 as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

- 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 FF, consisting of §§ 217.310 through 217.319, to read as follows:

Subpart FF—Taking Marine Mammals Incidental to the Sunrise Wind Offshore Wind Farm Project Offshore Rhode Island Sec.

- 217.310 Specified activity and specified geographical region.
- 217.311 Effective dates.
- 217.312 Permissible methods of taking.
- 217.313 Prohibitions.
- 217.314 Mitigation requirements.
- 217.315 Requirements for monitoring and reporting.

- 217.316 Letter of Authorization.
- 217.317 Modifications of Letter of Authorization.
- 217.318–217.319 [Reserved]

Subpart AF—Taking Marine Mammals Incidental to the Sunrise Wind Offshore Wind Farm Project Offshore New York

§ 217.310 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the taking of marine mammals that occurs incidental to activities associated with construction of the Sunrise Wind Offshore Wind Farm Project by Sunrise Wind, LLC (Sunrise Wind) and those persons it authorizes or funds to conduct activities on its behalf in the area outlined in paragraph (b) of this section.

(b) The taking of marine mammals by Sunrise Wind may be authorized in a Letter of Authorization (LOA) only if it occurs in the Bureau of Ocean Energy Management (BOEM) lease area Outer Continental Shelf (OCS)–A–0486 Commercial Lease of Submerged Lands for Renewable Energy Development and along export cable route at sea-to-shore transition points at Quonset Point in North Kingstown, Rhode Island.

(c) The taking of marine mammals by Sunrise Wind is only authorized if it occurs incidental to the following activities associated with the Sunrise Wind Offshore Wind Farm Project:

- (1) Installation of wind turbine generators (WTG) and offshore converter substation (OCS–DC) foundations by impact pile driving;
- (2) Installation of temporary cofferdams by vibratory pile driving;
- (3) High-resolution geophysical (HRG) site characterization surveys; and,
- (4) Detonation of unexploded ordnances (UXOs) or munitions and explosives of concern (MECs).

§ 217.311 Effective dates.

Regulations in this subpart are effective from November 20, 2023–November 19, 2028.

§ 217.312 Permissible methods of taking.

Under an LOA, issued pursuant to §§ 216.106 of this chapter and 217.316, Sunrise Wind, and those persons it authorizes or funds to conduct activities on its behalf, may incidentally, but not intentionally, take marine mammals within the area described in § 217.310(b) in the following ways, provided Sunrise Wind is in complete compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(a) By Level B harassment associated with the acoustic disturbance of marine

mammals by impact pile driving (WTG and OCS–DC monopile foundation installation), vibratory pile installation and removal of temporary cofferdams, the detonation of UXOs/MECs, and

through HRG site characterization surveys.

(b) By Level A harassment, provided take is associated with impact pile driving and UXO/MEC detonations.

(c) The incidental take of marine mammals by the activities listed in paragraphs (a) and (b) of this section is limited to the following species:

TABLE 1 TO PARAGRAPH (c)

Marine mammal species	Scientific name	Stock
Blue whale	<i>Balaenoptera musculus</i>	Western North Atlantic.
Fin whale	<i>Balaenoptera physalus</i>	Western North Atlantic.
Sei whale	<i>Balaenoptera borealis</i>	Nova Scotia.
Minke whale	<i>Balaenoptera acutorostrata</i>	Canadian East Stock.
North Atlantic right whale	<i>Eubalaena glacialis</i>	Western North Atlantic.
Humpback whale	<i>Megaptera novaeangliae</i>	Gulf of Maine.
Sperm whale	<i>Physeter macrocephalus</i>	North Atlantic.
Atlantic spotted dolphin	<i>Stenella frontalis</i>	Western North Atlantic.
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	Western North Atlantic.
Bottlenose dolphin	<i>Tursiops truncatus</i>	Western North Atlantic Offshore.
Common dolphin	<i>Delphinus delphis</i>	Western North Atlantic.
Harbor porpoise	<i>Phocoena phocoena</i>	Gulf of Maine/Bay of Fundy.
Long-finned pilot whale	<i>Globicephala melas</i>	Western North Atlantic.
Risso's dolphin	<i>Grampus griseus</i>	Western North Atlantic.
Gray seal	<i>Halichoerus grypus</i>	Western North Atlantic.
Harbor seal	<i>Phoca vitulina</i>	Western North Atlantic.

§ 217.313 Prohibitions.

Except for the takings described in § 217.312 and authorized by an LOA issued under §§ 217.316 or 217.317, it is unlawful for any person to do any of the following in connection with the activities described in this subpart.

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 217.316 and 217.317.

(b) Take any marine mammal not specified in § 217.312(c).

(c) Take any marine mammal specified in the LOA in any manner other than as specified in the LOA.

(d) Take any marine mammal, as specified in § 217.312(c), after NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammals.

§ 217.314 Mitigation requirements.

When conducting the activities identified in §§ 217.310(a) and 217.312, Sunrise Wind must implement the mitigation measures contained in this section and any LOA issued under §§ 217.316 or 217.317 of this subpart. These mitigation measures include, but are not limited to:

(a) *General Conditions.* (1) A copy of any issued LOA must be in the possession of Sunrise Wind and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM) operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) Sunrise Wind must conduct briefings between construction supervisors, construction crews, and the

PSO and PAM team prior to the start of all construction activities, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring and reporting protocols, and operational procedures.

An informal guide must be included with the Marine Mammal Monitoring Plan to aid personnel in identifying species if they are observed in the vicinity of the project area;

(3) Sunrise Wind must instruct all vessel personnel regarding the authority of the PSO(s). For example, the vessel operator(s) would be required to immediately comply with any call for a shutdown by a PSO. Any disagreement between the Lead PSO and the vessel operator would only be discussed after shutdown has occurred;

(4) Sunrise Wind must ensure that any visual observations of an ESA-listed marine mammal are communicated to PSOs and vessel captains during the concurrent use of multiple project-associated vessels (of any size; e.g., construction surveys, crew/supply transfers, etc);

(5) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone for each specified activity, pile driving and pneumatic hammering activities, and HRG acoustic sources must be shut down immediately, unless shutdown is not practicable, or be delayed if the activity has not commenced. Impact and

vibratory pile driving, pneumatic hammering, UXO/MEC detonation, and initiation of HRG acoustic sources must not commence or resume until the animal(s) has been confirmed to have left the relevant clearance zone or the observation time has elapsed with no further sightings. UXO/MEC detonations may not occur until the animal(s) has been confirmed to have left the relevant clearance zone or the observation time has elapsed with no further sightings;

(6) Prior to and when conducting any in-water construction activities and vessel operations, Sunrise Wind personnel (e.g., vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the project area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings and/or information associated with any Slow Zones (i.e., Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators and PSOs;

(7) Any marine mammals observed within a clearance or shutdown zone must be allowed to remain in the area (i.e., must leave of their own volition) prior to commencing impact and vibratory pile driving activities, pneumatic hammering, or HRG surveys; and

(8) Sunrise Wind must treat any large whale sighted by a PSO or acoustically detected by a PAM operator as if it were a North Atlantic right whale, unless a

PSO or a PAM operator confirms it is another type of whale.

(b) *Vessel strike avoidance measures:* Sunrise Wind must implement the following vessel strike avoidance measures:

(1) Prior to the start of construction activities, all vessel operators and crew must receive a protected species training that covers, at a minimum:

(i) Identification of marine mammals and other protected species known to occur or which have the potential to occur in the Sunrise Wind project area;

(ii) Training on making observations in both good weather conditions (*i.e.*, clear visibility, low winds, low sea states) and bad weather conditions (*i.e.*, fog, high winds, high sea states, with glare);

(iii) Training on information and resources available to the project personnel regarding the applicability of Federal laws and regulations for protected species;

(iv) Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of in-water construction activities; and

(v) Confirmation of marine mammal observer training (including an understanding of the LOA requirements) must be documented on a training course log sheet and reported to NMFS.

