FEDERAL REGISTER

Vol. 88 Friday,

No. 62 March 31, 2023

Pages 19213–19546

OFFICE OF THE FEDERAL REGISTER

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

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

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

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

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

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

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

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

How To Cite This Publication: Use the volume number and the page number. Example: 88 FR 12345.

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

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

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

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:	
Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

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

Contents

Federal Register

Vol. 88, No. 62

Friday, March 31, 2023

Separate Parts In This Issue

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Administrative Orders:

Presidential
Determinations:
No. 2023–06 of March
27, 2023 19545

6 CFR

5 19213

7 CFR

Proposed Rules:

210 19229
215 19229
220 19229
225 19229
226 19229
800 19229
810 19229

10 CFR

50 19214

Proposed Rules:

430 19382

12 CFR

1026 19214

14 CFR

71 19220

24 CFR

100 19450

33 CFR

100 19222
165 (2 documents) 19222, 19223

40 CFR

52 19225

Proposed Rules:

52 19233

50 CFR

217 19502
679 19227

Proposed Rules:

300 19236
600 19236

Rules and Regulations

Federal Register
Vol. 88, No. 62
Friday, March 31, 2023

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2022–0042]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP)–027 Customs Broker Management (CBM) System of Records

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, ''DHS/U.S. Customs and Border Protection (CBP)–027 Customs Broker Management (CBM) System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of this system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective March 31, 2023.

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

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP) published a notice of proposed rulemaking in the **Federal Register**, 87 FR 43749, July 22, 2022, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. DHS issued the new ''DHS/CBP–027 Customs Broker Management (CBM) System of Records'' in the **Federal Register** at 87 FR 43880, July 22, 2022, to determine (1) an individual's suitability for acquiring a Customs Broker license, whether that individual is representing him or herself or affiliated with an association, corporation, or partnership; and (2) whether a licensed Customs Broker continues to meet the eligibility requirements to maintain that Customs Broker license.

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

II. Public Comments

DHS received no comments on the NPRM and no comments on the SORN. The Department will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

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

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

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

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

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

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

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

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

* * * * *

88. The DHS/CBP–027 Customs Broker Management System of Records consists of electronic and paper records and will be used by DHS and its components. DHS/CBP–027 Customs Broker Management System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. DHS/CBP–027 Customs Broker Management System of Records maintains information about individuals, associations, corporations, or partnerships to administer the Customs Broker License Exam, determine suitability for providing an individual a Customs Broker license, and determine whether a licensed Customs Broker continues to meet the eligibility requirements to maintain a Customs Broker license.

The Secretary of Homeland Security has exempted this system pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), and (e)(8); (f); and (g). Additionally, the Secretary has exempted this system pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities when weighing and evaluating all available information. In

addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

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

* * * * *

Mason C. Clutter,

Acting Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2023–06714 Filed 3–30–23; 8:45 am]

BILLING CODE 9111–14–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC–2022–0159]

Regulatory Guide: Maintenance, Testing, and Replacement of Vented Lead-Acid Storage Batteries for Production and Utilization Facilities

Correction

In rule document 2023–06285, appearing on pages 18005 through 18006, in the issue of Monday, March 27, 2023, the subject line is corrected to read as set forth above.

[FR Doc. C1–2023–06285 Filed 3–30–23; 8:45 am]

BILLING CODE 0099–10–D

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB–2022–0070]

Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Preemption determination.

SUMMARY: After considering public comments, the Consumer Financial Protection Bureau (CFPB) has determined that commercial financing disclosure laws in California, New York, Utah, and Virginia are not preempted by the Truth in Lending Act.

DATES: This determination is issued on March 31, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton or Anand Das, Senior Counsels, Legal Division, or Joel Singerman, Senior Counsel, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Overview of This Proceeding

The Truth in Lending Act (TILA) ensures that key information about consumer credit transactions is disclosed to consumers. TILA preempts State disclosure laws only if they are ''inconsistent'' with it. The CFPB is authorized to determine whether there is an inconsistency.[1]

In recent years, New York, California, Utah, and Virginia have enacted laws that require disclosures for commercial financing transactions to businesses, which do not receive TILA disclosures in those transactions. The CFPB received a request from a trade association (the requesting party) that it determine that TILA preempts New York's commercial financing disclosure law. In response, the CFPB published for public comment a notification of intent to make a preemption determination. In the notification of intent, the CFPB considered the requesting party's initial arguments and preliminarily found that New York's law was not preempted. On the CFPB's own motion, the CFPB also provided notice that it may make parallel findings regarding the California, Utah, and Virginia laws.

The CFPB received fifteen comments on the notification of intent. The Attorney General of California, two trade associations, a lender to small businesses, a group of consumer advocacy organizations, and a group of lenders, investors, and small business advocates all supported the CFPB's notification of intent. On the other hand, the requesting party, several other trade associations, and a different lender to small businesses argued that some or all of the four States' laws are preempted.[2]

After analyzing the comments, the CFPB has concluded that the State commercial financing disclosure laws of California, New York, Utah, and Virginia are not preempted by TILA. Congress adopted a narrow standard for TILA preemption that displaces State law only in the case of ''inconsistency.'' This means that States have broad authority to establish their own protections for their residents, both within and outside the scope of TILA. As relevant here, commercial financing transactions to businesses—and any disclosures associated with such transactions—are beyond the scope of TILA's statutory purposes, which concern consumer credit.

[1] TILA section 111(a), 15 U.S.C. 1610(a).

[2] The notification of intent is available at 87 FR 76551 (Dec. 15, 2022). The original request is available at *https://www.regulations.gov/document/CFPB-2022-0070-0002.* The comments on the notification of intent are available at *https://www.regulations.gov/document/CFPB-2022-0070-0004/comment.*

II. General Background on the Truth in Lending Act

Congress enacted TILA in 1968 because it found that ''competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.'' [3] As relevant here, TILA's stated purpose is to ''assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' [4] TILA requires creditors to use specified formulas to determine credit costs and to provide cost disclosures, including the ''finance charge'' and ''annual percentage rate'' (APR), to consumers before consummation of ''consumer credit'' transactions. Consumer credit is credit that is offered or extended ''primarily for personal, family, or household purposes.'' [5] Conversely, TILA expressly does not apply to ''credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes.'' [6]

In 1968, Congress authorized the Board of Governors of the Federal Reserve System (Board) to issue regulations under TILA.[7] In 2010, Congress transferred the ''consumer financial protection functions'' of the Board to the CFPB as an independent bureau in the Federal Reserve System.[8] The CFPB's Regulation Z, originally based on the Board's Regulation Z, implements TILA.[9]

III. Standard for Preemption Under the Truth in Lending Act

A. TILA

According to TILA section 111(a)(1), TILA does not ''annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of [TILA], and then only to the extent of the inconsistency.'' [10]

As explained by TILA's legislative history, this provision ''sets forth the basic policy that the Federal statute does not preempt State legislation.'' [11]

B. Regulation Z

Section 1026.28(a)(1) of the CFPB's Regulation Z implements the inconsistency standard from TILA section 111(a)(1).[12] It is based on an identical provision in the Board's Regulation Z.[13] There are three key sentences in the provision for purposes of this determination.

The first sentence, tracking TILA section 111(a)(1), provides that ''State law requirements'' that are ''inconsistent'' with TILA and Regulation Z are preempted.[14]

The second sentence provides, as an example, that a ''State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law.'' [15] The term ''creditor'' is a defined term in TILA and Regulation Z, referring to a person extending ''consumer credit.'' [16]

The third sentence, in turn, provides examples of ''contradictory'' disclosures or actions by a creditor: ''A State law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or if it requires the use of a term different from that required in the Federal law to describe the same item.'' [17]

Based on Board precedents, the examples in the third sentence are only a subset of the second sentence, which in turn is only a subset of the first sentence.[18] The structure of § 1026.28(a)(1) is illustrated by Figure 1:

---

[3] TILA section 102(a), 15 U.S.C. 1601(a).

[4] *Id.*

[5] TILA section 103(i), 15 U.S.C. 1602(i); 12 CFR 1026.2(a)(12).

[6] TILA section 104(1), 15 U.S.C. 1603(1). There is a limited exception related to certain requirements for certain credit cards that is not applicable here. TILA section 135, 15 U.S.C. 1645; 12 CFR 1026.12.

[7] Public Law 90–321, title I, sec. 105, 82 Stat. 146, 148.

[8] *See* sections 1011(a) and 1061(b)(1) of the Consumer Financial Protection Act of 2010, 12 U.S.C. 5491(a), 5581(b)(1). Additionally, Congress has provided that ''the deference that a court affords to the Bureau with respect to a determination made by the Bureau relating to the meaning or interpretation of any provision of'' TILA or its implementing regulations, aside from certain provisions related to property appraisals, ''shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of'' TILA and its implementing regulations. TILA sections 103(z), 105(h), 15 U.S.C. 1602(z), 1604(h).

[9] 12 CFR part 1026.

[10] 15 U.S.C. 1610(a)(1). This authority pertains to chapters 1, 2, and 3 of TILA, which are codified as parts A, B, and C of 12 U.S.C. ch. 41, subch. I. This determination refers to chapters 1, 2, and 3 of TILA as ''TILA'' for convenience. Chapters 4 and 5 of TILA, which are codified as parts D and E and known as the Fair Credit Billing Act and Consumer Leasing Act, respectively, are not implicated here and have separate preemption provisions.

[11] S. Rep. No. 90–392, at 20 (1967); *accord* H.R. Rep. No. 90–1040, at 30 (1967).

[12] 12 CFR 1026.28(a)(1).

[13] 76 FR 79768, 79806–07 (Dec. 22, 2011); 46 FR 20848, 20906 (Apr. 7, 1981) (codified at 12 CFR 226.28(a)(1)).

[14] 12 CFR 1026.28(a)(1) (first sentence). There are exceptions that are not relevant here. *Id.*

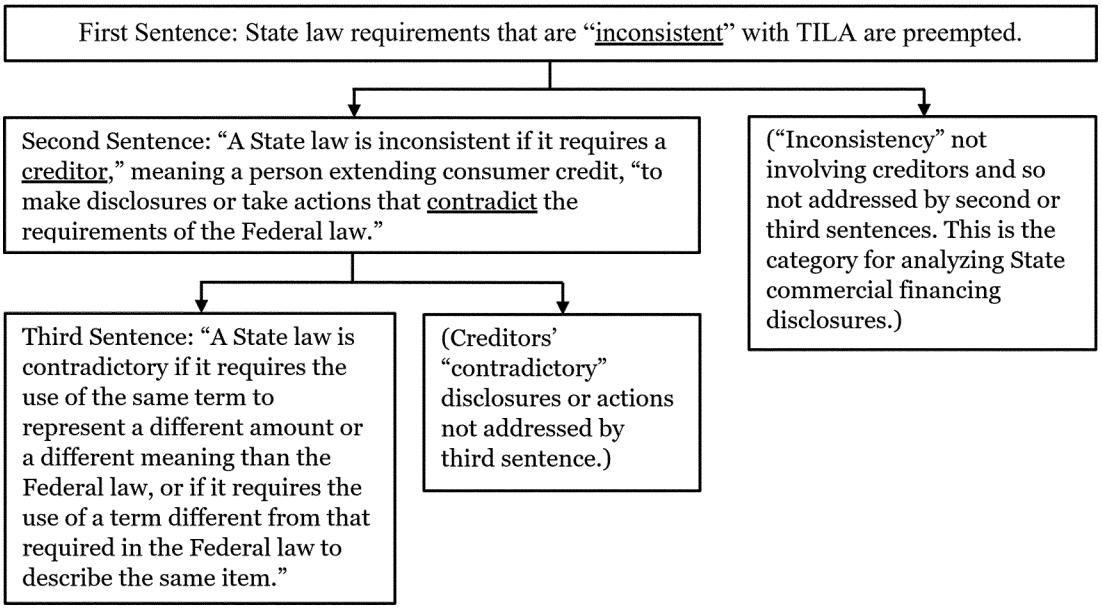
[15] 12 CFR 1026.28(a)(1) (second sentence).

[16] 12 CFR 1026.2(a)(17)(i). There are other features of the definition of ''creditor'' that are not relevant here. *Id.*

[17] 12 CFR 1026.28(a)(1) (third sentence).

[18] Put another way, when the second and third sentences use the word ''if,'' they do *not* mean ''if and only if.'' (Of course, use of language depends on context, and there are other statutory and regulatory contexts where ''if'' does imply ''if and only if.'') An example where the only the first sentence was applicable (but not the second or third), because there were no disclosures or actions by a ''creditor''—only by certain non-creditor loan brokers—was 53 FR 3332, 3332–33 (Feb. 5, 1988) (Indiana). Regarding that 1988 Indiana determination, *see also* note 54 below. In 1983, the Board that explained that sometimes both the first and second sentences are applicable (but not the third). That is when the State law does require disclosures or actions by a ''creditor,'' but the law does not ''deal with disclosures of terms and amounts.'' 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).

Figure 1: § 1026.28(a)(1) of Regulation Z



Because none of the four State commercial financing disclosure laws involve a TILA ''creditor,'' *i.e.,* a person extending consumer credit, the second and third sentences are not applicable to those laws, and only the first sentence is potentially applicable.

The requesting party submitted a comment arguing that the third sentence means that State laws are automatically preempted whenever they use the terms finance charge and APR to represent different amounts from Regulation Z. But this comment reads the third sentence out of its context. The third sentence provides examples of the second sentence's discussion of ''contradictory'' disclosures or actions by ''creditors.'' Conduct by non-creditors is outside its scope and has to be analyzed using the overall inconsistency standard in the first sentence.[19]

The reading of the third sentence proffered by the requesting party would result in implausibly sweeping preemption. Although the requesting party focuses its argument on the finance charge and APR, the reading would logically prevent State disclosures—regardless of topic—from using other Regulation Z disclosure terms such as ''File #,'' ''Closing Date,'' ''Deposit,'' or ''County Taxes,'' without aligning with technical Regulation Z definitions that may have no connection with the topic of the State disclosures.[20] Accordingly, the third sentence does not govern non-TILA-creditor contexts.

C. Approach When Evaluating Inconsistency

The notification of intent stated that the CFPB was considering whether it should clarify how the CFPB articulates the standard for TILA preemption and requested comment on that issue. The Attorney General of California commented that the standard should be understood to align with conflict preemption.

The CFPB agrees that TILA's and Regulation Z's inconsistency standard aligns with conflict preemption. In conflict preemption, there is a conflict either when it is ''*impossible*'' to comply with both the Federal law and the State law (the impossibility prong) or when the State law ''stands as an *obstacle* to the accomplishment and execution of the full purposes'' of the Federal law (the obstacle prong).[21] There is preemption under the obstacle prong when ''the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect.'' [22]

The Board's precedents align with conflict preemption. With respect to the impossibility prong, the Board at times assessed whether ''a creditor can comply with both the State and Federal provisions.'' [23] However, State laws rarely or never make delivery of TILA disclosures impossible, so impossibility does not figure prominently in the Board's precedents.

The Board's consideration of preemption instead typically focused on the obstacle prong. When determining whether disclosures or actions by a creditor contradicted TILA, the Board held that a State law is preempted when ''it significantly impedes the operation of the Federal law or interferes with the purposes of the Federal statute.'' [24] When evaluating whether a State law regulating non-creditors was inconsistent with TILA, the Board used similar wording, considering whether the State law was ''inconsistent with the purpose of the Federal law'' and would ''undermine the intent of the Federal

[19] The requesting party's comment also cites Regulation Z commentary discussing the third sentence of 12 CFR 1026.28(a)(1). The commentary provides two specific examples of types of State laws that would be preempted under the third sentence, but these commentary examples do not affect the present analysis of the regulation. The first example in the commentary explains that the third sentence's bar on a State law that ''requires the use of the same term to represent a different amount or a different meaning'' would include, as an example, a ''State law that requires use of the term finance charge, but defines the term to include fees that the Federal law excludes, or to exclude fees the Federal law includes.'' 12 CFR part 1026, supp. I, comment 28(a)–2.i. The second example explains that the third sentence's bar on a State law that ''requires the use of a term different from that required in the Federal law to describe the same item'' would include, as an example, a ''State law that requires a label such as nominal annual interest rate to be used for what the Federal law calls the annual percentage rate.'' *Id.,* comment 28(a)–2.ii. The commentary, like the language in the third sentence it illustrates, is limited by its context to disclosures provided by TILA creditors.

[20] *Id.;* 12 CFR 1026.38 (Regulation Z closing disclosure for mortgage loans).

[21] *Crosby* v. *Nat'l Foreign Trade Council,* 530 U.S. 363, 372–3 (2000) (emphasis added).

[22] *Id.* at 373.

[23] 56 FR 3005, 3006 (Jan. 28, 1991) (New Mexico).

[24] *E.g.,* 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).

scheme.'' [25] The CFPB understands these to be applications of the obstacle prong.

The conclusion that inconsistency under TILA aligns with conflict preemption is reinforced by case law. The District of Columbia Circuit has applied a conflict-preemption analysis when considering whether TILA preempted State law.[26] The Ninth Circuit has observed, in the context of other statutes that use an ''inconsistency'' test for preemption, that ''when the preemption clause uses the term 'inconsistent,' '' the analysis under the preemption clause and the analysis under conflict preemption ''effectively collapse into one.'' [27]

In order to determine whether State law ''stands as an obstacle'' to TILA's purposes, it is necessary to carefully consider those statutory purposes. Congress has delineated TILA's main purposes in purpose provisions. The relevant purpose provision in most disclosure contexts, including the present one, is section 102(a): ''a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' [28] Thus, in order to be preempted on this basis, a State law has to frustrate the meaningful disclosure of credit terms to consumers that TILA and Regulation Z provide.

The group of consumer advocacy organizations argued in a comment that preemption under TILA should not be based on conflict with the purposes of TILA. The organizations expressed concern about the vague way in which purposes could conceivably be articulated to preempt State law.

The CFPB notes that evaluating whether or not State law stands as an obstacle to a statute's purposes is a well-established prong of conflict preemption. The CFPB believes that the purposes of TILA, when carefully considered, provide appropriate guideposts for a narrow preemption standard that respects rather than undermines State law. When construing TILA's purposes, it is important to bear in mind that Congress's ''basic policy'' in drafting TILA was ''that the Federal statute does not preempt State legislation.'' [29]

D. States' Ability To Prescribe Additional Disclosures and Protections

The Attorney General of California requested that the CFPB emphasize the statement in the Regulation Z commentary that: ''Generally, State law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures,'' are not preempted.[30] The CFPB agrees that these are examples of State disclosure laws that are generally not inconsistent with TILA or Regulation Z and so are not preempted.

Relatedly, the group of consumer advocacy organizations asked the CFPB to note that TILA does not prevent States from affording greater protections to consumers. The CFPB agrees that, in the words of the District of Columbia Circuit: ''Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; States remain free to impose greater protections for borrowers.'' [31]

E. Limited Extent of Preemptive Effect

TILA section 111(a)(1) provides that, in a scenario where there is an inconsistency, State law is preempted ''*only to the extent* of the inconsistency.'' The Attorney General of California requested that the CFPB emphasize the principle articulated by the Board that ''preemption occurs only in those transactions in which an actual inconsistency exists between the State law and the Federal law.'' [32] The CFPB agrees. The Board's approach honors TILA section 111(a)(1), which intrudes on State law only so far as is necessary to prevent inconsistency with TILA. For example, if an aspect of a State disclosure form would be inconsistent with TILA in some transactions, the State law is only preempted as applied to those transactions, and even in those transactions only the relevant aspect of the State disclosure form is preempted.[33]

IV. Legal Authority

After establishing the inconsistency standard discussed above, TILA section 111(a)(1) provides that ''the Bureau shall determine whether any such inconsistency exists,'' upon the Bureau's own motion or upon the request of any creditor, State, or other interested party.[34]

Congress added the authority for preemption determinations to section 111(a)(1) in 1980.[35] According to the legislative history, Congress was concerned about ''current ambiguities'' regarding the interaction of TILA and State laws, which created uncertainty for creditors seeking to comply, but also wanted to maintain ''deference to the laws of the States.'' [36] Congress retained the existing inconsistency standard but conferred authority on the Board, and later the CFPB, to determine whether State laws are inconsistent.[37]

In addition to the CFPB's authority under TILA, section 554(e) of the Administrative Procedure Act authorizes any agency, in its sound discretion, to issue a declaratory order to terminate a controversy or remove uncertainty.[38] As the notification of intent explained, section 554(e) of the Administrative Procedure Act provides

[25] 53 FR 3332, 3333 (Feb. 5, 1988) (Indiana).

[26] *Williams* v. *First Gov't Mortg. & Invs. Corp.,* 176 F.3d 497, 500 (D.C. Cir. 1999) (considering whether State law ''would defeat TILA's purposes'' or whether ''joint applicability of the two statutes would subject [the regulated party] to conflicting obligations'').

[27] *Jones* v. *Google LLC,* 56 F.4th 735, 741 (9th Cir. 2022).

[28] 15 U.S.C. 1601(a); *see also, e.g., id.* (''to protect the consumer against inaccurate and unfair credit billing and credit card practices''); 15 U.S.C. 1639b(a)(2) (purposes related to residential mortgage loan origination).

[29] S. Rep. No. 90–392, at 20 (1967); *accord* H.R. Rep. No. 90–1040, at 30 (1967).

[30] 12 CFR part 1026, supplement I, comment 28(a)–3.

[31] *Williams* v. *First Gov't Mortg. & Invs. Corp.,* 176 F.3d 497, 500 (D.C. Cir. 1999).

[32] 48 FR 4454, 4455 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina).

[33] *E.g., id.* at 4455–57.

[34] 15 U.S.C. 1610(a)(1). Additionally, if the Bureau determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and they incur no liability under the law of that State for failure to use such term or form, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. *Id.* The CFPB's procedures for TILA preemption determinations are set out in Regulation Z, 12 CFR part 1026, appendix A.

[35] Truth in Lending Simplification and Reform Act of 1980, Public Law 96–221, title VI, sec. 609, 94 Stat. 163, 173.

[36] S. Rep. No. 96–73, at 14 (1979); *cf.* H.R. Conf. Rep. No. 96–842, at 80–81 (1980) (accepting Senate version). At the same time, Congress amended TILA to authorize the Board to make a ''substantially the same in meaning'' determination, which is distinct from a preemption determination and not at issue in this proceeding, as explained in the discussion of Virginia below.

[37] Although the requesting party requested this preemption determination, it responded to the notification of intent with a comment questioning the CFPB's authority to determine that State commercial financing disclosure laws are not preempted. According to the comment, if TILA does not preempt the four States' laws, as the CFPB's preliminarily determined, then the CFPB's authority to make preemption determinations should similarly not extend to these laws. However, TILA authorizes the CFPB to determine ''whether'' there is an ''inconsistency,'' which necessarily includes the authority to reach the conclusion that there is no inconsistency. Moreover, the comment does not make any arguments challenging the CFPB's independent authority under section 554(e) of the Administrative Procedure Act, discussed in the notification of intent and also in the paragraph below.

[38] 5 U.S.C. 554(e).

an additional, independent source of authority for this proceeding. Agencies have long used declaratory orders to address whether or not a law that they administer preempts a State law.[39]

Although not required, the CFPB consulted the Board, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, and Office of the Comptroller of the Currency as part of its deliberative process.

V. California and New York

This part V discusses the California Commercial Financing Disclosures Law[40] and New York Commercial Finance Disclosure Law[41] together, as they are the most similar of the four State laws at issue in this proceeding.

A. Provisions of the California and New York Laws

Both the California and New York laws require ''providers'' to issue disclosures before consummation of certain commercial financing transactions, ''intended by the recipient for use primarily for *other than* personal, family, or household purposes'' (California) or ''the proceeds of which the recipient does *not* intend to use primarily for personal, family, or household purposes'' (New York).[42] These contrast with the relevant TILA criterion for consumer credit, which is ''primarily for personal, family, or household purposes.''[43] Accordingly, there was consensus among commenters that TILA disclosures, on the one hand, and California or New York disclosures, on the other, would not both be required in the context of any single transaction.

The California and New York disclosures include a ''finance charge'' and ''annual percentage rate'' (APR). These amounts are calculated by reference to the formulas that would hypothetically be used under the CFPB's Regulation Z in order to calculate the finance charge and APR, as if the transactions were consumer credit transactions, with certain specifications added by California and New York.[44] There was disagreement among commenters about whether California's and New York's respective specifications result in different finance charges and APRs than would be generated under Regulation Z if it were hypothetically applicable, or whether they should instead be viewed as tailoring the finance charge and APR to the structures of certain types of commercial financing arrangements that are not shared by consumer credit transactions. For reasons discussed below, it is not necessary for the CFPB to resolve that specific debate.

B. Discussion

After considering the comments, the CFPB concludes that the California or New York laws are not inconsistent with TILA and so are not preempted. No commenter has suggested that compliance with these State laws as well as with TILA and Regulation Z is ''impossible.''[45] The CFPB also does not believe that these State laws stand ''as an obstacle to the accomplishment or execution'' of TILA's purposes.[46] As discussed above, the TILA purpose that is relevant here is ''a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.''[47] TILA achieves this purpose by requiring disclosures for consumer credit. Consumers applying for consumer credit will continue to receive only TILA disclosures, which will assure meaningful disclosure of credit terms and allow consumers to compare the terms of consumer credit products, including their finance charges and APRs.[48]

Businesses' understanding of credit available to them for business purposes is an important policy issue, but it is not a purpose of TILA and has been left to the States to address. As TILA's legislative history explains, Congress decided when enacting TILA in 1968 not to focus on lending to businesses: ''By limiting the bill to the field of consumer credit, the committee believes it is providing disclosure requirements in the area where it is most essential.''[49] Commenters advocating for preemption had a number of complaints about how businesses might be confused by the California and New York disclosures. However, these concerns about the merits of the State laws are properly addressed to State legislators or regulators. It is not appropriate to use TILA preemption to override States' judgments regarding how best to disclose information to businesses, which is not part of TILA's purposes.

Commenters advocating preemption have not shown that consumers—when shopping for credit that they intend to use primarily for personal, family, or household purposes—would somehow be prevented from understanding the terms of credit available to them for those purposes, by State disclosures provided in different (business-purpose) transactions. The CFPB notes that Regulation Z places the responsibility for ascertaining the borrower's intended purpose on the would-be creditor.[50] In any situation where a potential borrower is shopping for credit primarily for personal, family, or household purposes, the borrower would receive the Federal TILA disclosures for all potential transactions for those purposes—not the California or New York disclosures.[51]

---

[39] *E.g., New York State Comm'n on Cable Television* v. *FCC,* 749 F.2d 804, 815 (D.C. Cir. 1984).

[40] Cal. Fin. Code secs. 22800 to 22805; *see also* Cal. Code Regs. tit. 10, ch. 3, subch. 3.

[41] N.Y. Fin. Serv. Law secs. 801 to 812; *see also* N.Y. Comp. Codes R. & Regs., tit. 23, part 600.

[42] Cal. Fin. Code sec. 2280(d) (emphasis added); N.Y. Fin. Serv. Law sec. 801(b) (emphasis added).

[43] 15 U.S.C. 1602(i).

[44] Cal. Code Regs. tit. 10, secs. 940, 943; N.Y. Fin. Serv. Law secs. 801(e), 803–807; N.Y. Comp. Codes R. & Regs., tit. 23, secs. 600.2, 600.3. The California and New York disclosures use an ''estimated'' finance charge or APR in some circumstances, but any difference between estimated and non-estimated amounts does not affect the CFPB's analysis below. *Cf.* 12 CFR 1026.5(c), 1025.17(c)(2) (generally allowing use of estimates for Regulation Z disclosures when information is unavailable).

[45] *Crosby* v. *Nat'l Foreign Trade Council,* 530 U.S. 363, 372–73 (2000).

[46] *Id.* The CFPB would reach the same conclusion however this concept is expressed, whether as ''significantly impedes the operation of the Federal law or interferes with the purposes of the Federal statute,'' *e.g.,* 48 FR 4454 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina), or ''inconsistent with the purpose of the Federal law,'' or ''undermin[ing] the intent of the Federal scheme,'' 53 FR 3332, 3333 (Feb. 5, 1988) (Indiana).

[47] TILA section 102(a), 15 U.S.C. 1601(a).

[48] A comment by a lender cited a statement in a 1982 preliminary determination, not ultimately reflected in the final determination, that ''State provisions on disclosure of the cost of credit, analogous to the finance charge or annual percentage rate disclosures under Regulation Z, will be reviewed more strictly,'' because ''these disclosures are particularly significant.'' 47 FR 16201, 16202 (Apr. 15, 1982). This statement simply reflects the fact that the finance charge and APR are important disclosures in the context of consumer credit transactions, and it does not advance the analysis here.

[49] S. Rep. No. 90–392, at 7 (1967).

[50] 12 CFR part 1026, supplement I, comment 3(a)–1 (''A creditor must determine in each case if the transaction is primarily for an exempt purpose.'').

[51] *Id.* Relatedly, some commenters advocating preemption asserted that consumers who are also small businesspeople and receive the California or New York disclosures when applying for commercial financing will, in their personal lives, distrust the TILA finance charge and APR because they do not have consistent meanings across Federal and State law. However, these comments did not offer any evidence or other support for the assumption that these individuals would react to differences between the State commercial financing version and TILA consumer credit version with distrust of the TILA version, rather than an understanding that different calculations may be appropriate in the context of different types of transaction. The CFPB notes that within TILA and Regulation Z there can be significant differences in how the finance charge is calculated depending on the type of consumer credit transaction, but the CFPB is not aware of this causing distrust by consumers. As one illustration, *compare* 15 U.S.C. 1605(a)(4); 12 CFR 1026.4(b)(4) (credit report fees

TILA coverage depends on the primary purpose, so it is possible for a borrower to use the proceeds from a credit transaction primarily for business purposes but also to a lesser degree for personal purposes, in which case TILA disclosures would not be required. As noted above, TILA's disclosure regime concerned ''the area where it is most essential,'' namely ''consumer credit,'' which is an expansive category but subject to the primary-purpose standard.[52] Congress could have required, but did not require, TILA disclosures whenever any minor portion of primarily-business credit might be used for a personal purpose. Given that Congress did not consider addressing those transactions to be necessary in order to achieve its purpose of ensuring that consumer credit shopping is informed, such transactions should not drive an assessment of whether State disclosure regimes interfere with Congress's purposes.

The requesting party submitted a comment likening the California and New York laws to an Indiana law that the Board determined was preempted in 1988, but they are quite different.[53] The Indiana law required finance charge and APR disclosures in consumer credit transactions, with amounts that differed from TILA disclosures provided in the same transactions.[54] In the Board's words, the Indiana law would ''undermine the intent of the Federal scheme by confusing consumers who will receive two different sets of disclosures—both purporting to describe the cost of credit—that contain different figures described by the same terminology.'' [55] This type of concern is inapplicable in California and New York, where the consumer will receive only the Federal TILA disclosure forms when shopping for consumer credit.

Aside from State disclosure forms provided to borrowers individually, some comments asserted that advertisements for commercial financing that include APRs calculated using California or New York's formulas could cause confusion. As background, under Regulation Z there is a requirement that some advertisements for consumer credit transactions include the TILA APR.[56] However, there is no parallel requirement under the California or New York commercial financing laws that commercial lenders include any APR-related statements in advertisements, so the premise of these comments appears mistaken. To the extent commercial lenders might conceivably choose to add the California or New York APRs to advertisements, that is not a requirement of those laws and not a basis to declare those laws' disclosure requirements to be inconsistent with TILA. As the first sentence of § 1026.28(a)(1) states, only ''State law requirements'' that are inconsistent are preempted, not wholly voluntary practices that are independent of requirements.[57] In any event, even assuming such voluntary practices could somehow support preemption, commenters have not provided any evidence that commercial lenders have an incentive to use the California or New York APRs in advertisements, which the same set of commenters assert tend to overstate the cost of credit.[58]

C. Determinations

For these reasons, the Consumer Financial Protection Bureau determines that the California Commercial Financing Disclosures Law, Financial Code sections 22800 to 22805, is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

The Consumer Financial Protection Bureau also determines that the New York Commercial Finance Disclosure Law, Financial Services Law sections 801 to 811, is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

VI. Utah

A. Discussion

The Utah Commercial Financing Registration and Disclosure Act requires disclosures for certain commercial financing transactions, which do ''not include a transaction from which the resulting proceeds are intended to be used for personal, family, or household purposes.'' [59] Consequently, it is not preempted for parallel reasons to California and New York. As an additional reason, because it does not require disclosure of a finance charge, APR, or other TILA-related disclosure, there would be no occasion for it to be preempted even if applicable to consumer credit transactions. The requesting party acknowledged in its comment that the Utah law is not preempted, and no other commenter provided reasons to support a determination that it is preempted.

B. Determination

For these reasons, the Consumer Financial Protection Bureau determines that the Utah Commercial Financing Registration and Disclosure Act, Utah Code sections 7–27–101 to 7–27–301, is

included in finance charge for most consumer credit products) *with* 15 U.S.C. 1605(e)(6); 12 CFR 1026.4(c)(7)(iii) (credit report fees generally excluded from finance charge in transactions secured by real property). Moreover, even assuming this scenario were to occur, the CFPB would not consider the issue to be so significant as to interfere with TILA's purpose of enabling consumers to compare consumer credit products.

[52] S. Rep. No. 90–392, at 7 (1967).

[53] 53 FR 3332, 3332–33 (Feb. 5, 1988) (Indiana).

[54] Although the Indiana law did not impose requirements on creditors, it required loan brokers to disclose a finance charge and APR to consumers, which differed from the finance charge and APR that TILA required creditors to provide to the very same consumers in the very same consumer credit transactions. *Id.* Because the Indiana law regulated loan brokers rather than creditors, only the first sentence of § 1026.28(a)(1) (and not the second or third sentence) governed. But whether it was the loan broker or the creditor that provided the Indiana disclosure made little difference, and so even though the third sentence did not apply, the situation was analogous to the third sentence's bar on creditors providing State disclosures with differing amounts that contradict TILA disclosures.

[55] *Id.* at 3333.

[56] 12 CFR 1026.16, 1026.24.

[57] The Board at times considered how creditors were likely to *comply with* a State law requirement as context in considering whether the requirement is preempted. In particular, when the Board was faced with a State law that used certain terminology to describe an amount in a disclosure form, but did not expressly mandate that creditors use the law's terminology when labeling the amount in the disclosure form, the Board operated on the assumption that creditors would comply by using the State law's terminology in their disclosure forms. 48 FR 4454, 4455 (Feb. 1, 1983) (Arizona, Florida, Missouri, and South Carolina). For instance, if Missouri law required creditors to disclose what the text of the Missouri law called the ''principal balance,'' the Board assumed that creditors would go about complying by using the words ''principal balance'' in their disclosure forms, and the Board would not speculate about whether some synonym might also comply with the Missouri law. *Id.* at 4455, 4456–57. But here, whether creditors choose to add the California or New York APR to advertisements is independent of the California and New York requirements to provide disclosure forms to each commercial borrower, not a method for complying with the disclosure-form requirements.

[58] Some commenters advocating preemption also invoked an additional hypothetical. As background, most consumer credit transactions above $66,400 (as inflation-adjusted annually) are exempt from TILA and Regulation Z, other than loans secured by real property, loans secured by personal property that is a principal dwelling, or private education loans. 87 FR 63671 (Oct. 20, 2022). The commenters argued that, if a State were to hypothetically require disclosures for consumer credit transactions above the $66,400 threshold, and also hypothetically were to require APR calculations that differ from Regulation Z's, it would be illogical to allow different APR disclosures depending on loan amount. However, the CFPB does not need to resolve whether there would be an inconsistency between that hypothetical State law and TILA, and it does not resolve that issue. The hypothesized scenario presents materially different issues to weigh compared to the California and New York laws, given that some consumers seeking credit primarily for personal, family, or household purposes might be unsure of what loan amount they want and so shop for credit above and below the $66,400 threshold. The California and New York disclosures would not be given to a consumer seeking credit primarily for personal, family, or household purposes of any amount.

[59] Utah Code secs. 7–27–101 to 7–27–301; *id.* sec. 7–27–101(4)(b). Besides disclosures, the statute also contains certain registration requirements that are plainly not preempted by TILA. *Id.* sec. 7–27–201.

not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

VII. Virginia

A. Discussion

Chapter 22.1 of title 6.2 of the Code of Virginia requires disclosures in connection with sales-based financing to a recipient.[60] Based on the definition of ''sales-based financing,'' which is tied to sales or revenue of the recipient, and the definition of ''recipient,'' which must be ''a person whose principal place of business is in the Commonwealth,'' it appears that the Virginia law would not apply to a consumer credit transaction as defined in TILA and Regulation Z.[61] To the extent it could apply to a consumer credit transaction, there would still be no basis to find an inconsistency with TILA. That is because the only TILA-related disclosure term used in the Virginia law is the finance charge, which the Virginia law's implementing regulation defines in precisely the same manner as Regulation Z.[62] Because there is no difference in the amount that would be included in the Virginia disclosure compared to TILA and Regulation Z disclosures, there is no occasion to consider whether a difference in amount would be inconsistent with TILA and Regulation Z.

The requesting party has made an argument that the Virginia law's finance charge disclosure is nevertheless preempted. However, this argument appears to rely on a misunderstanding of an aspect of TILA that is distinct from the Act's preemption standard. TILA section 111(a)(2), which neighbors the preemption provision in section 111(a)(1), authorizes the CFPB to determine that a State disclosure ''is substantially the same in meaning as'' a TILA disclosure.[63] After the CFPB makes such a substantially-the-same-in-meaning determination, TILA creditors can provide the CFPB-endorsed State disclosure ''*in lieu of*'' the TILA disclosure, except that the finance charge and APR must still be disclosed as provided by TILA.[64] However, the present proceeding involves a preemption determination, not a substantially-the-same-in-meaning determination.

The requesting party's comment appears to conflate section 111(a)(2) (or more specifically the Regulation Z provision and commentary implementing section 111(a)(2)[65]) with the distinct question under section 111(a)(1) of whether State disclosures are preempted as inconsistent with TILA. The commenter appears to read section 111(a)(2) to mean that any State disclosure with a finance charge or APR is preempted. In fact, all that it does is guarantee that, when CFPB-endorsed State disclosures are provided ''in lieu of'' the normal TILA disclosures in consumer credit transactions, those State disclosure forms will still include the TILA finance charge and APR, so that consumers can use them to shop among consumer credit options.[66]

B. Determination

For these reasons, the Consumer Financial Protection Bureau determines that chapter 22.1 of title 6.2 of the Code of Virginia is not inconsistent with chapters 1, 2, and 3 of the Truth in Lending Act.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–06719 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AM–P

[60] Va. Code tit. 6.2, ch. 22.1; *see also* 10 Va. Admin. Code secs. 5–240–10 to 5–240–40.

[61] ''Sales-based financing'' is defined as a transaction that is repaid by the recipient to the provider, over time, as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient. Va. Code sec. 6.2–2228. Sales-based financing also includes a true-up mechanism where the financing is repaid as a fixed payment but provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue. *Id.*

[62] 10 Va. Admin. Code sec. 5–240–10.

[63] 15 U.S.C. 1610(a)(2).

[64] *Id.*

[65] 12 CFR 1026.28(b); 12 CFR part 1026, supplement I, comment 28(b)–1.

[66] The comment may also intend for this argument to extend to California and New York; if so, it would not succeed with respect to those States for the same reasons.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–1613; Airspace Docket No. 22–ASO–27]

RIN 2120–AA66

Amendment of Class D and Class E Airspace, Key West, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Key West International Airport and Key West Naval Air Station (NAS), FL, as a result of biennial airspace evaluations. This action also updates the geographic coordinates for the airport and the Key West VORTAC.

DATES: Effective 0901 UTC, June 15, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the notice of proposed rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov.*

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591: telephone (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2022–1613 in the **Federal Register** (87 FR 78883, December 23, 2022) amending Class D airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Key West International Airport and Key West Naval Air Station (NAS), FL, as a result of biennial airspace evaluations. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Differences From the NPRM

Subsequent to the publication of the Notice of Proposed Rulemaking, the FAA found the Key West International Airport geographic coordinates to be incorrect, as well as the geographic coordinates describing the Key West International Airport Class D airspace and Key West Naval Air Station Class D airspace points of intersection. This action corrects the errors. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Incorporation by Reference

Class D and E airspace designations are published in Paragraphs 5000, 6002, 6004, and 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. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface for Key West International Airport and Key West Naval Air Station (NAS) by extending the airspace for each airport from within a 6.4-mile radius to a 6.5-mile radius, and by updating the airport's geographic coordinates and the geographic coordinates describing the intersections of Class D airspace, to coincide with the FAA's database.

In addition, this action replaces the outdated terms Airport/Facility Directory with the term Chart Supplement and Notice to Airmen with the term Notice to Air Missions, in the Class D and Class E airspace descriptions.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action 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 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

Paragraph 5000 Class D Airspace.

* * * * *

ASO FL D Key West, FL [Amended]

Key West International Airport, FL
(Lat. 24°33′22″ N, long. 81°45′36″ W)
Key West NAS
(Lat. 24°34′29″ N, long. 81°41′12″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL beginning at Lat. 24°37′11″ N, long. 81°44′41″ W; to Lat. 24°33′04″ N, long. 81°43′48″ W; to Lat. 24°31′15″ N, long. 81°45′22″ W; to Lat. 24°30′40″ N, long. 81°45′15″ W; thence counterclockwise via the 5.3-mile radius of Key West NAS to the intersection of the 3.9-mile radius of the Key West International Airport, thence clockwise via the 3.9-mile radius of the Key West International Airport to the point of beginning. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

ASO FL D Key West NAS, FL [Amended]

Key West NAS, FL
(Lat. 24°34′29″ N, long. 81°41′12″ W)
Key West International Airport
(Lat. 24°33′22″ N, long. 81°45′36″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 5.3-mile radius of Key West NAS, excluding that airspace within the Key West International Airport Class D airspace area. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter by continuously published in the Chart Supplement.

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

* * * * *

ASO FL E4 Key West, FL [Amended]

Key West International Airport, FL
(Lat. 24°33′22″ N, long. 81°45′36″ W)
Key West NAS
(Lat. 24°34′29″ N, long. 81°41′12″ W)
Key West VORTAC
(Lat. 24°35′09″ N, long. 81°48′02″ W)

That airspace extending upward from the surface within 3.1 miles each side of the Key West VORTAC 309° radial extending from the 3.9-mile radius of the Key West International Airport and the 5.3-mile radius of Key West NAS to 7 miles northwest of the Key West VORTAC. This Class E airspace area is effective during the specific dates and time established in advance by a Notice to Air Missions. The effective date and time

will thereafter be continuously published in the Chart Supplement.

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

* * * * *

ASO FL E5 Key West, FL [Amended]

Key West International Airport, FL
(Lat 24°33′22″ N, long. 81°45′36″ W)
Key West VORTAC
(Lat 24°35′09″ N, long. 81°48′02″ W)
Key West NAS
(Lat 24°34′29″ N, long. 81°41′12″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Key West International Airport and within 3.1 miles each side of the Key West VORTAC 309° radial, extending from the 6.5-mile radius to 7 miles northwest of the Key West VORTAC; within a 6.8-mile radius of Key West NAS (Boca Chica).

Issued in College Park, Georgia, on March 20, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–06618 Filed 3–30–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2023–0142]

Special Local Regulations; California Half Ironman Triathlon, San Diego, CA

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

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the California Half Ironman Triathlon special local regulations on the waters of Oceanside, California on April 1, 2023. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 6 a.m. through 10 a.m. on April 1, 2023, for the locations described in item 2 in Table 1 of § 100.1101.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication of enforcement, call or email Lieutenant Junior Grade Shera Kim, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the California Half Ironman Triathlon in Oceanside, CA, in 33 CFR 100.1101, for the locations described in Table 1, Item 2 of that section from 6 a.m. until 10 a.m. on April 1, 2023. The location includes the waters of Oceanside Harbor, CA, including the entrance channel. This enforcement action is being taken to provide for the safety of life on navigable waterways during the event. The Coast Guard's regulation for recurring marine events in the San Diego Captain of the Port Zone identifies the regulated entities and area for this event. Under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area, unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, marine information broadcasts, and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: March 29, 2023.

J.W. Spitler,

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

[FR Doc. 2023–06862 Filed 3–30–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0233]

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulations.

SUMMARY: The Coast Guard will enforce multiple safety zones located in federal regulations for recurring marine events taking place in July 2023. This action is necessary and intended for the safety of life and property on navigable waters during these events. During the enforcement periods, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo or a designated representative.