(2) All vessels must abide by the following:

(i) All vessel operators and crews, regardless of their vessel's size, must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course, as appropriate, to avoid striking any marine mammal;

(ii) All vessels must have a visual observer on board who is responsible for monitoring the vessel strike avoidance zone for marine mammals. Visual observers may be PSO or crew members, but crew members responsible for these duties must be provided sufficient training by Sunrise Wind to distinguish marine mammals from other phenomena and must be able to identify a marine mammal as a North Atlantic right whale, other whale (defined in this context as sperm whales or baleen whales other than North Atlantic right whales), or other marine mammal. Crew members serving as visual observers must not have duties other than observing for marine mammals while the vessel is operating over 10 knots (kns);

(iii) Year-round and when a vessel is in transit, all vessel operators must continuously monitor US Coast Guard VHF Channel 16, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting

and at least once every four hours, vessel operators and/or trained crew members must monitor the project's Situational Awareness System, WhaleAlert, and the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales. Any observations of any large whale by any Sunrise Wind staff or contractors, including vessel crew, must be communicated immediately to PSOs, PAM operator, and all vessel captains to increase situational awareness.

Conversely, any large whale observation or detection via a sighting network (*e.g.*, Mysticetus) by PSOs or PAM operators must be conveyed to vessel operators and crew;

(iv) Any observations of any large whale by any Sunrise Wind staff or contractor, including vessel crew, must be communicated immediately to PSOs and all vessel captains to increase situational awareness;

(v) All vessels must comply with existing NMFS vessel speed regulations in 50 CFR 224.105, as applicable, for North Atlantic right whales;

(vi) In the event that any Slow Zone (designated as a DMA) is established that overlaps with an area where a project-associated vessel would operate, that vessel, regardless of size, will transit that area at 10 kns or less;

(vii) Between November 1st and April 30th, all vessels, regardless of size, must operate port to port (specifically from ports in New Jersey, New York, Maryland, Delaware, and Virginia) at 10 kns or less, except for vessels while transiting in Narragansett Bay or Long Island Sound which have not been demonstrated by best scientific information available to provide consistent habitat for North Atlantic right whales;

(viii) All vessels, regardless of size, must immediately reduce speed to 10 kns or less when any large whale, mother/calf pairs, or large assemblages of non-delphinid cetaceans are observed (within 100 m) of an underway vessel;

(ix) All vessels, regardless of size, must immediately reduce speed to 10 kns or less when a North Atlantic right whale is sighted, at any distance, by anyone on the vessel;

(x) If a vessel is traveling at greater than 10 kns, in addition to the required dedicated visual observer, Sunrise Wind must monitor the transit corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 kns or less for 12 hours following the detection. Each subsequent detection triggers an

additional 12-hour period at 10 kns or less. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection of North Atlantic right whales in the transit corridor for 12 hours;

(xi) All underway vessels (*e.g.*, transiting, surveying) operating at any speed must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard) located at an appropriate vantage point for ensuring vessels are maintaining appropriate separation distances. Visual observers must be equipped with alternative monitoring technology for periods of low visibility (*e.g.*, darkness, rain, fog, *etc.*). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements in this proposed action. Visual observers may be third-party observers (*i.e.*, NMFS-approved PSOs) or crew members. Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of in-water construction activities;

(xii) All vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 kns or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take the vessel strike avoidance measures described in this paragraph (b)(2)(xii);

(xiii) All vessels must maintain a minimum separation distance of 100 m from sperm whales and baleen whales other than North Atlantic right whales. If one of these species is sighted within 100 m of an underway vessel, that vessel must shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(xiv) All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all delphinid

cetaceans and pinnipeds, with an exception made for those that approach the vessel (e.g., bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of an underway vessel, that vessel must shift the engine to neutral, with an exception made for those that approach the vessel (e.g., bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(xv) When a marine mammal(s) is sighted while a vessel is underway, the vessel must take action as necessary to avoid violating the relevant separation distances (e.g., attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If a marine mammal(s) is sighted within the relevant separation distance, the vessel must reduce speed and shift the engine to neutral, not engaging the engine(s) until the animal(s) is clear of the area. This does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (i.e., any situation where the vessel is navigationally constrained);

(xvi) All vessels underway must not divert or alter course to avoid approaching any marine mammal. Any vessel underway must avoid speed over 10 kns or abrupt changes in course direction until the animal is out of an on a path away from the separation distances;

(xvii) For in-water construction heavy machinery activities other than impact or vibratory pile driving, if a marine mammal is on a path towards or comes within 10 m of equipment, Sunrise Wind must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment; and

(xviii) Sunrise Wind must submit a North Atlantic right whale vessel strike avoidance plan 90 days prior to commencement of vessel use. The plan will, at minimum, describe how PAM, in combination with visual observations, will be conducted to ensure the transit corridor is clear of right whales. The plan will also provide details on the vessel-based observer protocols on transiting vessels.

(c) *Wind turbine generator (WTG) and offshore converter substation (OCS-DC) foundation installation.* Sunrise Wind must comply with the following measures during WTG and OCS-DC installation:

(1) *Seasonal and daily restrictions:* (i) Foundation impact pile driving

activities may not occur January 1 through April 30;

(ii) No more than three monopiles may be installed per day;

(iii) Sunrise Wind must not initiate pile driving earlier than 1 hour after civil sunrise or later than 1.5 hours prior to civil sunset, unless Sunrise Wind submits and NMFS approves an Alternative Monitoring Plan as part of the Pile Driving and Marine Mammal Monitoring Plan that reliably demonstrates the efficacy of their night vision devices; and

(iv) Monopiles must be no larger than 15 m in diameter, representing the larger end of the tapered 7/15 m monopile design. The minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Maximum hammer energies must not exceed 4,000 kilojoules (kJ).

(2) *Noise abatement systems.* (i) Sunrise Wind must deploy dual noise abatement systems that are capable of achieving, at a minimum, 10 dB of sound attenuation, during all impact pile driving of foundation piles;

(A) A single big bubble curtain (BBC) must not be used unless paired with another noise attenuation device;

(B) A double big bubble curtain (dBBC) may be used without being paired with another noise attenuation device;

(ii) The bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m³/(min*m). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must make appropriate adjustments to the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iii) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(iv) No parts of the ring or other objects may prevent full seafloor contact; and

(v) Construction contractors must train personnel in the proper balancing of airflow to the ring. Construction contractors must submit an inspection/performance report for approval by Sunrise Wind within 72 hours following the performance test. Corrections to the bubble ring(s) to meet the performance standards must occur prior to impact

pile driving of monopiles. If Sunrise Wind uses a noise mitigation device in addition to the BBC, Sunrise Wind must maintain similar quality control measures as described here.

(3) *Sound field verification.* (i) Sunrise Wind must perform sound field verification (SFV) during all impact pile driving of the first three monopiles and must empirically determine source levels (peak and cumulative sound exposure level), the ranges to the isopleths corresponding to the Level A harassment (PTS) and Level B harassment thresholds, and estimated transmission loss coefficients;

(ii) If a subsequent monopile installation location is selected that was not represented by previous three locations (i.e., substrate composition, water depth), SFV must be conducted;

(iii) Sunrise Wind may estimate ranges to the Level A harassment and Level B harassment isopleths by extrapolating from *in situ* measurements conducted at several distances from the monopiles, and must measure received levels at a standard distance of 750 m from the monopiles;

(iv) If SFV measurements on any of the first three piles indicate that the ranges to Level A harassment and Level B harassment isopleths are larger than those modeled, assuming 10 dB attenuation, Sunrise Wind must modify and/or apply additional noise attenuation measures (e.g., improve efficiency of bubble curtain(s), modify the piling schedule to reduce the source sound, install an additional noise attenuation device) before the second pile is installed. Until SFV confirms the ranges to Level A harassment and Level B harassment isopleths are less than or equal to those modeled, assuming 10 dB attenuation, the shutdown and clearance zones must be expanded to match the ranges to the Level A harassment and Level B harassment isopleths based on the SFV measurements. If the application/use of additional noise attenuation measures still does not achieve ranges less than or equal to those modeled, assuming 10 dB attenuation, and no other actions can further reduce sound levels, Sunrise Wind must expand the clearance and shutdown zones according to those identified through SFV, in consultation with NMFS;

(v) If harassment zones are expanded beyond an additional 1,500 m, additional PSOs must be deployed on additional platforms, with each observer responsible for maintaining watch in no more than 180° and of an area with a radius no greater than 1,500 m;

(vi) If acoustic measurements indicate that ranges to isopleths corresponding to

the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10 dB attenuation), Sunrise Wind may request a modification of the clearance and shutdown zones for impact pile driving of monopiles and UXO/MEC detonations. For a modification request to be considered by NMFS, Sunrise Wind must have conducted SFV on three or more monopiles and on all detonated UXOs/MECs thus far to verify that zone sizes are consistently smaller than predicted by modeling (assuming 10 dB attenuation). Regardless of SFV measurements, the clearance and shutdown zones for North Atlantic right whales must not be decreased;

(vii) If a subsequent monopile installation location is selected that was not represented by previous locations (*i.e.*, substrate composition, water depth), SFV must be conducted. If a subsequent UXO/MEC charge weight is encountered and/or detonation location is selected that was not representative of the previous locations (*i.e.*, substrate composition, water depth), SFV must be conducted;

(vii) Sunrise Wind must submit a SFV Plan at least 180 days prior to the planned start of impact pile driving and any UXO/MEC detonation activities. The plan must describe how Sunrise Wind would ensure that the first three monopile foundation installation sites selected and each UXO/MEC detonation scenario (*i.e.*, charge weight, location) selected for SFV are representative of the rest of the monopile installation sites and UXO/MEC scenarios. In the case that these sites/scenarios are not determined to be representative of all other monopile installation sites and UXO/MEC detonations, Sunrise Wind must include information on how additional sites/scenarios would be selected for SFV. The plan must also include methodology for collecting, analyzing, and preparing SFV data for submission to NMFS. The plan must describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. Sunrise Wind must also provide, as soon as they are available but no later than 48 hours after each installation, the initial results of the SFV measurements to NMFS in an interim report after each monopile for the first three piles and after each UXO/MEC detonation; and

(viii) The SFV plan must also include how operational noise would be monitored. Sunrise Wind must estimate source levels (at 10 m from the operating foundation) based on received levels measured at 50 m, 100 m, and 250 m from the pile foundation. These data must be used to identify estimated

transmission loss rates. Operational parameters (*e.g.*, direct drive/gearbox information, turbine rotation rate) as well as sea state conditions and information on nearby anthropogenic activities (*e.g.*, vessels transiting or operating in the area) must be reported.

(4) *Protected species observer and passive acoustic monitoring.* (i) Sunrise Wind must have a minimum of four PSOs actively observing marine mammals before, during, and after (specific times described below) the installation of monopiles. At least four PSOs must be actively observing for marine mammals. At least two PSOs must be actively observing on the pile driving vessel while at least two PSOs must be actively observing on a secondary, PSO-dedicated vessel;

(ii) At least one active PSO on each platform must have a minimum of 90 days at-sea experience working in those roles in offshore environments with no more than eighteen months elapsed since the conclusion of the at-sea experience;

(iii) At least one acoustic PSO (*i.e.*, passive acoustic monitoring (PAM) operator) must be actively monitoring for marine mammals before, during and after impact pile driving with PAM; and

(iv) All visual PSOs and PAM operators monitoring the Sunrise Wind project must meet the requirements and qualifications described in § 217.315(a) and (b), and (c), respectively and as applicable to the specified activity.

(5) *Clearance and shutdown zones.* (i) Sunrise Wind must establish and implement clearance and shutdown zones (all distances to the perimeter are the radii from the center of the pile being driven) as described in the LOA for all WTG and OSC–DC foundation installation;

(ii) Sunrise Wind must use visual PSOs and PAM operators to monitor the area around each foundation pile before, during and after pile driving. PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes prior to commencing pile driving. At least one PAM operator must review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes prior to pile driving. Prior to initiating soft-start procedures, all clearance zones must be visually confirmed to be free of marine mammals for 30 minutes immediately prior to starting a soft-start of pile driving;

(iii) PSOs must be able to visually clear (*i.e.*, confirm no marine mammals are present) an area that extends around the pile being driven as described in the LOA. The entire minimum visibility zone must be visible (*i.e.*, not obscured

by dark, rain, fog, *etc.*) for a full 30 minutes immediately prior to commencing impact pile driving (minimum visibility zone size dependent on season);

(iv) If a marine mammal is observed entering or within the relevant clearance zone prior to the initiation of impact pile driving activities, pile driving must be delayed and must not begin until either the marine mammal(s) has voluntarily left the specific clearance zones and have been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other marine mammal species;

(v) The clearance zone may only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred within the PAM clearance zone during the 60-minute monitoring period. Any large whale sighting by a PSO or detected by a PAM operator that cannot be identified by species must be treated as if it were a North Atlantic right whale;

(vi) If a marine mammal is observed entering or within the respective shutdown zone, as defined in the LOA, after impact pile driving has begun, the PSO must call for a temporary shutdown of impact pile driving;

(vii) Sunrise Wind must immediately cease pile driving if a PSO calls for shutdown, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. In this situation, Sunrise Wind must reduce hammer energy to the lowest level practicable;

(viii) Pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time Sunrise Wind must use the lowest hammer energy practicable to maintain stability;

(ix) If impact pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale is no longer observed or 30

minutes has elapsed since the last detection;

(x) Upon re-starting pile driving, soft-start protocols must be followed.

(6) *Soft-start.* (i) Sunrise Wind must utilize a soft-start protocol for impact pile driving of monopiles by performing 4–6 strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes;

(ii) Soft-start must occur at the beginning of monopile installation and at any time following a cessation of impact pile driving of 30 minutes or longer; and

(iii) If a marine mammal is detected within or about to enter the applicable clearance zones, prior to the beginning of soft-start procedures, impact pile driving must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other species.

(d) *Cable landfall construction.* Sunrise Wind must comply with the following measures during cable landfall construction:

(1) *Daily restrictions.* (i) Sunrise Wind must conduct vibratory pile driving or pneumatic hammering during daylight hours only;

(ii) [Reserved].

(2) *PSO use.* (i) All visual PSOs monitoring the Sunrise Wind project must meet the requirements and qualifications described in § 217.315(a) and (b), as applicable to the specified activity; and

(ii) Sunrise Wind must have a minimum of two PSOs on active duty during any installation and removal of the temporary sheet piles, or casing pipes and goal posts. These PSOs must always be located at the best vantage point(s) on the vibratory pile driving platform or secondary platform in the immediate vicinity of the vibratory pile driving platform, in order to ensure that appropriate visual coverage is available for the entire visual clearance zone and as much of the Level B harassment zone, as possible.