DATES: The Coast Guard will enforce regulations listed in 33 CFR 165.939 Table 165.939, under (b) July Safety Zones, according to the schedule listed in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT. Jared Stevens, Waterways Management Division, U.S. Coast Guard Marine Safety Unit Cleveland; telephone 216–937–0124, email *D09-SMB-MSUCLEVELAND-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce multiple safety zones for annual events in the Captain of the Port Buffalo Zone listed in 33 CFR 165.939, Table 165.939, (b) July Safety Zones, for events occurring in the month of July as listed in the **DATES** section above. Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within these safety zones during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or his designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

The safety zones the Coast Guard will enforce are listed in 33 CFR 165.939

Table 165.939 under (b) July Safety Zones and are:

(3) High Speed Boat Races (Eastlake Willoughby Offshore Grand Prix)—from 11:45 p.m. through 5:15 p.m. on July 8 and 9, 2023;

(4) Downtown Cleveland Alliance July 4th Fireworks (Cleveland July 4th Fireworks)—from 9:45 p.m. through 10:45 p.m. on July 4, 2023;

(5) Mentor Harbor Yacht Club Fireworks (Mentor Harbor Yacht Club)—from 9:15 p.m. through 10:45 p.m. on July 3, 2023;

(7) Lorain Independence Day Celebration (Lorain Independence Day Fireworks Display)—from 9:45 p.m. through 10:15 p.m. on July 4, 2023;

(8) Conneaut Festival (Conneaut Port Authority 4th of July Fireworks Display)—from 9:45 p.m. through 10:45 p.m. on July 3, 2023;

(9) Fairport Harbor Mardi Gras—from 9:45 p.m. through 10:45 p.m. on July 2, 2023;

(10) Sheffield Lake Community Days (City of Sheffield Lake Fireworks)—from 8:45 p.m. through 10:45 p.m. on July 21, 2023;

(11) Bay Village Independence Day Celebration—from 9:45 p.m. through 10:45 p.m. on July 4, 2023;

(12) Lake Erie Open Water Swim (2023 Brogan Open Water Classic)—from 6:45 a.m. through 11:15 a.m. on July 22, 2023; and

(30) Wine and Walleye Festival Fireworks (Wine and Walleye Fireworks)—from 8:15 p.m. through 11 p.m., on July 22, 2023.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that the safety zone need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Dated: March 27, 2023.

J.B. Bybee,

Commander, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2023–06636 Filed 3–30–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0145]

RIN 1625–AA00

Safety Zone; Potomac River, Between Charles County, MD, and King George County, VA

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

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of the Potomac River. This action is necessary to provide for the safety of life on these navigable waters at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge during demolition operations from March 30, 2023, through April 30, 2023. This rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port, Maryland-National Capital Region or a designated representative.

DATES: This rule is effective without actual notice from March 31, 2023, through April 30, 2023. For the purposes of enforcement, actual notice will be used from March 30, 2023, until March 31, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0145 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LCDR Samuel Danus, Sector Maryland-NCR, Waterways Management Division, U.S. Coast Guard: telephone 410–576–2519, email *MDNCRWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

On March 10, 2023, Skanska-Corman-McLean, Joint Venture, notified the Coast Guard that the company will be conducting bridge demolition operations at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge. The work described by the contractor requires the use of explosives, and debris removal and hydrographic surveying equipment. During explosive detonation periods, there can be no marine traffic transiting near or around the bridge for safety reasons.

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 and contrary to the public interest. Demolition operations involving explosives will occur at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge across the Potomac River and immediate action is needed to respond to the potential safety hazards associated with bridge demolition. Hazards from the demolition operations include low-hanging or falling ropes, cables, large piles and cement cast portions, dangerous projectiles, and/or other debris. We must establish this safety zone by March 30, 2023, to guard against these hazards.

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 impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with demolition operations at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port (COTP) has determined that potential hazards associated with bridge demolition starting March 30, 2023, will be a safety concern for anyone near the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge demolition site. This rule is needed to protect personnel,

vessels, and the marine environment in the navigable waters within the safety zone while the bridge is being demolished.

IV. Discussion of the Rule

The COTP is establishing a safety zone from 12:01 a.m. on March 30, 2023, to 11:59 p.m. on April 30, 2023. The safety zone will cover the following areas:

Area 1. All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′38.74″ N, 077°00′52.99″ W, thence east to 38°21′52.67″ N, 076°59′2.51″ W, thence south along the shoreline to 38°21′43.45″ N, 076°58′56.22″ W, thence west to 38°21′28.91″ N, 077°00′52.81″ W, and thence north along the shoreline back to the beginning point, located in King George County, VA. Area 2. All navigable waters of the Potomac River, within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled demolition and debris removal. Except for marine equipment and vessels operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors, no vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The term designated representative also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

The COTP will notify the public that the safety zone will be enforced by all appropriate means to the affected segments of the public, as practicable, in accordance with 33 CFR 165.7(a). Such means of notification will also include, but are not limited to, Broadcast Notice to Mariners. Vessels or persons violating this rule are subject to the penalties set forth in 46 U.S.C. 70036 and 46 U.S.C. 70052. The regulatory text appears at the end of this document.

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, location and time of year of the safety zone. The temporary safety zone is approximately 3000 yards in width and 350 yards in length. This safety zone would impact a small designated area of the Potomac River for 32 total days, but we anticipate that there would be no vessels that are unable to conduct business. Excursion vessels and commercial fishing vessels are not impacted by this rulemaking. Excursion vessels do not operate in this area, and commercial fishing vessels are not impacted because of their draft. Some towing vessels may be impacted, but bridge project personnel have been conducting outreach throughout the project in order to coordinate with those vessels. During explosive detonations, the Coast Guard will have law enforcement assets on-scene to enforce the safety zone immediately before, during and after explosive detonations. This safety zone would be established outside the normal recreational boating season for this area, which occurs during the summer season. Moreover, the Coast Guard would issue Local Notices to Mariners and a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 32 total days that would prohibit entry within a portion of the Potomac River. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 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.T05–0145 to read as follows:

§ 165.T05–0145 Safety Zone; Potomac River, Between Charles County, MD and King George County, VA.

(a) *Location.* The following areas are a safety zone. These coordinates are based on North American Datum of 1983 (NAD 83).

(1) *Area 1.* All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′38.74″ N, 077°00′52.99″ W, thence east to 38°21′52.67″ N, 076°59′2.51″ W, thence south along the shoreline to 38°21′43.45″ N, 076°58′56.22″ W, thence west to 38°21′28.91″ N, 077°00′52.81″ W, and thence north along the shoreline back to the beginning point, located in King George County, VA.

(2) *Area 2.* All navigable waters of the Potomac River within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

(b) *Definitions.* As used in this section—

Captain of the Port (COTP) means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

Designated representative means any Coast Guard commissioned, warrant, or petty officer, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the COTP in the enforcement of the safety zone. The term also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

Marine equipment means any vessel, barge, or other equipment operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, except for marine equipment, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative. If a vessel or person is notified by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative that they have entered the safety zone without permission, they are required to immediately leave in a safe manner following the directions given.

(2) Mariners requesting to transit any of the safety zone areas in paragraph (a) of this section must first contact the Skanska-Corman-McLean, Joint Venture designated representative, the on-site project manager, by telephone number 785–953–1465 or on Marine Band Radio VHF–FM channels 13 and 16 from the pusher tug Miss Stacy. If permission is granted, mariners must proceed at their own risk and strictly observe any and all instructions provided by the COTP, Skanska-Corman-McLean, Joint Venture, or designated representative to the mariner regarding the conditions of entry to and exit from any area of the safety zone. The COTP or the COTP's representative can be contacted by telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcasts on VHF–FM marine band radio announcing specific enforcement dates and times.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 12:01 a.m. on March 30, 2023, to 11:59 p.m. on April 30, 2023.

Dated: March 27, 2023.

David E. O'Connell,

Captain, U.S. Coast Guard, Captain of the Port, Sector Maryland-National Capital Region.

[FR Doc. 2023–06659 Filed 3–30–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0910; FRL–10564–02–R9]

Determination To Defer Sanctions; California; El Dorado County Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final determination.

SUMMARY: The Environmental Protection Agency (EPA) is making an interim final determination that the State of California has submitted a rule that satisfies the requirements of title I, part D of the Clean Air Act (CAA or ''Act'') permitting program for areas under the jurisdiction of the El Dorado County Air

Quality Management District (EDCAQMD or ''District''). This determination is based on a proposed approval, published elsewhere in this **Federal Register**, of a District rule addressing these requirements. The effect of this interim final determination is to defer the imposition of sanctions that were triggered by a previous EPA action that included a limited disapproval of a District rule intended to address title I, Part D requirements.

DATES: This interim final determination is effective on March 31, 2023. However, comments will be accepted until May 1, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0910 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Camille Cassar, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105; by phone: (415)–947–4164; or by email to *cassar.camille@epa.gov.*

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

Table of Contents

I. Background

On February 2, 2000, the EPA issued a final limited approval and limited disapproval action addressing certain revisions to the District portion of the California State Implementation Plan (SIP) (''2000 NSR action'').[1] The 2000 NSR Action addressed the District's permitting program for the issuance of New Source Review (NSR) permits for stationary sources, including review and permitting of major and minor sources under the Act. In the 2000 NSR Action, we determined that while the District's SIP revision submittal strengthened the California SIP, District Rule 523, adopted by the District on April 26, 1994, did not fully meet the requirements for Nonattainment NSR (NNSR) permitting programs for major sources under title I, part D, of the Act. Accordingly, the 2000 NSR Action included a limited disapproval under title I, part D, of the Act, relating to NNSR program requirements for nonattainment areas. Pursuant to section 179 of the CAA and our regulations at 40 CFR 52.31, this limited disapproval action started a sanctions clock for imposition of offset sanctions and highway sanctions.

On December 7, 2021, the District adopted Rule 523–1, and on March 9, 2022, the California Air Resources Board submitted Rule 523–1 to the EPA for approval into the El Dorado County portion of the California SIP (''2022 NSR Submittal''). Rule 523–1 was intended to address all currently applicable NNSR program requirements under title I, part D of the Act, including all the provisions necessary to correct the deficiencies with the District's NNSR program that formed the basis for the EPA's limited disapproval in the 2000 NSR action. In the Proposed Rules section of this **Federal Register**, we have proposed approval of the District's 2022 NSR submittal. Based on this proposed approval action, we are also taking this final rulemaking action, effective upon publication, to defer imposition of the offset sanctions and highway sanctions that were triggered by the EPA's February 2, 2000 limited disapproval of the District's NNSR permitting program, because we believe that the 2022 NSR Submittal corrects the deficiencies that triggered such sanctions.

The EPA is providing the public with an opportunity to comment on this deferral of sanctions. If comments are submitted that change our assessment, as described in this final determination and in our proposed approval of the District's 2022 NSR Submittal, with respect to the deficiencies identified as the basis for our limited approval in the 2000 NSR Action, we will take final action proposing to lift this deferral of sanctions under 40 CFR 52.31. If no comments are submitted that change our assessment, then all sanctions and any sanction clocks triggered by our 2000 NSR Action will be permanently terminated on the effective date of our final approval of the 2022 NSR Submittal.

II. EPA Action

We are making an interim final determination to defer CAA section 179 sanctions associated with our February 2, 2000 limited disapproval of the District's NNSR permitting program. This determination is based on our concurrent proposal to fully approve the District's 2022 NSR submittal, which resolves the deficiencies that triggered sanctions under section 179 of the CAA.

Because the EPA has preliminarily determined that the District's 2022 NSR Submittal addresses the deficiencies identified in the February 2, 2000 limited disapproval action and is fully approvable, relief from sanctions should be provided as quickly as possible. Therefore, the EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action, the EPA is providing the public with a chance to comment on the EPA's determination after the effective date, and the EPA will consider any comments received in determining whether to reverse such action.

The EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. The EPA has reviewed the District's submittal and, through its proposed action, is indicating that it is more likely than not that it corrects the deficiencies that were the basis for the action that started the sanctions clocks. Therefore, it is not in the public interest to impose sanctions. The EPA believes that it is necessary to use the interim final rulemaking process to defer sanctions while we complete our rulemaking process on the approvability of the District's submittal. Moreover, with respect to the effective date of this action, the EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this notice is to relieve a restriction (5 U.S.C. 553(d)(1)).

[1] 65 FR 4887 (Feb. 2, 2000).

III. Statutory and Executive Order Reviews

This action defers sanctions and imposes no additional requirements.

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

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

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action defers sanctions and imposes no new requirements.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action defers sanctions and imposes no new requirements.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action defers sanctions and imposes no new requirements. In addition, this action does not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations, and/or Indigenous peoples. This action defers sanctions in accordance with CAA regulatory provisions and imposes no additional requirements.

Although this action does not concern human health or environmental conditions, the EPA identifies and addresses environmental justice concerns by promoting meaningful involvement in this action through providing the public with an opportunity to comment on this deferral of sanctions as well as the opportunity to comment on our proposed approval of the District's 2022 NSR submittal in the Proposed Rules section of this **Federal Register**.

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this action as discussed in section II of this preamble, including the basis for that finding.

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 May 30, 2023. Filing a petition for reconsideration by the EPA Administrator of this action does not affect the finality of this action for the purpose of judicial review nor does it extend the time within which 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 CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: March 24, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–06562 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XC716]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in the West Yakutat District of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2023 total allowable catch of pollock in the West Yakutat District of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), March 29, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 total allowable catch (TAC) of pollock in the West Yakutat District of the GOA is 7,523 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2023 TAC of pollock in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 7,323 mt, and is setting aside the remaining 200 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in the West Yakutat District of the GOA.

While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would delay the closure of pollock in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 27, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: March 28, 2023.

Jennifer M. Wallace,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–06685 Filed 3–28–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 62
Friday, March 31, 2023

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

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220, 225, and 226

RIN 0584–AE88

Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans

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

ACTION: Proposed rule; extension of comment period.

SUMMARY: The USDA Food and Nutrition Service is extending the public comment period on the proposed rule, ''Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans,'' which published in the **Federal Register** on February 7, 2023. This action extends the public comment period from April 10, 2023, to May 10, 2023, to give the public additional time to review the proposed rule.

DATES: The comment period of the proposed rule published February 7, 2023, at 88 FR 8050, is extended through May 10, 2023. To be assured of consideration, written comments on this proposed rule must be received on or before May 10, 2023.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this proposed rule. Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Send comments to School Meals Policy Division, Food and Nutrition Service, P.O. Box 9233, Reston, Virginia 20195.
- All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. The Food and Nutrition Service will make the comments publicly available on the internet via *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Tina Namian, School Meals Policy Division—4th floor, Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314; telephone: 703–305–2590.

SUPPLEMENTARY INFORMATION: The Food and Nutrition Service is extending the public comment period on the proposed rule ''Child Nutrition Programs: Revisions to Meal Patterns Consistent With the 2020 Dietary Guidelines for Americans,'' which published on February 7, 2023, at 88 FR 8050. This rulemaking proposes long-term school nutrition standards based on the *Dietary Guidelines for Americans, 2020–2025,* and feedback the U.S. Department of Agriculture (USDA) received from child nutrition program stakeholders during a robust stakeholder engagement campaign. This action extends the public comment period to May 10, 2023, to give the public additional time to review the proposed rule. USDA is proposing a gradual multi-year approach to implementing the nutrition standards. The proposed rule indicates that USDA expects to issue a final rule in time for schools to plan for school year (SY) 2024–2025. However, the proposed rule would not require changes from current meal patterns to take effect in SY 2024–2025. As proposed, new requirements to the school meal patterns would not begin until SY 2025–2026, at the earliest. USDA encourages public comments on the proposed implementation timelines, in addition to the proposed changes to the child nutrition program's regulatory text.

Cynthia Long,

Administrator, Food and Nutrition Service.

[FR Doc. 2023–06666 Filed 3–30–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 800 and 810

[Doc. No. AMS–FGIS–22–0083]

United States Standards for Soybeans

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) proposes to revise the United States Standards for Soybeans by removing soybeans of other colors (SBOC) as an official factor. In addition, AMS proposes to revise the table of Grade Limits and Breakpoints for Soybeans to reflect this change.

DATES: Comments must be submitted on or before May 1, 2023.

FOR FURTHER INFORMATION CONTACT: Barry Gomoll, USDA AMS; Telephone: (202) 720–8286; Email: *Barry.L.Gomoll@usda.gov.* Copies of the proposed U.S. Standards for Soybeans are available at *https://www.regulations.gov.* Copies of the current Standards are available at *https://www.ams.usda/govgrades-standards/grain-standards.*

SUPPLEMENTARY INFORMATION: This proposed action, pursuant to 5 U.S.C. 551 *et seq.,* would amend regulations, at 7 CFR part 800 and part 810, issued under the United States Grain Standards Act (7 U.S.C. 71–87k), as amended (USGSA). Section 4 of the USGSA (7 U.S.C. 76(a)) grants the Secretary of Agriculture the authority to establish standards for grain regarding kind, class, quality, and condition.

Executive Orders 12866 and 13563

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

regulatory actions that the Office of Management and Budget (OMB) has exempted from review under Executive Order 12866.

Executive Order 13175

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications.

AMS has determined that this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed action is not intended to have retroactive effect. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Background

AMS regularly reviews grain standards to ensure their effectiveness in meeting the quality requirements of grain moving in the value chain. Under the current soybean standards, soybeans of other colors (SBOC) is a grade determining factor in the class Yellow Soybeans. As such, SBOC content is not typically a factor that determines the numerical grade for a sample. Damage or foreign material typically has the greatest impact on the numerical grade of a given soybean shipment.

Until recently, yellow soybeans have shown phenotypic stability in seedcoat color; however, modern breeding technologies have produced varieties that have a higher tendency to demonstrate variations in seed coat color. Industry interactions (with producer groups, exporters, grain elevators, and grain processors) suggest that these varieties are gaining popularity with soybean growers and likely will be present in the value chain for the foreseeable future.

Official inspection data shows a sharp rise in the amount of SBOC found in soybean samples over the past two years. In 2019 and 2020, only 0.4% and 0.2%, respectively, of all inspected soybean lots failed to meet the standard for U.S. No. 1 Yellow Soybeans, as was typical in the years leading up to 2021. In 2021, 3.1% of all inspected soybean lots failed to meet the standard for U.S. No. 1 Yellow Soybeans, followed by 8.8% of lots inspected so far in 2022. The figures for 2022 also show an uneven distribution based on mode of conveyance, with 17.7% of container lot inspections failing to meet the standard versus 5.3% of shiplot inspections.

The increase in SBOC over the past two years has made it more difficult for shippers of U.S. soybeans to meet contract grade requirements, based solely on the factor of SBOC. Although research shows that SBOC do not impact the intrinsic quality of soybeans, such soybeans, present at certain levels, still influence the final grade of soybeans because of the current soybean grade standards.

The Department of Agriculture (USDA) Grain Inspection Advisory Committee recommended, at its June 2022 meeting in Kansas City, MO, that the Federal Grain Inspection Service conduct a study to determine whether the presence of higher SBOC has any impact on the oil and protein content of soybeans. The results of the study show no significant correlation between SBOC and protein and oil content.[1] Additionally, based on visual analysis, the color variation in the seedcoat does not extend into the cotyledon. Since most commercial crushing operations remove the hull before crushing, this is not likely to affect the color of the finished product.

Several producer and exporter groups have reached out to AMS to request that the soybean standards be reviewed to address the marketing challenges introduced by the higher presence of SBOC in U.S. soybeans. The groups requested that consideration be given, and provision be made, for those soybean processors who may desire soybeans with yellow seedcoats. In such instances, applicants for service would maintain the ability to request that soybeans be inspected for SBOC.

This proposed rule would remove SBOC as a criterion for determining the grade of U.S. Yellow soybeans (*e.g.,* U.S. No. 1, No. 2, No. 3, etc.). It also would retain SBOC as a class-determining criterion in the class ''Yellow soybeans.'' Official inspectors would only determine SBOC if needed to meet the definition of ''Yellow soybeans'' or at the request of an applicant for service. Accordingly, official certificates for Yellow soybeans would not show SBOC content unless requested by the applicant for service. Any sample of soybeans containing more than 10.0 percent of SBOC would continue to be graded as the class Mixed soybeans.

[1] *https://www.ams.usda.gov/sites/default/files/media/FGISSBOCStudy.pdf.*

A 30-day comment period is provided for interested persons to submit comments on the proposed revised Grade Standards. Copies of the proposed revised standards are at *https://www.regulations.gov.*

Implementation Period

The USGSA requires that changes to the grain standards may not be made effective within one calendar year of their promulgation ''unless in the judgment of the Secretary, the public health, interest, or safety require that they become effective sooner'' (7 U.S.C. 76(b)(1)). This provision was put into place to allow industry participants adequate time to make adjustments and transition to new standards. However, in this case, the soybeans that are more likely to exhibit discolored seedcoats and trigger higher determinations of SBOC in soybean samples are already present in the supply chain. Additionally, based on AMS research showing that the color variation does not materially affect the end use of the soybeans, AMS does not foresee any deleterious effects to farmers or merchandisers by making the rule effective sooner. AMS believes that implementing this proposed rule effective September 1, 2023, would be in service of public interest. AMS invites all interested parties to comment on whether this change is necessary to implement effective September 1, 2023.

Initial Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), AMS has considered the impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial Regulatory Flexibility analysis. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

As stated earlier in this proposed rule, modern breeding technologies have produced varieties that have a higher tendency to demonstrate variations in seed coat color. Official inspection data shows a sharp rise in the presence of soybeans that demonstrate these color variations, as well as impacts to the grade of U.S. soybeans. For instance, soybean discoloration can cause soybeans to be downgraded, which can potentially reduce the price of soybeans to producers, or even cause the soybeans to be rejected by some purchasers.

It is estimated that these modern soybean varieties are being adopted rapidly and could have market share as

high as 30 to 50 percent of the soybean seed market according to industry sources.[2] This rapid rate of adoption indicates that soybean producers see benefits exceeding costs in the production of soybean from this new seed breed. The proposed rule would eliminate color as an official factor that affects the grade of soybeans.

The proposed rule has been initiated at the request of industry, which recognizes the costs associated with lower grades and discounting. Reduced discounting due to the removal of the color requirement represents a benefit to producers. Costs of the rule primarily accrue to the government and would mainly involve the cost to the federal government for changing the standards electronically and in printed material.

The 2017 Agricultural Census (Census) reports soybean production, and classifies producers by income class, acreage, and other factors. The Small Business Administration (SBA) determines the cutoff level between large and small firms. The most recent SBA guidance has a size cutoff of $2.25 million for soybean producers. This classification is not specified in the Census, however, using current production and market data in combination with Census data, we can approximate the proportion of producers affected.

The Economic Research Service (ERS) reports that in 2021 soybean prices were $13.25 per bushel, and the per acre production was 51.4 bushels per acre. Therefore, the per acre revenue is $681. To be considered a large soybean producer, it would take $2,250,000/$681 or 3,304 acres. According to the Census, there were a total of 303,191 soybean producers, 1,624 of which were farms exceeding 3,000 acres. Thus, 0.5 percent of all soybean farms could be considered large.

However, to determine the impact of the rule on small farms, we must look at production of producers with less than 3,000 acres. Again from the Census, a total of 4.356 billion bushels were produced, with 0.332 billion bushels produced on farms of 3,000 or more acres, or 7.6 percent of production. Therefore, 92.4 percent of total production in 2017 came from small farms, according to the SBA definition.

The ERS reports that in 2021, 4.435 billion bushels of soybeans were produced in the U.S., with a carryover inventory of 0.257 billion bushels, for a total of 4.692 billion bushels available. Assuming the same production proportions between small and large farms as in the 2017 Census would yield a total of 4.334 billion bushels produced by farms of less than 3,000 acres.

AMS has data on the share of soybeans that are graded based on color for each of the four grade categories. Table 1 shows the distribution for an average over the 2010–2020 period. Individual years' data varies little from the overall average. However, data from 2022 shows a sharp decline in the share of soybeans with the highest grade, and an increase in the lower grade levels. The last line in the table shows the difference between the two, indicating a significant change in grading based on color since the introduction of the new seeds.

TABLE 1—SHARE OF SOYBEANS GRADED BASED ON COLOR BY GRADE LEVEL *

Category	% #1 SBOC	% #2 SBOC	% #3 SBOC	% #4 SBOC
2010–2020 Average	99.60	0.24	0.11	0.05
2022	83.12	11.42	4.98	0.48
Difference	16.48	11.18	4.87	0.43

* SBOC = Soybeans of other colors.

The price impact on graded soybeans is less significant than Table 1 might suggest, as there is typically little price difference between grades #1 and #2. However, grades #3 and #4 are discounted by 1.5 cents and 3.5 cents, respectively. The total impact on small farm revenues is shown in Table 2.

TABLE 2—CALCULATION OF DISCOUNTS FOR SBOC UNDER CURRENT GRADE STANDARDS

Grade	Share (percent)	Production (Bu.)	Affected bushels	Discount (per Bu.)	Total discount
#3	4.87	4,334,091,811	211,018,410	$0.015	$3,165,276
#4	0.43	4,334,091,811	18,587,862	0.035	650,575
Total			229,606,272		3,815,851

Using the difference in grading shares between the 2010–2020 average, and applying the share to production by small farms, shows that a total of nearly 230 million bushels of soybeans we discounted in 2022, and the total discount was $3.8 million. While we do not know the exact market share of the genetically modified soybeans in 2022, if we assume it was 30 percent, then an increase in market share of each additional 10 percent would be approximately $1,272,000.

The total value of discounts due to color represents a benefit to small producers from removing the color standard. Given that the majority of producers are considered small entities and the majority of production comes from small farms, AMS believes the impacts of the proposed changes to the standards would not be disproportionate or unduly burdensome to small producers.

Inspection Plan Tolerances

To reflect the removal of SBOC as an official factor, AMS proposes to revise the tables pertaining to soybean grade limits in section 800.86 of the regulations. Shiplots and unit trains are inspected in accordance with a statistically based inspection plan (55 FR 24030; June 13, 1990). Inspection

[2] Green, Jerry M., ''The rise and future of glyphosate and glyphosate-resistant crops'', Pest Management Science, 2018, Volume 74, pp. 1035–1039.

tolerances, commonly referred to as breakpoints, are used to determine acceptable quality. AMS's proposal to remove SBOC as an official factor necessitates removing soybean SBOC breakpoints from the Grade Limits and Breakpoints for Soybeans table. However, because SBOC would still be used to determine class in Yellow soybeans, the Breakpoints for Soybean Special Grades and Factors table will remain unchanged. Under this proposal, that breakpoint would only apply to determining the class of a sample of soybeans. Inspection plan breakpoints would not apply to SBOC when an applicant requests that it be inspected on an official criteria basis.

Proposed AMS Action

AMS proposes to revise 7 CFR 810, Subpart J, United States Standards for Soybeans. It is proposed that SBOC be eliminated as a grading factor but be retained in the standards as part of the definition of the class Yellow soybeans. AMS also proposes to revise 7 CFR 800.86, Inspection of shiplot, unit train, and lash barge grain in single lots, paragraph (c)(2) by removing SBOC from table 17.

List of Subjects

7 CFR Part 800

Administrative practice and procedure, Conflict of interests, Exports, Freedom of information, Grains, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

7 CFR Part 810

Exports, Grain.

For reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR parts 800 and 810 as follows:

PART 800—GENERAL REGULATIONS

■ 1. The authority citation for part 800 continues to read as follows:

Authority: 7 U.S.C. 71–87k.

■ 2. Amend § 800.86 by revising Table 17 to paragraph (c)(2) to read as follows:

§ 800.86 Inspection of shiplot, unit train, and lash barge grain in single lots.

* * * * *

(c) * * *

(2) * * *

TABLE 17 TO PARAGRAPH (c)(2)—GRADE LIMITS (GL) AND BREAKPOINTS (BP) FOR SOYBEANS

Grade	Maximum limits of—							
	Damaged kernels				Foreign material (percent)		Splits (percent)	
	Heat damaged (percent)		Total (percent)					
	GL	BP	GL	BP	GL	BP	GL	BP
U.S. No. 1	0.2	0.2	2.0	0.8	1.0	0.2	10.0	1.6
U.S. No. 2	0.5	0.3	3.0	0.9	2.0	0.3	20.0	2.2
U.S. No. 3[1]	1.0	0.5	5.0	1.2	3.0	0.4	30.0	2.5
U.S. No. 4[2]	3.0	0.9	8.0	1.5	5.0	0.5	40.0	2.7

[1] Soybeans which are purple mottled or stained shall be graded not higher than U.S. No. 3.
[2] Soybeans which are materially weathered shall be graded not higher than U.S. No. 4.

* * * * *

PART 810—OFFICIAL UNITED STATES STANDARDS FOR GRAIN

■ 3. The authority citation for part 810 continues to read as follows:

Authority: 7 U.S.C. 71–87k.

■ 4. Amend § 810.1602 by revising paragraph (a)(1) and removing paragraph (g). The revisions read as follows.

§ 810.1602 Definition of other terms.

(a) * * *

(1) *Yellow soybeans.* Soybeans that have yellow or green seed coats and which, in cross section, are yellow or have a yellow tinge, and may include not more than 10.0 percent of soybeans of other colors. Soybeans of other colors are soybeans that have black or bicolored seedcoats, as well as soybeans that have green seedcoats and are green in cross section. Bicolored soybeans will have seed coats of two colors, one of which is brown or black, and the brown or black color covers 50 percent of the seed coats. The hilum of a soybean is not considered a part of the seed coat for this determination.

* * * * *

■ 5. Revise § 810.1603 to read as follows:

§ 810.1603 Basis of determination.

Each determination of class, heat-damaged kernels, damaged kernels, and splits is made on the basis of the grain when free from foreign material. Other determinations not specifically provided for under the general provisions are made on the basis of the grain as a whole.

■ 6. Revise § 810.1604 to read as follows:

§ 810.1604 Grades and grade requirements for soybeans.

Grading factors	Grades U.S. Nos.			
	1	2	3	4
Maximum percent limits of:				
Damaged kernels:				
Heat (part of total)	0.2	0.5	1.0	3.0
Total	2.0	3.0	5.0	8.0
Foreign material	1.0	2.0	3.0	5.0
Splits	10.0	20.0	30.0	40.0

Grading factors	Grades U.S. Nos.			
	1	2	3	4
Maximum count limits of:				
Other materials:				
Animal filth	9	9	9	9
Castor beans	1	1	1	1
Crotalaria seeds	2	2	2	2
Glass	0	0	0	0
Stones [1]	3	3	3	3
Unknown foreign substance	3	3	3	3
Total [2]	10	10	10	10

U.S. Sample grade are soybeans that:
(a) Do not meet the requirements for U.S. Nos. 1, 2, 3, or 4; or
(b) Have a musty, sour, or commercially objectionable foreign odor (except garlic odor); or
(c) Are heating or otherwise of distinctly low quality.
[1] In addition to the maximum count limit, stones must exceed 0.1 percent of the sample weight.
[2] Includes any combination of animal filth, castor beans, crotalaria seeds, glass, stones, and unknown foreign substances. The weight of stones is not applicable for total other material.

* * * * *

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–06679 Filed 3–30–23; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0910; FRL–10564–01–R9]

Air Quality Implementation Plan; CA; El Dorado County Air Quality Management District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the El Dorado County Air Quality Management District (EDCAQMD) portion of the California State Implementation Plan (SIP). In this action, we are proposing to approve a rule submitted by the EDCAQMD governing the issuance of permits for stationary sources, focusing on the preconstruction review and permitting of major sources and major modifications under part D of title I of the Clean Air Act (CAA or ''the Act'').

We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before May 1, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0910 at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Camille Cassar, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105; by phone: (415)–947–4164; or by email to *cassar.camille@epa.gov.*

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

Table of Contents

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal, including the date on which it was adopted by the District and the date on which it was submitted to the EPA by the California Air Resources Board (CARB or ''the State'').

TABLE 1—SUBMITTED RULE

Rule No.	Rule title	Adopted	Submitted
Rule 523–1	Federal Non-Attainment New Source Review	December 7, 2021	March 9, 2022.

For areas designated nonattainment for one or more National Ambient Air Quality Standards (NAAQS), the applicable SIP must include preconstruction review and permitting requirements for new or modified major stationary sources of such nonattainment pollutant(s) under part D of title I of the Act, commonly referred to as Nonattainment New Source Review (NNSR). The rule listed in Table 1 contains the District's NNSR permit program applicable to new and modified major sources located in areas designated nonattainment for the ozone and/or $PM_{2.5}$ NAAQS.

On September 9, 2022, the submittal for Rule 523–1 was deemed by operation of law to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.[1]

B. Is there any other version of this rule?

There is no previous version of Rule 523–1 in the California SIP. There are other New Source Review (NSR) rules in the California SIP that apply to the sources to which Rule 523–1 also applies, including Rule 523, ''New Source Review,'' which was adopted by the District on April 26, 1994. Rule 523–1 is intended to satisfy current federal NNSR requirements applicable to ozone and $PM_{2.5}$, as well as related visibility program requirements. Other existing SIP-approved NSR rules such as the SIP-approved version of Rule 523 will also remain in the SIP to continue to impose certain requirements for stationary sources that are beyond the scope of Rule 523–1. Rule 523–1 provides that for purposes of its implementation and enforcement, its provisions take precedence over the provisions and requirements in other District rules and regulations (see Rule 523–1, Section 1.1, paragraph (a)).

C. What is the purpose of the submitted rule?

Rule 523–1 is intended to address the CAA's statutory and regulatory requirements for NNSR permit programs for major sources emitting nonattainment air pollutants and their precursors located in the areas within the District that are designated nonattainment for one or more National Ambient Air Quality Standards (NAAQS).

[1] The submittal was transmitted to the EPA via a letter from CARB dated March 9, 2022.

II. The EPA's Evaluation

A. What is the background for this action?

Because parts of El Dorado County are designated as federal ozone and $PM_{2.5}$ nonattainment areas, the CAA requires the District to have a SIP-approved NNSR program for new and modified major sources located in the ozone and $PM_{2.5}$ nonattainment areas that are under its jurisdiction. Most recently, the designation of parts of El Dorado County as a federal ozone nonattainment area for the 2008 and 2015 ozone NAAQS, and the 2006 $PM_{2.5}$ NAAQS, triggered the requirement for the District to develop and submit an updated NNSR program to the EPA for SIP approval.

The District's NNSR program must address NNSR requirements for the 1979, 1997, 2008, and the 2015 ozone NAAQS, as well as the 2006 $PM_{2.5}$ NAAQS.[2]

The District's NNSR program must meet the NNSR requirements for areas classified as Severe nonattainment. The ozone nonattainment area within the District is currently classified as Severe nonattainment for the 2008 ozone NAAQS and as Serious nonattainment for the 2015 ozone NAAQS. In addition, although the EPA revoked the 1979 ozone NAAQS in El Dorado County effective June 15, 2005,[3] and revoked the 1997 ozone NAAQS effective April 6, 2015,[4] the NNSR requirements applicable to the nonattainment area in El Dorado County based on its designation and classification as Severe for these revoked NAAQS remain in order to prevent future emissions from new and modified major stationary sources from increasing beyond the levels allowed, based on the area's prior designation and classification for these NAAQS.[5] Submission of an NNSR program that satisfies the requirements of the Act and EPA's regulations for Severe ozone nonattainment areas would also satisfy the NNSR program requirements for Serious ozone nonattainment areas.[6] The District's NNSR program must also satisfy the NNSR requirements applicable to Moderate $PM_{2.5}$ nonattainment areas.[7]

We note that, in 2000, the EPA issued a limited approval and limited disapproval of District Rule 523, adopted on April 26, 1994, which was intended to address the then-applicable NNSR program requirements, and which incorporated Rule 523 into the California SIP.[8] The District's current NNSR rule, Rule 523–1, which is the subject of our current action, is intended to meet the currently applicable NNSR program requirements for the District, which would also resolve all the deficiencies with the District's NNSR program that formed the basis for the EPA's limited disapproval in 2000 in its action on Rule 523.

In addition, to implement CAA section 169A, 40 CFR 51.307(b) requires that NNSR programs provide for review of any major stationary source or major modification that may have an impact on visibility in any mandatory Class I Federal area.[9]

B. How is the EPA evaluating this rule?

The EPA reviewed Rule 523–1 for compliance with CAA requirements for: (1) stationary source preconstruction permitting programs as set forth in CAA part D, including CAA sections 172(c)(5), 173, 182, and 189; (2) the review and modification of major sources in accordance with 40 CFR 51.160–51.165 as applicable in Severe ozone nonattainment areas as well as Moderate $PM_{2.5}$ nonattainment areas; (3) the review of new major stationary sources or major modifications in a designated nonattainment area that may

[2] The relevant nonattainment designation and classification history for the ozone and $PM_{2.5}$ NAAQS for El Dorado County is provided in our Technical Support Document (TSD) for this action, which can be found in the docket for this rule. Information regarding the District's attainment/nonattainment status for other criteria pollutants is also included in our TSD.

[3] See 70 FR 44470, 44475 (Aug. 3, 2005).

[4] 80 FR 12264, 12265 (March 6, 2015).

[5] The EPA determined in 2012 that the ozone nonattainment area in El Dorado County had attained the 1979 ozone NAAQS, which suspended the requirement to submit those SIP elements related to attainment of these NAAQS for so long as the area continues to attain, but did not suspend the requirement to submit an NNSR program. 77 FR 64036 (Oct. 18, 2012); 40 CFR 51.1118.

[6] The NNSR requirements applicable to Severe ozone nonattainment areas include the same requirements that apply to Serious ozone nonattainment areas, but Severe ozone nonattainment areas are also subject to certain additional and more stringent requirements. See generally CAA sections 182(c) and 182(d) and 40 CFR 51.165.

[7] The EPA determined in 2017 that the $PM_{2.5}$ nonattainment area in El Dorado County had attained the 2006 24-hr $PM_{2.5}$ NAAQS by the applicable attainment date. 82 FR 21711, 21713 (May 10, 2017). The EPA's determination that the $PM_{2.5}$ nonattainment area in El Dorado County had attained the 2006 $PM_{2.5}$ NAAQS by the applicable attainment date suspended the requirements to submit those SIP elements related to attainment of these NAAQS for so long as the area continues to attain, but did not suspend the requirement to submit an NNSR program. 40 CFR 51.1015.

[8] (Feb. 2, 2000); see also 64 FR 53973 (Oct. 5, 1999) (notice of proposed rulemaking).

[9] Such sources are required to perform a visibility impact analysis consistent with the provisions of 40 CFR 51.307(a)–(c) and 40 CFR 51.166(o), (p)(1) through (2) and (q). 40 CFR 51.307(d) also provides for states to require monitoring of visibility in any Federal Class I area near the proposed new major stationary source or major modification.

have an impact on visibility in any mandatory Class I Federal area in accordance with 40 CFR 51.307; (4) SIPs in general as set forth in CAA sections 110(a)(2), including 110(a)(2)(A) and 110(a)(2)(E)(i);[10] and (5) SIP revisions as set forth in CAA section 110(l)[11] and 193.[12] Our review evaluated the submittal for compliance with the NNSR requirements applicable to nonattainment areas classified as Severe for ozone and Moderate for $PM_{2.5}$, and ensured that the submittal addressed the NNSR requirements both the 2008 and 2015 ozone NAAQS, as well as the 2006 $PM_{2.5}$ NAAQS. As part of our analysis, we reviewed whether Rule 523–1 resolved all the deficiencies with the District's NNSR program that formed the basis for the EPA's limited disapproval in 2000 in its action on Rule 523.

C. Does this rule meet the evaluation criteria?

With respect to procedural requirements, CAA sections 110(a)(2) and 110(l) require that revisions to a SIP be adopted by the state after reasonable notice and public hearing. Based on our review of the public process documentation included in the March 9, 2022 submittal of Rule 523–1, we find that the District has provided sufficient evidence of public notice, opportunity for comment and a public hearing prior to adoption and submittal of this rule to the EPA.

With respect to the substantive requirements found in CAA sections 110(a)(2)(C), 172(c)(5), 173, 182, 189, and 40 CFR 51.160–51.165, we have evaluated Rule 523–1 in accordance with the applicable CAA and regulatory requirements that apply to NNSR permit programs under part D of title I of the Act for all relevant ozone NAAQS as well as the 2006 $PM_{2.5}$ NAAQS. We find that Rule 523–1 satisfies these requirements as they apply to sources subject to the NNSR permit program requirements for ozone nonattainment areas classified as Severe and $PM_{2.5}$ nonattainment areas classified as Moderate. Further, we determined that Rule 523–1 resolved all the deficiencies with the District's NNSR program that formed the basis for the EPA's limited disapproval in 2000 in its action on Rule 523.

We have also determined that this rule satisfies the related visibility requirements in 40 CFR 51.307. In addition, we have determined that Rule 523–1 satisfies the requirement in CAA section 110(a)(2)(A) that regulations submitted to the EPA for SIP approval be clear and legally enforceable and have determined that the submittals demonstrate in accordance with CAA section 110(a)(2)(E)(i) that the District has adequate personnel, funding, and authority under state law to carry out this proposed SIP revision.

Regarding the additional substantive requirements of CAA sections 110(l) and 193, our action will result in a more stringent SIP, while not relaxing any existing provision contained in the SIP. We have concluded that our action would comply with section 110(l) because our approval of Rule 523–1 will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other CAA applicable requirement. In addition, our approval of Rule 523–1 will not relax any pre-November 15, 1990 requirement in the SIP, and therefore changes to the SIP resulting from this action ensure greater or equivalent emission reductions of the nonattainment pollutants and their precursors in the District; accordingly, we have concluded that our action is consistent with the requirements of CAA section 193.

Our TSD contains a more detailed discussion of our analysis of Rule 523–1.

III. Proposed Action and Public Comment

As authorized in section 110(k)(3) of the Act, the EPA is proposing to approve the submitted rule because it fulfills all relevant CAA requirements, and resolves all deficiencies with the District's NNSR program that the EPA identified in our limited disapproval action in 2000. We have concluded that our approval of the submitted rule would comply with the relevant provisions of CAA sections 110(a)(2), 110(l), 172(c)(5), 173, 182, 189 and 193, and 40 CFR 51.160–51.165 and 40 CFR 51.307. If we finalize this action as proposed, our action will be codified through revisions to 40 CFR 52.220a (Identification of plan-in part).

In conjunction with the EPA's SIP approval of the District's visibility provisions for sources subject to the NNSR program as meeting the relevant requirements of 40 CFR 51.307, this action would also revise the regulatory provision at 40 CFR 52.281(d) concerning the applicability of the visibility Federal Implementation Plan (FIP) at 40 CFR 52.28 as it pertains to California, to provide that this FIP does not apply to sources subject to review under the District's SIP-approved NNSR program.

We will accept comments from the public on this proposal until May 1, 2023.

IV. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the rule listed in Table 1 of this preamble. The rule governs the issuance of permits for stationary sources, focusing on the preconstruction review and permitting of major sources and major modifications under part D of title I of the CAA. The EPA has made, and will continue to make, this document available electronically through *https://www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a

[10] CAA section 110(a)(2)(A) requires that regulations submitted to the EPA for SIP approval be clear and legally enforceable, and CAA section 110(a)(2)(E)(i) requires that states have adequate personnel, funding, and authority under state law to carry out their proposed SIP revisions.

[11] CAA section 110(l) requires SIP revisions to be subject to reasonable notice and public hearing prior to adoption and submittal by states to EPA and prohibits EPA from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA.

[12] CAA section 193 prohibits the modification of any SIP-approved control requirement in effect before November 15, 1990 in a nonattainment area, unless the modification ensures equivalent or greater emission reductions of the relevant pollutants.

substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) (E.O. 12898) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The District did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

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

List of Subjects in 40 CFR Part 52

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

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

Dated: March 24, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–06563 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 600

[Docket No. 221215–0273]

RIN 0648–BK85

Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program

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

ACTION: Proposed rule; request for comments; extension of the comment period.

SUMMARY: The National Marine Fisheries Service (NMFS) is announcing an extension to the comment period for the proposed rule on the Seafood Import Monitoring Program (SIMP) published in the **Federal Register** on December 28, 2022. The comment period is being extended from March 28, 2023, to April 27, 2023.

DATES: The comment period for the proposed rule published December 28, 2022 (87 FR 79836), is extended. Written comments must be received on or before April 27, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2022–0119, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2022–0119 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Rachael Confair, Office of International Affairs, Trade, and Commerce, National Marine Fisheries Service, 1315 East-West Highway (F/IS5), Silver Spring, MD 20910.

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).

FOR FURTHER INFORMATION CONTACT: Rachael Confair, Office of International Affairs, Trade, and Commerce, National Marine Fisheries Service (phone: 301–427–8361; or email: *rachael.confair@noaa.gov*).

SUPPLEMENTARY INFORMATION: The proposed rule would add species or groups of species to the Seafood Import Monitoring Program established pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In addition, the proposed rule would amend SIMP regulations to clarify the responsibilities of the importer of record; amend the definition of importer of record to more closely align with the U.S. Customs and Border Protection (CBP) definition; amend the language requiring chain of custody records to be made available for audit or inspection to add a requirement that such records be made available through digital means if requested by NMFS; clarify the Aggregated Harvest Report criteria; and clarify the application of SIMP requirements to imports into the Pacific Insular Areas.

Extension of Comment Period

This document extends the public comment period established in the **Federal Register** for 30 days. A number of stakeholders have requested additional time to comment. NMFS is hereby extending the comment period, which was set to end on March 28, 2023, to April 27, 2023.

Dated: March 28, 2023.

Janet Coit,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–06739 Filed 3–28–23; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 62
Friday, March 31, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–CN–22–0084]

Advisory Committee on Universal Cotton Standards

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; intent to reestablish committee and request for nominations.