(3) *Clearance and shutdown zones.* (i) Sunrise Wind must establish and implement clearance and shutdown zones as described in the LOA;

(ii) Prior to the start of pneumatic hammering or vibratory pile driving activities, at least two PSOs must monitor the clearance zone for 30 minutes, continue monitoring during pile driving and for 30 minutes post pile driving;

(iii) If a marine mammal is observed entering or is observed within the

clearance zones, piling and hammering must not commence until the animal has exited the zone or a specific amount of time has elapsed since the last sighting. The specific amount of time is 30 minutes for large whales and 15 minutes for dolphins, porpoises, and pinnipeds;

(iv) If a marine mammal is observed entering or within the respective shutdown zone, as defined in the LOA, after vibratory pile driving or hammering has begun, the PSO must call for a temporary shutdown of vibratory pile driving or hammering;

(v) Sunrise Wind must immediately cease pile driving or pneumatic hammering if a PSO calls for shutdown, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual, pile refusal, or pile instability; and

(vi) Pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and have been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other marine mammal species.

(e) *UXO/MEC detonation.* Sunrise wind must comply with the following measures related to UXO/MEC detonation:

(1) *General.* (i) Sunrise Wind must only detonate a maximum of three UXO/MECs, of varying sizes;

(ii) Upon encountering a UXO/MEC of concern, Sunrise Wind may only resort to high-order removal (*i.e.*, detonation) if all other means of removal are impracticable;

(iii) Sunrise Wind must utilize a noise abatement system (*e.g.*, bubble curtain or similar noise abatement device) around all UXO/MEC detonations and operate that system in a manner that achieves the maximum noise attenuation levels practicable.

(2) *Seasonal and daily restrictions.* (i) Sunrise Wind must not detonate UXOs/MECs from December 1 through April 30, annually; and

(ii) Sunrise Wind must only detonate UXO/MECs during daylight hours.

(3) *PSO and PAM use.* (i) All visual PSOs and PAM operators used for the Sunrise Wind project must meet the requirements and qualifications described in § 217.315(a), (b), and (c), respectively and as applicable to the specified activity; and

(ii) Sunrise Wind must use at least 2 visual PSOs on each platform (*i.e.*, vessels, plane) and one PAM operator to

monitor for marine mammals in the clearance zones prior to detonation. If the clearance zone is larger than 2 km (based on charge weight), Sunrise Wind must deploy a secondary PSO vessel. If the clearance is larger than 5 km (based on charge weight), an aerial survey must be conducted.

(4) *Clearance zones.* (i) Sunrise Wind must establish and implement clearance zones for UXO/MEC detonation using both visual and acoustic monitoring, as described in the LOA;

(ii) Clearance zones must be fully visible for at least 60 minutes and all marine mammal(s) must be confirmed to be outside of the clearance zone for at least 30 minutes prior to detonation. PAM must also be conducted for at least 60 minutes prior to detonation and the zone must be acoustically cleared during this time; and

(iii) If a marine mammal is observed entering or within the clearance zone prior to detonation, the activity must be delayed. Detonation may only commence if all marine mammals have been confirmed to have voluntarily left the clearance zones and been visually confirmed to be beyond the clearance zone, or when 60 minutes have elapsed without any redetections for whales (including the North Atlantic right whale) or 15 minutes have elapsed without any redetections of delphinids, harbor porpoises, or seals.

(5) *Sound field verification.* (i) During each UXO/MEC detonation, Sunrise Wind must empirically determine source levels (peak and cumulative sound exposure level), the ranges to the isopleths corresponding to the Level A harassment and Level B harassment thresholds, and estimated transmission loss coefficient(s); and

(ii) If SFV measurements on any of the detonations indicate that the ranges to Level A harassment and Level B harassment thresholds are larger than those modeled, assuming 10 dB attenuation, Sunrise Wind must modify the ranges, with approval from NMFS, and/or apply additional noise attenuation measures (*e.g.*, improve efficiency of bubble curtain(s), install an additional noise attenuation device) before the next detonation event.

(f) *HRG surveys.* Sunrise Wind must comply with the following measures during HRG Surveys:

(1) *General.* (i) All personnel with responsibilities for marine mammal monitoring must participate in joint, onboard briefings that would be led by the vessel operator and the Lead PSO, prior to the beginning of survey activities. The briefing must be repeated whenever new relevant personnel (*e.g.*, new PSOs, acoustic source operators,

relevant crew) join the survey operation before work commences;

(ii) Sunrise Wind must deactivate acoustic sources during periods where no data is being collected, except as determined to be necessary for testing. Unnecessary use of the acoustic source(s) is prohibited; and

(iii) Any large whale sighted by a PSO within 1 km of the boomer, sparker, or CHIRP that cannot be identified by species must be treated as if it were a North Atlantic right whale.

(2) *PSO use.* (i) Sunrise Wind must use at least one PSO during daylight hours and two PSOs during nighttime operations, per vessel;

(ii) PSOs must establish and monitor the appropriate clearance and shutdown zones (*i.e.*, radial distances from the acoustic source in-use and not from the vessel); and

(iii) PSOs must begin visually monitoring 30 minutes prior to the initiation of the specified acoustic source (*i.e.*, ramp-up, if applicable), through 30 minutes after the use of the specified acoustic source has ceased.

(3) *Ramp-up.* (i) Any ramp-up activities of boomers, sparkers, and CHIRPs must only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to the initiation of survey activities using a specified acoustic source;

(ii) Prior to a ramp-up procedure starting, the operator must notify the Lead PSO of the planned start of the ramp-up. This notification time must not be less than 60 minutes prior to the planned ramp-up activities as all relevant PSOs must monitor the clearance zone for 30 minutes prior to the initiation of ramp-up; and

(iii) Prior to starting the survey and after receiving confirmation from the PSOs that the clearance zone is clear of any marine mammals, Sunrise Wind must ramp-up sources to half power for five minutes and then proceed to full power, unless the source operates on a binary on/off switch in which case ramp-up is not feasible. Ramp-up activities would be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up would only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until additional time has elapsed with no further sighting. The specific time periods are 15 minutes for small odontocetes and seals, and 30 minutes for all other species.

(4) *Clearance and shutdown zones.* (i) Sunrise Wind must establish and

implement clearance zones as described in the LOA;

(ii) Sunrise Wind must implement a 30-minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30 minute break in survey activities and PSOs are not actively monitoring;

(iii) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and seals, and 30 minutes for all other species;

(iv) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (IR/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.*, no delay is required) despite periods of inclement weather and/or loss of daylight;

(v) Once the survey has commenced, Sunrise Wind must shut down boomers, sparkers, and CHIRPs if a marine mammal enters a respective shutdown zone;

(vi) In cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.*, no shutdown is required) so long as no marine mammals have been detected;

(vii) The use of boomers, sparkers, and CHIRPs would not be allowed to commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting;

(viii) Sunrise Wind must immediately shutdown any boomer, sparker, or CHIRP acoustic source if a marine mammal is sighted entering or within its respective shutdown zones. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus*, *Stenella*, *Lagenorhynchus*, and *Tursiops*. If there is uncertainty regarding the identification of a marine mammal species (*i.e.*, whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown.

Shutdown is required if a delphinid that belongs to a genus other than those specified here is detected in the shutdown zone;

(ix) If a boomer, sparker, or CHIRP is shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for less than 30 minutes, it may be activated again without ramp-up only if:

(A) PSOs have maintained constant observation; and

(B) No additional detections of any marine mammal occurred within the respective shutdown zones; and

(x) If a boomer, sparker, or CHIRP was shut down for a period longer than 30 minutes, then all clearance and ramp-up procedures must be initiated.

(5) *Autonomous survey vehicle (ASV):* Sunrise Wind must use and ASV during HRG Surveys and comply with the following requirements:

(i) The ASV must remain with 800 m (2,635 ft) of the primary vessel while conducting survey operations;

(ii) Two PSOs must be stationed on the mother vessel at the best vantage points to monitor the clearance and shutdown zones around the ASV;

(iii) At least one PSO must monitor the output of a thermal high-definition camera installed on the mother vessel to monitor the field-of-view around the ASV using a hand-held tablet; and

(iv) During periods of reduced visibility (*e.g.*, darkness, rain, or fog), PSOs must use night-vision goggles with thermal clip-ons and a hand-held spotlight to monitor the clearance and shutdown zones around the ASV.

(g) *Fisheries Monitoring.* (i) All captains and crew conducting trawl surveys will be trained in marine mammal detection and identification;

(ii) Survey vessels will adhere to all vessel mitigation measures (see Proposed Mitigation section);

(iii) Marine mammal monitoring will be conducted by the captain and/or a member of the scientific crew before (15 minutes prior to within 1 nm), during, and after haul back;

(iv) Trawl operations will commence as soon as possible once the vessel arrives on station;

(v) If a marine mammal (other than dolphins and porpoises) is sighted within 1 nm of the planned location in the 15 minutes before gear deployment Sunrise Wind will delay setting the trawl until marine mammals have not been resighted for 15 minutes, or Sunrise Wind may move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, Sunrise Wind may decide to move again or to skip the station;

(vi) Gear will not be deployed if marine mammals are observed within the area and if a marine mammal is deemed to be at risk of interaction, all gear will be immediately removed;

(vii) Sunrise Wind will maintain visual monitoring effort during the entire period of time that trawl gear is in the water (*i.e.*, throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, Sunrise Wind will take the most appropriate action to avoid marine mammal interaction;

(viii) Limit tow time to 20 minutes and monitoring for marine mammals throughout gear deployment, fishing, and retrieval;

(ix) Sunrise Wind will open the codend of the net close to the deck/ sorting area to avoid damage to animals that may be caught in gear; and

(x) Trawl nets will be fully cleaned and repaired (if damaged) before setting again.

§ 217.315 Requirements for monitoring and reporting.

(a) *PSO Qualifications.* (1) Sunrise Wind must employ qualified, trained visual and acoustic PSOs to conduct marine mammal monitoring during activities requiring PSO monitoring. PSO requirements are as follows:

(i) Sunrise Wind must use independent, dedicated, qualified PSOs, meaning that the PSOs must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements;

(ii) All PSOs must be approved by NMFS. Sunrise Wind must submit PSO resumes for NMFS' review and approval at least 60 days prior to commencement of in-water construction activities requiring PSOs. Resumes must include dates of training and any prior NMFS approval, as well as dates and description of last experience, and must be accompanied by information documenting successful completion of an acceptable training course. NMFS shall be allowed three weeks to approve PSOs from the time that the necessary information is received by NMFS, after which PSOs meeting the minimum requirements will automatically be considered approved;

(iii) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the

target size and distance (binocular use is allowable);

(iv) All PSOs must be trained in marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations;

(v) PSOs must have sufficient writing skills to document all observations, including but not limited to:

(A) The number and species of marine mammals observed;

(B) The dates and times when in-water construction activities were conducted;

(C) The dates and time when in-water construction activities were suspended to avoid potential incidental injury of marine mammals from construction noise within a defined shutdown zone; and

(D) Marine mammal behavior.

(vi) All PSOs must be able to communicate orally, by radio, or in-person with Sunrise Wind project personnel;

(vii) PSOs must have sufficient training, orientation, or experience with construction operations to provide for their own personal safety during observations;

(A) All PSOs must complete a Permits and Environmental Compliance Plan training and a 2-day refresher session that will be held with the PSO provider and Project compliance representative(s) prior to the start of construction activities;

(B) [Reserved];

(viii) At least one PSO must have prior experience working as an observer. Other PSOs may substitute education (*i.e.*, degree in biological science or related field) or training for experience;

(ix) One PSO for each activity (*i.e.*, foundation installation, sheet piles or casing pipe installation and removal, HRG surveys, UXO/MEC detonation) must be designated as the Lead PSO. The Lead PSO must have a minimum of 90 days of at-sea experience working in an offshore environment and would be required to have no more than eighteen months elapsed since the conclusion of their last at-sea experience;

(x) At a minimum, at least one PSO located on each observation platform (either vessel-based or aerial-based) must have a minimum of 90 days of at-sea experience working in an offshore environment and would be required to have no more than eighteen months elapsed since the conclusion of their last at-sea experiences. Any new and/or

inexperienced PSOs would be paired with an experienced PSO;

(xi) PSOs must monitor all clearance and shutdown zones prior to, during, and following impact pile driving, vibratory pile driving, pneumatic hammering, UXO/MEC detonations, and during HRG surveys that use boomers, sparkers, and CHIRPs (with specific monitoring durations described in § 217.315(b)(2)(iii), § 217.315(b)(3)(iv), § 217.315(b)(4)(ii), and § 217.315(b)(5)(iii). PSOs must also monitor the Level B harassment zones and document any marine mammals observed within these zones, to the extent practicable;

(xii) PSOs must be located on the best available vantage point(s) on the primary vessel(s) (*i.e.*, pile driving vessel, UXO/MEC vessel, HRG survey vessel) and on other dedicated PSO vessels (*e.g.*, additional UXO/MEC vessels) or aerial platforms, as applicable and necessary, to allow them appropriate coverage of the entire visual shutdown zone(s), clearance zone(s), and as much of the Level B harassment zone as possible. These vantage points must maintain a safe work environment; and

(xiii) Acoustic PSOs must complete specialized training for operating passive acoustic monitoring (PAM) systems and must demonstrate familiarity with the PAM system on which they must be working. PSOs may act as both acoustic and visual observers (but not simultaneously), so long as they demonstrate that their training and experience are sufficient to perform each task.

(b) *Other PSO requirements.* (1) *General.*

(i) All PSOs must be located at the best vantage point(s) on the primary vessel, dedicated PSO vessels, and aerial platform in order to ensure 360° visual coverage of the entire clearance and shutdown zones around the vessels, and as much of the Level B harassment zone as possible;

(ii) During all observation periods, PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During impact pile driving and UXO/MEC detonation events, at least one PSO on the primary pile driving or UXO/MEC vessels must be equipped with Big Eye binoculars (*e.g.*, 25 x 150; 2.7 view angle; individual ocular focus; height control) of appropriate quality. These must be pedestal mounted on the deck at the most appropriate vantage point that provides for optimal sea surface observation and PSO safety; and

(iii) PSOs must not exceed 4 consecutive watch hours on duty at any time, must have a 2-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period.

(2) *WTG and OCS-DC foundation installation.* (i) At least four PSOs must be actively observing marine mammals before, during, and after installation of foundation piles (monopiles). At least two PSOs must be stationed and observing on the pile driving vessel and at least two PSOs must be stationed on a secondary, PSO-dedicated vessel. Concurrently, at least one acoustic PSO (*i.e.*, PAM operator) must be actively monitoring for marine mammals with PAM before, during and after impact pile driving;

(ii) If PSOs cannot visually monitor the minimum visibility zone at all times using the equipment described in paragraph (b)(1)(ii) of this section, impact pile driving operations must not commence or must shutdown if they are currently active;

(iii) All PSOs, including PAM operators, must begin monitoring 60 minutes prior to pile driving, during, and for 30 minutes after an activity. The impact pile driving of monopiles must only commence when the minimum visibility zone is fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of impact pile driving;

(iv) For North Atlantic right whales, any visual or acoustic detection must trigger a delay to the commencement of pile driving. In the event that a large whale is sighted or acoustically detected that cannot be confirmed by species, it must be treated as if it were a North Atlantic right whale; and

(v) Following a shutdown, monopile installation must not recommence until the minimum visibility zone is fully visible and clear of marine mammals for 30 minutes.