SUMMARY: The U.S. Department of Agriculture (USDA) intends to reestablish the Advisory Committee on Universal Cotton Standards (Committee). The Committee is necessary and in the public interest. The Committee reviews official Universal Standards for American Upland cotton prepared by USDA and would make recommendations to the Secretary of Agriculture regarding the establishment or revision of standards. USDA also seeks nominations of individuals to be considered for appointment by the Secretary as Committee members.

DATES: Written nominations must be received on or before May 1, 2023.

ADDRESSES: Nominations and applications materials should be sent to Gretchen Deatherage, Designated Federal Official, Cotton & Tobacco Program, AMS, USDA, 3275 Appling Road, Room 5, Memphis, TN 38133 or by email to *Gretchen.Deatherage@usda.gov.*

FOR FURTHER INFORMATION CONTACT: Gretchen Deatherage, Designated Federal Official; Phone: (901) 384–3030; Email: *Gretchen.Deatherage@usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C. 10), notice is hereby given that the Secretary of Agriculture intends to reestablish the Committee for two years and the Committee would be composed of foreign and domestic representatives of the cotton industry. The purpose of the Committee would be to review official Universal Standards for U.S. Upland cotton prepared by USDA and make recommendations to the Secretary of Agriculture regarding establishment or revision of the standards established under the United States Cotton Standards Act (7 U.S.C. 51 *et seq.*). The Deputy Administrator of the Agricultural Marketing Service's Cotton and Tobacco Program will serve as the Committee's Executive Secretary.

Industry members will be appointed by the Secretary of Agriculture and serve two (2) year terms. Membership will consist of representatives from the cotton industry. The U.S. cotton industry's membership would comprise twelve (12) producers and ginners, six (6) representatives of merchandising firms, and six (6) representatives of textile manufacturers. These representatives would be appointed by the Secretary of Agriculture. Each member would have one vote. Accordingly, voting privileges will be divided as follows: U.S. cotton producers and ginners—twelve (12) votes; U.S. merchandising firms—six (6) votes; U.S. textile manufacturers—six (6) votes. There would be two committee members designated from each of the foreign signatory associations. These committee members would be designated by the respective associations. Voting privileges would be divided as follows: foreign signatory merchant associations—six (6) votes; foreign signatory spinner associations—six (6) votes. The members of the re-established Committee will elect a Chairperson of the Committee.

The Secretary of Agriculture invites those individuals, organizations, and groups affiliated with the categories listed above to nominate individuals for membership on the re-established Committee. Nominations should describe and document the proposed member's qualifications for membership to the Committee and list their name, title, address, telephone, and fax number. The Secretary of Agriculture seeks a diverse group of members that represent a broad spectrum of persons interested in providing suggestions and ideas on how USDA can tailor its programs to meet the needs of the cotton industry.

All individuals must submit the following to nominate yourself or someone else to the Advisory Committee on Universal Cotton Standards: a resume or curriculum vitae (required), a USDA Advisory Committee Membership Background Information Form AD–755—available online at *https://www.usda.gov/sites/default/files/documents/ad-755.pdf* (required), a cover letter (required), and a list of endorsements or letters of recommendation (optional). The resume or curriculum vitae must be limited to five one-sided pages and should include a summary of the following information: Current and past organization affiliations; areas of expertise; education; career positions held; and any other notable positions held.

More information on USDA Advisory Committees may be found at *https://www.usda.gov/whlo/apply.*

Equal opportunity practices in accordance with USDA policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership will include, to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: March 24, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–06684 Filed 3–30–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0025]

Notice of Request for Extension of Approval of an Information Collection; Brucellosis and Bovine Tuberculosis: Importation of Cattle and Bison

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: 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 an extension of approval of an information collection associated with the regulations governing importation of cattle and bison, specifically with regard

to classification of regions at designated status levels for bovine tuberculosis and brucellosis, and establishing conditions for the importation of cattle and bison from regions with the various classifications.

DATES: We will consider all comments that we receive on or before May 30, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2023–0025 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–2023–0025, 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 the regulations for bovine tuberculosis and brucellosis regionalization and associated importation of cattle and bison, contact Dr. Kari Coulson, Import Risk Analyst, Regionalization Evaluation Services, VS, APHIS, 920 Main Campus Drive, Raleigh, NC 27606; (919) 480–9876; email: *AskRegionalization@usda.gov.* For more 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: Brucellosis and Bovine Tuberculosis: Importation of Cattle and Bison.

OMB Control Number: 0579–0442.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. APHIS' Veterinary Services is the program responsible for regulating these importations.

The regulations in 9 CFR part 93 contain, among other things, provisions that address the risk that imported bovines (cattle or bison) may introduce or disseminate brucellosis or bovine tuberculosis (TB) within the United States. On September 17, 2020, APHIS published in the **Federal Register** (85 FR 57944–57956) a final rule [1] that amended these regulations to establish a system to classify foreign regions at designated status levels for bovine TB and brucellosis; to establish provisions for modifying the TB or brucellosis classification of a foreign region; and to establish conditions for the importation of cattle and bison from regions with the various classifications.

TB is a contagious disease of both animals and humans. Bovine TB, caused by *Mycobacterium bovis* (*M. bovis*), can be transmitted from livestock to humans and other animals. Brucellosis is an infectious disease of animals and humans caused by the bacteria of the genus *Brucella.* The disease is characterized by abortions and impaired fertility in its principal animal hosts. Brucellosis is mainly a disease of cattle, bison, and swine; *Brucella abortus* is associated with the disease in cattle and bison. There is no economically feasible treatment for brucellosis in livestock.

The activities associated with the regulations include the request for regional classification and additional information about a region, an application for recognition of regional classification (TB and brucellosis), maintaining classification and reclassification, and the official identification and certification.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities 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 14.6 hours per response.

Respondents: Foreign animal health officials, importers, and exporters.

Estimated annual number of respondents: 21.

Estimated annual number of responses per respondent: 3.

Estimated annual number of responses: 62.

Estimated total annual burden on respondents: 907 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 27th day of March 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–06720 Filed 3–30–23; 8:45 am]

BILLING CODE 3410–34–P

[1] To see the final rule, go to *www.regulations.gov.* Enter APHIS–2011–0044 in the Search field.

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–22–Business–0029]

Notice of Solicitation of Applications for the Rural Energy for America Program for Fiscal Years 2023 and 2024

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (the Agency) is issuing a second Notice of Solicitation of Applications (Notice) under the Rural Energy for America Program (REAP) as referenced in the notice that was published in the **Federal Register** on December 16, 2022. This second notice announces the availability of $1.055 billion in Inflation Reduction Act funds

across six quarterly cycles to be obligated by September 30, 2024. This Notice also announces the types of projects that qualify for a federal grant share not to exceed 50 percent of the project cost, a set-aside for underutilized renewable energy technologies (underutilized technologies), as well as scoring revisions to support Administration priorities. Applications received on or after April 1, 2023, will be evaluated and scored according to the provisions listed in this Notice, unless otherwise amended via a subsequent notice. The Notice will not be applied retroactively to any applications previously filed. However, a portion of the funding made available under this notice may be made available to add to pooled funds to fund any Fiscal Year (FY) 2023 applications submitted prior to March 31, 2023, with no other changes in funding provisions or scoring allowed.

DATES: As provided for in 7 CFR 4280.122, the Agency, by this Notice, is increasing the number of competitions for Renewable Energy Systems and Energy Efficiency Improvements (RES/EEI) grant applications. The application deadline date and time as outlined in 7 CFR 4280.156(a) remains unchanged. RES/EEI and Energy Efficient Equipment and Systems (EEE) guaranteed loan applications are competed on an ongoing basis in accordance with 7 CFR 5001.315. See Section D.4. of this Notice for details on REAP competitions.

ADDRESSES: You are encouraged to contact your United States Department of Agriculture (USDA) Rural Development (RD) State Energy Coordinator well in advance of the application deadline to discuss your project and ask any questions about the application process. Contact information for State Office Energy Coordinators can be found at *https://rd.usda.gov/files/RBS_StateEnergyCoordinators.pdf.*

Program guidance and application forms may be obtained at *https://rd.usda.gov/programs-services/all-programs/energy-programs.* To submit an electronic application via grants.gov, follow the instructions for the REAP funding announcement located at *https://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: Jonathan Burns, Program Management Division, Rural Business-Cooperative Service, United States Department of Agriculture, 774–678–7238 or email *CPgrants@usda.gov.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: USDA, Rural Business-Cooperative Service.

Funding Opportunity Title: Rural Energy for America Program (REAP).

Announcement Type: Notice of Solicitation of Applications.

Funding Opportunity Number: RDBCP–REAP–RES–EEI–2023–2024.

Assistance Listing Number: 10.868.

Dates: See the **DATES** section of this Notice and Section D.4. for details on REAP competitions.

Rural Development Key Priorities: The Agency encourages applicants to consider projects that will advance the following key priorities below:

- Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure;
- Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects; and
- Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities.

A. Program Description

1. *Purpose of the program.* The Agency provides grants, guaranteed loans, and combined grant and guaranteed loan combinations thru the REAP program to help agricultural producers and rural small businesses reduce energy costs and consumption and helps meet the Nation's critical energy needs. Applications for REAP may be submitted at any time throughout the year.

2. *Statutory and Regulatory Authority.* REAP is authorized under 7 U.S.C. 8107 and is implemented by 7 CFR 4280 Subpart B (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-XLII/part-4280#part-4280*) and 7 CFR part 5001 (*https://www.ecfr.gov/current/title-7/subtitle-B/chapter-L/part-5001*). The Inflation Reduction Act (IRA) of 2022 provides additional authorities for REAP (Public Law 117–169, Section 22002).

3. *Definitions.* The definitions applicable to this notice are published at 7 CFR 4280.103 and 7 CFR 5001.3.

For the purpose of this Notice only, underutilized renewable energy technologies (underutilized technologies) are defined as those technologies which do not produce greenhouse gases at the project level, and which make up less than 20 percent of the total grant dollars obligated at the end of the fiscal year, two (2) years previous to the current year. For example, FY 2021 award data will be utilized to determine which technologies are underutilized technologies for the FY 2023 competition.

For awareness, the number of employees calculation used to determine the size of a business concern in the definition of Small Business is being updated to 24 months versus 12 months, to align with recent changes made by the Small Business Administration.

B. Federal Award Information

Type of Award: Competitive grants and guaranteed loans.

Fiscal Year Funds: FY 2023 and FY 2024.

Available Funds: Total approximate budget authority made available under this notice is as follows:

Source	Available funds
2022 carryover, 2023, and 2024 Inflation Reduction Act	up to $910,251,000.
2022 carryover, 2023 and 2024 Inflation Reduction Act Set-Aside for Underutilized Technologies.	up to $144,752,000.
Total Funds Available	at least $1,055,003,000.

The Agency may, at its discretion, increase the total level of funding available in this funding round (or in any category in this funding round) from any available source provided the awards meet the requirements of the statute which made the funding available to the Agency.

Award Amounts: See *Funding Restrictions* in Section E of this Notice for minimum and maximum award amounts.

Anticipated Award Date: Projects will be awarded quarterly with all FY obligations made prior to September 30th of each year.

Performance Period: Up to 24 months for grants. Guaranteed loans are governed by the loan terms.

Type of Instrument: Grant, guaranteed loan, and grant and guaranteed loan combined funding.

Approximate Number of Awards: The estimated number of awards of 9,000 is based on the anticipated level of funding as noted in the table above. The number of awards will depend on the actual amount of funds made available and on the number of eligible applicants participating in this program.

Available Funds Information:

(a) *Program Level Funds.* This Notice is announcing the remainder of FY 2022 mandatory Farm Bill carryover funding in addition to FYs 2023 and 2024 IRA funding not announced in the December 16, 2022, REAP notice, including any carryover. This Notice also includes a set-aside for underutilized renewable energy technologies. Expenses incurred in developing applications will be at the applicant's risk.

1. *Energy Audit and Renewable Energy Development Assistance (EA/REDA) grant funds.* The amount of funds that will be available for EA/REDA will be dependent on new Farm Bill funding received, if any, and any other appropriated funding. Applications will be competed at the National Office and obligations of EA/REDA funds will take place through March 31 of each year.

2. *RES/EEI grant funds.* IRA funds will be available to fund requests that do not exceed 50 percent of total eligible project costs. Farm Bill funds and FY 2024 annual appropriated funds, if any, will be available to fund requests that do not exceed 25 percent of total eligible project costs.

(i) To ensure that small projects have a fair opportunity to compete for the funding and to be consistent with the requirements set forth in the 7 U.S.C. 8107(e)(1), the Agency will set aside not less than 20 percent of the Farm Bill and IRA funds until June 30 of each year to fund grant requests of $20,000 or less, including the grant portion of a combined grant and guaranteed loan request. Each RD State Office will receive a set-aside allocation of IRA funds for grant requests of $20,000 or less, which includes combination grant and guaranteed loan requests where the grant amount requested is $20,000 or less. States may request Farm Bill set-aside funds from their allocation held at the National Office. Complete grant applications requesting $20,000 or less must be submitted by March 31 to compete for set-aside funding. Any unobligated balance of funds remaining in state set-aside accounts on June 1 will be pooled by the National Office for national set-aside competitions. Obligation of set-aside grant funds will take place through June 30 of each year.

(ii) Each RD State Office will also receive allocations of unrestricted Farm Bill funds, if any, and IRA grant funds that can be used to fund any RES/EEI grant application regardless of the amount of grant requested, including the grant portion of a combination grant and guaranteed loan request. Complete applications must be received by June 30th to compete for FY funding. Any unobligated balance of funds remaining in state unrestricted accounts on August 1 will be pooled to the National Office for a national competition of funds. The pooling will first consider funding underutilized technology with the funding set-aside. Obligation of unrestricted grant funds will take place through September 30th of each year.

3. *RES/EEI and EEE loan guarantee funds.* RD's National Office will maintain a reserve of Farm Bill guaranteed loan funds to fund guaranteed loan only requests or the loan portion of a combined funding request. EEE guaranteed loans for agricultural production and processing shall not exceed 15 percent of the funds available to the program. Applications will be reviewed and processed when received. Those applications that meet the Agency's underwriting requirements and are credit worthy will compete in national competitions for guaranteed loan funds periodically. If funds remain after the final guaranteed loan-only national competition, the Agency may elect to utilize budget authority to fund additional grant-only applications. The guaranteed fee rates, the annual renewal fee, the maximum percentage of guarantee and the maximum portion of guaranteed authority available for a reduced guaranteed fee will be published annually in a separate notice. Obligation of guaranteed loan funds will take place through September 30th of each year.

4. *RES/EEI combined grant and guaranteed loan funds.* Funding availability for combined grant and guaranteed loan applications is outlined in Sections B and C of this Notice. Combination funding requests are scored using RES/EEI grant scoring criteria in accordance with 7 CFR 4280.121 and 7 CFR 4280.137(h). If the combined application is ranked high enough to receive state allocated grant funds, the state will request funding for the guaranteed loan portion of the request from the National Office guaranteed loan reserve and no further competition will be required. If not funded by the state allocation of funds, combined grant and guaranteed loan applications may be submitted to the National Office to compete in the appropriate National Office competition. Obligation of these funds will take place through September 30th of each year.

Signage: The Awardee is encouraged to display USDA standard infrastructure investment signage, available for download from the Agency, during construction of the project. Expenditures for such signage shall be a permitted eligible cost of IRA funded projects.

C. Eligibility Information

1. *Eligibility Requirements.* The eligibility requirements for the applicant, borrower, lender, and project (as applicable) are clarified in 7 CFR part 4280 Subpart B and in 7 CFR part 5001 and are summarized in this Notice. Failure to meet the eligibility criteria by the time of the competition window will preclude the application from competing until all eligibility criteria have been met.

i. *Eligible Applicants.* Grant applicants must meet the requirements specified in 7 CFR 4280.110. An applicant must also meet the requirements specified at: 7 CFR 4280.112 for RES/EEI grant; 7 CFR 4280.137 for RES/EEI combined grant and guarantee; and 7 CFR 4280.149 for EA/REDA grant.

ii. *Eligible Borrowers and Lenders.* To be eligible for the guaranteed loan portion of the program, borrowers must meet the eligibility requirements in 7 CFR 5001.126 and lenders must meet the eligibility requirements in 7 CFR 5001.130.

iii. *Eligible Projects.* To be eligible for the program a project must meet the eligibility requirements specified in 7 CFR 4280.113 for RES/EEI grant; 7 CFR 4280.150 for EA/REDA grant; 7 CFR 4280.137 for RES/EEI combined grant and guaranteed loan; and 7 CFR 5001.106 through 5001.108, as applicable, for RES/EEI/EEE loan guarantees.

2. *Cost Sharing or Matching.* Matching requirements for each type of funding, as applicable, are outlined in 7 CFR 4280.115 (b) for RES/EEI grant; and 7 CFR 4280.137 for RES/EEI combined grant and guaranteed loan.

3. *Other.*

i. *Ineligible project costs* are defined at: 7 CFR 4280.115(d) for RES/EEI grant and combined grant and guaranteed loans; 7 CFR 4280.152(c) for EA/REDA grant; and 7 CFR 4280.137 (j)(5) and 5001.122 for RES/EEI/EEE loan guarantees.

ii. *Other compliance requirements.* The USDA Departmental Regulations and Laws that contain other compliance requirements are referenced in Section D.5. of this Notice. Applicants who have been found to be in violation of applicable Federal statutes will be ineligible.

iii. *Hemp production.* The Agriculture Improvement Act of 2018, Public Law 115–334, (the 2018 Farm Bill) requires USDA to promulgate regulations and guidelines to establish and administer a program for the production of hemp in the United States.

In determining eligibility for the applicant, project or use of funds, any project applying for funding under the REAP program and proposing to produce, procure, supply or market any component of the hemp plant or hemp related by-products, or provide technical assistance related to such products, must have a valid license from an approved state, Tribal or Federal plan pursuant to Section 10113 of the 2018 Farm Bill, to be in compliance with regulations published by the Agricultural Marketing Service at 7 CFR part 990, and meet any applicable U.S. Food and Drug Administration and U.S. Drug Enforcement Administration regulatory requirements. Verification of valid hemp licenses will occur prior to award. In addition, all projects proposing to use biomass feedstock from any part of the hemp plant must demonstrate assurance of an adequate supply of the feedstock.

D. Application and Submission Information

1. *Address to Request Application Package.* Application materials may be obtained by contacting the RD Energy Coordinator for the state where the proposed project will be located, as identified via the following link: *https://www.rd.usda.gov/files/RBS_StateEnergyCoordinators.pdf.* In addition, for grant applications, applicants may obtain electronic grant applications for REAP from *www.grants.gov.*

2. *Content and Form of Application Submission.* Applicants seeking to participate in this program must submit applications in accordance with this Notice, 7 CFR part 4280 subpart B and 7 CFR part 5001, as applicable. Applicants must submit complete applications by the dates identified in Section D.4., of this notice, containing all parts necessary for the Agency to determine applicant and project eligibility, to score the application, and to conduct the technical evaluation, as applicable, in order to be considered. The Agency encourages the applicant to reach out to their Energy Coordinator to determine application status. The applicant bears all risk should they incur project costs or commence construction activities prior to Agency notification of a complete and eligible application and the completion of an environmental review.

3. *Submission.* Applicants must submit one original, hardcopy or electronic application to the appropriate RD Energy Coordinator for the State where the applicant's proposed project will be located. For grant applications, submission may be via *www.grants.gov.* A list of USDA RD State Office Energy Coordinators is available via the following link: *https://www.rd.usda.gov/files/RBS_StateEnergyCoordinators.pdf.*

4. *Submission Dates and Times.* Grant applications, guaranteed loan-only applications, and combined grant and guaranteed loan applications for financial assistance may be submitted at any time on an ongoing basis and will compete accordingly based on the application window submission deadlines. In accordance with 7 CFR part 4280 and this Notice, application submission deadlines are summarized in the table below. To be considered for funds under this Notice, complete applications must be received by the appropriate USDA RD State Office Energy Coordinator or via *www.grants.gov* by 4:30 p.m. local time on the application window submission deadline. The complete application date is the date the Agency receives the last piece of information that allows the Agency to determine eligibility and to score, rank, and compete the application for funding. The Agency encourages the applicant to reach out to their Energy Coordinator to determine application status.

When an application window closes, the next application window opens on the following day. An application received after the window closing date will be considered with other complete applications received in the next application window.

Type of application	Application window opening dates	Application window closing dates
EA/REDA	February 1, 2023	January 31, 2024.
RES/EEI (Q1)	April 1, 2023	June 30, 2023*.
RES/EEI (Q2)	July 1, 2023	September 30, 2023.
RES/EEI (Q3)	October 1, 2023	December 31, 2023.
RES/EEI (Q4)	January 1, 2024	March 31, 2024.
RES/EEI (Q5)	April 1, 2024	June 30, 2024*.
RES/EEI (Q6)	July 1, 2024	September 30, 2024.
RES/EEI/EEE Guaranteed Loans	Continuous application cycle	Continuous application cycle.

* Unless subsequent deadlines are published via a Notice, applications received after this date will be considered in the next quarter for the subsequent FY funding.

5. *Other Submission Requirements.* The following are applicable for all REAP applications:

i. *Environmental information.* For the Agency to consider an application, the application must address all environmental considerations specific to the project in accordance with 7 CFR part 1970 and provide supporting documentation as necessary. Applicants are advised to contact the Agency as soon as possible and prior to commissioning a project to determine environmental requirements and ensure adequate review time.

ii. *Transparency Act Reporting.* All recipients of Federal financial assistance are required to report information about first-tier subawards and executive compensation in accordance with 2 CFR part 170. If an applicant does not have an exception under 2 CFR 170.110(b), the applicant must then ensure that they have the necessary processes and systems in place to comply with the reporting requirements to receive funding.

iii. *Race, ethnicity, and gender.* The Agency is requesting that each applicant provide race, ethnicity, and gender information about the applicant. The information will allow the Agency to evaluate its outreach efforts to under-served and under-represented populations. Applicants are encouraged to furnish this information with their application but are not required to do so. An applicant's eligibility or the

likelihood of receiving an award will not be impacted by furnishing or not furnishing this information.

E. Funding Restrictions

The following funding limitations apply to applications submitted under this Notice.

1. *RES/EEI/EEE applications.*

i. Modification is being made via this Notice to increase the maximum grant assistance noted in 7 CFR 4280.115(a)(3). Applicants can compete and be awarded only one RES grant and one EEI grant in a FY, which includes the grant portion of a combined funding request. If it is determined that an applicant is affiliated with another entity that has also applied, then the maximum grant award applies to all affiliated entities as if they applied as one applicant. An affiliate is an entity controlling or having the power to control another entity, or a third party or parties that control or have the power to control both entities. The maximum amount of grant assistance to an entity will not exceed $1,500,000 in a FY.

ii. Modification is being made via this Notice to the Federal grant portion noted in 7 CFR 4280.115(a). Pursuant to Section 22002 of the IRA, the Federal grant portion of a project utilizing IRA funds cannot exceed 50 percent of total eligible project costs. Applications submitted on or after April 1, 2022, through March 31, 2023, are eligible for up to 40 percent Federal grant share from IRA funds as outlined in the December 16, 2022, notice. Applications submitted on or after April 1, 2023, are eligible for up to 50 percent Federal grant share from IRA funds if the project meets one of the following criteria:

(a) Is a renewable energy system or retrofit of a renewable energy system that produces zero greenhouse gas emissions (carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), or fluorinated gases) at the project level;

(b) Is located in an Energy Community as defined in 26 U.S.C. 45(b)(11)(B), and as determined by the Department of Energy;

(c) Is an energy efficiency improvement project; or

(d) Is a project proposed from an eligible Tribal corporation or other Tribal Business entities (including Tribal agriculture operations) as described in 7 CFR part 4280.

All other applications, such as biomass and biogas projects, are eligible for up to 25 percent Federal grant share from IRA funds. The Federal grant portion of a project utilizing Farm Bill funds or FYs 2023 or 2024 appropriated funds, if any, cannot exceed 25 percent of total eligible project costs. Sources of REAP grant funds cannot be combined to fund a project. Loan and grant combination applications may use IRA grant funds and mandatory Farm Bill loan funds to fund a project.

iii. For RES grants, the minimum request is a total project cost threshold of $10,000, therefore at 25 percent funding the minimum grant request is $2,500 and at 50 percent funding the minimum grant request is $5,000. The maximum grant request is $1,000,000. For EEI grants, the minimum request is a total project cost threshold of $6,000, therefore at 25 percent funding the minimum grant request is $1,500 and at 50 percent funding the minimum grant request is $3,000. The maximum grant request is $500,000. These minimum and maximum limits also apply to the grant portion of a combined funding request.

Renewable energy systems		Energy efficiency improvements	
At 25% Funding—Minimum Grant Request	$2,500	At 25% Funding—Minimum Grant Request	$1,500
At 50% Funding—Minimum Grant Request	5,000	At 50% Funding—Minimum Grant Request	3,000
Maximum Grant Request	1,000,000	Maximum Grant Request	500,000

iv. For RES/EEI/EEE loan guarantees or the loan guaranteed portion of a combined funding request, the minimum REAP guaranteed loan amount is $5,000 and the maximum amount of a guaranteed loan to be provided to a borrower is $25 million. REAP guaranteed loan requests and combined grant and guaranteed loan requests will not exceed 75 percent of total eligible project costs, with the portion of any grant requests under this Notice not exceeding 25, or 50 percent of total eligible project costs, as applicable to the source of grant funds and grant funding provisions as outlined in this Notice.

2. *EA/REDA applications.*

i. Applicants may submit only one EA grant application and one REDA grant application in a FY. Separate applications must be submitted for EA funding and REDA funding. If an application is submitted for both EA and REDA funding or if an application's scope of work includes both EA and REDA activities, it will be determined ineligible for competition. The maximum aggregate amount of EA and REDA grant awards to any one recipient cannot exceed $100,000 in a FY.

ii. Applicants that have received one or more grants under this program must have made satisfactory progress per 7 CFR 4280.110(a) before being considered for funding.

iii. The 2018 Farm Bill mandates that the recipient of an EA grant must require the agricultural producer or rural small business receiving the energy audit to pay at least 25 percent of the cost of the energy audit, which shall be retained by the grantee for the cost of the audit.

F. Application Review Information

1. *Scoring.* All complete applications will be scored in accordance with the following:

i. RES/EEI grant applications and RES/EEI combined grant and loan guarantee requests received between April 1, 2022, through March 31, 2023, will be scored according to the Notice published in the **Federal Register** on December 16, 2022.

ii. RES/EEI grants and RES/EEI combined grant and loan guarantee requests submitted on or after April 1, 2023, will be scored based on 7 CFR 4280.121 and criteria identified in F.1.v. below. The following modifications to the scoring criteria outlined in 7 CFR 4280.121 will be applied for this section:

(a) Existing business and size of request, 7 CFR 4280.121(e) and (g) will be removed from the scoring criteria.

(b) Project is located in a Disadvantaged Community or a Distressed Community (15 points will be added). A Disadvantaged Community will be determined by the Agency by using the Council on Environmental Quality's Climate and Economic Justice Screening Tool (which is incorporated into the USDA look-up map) which identifies communities burdened by climate change and environmental injustice. Additionally, all communities within the boundaries of Federally Recognized Tribes and Alaska Native Villages will also be determined to be Disadvantaged Communities by the Agency. Distressed Community will be determined by the Agency by using the Economic Innovation Group's Distressed Communities Index (which is incorporated into the USDA look-up map), which uses several socio-

economic measures to identify communities with low economic well-being. To determine if your project is located in a Disadvantaged Community or a Distressed Community, please use the following USDA look-up map: *https://ruraldevelopment.maps.arcgis.com/apps/webappviewer/index.html?id=4acf083be4c44bb7864d90f97de0c788.*

(c) Environmental benefits, 7 CFR 4280.121(a) is being increased to a maximum of 10 points and points will be awarded as follows. All projects which do not produce greenhouse gases at the project level will be awarded five points and may be considered for up to a maximum of 10 points. Applicants must provide a detailed narrative or analysis to support additional environmental benefits. One point will be awarded for each documented environmental benefit supported by the project; does not convert farmland; does not contribute to deforestation or addresses fire hazards on forest lands; documented water conservation; complies with EPA's renewable fuel standards; and at least 25% of project components are biobased.

(d) Commitment of funds, 7 CFR 4280.121(c) is being decreased to a maximum of 10 points.

(e) State Director and Administrator priority points, 7 CFR 4280.121(h) have been modified as shown in item F.1.v. below.

(f) The remaining scoring criteria, energy generated, replaced or saved; previous grantees and borrowers; and simple payback, 7 CFR 4280.121 (b), (d), and (f), respectively, remain as stated in the regulation.

TABLE SUMMARIZING THE REAP RES AND EEI SCORING CHANGES

Scoring Criteria for REAP RES/EEI applications submitted April 1, 2022, to March 31, 2023		Scoring Criteria for REAP RES/EEI applications submitted on and after April 1, 2023	
Points	Criteria	Points	Criteria
25	Energy generated/saved/replaced	25	Energy generated/saved/replaced
15	Previous recipient? If no, 15 points and scales from there.	15	Previous recipient? If no, 15 points and scales from there
15	Length of payback period	15	Length of payback period
15	Commitment of matching funds	10	Commitment of matching funds
5	Environmental benefits	10	Environmental benefits
10	Size of request	15	Located in a Disadvantaged Community or a Distressed Community.
5	Existing business		
10	State Director/Administrator Pts.	10	State Director/Administrator Pts.
100	Total	100	Total

iii. EA/REDA grants will be scored based on 7 CFR 4280.155.

iv. RES/EEI/EEE guaranteed loans will be scored based on 7 CFR 5001.319 and item F.1.v. below.

v. State Director or Administrator priority points are found in 7 CFR 4280.121(h), 4280.137(h), and 5001.319(g). For the purposes of this notice, the State Director or Administrator at their discretion may award up to 10 priority points maximum for projects which meet any of the following criteria: (i) Selecting the application helps achieve geographic diversity, which may include points based upon the size of the funding request; (ii) The applicant is a member of an unserved or underserved population described as follows: (1) Owned by a veteran, including but not limited to individuals as sole proprietors, members, partners, stockholders, etc., of not less than 20 percent. In order to receive points, applicants must provide a statement in their application to indicate that owners of the project have veteran status; or (2) Owned by a member of a socially disadvantaged group, which are groups whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. In order to receive points, the application must include a statement to indicate that the owners of the project are members of a socially disadvantaged group; (iii) The proposed project is in a Federally declared major disaster area. Declarations must be within the last 2 calendar years; or (iv) the proposed project is located in (1) an area where 20 percent or more of its population is living in poverty over the last 30 years, as defined by the United States Census Bureau, or (2) an area that has experienced long-term population decline, or loss of employment. Except for veteran and socially disadvantaged group status, all other priority points are based upon project location specific criteria which will be documented automatically by the Agency. State Director or Administrator priority points for a REAP application cannot exceed 10 points total.

2. *Competitions.* As provided for in 7 CFR 4280.122, additional competition windows are being added to allow RES/EEI grants, including combination grant and guaranteed loan requests, submitted on or after April 1, 2023, to compete quarterly. There are six quarterly application windows. Applications compete in the quarter following the quarter in which the application was submitted. Quarterly windows through the end of FY 2024 are as follows: Q1, April–June 2023; Q2, July–September 2023; Q3, October–December 2023; Q4, January–March 2024; Q5, April–June 2024; Q6, July–September 2024. Applications must be received, regardless of postmark, by the applicable State Office by 4:30 p.m. local time on the final day of each quarter or else they will be considered submitted in the following quarter. If the last day of the quarter falls on a non-business day or a Federally-observed holiday, the next Federal business day will be considered the last day for receipt of a complete application for the quarter. Applications not funded in a given quarter will rollover to the next quarterly competition however, the applicant must file a new application if the application is not funded in the final fiscal year competition (final fiscal year competitions are Q2 for September 2023 and Q6 for September 2024).

There are multiple sources and reserves of funding and the application will compete accordingly based upon on the dollar amount of grant request (set-aside or unrestricted), the percent of Federal grant share to total project cost (IRA or Farm Bill), or if the definition

of underutilized technologies, as defined in Section A.3. is met. The final FY quarterly application window for grant requests of $20,000 or less to compete in the set-aside is the quarter ending March 31st which allows the application to compete prior to the June 30th set-aside obligation deadline. The final FY quarterly application window, regardless of the size of the grant request, to compete for fiscal year funds is the quarter ending June 30th which allows the application to compete prior to the September 30th unrestricted obligation deadline. Funds not used in a given quarter will roll over to the next quarter. State allocated restricted funds will be pooled on June 1 to hold a national pooled competition for grants requesting $20,000 or less. State allocated, unrestricted funds, will be pooled on or before August 1st to hold a national pooled competition for grants unrestricted by the size of the grant request. To compete in a national pooling an application must have competed in at least one state competition. Applications not funded in the national unrestricted pooling competition must be withdrawn. If eligible, the applicant may submit a new application for the project to compete in the next fiscal year. Unless modified in a subsequent notice, the maximum number of competitions a complete and eligible application will be able to compete within the FY is outlined in 7 CFR 4280.156 for EA/REDA grants, and 7 CFR 5001.315 for guaranteed loans. If the application remains unfunded after the final National Office competition for the FY it must be withdrawn.

3. *Notification of funding determination.* As per 7 CFR 4280.111(c) and 7 CFR 5001.315(b)(2), all applicants will be informed in writing by the Agency as to the funding determination of the application.

H. Build America, Buy America Act

Funding to Non-Federal Entities. Awardees that are Non-Federal Entities, defined pursuant to 2 CFR 200.1 as any State, local government, Indian tribe, Institution of Higher Education, or nonprofit organization, shall be governed by the requirements of Section 70914 of the Build America, Buy America Act (BABAA) within the IIJA. Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

I. Other Information

1. *Congressional Review Act Statement.* Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA); 5 U.S.C. 801 *et seq.,* the Office of Information and Regulatory Affairs in the Office of Management and Budget designated this action as a major rule as defined by 5 U.S.C. 804(2), because it is likely to result in an annual effect on the economy of $100,000,000 or more. Accordingly, there is a 60-day delay in the effective date of this action, and the Agency will not take action on applications until the later of 60 days after notification to Congress or May 30, 2023. The 60-day delay required by the CRA is not expected to have a material impact upon the administration and/or implementation of this program.

2. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with the programs, as covered in this notice, have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0067.

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

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation.

The completed AD–3027 form or letter must be submitted to USDA by:

(i) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(ii) *Fax:* (833) 256–1665 or (202) 690–7442; or

(iii) *Email: program.intake@usda.gov*

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

Karama Neal,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2023–06376 Filed 3–30–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Census Bureau

[Docket Number: 230206–0038]

Estimates of the Voting Age Population for 2022

AGENCY: Census Bureau, Commerce.

ACTION: General notice announcing population estimates.

SUMMARY: This notice announces the voting age population estimates as of July 1, 2022 for each state and the District of Columbia. We are providing this notice in accordance with the 1976 amendment to the Federal Election Campaign Act.

FOR FURTHER INFORMATION CONTACT: Karen Battle, Chief, Population Division, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233. Phone: 301–763–2071. Email: *Karen.Battle@census.gov.*

SUPPLEMENTARY INFORMATION: Under the requirements of the 1976 amendment to the Federal Election Campaign Act, Title 52, United States Code, Section 30116(e), I hereby give notice that the estimates of the voting age population for July 1, 2022 for each state and the District of Columbia are as shown in the following table.

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2022

Area	Population 18 and over	Area	Population 18 and over
United States	260,836,730		
Alabama	3,962,734	Missouri	4,813,049
Alaska	557,060	Montana	889,114
Arizona	5,770,187	Nebraska	1,491,246
Arkansas	2,348,518	Nevada	2,487,994
California	30,523,315	New Hampshire	1,142,307
Colorado	4,624,351	New Jersey	7,267,590
Connecticut	2,895,175	New Mexico	1,653,831
Delaware	810,269	New York	15,687,863
District of Columbia	547,328	North Carolina	8,404,094
Florida	17,948,469	North Dakota	596,486
Georgia	8,402,753	Ohio	9,193,508
Hawaii	1,142,870	Oklahoma	3,066,654
Idaho	1,475,629	Oregon	3,403,149
Illinois	9,861,901	Pennsylvania	10,347,543
Indiana	5,263,114	Rhode Island	889,822
Iowa	2,476,028	South Carolina	4,164,762
Kansas	2,246,318	South Dakota	690,659
Kentucky	3,507,735	Tennessee	5,513,202
Louisiana	3,528,548	Texas	22,573,234
Maine	1,137,442	Utah	2,449,192
Maryland	4,818,071	Vermont	532,307
Massachusetts	5,644,540	Virginia	6,816,709
Michigan	7,924,418	Washington	6,139,213
Minnesota	4,423,022	West Virginia	1,423,234
Mississippi	2,261,996	Wisconsin	4,646,910
		Wyoming	451,267

Source: U.S. Census Bureau, Population Division, Vintage 2022 Population Estimates.

Gina Raimondo, Secretary, Department of Commerce, certified these estimates for the Federal Election Commission.

Robert L. Santos, Director, Census Bureau, approved the publication of this Notice in the **Federal Register**.

Dated: March 28, 2023.

Shannon Wink,

Program Analyst, Policy Coordination Office, U.S. Census Bureau.

[FR Doc. 2023–06717 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2141]

Reorganization and Expansion of Foreign-Trade Zone 39 Under Alternative Site Framework; Dallas/Fort Worth, Texas

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR sec. 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Dallas/Fort Worth International Airport Board, grantee of Foreign-Trade Zone 39, submitted an application to the Board (FTZ Docket B–51–2022, docketed November 15, 2022) for authority to expand the service area of the zone to include Hill County, Texas, as described in the application, adjacent to the Dallas/Fort Worth Customs and Border Protection port of entry, and to include a usage-driven site (Site 34) in Hill County;

Whereas, notice inviting public comment was given in the **Federal Register** (87 FR 70779, November 21, 2022) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 39 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, and to an ASF sunset provision for usage-driven sites that would terminate authority for Site 34 if no foreign-status merchandise is admitted for a *bona fide* customs purpose within three years from the month of approval.

Dated: March 28, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2023–06705 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Voluntary Self-Disclosure of Violations of the EAR

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 18, 2022, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Commerce Department.

Title: Voluntary Self-Disclosure of Violations of the EAR.

OMB Control Number: 0694–0058.

Form Number(s): None.

Type of Request: Extension of a current information collection.

Number of Respondents: 180.

Average Hours per Response: 10 hours.

Burden Hours: 1,800.

Needs and Uses: This collection of information is needed to detect violations of the Export Administration Act and Regulations and determine if an investigation or prosecution is necessary and to reach a settlement with violators. Voluntary self-disclosure of EAR violations strengthens BIS's enforcement efforts by allowing BIS to conduct investigations of the disclosed incidents faster than would be the case if BIS had to detect the violations without such disclosures. BIS evaluates the seriousness of the violation and either (1) Informs the person making the disclosure that no action is warranted; (2) issues a warning letter; (3) issues a proposed charging letter and attempts to settle the matter; (4) issues a charging letter if settlement is not reached; and/or (5) refers the matter to the U.S. Department of Justice for criminal prosecution.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

Legal Authority: EAR Sections 764.5, and 764.7.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0058.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–06708 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Entity List and Unverified List Requests

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 25, 2022, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Commerce Department.

Title: Entity List and Unverified List Requests.

OMB Control Number: 0694–0134.

Form Number(s): None.

Type of Request: Extension of a current information collection.

Number of Respondents: 5.

Average Hours per Response: 3 hours.

Burden Hours: 15.

Needs and Uses: This collection is needed to provide a procedure for persons or organizations listed on the Entity List and Unverified List to request removal or modification of the entry that affects them. The Entity List appears at 15 CFR part 744, Supp. No. 4, and the Unverified List appears at 15 CFR part 744, Supp. No. 6. The Entity List and Unverified List are used to inform the public of certain parties whose presence in a transaction that is subject to the Export Administration Regulations (15 CFR parts 730–799) requires a license from the Bureau of Industry and Security (BIS). Requests for removal from the Entity List would be reviewed by the Departments of Commerce, State, and Defense, and Energy and Treasury as appropriate. The interagency decision, as communicated to the requesting entity by BIS, would be the final agency action on such a request. Requests for removal from the Unverified List would be reviewed by the Department of Commerce. The decision, as communicated to the requesting entity by BIS, would be the final agency action on such a request.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Sections 744.15, and 744.16 of the EAR.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0134.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–06702 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC798]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Chevron Long Wharf Maintenance and Efficiency Program in San Francisco Bay, California

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

ACTION: Notice; proposed incidental harassment authorization; request for

comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from Chevron Products Company for authorization to take marine mammals incidental to the Long Wharf Maintenance and Efficiency Program (LWMEP) in San Francisco Bay, California. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than May 1, 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.taylor@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* 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 proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On December 16, 2022, NMFS received a request from Chevron Products Company (Chevron) for an IHA to take marine mammals incidental to pile driving activities associated with the LWMEP in San Francisco Bay (the Bay), California. Following NMFS' review of the application, Chevron submitted a final revised version on February 27, 2023. The application was deemed adequate and complete on March 20, 2023. Chevron's request is for take of 7 species of marine mammals by Level B harassment only. Neither Chevron nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued IHAs to Chevron for similar work (83 FR 27548, June 13, 2018; 84 FR 28474, June 19, 2019; 85 FR 37064, June 19, 2020; 86 FR 28578, May 27, 2021; 87 FR 35180, June 9, 2022). Chevron complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Estimated Take section.

This proposed IHA would cover 1 year of a larger project for which Chevron obtained prior IHAs and intends to request take authorization for subsequent facets of the project. The larger 5-year project involves upgrading Long Wharf to satisfy current Marine Oil Terminal Engineering and Maintenance Standards.

Description of Proposed Activity

Overview

Chevron plans to upgrade Berth 1 of the Refinery Long Wharf in the Bay, California in order to meet current safety and efficiency standards. As part of the proposed project, Chevron is proposing to use vibratory extraction to remove concrete piles associated with the existing gangway and catwalk. Impact hammers would be used to install concrete piles to construct a mooring dolphin and hook, breasting dolphin and breasting points with standoff fenders, and to replace the catwalk in a different location. A temporary construction template composed of steel piles would be installed through the use of a vibratory hammer and removed by vibratory extraction when in-water construction activities are complete. The Long Wharf

has six berths for receiving raw materials and shipping products. The project area encompasses the entirety of Berth 1, an area of approximately 470 square meters (m^2). All in-water work would take place within the seasonal work window of June 1, 2023 through November 30, 2023.

Chevron's proposed activity includes impact and vibratory pile driving and vibratory pile removal, which may result in the incidental take of marine mammals, by harassment only. Due to mitigation measures, no Level A harassment is anticipated to occur, and none is proposed for authorization.

Dates and Duration

In-water construction activities would occur over the course of 30 days from June 1, 2023 through November 30, 2023. Chevron states that it would conduct work only in daylight hours. The proposed in-water work schedule is shown in table 1. In-water work would begin with of 1 day of vibratory pile extraction, then 21 days of impact pile installation. The temporary construction trestle would require 4 days of vibratory pile installation and 4 days of vibratory pile removal. Pile installation and removal would occur at a rate 2–3 piles per day, depending upon pile size and type. Only one pile would be driven or extracted at a time. Although the IHA would be active for a period of 1 year, in-water pile installation and removal activities are planned from June through November to protect sensitive life stages of listed fish species in the area.

TABLE 1—IN-WATER CONSTRUCTION SCHEDULE

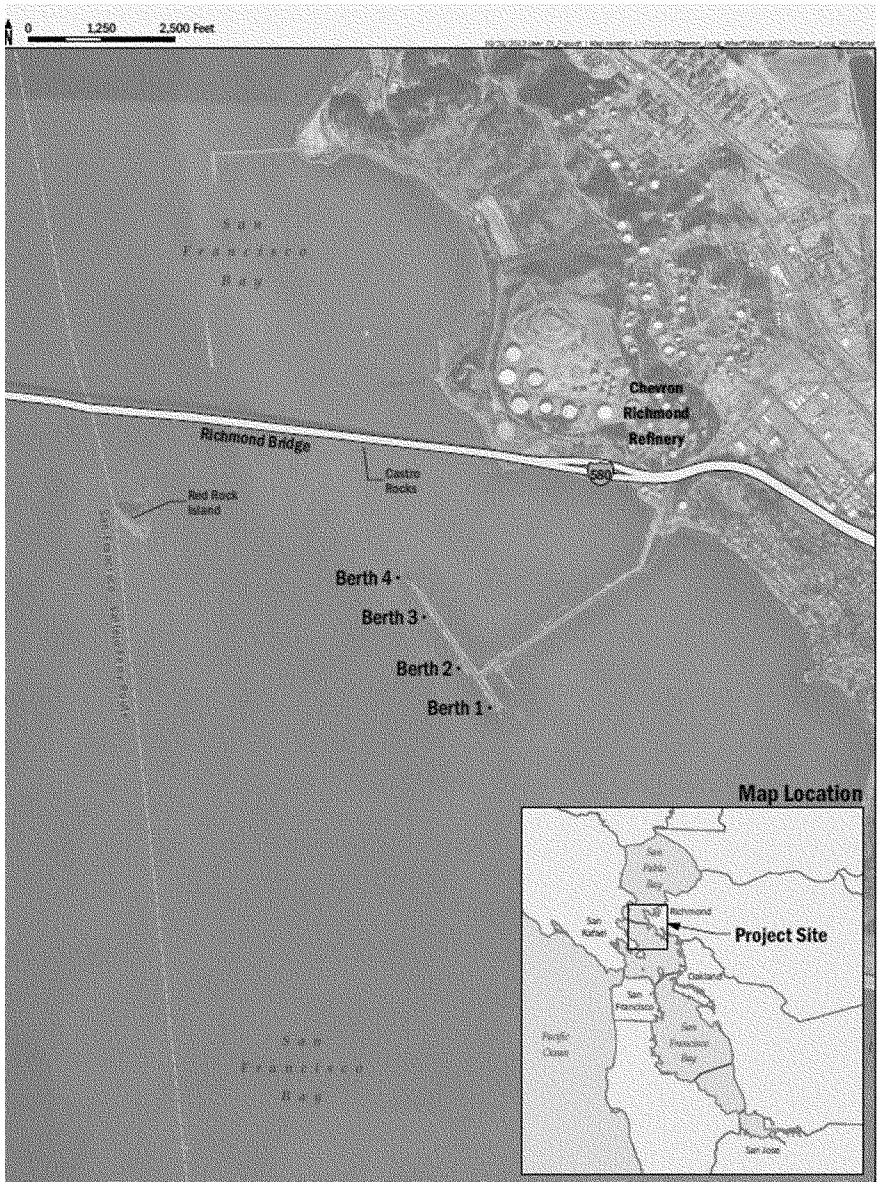
Pile type	Method	Number of piles	Estimated strikes per pile	Estimated duration per pile in minutes (seconds)	Estimated number per day	Total estimated days
24-inch square concrete pile	Impact install	42	440 [1]	20 (1200)	2	21
36-inch steel shell pile [2]	Vibratory install	12	N/A	10 (600)	3	4
18-inch concrete pile	Vibratory extract	2	N/A	6.67 (400)	2	1
36-inch steel shell pile [2]	Vibratory extract	12	N/A	10 (600)	3	4

[1] Using a DelMag D62 22 or similar diesel hammer.
[2] Temporary template.

Specific Geographic Region

The Long Wharf is located in northern region of the central Bay, south of the eastern terminus of the Richmond-San Rafael Bridge (RSRB) (Figure 1). Water depth in the project area ranges from approximately 6 to 15 meters (m), mean lower low water (MLLW). The substrate is primarily Bay mud, however, sand or gravel may exist deeper into the substrate. The project area around Berth 1 is approximately 470 square kilometers (km^2) in size. Ambient underwater noise in the vicinity of the project area is generated by shipping activity, ferry traffic, and sound generated by the Richmond Bridge piers. Underwater noise measurements in 2006 and from 2020–2022 found the ambient noise in the project area to exceed 120 dB RMS. Ambient underwater noise levels at Long Wharf may vary with noise levels being higher at Berth 1, likely due to its closer proximity to the main shipping channel.

BILLING CODE 3510–22–P



BILLING CODE 3510–22–C

Figure 1—Chevron Long Wharf Project Area

Detailed Description of the Specified Activity

The LWMEP upgrades began in 2018 and were planned to be completed within 2–3 years, however, the project experienced several delays. The proposed IHA would cover activities that were not completed under the 2021 IHA (86 FR 28578, May 27, 2021).

Chevron plans to complete modifications to Berth 1 at the Long Wharf by updating the fender system to better accommodate barges and enable balanced utilization across berths. Specifically, these modifications include replacing the gangway, construction of a new mooring dolphin and hook and breasting dolphin with breasting point, removing a catwalk and concrete piles, and installing a temporary construction template. Unless otherwise specified, the term ''pile driving'' in this section, and all following sections, may refer to either pile installation or removal.

Gangway Replacement—The existing gangway would be replaced in order to accommodate barges. Four 24-inch concrete piles would be installed using an impact hammer at a rate of 2 piles per day (table 1). A new raised fire monitor would be added as well. However, addition of the fire monitor would occur above water, and therefore, we do not anticipate take of marine mammals associated with this activity, and it is not discussed further.

Mooring Dolphin and Hook Construction—A new 24 feet (ft) (7.3 meters (m)) by 25 ft (7.6 m) mooring dolphin and hook would be installed to accommodate barges at Berth 1. An impact hammer would be used to drive 13 24-inch concrete piles at a rate of 2 piles per day (table 1).

Breasting Dolphin and Breasting Point Construction—A new 24 ft (7.3 m) by 25 ft (7.6 m) breasting dolphin would be installed with a 13 ft (4 m) by 26 ft (7.9 m) breasting point with standoff fenders to accommodate barges. The breasting dolphin would be constructed using an impact hammer to install 17 24-inch concrete piles at a rate of 2 piles per day (table 1). The breasting point with standoff fenders would be installed using an impact hammer to drive 8 24-inch concrete piles at a rate of 2 piles per day. Construction of the breasting dolphin and breasting point also require the removal of an existing catwalk and 2 18-inch concrete piles. These piles

would be removed through the use of vibratory extraction over 1 day. The existing catwalk would be replaced by a new catwalk in a different location. Removal and replacement of the catwalk would occur above water, and therefore, we do not anticipate take of marine mammals associated with this activity, and it is not discussed further.

In addition to the planned modifications, Chevron would construct a temporary template using 12 36-inch steel piles. These piles would be installed using vibratory installation and removed using vibratory extraction after in-water construction activities are complete.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Pacific SARs. All values presented in table 2 are the most recent available at the time of publication (including from the draft 2022 SARs) and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 2—MARINE MAMMAL SPECIES[4] LIKELY TO BE IMPACTED BY THE SPECIFIED 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—Infraorder Cetacea—Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-, -, N	26,960 (0.05, 25,849, 2016).	801	131
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose dolphin	*Tursiops truncatus*	California Coastal	-, -, N	453 (0.06, 346, 2011)	2.7	≥2.0
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	San Francisco/Russian River	-, -, N	7,777 (0.62, 4,811, 2017)	73	≥0.4
Order Carnivora—Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California sea lion	*Zalophus californianus*	U.S.	-, -, N	257,606 (N/A, 233,515, 2014).	14,011	>321
Northern fur seal[5]	*Callorhinus ursinus*	California	-, D, N	14,050 (N/A, 7,524, 2013).	451	1.8
Family Phocidae (earless seals):						
Harbor seals	*Phoca vitulina*	California	-, -, N	30,968 (N/A, 27,348, 2012).	1,641	43
Northern elephant seal	*Mirounga angustirostris*	California Breeding	-, -, N	187,386 (N/A, 85,369, 2013).	5,122	13.7

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments/.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable as in the case of the pinnipeds, as population estimates are dependent upon the numbers of individuals hauled out or the number of pups.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

[5] Survey years = Sea Lion Rock—2014; St. Paul and St. George Is—2014, 2016, 2018; Bogoslof Is.—2015, 2019.

As indicated above, all 7 species (with 7 number managed stocks) in table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the proposed survey areas are included in table 4–1 of the IHA application. While humpback whales have been sighted in the coastal waters outside of the Bay, the spatial occurrence of this species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Although there are no published studies available regarding the distribution of humpback whales in the Bay, sightings from whale watching vessels and other mariners report that when humpback whales enter the Bay, they rarely move east into the Bay towards the vicinity of the project area and are unlikely to occur during the proposed activities.

Harbor Seal

Pacific harbor seals are distributed from Baja California north to the Aleutian Islands of Alaska. Harbor seals do not make extensive pelagic migrations, but may travel hundreds of kilometers to find food or suitable breeding areas (Herder, 1986; Harvey and Goley, 2011; Carretta *et al.,* 2022).

The California Department of Transportation (Caltrans) conducted extensive marine mammal surveys in Bay before and during seismic retrofit on the RSRB from 1998–2002 and determined that a minimum of 500 harbor seals occur within the Bay (Green *et al.,* 2002). This estimate aligns with more recent seal counts (Lowry *et al.,* 2008; Codde *et al.,* 2020). The California harbor seal stock may be stabilizing at or near carrying capacity, although conservation concerns such as vessel strikes, disturbance, fishing gear entanglement, and habitat loss are still a concern in the Bay area (Duncan, 2019).

The number of harbor seals in the Bay increases during the winter foraging period as compared to the spring breeding season. In the Bay, harbor seals are known to forage on a variety of fish, crustaceans, and cephalopods found in shallow intertidal waters.

Seals primarily haul out on remote mainland and island beaches, reefs, and estuary areas. At haul-outs, they congregate to rest, socialize, breed, and molt. Haul out sites are consistent for harbor seals across years (Kopec and Harvey, 1995), and females may return to their natal sites for breeding (Green *et al.,* 2006). The nearest major haul out site to the project area is Castro Rocks, located approximately 1,400 meters (0.87 miles) north of the Berth 1 of Long Wharf. Use of Castro Rocks as a haul out site has been increasing over the years (Codde *et al.,* 2020). Seals haul out on Castro Rocks year-round during medium to low tides, and usage of this haul out site is highest during the summer molting period of June–July. During the LWMEP 2020–2021 construction period, protected species observers (PSOs) observed the number of harbor seals on Castro Rocks to vary greatly, from 0 to 90 individuals, depending upon the tide level (AECOM, 2021). Due to the proximity of Long Wharf to the Castro Rocks haul out site and previous monitoring conducted by Chevron, it is likely that harbor seals would be in the project area during construction activities.

California Sea Lion

California sea lions are mainly seen swimming off the San Francisco and Marin shorelines within the Bay, but may occasionally enter the project area to forage. They feed seasonally on schooling fish and cephalopods, including salmon, herring, sardines, anchovy, mackerel, whiting, rockfish, and squid (Lowry *et al.,* 1990, 1991; Weise 2000; Carretta *et al.,* 2022; Lowry *et al.,* 2022). In central California sea lion populations, short term seasonal variations in diet are related to prey movement and life history patterns while long-term annual changes correlate to large-scale ocean climate shifts and foraging competition with commercial fisheries (Weise and Harvey, 2008; McClatchie *et al.,* 2016). Conservation concerns for California sea lions include prey species availability due to climate change, vessel strikes, non-commercial fishery human caused mortality, hookworms, and competition for forage with commercial fisheries (Carretta *et al.,* 2018; Carretta *et al.,* 2022).

Although California sea lions forage and conduct many activities within the water, they also use haul outs on land. In the Bay, sea lions haul out primarily on floating docks at Pier 39 at the Fisherman's Wharf area of the San Francisco Marina, approximately 12.5 kilometers (7.8 miles) southwest of the project area. Haul out numbers at Pier 39 vary seasonally. In addition to the Pier 39 haul out, California sea lions haul out on buoys, wharfs, and similar structures throughout the Bay.

Occurrence of sea lions in the Bay is typically lowest in June during the breeding season and higher during El Niño seasons. In the Bay, California sea lions have been observed foraging near Pier 39, in the shipping channel south of Yerba Buena Island, and along the west and north sides of the Long Wharf (AECOM, 2019). The relatively deep shipping channel west and north of the Point Orient Wharf also provides foraging area for sea lions. PSOs observed up to 13 sea lions within a construction season during prior monitoring efforts for the LWMEP (AECOM, 2021). As sea lions may forage widely throughout the Bay, this species may enter the project area during construction activities.

Harbor Porpoise

Harbor porpoises typically occur in cool temperate to sub-polar waters less than 62.6 degrees Fahrenheit (17 degrees Celsius) (Read 1999) where prey aggregations are concentrated (Watts and Gaskin, 1985). In the eastern Pacific, harbor porpoises occur in coastal and inland waters from Point Conception, California to Alaska (Gaskin 1984). The non-migratory San Francisco-Russian River stock ranges from Pescadero to Point Arena, California, utilizes relatively shallow nearshore waters (<100 meters), and feeds on small schooling fishes such as northern anchovy and Pacific herring which enter the Bay (Caretta *et al.,* 2022; Stern *et al.,* 2017). Harbor porpoises tend to occur in small groups and are considered to be relatively cryptic animals.

Before 2008, harbor porpoises occurred primarily outside of the Bay although the Bay has historically been considered habitat for harbor porpoises (Broughton, 1999). Recently, observations of harbor porpoises within the Bay have become more common (Duffy 2015; Stern *et al.,* 2017; AECOM, 2021). From 2011–2014, the Golden Gate Cetacean Research (GGCR) program conducted a visual count and identified 2,698 porpoise groups from the Golden Gate Bridge during 96 percent of their on-effort survey days (Stern *et al.,* 2017). During 2021 LWMEP monitoring, PSOs observed harbor porpoises swimming past the Bay side of the Long Wharf on four different occasions (AECOM, 2021). Harbor porpoise movements into the Bay are linked to tidal cycle with the greatest numbers of porpoises sighted during high tide to ebb tide periods. Movements into the Bay are likely influenced by prey availability (Duffy 2015; Stern *et al.,* 2017) and may serve as a foraging area. Although harbor porpoise sightings are generally concentrated in the vicinity of the Golden Gate Bridge and Angel Island, southwest of the project site (Keener, 2011), this species is occurring more frequently in the Bay east of Angel Island and may approach the project area during pile driving activities.

Bottlenose Dolphin

The common bottlenose dolphin is found in all oceans across the globe, and is one of the most commonly observed marine mammal species in coastal waters and estuaries. Two genetically distinct stocks occur off the coast of California, the California coastal stock and the California/Oregon/Washington offshore stock. The range of the California coastal stock has been expanding north since an El Niño event in 1982–1983 (Hansen and Defran, 1990; Wells *et al.,* 1990) and spans as far north as Sonoma County (Keener *et al.,* 2023). From 2010–2018, a photo-identification monitoring study identified 84 distinctive individual bottlenose dolphins in the Bay, likely belonging to the California coastal stock (Keener *et al.,* 2023). This stock shows little site fidelity and individuals are highly mobile (Weller et al., 2016). Since 2008, coastal bottlenose dolphins have been observed regularly in the Bay, mainly in proximity to the Golden Gate near the mouth of the Bay (Bay Nature, 2020). PSOs did not observe bottlenose dolphins during prior monitoring efforts for the LWMEP. However, due to increased numbers of dolphins occurring in the Bay, it is possible that a limited number of individuals may approach the project area during in-water construction activities.

Gray Whale

Gray whales are one of the most common whales along the California coast. A small number of whales, known as the Pacific Coast Feeding Group (PCFG), are known to feed along the Pacific coast between Kokiak Island, AK and northern California, as well as in nearshore waters just outside of the Bay (Carretta *et al.,* 2022). The southward migration to winter breeding grounds occurs from December through February while the northward migration to the feeding grounds takes place from February through May, peaking in March (NOAA NCOSS, 2007). A few individuals may enter the Bay during the northward migration. Since 2019, it has become more common for gray whales on their northward migration to enter the Bay during the months of February and March to feed (Bartlett, 2022), although many only travel up to 2 miles into the Bay (Self, 2012). Although it is more likely that a gray whale would enter the Bay from February to March, it is possible a gray whale may enter the project area during pile driving activities.

Eastern North Pacific gray whales have been experiencing a UME since 2019 when large numbers of whales began stranding from Mexico to Alaska. As of March 14, 2023, approximately 307 gray whales have stranded in the U.S. and 633 total throughout the U.S., Canada, and Mexico since 2019 (NOAA, 2023). Preliminary necropsy results conducted on a subset of the whales indicated that many whales showed signs of nutritional stress, however, these findings are not consistent across all of the whales examined (NOAA, 2023). This UME is ongoing and similar to that of 1999 and 2000 when large numbers of gray whales stranded along the eastern Pacific coast (Moore *et al.,* 2001; Gulland *et al.,* 2005). Oceanographic factors limiting food availability for whales was identified as a likely cause of the prior UME and may also be influencing the current UME (LeBouef *et al.,* 2000; Moore *et al.,* 2001; Minobe 2002; Gulland *et al.,* 2005).

Northern Elephant Seal

Northern elephant seals breed and give birth in California and Baja California, mainly on offshore islands during the months of December to March (Stewart and Huber, 1993; Stewart *et al.,* 1994; Carretta *et al.,* 2022). Molting season takes place from March to August. Adults typically reside in offshore pelagic waters when not breeding or molting, however, a healthy juvenile male was observed basking at Aquatic Park in San Francisco in the spring of 2019 (Hernández, 2020). PSOs did not observe northern elephant seals during prior monitoring efforts for the LWMEP. Although rare visitors to the Bay, it is possible that a few individuals may be present during construction activities.

Northern Fur Seal

Northern fur seals range from southern California north to the Bering Sea, and west to the Okhotsk Sea and Honshu Island, Japan in the west (Carretta *et al.,* 2022). The majority of the population breeds on the Pribilof Islands in the southern Bering Sea, although a small percentage of the population breed at San Miguel Island and the Farallon Islands off the coast of California. Northern fur seals show high site fidelity to breeding and rookery locations, and may swim long distances for prey. Their diet is composed of small schooling fish such as walleye Pollock, herring, hake, anchovy, and squid. Diet and population trends vary with environmental conditions, such as El Niño (Carretta *et al.,* 2022). The California stock of northern fur seals forage in waters outside of the Bay. Juvenile northern fur seals occasionally strand in the Bay, especially during El Niño events (TMMC 2016). The Marine Mammal Center (TMMC) responds to approximately five northern fur seal strandings per year in the Bay (TMMC, 2016). PSOs did not observe northern fur seals during prior monitoring efforts for the LWMEP. Although rarely observed in the Bay, it is possible individuals may be present during construction activities.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Acoustic effects on marine mammals during the specified activities can occur from impact pile driving and vibratory pile driving and removal. The effects of underwater noise from Chevron's proposed activities have the potential to result in Level B harassment of marine mammals in the project area.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (ANSI, 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 decibels (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 activities may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact and vibratory pile driving and removal. The sounds produced by these activities fall into one of two general sound types: impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI, 1986; NIOSH, 1998; NMFS, 2018). Non-impulsive sounds (*e.g.,* machinery operations such as drilling or dredging, vibratory pile driving, underwater chainsaws, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI, 1995; NIOSH, 1998; NMFS, 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997).

Two types of hammers would be used on this project, impact and vibratory. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is considered impulsive. Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce non-impulsive, continuous sounds. Vibratory hammering generally produces SPLs 10 to 20 dB lower than impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

The likely or possible impacts of Chevron's proposed activities on marine mammals could be generated from both non-acoustic and acoustic stressors. Potential non-acoustic stressors include the physical presence of the equipment, vessels, and personnel; however, we expect that any animals that approach the project site close enough to be harassed due to the presence of equipment or personnel would be within the Level B harassment zones from pile driving and would already be subject to harassment from the in-water activities. Therefore, any impacts to marine mammals are expected to primarily be acoustic in nature.

Acoustic stressors are generated by heavy equipment operation during pile driving activities (*i.e.,* impact and vibratory pile driving and removal).

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving equipment is the primary means by which marine mammals may be harassed from Chevron's specified activities. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). Generally, exposure to pile driving and removal and other construction noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses, such as an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions, such as communication and predator and prey detection. The effects of pile driving and demolition noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mother with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014a), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.,* 1958, 1959; Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson *et al.,* 2008). PTS levels for marine mammals are estimates, because there are limited empirical data measuring PTS in marine mammals (*e.g.,* Kastak *et al.,* 2008), largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—TTS is a temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (see Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000, 2002). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SEL_{cum}) in an accelerating fashion: At low exposures with lower $SEL_{cum,}$ the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum}, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*), and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). At low frequencies, onset-TTS exposure levels are higher compared to those in the region of best sensitivity (*i.e.,* a low frequency noise would need to be louder to cause TTS onset when TTS exposure level is higher), as shown for harbor porpoises and harbor seals (Kastelein *et al.,* 2019a, 2019b, 2020a, 2020b). In addition, TTS can accumulate across multiple exposures, but the resulting TTS will be less than the TTS from a single, continuous exposure with the same SEL (Finneran *et al.,* 2010; Kastelein *et al.,* 2014b; Kastelein *et al.,* 2015a; Mooney *et al.,* 2009). This means that TTS predictions based on the total, cumulative SEL will overestimate the amount of TTS from intermittent exposures such as sonars and impulsive sources.

The potential for TTS from impact pile driving exists. After exposure to playbacks of impact pile driving sounds (rate 2,760 strikes/hour) in captivity, mean TTS increased from 0 dB after 15 minute exposure to 5 dB after 360 minute exposure; recovery occurred within 60 minutes (Kastelein *et al.,* 2016). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. Nonetheless, what we considered is the best available science. For summaries of data on TTS in marine mammals or for

further discussion of TTS onset thresholds, please see Southall *et al.* (2007, 2019), Finneran and Jenkins (2012), Finneran (2015), and table 5 in NMFS (2018).

Activities for this project include impact and vibratory pile driving, and vibratory pile removal. There would likely be pauses in activities producing the sound during each day. Given these pauses and the fact that many marine mammals are likely moving through the project areas and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment—Exposure to noise from pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); or avoidance of areas where sound sources are located. Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010; Southall *et al.,* 2021). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) as well as Nowacek *et al.* (2007); Ellison *et al.* (2012), and Gomez *et al.* (2016) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007; Melcón *et al.,* 2012). In addition, behavioral state of the animal plays a role in the type and severity of a behavioral response, such as disruption to foraging (*e.g.,* Sivle *et al.,* 2016; Wensveen *et al.,* 2017). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal (Goldbogen *et al.,* 2013).

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of these projects based on observations of marine mammals during previous, similar projects in the area.

Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of

interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). The Bay is heavily used by commercial, recreational, and military vessels, and background sound levels in the area are already elevated. Due to the transient nature of marine mammals to move and avoid disturbance, masking is not likely to have long-term impacts on marine mammal species within the proposed project area.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would likely previously have been ''taken'' because of exposure to underwater sound above the behavioral harassment thresholds, which are generally larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Marine Mammal Habitat Effects

Chevron's proposed construction activities could have localized, temporary impacts on marine mammal habitat, including prey, by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project areas (see discussion below). During impact and vibratory pile driving or removal, elevated levels of underwater noise would ensonify the project area where both fishes and mammals occur, and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations. Construction activities are expected to be of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne sound.

A temporary and localized increase in turbidity near the seafloor would occur in the immediate area surrounding the area where piles are installed or removed. In general, turbidity associated with pile driving is localized to about a 25-ft (7.6-m) radius around the pile (Everitt *et al.,* 1980). Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Local currents are anticipated to disburse any additional suspended sediments produced by project activities at moderate to rapid rates depending on tidal stage. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat—The area likely impacted by the LWMEP is relatively small compared to the total available habitat in the Bay. The proposed project area is highly influenced by anthropogenic activities and provides limited foraging habitat for marine mammals. Furthermore, pile driving and removal at the proposed project site would not obstruct long-term movements or migration of marine mammals.

Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish and marine mammal avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated. Any behavioral avoidance by prey of the disturbed area would still leave significantly large areas of potential foraging habitat in the nearby vicinity.

In-water Construction Effects on Potential Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton, other marine mammals). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage,

barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish; several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Many studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). In response to pile driving, Pacific sardines and northern anchovies may exhibit an immediate startle response to individual strikes, but return to ''normal'' pre-strike behavior following the conclusion of pile driving with no evidence of injury as a result (appendix C in NAVFAC SW, 2014). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Popper *et al.,* 2005).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

The most likely impact to fishes from pile driving and removal and construction activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary. Further, it is anticipated that preparation activities for pile driving or removal (*i.e.,* positioning of the hammer, clipper or wire saw) and upon initial startup of devices would cause fish to move away from the affected area outside areas where injuries may occur. Therefore, relatively small portions of the proposed project area would be affected for short periods of time, and the potential for effects on fish to occur would be temporary and limited to the duration of sound-generating activities.

In summary, given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed actions are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large potential areas fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activities are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

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 be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to the acoustic sources. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown zones, PSO monitoring) discussed in detail below in the Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and

measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Chevron's proposed construction activities include the use of continuous (vibratory pile-driving) and impulsive (impact pile-driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa 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). Chevron's proposed construction activities include the use of impulsive (impact hammer) and non-impulsive (vibratory hammer) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{p,0\text{-}pk,flat}$*:* 219 dB; $L_{E,p,LF,24h}$*:* 183 dB	*Cell 2:* $L_{E,p,\ LF,24h}$*:* 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{p,0\text{-}pk,flat}$*:* 230 dB; $L_{E,p,MF,24h}$*:* 185 dB	*Cell 4:* $L_{E,p,MF,24h}$*:* 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{p,0\text{-}pk,flat}$*:* 202 dB; $L_{E,p,HF,24h}$*:* 155 dB	*Cell 6:* $L_{E,p,HF,24h}$*:* 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{p,0\text{-}pk.flat}$*:* 218 dB; $L_{E,p,PW,24h}$*:* 185 dB	*Cell 8:* $L_{E,p,PW,24h}$*:* 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-}pk,flat}$*:* 232 dB; $L_{E,p,OW,24h}$*:* 203 dB	*Cell 10:* $L_{E,p,OW,24h}$*:* 219 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 ($L_{p,0\text{-}pk}$) has a reference value of 1 μPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1μPa^{2}s. 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 and OW 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.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

Pile driving activities, using an impact hammer as well as a vibratory hammer, would generate underwater noise that could result in disturbance to marine mammals near the project area. A review of underwater sound measurements for similar projects was conducted to estimate the near-source sound levels for impact and vibratory pile driving and vibratory extraction. Source levels for proposed removal and installation activities derived from this review are shown in table 5.

TABLE 5—SOURCE LEVELS FOR PROPOSED PILE REMOVAL AND INSTALLATION ACTIVITIES

Method	Pile type	Source levels (dB)/source distance (m)			Reference
		Peak sound pressure (dB re 1 μPa)	Mean maximum RMS SPL (dB re 1 μPa)	SEL (dB re 1 μPa2 sec)	
Impact install [1]	24-inch square concrete pile	191/10	173/10	161/10	AECOM (2018, 2019).
Vibratory install/extract	36-inch steel shell pile	196/10	167/15	167	AECOM (2019).
Vibratory extract [2]	18-inch concrete pile	N/A	163/10	150	NAVFAC SW (2022).

[1] Chevron would use a bubble curtain attenuation system for all impact pile driving. NMFS conservatively assumes that the bubble curtain would result in a 5 dB reduction in sound. These source levels incorporate the 5 dB reduction.

[2] 20-inch concrete piles used as a proxy as vibratory data for 18-inch concrete piles was not available.

Level B Harassment Zones—Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition topography. The general formula for underwater TL is:

$TL = B * Log10 (R_1/R_2)$,

where

TL = transmission loss in dB;

B = transmission loss coefficient;

R_1 = the distance of the modeled SPL from the driven pile; and

R_2 = the distance from the driven pile of the initial measurement.

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, known as practical spreading. As is common practice in coastal waters, here we assume practical spreading (4.5 dB reduction in sound level for each doubling of distance) for vibratory extraction of concrete piles, as hydro-acoustic data for the same pile type was not available for this project site. Chevron conducted hydro-acoustic monitoring for prior projects at Long Wharf for the impact driving of 24-inch concrete piles and vibratory driving of 36-inch steel piles. Based upon hydro-acoustic monitoring conducted at Long Wharf in 2018 and 2019 (AECOM 2018, 2019), Chevron calculated a transmission loss coefficient ranging from 14 to 20 (~4.4 dB to 8 dB per doubling of distance). As this estimate represents a wide range of measured transmission loss, NMFS applied the standard value of 15 for impact driving of concrete piles. For vibratory driving of 36-inch steel piles, Chevron calculated a transmission loss coefficient of 20.8 to 25.0 (~8 dB to 9 dB per doubling of distance) from hydro-acoustic monitoring conducted at Long Wharf in 2019 (AECOM, 2019). Given that all available data suggested a higher transmission loss, NMFS found it appropriate to apply this to its analysis. NMFS applied the lower of these two values, 20.8 TL, to this analysis to be conservative. The Level B harassment zones and ensonified areas for Chevron's proposed activities are shown in table 6.

TABLE 6—DISTANCE TO LEVEL B HARASSMENT THRESHOLDS AND ENSONIFIED AREAS

Pile type	Source levels (dB)/ source distance (m)		Distance to Level B harassment thresholds (m)	Ensonified area (km^2)
	Peak	RMS		
Impact Installation:				
24-inch square concrete pile	191/10	173/10	74	0.02
Vibratory Installation:				
36-inch steel shell pile	196/10	167/15	2,727	23.36
Vibratory Extraction:				
18-inch concrete pile	N/A	163/10	7,356	170
36-inch steel shell pile	196/10	167/15	2,727	17.24

Level A Harassment Thresholds—The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying the optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources, such as pile driving activities, the optional User Spreadsheet tool predicts the closest distance at which a stationary animal would not be expected to incur PTS if the sound source traveled by the stationary animal in a straight line at a constant speed. The isopleths generated by the User Spreadsheet used the same TL coefficients as the Level B harassment zone calculations, as indicated above for each activity type. Inputs used in the User Spreadsheet (*e.g.,* number of piles per day, duration and/or strikes per pile) are presented in table 1. The maximum RMS SPL/SEL SPL as well as peak SPL and resulting isopleths are reported below in table 7. The RMS SPL value was used to calculate Level A harassment isopleths for vibratory pile driving and extraction activities, while the single strike SEL SPL value was used to calculate Level A isopleths for impact pile driving activity.

TABLE 7—DISTANCE TO LEVEL A HARASSMENT THRESHOLDS FOR EACH MARINE MAMMAL HEARING GROUP

Pile type	Source levels (dB)/ source distance (m)		Distances to Level A harassment threshold (m)				
	Peak	RMS/SEL	Lf cetaceans	Mf cetaceans	Hf cetaceans	Phocid pinnipeds	Otariid pinnipeds
Impact Installation:							
24-inch square concrete pile	191/10	161/10 SEL	31.3	1.1	37.3	16.8	1.2
Vibratory Installation:							
36-inch steel shell pile	196/10	167/15 RMS	15.9	2.8	21	11.1	1.6
Vibratory Extraction:							
18-inch concrete pile	N/A	163/10 RMS	3.4	0.3	5	2.1	0.1

TABLE 7—DISTANCE TO LEVEL A HARASSMENT THRESHOLDS FOR EACH MARINE MAMMAL HEARING GROUP—Continued

Pile type	Source levels (dB)/ source distance (m)		Distances to Level A harassment threshold (m)				
	Peak	RMS/SEL	Lf cetaceans	Mf cetaceans	Hf cetaceans	Phocid pinnipeds	Otariid pinnipeds
36-inch steel shell pile	196/10	167/15 RMS ...	15.9	2.8	21	11.1	1.6

Lf = low frequency, Mf = mid-frequency, Hf = high frequency.

Marine Mammal Occurrence

In this section we provide information about the occurrence of marine mammals, including density or other relevant information, that will inform the take calculations.

Harbor seal—Limited at-sea densities are available for Pacific harbor seals in the Bay. To estimate the number of harbor seals potentially taken by Level B harassment, take estimates were developed based upon annual surveys of haul outs in the Bay conducted by the National Park Service (NPS) (Codde and Allen 2013, 2015, 2017, 2020; Codde, 2020). Harbor seals spend more time hauled out and enter the water later in the evening during molting season (NPS, 2014). The molting season occurs from June–July and overlaps with the construction period of June–November, therefore, haul out counts may provide the most accurate estimates of harbor seals in the area during that time. Due to the close proximity of Castro Rocks to the project area, Chevron used the highest mean value of harbor seals observed hauled out at Castro Rocks during the molting season in any recent NPS annual survey. The highest mean number of harbor seals was recorded in 2019 as 237 seals. There are no systematic counts available to estimate the number of seals that may be in the water near Long Wharf at any given time and the number of seals hauled out on Castro Rocks may vary based upon time of day, tide, and seal activity. Therefore, the analysis assumes that all 237 seals could swim into the Level B harassment zone each day that pile driving is occurring.

California sea lion—Although there are no haul out sites for California sea lions in close proximity to the project area, sea lions have consistently been sighted in the Bay while monitoring during past construction projects (AECOM 2019, 2020, 2021, 2022; Caltrans, 2017). As limited data is available on the occurrences of California sea lions in the Bay, NMFS used PSO monitoring data from previous stages of the LWMEP (AECOM, 2019, 2020, 2021) and Year 1 of the Point Orient Wharf Removal (POWR) project (AECOM, 2022) to generate a daily occurrence rate. NMFS calculated daily occurrence rate using the following equation:

Daily occurrence rate = Total number of animals sighted/Total monitoring days

From 2018–2022, a total of 73 days of monitoring occurred across all projects during the seasonal window of June through November. During this time, 13 sea lions were sighted. Based upon sightings and monitoring days, we calculated a daily occurrence rate of 0.18 sea lions per day.

San Francisco has received a record amount of rainfall since July 1, 2022 (Bay City News, 2023), indicating that increased freshwater inflow into the Bay could be expected this year. The Bay did not experience similar freshwater inflow during the LWMEP and POWR years of 2018–2022. As the impacts of increased freshwater flow into the project area on California sea lion occurrences are unclear, and this increased freshwater input did not occur during prior monitoring years, we conservatively used a daily occurrence rate of California sea lions, 1 sea lion per day, to estimate take.

Harbor porpoise—The harbor porpoise population has been growing over time in the Bay (Stern *et al.,* 2017). Although commonly sighted in the vicinity of Angel Island and the Golden Gate Bridge, approximately 6 and 12 kilometers (3.7 and 7.5 miles, respectively) southwest of the Wharf, individuals may use other areas of central the Bay (Keener, 2011), as well as the project area. As limited data is available on the occurrences of harbor porpoises in the Bay, NMFS used PSO monitoring data from previous stages of the LWMEP (AECOM, 2019, 2020, 2021) and Year 1 of the Point Orient Wharf Removal (POWR) project (AECOM, 2022) to generate a daily occurrence rate. NMFS calculated the daily occurrence rate according to the same methods for calculating the daily occurrence rate for California sea lions, as described above. From 2018–2022, a total of 16 harbor porpoises were sighted on 73 monitoring days, resulting in a daily occurrence rate of 0.22 harbor porpoises per day. Due to the impacts of increased freshwater inflow into the Bay (Bay City News, 2023) resulting from elevated rainfall being unclear, we conservatively used a higher daily occurrence rate of harbor porpoises, 1 porpoise per day, to estimate take.

Gray whale—Gray whales are often sighted in the Bay during February and March, however, pile driving activities are not planned to occur during this time. Prior monitoring reports for similar projects occurring during the same work windows did not document gray whales in the area (AECOM 2019, 2020, 2021). Limited sightings of gray whales in the Bay include strandings (Bartlett 2022; TMMC, 2019) and whale watch reports (Bartlett, 2022). At-sea densities and regular observational data for gray whales in the Bay during the planned project time are not available. Although unlikely during the time planned for in-water construction activities, Chevron conservatively estimated that up to two gray whales may occur in the project area.

Bottlenose dolphin—The numbers of dolphins in the Bay have been increasing over the years (Perlman, 2017; Szczepaniak *et al.,* 2013), and a recent study determined that bottlenose dolphins have expanded their range to include coastal waters north and south of the Bay (Keener *et al.,* 2023). In the Bay, dolphins have been sighted in the vicinity of the Golden Gate Bridge, around Yerba Buena and Angel Islands, and in the central Bay as far east as Alameda and Point Richard (Keener *et al.,* 2023). Although dolphins may occur in the Bay year-round, occurrence estimates are limited. Chevron estimated that one group of dolphins may enter the Bay once per month. Weller *et al.* (2016) estimated an average group size for coastal bottlenose dolphins to be approximately 8.2 dolphins.

Northern elephant seal—Small numbers of elephant seals may haul out or strand within the central Bay (Hernández, 2020). Previous monitoring, however, has shown northern elephant seal densities to be very low in the area and, based upon seasonality of occurrences, northern elephant seals would be unlikely to occur in the

project area during the proposed project activities. Additionally, northern elephant seals were not observed during pile driving monitoring for the LWMEP from 2018–2021 (AECOM, 2018, 2019, 2020, 2021) nor for the Point Orient Wharf Removal in 2022 (AECOM, 2022), which was located just north of the proposed project area. While it is unlikely that northern elephant seals would occur in the project area during the months in which work is proposed, Chevron conservatively estimated that one northern elephant seal could enter the project area once every 3 days during in-water construction activities resulting in a total of 10 northern elephant seals.

Northern fur seal—The presence of northern fur seals in depends upon oceanic conditions, as more fur seals are more likely to range in the Bay in search of food and strand during El Niño events (TMMC, 2016). Equatorial sea surface temperatures of the Pacific Ocean have been below average across most of the Pacific. La Niña conditions are likely to remain into the spring 2023 after which conditions are expected to become more neutral. However, it is unlikely El Niño conditions would develop later in 2023 (NOAA, 2022). Northern fur seals were not observed during prior LWMEP monitoring (AECOM, 2019, 2020, 2021) nor during the POWRP monitoring (AECOM, 2022). While it is unlikely that northern fur seals would occur in the project areas during in-water activities, Chevron conservatively estimated that a maximum of 10 northern fur seals could occur enter the project area.

Take Estimation

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

Take estimate calculations vary by species. To calculate take by Level B harassment for harbor seals, California sea lions, and harbor porpoises, NMFS multiplied the daily occurrence estimates described in the *Marine Mammal Occurrence* section by the number of project days (table 8).

For bottlenose dolphins, Chevron estimated, and NMFS concurs, that one group of 8 bottlenose dolphins may be taken by Level B harassment every month of the project. Therefore, Chevron requested, and NMFS proposes to authorize, 32 takes of bottlenose dolphins by Level B harassment.

Chevron based requested take by Level B harassment for gray whales upon total daily occurrence estimates during the project period. Chevron conservatively estimated, and NMFS concurs, that 2 gray whales may enter the project area per year. Therefore, Chevron requested, and NMFS proposes to authorize, 2 takes of gray whales by Level B harassment (table 8).

For northern elephant seals, Chevron conservatively estimated, and NMFS concurs, that one northern elephant seal could enter the project area once every 3 days during in-water construction activities. Therefore, Chevron requested, and NMFS proposes to authorize, 10 takes of northern elephant seals by Level B harassment (table 8).

Based upon prior occurrences in the Bay, Chevron conservatively estimated, and NMFS concurs, that a maximum of 10 northern fur seals could occur in the project area during the in-water construction activity period. Therefore, Chevron requested, and NMFS proposes to authorize 10 takes of northern fur seals by Level B harassment (table 8).

Chevron did not request, nor is NMFS proposing to authorize, take by Level A harassment. For all pile driving activities, Chevron proposed to implement shutdown zones (described further in the Proposed Mitigation section) that would be expected to effectively prevent take by Level A harassment.

TABLE 8—ESTIMATED TAKE BY LEVEL B HARASSMENT PROPOSED FOR AUTHORIZATION AND ESTIMATED TAKE AS A PERCENTAGE OF THE POPULATION

Species	Expected occurrence	Estimated take by Level B harassment proposed for authorization			Estimated take as a percentage of population
		Impact install	Vibratory install/extract	Total	
Harbor seal	237 seals per day	4,977	2,133	7,110	23
Sea lion	1 sea lion per day [1]	21	9	30	0.012
Harbor porpoise	1 harbor porpoise per day [1]	21	9	30	0.39
Bottlenose dolphin	Up to 8 dolphins once per month	N/A	N/A	32	1.77
Gray whale	2 whales over project duration	N/A	N/A	2	0.007
Northern elephant seal	1 seal every 3 days	N/A	N/A	10	0.005
Northern fur seal	10 seals over project duration	N/A	N/A	10	0.071

[1] Rounded daily occurrence to one individual per day.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure would 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, and impact on operations.

Chevron must follow mitigation measures as specified below.

Chevron must ensure that construction supervisors and crews, the monitoring team, and relevant Chevron staff are trained prior to the start of all pile driving activities, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work.

Shutdown Zones

Chevron must establish shutdown zones for all pile driving activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones would be based upon the Level A harassment zone for each pile size/type and driving method where applicable, as shown in table 7. A minimum shutdown zone of 10 m would be required for all in-water construction activities to avoid physical interaction with marine mammals. For pile driving, the radii of the shutdown zones are rounded to the next largest 10 m interval in comparison to the Level A harassment zone for each activity type. If a marine mammal is observed entering or within a shutdown zone during pile driving activity, the activity must be stopped until there is visual confirmation that the animal has left the zone or the animal is not sighted for a period of 15 minutes. Proposed shutdown zones for each activity type are shown in table 9.

All marine mammals would be monitored in the Level B harassment zones and throughout the area as far as visual monitoring can take place. If a marine mammal enters the Level B harassment zone, in-water activities would continue and PSOs would document the animal's presence within the estimated harassment zone.

Chevron would also establish shutdown zones for all marine mammals for which take has not been authorized or for which incidental take has been authorized but the authorized number of takes has been met. These zones would be equivalent to the Level B harassment zones for each activity. If a marine mammal species for which take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met enters the shutdown zone, all in-water activities would cease until the animal leaves the zone or has not been observed for at least 1 hour, and NMFS would be notified about species and precautions taken. Pile removal would proceed if the animal is observed to leave the Level B harassment zone or if 1 hour has passed since the last observation.

If shutdown and/or clearance procedures would result in an imminent safety concern, as determined by Chevron or its designated officials, the in-water activity would be allowed to continue until the safety concern has been addressed, and the animal would be continuously monitored.

TABLE 9—PROPOSED SHUTDOWN ZONES BY ACTIVITY TYPE

Method	Pile type	Shutdown zones (m) [1]				
		LF	MF	HF	PW	OW
Pile removal activities:						
Vibratory extract	36-inch steel pile	20	10	30	20	10
	18-inch concrete pile	10	10	10	10	10
Pile installation activities:						
Impact install	24-inch square concrete pile.	40	10	40	20	10
Vibratory install	36-inch steel pile	20	10	30	20	10

[1] Observers would monitor as far as the eye can see.

Protected Species Observers

The placement of PSOs during all pile driving activities (described in the Proposed Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. Should environmental conditions deteriorate such that the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving would be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

PSOs would monitor the full shutdown zones and the Level B harassment zones to the extent practicable. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

Pre- and Post-Activity Monitoring

Monitoring must take place from 30 minutes prior to initiation of pile driving activities (*i.e.,* pre-clearance monitoring) through 30 minutes post-completion of pile driving. Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, PSOs would observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone would be considered cleared when a marine mammal has not been observed within the zone for a 30-minute period. If a marine mammal is observed within the shutdown zones listed in table 10, pile driving activity would be delayed or halted. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones would commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

Soft-Start Procedures

Soft-start procedures provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors would be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. Soft-start would be implemented at the start of each day's

impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

Bubble Curtain

A bubble curtain must be employed during all impact pile installation of the 24-inch square concrete piles to interrupt the acoustic pressure and reduce impact on marine mammals. The bubble curtain must distribute air bubbles around 100 percent of the piling circumference for the full depth of the water column. The lowest bubble ring must be in contact with the mudline for the full circumference of the ring. The weights attached to the bottom ring must ensure 100 percent substrate contact. No parts of the ring or other objects may prevent full substrate contact. Air flow to the bubblers must be balanced around the circumference of the pile.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that would result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the conditions in this section, the Monitoring Plan, and this IHA. Marine mammal monitoring during pile driving activities would be conducted by PSO's meeting NMFS' standards and in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO would have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and
- PSOs must be approved by NMFS prior to beginning any activity subject to the IHA.

PSOs should have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Chevron would have at least two PSOs stationed at the best possible vantage points in the project area to monitor during all pile driving activities. Monitoring would occur from elevated locations along the shoreline or on barges where the entire shutdown zones and monitoring zones are visible. PSOs would be equipped with high quality binoculars for monitoring and radios or cells phones for maintaining contact with work crews. Monitoring would be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs would record all incidents of marine mammal occurrence, regardless of distance from activity, and would document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

In addition to monitoring on days that construction would occur, as proposed by the applicant, Chevron would conduct biological monitoring within one week ahead of the project's start date to establish baseline observation. These observation periods would encompass different tide levels at different hours of the day.

Data Collection

Chevron would record detailed information about implementation of shutdowns, counts and behaviors (if possible) of all marine mammal species observed, times of observations, construction activities that occurred, any acoustic and visual disturbances, and weather conditions. PSOs would

use approved data forms to record the following information:

- Date and time that permitted construction activity begins and ends;
- Type of pile removal activities that take place;
- Weather parameters (*e.g.,* percent cloud cover, percent glare, visibility, air temperature, tide level, Beaufort sea state);
- Species counts, and, if possible, sex and age classes of any observed marine mammal species;
- Marine mammal behavior patterns, including bearing and direction of travel;
- Any observed behavioral reactions just prior to, during, or after construction activities;
- Location of marine mammal, distance from observer to the marine mammal, and distance from pile driving activities to marine mammals;
- Whether an observation required the implementation of mitigation measures, including shutdown procedures and the duration of each shutdown; and
- Any acoustic or visual disturbances that take place.