(3) *Cable landfall construction.* (i) At least two PSOs must be on active duty during all activities related to the installation and removal of sheet piles or casing pipe;

(ii) These PSOs must be located at appropriate vantage points on the vibratory pile driving or pneumatic hammering platform or secondary platform in the immediate vicinity of the vibratory pile driving or pneumatic hammering platforms;

(iii) PSOs must ensure that there is appropriate visual coverage for the entire clearance zone and as much of

the Level B harassment zone as possible; and

(iv) PSOs must monitor the clearance zone for the presence of marine mammals for 30 minutes before, throughout the installation of the sheet piles and casing pipes, and for 30 minutes after all vibratory pile driving or pneumatic hammering activities have ceased. Sheet pile or casing pipe installation shall only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of vibratory pile driving or pneumatic hammering.

(4) *UXO/MEC detonation.* (i) At least two PSOs must be on active duty on each observing platform (*i.e.*, vessel, plane) prior to, during, and after UXO/MEC detonations. Concurrently, at least one acoustic PSO (*i.e.*, PAM operator) must be actively monitoring for marine mammals with PAM before, during and after UXO/MEC detonations;

(ii) All PSOs, including PAM operators, must begin monitoring 60 minutes prior to UXO/MEC detonation, during detonation, and for 30 minutes after detonation;

(iii) Sunrise Wind must ensure that clearance zones are fully (100 percent) monitored;

(iv) For detonation areas larger than 2 km, Sunrise Wind must use a secondary vessel to monitor. For any additional vessels determined to be necessary, two PSOs must be used and located at the appropriate vantage point on the vessel. These additional PSOs would maintain watch during the same time period as the PSOs on the primary monitoring vessel; and

(v) For detonation areas larger than 5 km, Sunrise Wind must use an aircraft, in addition to the primary monitoring vessel, to monitor for marine mammals. Two PSOs must be used and located at the appropriate vantage point on the aircraft. These additional PSOs would maintain watch during the same time period as the PSOs on the primary monitoring vessel.

(5) *HRG surveys.* (i) Between four and six PSOs must be present on every 24-hour survey vessel and two to three PSOs must be present on every 12-hour survey vessel. At least one PSO must be on active duty during HRG surveys conducted during daylight and at least two PSOs must be on activity duty during HRG surveys conducted at night;

(ii) During periods of low visibility (*e.g.*, darkness, rain, fog, *etc.*), PSOs must use alternative technology (*i.e.*, infrared/thermal camera) to monitor the clearance and shutdown zones;

(iii) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating boomers, sparkers, or CHIRPs, during use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(iv) Any observations of marine mammals must be communicated to PSOs on all nearby survey vessels during concurrent HRG surveys; and

(v) During daylight hours when survey equipment is not operating, Sunrise Wind must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports.

(c) *PAM operator requirements—(1) General.* (i) PAM operators must have completed specialized training for operating PAM systems prior to the start of monitoring activities, including identification of species-specific mysticete vocalizations (*e.g.*, North Atlantic right whales);

(ii) During use of any real-time PAM system, at least one PAM operator must be designated to monitor each system by viewing data or data products that would be streamed in real-time or in near real-time to a computer workstation and monitor;

(iii) PAM operators may be located on a vessel or remotely on-shore but must have the appropriate equipment (*i.e.*, computer station equipped with a data collection software system (*i.e.*, Mysticetus or similar system) and acoustic data analysis software) available wherever they are stationed;

(iv) Visual PSOs must remain in contact with the PAM operator currently on duty regarding any animal detection that would be approaching or found within the applicable zones no matter where the PAM operator is stationed (*i.e.*, onshore or on a vessel);

(v) The PAM operator must inform the Lead PSO on duty of animal detections approaching or within applicable ranges of interest to the pile driving activity via the data collection software system (*i.e.*, Mysticetus or similar system) who will be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.*, delay or shutdown);

(vi) PAM operators must be on watch for a maximum of four consecutive hours, followed by a break of at least two hours between watches; and

(vii) A Passive Acoustic Monitoring Plan must be submitted to NMFS for review and approval at least 180 days prior to the planned start of monopile installation. The authorization to take

marine mammals would be contingent upon NMFS' approval of the PAM Plan.

(2) *WTG and OCS-DC foundation installation.* (i) Sunrise Wind must use a minimum of one PAM operator before, during, and after impact pile driving activities. The PAM operator must assist visual PSOs in ensuring full coverage of the clearance and shutdown zones;

(ii) PAM operators must assist the visual PSOs in monitoring by conducting PAM activities 60 minutes prior to any impact pile driving, during, and after for 30 minutes for the appropriate size PAM clearance zone (dependent on season). The entire minimum visibility zone must be clear for at least 30 minutes, with no marine mammal detections within the visual or PAM clearance zones prior to the start of impact pile driving;

(iii) Any acoustic monitoring during low visibility conditions during the day would complement visual monitoring efforts and would cover an area of at least the Level B harassment zone around each monopile foundation;

(iv) Any visual or acoustic detection within the clearance zones must trigger a delay to the commencement of pile driving. In the event that a large whale is sighted or acoustically detected that cannot be identified by species, it must be treated as if it were a North Atlantic right whale. Following a shutdown, monopile installation shall not recommence until the minimum visibility zone is fully visible and clear of marine mammals for 30 minutes and no marine mammals have been detected acoustically within the PAM clearance zone for 30 minutes; and

(v) Sunrise Wind must submit a Pile Driving and Marine Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any pile driving. The plan must include final project design related to pile driving (*e.g.*, number and type of piles, hammer type, noise abatement systems, anticipated start date, *etc.*) and all information related to PAM PSO monitoring protocols for pile-driving and visual PSO protocols for all activities.

(3) *UXO/MEC detonation.* (i) Sunrise Wind must use a minimum of one PAM operator before, during, and after UXO/MEC detonations. The PAM operator must assist visual PSOs in ensuring full coverage of the clearance and shutdown zones;

(ii) PAM must be conducted for at least 60 minutes prior to detonation, during, and for 30 minutes after detonation;

(iii) The PAM operator must monitor to and beyond the clearance zone for large whales; and

(iv) Sunrise Wind must prepare and submit a UXO/MEC and Marine Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any UXO/MEC detonations. The plan must include final project design and all information related to visual and PAM PSO monitoring protocols for UXO/MEC detonations.

(d) *Data Collection and Reporting.* (1) Prior to initiation of project activities, Sunrise Wind must demonstrate in a report submitted to NMFS (at jaclyn.daly@noaa.gov and pr.itp.monitoringreports@noaa.gov) that all required training for Sunrise Wind personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed;

(2) Sunrise Wind must use a standardized reporting system from November 20, 2023 through November 19, 2028, the effective period of this subpart and the LOA. All data collected related to the Sunrise Wind project must be recorded using industry-standard softwares (*e.g.*, Mysticetus or a similar software) that is installed on field laptops and/or tablets. For all monitoring efforts and marine mammal sightings, Sunrise Wind must collect the following information and report it to NMFS:

(i) Date and time that monitored activity begins or ends;

(ii) Construction activities occurring during each observation period;

(iii) Watch status (*i.e.*, sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

(iv) PSO who sighted the animal;

(v) Time of sighting;

(vi) Weather parameters (*e.g.*, wind speed, percent cloud cover, visibility);

(vii) Water conditions (*e.g.*, sea state, tide state, water depth);

(viii) All marine mammal sightings, regardless of distance from the construction activity;

(ix) Species (or lowest possible taxonomic level possible);

(x) Pace of the animal(s);

(xi) Estimated number of animals (minimum/maximum/high/low/best);

(xii) Estimated number of animals by cohort (*e.g.*, adults, yearlings, juveniles, calves, group composition, *etc.*);

(xiii) Description (*i.e.*, as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

(xiv) Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of

behavioral responses thought to have resulted from the specific activity;

(xv) Animal's closest distance and bearing from the pile being driven, UXO/MEC, or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zones;

(xvi) Construction activity at time of sighting (*e.g.*, vibratory installation/removal, impact pile driving, UXO/MEC detonation, construction survey), use of any noise attenuation device(s), and specific phase of activity (*e.g.*, ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, post-UXO/MEC detonation, *etc.*);

(xvii) Marine mammal occurrence in Level A harassment or Level B harassment zones;

(xviii) Description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.*, delay, shutdown, *etc.*) and time and location of the action; and

(xix) Other human activity in the area.