Reporting

Chevron must submit a draft marine mammal monitoring report to NMFS within 90 days after the completion of pile driving activities, or 60 days prior to the requested issuance of any future IHAs for the project, or other projects at the same location, whichever comes first. 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 receipt of the draft report, the report shall be considered final. The marine mammal report would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets and/or raw sighting data. Specifically, the report would include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including: (a) How many and what type of piles were driven or removed and the method (*i.e.,* impact or vibratory); and (b) the total duration of time for each pile (vibratory driving) number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring; and
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance.

For each observation of a marine mammal, the following would be recorded:

- Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting;
- Time of sighting;
- Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;
- Distance and location of each observed marine mammal relative to pile being driven or removed for each sighting;
- Estimated number of animals (min/max/best estimate);
- Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*);
- Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching); and
- Animal's closest point of approach and estimated time spent within the harassment zone.

Additionally, Chevron must include the following information in the report:

- Number of marine mammals detected within the harassment zones, by species; and
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensured, and resulting changes in behavior of the animal(s), if any.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, Chevron would report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to the West Coast regional stranding network (866–767–6114) as soon as feasible. If the death or injury was clearly caused by the specified activity, Chevron would immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHAs. Chevron would not resume their activities until notified by NMFS.

The report would include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in table 2, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or

structure of any of these species or stocks that would lead to a different analysis for this activity.

Level A harassment is extremely unlikely given the small size of the Level A harassment isopleths and the required mitigation measures designed to minimize the possibility of injury to marine mammals. No serious injury or mortality is anticipated given the nature of the activity.

Pile driving activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level B harassment from underwater sounds generated from impact and vibratory pile driving activities. Potential takes could occur if individuals move into the ensonified zones when these activities are underway.

The takes by Level B harassment would be due to potential behavioral disturbance. The potential for harassment is minimized through construction methods and the implementation of planned mitigation strategies (see Proposed Mitigation section).

Take would occur within a limited, confined area of each stock's range. Further, the amount of take authorized is extremely small when compared to stock abundance.

No marine mammal stocks for which take is proposed are listed as threatened or endangered under the ESA or determined to be strategic or depleted under the MMPA. The relatively low marine mammal occurrences in the area, small shutdown zones, and planned monitoring make injury takes of marine mammals unlikely. The shutdown zones would be thoroughly monitored before the pile driving activities begin, and activities would be postponed if a marine mammal is sighted within the shutdown zone. There is a high likelihood that marine mammals would be detected by trained observers under environmental conditions described for the project. Limiting construction activities to daylight hours would also increase detectability of marine mammals in the area. Therefore, the mitigation and monitoring measures are expected to eliminate the potential for injury and Level A harassment as well as reduce the amount and intensity of Level B behavioral harassment. Furthermore, the pile driving activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations which have occurred with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment.

Anticipated and authorized takes are expected to be limited to short-term Level B harassment (behavioral disturbance) as construction activities would occur intermittently over the course of 30 days. Effects on individuals taken by Level B harassment, based upon reports in the literature as well as monitoring from other similar activities, may include increased swimming speeds, increased surfacing time, increased haul out time by pinnipeds, or decreased foraging (*e.g.,* Thorson and Reyff, 2006; NAVFAC SW, 2018b). Individual animals, even if taken multiple times, would likely move away from the sound source and be temporarily displaced from the area due to elevated noise level during pile removal. Marine mammals could also experience TTS if they move into the Level B harassment zone. TTS is a temporary loss of hearing sensitivity when exposed to loud sound, and the hearing threshold is expected to recover completely within minutes to hours. Thus, it is not considered an injury. While TTS could occur, it is not considered a likely outcome of this activity. Repeated exposures of individuals to levels of sounds that could cause Level B harassment are unlikely to considerably significantly disrupt foraging behavior or result in significant decrease in fitness, reproduction, or survival for the affected individuals. In all, there would be no adverse impacts to the stock as a whole.

As previously described, a UME has been declared for Eastern Pacific gray whales. However, we do not expect proposed takes for authorization in this action to exacerbate the ongoing UME. As mentioned previously, no injury or mortality is proposed for authorization, and take by Level B harassment is limited (2 takes over the duration of the project). Therefore, we do not expect the proposed take authorization to compound the ongoing UME.

The project is not expected to have significant adverse effects on marine mammal habitat. There are no known Biologically Important Areas (BIAs) or ESA-designated critical habitat within the project area, and the activities would not permanently modify existing marine mammal habitat. Although harbor seal haul out sites are located in the Bay, hauled out seals are not likely to be impacted. PSOs during the seismic retrofit of the Richmond Bridge did not note any decline in use by harbor seals at Castro Rocks, a haul out site which is approximately 20 to 100 m from the bridge (Greene *et al.,* 2006) and 560 m from the project area. In addition, any pupping that may occur at Castro Rocks would take place outside of the work window for the proposed pile driving activities. The activities may cause fish to leave the area temporarily. This could impact marine mammals' foraging opportunities in a limited portion of the foraging range, however, due to the short duration of activities and the relatively small area of affected habitat, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In combination, these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities would have only minor, short-term effects on individuals. The specified activities are not expected to impact reproduction or survival of any individual marine mammals, much less have impacts on annual rates of recruitment or survival.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury, mortality, or Level A harassment is anticipated or proposed for authorization;
- The specified activities and associated ensonified areas are very small relative to the overall habitat ranges of all species;
- The project area does not overlap known BIAs or ESA-designated critical habitat;
- The lack of anticipated significant or long-term effects to marine mammal habitat;
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity; and
- Monitoring reports from similar work in the Bay have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity would have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for

specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS has authorized is below one-third of the estimated stock abundances for all seven stocks (refer back to table 8). For most stocks, the proposed take of individuals is less than 2 percent of the abundance of the affected stock (with exception for harbor seals at 23 percent). This is likely a conservative estimate because it assumes all takes are of different individual animals, which is likely not the case for harbor seals, given the nearby haulout. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Chevron's for conducting pile driving activities in San Francisco Bay from June 1, 2023 through November 30, 2023, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed construction project. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, 1 year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activities section of this notice is planned or (2) the activities as described in the Description of Proposed Activities section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: March 28, 2023.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–06744 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC873]

Marine Mammals; File No. 27246

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

ACTION: Notice; withdrawal of application.

SUMMARY: Notice is hereby given that Yara Bernaldo de Quirós, Ph.D., University of Colorado Boulder, Boulder, CO 80309, has withdrawn an application for a permit to receive parts from bottlenose dolphins (*Tursiops truncatus*) for scientific research.

ADDRESSES: The application and related documents are available for review upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Shasta McClenahan, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: On February 17, 2023, notice was published in the **Federal Register** (88 FR 10300) that a request for a permit to receive bottlenose dolphin parts from the National Marine Mammal Tissue Bank had been submitted by the above-named

applicant. The applicant has withdrawn the application from further consideration.

Dated: March 27, 2023.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–06662 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC885]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Advisory Panel will hold a public webinar meeting.

DATES: The meeting will be held on Wednesday, April 26, 2023, from 1 p.m. to 4 p.m.

ADDRESSES: The meeting will be held via webinar. Connection information will be posted to *https://www.mafmc.org/council-events.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's Mackerel, Squid, and Butterfish Advisory Panel will meet via webinar to discuss recent performance of the butterfish and Atlantic chub mackerel fisheries and develop Fishery Performance Reports. These reports will be considered by the Scientific and Statistical Committee, the Monitoring Committee, and the Mid-Atlantic Fishery Management Council when reviewing 2024 catch and landings limits and management measures. The results of the April 2023 Council meeting relating to the *Illex* fishery and potential follow-up to the disapproved *Illex* Permit Amendment may also be discussed.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: March 28, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–06724 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC887]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Tilefish Advisory Panel will hold a public meeting.

DATES: The meeting will be held on Thursday, April 20, 2023, from 9 a.m. to 12 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar. Webinar connection, agenda items, and any additional information will be available at *www.mafmc.org/council-events.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss recent performance of the blueline and golden tilefish commercial and recreational fisheries and develop Fishery Performance Reports. These reports will be considered by the Scientific and Statistical Committee, the Monitoring Committee, and Mid-Atlantic Fishery Management Council when reviewing 2024 catch and landings limits and management measures for blueline and golden tilefish.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Spedden at the Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: March 28, 2023.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–06726 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Evaluations of Coastal Zone Management Act Programs: State Coastal Management Programs and National Estuarine Research Reserves

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 January 12, 2023 (88 FR 2071), during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce Department.

Title: Evaluations of Coastal Zone Management Act (CZMA) Programs: State Coastal Management Programs and National Estuarine Research Reserves.

OMB Control Number: 0648–0661.

Form Number(s): None.

Type of Request: Regular submission (revision and extension of a current information collection).

Number of Respondents: 288.

Average Hours per Response: 72 hours per CZMA program manager's

evaluation; 15 minutes per partner/stakeholder response.

Total Annual Burden Hours: 933.

Needs and Uses: This request is for revision and extension of a currently approved information collection. A few questions will be rewritten to improve the usefulness of information collected. A new question is proposed for inclusion that will collect information from Coastal Zone Management Act programs about efforts in racial equity and engagement with underserved communities.

The Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*) requires that state coastal management programs and national estuarine research reserves developed in accordance with the CZMA and approved by the Secretary of Commerce be evaluated periodically. This request is to collect information to accomplish those evaluations. NOAA's Office for Coastal Management conducts periodic evaluations of the 34 coastal management programs and 30 research reserves and produces written findings for each evaluation. The Office for Coastal Management has access to documents submitted in cooperative agreement applications, performance reports, and certain documentation required by the CZMA and implementing regulations. However, additional information from each coastal management program and research reserve, as well as information from the program and reserve partners and stakeholders with whom each works, is necessary to evaluate against statutory and regulatory requirements. Different information collection subsets are necessary for (1) coastal management programs, (2) their partners and stakeholders, (3) research reserves, and (4) their partners and stakeholders.

As part of this submission, a few questions will be modified to clarify the information that should be provided as part of the information requests and questionnaires sent to the coastal program and reserve managers. One new question about efforts in diversity, inclusion, equity, and accessibility will be included for coastal program and reserve managers. A few questions will be revised to clarify and improve the usefulness of responses for the partners and stakeholders' survey.

Given the addition of a designated research reserve since the last renewal of this information collection and the anticipated designation of additional reserves in the coming years, and an increase in Office for Coastal Management staff capacity to conduct evaluations, the number of CZMA programs to be evaluated, on average, in the next three years will increase from 11 to 12 programs per year. This increase in the number of programs to be evaluated will also increase the number of partner and stakeholder respondents to this information collection.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; state, local, or tribal government; Federal government.

Frequency: CZMA programs will complete once every five to six years. Program partners and stakeholders are invited to complete one survey for program(s) that they work with on the same schedule as that program(s) (once every five to six years).

Respondent's Obligation: Mandatory for CZMA programs; voluntary for program partners and stakeholders.

Legal Authority: Section 312 of the Coastal Zone Management Act, as amended (16 U.S.C. 1458).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0661.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–06709 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2023–0014]

Grant of Interim Extension of the Term of U.S. Patent No. 9,314,630; Symplicity Spyral® System, Symplicity Spyral® Catheter, and Symplicity G3 Generator

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

ACTION: Notice of interim patent term extension.

SUMMARY: The United States Patent and Trademark Office has issued an order granting a one-year interim extension of the term of U.S. Patent No. 9,314,630 ('630 patent).

FOR FURTHER INFORMATION CONTACT: Ali Salimi, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at 571–272–0909 or by email to *ali.salimi@uspto.gov.*

SUPPLEMENTARY INFORMATION: 35 U.S.C. 156 generally provides that the term of a patent may be extended for a period of up to five years, if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review. 35 U.S.C. 156(d)(5) generally provides that the term of such a patent may be extended for no more than five interim periods of up to one year each, if the approval phase of the regulatory review period is reasonably expected to extend beyond the expiration date of the patent.

On March 23, 2023, Medtronic Ireland Manufacturing Unlimited Company, the owner of record of the '630 patent, timely filed an application under 35 U.S.C. 156(d)(5) for an interim extension of the term of the '630 patent. The '630 patent claims a method of using the product Symplicity Spyral® system, which includes the Symplicity Spyral catheter and the Symplicity G3 generator. The application for interim patent term extension indicates that a Premarket Approval Application (PMA) PMA–220026 was submitted to the Food and Drug Administration (FDA) on March 15, 2015, and that the FDA's review thereof is ongoing.

Review of the interim patent term extension application indicates that, except for permission to market or use the product commercially, the '630 patent would be eligible for an extension of the patent term under 35 U.S.C. 156. Because it appears the approval phase of the regulatory review period will continue beyond the expiration date of the patent, *i.e.,* April 8, 2023, interim extension of the '630 patent's term under 35 U.S.C. 156(d)(5) is appropriate.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 9,314,630 is granted for a period of one year from the expiration date of the '630 patent.

Robert Bahr,

Deputy Commissioner for Patents, United States Patent and Trademark Office.

[FR Doc. 2023–06665 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–16–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 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) previously furnished by such agencies.

DATES: *Comments must be received on or before:* April 30, 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: Custodial Service
Mandatory for: U.S. Army, Oahu, HI
Designated Source of Supply: Work Now Hawaii, Honolulu, HI
Contracting Activity: DEPT OF THE ARMY, 0413 AQ HQ

Deletions

The following product(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
2540–00–741–6339—Curtain Assembly
Designated Source of Supply: APEX, Inc., Anadarko, OK
Contracting Activity: DLA LAND AND MARITIME, COLUMBUS, OH

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–06713 Filed 3–30–23; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date added to the Procurement List:* April 30, 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 12/23/2022 and 1/27/2023, 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 product(s) and 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 product(s) and service(s) are added to the Procurement List:

Product(s)

NSN(s)—Product Name(s):
5345–01–360–9967—Flap Disc, 4½″ × ⅞″, 60 Grit, Type 29
5345–01–499–9809—Flap Disc, 4½″ × ⅞″, 40 Grit, Type 29
530009501N—Flap Disc, 4½″ × ⅞″ 40 Grit Type 27
530009502N—Flap Disc, 4½″ × ⅞″ 60 Grit Type 27
530009503N—Flap Disc, 4½″ × ⅞″ 80 Grit Type 27
530009603N—Flap Disc, 4½″ × ⅞″ 80 Grit, Type 29
Designated Source of Supply: Association for Vision Rehabilitation and Employment, Inc., Binghamton, NY
Contracting Activity: FEDERAL ACQUISITION SERVICE, GSA/FSS GREATER SOUTHWEST ACQUISITI
Distribution: B-List
Mandatory for: Broad Government Requirement

Service(s)

Service Type: Document Conversion
Mandatory for: Department of Homeland Security, US Coast Guard Finance Center, Chesapeake, VA
Designated Source of Supply: ServiceSource, Inc., Oakton, VA
Contracting Activity: U.S. COAST GUARD, HQ CONTRACT OPERATIONS (CG–912) (000)

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–06716 Filed 3–30–23; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

[Docket No. CFPB–2023–0008]

Agency Information Collection Activities: Comment Request

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (CFPB or Bureau) is

publishing this notice seeking comment on a Generic Information Collection titled ''Loan Judgment Bias Experiment'' prior to requesting the Office of Management and Budget's (OMB's) approval of this collection under the Generic Information Collection ''Generic Information Collection Plan for Studies of Consumers Using Controlled Trials in Field and Economic Laboratory Settings'' under OMB Control Number 3170–0048.

DATES: Written comments are encouraged and must be received on or before May 1, 2023 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2023–0008 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Anthony May, PRA 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: Loan Judgment Bias Experiment.

OMB Control Number: 3170–0048.

Type of Review: Request for approval of a generic information collection under an existing Generic Information Collection Plan.

Affected Public: Individuals.

Estimated Number of Respondents: 3,600.

Estimated Total Annual Burden Hours: 1,800.

Abstract: The proposed research examines whether information about borrower race biases judgments of creditworthiness in the context of a specific financial product: mortgage loan applications. We will ask non-practitioner research participants to evaluate stylized loan applications for Black, Hispanic, Asian, and White non-Hispanic consumers, where information about applicant race is the only characteristic that varies. We will also ask whether any impact of race information depends on the mode of information provision (*e.g.,* explicit race/ethnicity information vs. implicit from borrower name or other indirect signal). A maximum of 3,600 participants will be recruited from the panel maintained by CloudResearch to complete the Loan Judgment Bias Experiment. The Bureau will collect information on judgments about the riskiness of hypothetical applications with varying characteristics and information related to the task including an assessment of the respondent's experience completing the task. The Bureau will not receive any personal identifiable information (PII).

Request for Comments: The Bureau is publishing this notice and soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be submitted to OMB as part of its review of this request. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Consumer Financial Protection Bureau.

[FR Doc. 2023–06751 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Air Force, Board of Visitors of the U.S. Air Force Academy

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Board of Visitors (BoV) of the U.S. Air Force Academy (USAFA) will take place.

DATES: Open to the public Thursday, April 13, 2023 from 8:00 a.m. to 5:00 p.m. (Mountain Time).

ADDRESSES: The meeting will occur at the United States Air Force Academy, Colorado Springs, Colorado, as well as virtually. Members of the public will only be allowed to attend the meeting virtually. The link for the virtual meeting can be found at: *https://www.usafa.edu/about/bov/* and will be active approximately thirty minutes before the start of the meeting.

FOR FURTHER INFORMATION CONTACT: *Designated Federal Officer:* Mr. Anthony R. McDonald, *anthony.mcdonald@us.af.mil,* (703) 614–4751, 1660 Air Force Pentagon, Washington, DC 20330–1660.

Alternate Designated Federal Officer: Mr. James M. Wilmer, *james.wilmer@afacademy.af.edu,* (719) 333–0472, 2304 Cadet Drive, Suite 3200, USAF Academy, CO 80840–5025.

USAFA BoV website: https://www.usafa.edu/about/bov/. Contains information on the Board of Visitors, link to the virtual meeting, and meeting agenda.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. 1001 *et seq.*), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to review morale and discipline, social climate, athletics, diversity, curriculum and other matters relating to the U.S. Air Force Academy.

Written Statements: Any member of the public wishing to provide input to the Board of Visitors of the U.S. Air Force Academy should submit a written statement in accordance with 41 CFR 102–3.105(j) and § 102–3.140 and

§ 1009(a)(3) of the FACA. The public or interested organizations may submit written comments or statements to the BoV about its mission and/or the topics to be addressed in the open sessions of this public meeting. Written comments or statements should be submitted to the Alternate Designated Federal Officer, Mr. James Wilmer, via electronic mail, at the email address listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received at least five (5) business days prior to the meeting so they may be made available to the BoV Chairman for consideration prior to the meeting. Written comments or statements received after April 5, 2023, may not be provided to the BoV until its next meeting. Please note that because the BoV operates under the provisions of the FACA, as amended, all written comments will be treated as public documents and will be made available for public inspection.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–06664 Filed 3–30–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Air University Board of Visitors Meeting

AGENCY: Department of the Air Force, DoD.

ACTION: Meeting notice.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce the following Federal Advisory Committee meeting of the Board of Visitors (BoV) of the Air University.

DATES: Tuesday, April 4, 2023, from 8 a.m. to 5 p.m. and Wednesday, April 5, 2023, from 8 a.m. to 3 p.m. (Central Time).

ADDRESSES: Air University Commander's Conference Room, Building 800, Maxwell Air Force Base, AL.

FOR FURTHER INFORMATION CONTACT: Dr. Shawn P. O'Mailia, Designated Federal Officer, Air University Headquarters, 55 LeMay Plaza South, Maxwell Air Force Base, Alabama 36112–6335, telephone (334) 953–4547.

SUPPLEMENTARY INFORMATION: This meeting is held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of this meeting is to provide independent advice and recommendations on matters pertaining to the educational, doctrinal, and research policies and activities of Air University. The agenda will include topics relating to the Air University Commander and President's priorities, the Community College of the Air Force Subcommittee update, Air University Program Review update, Air Force Requirements Process, Commissioning, Wargaming, AU Student Information System update, and AU financial update.

Meeting Accessibility: Open to the public. Any member of the public wishing to attend this meeting should contact the Designated Federal Officer listed below at least ten calendar days prior to the meeting for information on base entry procedures.

Written Statements: Any member of the public wishing to provide input to the Air University Board of Visitors in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act should submit a written statement to the Designated Federal Officer at the address detailed below. Statements submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least ten calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the Air University Board of Visitors until its next meeting. The Designated Federal Officer will review all timely submissions with the Air University Board of Visitors' Board Chairperson and ensure they are provided to members of the Board before the meeting that is the subject of this notice.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–06668 Filed 3–30–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–0C]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–0C.

Dated: March 27, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

SEP 2 8 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 21-0C. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 19-37 of May 3, 2019.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Regional Balance (Classified document provided under separate cover)

BILLING CODE 5001–06–C

Transmittal No. 21–0C

REPORT OF ENHANCEMENT OR UPGRADE OF SENSITIVITY OF TECHNOLOGY OR CAPABILITY (SEC. 36(B)(5)(C), AECA)

(i) *Prospective Purchaser:* Government of the United Arab Emirates
(ii) *Sec. 36(b)(1), AECA Transmittal No.:* 19–37
Date: May 3, 2019
Implementing Agency: Army
Funding Source: National Funds
(iii) *Description:* On May 3, 2019, Congress was notified by Congressional certification transmittal number 19–37 of the possible sale, under Section 36(b)(1) of the Arms Export Control Act, of up to four hundred fifty-two (452) Patriot Advanced Capability 3 (PAC–3) Missiles Segment Enhanced (MSE). Also included are tools and test equipment, support equipment, publications and technical documentation, personnel training and training equipment, spare and repair parts, facility design, U.S. Government and contractor technical, engineering, and logistics support services, and other related elements of logistics, sustainment and program support. The estimated cost was $2.728 billion. Major Defense Equipment (MDE) constituted $2.7 billion of this total.

This transmittal reports the inclusion of an additional five hundred ten (510) Patriot Advanced Capability 3 (PAC–3) Missiles Segment Enhanced (MSE) (includes 10 fly-to-buy missiles). The following non-MDE items will also be included: tools and test equipment, support equipment, publications and technical documentation, personnel training and training equipment, spare and repair parts, facility design, U.S. Government and contractor technical, engineering, and logistics support services, and other related elements of logistics, sustainment and program support. The total cost of the new MDE articles is $2.728 billion. The total

notified cost of MDE will increase to $5.428 billion, and the total notified case value will increase to $5.90 billion.

(iv) *Significance:* The proposed articles and services will support the United Arab Emirates' ability to maintain a reserve stock of PAC–3 MSE missiles to ensure adequate capability to defend their homeland from regional threats. The proposed sale will also improve the UAE's Air Force and Air Defense's (AFAD's) ability to defend population centers, friendly forces, infrastructure, and other critical assets in support of combined contingency operations, and to promote regional security.

(v) *Justification:* This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of an important regional partner. The UAE has been, and continues to be, a vital U.S. partner for political stability and economic progress in the Middle East.

(vi) *Sensitivity of Technology:* The Sensitivity of Technology Statement contained in the original notification applies to items reported here.

(vii) *Date Report Delivered to Congress:* September 28, 2021

[FR Doc. 2023–06623 Filed 3–30–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–64]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–64 with attached Policy Justification and Sensitivity of Technology.

Dated: March 27, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

December 10, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-64, concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Greece for defense articles and services estimated to cost $2.5 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Jedidiah P. Royal
Acting Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Section 620C(d) Certification

BILLING CODE 5001–06–C

Transmittal No. 21–64

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Greece

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	$1.5 billion
Other	$1.0 billion
TOTAL	$2.5 billion

Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of Greece has requested to buy equipment and services to repair, update, and enhance their four (4) existing Hellenic Navy (HN) MEKO Class frigates. These upgrades will include the following:

Major Defense Equipment (MDE):

Eight (8) Close in Weapon Systems (CIWS) Phalanx BLK 1B Baseline 2 Upgrade Kits

Four (4) MK 45, 5″ 54 Caliber Gun Overhauls

Four (4) MK 49 Guided Missile Launcher Systems

Four (4) COMBATSS–21 Combat Management Systems

Four (4) AN/SQS–56 Sonar Overhauls

Non-MDE:

Also included is the repair and/or upgrade of existing systems; ordnance; testing; training; systems integration; follow-on technical support; acquisition, upgrades, and overhaul of Narwhal 20A Gun System; Sylena MK 2 Decoy Launching System with CANTO torpedo countermeasure; Radar/Fire Control TRS–4D; Identification Friend or Foe (IFF) Mode 5; NIXIE SLQ–25 Surface Ship Torpedo Defense System; Helicopter Handling System (Repairs); Defense Advance GPS Receiver (DAGR); Gun Computer System (GCS); Low Frequency Active Towed Sonar (LFATS); Compact Low Frequency Active Passive Variable Depth Sonar–2 (CAPTAS–2); Infrared Search & Track System (IRST); Elta Electronic Warfare (EW), with C–ESM, R–ESM, and ECM capability; Naval Laser-Warning System (NLWS); 7 meter Rigid Hull Inflatable Boat (RHIB); SQQ–89 ASW System; Fire Control Radar System; Improved Point Detection System-Lifecycle Replacement (IPDS–LR); Enhanced Maritime Biological Detection (EMBD), as well as significant Hull, Mechanical and Electrical upgrades, replacements, and repairs; support and test equipment; spare and repair parts; communications equipment, including Link 16 communications equipment; Battlefield Information Collection and Exploitation System (BICES); AN/SRQ–4 Tactical Common Datalink (TCDL); Global Command and Control System-Joint (GCCS–J); Air Defense Systems Integrator (ADSI); cryptographic equipment including SY–150, SY–117G, and KYV–5M; software delivery and support; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, systems integration, technical, and logistics support services; test and trials support; studies and surveys; and other related elements of logistical and program support.

(iv) *Military Department:* Navy (GR–P–LJO)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None known

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* December 10, 2021

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Greece—MEKO Class Frigate Modernization

The Government of Greece has requested to buy equipment and services to repair, update, and enhance their four (4) existing Hellenic Navy (HN) MEKO Class frigates. These upgrades will include the following: eight (8) Close in Weapon Systems (CIWS) Phalanx BLK 1B Baseline 2 upgrade kits; four (4) MK 45, 5″ 54 caliber gun overhauls; four (4) MK 49 Guided Missile Launcher Systems; four (4) COMBATSS–21 Combat Management Systems; and, four (4) AN/SQS–56 Sonar overhauls. Also included is the repair and/or upgrade of existing systems; ordnance; testing; training; systems integration; follow-on technical support; acquisition, upgrades, and overhaul of Narwhal 20A Gun System; Sylena MK 2 Decoy Launching System with CANTO torpedo countermeasure; Radar/Fire Control TRS–4D; Identification Friend or Foe (IFF) Mode 5; NIXIE SLQ–25 Surface Ship Torpedo Defense System; Helicopter Handling System (Repairs); Defense Advance GPS Receiver (DAGR); Gun Computer System (GCS); Low Frequency Active Towed Sonar (LFATS); Compact Low Frequency Active Passive Variable Depth Sonar–2 (CAPTAS–2); Infrared Search & Track System (IRST); Elta Electronic Warfare (EW), with C–ESM, R–ESM, and ECM capability; Naval Laser-Warning System (NLWS); 7 meter Rigid Hull Inflatable Boat (RHIB); SQQ–89 ASW System; Fire Control Radar System; Improved Point Detection System-Lifecycle Replacement (IPDS–LR); Enhanced Maritime Biological Detection (EMBD), as well as significant Hull, Mechanical and Electrical upgrades, replacements, and repairs; support and test equipment; spare and repair parts; communications equipment, including Link 16 communications equipment; Battlefield Information Collection and Exploitation System (BICES); AN/SRQ–4 Tactical Common Datalink (TCDL); Global Command and Control System-Joint (GCCS–J); Air Defense Systems Integrator (ADSI); cryptographic equipment including SY–150, SY–117G, and KYV–5M; software delivery and support; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering, systems integration, technical, and logistics support services; test and trials support; studies and surveys; and other related elements of logistical and program support. The estimated total cost is $2.5 billion.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the security of a NATO ally, which is an important partner for political stability and economic progress in Europe.

The proposed sale will improve Greece's capability to meet current and future threats by providing an effective combatant deterrent capability to protect maritime interests and infrastructure in support of its strategic location on NATO's southern flank. This acquisition, which will be awarded to the winner of an international competition for the Hellenic Navy (HN) MEKO Class Frigate Upgrade, will enhance stability and maritime security in the Eastern Mediterranean region and contribute to security and strategic objectives of NATO and the United States. Greece contributes to NATO operations in Kosovo, as well as to counterterrorism and counter-piracy maritime efforts. Greece will have no difficulty absorbing these articles and services into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be Raytheon Missiles and Defense, Waltham, MA; Lockheed Martin, Bethesda, MD; BAE Systems, Arlington, VA; and VSE Corporation, Alexandria, VA. There are no known offset agreements in connection with this potential sale.

Implementation of this proposed sale will require the assignment of 3 additional U.S. Government and (5) contractor representatives, Full-Time Equivalent (FTE) positions to Greece.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21–64

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The MEKO Class Frigate Modernization (Upgrades) will provide Greece with an increased ability to identify, engage, and defeat maritime security threats in open waters of the Mediterranean and Aegean Seas (NATO's Southern Flank). These enhancements will deliver protection-in-depth for Greece's industrial infrastructure and sea lines of communication.

a. Close in Weapon Systems (CIWS) MK 15 Phalanx BLK 1B Baseline 2 Upgrade Kits is a close-in weapon system for defense against incoming threats such as small boats, surface torpedoes, anti-ship missiles and helicopters. It was designed and manufactured by the General Dynamics Corporation, Pomona Division later a part of Raytheon. The upgraded MK 15 Phalanx 1B Baseline 2 improves detection performance, increases reliability, and reduces maintenance. It also has a surface mode to track, detect, and destroy threats closer to the water's surface, increasing the ability to defend against fast-attack boats and low-flying missiles.

b. MK 45, 5″ 54 Caliber Gun overhaul by performing a Standard Pier-Side Maintenance & Repair (SPMR) of the MK 45 Gun Systems. The MK 45 Gun is a fully-automatic naval gun mount employed against surface (Anti-Surface Warfare—ASuW), air (Anti-Air Warfare—AAW), and land attack (Naval Surface Fire Support—NSFS) targets.

c. MK 49 Guided Missile Launching System (GMLS) is used to deploy the Rolling Airframe Missile (RAM).

d. COMBATSS–21 is the ship's battle management system, which is produced by Lockheed Martin and derived from the USN's latest AEGIS combat management system. The COMBATSS–21 Combat Management System is the backbone of the Freedom-variant self-defense suite and integrates the radar, electro-optical infrared cameras, gun fire control system, countermeasures and short-range anti-air missiles.

e. Upgrading the existing AN/SQS–56 Sonar is accomplished by replacement of defective transducers and staves and upgrading the electronics in the Hull Mounted Sonar as well as the SQS–56 adjunct processor. The AN/SQS–56 is a modern hull-mounted sonar. The sonar is an active/passive, preformed beam, digital sonar providing panoramic echo ranging and panoramic (DIMUS) passive surveillance. A single operator can search, track, classify and designate multiple targets from the active system while simultaneously maintaining anti-torpedo surveillance on the passive display.

f. The 20mm Narwhal gun system is a gyro-stabilized mount armed with a 20mm automatic cannon, an electro-optic, charge-coupled device camera, and a closed loop, fire-control system, which can be controlled remotely to enable system operation, target acquisition and tracking, and fire opening by the gun operator. Optional add-ons include a thermal camera, laser rangefinder and target automatic tracking video system. The 20mm gun has a firing rate of 800 rounds per minute of NATO standard ammunition, and is produced by the French Government-owned Nexter Systems.

g. Sylena MK 2 Decoy Launching System with CANTO is a torpedo countermeasure. The Sylena MK 2 launches the CANTO decoy, which generates a high-level, 360-degree acoustic signal to jam the full frequency range of an attacking torpedo. Sylena MK 2 is available internationally from Lacroix; CANTO from Naval Group.

h. TRS–4D radar is a three-dimensional, air volume surveillance radar with fast target alert, which provides target designation to the combat management system for anti-air warfare (AAW) and anti-surface warfare (ASuW). The TRS–4D radar is manufactured by Hensoldt a German company. It provides sensor support for surface gun fire control with splash detection, ship-controlled helicopter approach support, jammer detection, tracking and suppression, cued search with enhanced detection performance for a dedicated sector, cued track with high-accuracy target tracking for missile guidance, and target classification, integrated IFF, and is integrated with the combat management system. The system is available internationally through Hensoldt.

i. Identification Friend or Foe (IFF) Mode 5 is an identification system designed for command and control. It enables military and national (civilian air traffic control) interrogation systems to identify aircraft, vehicles or forces as friendly. Mode 5 provides a cryptographically secured version of Mode S and ADS–8 GPS position.

j. AN/ARC–210 GEN 6 (RT–2036(C)) version is a radio that provides two-way, multi-mode voice and data communications with military aircraft over Very High Frequency (VHF) and Ultra High Frequency (UHF) range using U.S. Type 1 encryption. ARC–210 radios contain embedded sensitive encryption algorithms, keying material and integrated waveforms.

k. SY–117G is a combat manpack radio with Type 1 encryption for secure voice communication. In the HN MEKO Upgrade configuration, the radio will be used for interoperable, secure Satellite Communications (SATCOM). The SY–117G COMSEC device is a Controlled Cryptographic Item (CCI).

l. SY–150 is a combat manpack radio with Type 1 encryption. The SY–150 COMSEC device is a CCI.

m. KYV–5M supports tactical secure voice communications. The KYV–5M COMSEC device is a CCI.

n. The Battlefield Information Collection and Exploitation System (BICES) is a web-enabled, multi-national intelligence system that provides near real-time, correlated, situation and order of battle information.

o. Global Command and Control System-Joint (GCCS–J) is a command, control, communications, computers, and intelligence system consisting of hardware, software (commercial-off-the-shelf and government-off-the-shelf), procedures, standards, and interfaces that provide an integrated near real-time picture of the battlespace necessary to conduct joint and multinational operations. For the HN MEKO Upgrade configuration, GCCS–J will use Type 1 encryption.

p. Air Defense Systems Integrator (ADSI) is a tactical command and control system that integrates land, air and sea domains to report real-time sensor information across the battlespace.

q. The NIXIE SLQ–25 Surface Ship Torpedo Defense System is a digitally controlled, electro-acoustic, soft kill countermeasure decoy system capable of countering wake homing torpedoes, acoustic homing torpedoes, and wire guided torpedoes. NIXIE provides active/passive detection, location, threat identification of torpedoes and other acoustic targets. NIXIE's towed body, the decoy which diverts the threat from the ship, connects to the management system using a fiber optic cable to control the signals emitted by the decoy.

r. Defense Advance GPS Receiver (DAGR) provides secure, military Selective Availability/Anti-Spoofing Module (SAASM)-based GPS in the most reliable and proven handheld form available today. It is a military-grade, dual-frequency receiver, and has the security hardware necessary to decode encrypted P(Y)-code GPS signals. Features include: graphical screen, with the ability to overlay map images, 12-channel continuous satellite tracking for ''all-in-view'' operation, simultaneous L1/L2 dual frequency GPS signal reception, extended performance in a diverse jamming environment, and SAASM compatibility.

s. The Gun Computer System (GCS) directs the actions of the ship's main gun battery and receives orders for

engagement and firing authorization from the Combat Management System. The GCS takes target data from ship sensors for air and surface targets, or operator-entered data for targets ashore, and calculates ballistic solutions and outputs gun positioning orders, ammunition loading and firing orders for the mount.

t. Low Frequency Active Towed Sonar (LFATS) is a low frequency, variable depth sonar used to detect, track and engage submarines. LFATS incorporates active and passive processing with 360-degree coverage. The VDS–100 system is designed for high performance at a lower operating frequency for improved performance.

u. Compact Low Frequency Active Passive Variable Depth Sonar-2 (CAPTAS–2) is a key sensor technology for identifying conventional, diesel-powered submarines operating in difficult sonar environments, such as littoral waters. CAPTAS–2 employs a single winch, which is used to pull the transmit tow body, and receiver array.

v. Infrared Search and Track (IRST) is a 360-degree, panoramic, day and night, passive air and surface surveillance system. The IRST system provides long-range detection with tracking of conventional, asymmetric and emerging threats.

w. Elta Electronic Warfare (EW) suite provides Radar Electronic Support Measures (RESM), Communications Electronics Support Measures (CESM), and Electronic Countermeasures (ECM) with counter-Unmanned Aerial System capability. Elta EW to include C–ESM, R–ESM, and ECM capability. The Elta EW suite is available internationally through ELTA Systems, a subsidiary of Israel Aerospace Industries.

x. Naval Laser-Warning System (NLWS) provides real time situational awareness of laser-based threats to enhance the tactical picture. NLWS interfaces with the ship's CMS, electronic support measures and onboard countermeasure system. NLWS is available internationally from SAAB.

y. SRQ–4 provides the Tactical Common Data Link (TCDL) to serve COMBATSS–21 for command and control (C2) functions for radar, FLIR and ESM data. Also, as the TCDL terminal on the ship, the AN/SRQ–4 exchanges classified SECRET level acoustic data with the AN/SQQ–89 for real-time shipboard processing of MH–60R deployed sonobuoys, increased sonobuoy processing, updated sonobuoy control and increased ASW tracks. The AN/SQQ–89 accepts MH–60R ASW data and processes the data shipboard as a coordinated tactical ASW picture with the Variable Depth Sonar. ASW Operators, at AN/SQQ–89 consoles, analyze the classified SECRET level data and integrate with COMBATSS–21 to provide full implementation and access to the capabilities of the MH–60R. The MH–60R Multi-Mission Helicopters, procured by the Hellenic Navy under a separate FMS case, introduces dipping sonar, upgraded radar, electronic warfare, weapons including MK 54 torpedoes and external command and control systems. With the MH–60R comes the need for a Ku-Band Common Data Link via a shipboard AN/SRQ–4 Radio Terminal System to support the high data rate requirements associated with aircraft systems.

z. The AN/SQQ–89 Undersea Warfare Combat System is a naval anti-submarine warfare (ASW) system for surface warships. The system presents an integrated picture of the tactical situation by receiving, combining and processing active and passive sensor data from the hull-mounted array, towed array and sonobuoys. The AN/SQQ–89 will interface with the SQS–56 sonar, VDS, SQR–4 and COMBATSS–21. It provides a full range of undersea warfare (USW) functions including active and passive sensors, underwater fire control, onboard trainer and a highly evolved display subsystem.

aa. The Fire Control Radar System is a medium-to-long range radar that interfaces with the Gun Control System (GCS) and COMBATSS–21.

bb. Improved Point Detection System-Lifecycle Replacement (IPDS–LR) is a ship-based Chemical Warfare Agent (CWA) detector designed for chemical detection of chemical warfare agent vapors onboard navy ships. The detector units have special interference rejection built into the detection algorithm and meets specifications for false alarm thresholds with sensitivity requirements. The sampling system includes specially designed sampling lines, filters, and bulkhead adapters to operate in marine environments.

cc. Enhanced Maritime Biological Detection (EMBD) is an automated biological point detection and identification system that provides near real time biological detection, warning, and presumptive identification against Biological Warfare Agents (BWAs). EMBD will provide an early indication that a BWA attack has occurred and provide identification information allowing ship commanding officers to select from an array of countermeasures that can prevent or limit exposure to the ship and other ships in the naval task force.

dd. Link 16 is an advanced command, control, communications, and intelligence (C3I) system incorporating high capacity, jam-resistant, digital communication links for exchange of near real-time tactical information, including both data and voice, among air, ground, and sea elements. It provides the warfighter key theater functions such as surveillance, identification, air control, weapons engagement coordination, and direction for all services and allied forces. With modernized cryptography, Link 16 will ensure interoperability into the future.

2. The overall highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness, or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Greece can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Greece.

[FR Doc. 2023–06742 Filed 3–30–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Uniform Formulary Beneficiary Advisory Panel; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of 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 Uniform Formulary Beneficiary Advisory Panel (UF BAP) will take place.

DATES: Open to the public Tuesday, April 4, 2023, 10:00 a.m.–1:00 p.m. (Eastern Standard Time).

ADDRESSES: The meeting will be held telephonically or via conference call. The phone number for the remote access on April 4, 2023 is: CONUS: 1–800–

369–2046; OCONUS: 1–203–827–7030; PARTICIPANT CODE: 8546285.

These numbers and the dial-in instructions will also be posted on the UF BAP website at: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.*

FOR FURTHER INFORMATION CONTACT: Designated Federal Official (DFO) Colonel Paul B. Carby, USA, 703–681–2890 (voice), *dha.ncr.j-6.mbx.baprequests@health.mil* (email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, VA 22042–5101. Website: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.* 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 chapter 10 of the United States Code (U.S.C.) (commonly known as the Federal Advisory Committee Act or FACA, the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Due to circumstances beyond the control of the Designated Federal Officer, the Uniform Formulary Beneficiary Advisory Panel was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its April 4, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting: The Panel will review and comment on recommendations made to the Director, Defense Health Agency, by the Pharmacy and Therapeutics Committee, regarding the Uniform Formulary.

Agenda:

1. 10:00 a.m.–10:10 a.m. Sign In for UF BAP members
2. 10:10 a.m.–10:40 a.m. Welcome and Opening Remarks
   a. Welcome, Opening Remarks, and Introduction of UF BAP Members by DFO, UF BAP
   b. Public Written Comments by DFO, UF BAP
   c. Opening Remarks by UF BAP Co-Chair
   d. Introductory Remarks by Chief, Formulary Management Branch
3. 10:40 a.m.–11:45 a.m. Scheduled Therapeutic Class Reviews
4. 11:45 a.m.–12:30 p.m. Newly Approved Drugs Review
5. 12:30 p.m.–12:45 p.m. Pertinent Utilization Management Issues

* Note that UF BAP discussion and vote will follow each section

6. 12:45 p.m.–1:00 p.m. Closing remarks
   a. Closing Remarks by UF BAP Co-Chair
   b. Closing Remarks by DFO, UF BAP

Meeting Accessibility: Pursuant to section 10(a)(1) of the FACA and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of phone lines, this meeting is open to the public. Telephone lines are limited and available to the first 220 people dialing in. There will be 220 lines total: 200 domestic and 20 international, including leader lines.

Written Statements: Pursuant to 41 CFR 102–3.140 and 3.150, and section 10(a)(3) of FACA, interested persons or organizations may submit written statements to the UF BAP about its mission and/or the agenda to be addressed in this public meeting. Written statements should be submitted to the UF BAP's DFO. The DFO's contact information can be found in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Written comments or statements must be received by the UF BAP's DFO at least five (5) calendar days prior to the meeting so they may be made available to the UF BAP for its consideration prior to the meeting. The DFO will review all submitted written statements and provide copies to UF BAP.

Dated: March 28, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–06699 Filed 3–30–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Nita M. Lowey 21st Century Community Learning Centers National Technical Assistance Center

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2023 for the Nita M. Lowey 21st Century Community Learning Centers (21st CCLC) National Technical Assistance Center (NTAC), Assistance Listing Number 84.287E. This notice relates to the approved information collection under OMB control number 1894–0006.

DATES:

Applications Available: March 31, 2023.

Deadline for Notice of Intent to Apply: May 1, 2023.

Deadline for Transmittal of Applications: May 30, 2023.

Deadline for Intergovernmental Review: July 31, 2023.

Pre-Application Webinar Information: The Department will hold a pre-application meeting via webinar for prospective applicants. Once scheduled, the date and time for the webinar will be posted at *https://oese.ed.gov/21st-cclc-national-technical-assistance-center-ntac/.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Julie Coplin, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202. Telephone: (202) 987–1797. Email: *21stCCLC@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 purpose of this discretionary grant is to create the 21st CCLC NTAC, which will support State educational agencies (SEAs) and their subgrantees that operate 21st CCLC programs.

Background: The 21st CCLC program provides essential out-of-school time learning that helps accelerate academic recovery and support students' social, emotional, and mental health. While out-of-school time opportunities are always essential, they have been especially critical as students continue to recover from the impacts of the COVID–19 pandemic. The 21st CCLC NTAC will help 21st CCLC grantees and subgrantees provide effective out-of-school time opportunities that have the biggest possible positive impact in students' lives.

Out-of-school time programming can be a key to success when programs are evidence-based and effective. For

example, available evidence [1] suggests that tutoring is especially helpful when tutors are well-trained, offer high-dosage tutoring, and are providing instruction and enrichment that is evidence-based and culturally and linguistically responsive. Practices that support student learning in the classroom are also important in tutoring, and the 21st CCLC NTAC will assist SEAs and 21st CCLC subgrantees in identifying and using evidence-based approaches and in providing professional development to educators, tutors, mentors, and others who support students.