(3) For all real-time acoustic detections of marine mammals, the following must be recorded and included in weekly, monthly, annual, and final reports:

(i) Location of hydrophone (latitude & longitude; in Decimal Degrees) and site name;

(ii) Bottom depth and depth of recording unit (in meters);

(iii) Recorder (model & manufacturer) and platform type (*i.e.*, bottom-mounted, electric glider, *etc.*), and instrument ID of the hydrophone and recording platform (if applicable);

(iv) Time zone for sound files and recorded date/times in data and metadata (in relation to UTC. *i.e.*, EST time zone is UTC-5);

(v) Duration of recordings (start/end dates and times; in ISO 8601 format, yyyy-mm-ddTHH:MM:SS.sssZ);

(vi) Deployment/retrieval dates and times (in ISO 8601 format);

(vii) Recording schedule (must be continuous);

(viii) Hydrophone and recorder sensitivity (in dB *re.* 1 μ Pa);

(ix) Calibration curve for each recorder;

(x) Bandwidth/sampling rate (in Hz);

(xi) Sample bit-rate of recordings; and,

(xii) Detection range of equipment for relevant frequency bands (in meters).

(4) For each detection, the following information must be noted:

(i) Species identification (if possible);

(ii) Call type and number of calls (if known);

(iii) Temporal aspects of vocalization (date, time, duration, *etc.*; date times in ISO 8601 format);

(iv) Confidence of detection (detected, or possibly detected);

(v) Comparison with any concurrent visual sightings;

(vi) Location and/or directionality of call (if determined) relative to acoustic recorder or construction activities;

(vii) Location of recorder and construction activities at time of call;

(viii) Name and version of detection or sound analysis software used, with protocol reference;

(xi) Minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and

(x) Name of PAM operator(s) on duty.

(5) Weekly reports are required from Sunrise Wind and must adhere to the following standards:

(i) Sunrise Wind must compile and submit weekly PSO, PAM, and sound field verification (SFV) reports to NMFS (at jaclyn.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) that document the daily start and stop of all pile driving, HRG survey, or UXO/MEC detonation activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday—Saturday) and must include the information required under this section. The weekly report will also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is completed, weekly reports are no longer required;

(ii) [Reserved].

(6) Monthly reports are required from Sunrise Wind and must adhere to the following standards:

(i) Sunrise Wind must compile and submit monthly reports to NMFS (at itp.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, number of UXO/MEC detonations, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). Once foundation installation is complete, monthly reports are no longer required;

(ii) [Reserved].

(7) Annual reports are required from Sunrise Wind and must adhere to the following standards:

(i) Sunrise Wind must submit an annual report to NMFS (at itp.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) no later than 90 days following the end of a given calendar year. Sunrise Wind must provide a final report within 30 days following resolution of comments on the draft report. The report must detail the following information and the information specified in paragraphs (d)(2)(i) through (xix), (d)(3)(i) through (xii), and (d)(4)(i) through (x) of this section:

(A) The total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zones with comparison to authorized take of marine mammals for the associated activity type;

(B) Marine mammal detections and behavioral observations before, during, and after each activity;

(C) What mitigation measures were implemented (*i.e.*, number of shutdowns or clearance zone delays, *etc.*) or, if no mitigative actions was taken, why not;

(D) Operational details (*i.e.*, days of impact and vibratory pile driving, days/amount of HRG survey effort, total number and charge weights related to UXO/MEC detonations, *etc.*);

(E) SFV results;

(F) Any PAM systems used;

(G) The results, effectiveness, and which noise abatement systems were used during relevant activities (*i.e.*, impact pile driving, UXO/MEC detonation);

(H) Summarized information related to Situational Reporting; and

(I) Any other important information relevant to the Sunrise Wind project, including additional information that may be identified through the adaptive management process.

(ii) The final annual report must be prepared and submitted within 30 calendar days following the receipt of any comments from NMFS on the draft report. If no comments are received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report must be considered final.

(8) Final reports are required from Sunrise Wind and must adhere to the following standards:

(i) Sunrise Wind must submit its draft final report to NMFS (at jaclyn.daly@noaa.gov and PR.ITP.monitoringreports@noaa.gov) on all visual and acoustic monitoring

conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of NMFS' receipt of the draft report, the report shall be considered final.

(ii) [Reserved].

(9) Sound field verification reports are required from Sunrise Wind and must adhere to the following standards:

(i) Sunrise Wind must provide the initial results of the SFV measurements to NMFS in an interim report after each monopile foundation installation for the first three monopiles piles, and for each UXO/MEC detonation as soon as they are available, but no later than 48 hours after each installation or detonation. Sunrise Wind must also provide interim reports on any subsequent SFV on foundation piles within 48 hours. The interim report must include hammer energies used during pile driving or UXO/MEC weight (including donor charge weight), peak sound pressure level (SPL_{pk}) and median, mean, maximum, and minimum root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}) and single strike sound exposure level (SEL_{ss});

(ii) The final results of SFV of monopile installations must be submitted as soon as possible, but no later than within 90 days following completion of impact pile driving of monopiles and UXO/MEC detonations. The final report must include, at minimum, the following:

(A) Peak sound pressure level (SPL_{pk}), root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), single strike sound exposure level (SEL_{ss}), integration time for SPL_{rms} , spectrum, and 24-hour cumulative SEL extrapolated from measurements at specified distances (*e.g.*, 750 m).

(1) All these levels must be reported in the form of:

(i) Median;

(ii) Mean;

(iii) Maximum; and

(iv) Minimum.

(2) The SEL and SPL power spectral density and one-third octave band levels (usually calculated as decidecade band levels) at the receiver locations should be reported;

(B) The sound levels reported must be in median and linear average (*i.e.*, average in linear space), and in dB;

(C) A description of depth and sediment type, as documented in the

Construction and Operation Plan, at the recording and pile driving locations;

(D) Hammer energies required for pile installation and the number of strikes per pile;

(E) Hydrophone equipment and methods (*i.e.*, recording device, bandwidth/sampling rate, distance from the pile where recordings were made; depth of recording device(s));

(F) Description of the SFV PAM hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, and other relevant information;

(G) Description of UXO/MEC, weight, including donor charge weight, and why detonation was necessary;

(H) Local environmental conditions, such as wind speed, transmission loss data collected on-site (or the sound velocity profile), baseline pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern);

(I) Spatial configuration of the noise attenuation device(s) relative to the pile;

(J) The extents of the Level A harassment and Level B harassment zones; and

(K) A description of the noise abatement system and operational parameters (*e.g.*, bubble flow rate, distance deployed from the pile, *etc.*) and any action taken to adjust the noise abatement system.

(10) Situational reports are required from Sunrise Wind and must adhere to the following standards:

(i) If a North Atlantic right whale is observed at any time by PSOs or personnel on or in the vicinity of any project vessel, or during vessel transit, Sunrise Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System (866) 755–6622, through the WhaleAlert app (<https://www.whalealert.org/>), and to the U.S. Coast Guard via channel 16, as soon as feasible but no longer than 24 hours after the sighting. Information reported must include, at a minimum: time of sighting, location, and number of North Atlantic right whales observed.

(ii) When an observation of a marine mammal occurs during vessel transit, the following information must be recorded:

- (A) Time, date, and location;
- (B) The vessel's activity, heading, and speed;
- (C) Sea state, water depth, and visibility;
- (D) Marine mammal identification to the best of the observer's ability (*e.g.*,

North Atlantic right whale, whale, dolphin, seal);

(E) Initial distance and bearing to marine mammal from vessel and closest point of approach; and

(F) Any avoidance measures taken in response to the marine mammal sighting.