The work the 21st CCLC NTAC will do is aligned with other key Department initiatives that are supporting access to urgently needed out-of-school time programming. For example, the Department launched the National Partnership for Student Success, a public-private partnership, to help increase the number of tutors, mentors, student success coaches, postsecondary transition coaches, and integrated student support coordinators to help students get back on track. (See *https://sites.ed.gov/cfbnp/national-partnership-for-student-success-launched/* for additional information.) In addition, the Department launched the Engage Every Student initiative to help expand high-quality out-of-school time learning opportunities, including those in 21st CCLCs. (See *https://www.ed.gov/ost* for additional information.) The Department has also encouraged State and local leaders to partner with AmeriCorps, including by clarifying that Department funds may be used to meet AmeriCorps matching requirements. (See *https://www2.ed.gov/policy/fund/guid/americorps-matching-letter.pdf?src=grants-page* for additional information.) AmeriCorps members may in turn serve as tutors, mentors, and student success coaches; assist with additional administrative responsibilities resulting from the pandemic; and provide creative enrichment opportunities, including by collaborating with 21st CCLCs.

21st CCLCs provide academic enrichment opportunities during non-school hours for students attending high-poverty, low-performing schools. The Department allocates 21st CCLC funds to SEAs that, in turn, award competitive subgrants to various entities to provide 21st CCLC programs. The awardee of this grant will collaboratively with the Department to: (a) identify needs of SEAs and 21st CCLC subgrantees, (b) provide best practices in program implementation, (c) develop technical assistance opportunities and tools, and (d) implement supports using a continuous improvement approach. The grantee will build the capacity of SEAs and their 21st CCLC subgrantees through communities of practice and the development of tools, webinars, resources, and courses that will be disseminated through a web portal in English, with a subset translated into Spanish, to support independent, self-paced learning. The Department also will house materials from the 21st CCLC Summer Symposium and annual meetings with SEA 21st CCLC directors on the portal. Members of the public will have access to the portal, although there will be a separate login for SEAs and 21st CCLC subgrantees. The grantee will develop and disseminate a monthly newsletter that will share recently developed products (*e.g.,* webinars, resources, tools) and announce opportunities to participate in a variety of convenings.

The 21st CCLC NTAC will initially focus on: (a) students' academic and mental health needs and alignment with the traditional school day (*e.g.,* literacy, math, overall well-being); (b) academic recovery (*e.g.,* acceleration, high-dosage tutoring); (c) science, technology, engineering, and mathematics (STEM) activities; (d) providing 21st CCLC programming in rural areas; (e) improving attendance and student engagement of middle and high school students; (f) re-engagement of disengaged youth; (g) implementation and evaluation of 21st CCLC programs; (h) supporting multilingual learners; (i) financial literacy; (j) supporting discretionary grants funded with 21st CCLC funds, including the Department's four current 21st CCLC Out-of-School Time Career Pathways grants; and (k) any other priority areas mutually identified by the grantee and the Department through annual service plans. In addition, the 21st CCLC NTAC will provide sessions and resources to support SEAs and their 21st CCLC subgrantees in the development and implementation of robust 21st CCLC programs. The grantee will periodically gather data from SEAs and a sample of 21st CCLC subgrantees, as well as the Department, to determine its activities and to plan its technical assistance using a multi-tiered system of supports and/or a multi-session series that incorporates principles of adult learning, resulting in improved systems and processes for SEAs and 21st CCLC subgrantees.

Upon award of this grant, the grantee will enter into a cooperative agreement with the Department that will set forth how the 21st CCLC NTAC will be developed, managed, and evaluated. As part of the cooperative agreement, the grantee will submit a plan to the Department for its review and approval that, for each year of the grant, lays out its technical assistance plan, focusing on technical assistance to individual SEAs, groups of SEAs (and possibly including 21st CCLC subgrantees), and to the 21st CCLC field at large.

Priorities:

This notice contains one absolute priority and three competitive preference priorities. We are establishing the Absolute Priority for the FY 2023 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1). Competitive Preference Priorities 1, 2, and 3 are from the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Building Capacity in 21st CCLC Programs.

The 21st CCLC NTAC must provide high-quality, universal and targeted capacity-building services to SEAs and 21st CCLC subgrantees to address common implementation challenges facing SEAs and 21st CCLC subgrantees and emerging trends in out-of-school time settings. The initial set of proposed activities must focus on (a) students' academic and mental health needs and alignment with the traditional school day (*e.g.,* literacy, math, overall well-being); (b) academic recovery (*e.g.,* acceleration, high-dosage tutoring); (c) STEM activities; (d) providing 21st CCLC programming in rural areas; (e) improving attendance and student engagement of middle and high school students; (f) re-engagement of disengaged youth; (g) implementation and evaluation of 21st CCLC programs; (h) supporting multilingual learners; (i) financial literacy; (j) supporting discretionary grants funded with 21st CCLC funds, including the Department's four current 21st CCLC Out-of-School Time Career Pathways grants; and (k)

[1] Nickow, A., Oreopoulos, P., & Quan, V. (2020, July). The Impressive Effects of Tutoring on PreK–12 Learning: A Systematic Review and Meta-Analysis of the Experimental Evidence. EdWorkingPaper: 20–267. Retrieved from Annenberg Institute at Brown University: *https://doi.org/10.26300/eh0c-pc52.*

any other priority areas mutually identified by the grantee and the Department through annual service plans.

Competitive Preference Priorities: These priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 15 points total to an application, depending on how well the application meets these priorities. An applicant must clearly indicate in the abstract section of its application which competitive preference priority or priorities it addresses.

Competitive Preference Priority 1: Addressing the Impact of COVID–19 on Students, Educators, and Faculty (up to 5 points).

Projects that are designed to address the impacts of the COVID–19 pandemic, including impacts that extend beyond the duration of the pandemic itself, on the students most impacted by the pandemic, with a focus on underserved students and the educators who serve them, both priority areas:

(a) Providing resources and supports to meet the basic, fundamental, health and safety needs of students and educators.

(b) Addressing students' social, emotional, mental health, and academic needs through approaches that are inclusive with regard to race, ethnicity, culture, language, and disability status.

Competitive Preference Priority 2: Promoting Equity in Student Access to Educational Resources and Opportunities (up to 5 points).—

Projects that are designed to promote educational equity and adequacy in student access to educational resources and opportunities for underserved students:

(a) In out-of-school-time settings; and

(b) That examine the sources of inequity and inadequacy and implement responses, by increasing student racial or socioeconomic diversity through developing evidence related to, or providing technical assistance on, evidence-based policies or strategies designed to increase inclusivity with regard to race, ethnicity, culture, language, and disability status.

Competitive Preference Priority 3: Meeting Student Social, Emotional, and Academic Needs (up to 5 points).

Projects that are designed to improve students' social, emotional, academic, and career development, with a focus on underserved students, through both of the following priority areas:

(a) Providing multi-tiered systems of supports that address learning barriers both in and out of the classroom, that enable healthy development and respond to students' needs and which may include evidence-based trauma-informed practices and professional development for educators on avoiding deficit-based approaches.

(b) Preparing educators to implement project-based or experiential learning opportunities for students to strengthen their metacognitive skills, self-direction, self-efficacy, competency, or motivation, including through instruction that: Connects to students' prior knowledge and experience; provides rich, engaging, complex, and motivating tasks; and offers opportunities for collaborative learning.

Application Requirements:

(1) Explain how the grantee's program design will create high-quality technical assistance for SEAs and 21st CCLC subgrantees in their work with targeted student populations and how the grantee will develop and implement a continuous improvement cycle to support the work.

(2) Describe how the grantee's project services will be carried out using a multi-tiered system of support to provide technical assistance virtually and onsite.

(3) Demonstrate expert knowledge of statutory requirements and regulations related to Title IV, Part B of the Elementary and Secondary Education Act of 1965 (ESEA) and current education issues and policy initiatives for supporting the implementation and scaling of evidence-based programs, practices, and interventions related to out-of-school time programming.

(4) Describe the current research on adult learning principles, coaching, and implementation science that will inform the applicant's capacity-building services.

(5) Present a proposed 5-year service plan that considers commonalities identified in final Department monitoring reports for 21st CCLC, implementation challenges faced by SEAs and 21st CCLC subgrantees, and emerging trends in out-of-school time settings. The 5-year service plan must include for each year, at a minimum, the following elements: high-leverage problems to be addressed, capacity-building services to be delivered both universally and through targeted assistance to SEAs and 21st CCLC subgrantees, key personnel responsible, milestones, outputs, and outcome measures.

(6) Present a proposed evaluation plan that describes the criteria for whether (a) milestones are met, (b) outputs are met, (c) SEA and 21st CCLC subgrantee outcomes (*i.e.,* short-term, mid-term, long-term) are met, and (d) capacity-building services are implemented as intended.

(7) A description of the applicant's demonstrated experience in providing training, information, and support to SEAs, local educational agencies (LEAs), schools, educators, parents, and organizations on effective out-of-school time policies and practices.

Program Requirements:

(1) Develop a service plan annually in consultation with the Department. The service plan must consider commonalities identified in finalized Department monitoring report findings in 21st CCLC programs, implementation challenges faced by SEAs and 21st CCLC subgrantees, and emerging trends in out-of-school time settings. The annual service plan must be an update to the 5-year plan submitted as part of the 21st CCLC NTAC's application. The annual service plan must include, at a minimum, the following elements: high-leverage problems to be addressed, capacity-building services to be delivered both universally and through targeted assistance to individual SEAs and 21st CCLC subgrantees, key personnel responsible, milestones, outputs, and outcome measures.

(2) Create and maintain the 21st CCLC NTAC website with an easy-to-navigate design that meets government or industry-recognized standards for accessibility.

(3) Obtain and retain education practitioners, researchers, policy professionals, and other consultants with direct experience with out-of-school time programs at the State and local level. Personnel must have a proven record of publishing in peer-reviewed journals, presenting at national conferences, and/or delivering quality adult learning experiences that meet SEA and 21st CCLC subgrantees' needs.

(4) Disseminate information (*e.g.,* instructional videos, tool kits, and briefs) including evidence-based practices to a variety of education stakeholders, including parents, students, and the general public, via multiple mechanisms such as the 21st CCLC NTAC website, social media, and other channels as appropriate.

(5) Assemble a Technical Assistance Advisory Committee (TAAC) consisting of SEAs and 21st CCLC subgrantees to work collaboratively on education strategies in out-of-school settings and implementation practices at least twice per year.

(6) Employ one full-time equivalent (FTE) project director who is capable of managing all aspects of the 21st CCLC NTAC.

(7) Within 90 days of receiving funding, demonstrate that any necessary contractors to assist in carrying out the

proposed services have been secured, to the extent contractors are needed.

Definitions: For the FY 2023 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, the definition of ''evidence-based'' is from section 8101(21) of the ESEA, and the definition of ''underserved student'' is from the Supplemental Priorities.

Evidence-based means an activity, strategy, or intervention that—

(i) demonstrates a statistically significant effect on improving student outcomes or other relevant outcomes based on—

(I) strong evidence from at least 1 well-designed and well-implemented experimental study;

(II) moderate evidence from at least 1 well-designed and well-implemented quasi-experimental study; or

(III) promising evidence from at least 1 well-designed and well-implemented correlational study with statistical controls for selection bias; or

(ii)(I) demonstrates a rationale based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes; and

(II) includes ongoing efforts to examine the effects of such activity, strategy, or intervention.

Underserved student means a student (which may include children in early learning environments, students in K–12 programs, and students in career and technical education, as appropriate) in one or more of the following subgroups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) A student who is a member of a federally recognized Indian Tribe.

(d) An English learner.

(e) A child or student with a disability.

(f) A disconnected youth.

(g) A technologically unconnected youth.

(h) A migrant student.

(i) A student experiencing homelessness or housing insecurity.

(j) A lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student.

(k) A student who is in foster care.

(l) A student without documentation of immigration status.

(m) A pregnant, parenting, or caregiving student.

(n) A student impacted by the justice system, including a formerly incarcerated student.

(o) A student performing significantly below grade level.

(p) A military- or veteran-connected student.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities and application requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under section 4202(a)(2) of the ESEA, and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forgo public comment on the priorities and requirements under section 437(d)(1) of GEPA. These priorities and requirements will apply to the FY 2023 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition.

Program Authority: 20 U.S.C. 7172(a)(2).

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, 79, 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 Supplemental Priorities.

II. Award Information

Type of Award: Cooperative Agreement.

Estimated Available Funds: $4,600,000 in FY 2023 and $4,100,000 in each subsequent fiscal year.

Maximum Award: We will not make an award exceeding $4,600,000 for a single 12-month budget period.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Research organizations.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the Applicable Regulations section of this notice.

4. *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 75 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; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

5. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for addressing all of these criteria is 100 points. The maximum score for addressing each criterion is indicated in parentheses.

(a) *Quality of the project design (20 points).*

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers one or more of the following factors:

(1) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(2) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(3) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(b) *Quality of project services (30 points).*

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers one or more of the following factors:

(1) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(2) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(3) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(4) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(c) *Quality of project personnel (20 points).*

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers one or more of the following factors:

(1) The qualifications, including relevant training and experience, of the project director or principal investigator.

(2) The qualifications, including relevant training and experience, of key project personnel.

(3) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(d) *Quality of the management plan (25 points).*

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers one or more of the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(4) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(e) *Quality of the project evaluation (5 points).*

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this program 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 the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

6. *Build America, Buy America Act:* This program is not subject to the Build America, Buy America Act (Pub. L. 117–58) domestic sourcing requirements.

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 also may notify you informally.

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. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works.

Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *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.*

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, the Department has established the following performance measures for the 21st CCLC NTAC program:

Measure 1: The percentage of 21st CCLC subgrantees reporting that the 21st CCLC NTAC resources were useful and applicable to their work, as evidenced by surveys.

Measure 2: The percentage of SEAs reporting that they are satisfied with the quality, usefulness, and relevance of technical assistance provided by the 21st CCLC NTAC, as evidenced by surveys.

Measure 3: The percentage of SEAs and 21st CCLC subgrantees that report changed policies or practices as a result of the technical assistance provided by the 21st CCLC NTAC, as evidenced by surveys.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, 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).

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.

James F. Lane,

Senior Advisor, Office of the Secretary Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Elementary and Secondary Education.

[FR Doc. 2023–06681 Filed 3–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0055]

Agency Information Collection Activities; Comment Request; Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 30, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0055. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Freddie Cross, 202–453–7224.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation.

OMB Control Number: 1840–0744.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 2,283.

Total Estimated Number of Annual Burden Hours: 185,000.

Abstract: This request is for a revision of the State Report Card and Institution and Program Report Card required by the Higher Education Act of 1965, as amended in 2008 by the Higher Education Opportunity Act (HEOA). States must report annually on criteria and assessments required for initial teacher credentials using a State Report Card (SRC), and institutions of higher education (IHEs) with teacher preparation programs (TPP), and TPPs outside of IHEs, must report on key program elements on an Institution and Program Report Card (IPRC). IHEs and TPPs outside of IHEs report annually to their states on program elements, including program numbers, type, enrollment figures, demographics, completion rates, goals and assurances to the state. States, in turn, must report on TPP elements to the Secretary of Education in addition to information on assessment pass rates, state standards, initial credential types and requirements, numbers of credentials issued, TPP classification as at-risk or low-performing. The information from states, institutions, and programs is published annually in The Secretary's Report to Congress on Teacher Quality.

The revisions to the IPRC consist of the following:

- A new sub-section about the impact of COVID–19 in Section I: Program Information. The section would have four questions in the first data collection year in which it is implemented, due to retrospective questions going back to academic year 2019–20, but only one question in subsequent data collection years.
- A new question about student completion rate in Section I: Program Information.
- Minor revisions to the gender and race/ethnicity categories in Section I: Program Information.

The revisions to the SRC consist of the following:

- Two new items showing completion rate, total and by program, pre-loaded from the IPRC for state

review, in Section I: Program Information.

- Five new multiple choice questions in Section VII: Teacher Shortages and Teacher Preparation, which are replacing three open text items.
- A new ''other'' response option for a multiple choice item in Section IX: Improvement Efforts.
- A new multiple choice and open text item in Section IX: Improvement Efforts.
- A new section (Section X) about the impact of COVID–19. The section would have three questions in the first data collection year in which it is implemented, due to retrospective questions going back to academic year 2019–20, but only one question in subsequent data collection years.
- Minor revisions to the gender and race/ethnicity categories in Section I: Program Information.

Dated: March 27, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–06667 Filed 3–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0054]

Agency Information Collection Activities; Comment Request; Grant Reallotment

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 30, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0054. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact David Steele, 202–245–6520.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Grant Reallotment.

OMB Control Number: 1820–0692.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 323.

Total Estimated Number of Annual Burden Hours: 11.

Abstract: The Rehabilitation Act of 1973, as amended (the Act), authorizes the Rehabilitation Services Administration (RSA) Commissioner to reallot to other grant recipients that portion of a recipient's annual grant that cannot be used. To maximize the use of appropriated funds under the formula grant programs, RSA has established a reallotment process for the State Vocational Rehabilitation Services (VR); State Supported Employment Services (Supported Employment); Independent Living Services for Older Individuals Who Are Blind (OIB); Client Assistance Program (CAP); and Protection and Advocacy of Individual Rights (PAIR) programs. The authority for RSA to reallot formula grant funds is found at sections 110(b)(2) (VR), 622(b) (Supported Employment), 752(i)(4) (OIB), 112(e)(2) (CAP), and 509(e) (PAIR) of the Act.

The information will be used by the RSA State Monitoring and Program Improvement Division (SMPID) to reallot formula grant funds for the awards mentioned above.

Dated: March 27, 2023.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–06625 Filed 3–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2023–OESE–0043]

Request for Information Regarding the Innovative Assessment Demonstration Authority

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Request for information.

SUMMARY: The Department of Education (Department) is requesting information on successful approaches to innovative assessment implementation that can encourage State educational agencies (SEAs) to pursue the Innovative Assessment Demonstration Authority (IADA) and improve statewide assessments. We will use this information to inform our implementation of IADA, under title I, part B of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA).

DATES: We must receive your comments on or before May 1, 2023.

ADDRESSES: Submit your comments to this request for information (RFI) through the Federal eRulemaking Portal

at *regulations.gov*. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site, under ''FAQ.'' Comments submitted by hand delivery, fax, email, or after the comment period will not be accepted. However, if you require an accommodation or cannot otherwise submit your comments via *regulations.gov*, please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. To ensure that the Department does not receive duplicate copies, please submit your comments only one time. To ensure that your comments have maximum effect in informing the Department's knowledge base of innovations in assessments, we encourage you to clearly identify the question number that each comment addresses. Additionally, please include the Docket ID at the top of your comments.

Privacy Note: The Department's policy is generally to make comments received from members of the public available for public viewing on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. The Department reserves the right to redact at any time any information that identifies other individuals, includes information that would allow readers to identify other individuals, or includes threats of harm to another person.

This is an RFI only. This RFI is not a request for proposals (RFP) or a promise to issue an RFP or a notice inviting applications. This RFI does not commit the Department to contract for any supply or service whatsoever. Further, we are not seeking proposals and will not accept unsolicited proposals. The Department will not pay for any information or administrative costs that you may incur in responding to this RFI. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

FOR FURTHER INFORMATION CONTACT: Patrick Rooney, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W202, Washington, DC 20202. Telephone: (202) 453–5514. Email: *patrick.rooney@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: The ESEA requires annual assessments of all students in grades 3–8 and assessments of students once in high school. When developed thoughtfully, these assessments are tools for advancing learning and promoting equity. When assessments are done poorly, in excess, or without a clear purpose, they divert time and resources from teaching and learning. The ESEA affords States important discretion in implementing assessment systems, including the opportunity to pilot new approaches or designs in summative assessments through IADA.

IADA is authorized in section 1204 of the ESEA, and the implementing regulations for IADA are found in 34 CFR 200.104 through 34 CFR 200.108.[1] IADA regulations address the following topics: definitions (§ 200.104); application requirements (§ 200.105); selection criteria (§ 200.106); transition to statewide use (§ 200.107); and extensions, waivers, and withdrawal of authority (§ 200.108).

IADA seeks to help States interested in fostering and scaling up high-quality, innovative assessments that will replace their current summative assessments. An SEA would require this demonstration authority if the SEA proposes to develop an innovative assessment in any grade or subject that requires academic assessments (section 1111(b)(2)(B) of the ESEA). Additionally, the SEA seeking IADA must first administer the assessment, initially, to students in only a subset of its local educational agencies (LEAs) or schools. Under IADA, schools participating in a pilot assessment would not have to also administer the current statewide assessment in that grade or subject to all students in those LEAs or schools. The State will scale up the innovative assessment over time, eventually using it statewide at the end of the demonstration authority. During the period of the demonstration authority, the results of IADA assessment must be used in the State's accountability system and the results must be included on State and local report cards.

Since 2018, five States have been awarded IADA.[2] Most recently, in 2021, the Department provided States with an opportunity [3] to apply for the IADA, but no States applied. The Department has received informal feedback from several States and stakeholders that one reason SEAs are reluctant to apply for IADA stems from perceived barriers within the current IADA regulations.

Section 1204(b)(2) of the ESEA establishes the five-year period for the demonstration authority, and ESEA section 1204(g) provides the Department with the discretion to extend the authority for an additional two years (if certain conditions are met as specified in 34 CFR 200.108(a)(1)). The ESEA further permits the Secretary to grant additional waivers to a State to extend the State's IADA authority, and the Department's regulations clarify that such waivers would be granted one year at a time.[4] Section 1204(e)(2)(A)(iv) of the ESEA requires that the State's application must demonstrate that the innovative assessment system will include valid and reliable results that are comparable to all students and for each subgroup of students described in section 1111(b)(2)(B)(xi), as compared to the results for such students on the State assessments under section 1111(b)(2). The Department has heard concerns that the regulations confine State ability to meet this comparability requirement in the statute such that it stifles innovation in new assessments. Section 200.105(b)(4)(i) currently provides the following five options for a State to meet the comparability requirement in the ESEA:

(A) Administering full assessments from both the innovative and statewide assessment systems to all students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered to all such students. As part of this determination, the innovative assessment and statewide assessment need not be administered to an individual student in the same school year.

(B) Administering full assessments from both the innovative and statewide assessment systems to a demographically representative sample of all students and subgroups of students described in section 1111(c)(2)

[1] See: *www.ecfr.gov/current/title-34/subtitle-B/chapter-II/part-200/subpart-E/subject-group-ECFR9277b2b0db822d9?toc=1.*

[2] New Hampshire and Louisiana in 2018; Georgia and North Carolina in 2019; and Massachusetts in 2020. Applications and Annual Reports from these States are available at: *https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/iada/.*

[3] See: *www.federalregister.gov/public-inspection/2021-00882/applications-for-new-authorities-innovative-assessment-demonstration-authority.*

[4] See: ESEA section 1204(j)(3) and 34 CFR 200.108(c)(2).

of the Act, from among those students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered in the same school year to all students included in the sample.

(C) Including, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

(D) Including, as a significant portion of the statewide assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

(E) An alternative method for demonstrating comparability that an SEA can demonstrate will provide for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment, including for each subgroup of students described in section 200.2(b)(11)(i)(A)–(I) and section 1111(b)(2)(B)(xi) and section 1111(h)(1)(C)(ii) of the Act.

The Department is seeking comments on whether these five approaches are sufficient to support States as they consider developing an assessment for implementation under the IADA authority, what additional examples or models of measuring comparability the Department should consider, and information about ideas or practices States might use to demonstrate comparability under section 200.105(b)(4)(i)(E).

In addition, current IADA regulations do not specify a timeline by which a State approved under IADA must begin to administer an operational IADA assessment in some schools or LEAs. Accordingly, the Department is seeking comments on whether the Department approving a State for IADA that includes a planning period would be helpful to the State in its development work.

We will review every comment and, as described above, electronic comments in response to this RFI will be publicly available on the Federal eRulemaking Portal at *www.regulations.gov.* Please note that the Department will not directly acknowledge or respond to comments, including comments that contain specific questions or inquiries. Receipt of comments in response to this request for information does not imply that the Department has decided to issue guidance, technical assistance, or other resources.

Detailed Questions: The Department invites stakeholders who are aware of policies and practices in educational assessment that are specifically relevant for innovation to address the following questions in their comments.

1. The Department is interested in whether there are additional considerations or approaches to comparability, whether through changes to current IADA regulations or additional guidance (for elaborating on the ''other method'' in section 200.105(b)(4)(i)(E)), for the innovative assessment.

a. Are there other methodologies that could be used as models to provide comparable results to current statewide assessments without compromising the innovative nature of the new assessments?

b. Are there ways that a State could plan for an orderly transition from using the achievement standards for the current statewide assessments to achievement standards for the innovative assessment as it scales to statewide use?

c. We note that ESEA section 1204(e)(2)(A)(iv) states that the IADA ''generate results that are valid and reliable, and comparable, for all students and for each subgroup of students described in section 1111(b)(2)(B)(xi), as compared to the results for such students on the State assessments under section 1111(b)(2);'' and ESEA section 1204(e)(2)(A)(x) states that the IADA ''generate an annual, summative achievement determination, based on the aligned State academic achievement standards under section 1111(b)(1) and based on annual data, for each individual student.'' Within these statutory requirements, are there other issues with respect to comparability that the Department should clarify, either in regulation or guidance to help states meet this requirement? Please be specific in: (a) describing the issue; (b) identifying the proposed change to address the issue; and (c) identifying how the change will lead to a State being more likely to apply for IADA.

2. Current IADA regulations do not specify a timeline by which a State approved under IADA must administer an operational IADA assessment in some schools or LEAs.

a. Would a State be more likely to submit an IADA application if the Department explicitly provided one or two planning years, after the granting of IADA authority, before the State first administers an operational IADA assessment in some schools or LEAs?

b. Noting that the State would need to have enough detail about its plan for the Department to grant IADA approval or pre-approval, please describe the benefit to the State that would be provided with one or two years of planning time as well as suggestions for the types of activities the State would undertake during the planning time?

3. Please describe any other barriers in the Department's regulations that might preclude a State from applying for IADA. Please be specific in: (a) identifying the regulatory provision; (b) describing the issue; (c) identifying the proposed change to address the issue; and (d) identifying how the change will lead to a State being more likely to apply for IADA.

In providing feedback, commenters are encouraged to cite published research on promising practices and methodologies for innovative assessment design and implementation. The Department is committed to improving the public's access to, and the discoverability of, education research. In service of that goal, we encourage responders to share any publications with us and we invite authors, those who hold copyright, or their authorized representatives to consider depositing eligible content into ERIC, the Institute of Education Sciences' bibliographic and full-text database of education research (*https://eric.ed.gov/*). More information about submitting content to ERIC, including our selection policy and how to access the online submission portal, can be found at *https://eric.ed.gov/submit/.*

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in

text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. The Department is committed to making its publications available to all members of the public. If you have difficulty understanding English, you may, free of charge, request language assistance services for Department information by calling 1–800–USA–LEARN (1–800–872–5327) (TTY: 1–800–877–8339) or email us at *Ed.Language.Assistance@ed.gov.*

James F. Lane,

Senior Advisor, Office of the Secretary Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary Office of Elementary and Secondary Education, U.S. Department of Education.

[FR Doc. 2023–06697 Filed 3–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Peer Review Opportunities With the U.S. Department of Education's Office of Career, Technical, and Adult Education (OCTAE); Office of Elementary and Secondary Education (OESE); Office of English Language Acquisition (OELA); Office of Postsecondary Education (OPE); and Office of Special Education and Rehabilitative Services (OSERS)

AGENCY: Office of Career, Technical, and Adult Education; Office of Elementary and Secondary Education; Office of English Language Acquisition; Office of Postsecondary Education; and Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) announces opportunities for individuals to participate in its peer review process for competitive grant funding under the programs administered by OCTAE, OESE, OELA, OPE, and OSERS.

DATES: Requests to serve as a peer reviewer for fiscal year 2023 will be accepted on an ongoing basis, aligned with this year's grant competition schedule. Requests to serve as a peer reviewer should be submitted at least four weeks prior to the program's application deadline noted on the Department's website under ''Forecast of Funding Opportunities'' at *www2.ed.gov/fund/grant/find/edlite-forecast.html.* This notice highlights the specific needs of OCTAE, OESE, OELA, OPE, and OSERS.

ADDRESSES: An individual interested in serving as a peer reviewer must register and upload his or her resume in the Department's grants management system known as ''G5'' at *www.g5.gov.*

FOR FURTHER INFORMATION CONTACT:

OCTAE: Daphnne Bonaparte, U.S. Department of Education, 400 Maryland Avenue SW, Room 10–358, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 987–1561. Email: *CTE@ed.gov.*

OESE: Andrew Brake, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W344, Washington, DC 20202. Telephone: (202) 453–6136. Email: *andrew.brake@ed.gov.*

OELA: Celeste McLaughlin, U.S. Department of Education, 400 Maryland Avenue SW, Room H3214, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7693. Email: *NAM@ed.gov.*

OPE: Tonya Hardin, U.S. Department of Education, 400 Maryland Avenue SW, Room 2C205, Washington, DC 20202. Telephone: (202) 453–7694. Email: *tonya.hardin@ed.gov.*

OSERS: Kate Friday, U.S. Department of Education, 400 Maryland Avenue SW, Room 5081B, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7605. Email: *kate.friday@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: The mission of the Department is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. The Department pursues its mission by funding grant programs that will improve access to high-quality educational opportunities and programs that pursue innovations in teaching and learning with a focus on underserved students. The Department also funds programs in other areas as authorized by statute. Grant funds are awarded to State educational agencies; local educational agencies (*i.e.,* school districts); State, local, or Tribal governments; nonprofit organizations; institutions of higher education; and other entities through a competitive process referred to as a grant competition.

Each year the Department convenes panels of external education professionals and practitioners to serve as peer reviewers.[1] Peer reviewers evaluate and score submitted applications against competition-specific criteria and announced priorities. Application scores are then used to inform the Secretary's funding decisions.

Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, directs Federal agencies to ''assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs.'' The Department is committed to increasing the racial and ethnic diversity of peer reviewers—an important element of the Department's efforts to implement this Executive order. Moreover, the Department is particularly interested in peer reviewers who represent diverse experiences and perspectives, including experiences working with diverse and underserved communities, and whose expertise pertains to OCTAE, OESE, OELA, OPE, and OSERS grant competitions, and this emphasis on increasing peer reviewer diversity is included in the Department's Agency Equity Plan, available at *www2.ed.gov/documents/equity/2022-equity-plan.pdf.*

This year, OCTAE is managing one grant competition: Career-Connected High School Initiative.

This year, OESE is managing approximately 25 grant competitions to fund a range of projects that support, education innovation and research; educator growth and diversity; magnet schools; charter schools; literacy; history and civics; family engagement; community schools; Indian education; school infrastructure; and out-of-school time learning, among others.

OELA is managing one grant competition: Native American and Alaska Native Children in School Program.

OPE is managing approximately 20 grant competitions to fund a wide range of projects, including projects to support improvements in educational quality, management, and financial stability at colleges and universities that enroll high numbers of underserved students; projects designed to increase college enrollment among students in high-poverty schools; projects designed to

[1] Please note that the Institute of Education Sciences (IES) uses different peer review processes and procedures than those described in this notice. More information on the IES peer review process can be found at: *https://ies.ed.gov/director/sro/application_review.asp.* IES also administers its research grant competitions on a different timeline from other offices in the Department.

increase college participation among low-income parent students by providing high-quality child care; projects designed to strengthen foreign language instruction, area and international studies, teaching and research, professional preparation and development for educators, and curriculum development at the K–12, graduate, and postsecondary levels; and other innovative projects designed to improve postsecondary education, including a new Postsecondary Student Success Grants competition under the Fund for the Improvement of Postsecondary Education, a tiered evidence grant program designed to develop and rigorously evaluate evidence-based interventions to improve postsecondary completion outcomes.

OSERS is managing nearly 20 grant competitions. The competitions in OSERS' Office of Special Education Programs (OSEP) include those under the following programs: State Personnel Development Grants; Personnel Development; Technical Assistance and Dissemination; Educational Technology, Media, and Materials; Parent Training and Information; and Technical Assistance on State Data Collection. The remaining competitions in OSERS' Rehabilitation Services Administration (RSA) are Section 21: Capacity Building in Traditionally Underserved Populations and the Disability Innovation Fund.

The Department seeks to expand its pool of peer reviewers to ensure that applications are evaluated by individuals with up-to-date and relevant knowledge of educational interventions and practices across the learning continuum, from early education to college and career, in a variety of learning settings. Department peer reviewers are education professionals and practitioners who have gained subject matter expertise through their education and work as teachers, professors, principals, administrators, school counselors, researchers, evaluators, content developers, or vocational rehabilitation professionals or interpreters. Peer reviewers can be active education professionals in any educational level or sector, or those who are retired but stay informed of current educational content and issues. No prior experience as a peer reviewer is required.

Peer reviewers for each competition will be selected based on several factors, including each reviewer's program-specific expertise, the number of applications to be reviewed, and the diversity and availability of prospective reviewers. Individuals selected to serve as peer reviewers are expected to participate in training; independently read, score, and provide written evaluative comments on assigned applications; and participate in facilitated panel discussions with other peer reviewers. Panel discussions are held via conference calls or in-person, as identified for the specific competition. The time commitment for peer reviewers is usually several hours a day over a period of two to four weeks. Peer reviewers receive an honorarium payment as monetary compensation for successfully reviewing applications.

If you are interested in serving as a peer reviewer for the Department, you should first review the program web pages of the grant programs that match your area of expertise. You can access information on each grant program from the link provided on the Department's grants forecast page at *www2.ed.gov/fund/grant/find/edlite-forecast.html.* If you have documented experience that you believe qualifies you to serve as a peer reviewer for one or more specific grant programs, please register in G5, at *www.g5.gov,* which allows the Department to manage and assign potential peer reviewers to competitions that may draw upon their professional backgrounds and expertise. A toolkit that includes helpful information on how to be considered as a peer reviewer for programs administered by the Department can be found at *www2.ed.gov/documents/peer-review/peer-reviewer-toolkit.pptx.* Neither the submission of a resume nor registration in G5 guarantees you will be selected to be a peer reviewer.

In addition to registering in G5, some OPE and OSERS/RSA peer reviews may require being registered in the System for Award Management (SAM). Since registration for this process can take longer than a week, interested individuals are encouraged to register in advance of being contacted by the Department. In addition to registering in G5, some OSERS/OSEP peer reviews require being approved to serve on the Office of Special Education's Standing Panel. Individuals should express their interest to serve as a peer reviewer for OSEP competitions directly to the competition manager listed in the Notice Inviting Applications at least four weeks prior to the application closing date.

If you have interest in serving as a reviewer specifically for the OCTAE competition (Chart 5 of the Forecast of Funding Opportunities), you must also send your resume to *CTE@ed.gov.* The subject line of the email should read ''Prospective 2023 Peer Reviewer.''

If you have interest in serving as a reviewer specifically for OESE competitions (Chart 2), you must also send your resume to *OESEPeerReviewRecruitment@ed.gov.*

If you have interest in serving as a reviewer specifically for the OELA competition (Chart 6), you must also send your resume to *NAM@ed.gov.* The subject line of the email should read ''Prospective 2023 Peer Reviewer.''

If you have interest in serving as a reviewer specifically for RSA competitions (Chart 4B) also send your resume to *RSAPeerReview@ed.gov* and *osersprs@ed.gov.* The subject line of the email should read ''Prospective 2023 Peer Reviewer.'' In the body of the email, list all programs for which you would like to be considered to serve as a peer reviewer.

Requests to serve as a peer reviewer should be submitted at least four weeks prior to the program's application deadline, noted on the forecast page, to provide program offices with sufficient time to review resumes and determine an individual's suitability to serve as a peer reviewer for a specific competition. If you are selected to serve as a peer reviewer, the program office will contact you.

Accessible Format: On request to the person(s) 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.

Program Authority: Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening

Career and Technical Education for the 21st Century Act (Pub. L. 115–224); Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6301 *et seq.*); Higher Education Act of 1965, as amended (20 U.S.C. 1001 *et seq.*); Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*); and the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (29 U.S.C. 701 *et seq.*).

Roberto J. Rodriguez,

Assistant Secretary for Planning, Evaluation and Policy Development.

[FR Doc. 2023–06675 Filed 3–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Case Number 2022–008; EERE–2022–BT–WAV–0027]

Energy Conservation Program: Notification of Petition for Waiver of Alliance Laundry Systems From the Department of Energy Clothes Washer Test Procedure and Notification of Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of petition for waiver and grant of an interim waiver; request for comments.

SUMMARY: This notification announces receipt of and publishes a petition for waiver and interim waiver from Alliance Laundry Systems (''Alliance''), which seeks a waiver for a specified residential clothes washer basic models from the U.S. Department of Energy (''DOE'') test procedure used for determining the efficiency of clothes washers. DOE also gives notification of an Interim Waiver Order that requires Alliance to test and rate the specified residential clothes washer basic models in accordance with the alternate test procedure set forth in the Interim Waiver Order. DOE solicits comments, data, and information concerning Alliance's petition and its suggested alternate test procedure to inform DOE's final decision on Alliance's waiver request.

DATES: Written comments and information are requested and will be accepted on or before May 1, 2023.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2022–BT–WAV–0027. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2022–BT–WAV–0027, by any of the following methods:

Email: AllianceLaundrySystemsCW2022WAV0027@ee.doe.gov. Include the case number [Case No. 2022–008] in the subject line of the message.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver [Case No. 2022–008], 1000 Independence Avenue SW, Washington, DC 20585–0121. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, public meeting attendee lists and transcripts (if a public meeting is held), comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2022-BT-WAV-0027.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Julia Hegarty, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–0729. Email: *AS_Waiver_Request@ee.doe.gov.* Ms. Melanie Lampton, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–33, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585–0103. Telephone: (240) 751–5157. Email: *Melanie.Lampton@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE is publishing Alliance's petition for waiver in its entirety, pursuant to 10 CFR 430.27(b)(1)(iv).[1] DOE is also publishing the Interim Waiver Order granted to Alliance, which serves as notification of DOE's determination regarding Alliance's petition for an interim waiver, pursuant to 10 CFR 430.27(e)(3). DOE invites all interested parties to submit in writing by May 1, 2023, comments and information on all aspects of the petition, including the alternate test procedure. Pursuant to 10 CFR 430.27(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Daryl Johnson, *Daryl.Johnson@alliancels.com,* P.O. Box 990, Shepard Street, Ripon, WI 54971.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. If this instruction is followed, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI''). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For

[1] The petition did not identify any of the information contained therein as confidential business information.

information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. Faxes will not be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Case Number 2022–008

Interim Waiver Order

I. Authority

The Energy Policy and Conservation Act, as amended (''EPCA''),[2] authorizes the U.S. Department of Energy (''DOE'') to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA [3] established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain types of consumer products. These products include residential clothes washers, the subject of this document. (42 U.S.C. 6292(a)(7))

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that product (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the product complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which reflect the energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and requires that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for clothes washers is contained in the Code of Federal Regulations (''CFR'') at 10 CFR part 430, subpart B, appendix J2, *Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers* (''appendix J2'').

Under 10 CFR 430.27, any interested person may submit a petition for waiver from DOE's test procedure requirements. DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(f)(2). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the performance of the product type in a manner representative of the energy consumption characteristics of the basic model. 10 CFR 430.27(b)(1)(iii). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2).

As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. 10 CFR 430.27(*l*). As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule to that effect. *Id.*

The waiver process also provides that DOE may grant an interim waiver if it appears likely that the underlying petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a

[2] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[3] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

determination on the underlying petition for waiver. 10 CFR 430.27(e)(3). Within one year of issuance of an interim waiver, DOE will either: (i) publish in the **Federal Register** a determination on the petition for waiver; or (ii) publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 430.27(h)(1).

If the interim waiver test procedure methodology is different than the decision and order test procedure methodology, certification reports to DOE required under 10 CFR 429.12 and any representations must be based on either of the two methodologies until 180 days after the publication date of the decision and order. Thereafter, certification reports and any representations must be based on the decision and order test procedure methodology, unless otherwise specified by DOE. 10 CFR 430.27(i)(1). When DOE amends the test procedure to address the issues presented in a waiver, the waiver or interim waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 429.27(h)(3).

II. Background

On June 1, 2022, DOE published a final rule (''June 2022 Final Rule'') amending DOE's clothes washer test procedures prescribed at 10 CFR part 430, subpart B, appendix J2. 87 FR 33316. Appendix J2 is currently required for use to demonstrate compliance with the currently applicable energy conservation standards. The June 2022 Final Rule also established a new test procedure at 10 CFR part 430, subpart B, appendix J (''appendix J''). Use of appendix J is not required until the compliance date of any energy conservation standards amended based on the test procedure in appendix J, should such amendments be adopted.

Prior to the amendments promulgated by the June 2022 Final Rule, section 1 of appendix J2 defined an automatic WFCS as ''a clothes washer water fill control system that does not allow or require the user to determine or select the water fill level, and includes adaptive water fill control systems and fixed water fill control systems.'' A fixed WFCS was defined as ''a clothes washer automatic water fill control system that automatically terminates the fill when the water reaches an appropriate level in the clothes container;'' [4] and an adaptive WFCS was defined as ''a clothes washer automatic water fill control system that is capable of automatically adjusting the water fill level based on the size or weight of the clothes load placed in the clothes container.'' Prior to the amendments promulgated by the June 2022 Final Rule, appendix J2 did not provide an explicit definition for user-adjustable automatic WFCS; however, section 3.2.6.2.2 of appendix J2 specified that a user-adjustable automatic WFCS ''affect[s] the relative wash water levels.'' Section 3.2.6.2.2 also specified the testing provisions applicable to clothes washers with a user-adjustable automatic WFCS.[5]

In the June 2022 Final Rule, DOE established a more explicit definition of a user-adjustable adaptive WFCS as ''a clothes washer fill control system that allows the user to adjust the amount of water that the machine provides, which is based on the size or weight of the clothes load placed in the clothes container.'' [6] 87 FR 33316, 33358, 33396. In conjunction with this change, DOE amended all instances of the term ''user-adjustable automatic'' to instead read ''user-adjustable adaptive.'' [7] *Id.* As a result of this change in terminology, the testing provisions at section 3.2.6.2.2 in appendix J2 as amended by the June 2022 Final Rule apply only to clothes washers with a user-adjustable *adaptive* WFCS, rather than a user-adjustable *automatic* WFCS (*i.e.,* the provisions at section 3.2.6.2.2 no longer accommodate a user-adjustable *fixed* WFCS).

III. Alliance's Petition for Waiver and Interim Waiver

On October 28, 2022, DOE received from Alliance a petition for waiver and interim waiver from the test procedure for clothes washers set forth at 10 CFR part 430, subpart B, appendix J2.[8] (Alliance, No. 1 at p. 1) [9] Pursuant to 10 CFR 430.27(e)(1), DOE posted the petition on the DOE website, at: *www.energy.gov/eere/buildings/current-test-procedure-waivers#Clothes%20Washers.* The petition did not identify any of the information contained therein as confidential business information.

In its petition for waiver and interim waiver, Alliance asserts that the change in wording from user-adjustable *automatic* WFCS to user-adjustable *adaptive* WFCS in the appendix J2 test procedure as finalized in the June 2022 Final Rule results in a lack of instruction as to how to test clothes washer basic models from Alliance that have a user-adjustable *fixed* WFCS. (Alliance, No. 1 at p. 1)

As presented in Alliance's petition, the specified basic models have a fixed WFCS and also have a ''Deep Fill'' button that allows the user to adjust the relative water level for each cycle. (*Id.*) Alliance stated that the specified basic models met the definition of a ''user-adjustable automatic water fill control system,'' as defined in appendix J2 prior to the June 2022 Final Rule. (*Id.*) Alliance noted that since the term was changed to be ''user-adjustable adaptive water fill control system'' in the June 2022 Final Rule, the specified basic models are no longer included in the definition. (*Id.*) [10]

[4] In the June 2022 Final Rule, DOE amended the definition of fixed WFCS to mean ''a clothes washer automatic water fill control system that automatically terminates the fill when the water reaches a pre-defined level that is not based on the size or weight of the clothes load placed in the clothes container, without allowing or requiring the user to determine or select the water fill level.'' 87 FR 33316, 33358, 33396.

[5] Specifically, section 3.2.6.2.2 of appendix J2 (prior to the amendments promulgated by the June 2022 Final Rule) specified that on clothes washers with a user-adjustable automatic WFCS, four tests are conducted: (1) using the maximum test load and the WFCS set in the setting that gives the most energy intensive result, (2) using the minimum test load and the WFCS set in the setting that that gives the most energy intensive result, (3) using the average test load and the WFCS set in the setting that that gives the most energy intensive result, and (4) using the average test load and the WFCS set in the setting that that gives the most energy intensive result.

[6] In the notice of proposed rulemaking preceding the June 2022 Final Rule, DOE had proposed to establish this definition for the term user-adjustable *automatic* WFCS [emphasis added]. 86 FR 49140, 49181 (Sep. 1, 2021). In response to this proposal, DOE received a comment stating that the proposed definition—by referencing that the amount of water is adjusted based on the size or weight of the clothes load placed in the clothes container—would include only user-adjustable *adaptive* WFCSs and not user-adjustable *fixed* WFCSs (since fixed WFCSs do not adjust the amount of water based on the size or weight of the clothing load). 87 FR 33316, 33358.

[7] In the June 2022 Final Rule, DOE posited that that a WFCS that provides user-adjustable fixed fill water levels would essentially be a manual WFCS, in the sense that a manual fill WFCS automatically terminates the fill when the water reaches the level in the clothes container corresponding to the level select by the user (*i.e.,* a ''fixed'' water level that is not automatically determined based on the size or weight of the clothes load and is selectable (*i.e.,* adjustable) by the user). 87 FR 33316, 33358–33359.

[8] The specific basic models for which the petition applies are Speed Queen R16 and Huebsch R16. These basic model names were provided by Alliance in its October 28, 2022, petition.

[9] A notation in this form provides a reference for information that is in the docket for this test procedure waiver (Docket No. EERE–2022–BT–WAV–0027) (available at *www.regulations.gov/document/EERE-2022-BT-WAV-0027-0001*). This notation indicates that the statement preceding the reference is document number 1 in the docket and appears at page 1 of that document.

[10] New appendix J, which will be required for use at the time of any potential amended standards, resolves this issue by not differentiating test

Continued

As discussed in the following section of this document, Alliance requested a waiver that would reinstate testing instructions for clothes washers with a user-adjustable fixed WFCS.

Alliance also requested an interim waiver from the existing DOE test procedure, explaining that if DOE were to deny its application for waiver and interim waiver, its affected models would need to be taken off the market, resulting in the loss of around 40 percent of Alliance's retail top-loading clothes washer sales and accompanying clothes dryers. (*Id.* at p. 2) DOE will grant an interim waiver if it appears likely that the petition for waiver will be granted, and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.27(e)(3).

IV. Requested Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of covered products. (42 U.S.C. 6293(c)) Consistency is important when making representations about the energy efficiency of covered products, including when demonstrating compliance with applicable DOE energy conservation standards. Pursuant to 10 CFR 430.27, and after consideration of public comments on the petition, DOE may establish in a subsequent Decision and Order an alternate test procedure for the basic models addressed by the Interim Waiver Order.

Alliance seeks to use an alternate test procedure to test and rate its clothes washer basic models subject to its petition. The alternate test procedure requested by Alliance would apply the provisions specified in section 3.2.6.2.2 of appendix J2 (as amended by the June 2022 Final Rule) for a user-adjustable adaptive WFCS to Alliance's models with a user-adjustable fixed WFCS.[11] These provisions are consistent with the provisions in section 3.2.6.2.2 of appendix J2 (prior to the June 2022 Final Rule) that were previously applicable to models with a user-adjustable fixed WFCS. (Alliance, No. 1 at pp. 1–2)

In its petition, Alliance asserted that testing provisions specified in appendix J2 as amended by the June 2022 Final Rule for a clothes washer with a user-adjustable adaptive WFCS would provide results that most represent real water and energy characteristics of the basic models subject to its petition because these provisions reflect how the end user would interact with these products, which would be the same as for other manufacturers' models that also include a deep fill option and are tested using this method. Additionally, Alliance asserted that this method would require half of the test runs to be run with deep fill off and half with deep fill on, such that the water usage for all possible settings that affect water level in the DOE test cycle would be tested and factored into the final result. (*Id.* at p. 2)

V. Interim Waiver Order

DOE has reviewed Alliance's application for an interim waiver, the alternate test procedure requested by Alliance, and the control panel and user manual of the basic models subject to the petition as well as control panels and user manuals of other clothes washer models on the market with similar ''Deep Fill'' type options, but which have a user-adjustable adaptive WFCS.[12]

DOE's review of these materials indicates that the basic models subject to this petition provide the same user interface and implementation of the ''Deep Fill'' setting as other models with a user-adjustable adaptive WFCS, suggesting that consumer usage of this feature on the Alliance basic models would be similar to the consumer usage of the deep fill feature on other clothes washer models with a user-adjustable adaptive WFCS. Given this comparison, DOE has initially determined that testing the basic models subject to Alliance's petition using the alternate test procedure requested by Alliance would evaluate the performance of these basic models in a manner representative of the basic models' energy and water consumption characteristics.

In summary, DOE has initially determined that the alternate test procedure appears to allow for the accurate measurement of the efficiency of the specified basic models, while alleviating the testing problems cited by Alliance in implementing the DOE test procedure for these basic models. Consequently, DOE has determined that Alliance's petition for waiver likely will be granted. Furthermore, DOE has determined that it is desirable for public policy reasons to grant Alliance immediate relief pending a determination of the petition for waiver.

For the reasons stated, it is *ordered* that:

(1) Alliance must test and rate the following residential clothes washer basic models with the alternate test procedure set forth in paragraph (2).

Brand	Basic model
Speed Queen	R16
Huebsch	R16

(2) The alternate test procedure for the Alliance basic models identified in paragraph (1) of this Interim Waiver Order is the test procedure for clothes washers prescribed by DOE at 10 CFR part 430, subpart B, appendix J2, using the provisions specified in section 3.2.6.2.2 of appendix J2 for a clothes washer with a user-adjustable adaptive WFCS. All other requirements of appendix J2 and DOE's regulations remain applicable.

(3) *Representations.* Alliance may not make representations about the efficiency of a basic model listed in paragraph (1) of this Interim Waiver Order for compliance, marketing, or other purposes unless that basic model has been tested in accordance with the provisions set forth in this alternate test procedure and such representations fairly disclose the results of such testing.

(4) This Interim Waiver Order shall remain in effect according to the provisions of 10 CFR 430.27.

(5) This Interim Waiver Order is issued on the condition that the statements, representations, test data, and documentary materials provided by Alliance are valid. If Alliance makes any modifications to the controls or configurations of a basic model subject to this Interim Waiver Order, such modifications will render the waiver

provisions by type of WFCS. If granted, this waiver would apply only to appendix J2 testing.

[11] Specifically, section 3.2.6.2.2 of appendix J2 as amended by the June 2022 Final Rule specifies the following test provisions for clothes washers with a user-adjustable adaptive WFCS: Conduct four tests on clothes washers with user-adjustable adaptive water fill controls. Conduct the first test using the maximum test load and with the adaptive water fill control system set in the setting that uses the most water. Conduct the second test using the minimum test load and with the adaptive water fill control system set in the setting that uses the least water. Conduct the third test using the average test load and with the adaptive water fill control system set in the setting that uses the most water. Conduct the fourth test using the average test load and with the adaptive water fill control system set in the setting that uses the least water. Average the results of the third and fourth tests to obtain the energy and water consumption values for the average test load size.

[12] The user manual for an individual model concerned by the waiver request is available at *docs.alliancelaundry.com/tech_pdf/Production/204807en.pdf.* User manuals for other models with ''Deep Fill'' options are available at *products.geappliances.com/MarketingObjectRetrieval/Dispatcher?RequestType=PDF&Name=49-3000255-2.pdf&_ga=2.25206205.1455460763.1668610312-280138474.1643989292* and *www.maytag.com/content/dam/global/documents/201910/owners-manual-w11197727-reva.pdf.*

invalid with respect to that basic model, and Alliance will either be required to use the current Federal test method or submit a new application for a test procedure waiver. DOE may rescind or modify this waiver at any time if it determines the factual basis underlying the petition for the Interim Waiver Order is incorrect, or the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics. 10 CFR 430.27(k)(1). Likewise, Alliance may request that DOE rescind or modify the Interim Waiver Order if Alliance discovers an error in the information provided to DOE as part of its petition, determines that the interim waiver is no longer needed, or for other appropriate reasons. 10 CFR 430.27(k)(2).

(6) Issuance of this Interim Waiver Order does not release Alliance from the applicable requirements set forth at 10 CFR part 429.

DOE makes decisions on waivers and interim waivers for only those basic models specifically set out in the petition, not future models that may be manufactured by the petitioner. Alliance may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional basic models of clothes washers. Alternatively, if appropriate, Alliance may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition consistent with 10 CFR 430.27(g).

Signing Authority

This document of the Department of Energy was signed on March 28, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 28, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

October 28, 2022

Julia Hegarty
AS_Waiver_Requests@ee.doe.gov

Re: Waiver Petition

On behalf of Alliance Laundry Systems, I would like to submit this petition for waiver and interim waiver for our R16 basic model of clothes washer. Please see the items below for the information required for this petition.

1. Identify the particular basic model(s) for which a waiver is requested.

a. The requested waiver will cover models included in Alliance Laundry Systems basic model R16.

2. Brand names under which the identified basic model(s) will be distributed in commerce.

a. These models are distributed under the Speed Queen and Huebsch brand names.

3. Design characteristic(s) constituting the grounds for the petition.

a. This basic model has a user adjustable ''automatic'' water fill control system, rather than a user adjustable ''adaptive'' water fill control system as redefined in the amended J2 procedure which machines must be tested to starting November 28, 2022.

4. Specific requirements sought to be waived.

a. Requesting that the requirement to meet the definition of user adjustable ''adaptive'' water fill control system as redefined in the amended J2 test procedure effective July 1, 2022 is waived, and allow this basic model to continue being testing as a user adjustable ''automatic'' water fill control system until the next standards revision.

5. Discuss in detail the need for the requested waiver.

a. The amended test J2 test procedure with effective date of July 1, 2022 would make a small change in wording that would have a profound effect for the Alliance R16 basic model of clothes washer. The Alliance washer has a fixed fill system, and also has a ''Deep Fill'' button that allows the user to adjust the relative water level for each cycle. This fits within the current test procedure applicable to a ''user-adjustable automatic water fill control system.'' See current 10 CFR part 430, subpart B, App. J2 (Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-automatic Clothes Washers), § 3.2.6.2. The definition in the amended version of J2 would make a material change by changing ''automatic'' to ''adaptive'' (''user-adjustable adaptive water fill control system''). It appears that this change could exclude the Alliance washer from the new definition ''user-adjustable adaptive water fill control system.'' For the new Appendix J there is a clear definition (Table III.2) that would move this product into the category of a ''manual fill'', but there is not a new definition for this type of WFCS in the amended J2.

6. Identify manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition.

a. Samsung, Whirlpool, LG, GE all have models which use a ''Deep Fill'' modifier button to add more water relative to the default fill level, but most of them would likely still fit the revised definition of user adjustable adaptive WFCS. The user interacts with these products in the same way as they would with our R16 basic model with ''Deep Fill'' option. However, without testing the competitor's models there is no way to know if they are fixed fill or adaptive fill.

7. Include any alternate test procedures known to the petitioner to evaluate the performance of the product type in a manner representative of the energy and/or water consumption characteristics of the basic model.

a. We believe that the procedure described in the amended J2 for a user adjustable adaptive WFCS would provide results that most represent real water and energy characteristics of this basic model, for the reasons shown below.

i. Reflects how the end user would interact with this product, which is the same as with other manufacturers models that also include a deep fill option and are tested using this method.

ii. Requires half of the test runs to be done with deep fill off and half with it turned on, so water usage for all possible settings that affect water level in the DOE test cycle are being tested and factored into the final result with equal weighting.

iii. The default fill level on this product is a fixed fill, which is still classified as an automatic fill system in the amended J2 procedure, and the deep fill option adjusts the water level relative to the default level. There are no manually selectable small, medium, or large load sizes.

iv. Selecting the deep fill option only changes the water level relative to the

default level. It does not add any additional hot water, increase wash time, or change the cycle in any other way that would have a noticeable effect on energy usage of this product.

8. Each petition for interim waiver must reference the related petition for waiver.

a. Not applicable.

9. Demonstrate likely success of the petition for waiver and interim waiver, and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the petition for waiver and interim waiver.

a. The amended J2 test procedure does not have a clear definition for testing a user adjustable fixed WFCS. Based on other similar products on the market that have a Deep Fill option and the fact that our R16 basic model interacts with the user in the same manner, we believe that testing using the procedure defined for user adjustable adaptive WFCS is appropriate for this product. If the waiver were to be denied and our R16 basic model had to be taken off the market, it would result in the loss of about 40% of our retail top load washer sales and the accompanying dryers.

Sincerely,
/s/
Daryl T. Johnson,
Manager—Small Chassis Engineering.

[FR Doc. 2023–06750 Filed 3–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Electricity Advisory Committee

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Electricity Advisory Committee (EAC). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**. This meeting will be held virtually for members of the public and the EAC members.

DATES: Friday April 21, 2023; 3:00–4:00 p.m. EST.

ADDRESSES: Virtual meeting for members of the public, EAC members, Department of Energy (DOE) representatives, agency liaisons, and EAC support staff. To register to attend virtually, please visit the meeting website: *https://www.energy.gov/oe/april-21-2023-electricity-advisory-committee-meeting.*

FOR FURTHER INFORMATION CONTACT: Jayne Faith, Designated Federal Officer, Office of Electricity, U.S. Department of Energy, Washington, DC 20585; Telephone: (202) 586–2983 or Email: *Jayne.Faith@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The EAC was established in accordance with the provisions of FACA, as amended, to provide advice to the U.S. Department of Energy (DOE) in implementing the Energy Policy Act of 2005, executing certain sections of the Energy Independence and Security Act of 2007, and modernizing the nation's electricity delivery infrastructure. The EAC is composed of individuals of diverse backgrounds selected for their technical expertise and experience, established records of distinguished professional service, and their knowledge of issues that pertain to the electric sector.

Tentative Agenda: The meeting will start at 3:00 p.m. Eastern Time on April 21, 2023. Agenda items for this meeting include a discussion of a draft recommendation concerning national transmission corridors and public comments. The meeting will conclude at approximately at 4:00 p.m. The meeting agenda and times may change to accommodate EAC business. For EAC agenda updates, see the EAC website at: *https://www.energy.gov/oe/april-21-2023-electricity-advisory-committee-meeting.*

Public Participation: The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://www.energy.gov/oe/april-21-2023-electricity-advisory-committee-meeting.* Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 20 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed three minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so by sending an email to Ms. Jayne Faith at *Jayne.Faith@hq.doe.gov,* no later than 5:00 p.m. on April 20, 2023. Anyone who is not able to attend the meeting, or for whom the allotted public comments time is insufficient to address pertinent issues with the EAC, is invited to send a written statement identified by ''*Electricity Advisory Committee April 2023 Meeting,*'' to Ms. Jayne Faith at *Jayne.Faith@hq.doe.gov.*

Minutes: A recording and minutes of the EAC meeting will be posted on the EAC web page at *www.energy.gov/oe/april-21-2023-electricity-advisory-committee-meeting.* They can also be obtained by contacting Ms. Jayne Faith at the address above.

Signed in Washington, DC, on March 28, 2023.

LaTanya R. Butler,
Deputy Committee Management Officer.

[FR Doc. 2023–06722 Filed 3–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho Cleanup Project

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho Cleanup Project (ICP). The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, April 27, 2023; 9:00 a.m.–12:00 p.m. MDT.

An opportunity for public comment will be at 11:45 a.m. MDT.

These times are subject to change; please contact the ICP Citizens Advisory Board (CAB) Administrator (below) for confirmation of times prior to the meeting.

ADDRESSES: This meeting will be open to the public in-person at the Residence Inn (address below) or virtually via Zoom. To attend virtually, please contact Mariah Porter, ICP CAB Administrator, by email *mariah.porter@northwindgrp.com* or phone (208) 557–7857, no later than 5:00 p.m. MDT on Tuesday, April 25, 2023.

Board members, Department of Energy (DOE) representatives, agency liaisons, and Board support staff will participate in-person, following COVID–19 precautionary measures, at: Residence Inn, 635 West Broadway Street, Idaho Falls, ID 83404.

Attendees should check the ICP CAB Administrator (below) for any meeting format changes due to COVID–19 protocols.

FOR FURTHER INFORMATION CONTACT: Mariah Porter, ICP CAB Administrator, by phone (208) 557–7857 or email *mariah.porter@northwindgrp.com* or

visit the Board's internet homepage at *https://energy.gov/em/icpcab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda (agenda topics may change up to the day of the meeting; please contact Mariah Porter for the most current agenda):

1. Recent Public Outreach
2. Program Presentations
3. DOE Presentation

Public Participation: The in-person/online virtual hybrid meeting is open to the public either in-person at the Residence Inn or via Zoom. To sign-up for public comment, please contact the ICP CAB Administrator (above) no later than 5:00 p.m. MDT on Tuesday, April 25, 2023. In addition to participation in the live public comment sessions identified above, written statements may be filed with the Board either five days before or five days after the meeting by sending them to the ICP CAB Administrator at the aforementioned email address. Written public comment received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Mariah Porter, ICP CAB Administrator, phone (208) 557–7857 or email *mariah.porter@northwindgrp.com.* Minutes will also be available at the following website: *https://www.energy.gov/em/icpcab/listings/cab-meetings.*

Signed in Washington, DC, on March 27, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–06728 Filed 3–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension; Correction

AGENCY: Office of Sustainability and Asset Management, Department of Energy.

ACTION: Notice of request for comments; correction.

SUMMARY: On January 19, 2023, the Office of Sustainability and Asset Management, Department of Energy, published a request for comments in the **Federal Register** on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Monja Vadnais, Acting Director, Office of Sustainability and Asset Management, U.S. Department of Energy, 1000 Independence Avenue, Washington, DC 20585; Telephone: (202) 287–1563; Email: *monja.vadnais@hq.doe.gov.*

Correction

In the **Federal Register** of January 19, 2023, FR Doc. 2023–00966, (88 FR 3398) under the **SUPPLEMENTARY INFORMATION** section, the following corrections are made:

(5) *Annual Estimated Number of Respondents:* 201;

(6) *Annual Estimated Number of Total Responses:* 367;

(7) *Annual Estimated Number of Burden Hours:* 3722;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $160,826.

Reason for Correction: The change aims to correct the collection information based upon the new OMB 1910–1000 Supporting Statement template.

Signing Authority

This document of the Department of Energy was signed on March 14, 2023, by Monja Vadnais, Acting Director for the Office of Sustainability and Asset Management, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 28, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–06725 Filed 3–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2701–000]

Erie Boulevard Hydropower, L.P.; Notice of Authorization for Continued Project Operation

The license for the West Canada Creek Hydroelectric Project No. 2701 was issued for a period ending February 28, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2701 is issued to Erie Boulevard Hydropower, L.P., for a period effective March 1, 2023, through February 29, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before February 29, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Erie Boulevard Hydropower, L.P. is authorized to continue operation of the West Canada Creek Hydroelectric Project under the terms and conditions of the prior license until the issuance of

a new license for the project or other disposition under the FPA, whichever comes first.

Dated: March 27, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–06748 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–591–000.

Applicants: Guardian Pipeline, L.L.C.

Description: § 4(d) Rate Filing: Amendment to Non-Conforming Agreements to be effective 4/1/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5025.

Comment Date: 5 pm ET 4/10/23.

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: March 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–06694 Filed 3–30–23; 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 Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–49–000; QF22–58–000.

Applicants: McAdoo & Allen, Inc.

Description: Petition for Enforcement and Declaratory Order of McAdoo & Allen, Inc. d/b/a Quaker Color.

Filed Date: 3/17/23.

Accession Number: 20230317–5180.

Comment Date: 5 p.m. ET 4/7/23.

Docket Numbers: EL23–50–000.

Applicants: Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.

Description: Complaint of Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.

Filed Date: 3/27/23.

Accession Number: 20230327–5039.

Comment Date: 5 p.m. ET 4/17/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–1489–002; ER16–1154–009; ER13–1101–027; ER13–1541–026; ER14–787–020; ER14–661–017; ER15–54–011; ER15–55–011; ER15–1475–012; ER15–2593–011; ER16–452–010; ER16–1882–004; ER16–705–008; ER16–706–008; ER17–2508–003; ER17–252–005; ER21–1988–003; ER21–2867–001.

Applicants: Tri-State Generation and Transmission Association, Inc., SP Garland Solar Storage, LLC, 2016 ESA Project Company, LLC, RE Gaskell West 1 LLC, RE Garland A LLC, RE Garland LLC, Boulder Solar Power, LLC, RE Tranquillity LLC, Desert Stateline LLC, North Star Solar, LLC, Blackwell Solar, LLC, Lost Hills Solar, LLC, SG2 Imperial Valley LLC, Macho Springs Solar, LLC, Campo Verde Solar, LLC, Spectrum Nevada Solar, LLC, Parrey, LLC, SP Cimarron I, LLC.

Description: Supplement to June 30, 2022, Triennial Market Power Analysis for Southwest Region of SP Cimarron I, LLC, et al.

Filed Date: 3/24/23.

Accession Number: 20230324–5336.

Comment Date: 5 p.m. ET 4/14/23.

Docket Numbers: ER19–1078–002.

Applicants: PPA Grand Johanna LLC.

Description: Compliance filing: Notice of Change in Status to be effective 3/28/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5184.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER22–611–002.

Applicants: Wildcat I Energy Storage, LLC.

Description: Compliance filing: Notice of Change in Status to be effective 3/28/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5185.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER22–1554–003.

Applicants: Ford County Wind Farm LLC.

Description: Compliance filing: Compliance Filing Revising Tariff Record to be effective 7/1/2022.

Filed Date: 3/27/23.

Accession Number: 20230327–5145.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–567–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: Deficiency Response—Transmission Owner Project Evaluation Process to be effective 2/6/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5186.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1034–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment to ISA, SA No. 6000; Queue No. AD2–116 in Docket No. ER23–1034 to be effective 4/3/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5180.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1466–000.

Applicants: Interstate Power and Light Company, ITC Midwest LLC.

Description: § 205(d) Rate Filing: Interstate Power and Light Company submits tariff filing per 35.13(a)(2)(iii: Update to O&T Agreement Exhibits and Appendices (2023) to be effective 5/29/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5017.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1467–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 6857; Queue No. AC1–168 to be effective 2/23/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5042.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1468–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5836; Queue No. AE2–227 to be effective 5/27/2023.

Filed Date: 3/27/23.

Accession Number: 20230327–5047.

Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1469–000.

Applicants: Arroyo Solar LLC.

Description: Initial rate filing: Certificate of Concurrence to Operational Control and Maintenance Agreement to be effective 12/31/2022.

Filed Date: 3/27/23.
Accession Number: 20230327–5058.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1470–000.
Applicants: Cottontail Solar 2, LLC.
Description: Baseline eTariff Filing: Petition for MBR Authorization with Waivers & Expedited Treatment to be effective 4/15/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5070.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1471–000.
Applicants: MPower Energy NJ LLC.
Description: Baseline eTariff Filing: MPE_NJ_FERC_Application to be effective 4/26/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5075.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1472–000.
Applicants: SunZia Transmission, LLC.
Description: § 205(d) Rate Filing: Generator Interconnection Agreement with SunZia Wind PowerCo LLC to be effective 5/26/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5078.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1473–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5837; Queue No. AE2–228 to be effective 5/27/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5083.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1474–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6838; Queue No. AF2–356 to be effective 2/23/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5120.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1475–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–03–27_Phasing Out Stored Energy Resources and SER–II to be effective 6/1/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5135.
Comment Date: 5 p.m. ET 4/17/23.

Docket Numbers: ER23–1476–000.
Applicants: Cottontail Solar 8, LLC.
Description: Baseline eTariff Filing: Petition for MBR Authorization with Waivers & Expedited Treatment to be effective 4/15/2023.
Filed Date: 3/27/23.
Accession Number: 20230327–5160.
Comment Date: 5 p.m. ET 4/17/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–38–000.
Applicants: Northern Maine Independent Administrator, Inc.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Northern Maine Independent System Administrator, Inc.
Filed Date: 3/24/23.
Accession Number: 20230324–5284.
Comment Date: 5 p.m. ET 4/14/23.

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: March 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–06690 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1445–000]

Hobnail Solar, 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 Hobnail Solar, 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 April 17, 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: March 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–06691 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2533–000]

Brainerd Public Utilities; Notice of Authorization for Continued Project Operation

The license for the Brainerd Hydroelectric Project No. 2533 was issued for a period ending February 28, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2533 is issued to the City of Brainerd for a period effective March 1, 2023, through February 29, 2024 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before February 29, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that City of Brainerd is authorized to continue operation of the Brainerd Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: March 27, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–06747 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5728–000]

Sandy Hollow Power Company, Inc.; Notice of Authorization for Continued Project Operation

The license for the Sandy Hollow Hydroelectric Project No. 5728 was issued for a period ending February 28, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 5728 is issued to the Sandy Hollow Power Company, Inc. for a period effective March 1, 2023, through February 29, 2024 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before February 29, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the Sandy Hollow Power Company, Inc. is authorized to continue operation of the Sandy Hollow Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: March 27, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–06746 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL23–27–000]

Nevada Power Company; Notice Granting Motion To Hold Proceeding in Abeyance

On March 16, 2023, Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Power) filed a joint motion to hold the show cause proceeding in the above-captioned docket [1] in abeyance while the Commission considers a concurrently filed Federal Power Act (FPA) section 205 filing made by Nevada Power in Docket No. ER23–1406–000.

Nevada Power states that, in the FPA section 205 filing, it proposes revisions to its tariff to specify the method for allocating network upgrade costs among interconnection customers in a cluster. Nevada Power represents that good cause exists to hold the show cause proceeding in Docket No. EL23–27–000 in abeyance because if the Commission accepts the proposed revisions to Nevada Power's tariff in Docket No. ER23–1406–000, then the basis for the Show Cause Order would be addressed.

Upon consideration, notice is hereby given that Nevada Power's motion is granted and the show cause proceeding in Docket No. EL23–27–000 will be held in abeyance pending the Commission's consideration of the filing in Docket No. ER23–1406–000.

[1] *Nev. Power Co.,* 182 FERC ¶ 61,051 (2023) (Show Cause Order) (finding that Nevada Power's Large Generator Interconnection Procedures appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful and instituting a show cause proceeding pursuant to FPA section 206).

Dated: March 27, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–06695 Filed 3–30–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2023–0030; FRL–10828–01–OA]

Notice of Meeting of the EPA Children's Health Protection Advisory Committee (CHPAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given that the next meeting of the Children's Health Protection Advisory Committee (CHPAC) will be held virtually and in-person on May 17 and 18, 2023 at the U.S. Environmental Protection Agency (EPA) Headquarters located at 1200 Pennsylvania Avenue NW, Washington, DC 20460. The CHPAC advises EPA on science, regulations and other issues relating to children's environmental health.

DATES: May 17, 2023, from 9 a.m. to 5:30 p.m. and May 18, 2023, from 9 a.m. to 3:30 p.m.

ADDRESSES: The meeting will take place virtually and in-person. If you want to listen to the meeting or provide comments, please email *nguyen.amelia@epa.gov* for further details.

FOR FURTHER INFORMATION CONTACT: Amelia Nguyen, Office of Children's Health Protection, U.S. EPA, MC 1107T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, (202) 564–4268, or *nguyen.amelia@epa.gov.*

SUPPLEMENTARY INFORMATION: The meetings of the CHPAC are open to the public. An agenda will be posted to *https://www.epa.gov/children/chpac.*

Access and Accommodations: For information on access or services for individuals with disabilities, please contact Amelia Nguyen at 202–564–4268 or *nguyen.amelia@epa.gov.*

Amelia Nguyen,

Biologist, Office of Children's Health Protection.

[FR Doc. 2023–06733 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0138; FRL–10865–01–OAR]

Proposed Information Collection Request; Comment Request; Regional Haze Regulations (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), ''Renewal of the ICR for the Regional Haze Regulations'' (EPA ICR No. 2540.04 OMB Control No. 2060–0704) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. An Agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before May 30, 2023.

ADDRESSES: Comments. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2023–0138, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*e.g.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.* Certain other material, such as copyrighted material, will not be placed on the internet but may be viewed, with prior arrangement, at the EPA Docket Center. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at: *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Macie Moore, Air Quality Policy Division, Office of Air Quality Planning and Standards, mail code C539–04, U.S. Environmental Protection Agency, Research Triangle Park, NC 27709; email address: *moore.macie@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is (202) 566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The EPA will consider the comments received and amend the ICR

as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This ICR is for activities related to the implementation of the EPA's Regional Haze Rule (2017 rule revision),[1] for the period between September 30, 2023, and September 30, 2026, and renews the previous ICR. The Regional Haze Rule codified at 40 CFR parts 308 and 309, as authorized by sections 169A and 169B of the Clean Air Act, requires states to develop implementation plans to protect visibility in 156 federally protected Class I areas. Tribes may choose to develop implementation plans. For this period, all 50 states, the District of Columbia, and the U.S. Virgin Islands will be developing and submitting 2nd planning period progress reports pursuant to 40 CFR 51.308(g) and 40 CFR 51.309(d)(10). In accordance with the 2017 rule revision, the progress reports associated with the 2nd planning period are not required to be submitted as SIP revisions. Further, 13 states and the U.S. Virgin Islands will be developing and submitting periodic comprehensive implementation plan revisions for the 2nd planning period to comply with the regulations.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are state, local and tribal air quality agencies, regional planning organizations and facilities potentially regulated under the Regional Haze Rule.

Respondent's obligation to respond: Mandatory [*see* 40 CFR 51.308(b), (f) and (g)].

Estimated number of respondents: 52 (total); 52 state agencies.

Frequency of response: Approximately every 5 years.

Total estimated burden: 14,459 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $850,478.38 (per year). There are no annualized capital or operation & maintenance costs.

Changes in Estimates: There is decrease of 23,796 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease in burden reflects changes in labor rates and changes in the activities conducted due to the normal progression of the program. In the currently approved ICR, the estimated respondent burden assumed 50 states, the District of Columbia, and the U.S. Virgin Islands would be developing and submitting comprehensive State Implementation Plans (SIPs), which were due by July 31, 2021. In practice, 37 states and the District of Columbia submitted SIPs during the currently approved ICR period. Within the proposed ICR, the estimated respondent burden assumes that all 50 states, the District of Columbia, and the U.S. Virgin Islands will be developing and submitting progress reports by January 31, 2025, while 13 states and the U.S. Virgin Islands will be submitting outstanding periodic comprehensive SIP revisions.

Scott Mathias,

Director, Air Quality Policy Division.

[FR Doc. 2023–06732 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

[1] Final Rule: Protection of Visibility: Amendments to Requirements for State Plans, 82 FR 3078, January 10, 2017.

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–063]

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 March 20, 2023 10 a.m. EST Through March 27, 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. 20230042, Final, USFWS, CA, Tijuana Estuary Tidal Restoration Program II Phase I, Review Period Ends: 05/01/2023, Contact: Victoria Touchstone 760–431–9440 x273.

EIS No. 20230043, Final, USAF, WY, Sentinel (GSBD) Deployment and Minuteman III Decommissioning and Disposal, Review Period Ends: 05/01/2023, Contact: Lt Col Alysia Harvey 307–773–3400.

Dated: March 27, 2023.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023–06683 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2020–0701; FRL–10796–01–ORD]

Integrated Science Assessment for Lead (Pb) (External Review Draft)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 60-day public comment period for the draft document titled, ''Integrated Science Assessment for Lead (External Review Draft)''. This draft document was prepared by the Center for Public Health and Environmental Assessment (CPHEA) within EPA's Office of Research and Development (ORD) as part of the review of the primary (health-based) and secondary (welfare-based) Lead (Pb) National Ambient Air Quality Standards (NAAQS). It represents an update of the 2013 Integrated Science Assessment (ISA) for Lead (Pb) (EPA/600/R–10/075F). The ISA, in conjunction with additional technical and policy assessments, provides the scientific foundation for EPA's decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. EPA is releasing the draft ISA for Pb to seek review by the Clean Air Scientific Advisory Committee (CASAC) and input from the public. The date and location of a public meeting for the CASAC to discuss its review of this document will be specified in a separate **Federal Register** notice (FRN). The draft ISA is not final and does not represent, and should not be construed to represent, any final Agency policy or views. When revising the document, EPA will consider any public comments submitted during the public comment period specified in this notice.

DATES: The public comment period begins March 31, 2023 and ends May 30, 2023. Comments must be received on or before May 30, 2023.

ADDRESSES: The ''Integrated Science Assessment for Lead (Pb) (External Review Draft)'' will be available on or about March 31, 2023 via the internet on EPA's Integrated Science Assessment Lead page at *https://www.epa.gov/isa/integrated-science-assessment-isa-lead* and in the public docket at *http://www.regulations.gov,* Docket ID No. EPA–HQ–ORD–2020–0701. You may send comments, identified by Docket ID No. EPA–HQ–ORD–2020–0701, by any of the methods discussed in the ''How to Submit Technical Comments to the

Docket'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the ORD Docket at the EPA Headquarters Docket Center; phone: 202–566–1752; facsimile: 202–566–9744; or email: *ord.docket@epa.gov.*

For technical information, contact Evan Coffman; phone: (919) 541–0567; facsimile: 919–541–5078; or email: *Coffman.Evan@epa.gov* or Meredith Lassiter; phone (919) 541–3200; facsimile: 919–541–5078; or email: *Lassiter.Meredith@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About the Document

Section 108(a) of the Clean Air Act (the Act) directs the EPA Administrator to identify and list certain air pollutants that ''may reasonably be anticipated to endanger public health or welfare'' and ''the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.'' The Act further directs the Administrator to issue air quality criteria for these pollutants. The air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . .'' Under section 109 of the Act, EPA is then to establish NAAQS for each pollutant for which the Agency has issued air quality criteria. Section 109(d)(1) requires periodic review and, if appropriate, revision of air quality criteria and the NAAQS to reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. Information on EPA's process for reviewing the air quality criteria and the NAAQS is available at *https://www.epa.gov/naaqs.*

EPA has established NAAQS for six criteria pollutants. Presently the EPA is reviewing the air quality criteria and NAAQS for Pb. As part of that review, EPA is preparing an updated ISA to reflect the latest scientific knowledge on the public health and welfare effects of Pb exposures, per section 108(a) of the Clean Air Act. When final, the ISA, in conjunction with additional technical and policy assessments, will provide the scientific foundation for EPA's decisions on the adequacy of the current Pb NAAQS and, if appropriate, on potential alternative standards. The CASAC, an independent scientific advisory committee with review and advisory functions that are mandated by section 109(d)(2) of the Clean Air Act, will provide an independent scientific review of the draft ISA.

On July 7, 2020, (85 FR 40641), EPA formally initiated its current review of the air quality criteria for the health and welfare effects of Pb, requesting the submission of recent scientific information on specified topics. Key background information on the air quality criteria for the primary (health-based) and secondary (welfare-based) NAAQS for Pb was summarized in Volume 1 of EPA's ''Integrated Review Plan for the Lead National Ambient Air Quality Standards,'' and the general approach to developing the Pb ISA was incorporated into Volume 2 of EPA's ''Integrated Review Plan for the Lead National Ambient Air Quality Standards,'' which was available for public comment (87 FR 13732, March 10, 2022) and was discussed by the CASAC at a publicly accessible teleconference consultation (87 FR 15985, March 21, 2022).[1]

Webinar workshops were held on May 26, June 7, June 22, and June 29, 2022, for invited EPA and external scientific experts to discuss initial Pb ISA draft materials and for the public to have an opportunity to listen in to these discussions (87 FR 27147, May 6, 2022). Input received during these webinar workshops aided in the development of the draft ISA for Pb being released at this time.

The next step is for the CASAC to review the draft ISA and to discuss its review at a public meeting. This meeting will include an opportunity for members of the public to address comments to the CASAC for its consideration. A separate FRN will inform the public of the date and time of the CASAC meeting and of the procedures for public participation.

II. How To Submit Technical Comments to the Docket

Submit your materials identified by Docket ID No. EPA–HQ–ORD–2020–0701 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: ord.docket@epa.gov.*
- *Fax:* 202–566–9744. Due to COVID–19, there may be a delay in processing comments submitted by fax.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Research and Development Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday through Friday (except Federal Holidays). If you provide materials by mail or hand delivery, please submit three copies of these materials. For attachments, provide an index, number pages consecutively with the materials, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2020–0701. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and will only be considered if time permits. It is EPA's policy to include all materials it receives in the public docket without change and to make the materials available online at *www.regulations.gov,* including any personal information provided, unless materials include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the materials that are placed in the public docket and made available on the internet. If you submit electronic materials, EPA recommends that you include your name and other contact information in the body of your materials and with any disk or CD–ROM you submit. If EPA cannot read your materials due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider the materials you submit. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EPA's Docket Center homepage at *https://www.epa.gov/dockets.*

Docket: Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available,

[1] Volume 3 of the IRP will describe key considerations in EPA's planning for any exposure/risk analyses. Volume 3 will also be the subject of a future consultation with the CASAC.

e.g., CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health and Environmental Assessment, Office of Research and Development.

[FR Doc. 2023–05740 Filed 3–30–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0153]

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, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collection described below (OMB Control No. 3064–0153).

DATES: Comments must be submitted on or before May 30, 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:* Jennifer Jones (202–898–6768), Regulatory Counsel, MB–3078, 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: Jennifer Jones, Regulatory Counsel, 202–898–6768, *jennjones@fdic.gov,* MB–3078, 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:* Regulatory Capital Rules.

OMB Number: 3064–0153.

Forms: None.

Affected Public: Insured state nonmember banks and state savings associations.

Burden Estimate:

ESTIMATED SUMMARY OF ANNUAL BURDEN

	Type of burden	Estimated number of respondents	Estimated time per response	Frequency of response	Total annual estimated burden
BASEL III Advanced Approaches: Recordkeeping, Disclosure, and Reporting					
Implementation plan—Section _.121(b): Ongoing	Recordkeeping	1	330.00	On Occasion	330
Documentation of advanced systems—Section _.122(j): Ongoing	Recordkeeping	1	19.00	On Occasion	19
(CCR)—Section _.132(d)(3)(vi): One-time	Recordkeeping	1	80.00	On Occasion	80
(CCR)—Section _.132(d)(3)(viii): One-time	Recordkeeping	1	80.00	On Occasion	80
(CCR)—Section _.132(d)(3)(viii) Ongoing	Recordkeeping	1	10.00	Quarterly	40
(CCR)—Section _.132(d)(3)(ix): One-time	Recordkeeping	1	40.00	On Occasion	40
(CCR)—Section _.132(d)(3)(ix): Ongoing	Recordkeeping	1	40.00	On Occasion	40
(CCR)—Section _.132(d)(3)(x): One-time	Recordkeeping	1	20.00	On Occasion	20
(CCR)—Section _.132(d)(3)(xi): One-time	Recordkeeping	1	40.00	On Occasion	40
(CCR)—Section _.132(d)(3)(xi): Ongoing	Recordkeeping	1	40.00	On Occasion	40
(OC)—Sections _.141(b)(3), _.141(c)(1), _.141(c)(2)(i)–(ii) One-time	Recordkeeping	1	39.00	On Occasion	39
(OC)—Section _.141(c)(2)(i)–(ii): Ongoing	Recordkeeping	1	10.00	Quarterly	40
(CCR)—Section _.132(b)(2)(iii)(A): One-time	Reporting	1	80.00	On Occasion	80
(CCR)—Section _.132(b)(2)(iii)(A): Ongoing	Reporting	1	16.00	On Occasion	16
(CCR)—Section _.132(d)(2)(iv): One-time	Reporting	1	80.00	On Occasion	80
(CCR)—Section _.132(d)(2)(iv): Ongoing	Reporting	1	40.00	On Occasion	40
Section _.153(b): One-time	Reporting	1	1.00	On Occasion	1
Supervisory approvals—Sections _.123, _.124, _.132(b)(3), _.132(d)(1), _.132(d)(1)(iii) Ongoing.	Recordkeeping	1	55.77	On Occasion	56
Sections _.142 and _.172 Ongoing	Disclosure	1	5.78	On Occasion	6
(CCB and CCYB)—Section _.173, Table 4 (Securitization)—Section _.173, Table 9. (IRR)—Section _.173, Table 12 Ongoing.	Disclosure	1	25.00	Quarterly	100
(CCB and CCYB)—Section _.173, Table 4 (Securitization)—Section _.173, Table 9. (IRR)—Section _.173, Table 12 One-time.	Disclosure	1	200.00	On Occasion	200
(Capital Structure)—Section _.173, Table 2: Ongoing	Disclosure	1	2.00	Quarterly	8
(Capital Structure)—Section _.173, Table 2: One-time	Disclosure	1	16.00	On Occasion	16
(Capital Adequacy)—Section _.173, Table 3: Ongoing	Disclosure	1	2.00	Quarterly	8
(Capital Adequacy)—Section _.173, Table 3: One-time	Disclosure	1	16.00	On Occasion	16
(CR)—Section _.173, Table 5: Ongoing	Disclosure	1	12.00	Quarterly	48
(CR)—Section _.173, Table 5: One-time	Disclosure	1	96.00	On Occasion	96
(CR)—Section _.173, Table 13: Ongoing	Disclosure	1	5.00	Quarterly	20
Section _.124(a): Ongoing	Disclosure	1	0.50	Quarterly	2
Subtotal: One-time Recordkeeping, Reporting, and Disclosure					788
Subtotal: Ongoing Recordkeeping, Disclosure, and Reporting					813
Total Recordkeeping, Disclosure, and Reporting					1,601

ESTIMATED SUMMARY OF ANNUAL BURDEN—Continued

	Type of burden	Estimated number of respondents	Estimated time per response	Frequency of response	Total annual estimated burden
Minimum Regulatory Capital Ratios: Recordkeeping					
(CCR Operational Requirements)—Sections _.3(d) and _ .22(h)(2)(iii)(A): Ongoing.	Recordkeeping	3,038	16.00	On Occasion	48,608
Subtotal: One-time Recordkeeping					0
Subtotal: Ongoing Recordkeeping					48,608
Total Recordkeeping					48,608
Standardized Approach: Recordkeeping, Reporting, and Disclosure					
(QCCP)—Section _.35(b)(3)(i)(A): One-time	Recordkeeping	1	2.00	On Occasion	2
(QCCP)—Section _.35(b)(3)(i)(A): Ongoing	Recordkeeping	3,038	2.00	On Occasion	6,076
(CT)—Section _.37(c)(4)(i)(E): One-time	Recordkeeping	1	80.00	On Occasion	80
(CT)—Section _.37(c)(4)(i)(E): Ongoing	Recordkeeping	3,038	16.00	On Occasion	48,608
(SE)—Sections _.41(b)(3) and _.41(c)(2)(i) One-time	Recordkeeping	1	40.00	On Occasion	40
(SE)—Section _.41(c)(2)(ii): Ongoing	Recordkeeping	3,038	2.00	On Occasion	6,076
(CT)—Section _.37(c)(4)(i)(E): Ongoing	Reporting	1	1.00	On Occasion	1
(S.E.)—Section _.42(e)(2) (C.R.) Sections _.62(a),(b), & (c). (Q&Q) Sections _.63(a) & (b). One-time.	Disclosure	1	226.25	On Occasion	226
(S.E.)—Section _.42(e)(2) (C.R.) Sections _.62(a),(b), & (c). (Q&Q) Sections _.63(a) & (b) and _.63 Tables: Ongoing.	Disclosure	1	131.25	Quarterly	525
Subtotal: One-time Recordkeeping, Reporting, and Disclosure					348
Subtotal: Ongoing Recordkeeping, Reporting, and Disclosure					61,286
Total Recordkeeping, Reporting, and Disclosure					61,634
Total One-Time Burden Hours					1,136
Total Ongoing Burden Hours					110,707
Total Burden Hours					111,843

General Description of Collection: This collection comprises the recordkeeping, reporting, and disclosure requirements associated with minimum capital requirements and overall capital adequacy standards for insured state nonmember banks, state savings associations, and certain subsidiaries of those entities. The data is used by the FDIC to evaluate capital before approving various applications by insured depository institutions, to evaluate capital as an essential component in determining safety and soundness, and to determine whether an institution is subject to prompt corrective action provisions.

There is no change in the method or substance of the collection. The 8,413-hour decrease in burden hours is a result of economic fluctuation, a decrease in the number of entities subject to the information collection, and efforts to align with the other banking agencies' related information collections.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on March 27, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–06656 Filed 3–30–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update listing of financial institutions in liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing.

SUPPLEMENTARY INFORMATION: This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992, issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which

have been placed in liquidation, please contact the Chief, Receivership Oversight at *RO@fdic.gov* or at Division of Resolutions and Receiverships, FDIC, 600 North Pearl Street, Suite 700, Dallas, TX 75201.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC ref. No.	Bank name	City	State	Date closed
10541	Signature Bridge Bank, N.A	New York	NY	03/20/2023
10542	Silicon Valley Bridge Bank, N.A	Santa Clara	CA	03/27/2023

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on March 27, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–06660 Filed 3–30–23; 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 April 17, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, IL 60604.

1. *The Kehl Family 2009 Trust; the Kehl Grandchildren's Trust dated November 5, 1997; the Kehl Grandchildren's Trust fbo Cody J. Kehl dated November 5, 1997; the Ruth A. Kehl Grandchildren's Trust fbo Jacob R. Winter dated November 5, 1997; and the Ruth A. Kehl Grandchildren's Trust fbo Tanner C. Kehl dated November 5, 1997, The First National Bank in Sioux Falls, as trustee of the aforementioned trusts, all of Sioux Falls, South Dakota; The Kevin A. Kehl Trust May 15, 2017, Kevin A. Kehl, as trustee, Dubuque, Iowa; and Krystina L. Moore, Tiffin, Iowa;* to join the Kehl Family Control Group, a group acting in concert, to acquire voting shares of Savanna-Thomson Investment, Inc., Savanna, Illinois, and thereby indirectly acquire voting shares of Savanna-Thomson State Bank, Thomas, Illinois.

Additionally, Daniel J. Kehl, Solon, Iowa, to join the Kehl Family Control Group, to retain voting shares of Savanna-Thomson Investment, Inc., and thereby indirectly acquire voting shares of Savanna-Thomson State Bank.