(iii) If a North Atlantic right whale is detected via PAM, the date, time, location (*i.e.*, latitude and longitude of recorder) of the detection as well as the recording platform that had the detection must be reported to nmfs.pacmdata@noaa.gov as soon as feasible, but no longer than 24 hours after the detection. Full detection data and metadata must be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic right whale Passive Acoustic Reporting System website (<https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>);

(iv) In the event that the personnel involved in the activities defined in § 217.310(a) discover a stranded, entangled, injured, or dead marine mammal, Sunrise Wind must immediately report the observation to the NMFS Office of Protected Resources (OPR), the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866–755–6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, Sunrise Wind must immediately cease all 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 the LOA. NMFS may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Sunrise Wind may not resume their activities until notified by NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(B) Species identification (if known) or description of the animal(s) involved;

(C) Condition of the animal(s) (including carcass condition if the animal is dead);

(D) Observed behaviors of the animal(s), if alive;

(E) If available, photographs or video footage of the animal(s); and

(F) General circumstances under which the animal was discovered.

(v) In the event of a vessel strike of a marine mammal by any vessel associated with the Sunrise Wind

Offshore Wind Farm Project, Sunrise Wind must immediately report the strike incident to the NMFS OPR and the GARFO within and no later than 24 hours. Sunrise Wind must immediately cease all 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 the LOA. Sunrise Wind may not resume their activities until notified by NMFS and additional measures, if any, to ensure compliance with the terms of the LOA are implemented. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Species identification (if known) or description of the animal(s) involved;

(C) Vessel's speed leading up to and during the incident;

(D) Vessel's course/heading and what operations were being conducted (if applicable);

(E) Status of all sound sources in use;

(F) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(G) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(H) Estimated size and length of animal that was struck;

(I) Description of the behavior of the marine mammal immediately preceding and following the strike;

(J) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(K) Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(L) To the extent practicable, photographs or video footage of the animal(s).

§ 217.316 Letter of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Sunrise Wind 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 November 20, 2023 through November 19, 2028 of this subpart.

(c) If an LOA expires prior to the expiration date of these regulations, Sunrise Wind 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, Sunrise Wind must apply for and obtain a modification of the LOA as described in § 217.317.

(e) The LOA must set forth:

(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 must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.317 Modifications of Letter of Authorization.

(a) An LOA issued under §§ 217.312 and 217.316 or § 217.317 for the activity identified in § 217.310(a) shall be 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 this subpart (excluding changes made pursuant to the adaptive management

provision in paragraph (c)(1) of this section), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For a LOA modification request by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart 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) An LOA issued under §§ 217.312 and 217.316 or § 217.317 for the activities identified in § 217.310(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive Management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Sunrise Wind 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 this subpart;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from Sunrise Wind's monitoring from the previous year(s);

(B) Results from other marine mammals and/or sound research or studies;

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by this subpart or subsequent LOA; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* 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 the LOA issued pursuant to §§ 217.312 and 217.316 or § 217.317, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.318–217.319 [Reserved]

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Friday, February 10, 2023

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FEDERAL REGISTER PAGES AND DATE, FEBRUARY

6609-6970.....	1
6971-7346.....	2
7347-7556.....	3
7557-7832.....	6
7833-8206.....	7
8207-8348.....	8
8349-8728.....	9
8729-9104.....	10

CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Proposed Rules:	
184.....	8374
200.....	8374

3 CFR

1.....	7833, 7837
Proclamations:	
10517.....	7347
10518.....	7349
10519.....	7353
10520.....	8203

Administrative Orders:

Memorandums:	
Memorandum of	
February 2, 2023.....	7833

Notices:

Notice of February 3,	
2023.....	7837
Notice of February 6,	
2023.....	8205

Presidential

Determinations:	
No. 2023-03 of	
January 30, 2023.....	8347

5 CFR

Ch. CIV.....	8207
Proposed Rules:	
4401.....	7891

7 CFR

1709.....	7557
1719.....	7557
1734.....	7557
1738.....	7557
1739.....	7557
1770.....	7557
1773.....	7557
1777.....	6609

Proposed Rules:

210.....	8050
215.....	8050
220.....	8050
225.....	8050
226.....	8050

10 CFR

50.....	7839
52.....	7355, 7839
429.....	7840
430.....	7846
810.....	8217

Proposed Rules:

50.....	6672, 7012
52.....	6672
429.....	6818
430.....	6818, 7284
431.....	7629

12 CFR

201.....	8219
----------	------

204.....	8220
208.....	7848

Proposed Rules:

328.....	6673
1092.....	6906

14 CFR

13.....	6971
27.....	8729
29.....	8729
39.....	6615, 6618, 6972, 6974,
	6976, 6983, 6985, 7355,
	7566, 7568, 7572, 7575,
	7578, 7851, 7856, 7859,
	7862, 7864, 7867, 8349,
	8740, 8743, 8747
71.....	7580, 7583, 7584, 7585,
	7869, 8222, 8750
73.....	8751
91.....	8223
97.....	6988, 6990

Proposed Rules:

39.....	7013, 7370, 7651, 8238
71.....	7654, 7897, 7899, 7901,
	8241, 8378

15 CFR

71.....	8352
744.....	6621
902.....	7586
922.....	7357

Proposed Rules:

774.....	7655
----------	------

16 CFR

801.....	8224
803.....	8224

Proposed Rules:

260.....	7656
1112.....	8692
1263.....	8692

17 CFR

23.....	8752
---------	------

18 CFR

11.....	6991
40.....	8354
410.....	7005
440.....	7005

19 CFR

Proposed Rules:	
122.....	7016

21 CFR

1.....	6624
864.....	7007

Proposed Rules:

573.....	7657
1311.....	7033

23 CFR
1300.....7780

24 CFR
Proposed Rules:
5.....8516
91.....8516
92.....8516
93.....8516
402.....7044
570.....8516
574.....8516
576.....8516
880.....7044
881.....7044
883.....7044
884.....7044
886.....7044
891.....7044
903.....8516
983.....8516

25 CFR
Proposed Rules:
1000.....7374

26 CFR
Proposed Rules:
1.....7903
54.....7236

29 CFR
1991.....8755

Proposed Rules:
2590.....7236

30 CFR
Proposed Rules:
585.....7657

31 CFR
591 (3 documents)6624,
6625, 6628
1010.....7357

Proposed Rules:
240.....6674

32 CFR
Proposed Rules:
310.....7375

33 CFR
1657357, 7360, 7871, 7873,
8224, 8368, 8369, 8371,
8769

34 CFR
Proposed Rules:
Ch. III.....8242

37 CFR
210.....6630

38 CFR
Proposed Rules:
51.....8380

39 CFR
111.....7875

Proposed Rules:
3050.....6679

40 CFR
51.....8226
526632, 7877, 7879, 7881,
7883, 7885, 7886, 7888,
8371, 8771
70.....7591
81.....6633
180.....6636, 8233

Proposed Rules
526688, 7046, 7378, 7382,
7384, 7903, 8241

42 CFR
422.....6643

45 CFR
1611.....7010

Proposed Rules:
147.....7236
156.....7236

47 CFR
2.....7592
15.....7592

Proposed Rules:
0.....8636
1.....7910

27.....8636
64.....7049, 8253
73.....8636
74.....8636
87.....7910
88.....7910

49 CFR
Proposed Rules:
Ch. III.....6691

50 CFR
17.....7134
229.....7362
622.....7626
648.....6665, 7626
6797369, 7586, 8236
680.....7586

Proposed Rules:
13.....8380
17.....7658, 8380
217.....8996
218.....8146
223.....8774
224.....8774
622.....7388, 8785
660.....7661
679.....8592

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion

in today's **List of Public Laws**.

Last List January 10, 2023

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