Board of Governors of the Federal Reserve System.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2023–06752 Filed 3–30–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX; Docket No. 2022–0001; Sequence No. 16]

GSA Equity Study on Remote Identity Proofing; Correction

Correction

In the FR Doc. 2023–06174, appearing on page 18139, in the issue of Monday, March 27, 2023, make the following correction:

On page 18139, in the second column, in the **SUPPLEMENTARY INFORMATION** section, ''FR Doc. 2023–03131'' should read ''FR Doc. 2023–02918''.

Lois Mandell,

Director, Regulatory Secretariat Division.

[FR Doc. 2023–06711 Filed 3–30–23; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–23–1308; Docket No. CDC–2023–0021]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Validated Follow-up Interview of Clinicians on Outpatient Antibiotic Stewardship Interventions. This collection aims to perform an interview of outpatient clinicians regarding the acceptability and perceived clinician-level barriers associated with our year-long implementation of interventions designed around the Core Elements of Outpatient Antibiotic Stewardship.

DATES: CDC must receive written comments on or before May 30, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0021 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Validated Interview and Survey of Outpatient Providers on Antibiotic Stewardship Interventions (OMB Control No. 0920–1308)—Reinstatement—National Center for Emerging Zoonotic and Infectious Disease (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Inappropriate antibiotic prescribing is a major driver of antibiotic resistance which is an urgent national and global health threat. Additionally, inappropriate antibiotic prescribing contributes to avoidable adverse drug events that cause substantial harms to patients. Most antibiotic prescribing originates in traditional outpatient settings such as physician offices and emergency departments, and at least 30% of these prescriptions are completely unnecessary.

Over the past decade there has been rapid growth in non-traditional outpatient settings including Urgent Care clinics. Recent evidence shows that when compared to traditional office settings, inappropriate antibiotic prescribing is substantially higher in Urgent Care clinics making this an important priority for antibiotic stewardship. The design, development, and evaluation of durable stewardship interventions addressing the unique setting of Urgent Care clinics is an important area of unmet need. This data collection will assess knowledge, attitudes, and practices related to antibiotic prescribing among clinicians after implementation of a year-long Urgent Care stewardship initiative.

CDC requests OMB approval for an estimated 62 annualized burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Urgent Care Clinician	Interview Guide	20	1	1	20
Urgent Care Clinician	Survey	125	1	20/60	42
Total					62

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–06734 Filed 3–30–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–1215]

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 ''Awardee Lead Profile Assessment (ALPA)'' 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 December 20, 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

Awardee Lead Profile Assessment (ALPA) (OMB Control No. 0920–1215, Exp. 03/31/2024)—Revision—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is requesting Paperwork Reduction Act (PRA) clearance for a three-year revised Information Collection Request (ICR) titled ''Awardee Lead Profile Assessment (ALPA)'' (OMB Control No. 0920–1215; Exp. 03/31/2024). The goal of this ICR is to build on the CDC's existing childhood lead poisoning prevention program. CDC requires that ongoing and new CDC Childhood Lead Poisoning Prevention Programs (CLPPPs), including the FY21 ''Childhood Lead Poisoning Prevention and Surveillance of Blood Lead Levels in Children'' (CDC–RFA–EH21–2102), complete the ALPA annually. This annual information collection will be used to identify jurisdictional legal frameworks governing CDC-funded CLPPPs in the United States and strategies for implementing childhood lead poisoning prevention activities. CDC can use this information to inform guidance, resource development, and technical assistance activities in support of the ultimate goal, which is eliminating lead exposure in children. The dissemination of these ALPA results will ensure that both funded and non-funded jurisdictions are able to: (1) identify policies and other factors that support or hinder childhood lead poisoning prevention efforts; (2) understand what strategies are being used by funded public health agencies to implement childhood lead poisoning prevention activities; and (3) use this knowledge to develop and apply similar strategies to support the national agenda to eliminate childhood lead poisoning. This program management information collection has been revised in several ways, including the addition of new answer options and questions to understand usage of the updated blood lead reference value (BLRV).

CDC will use one data collection mode, a web survey. A change in the mode of collection will not affect the total time burden requested as the time per response is the same for either mode, and the time to take the survey has remained consistent from 2021 estimates (47 minutes per response) despite revisions to the survey. This time estimate per response is based on pilot tests of the revised survey among eight respondents, and includes the time needed to review the ALPA Training Manual.

In total, the annual number of respondents remains unchanged at 75, and the annual time burden requested remains at 59 hours. There are no costs to respondents other than their time. The respondents are participating in this survey as a program requirement.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State or Local Governments (or their bona fide fiscal agents)	ALPA Web Survey	75	1	47/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–06736 Filed 3–30–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–23–23DT; Docket No. CDC–2023–0022]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of Government information, invites the general public and other Federal agencies the opportunity to comment on a proposed information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Reporting of the Essentials for Childhood (EfC): Preventing Adverse Childhood Experiences through Data to Action Program. This data collection will help to ensure that associated programs are

progressing toward achievement of their stated goals and objectives, as well as consistently demonstrating efficient and appropriate use of federal funds.

DATES: CDC must receive written comments on or before May 30, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0022 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected;

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and

5. Assess information collection costs.

Proposed Project

Reporting of the Essentials for Childhood (EfC): Preventing Adverse Childhood Experiences through Data to Action Program—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of this information collection effort is to collect Essentials for Childhood (EfC) program recipient data related to surveillance, implementation, program evaluation, and performance monitoring. This data collection is necessary to ensure that programs are progressing toward achievement of their stated goals and objectives, as well as consistently demonstrating efficient and appropriate use of federal funds. CDC will use the information collected to further understand the facilitators, barriers, and critical factors to implementing specific violence prevention strategies and conducting related program evaluation activities. Data collected will also be used to inform CDC's training and technical assistance, program improvement, and the development of future funding opportunities.

Data collection is designed to address the following key program evaluation questions:

- To what extent have recipients accomplished the short-term and intermediate-term outcomes outlined in the Logic Model?
- To what extent do recipients effectively implement ACEs prevention strategies during the period of performance?
- To what extent have recipients leveraged multi-sector partnerships and resources among state agencies (additional funding at the local level) and other sectors to prevent ACEs, including forming sustainable systems and partnerships, and realigning/focusing/mobilizing resources to prevent ACEs?
- In what ways has the recipient built or enhanced their state-level surveillance system to monitor ACEs, PCEs, and social determinants of health?
- How has the recipient integrated and addressed racial and health inequities and social determinants of health in preventing ACEs?
- To what extent have recipients enhanced their statewide action plan to implement complementary ACEs prevention strategies (additional funding for implementation at the local level)?
- To what extent have funded recipients enhanced their ability to use ACEs and PCEs surveillance and evaluation data to inform prevention strategy allocation?
- To what extent have recipients enhanced their ability to disseminate and use data to inform partner, policy, or other action?
- To what extent have recipients seen a sustainable increase in capacity and activities related to routine monitoring of ACEs and PCEs data among youth?
- To what extent have recipients seen a sustainable increase in capacity and activities related to routine monitoring of near real-time surveillance to monitor indicators of ACEs?
- To what extent have recipients demonstrated ability to link ACEs and PCEs data to those on the social determinants of health, and utilize these data to inform prevention strategies? (if applicable)
- What is the reach/exposure to the ACEs prevention program efforts?
- Are ACEs prevention strategies reaching populations at highest risk for ACEs?
- To what extent have recipients demonstrated use of surveillance and evaluation data to inform prevention strategy allocation and implementation to improve health equity?
- What has been the reach/exposure of ACEs and PCEs data dissemination efforts?

Information will be collected annually from recipients through the DVP Partners Portal, a web-based data collection system. The DVP Partners Portal allows recipients to fulfill their annual reporting obligations efficiently by employing user-friendly, easily accessible web-based instruments to collect necessary information for both progress reports and continuation applications. Because information from previous reports will be carried over and pre-populated for the next annual reporting, recipients will only need to enter changes, provide progress updates, and add any new information after the first year of reporting, which will help to reduce recipient burden.

CDC requests OMB approval for an estimated 552 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)	Total burden (in hours)
Essentials for Childhood (EfC) Grantees.	Annual Reporting—Project Leads	2	4	10	480
	Key Informant Interview—Principal Investigator	12	2	1	24
	Key Informant Interview—Principal Investigator/ Implementor.	12	2	1	24
	Surveillance Capacity Assessment—Surveillance Lead.	12	1	0.5	6
	Implementation Capacity Assessment	12	1	0.5	6
	Evaluation and Surveillance Survey—Surveillance Lead or Evaluator.	12	1	1	12
Total					552

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–06738 Filed 3–30–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–0142]

Research Involving Children as Subjects and Not Otherwise Approvable by an Institutional Review Board: Process for Referrals to Food and Drug Administration and Office for Human Research Protections, Guidance for Institutional Review Boards, Investigators, and Sponsors; 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) is announcing the availability of a draft guidance for industry entitled ''Research Involving Children as Subjects and Not Otherwise Approvable by an IRB: Process for Referrals to FDA and OHRP.'' This guidance is intended to assist institutional review boards (IRBs), institutions, investigators, and sponsors in understanding the processes used for review of research involving children as subjects that is not otherwise approvable by an IRB and has been referred to FDA, the Office for Human Research Protections (OHRP), or both, for review. When final, this guidance will replace the final guidance issued by FDA in December 2006 entitled, ''Guidance for Clinical Investigators, Institutional Review Boards and Sponsors: Process for Handing Referrals to FDA Under 21 CFR 50.54: Additional Safeguards for Children in Clinical Investigations'' and the guidance issued by the OHRP entitled ''Children as Research Subjects and the HHS '407' Process,'' issued on May 26, 2005. This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by May 30, 2023 to ensure that the Agency and OHRP consider your comment on this draft guidance before they 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 30, 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–0142 for ''Research Involving Children as Subjects and Not Otherwise Approvable by an IRB: Process for Referrals to FDA and OHRP, Guidance for Institutional Review Boards, Investigators, and Sponsors.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your

comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this draft guidance to the Office of Pediatric Therapeutics, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5126, Silver Spring, MD 20993–0002; or Office for Human Research Protections, Division of Policy and Assurances, 1101 Wootton Pkwy., Suite 200, Rockville, MD 20852. 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: Donna Snyder, Office of Pediatric Therapeutics, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5121, Silver Spring, MD 20993–0002, 301–796–1397, *optpediatricethics@fda.hhs.gov;* or Natalie Klein, Office for Human Research Protections, 1101 Wootton Pkwy., Suite 200, Rockville, MD 20852, 240–453–6900 or toll free within the United States, 866–447–4777, *Natalie.Klein@hhs.gov.*

With regard to the proposed collection of information: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA and the OHRP are announcing the availability of a draft guidance for IRBs, institutions, investigators, and sponsors entitled ''Research Involving Children as Subjects and Not Otherwise Approvable by an IRB: Process for Referrals to FDA and OHRP, Guidance for Institutional Review Boards, Investigators, and Sponsors.'' This guidance is intended to assist IRBs, institutions, investigators, and sponsors in understanding the processes for review of research involving children as subjects that is not otherwise approvable by an IRB and has been referred to FDA under § 50.54 (21 CFR 50.54), OHRP under 45 CFR 46.407, or both, for review.

The Department of Health and Human Services (HHS) issued 45 CFR part 46, subpart D, ''Additional Protections for Children Involved as Subjects in Research'' as a final rule on March 8, 1983 (48 FR 9814). FDA issued part 50, subpart D (21 CFR part 50, subpart D), ''Additional Safeguards for Children in Clinical Investigations of Food and Drug Administration-Regulated Products,'' as a final rule on February 26, 2013 (78 FR 12937). These regulations, hereinafter referred to collectively as subpart D, are similar, with some minor differences. (For a full discussion of the differences between FDA and HHS human subject protection regulations, see 78 FR 12937–12947.)

FDA's part 50, subpart D regulations apply to clinical investigations regulated by FDA as described in 21 CFR 50.1(a). HHS regulations apply to all research involving human subjects conducted or supported by HHS in accordance with 45 CFR 46.101(a). FDA-regulated clinical investigations conducted or supported by HHS are subject to both sets of regulations. As a result, many sponsors, investigators, and IRBs need to be familiar and comply with both FDA's and HHS's regulations.

The draft guidance describes an overview of the review process as it relates to FDA referral and review (§ 50.54), OHRP referral and review (45 CFR 46.407), joint FDA and OHRP review, multisite research, and FDA and OHRP review of similar research. This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on research involving children as subjects not otherwise approvable by an IRB and the process for referrals to FDA and OHRP. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

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.

Protection of Human Subjects and Institutional Review Boards

OMB Control Number 0910–0130—Revision

This information collection supports FDA regulations governing requirements for informed consent and IRBs that are intended to protect the rights and safety of human subjects involved in FDA-regulated clinical investigations (parts 50 and 56 (21 CFR parts 50 and 56)). A ''clinical investigation'' is any experiment that involves a test article and one or more human subjects and is subject to requirements for prior submission to FDA under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i) or 360j(g)), or is not subject to requirements for prior submission to FDA under these sections of the FD&C Act, but the results of which are intended to be submitted later to, or held for inspection by, FDA as part of an application for a research or marketing permit (§ 50.3).

Under § 50.54, FDA will accept IRB referrals of clinical investigations involving children as subjects that are not otherwise approvable by an IRB under part 50 subpart D. The collections of information in parts 50 and 56 are currently approved under OMB control number 0910–0130; however, the submission of records to FDA as part of an IRB referral under § 50.54, as recommended in the draft guidance document, is not called for in the regulations themselves. We are therefore revising the information collection to include submissions of records to the Agency that may occur under § 50.54. Based on a review of Agency data regarding the frequency of IRB referrals under § 50.54, we expect that fewer than one such submission would be made annually. The records that the draft guidance recommends be sent to FDA as part of an IRB's referral are records that are kept by IRBs in the ordinary course of their business, and where necessary, information collections related to the creation and retention of these documents are already approved under OMB control number 0910–0130. We assume that no more than 1 hour would be needed to complete the task of transmitting this existing information to FDA in accordance with the draft guidance recommendations. We invite comment on our estimate and assumptions.

This draft guidance also refers to previously approved collections of information by HHS' OHRP under OMB control numbers 0990–0481 and 0990–0260. Specifically, on February 14, 2022, OMB approved the collection of information identified with the OMB control number 0990–0481 without change. The approved collection of information consists of a requirement that IRB records be submitted when an IRB or its institution request an HHS consultation process for proposed research involving, respectively: (1) pregnant women, human fetuses or neonates; (2) prisoners; or (3) children, as subjects that are not otherwise approvable by an IRB.

This draft guidance also refers to previously approved FDA collections of information. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014, the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078.

III. Electronic Access

Persons with access to the internet may obtain an electronic version of the draft guidance at either *https://www.fda.gov/regulatory-information/search-fda-guidance-documents* or *https://www.regulations.gov.*

Dated: March 27, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–06649 Filed 3–30–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–0606]

Infectious Otitis Externa Drugs for Topical Use in Dogs; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GFI) #281 entitled ''Infectious Otitis Externa Drugs for Topical Use in Dogs.'' This draft guidance provides recommendations to help sponsors complete the effectiveness, target animal safety, and labeling technical sections of a new animal drug application (NADA) for infectious otitis externa drugs for topical use in dogs.

DATES: Submit either electronic or written comments on the draft guidance by May 30, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–0606 for ''Infectious Otitis Externa Drugs for Topical Use in Dogs.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the

information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Lea Cranford, Center for Veterinary Medicine (HFV–118), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0615, *lea.cranford@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft GFI #281 entitled ''Infectious Otitis Externa Drugs for Topical Use in Dogs.'' This draft guidance provides recommendations to help sponsors complete the effectiveness, target animal safety, and labeling technical sections of an NADA for infectious otitis externa drugs for topical use in dogs.

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Infectious Otitis Externa Drugs for Topical Use in Dogs.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: March 22, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–06380 Filed 3–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–2613]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Prescription Drug Advertising

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA).

DATES: Submit written comments (including recommendations) on the collection of information by May 1, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://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. The OMB control number for this information collection is 0910–0686. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Prescription Drug Advertising

OMB Control Number 0910–0686—Revision

This information collection supports FDA implementation of Agency regulations and associated guidance. Section 502(n) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 352(n)) requires that manufacturers, packers, and distributors (firms) who advertise prescription human and animal drugs, including biological products for humans, disclose in advertisements certain information about the advertised product's uses and risks. FDA's prescription drug advertising regulations in § 202.1 (21 CFR 202.1) describe requirements and standards for print and broadcast advertisements. Section 202.1 applies to advertisements published in journals, magazines, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems. Print advertisements must include a brief summary of each of the risk concepts from the product's approved package labeling (§ 202.1(e)(1)). Advertisements

that are broadcast through media such as television, radio, or telephone communications systems must disclose the major risks from the product's package labeling in either the audio or audio and visual parts of the presentation (§ 202.1(e)(1)); this disclosure is known as the ''major statement.'' If a broadcast advertisement omits the major statement, or if the major statement minimizes the risks associated with the use of the drug, the advertisement could render the drug misbranded in violation of the FD&C Act, (21 U.S.C. 352(n) and section 201 of the FD&C Act (21 U.S.C. 321(n))), and FDA's implementing regulations at § 202.1(e).

We are revising the information collection to include recommendations found in Agency guidance. The guidance document entitled, ''Presenting Quantitative Efficacy and Risk Information in Direct-to-Consumer [DTC] Promotional Labeling and Advertisements,'' provides content and format recommendations for DTC promotional labeling and advertisements (promotional communications) that present quantitative efficacy and risk information. The guidance document was developed consistent with Agency good guidance practices regulations in 21 CFR 10.115, which provide for comment at any time. The draft guidance document, issued on October 17, 2018, is available at *https://www.fda.gov/media/117573/download* and in docket FDA–2018–D–2613. FDA also maintains a searchable guidance database at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents* to facilitate access to these documents.

The guidance document recommends specific content elements pertaining to the presentation of quantitative efficacy and risk information in DTC promotional communications. The guidance also discusses formatting considerations related to the use of visual aids that display quantitative efficacy or risk information in DTC promotional communications. The guidance document explains that the information collection applies to the third-party disclosure of information pertaining to FDA-regulated products that contain quantitative efficacy or risk information and discusses the Agency's current thinking with regard to this topic.

In the **Federal Register** of October 17, 2018 (83 FR 52484), we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received regarding FDA's need for the information, the accuracy of our burden estimate, or ways to minimize burden. Although we are preparing to finalize the guidance document to clarify considerations for quantitative efficacy or risk presentations across various media types and provide additional explanation regarding specific concepts and examples that were included in the draft guidance, none of the revisions pertain to the information collection recommendations discussed in our 60-day notice.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

Guidance document recommendations	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
''Presenting Quantitative Efficacy and Risk Information in Direct-to-Consumer Promotional Labeling and Advertisements'' as recommended in Section III of the guidance	465	43	19,995	2	39,990

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

According to available data, approximately 465 firms prepare 49,000 FDA-regulated DTC promotional communications annually. Of these communications, we assume 40 percent contain a disclosure of quantitative efficacy or risk information. Based on this information, we calculate that firms each disseminate 43 DTC promotional communications that contain a disclosure of quantitative efficacy or risk information annually. Based on our experience reviewing FDA-regulated promotional communications for drugs, we estimate respondents spend an average of 2 hours to prepare a disclosure as recommended in the guidance. We therefore estimate 19,995 disclosures and a burden of 39,990 hours annually.

Dated: March 26, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–06707 Filed 3–30–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines Meeting; Correction

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice; correction.

SUMMARY: HRSA published a notice in the **Federal Register** on December 20, 2022, concerning 2023 calendar year meetings of the Advisory Commission on Childhood Vaccines (ACCV). The document contained incorrect dates for future meetings. The remaining 2023 ACCV meetings will be held on September 7, 2023, 10:00 a.m. Eastern time (ET)–4:00 p.m. ET and September 8, 2023, 10:00 a.m. ET–4:00 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Pita Gomez, Principal Staff Liaison, Division of Injury Compensation Programs, HRSA, 5600 Fishers Lane, 08N186B, Rockville, Maryland 20857; (800) 338–2382; or *ACCV@hrsa.gov*.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of December 20, 2022, FR Doc. 2022–27543, page 77852, column 3, correct the Dates caption to read: ''The ACCV meetings will be held on:

- March 1, 2023, 10:00 a.m. Eastern Time (ET)–4:00 p.m. ET;
- March 2, 2023, 10:00 a.m. ET–4:00 p.m. ET;
- September 7, 2023, 10:00 a.m. ET–4:00 p.m. ET;
- September 8, 2023, 10:00 a.m. ET–4:00 p.m. ET.''

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–06673 Filed 3–30–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Toxicology Program Board of Scientific Counselors; Announcement of Meeting; Request for Comments

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: This notice announces the next meeting of the National Toxicology Program (NTP) Board of Scientific Counselors (BSC). The BSC, a federally chartered, external advisory group composed of scientists from the public and private sectors, will review and provide advice on programmatic activities. This meeting is a virtual meeting and is open to the public. Written comments will be accepted and registration is required to present oral comments.

DATES:

Meeting: Scheduled for May 4, 2023, 12:30 p.m.–6:00 p.m. Eastern Daylight Time (EDT). Ending time is approximate; meeting may end earlier or run later.

Written Public Comment Submissions: Deadline is April 28, 2023.

Registration for Oral Comments: Deadline is April 28, 2023.

ADDRESSES:

Meeting Web Page: The preliminary agenda, registration, and other meeting materials will be available at *https://ntp.niehs.nih.gov/go/165* by April 10, 2023.

Virtual Meeting: The URL for viewing the virtual meeting will be provided on the meeting web page the day before the meeting.

FOR FURTHER INFORMATION CONTACT: Dr. Milene Brownlow, Designated Federal Officer for the BSC, Office of Policy, Review, and Outreach, Division of Translational Toxicology, NIEHS. Phone: 984–287–3364, Email: *milene.brownlow@nih.gov.* Hand Deliver/Courier address: 530 Davis Drive, Room K2136, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION: The NTP conducted a systematic review to evaluate the neurobehavioral health effects from exposure to fluoride during development and prepared a Draft State of the Science Monograph and a Draft Meta-Analysis Manuscript. Both draft documents were then reviewed internally by various Department of Health and Human Services (HHS) entities and, additionally, the Draft State of the Science Monograph underwent external peer review by five scientific experts. Subsequently, the NTP Director decided to seek additional review of both documents from the NTP BSC. In 2022, the NTP Director and the NTP BSC Chair jointly made the decision to convene an independent working group of subject-matter experts to assist the BSC in reviewing the input on the Draft State of the Science Monograph and Draft Meta-Analysis Manuscript along with NTP authors' responses to the comments. The BSC Working Group has prepared a report with its recommendations on whether the authors sufficiently addressed internal and external scientific comments. The preliminary agenda topic for the meeting on May 4, 2023, is BSC's deliberation on the BSC Working Group's report.

The preliminary agenda, working group report, roster of BSC members, background materials, public comments, and any additional information, when available, will be posted on the BSC meeting web page (*https://ntp.niehs.nih.gov/go/165*) and minutes will be available on the BSC meeting web page within 90 calendar days of the meeting.

Meeting Attendance Registration: The meeting is open to the public with time scheduled for oral public comments. Registration is not required to view the virtual meeting; the URL for the virtual meeting will be provided on the BSC meeting web page (*https://ntp.niehs.nih.gov/go/165*), the day before the meeting. TTY users should contact the Federal TTY Relay Service at 800–877–8339. Requests should be made at least five business days in advance of the event.

Written Public Comments: NTP invites written public comments. Guidelines for public comments are available at *https://ntp.niehs.nih.gov/ntp/about_ntp/guidelines_public_comments_508.pdf.*

The deadline for submission of written comments is April 28, 2023. Written public comments should be submitted through the meeting web page. Persons submitting written comments should include name, affiliation, mailing address, phone, email, and sponsoring organization (if any). Written comments received in response to this notice will be posted on the NTP web page, and the submitter will be identified by name, affiliation, and sponsoring organization (if any).

Oral Public Comment Registration: The agenda allows for one public comment period on the agenda topic (up to 12 commenters, up to five minutes per speaker). Persons wishing to make an oral comment are required to register online at *https://ntp.niehs.nih.gov/go/165* by April 28, 2023. Oral comments will be received only during the formal comment period indicated on the preliminary agenda. Registration is on a first-come, first-served basis. Each organization is allowed one time slot. After the maximum number of speakers is exceeded, individuals registered to provide oral comment will be placed on a wait list and notified should an opening become available. Logistical information for presentations will be provided to commenters approximately 2–3 days before the meeting.

If possible, oral public commenters should send a copy of their slides and/or statement or talking points to *NTP-Meetings@icf.com* by April 28, 2023.

Meeting Materials: The preliminary meeting agenda will be available on the meeting web page (*https://ntp.niehs.nih.gov/go/165*) by April 10, 2023. Individuals are encouraged to access the meeting web page periodically to stay abreast of the most current information regarding the meeting.

Background Information on the BSC: The BSC is a technical advisory body comprised of scientists from the public and private sectors that provides primary scientific oversight to the NTP. Specifically, the BSC advises the NTP on matters of scientific program content, both present and future, and conducts periodic review of the program for the purpose of determining and advising on the scientific merit of its activities and their overall scientific quality. Its members are selected from recognized authorities knowledgeable in fields such as toxicology, pharmacology, pathology, epidemiology, risk assessment, carcinogenesis, mutagenesis, cellular biology, computational toxicology, neurotoxicology, genetic toxicology, reproductive toxicology or teratology, and biostatistics. Members serve overlapping terms of up to four years. The BSC usually meets periodically. The authority for the BSC is provided by 42 U.S.C. 217a, section 222 of the Public Health Service Act (PHS), as amended.

The BSC is governed by the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. ch. 10), which sets forth standards for the formation and use of advisory committees.

Dated: March 27, 2023.

Richard P. Woychik,

Director, National Institute of Environmental Health Sciences and National Toxicology Program, National Institutes of Health.

[FR Doc. 2023–06678 Filed 3–30–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2021–1 Phase II: Pediatric Formulations of Select Second Line Drugs for Treating Tuberculosis (Topic 97).

Date: April 24, 2023.

Time: 11:00 a.m. to 3:00 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 3G11A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: J. Bruce Sundstrom, 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 3G11A, Rockville, MD 20852, (240) 669–5045, *sundstromj@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: March 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–06677 Filed 3–30–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 on Aging Special Emphasis Panel; Aging Biobank.

Date: May 9, 2023.

Time: 11:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–1622, *bissonettegb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 27, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–06638 Filed 3–30–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0008; OMB No. 1660–0134]

Agency Information Collection Activities: Proposed Collection; Comment Request; Preparedness Activity Registration and Feedback

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of renewal and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning FEMA's Individual and Community Preparedness Division's (ICPD) efforts to enable individuals, organizations, or other groups to register with FEMA and to take part in FEMA's preparedness mission by connecting with individuals, organizations, and communities with research and tools to build and sustain capabilities to prepare for any disaster or emergency.

DATES: Comments must be submitted on or before May 30, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *www.regulations.gov* under Docket ID FEMA–2023–0008. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Andrew Burrows, Preparedness Behavior Change Branch Chief, Individual and Community Preparedness Division, National Preparedness Directorate, FEMA, DHS, 400 C St. SW, Washington, DC 20024, at 202–716–0527 or *andrew.burrows@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: As part of 6 U.S.C. 313–314, and section 611 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, (codified at 42 U.S.C. 5196), the mission of the Federal Emergency Management Agency (FEMA) is to reduce the loss of life and property and protect the Nation from all hazards by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation. FEMA's Individual and Community Preparedness Division (ICPD) supports the FEMA Mission by connecting individuals, organizations, and communities with research and tools to build and sustain capabilities to prepare

for any disaster or emergency. The Division conducts research to better understand effective preparedness actions and ways to motivate the public to take those actions. ICPD develops and shares preparedness resources and coordinates comprehensive disaster preparedness initiatives that empower communities to prepare for, protect against, respond to, and recover from a disaster. This mission is achieved through close coordination with the FEMA Regions and working relationships with Federal, state, local, and Tribal agencies. This includes working with nongovernmental partners from all sectors both nationally and through neighborhood-based community groups.

This collection will allow ICPD to gather the following information from the public via web form(s):

- *Feedback:* General feedback on the effectiveness of national FEMA preparedness programs and initiatives and website user experience
- *Activity Details:* Information regarding the type, size and location of preparedness activities hosted by members of the public and community organizers
- *POC Information:* For registration within the site and follow-on communication, if needed
- *Future Engagement Requests:* Allow for the public to enroll in the ICPD newsletter or other public communications
- *Publication Ordering:* Submitting requests to the FEMA publication warehouse to have materials shipped directly to members of the public

Collection of Information

Title: Preparedness Activity Registration and Feedback.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0134.

FEMA Forms: FEMA Form FF–008–FY–23–101 (formerly 008–0–8), Preparedness Activity Web Collection; FEMA Form FF–008–FY–23–102 (formerly 519–0–11), Preparedness Activity Feedback Form.

Abstract: To fulfill its mission for FEMA, the Individual and Community Preparedness Division (ICPD) collects information from individuals and organizations by the Preparedness Activity Registration Form and the Preparedness Activity Feedback Form located within a public website. This collection facilitates FEMA's ability to assess its progress for multiple programs. As new programs or initiatives are created, ICPD will leverage the pre- approved questions in the question bank provided for this collection. ICPD uses this information to inform the continuous improvement of the programs and the Division's outreach. Further, the information allows the Division to analyze seasonal trends in preparedness across the variety of programs. Raw data is not shared outside of the database; only results of the data assessment is shared. The data is used for internal reports as well as public-facing talking points.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 86,115.

Estimated Number of Responses: 86,115.

Estimated Total Annual Burden Hours: 7,174.

Estimated Total Annual Respondent Cost: $217,229.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $13,151.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the 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; and (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.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–06710 Filed 3–30–23; 8:45 am]

BILLING CODE 9111–27–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2022–0042]

Privacy Act of 1974; System of Records

AGENCY: Department of Homeland Security Federal Emergency Management Agency.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security (DHS) proposes to update and reissue a current system of records titled, ''Department of Homeland Security/Federal Emergency Management Agency (FEMA)–012 Suspicious Activity Reporting System of Records.'' This system of records allows DHS/FEMA to collect, maintain, and retrieve records on individuals reported as being involved in suspicious activities, individuals who report suspicious activities, and individuals charged with the analysis and appropriate handling of suspicious activity reports. DHS/FEMA is updating this system of records to (1) revise contact and administrative information associated with this system of records, (2) add to the categories of records collected, (3) modify routine uses, and (4) other non-substantive changes. This updated system will be included in DHS's inventory of record systems.

DATES: Submit comments on or before May 1, 2023. This modified system will be effective upon publication. New or modified routine uses will be effective May 1, 2023.

ADDRESSES: You may submit comments, identified by docket number DHS–2022–0042 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Mason Cutter, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC, 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2022. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Tammi

Hines, (202) 646–3606, *FEMA-Privacy@fema.dhs.gov,* Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, 20478. For privacy questions please contact: Mason Cutter, (202) 343–1717, *Privacy@hq.dhs.gov,* Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC, 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, DHS/FEMA proposes to update and reissue a current DHS/FEMA system of records titled, ''DHS/FEMA–012 Suspicious Activity Reporting System of Records.'' FEMA's mission is to ''support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.'' In support of this mission, and to ensure the safety of its citizens and first responders, FEMA collects, maintains, and retrieves records of individuals reported as being involved in suspicious activities and of individuals who report suspicious activities. FEMA's Office of the Chief Security Officer (OCSO), Fraud Investigations and Inspections Division (FIID) manages this process. Investigators and Analysts are assigned to complete the analysis of suspicious activity reports; they are also responsible for the appropriate handling of such reports.

FEMA Suspicious Activity Reports may be shared with federal, state, local, and tribal jurisdictions with responsibility for investigating suspicious activities within their jurisdictions. FEMA Suspicious Activity Reports that have a nexus to terrorism or hazards to homeland security, as determined by FEMA FIID Investigators or Analysts, and require immediate attention are reported to the police or law enforcement agency of jurisdiction via telephone and uploaded into the Federal Bureau of Investigation's (FBI) eGuardian system by FEMA FIID Investigators or Analysts in coordination with the agency that reported the information. All investigators and analysts who submit reports to the eGuardian system are trained in the DHS Nationwide Suspicious Activity Reports Initiative, per DHS policy.

FEMA is updating this System of Records Notice to reflect the following changes: (1) the contact information for general questions and administrative information has been updated, as well as the Authority for Maintenance of the System section; (2) the categories of records have been updated to clarify the information collected in suspicious activity reports; and (3) Routine Use E has been modified and Routine Use F has been added to conform to Office of Management and Budget (OMB) Memorandum M–17–12 regarding breach notification and investigation.

Furthermore, non-substantive changes to simplify the formatting and text of the previously published notice and the references to FEMA's Office of Chief Security Officer (OCSO) have been updated to identify FEMA's Fraud Investigations and Inspections Division as the specific office responsible for suspicious activity reporting.

Consistent with DHS's information sharing mission, information stored in the DHS/FEMA–012 Suspicious Activity Reporting System of Records may be shared with other DHS components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, information may be shared with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this system of records notice.

This modified system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. The Privacy Act defines ''individual'' to encompass U.S. citizens and lawful permanent residents. Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, and judicial review of denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

Below is the description of the DHS/FEMA–12 Suspicious Activity Reporting System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget, and to Congress.

SYSTEM NAME AND NUMBER:

Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA)–012 Suspicious Activity Reporting System of Records.

SECURITY CLASSIFICATION:

For official use only (FOUO) and law enforcement sensitive (LES). This system does not contain classified information.

SYSTEM LOCATION:

Records are maintained on a FEMA Exchange Server that is access-controlled and under the management and control of the Federal Emergency Management Agency (FEMA) Office of Chief Information Officer at FEMA Headquarters, 500 C Street SW, Washington, DC 20472.

SYSTEM MANAGERS:

Office of the Chief Security Officer, Fraud Investigations and Inspections Division, 500 C Street SW, Washington, DC 20472.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 5196(d); Executive Orders 12333 and 13388; 40 U.S.C. 1315(b)(2)(F); 6 U.S.C. 314 of the Homeland Security Act of 2002, as amended; the Intelligence Reform and Terrorism Prevention Act of 2004, as amended; and the National Security Act of 1947, as amended.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to collect, investigate, analyze, and report suspicious activities to the police or law enforcement agency of jurisdiction and upload the Suspicious Activity Reports into the FEMA Exchange Server in coordination with the agency that reported the information.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by the system include individuals reported as being involved in suspicious activities, individuals who report suspicious activities, and Fraud Investigations and Inspections Division Investigators and Analysts assigned to analyze and appropriately handle suspicious activity reports.

CATEGORIES OF RECORDS IN THE SYSTEM:

The following fields related to individuals may be maintained in this system:

- Report of the suspicious activity (*e.g.,* description of the suspicious activity and physical descriptors of individuals involved in suspicious activity);
- Case/incident number;
- Name (first, middle, and last);
- Address (number, street, apartment, city, and state);
- Age;
- Sex;
- Race for subject description;
- Signature (investigator, analyst, or law enforcement officer (LEO));
- Jurisdiction over the suspected activity;
- Injury code (a dropdown that lists the codes in question (0–None, 1–Refused, 2–First Aid, 3–Hospital, 4–Deceased) (if applicable));
- Telephone numbers (home, business, or cell);
- Other contact information (*e.g.,* email address); and
- Property information (*e.g.,* name, quantity, serial number, brand name, model, value, year, make, color, identifying characteristics, registration information).

RECORD SOURCE CATEGORIES:

Records are obtained from individuals reported as being involved in suspicious activities, individuals who report suspicious activities, Fraud Investigations and Inspections Division Investigators and Analysts, commercially available systems (LexisNexis) and other federal, state, and local law enforcement agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including Offices of the U.S. Attorneys, or to another federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant and necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee or former employee of DHS in their official capacity;

3. Any employee or former employee of DHS in their individual capacity when DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another federal agency or federal entity, when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security, resulting from a suspected or confirmed breach.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

I. To an appropriate federal, state, tribal, local, international counterterrorism agencies when DHS becomes aware of an indication of a threat or potential threat to security, and when such use is to assist in counterterrorism efforts.

J. To an organization or individual in either the public or private sector, either foreign or domestic, when there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life, property, or other vital interests of a data subject and disclosure is proper and consistent with the official duties of the person making the disclosure.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

DHS/FEMA stores records in this system electronically on the access-controlled FEMA Exchange Server.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

DHS/FEMA retrieves records by case/incident number, name, address, and/or date.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Pursuant to National Archives and Records Administration Schedule Number N1–311–99–6, Items 1, 2, and 3, files containing information or allegations that are of an investigative nature but do not relate to a specific investigation are destroyed after five (5) years. Investigative case files that involve allegations made against senior agency officials, attract significant attention in the media, attract congressional attention, result in substantive changes in agency policies and procedures, or are cited in the

Office of the Inspector General's (OIG) periodic reports to Congress are cut off when the case is closed, retired to the Federal Records Center (FRC) five (5) years after cutoff, and then transferred to the National Archives and Records Administration twenty (20) years after cutoff. All other investigative case files are placed in inactive files when a case is closed, cut off at the end of fiscal year, and destroyed ten (10) years after cutoff, except those that are unusually significant for documenting major violations of criminal law or ethical standards by agency officials or others.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DHS/FEMA safeguards records in this system in accordance with applicable rules and policies, including all applicable DHS systems security and access policies. DHS/FEMA imposes strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, DHS/FEMA will consider individual requests to determine whether information may be released. Thus, individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Chief Privacy Officer and FEMA's Freedom of Information Act (FOIA) Officer whose contact information can be found at *http://www.dhs.gov/foia* under ''Contact Information.'' If an individual believes more than one component maintains Privacy Act records concerning them, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, Washington, DC 20528–0655, or electronically at *https://www.dhs.gov/dhs-foia-privacy-act-request-submission-form.* Even if neither the Privacy Act nor the Judicial Redress Act provide a right of access, certain records about you may be available under the Freedom of Information Act.

When an individual is seeking records about themself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify their identity, meaning that the individual must provide their full name, current address, and date and place of birth. The individual must sign the request, and the individual's signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. An individual may obtain more information about this process at *http://www.dhs.gov/foia.* In addition, the individual should:

- Explain why they believe the Department would have information being requested;
- Identify which component(s) of the Department they believe may have the information;
- Specify when the individual believes the records would have been created; and
- Provide any other information that will help the DHS staff determine which DHS component agency may have responsive records.

If the request is seeking records pertaining to another living individual, the request must include an authorization from the individual whose record is being requested, authorizing the release to the requester.

Without the above information, the component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act or covered Judicial Redress Act (JRA) records, individuals may make a request for amendment or correction of a Department record about the individual by writing directly to the Department component that maintains the record, unless the record is not subject to amendment or correction. The request should identify each particular record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. If the individual believes that the same record is in more than one system of records, the request should state that and be addressed to each component that maintains a system of records containing the record. When an individual is making a request for amendment or correction of Departmental records about themself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5.

NOTIFICATION PROCUEDURES:

See ''Record Access Procedures'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2), has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

HISTORY:

79 FR 40124 (July 11, 2014).

* * * * *

Mason C. Clutter,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2023–06745 Filed 3–30–23; 8:45 am]

BILLING CODE 9111–19–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R8–NWRS–2023–N003; FXRS12610800000–223–FF08RSDC00]

Final Environmental Impact Statement/ Environmental Impact Report for Tijuana Estuary Tidal Restoration Program II Phase I

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; final environmental impact statement/ environmental impact report.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final environmental impact statement/environmental impact report (FEIS/EIR) for the Tijuana Estuary Tidal Restoration Program II Phase I project. The FEIS/EIR was prepared jointly by the Service and the California Department of Parks and Recreation to satisfy the requirements of the National Environmental Policy Act (NEPA) and California Environmental Quality Act, respectively. The U.S. Army Corps of Engineers is participating in the NEPA process as a cooperating agency. The FEIS/EIR evaluates the environmental consequences of restoring 82 to 87 acres of native coastal wetlands and uplands within the Tijuana River National Estuarine Research Reserve on portions of both the Tijuana Slough National Wildlife Refuge and Border Field State Park, in San Diego County, California.

DATES: The Service will issue a record of decision no sooner than 30 days after publication of this notice of availability of the FEIS/EIR in the **Federal Register**.

ADDRESSES: *Document Availability:* You may view or download the FEIS/EIR by the following methods:

- *Internet: https://trnerr.org/about/public-notices/.*
- *In Person:* Subject to any restrictions imposed in response to public health issues, you may view the FEIS/EIR at the following location (call to verify office hours before traveling to the site).
  - Tijuana Estuary Visitor Center, 301 Caspian Way, Imperial Beach, CA 91932 (closed Mondays and Tuesdays); telephone 619–575–3613.

FOR FURTHER INFORMATION CONTACT: Victoria Touchstone, Conservation Planner, at 760–431–9440, extension 273 (phone), or *Victoria_Touchstone@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:

Project Location

The project site, which encompasses approximately 90 acres (ac), is located within the southern arm of the Tijuana Estuary, just to the east of the Pacific Ocean, in southwestern San Diego County, California. The project site includes portions of both the Tijuana Slough National Wildlife Refuge and Border Field State Park and is located entirely within the Tijuana River National Estuarine Research Reserve.

Background

The Tijuana Estuary, located in the southwest corner of the United States in San Diego County, California, occurs at the western terminus of the Tijuana River, which drains an approximately 1,700-square-mile watershed, a large portion of which is located within Mexico. Despite recent changes to the upstream watershed, including an increase in the flow of contaminated freshwater inputs and sedimentation, the Tijuana Estuary remains the largest and most intact coastal wetland in the region, supporting habitat for resident and migratory wildlife and native plants, including many sensitive, threatened, and endangered species.

It is estimated that in the 1800s, Tijuana Estuary included over 2,500 ac of estuarine wetland and high marsh. Since then, the estuary has experienced an approximately 50 percent decrease in subtidal and mudflat habitat and a 42 percent decrease in salt marsh. In addition, extensive loss of tidal prism (the volume of water coming and going with the tides) has occurred. This degradation in the southern arm of Tijuana Estuary served as the primary motivation for the initiation of Tijuana Estuary Tidal Restoration Program (TETRP), an extensive restoration proposal developed in the early 1990s.

The TETRP proposal included a multi-phased 495-ac restoration project in the estuary's southern arm, along with a proposed Model Marsh and Oneonta Tidal Linkage project (both of which have been implemented). The final environmental impact statement/environmental impact report (FEIR/EIS) for the original TETRP proposal was completed in 1991. Based on updated research and analysis, the TETRP restoration proposals were refined in 2008 as part of the Tijuana Estuary Friendship Marsh Restoration Feasibility and Design Study. The TETRP II Phase I project, which proposes the restoration of 82 to 87 acres of coastal wetlands and associated native coastal upland vegetation, is the first phase of this 2008 multi-phased restoration project.

National Environmental Policy Act

In compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Service has prepared a FEIS/EIR that describes the project setting and restoration planning history for the Tijuana Estuary and analyzes the environmental consequences of each alternative, including the effects of those alternatives when combined with reasonably foreseeable future actions and environmental trends, to determine if significant impacts to the human environment would occur. Three alternatives are analyzed in detail and at an equal level of detail in the FEIS/EIR: two action alternatives and a no action/no project alternative. The primary differences between the two action alternatives are the amount of intertidal mudflat restored versus salt marsh habitat, the total acreage of restored versus preserved habitats, and the number of connections provided to existing tidal channels.

Common features include restoration of predominantly disturbed portions of the southern arm of Tijuana Estuary to tidal wetlands, tidal channel enhancements, and new intertidal channel connections to restored habitat areas and the existing Model Marsh, incorporation of transitional habitat areas into the restoration design, and river mouth excavation, as needed, to ensure continued tidal exchange within the estuary. Additionally, both action alternatives propose the beneficial reuse of suitable excavated material for beach nourishment, development and maintenance of adjacent coastal barrier dunes, and/or restoration of the Nelson Sloan Quarry, located approximately 3 miles to the east within the Tijuana River Valley. Excavated material not suitable for these purposes would be transported off site to the Otay Landfill or another suitable disposal site.

Alternative 1—Alternative 1, which includes 86.8 ac, was designed to maximize deeper intertidal habitats, such as mudflat, and to increase tidal prism in the southern arm of the estuary. A network of intertidal channels would connect with existing tidal channels and the mouth of the Tijuana River. The primary tidal connection would be the existing South Beach Slough, which would be made deeper. A smaller tidal connection would be provided to the existing Old River Slough, where the adjacent vegetated marsh habitat would be preserved. Excavation to restore wetland habitats would generate approximately 585,000 cubic yards (cy) of sediment, with approximately 5,000 cy to be used to establish higher elevation transitional areas within the restoration footprint.

Alternative 2 (Preferred Alternative)—Alternative 2, identified in the FEIS/EIR as the preferred alternative, includes a restoration footprint of approximately 83.6 ac and proposes to restore approximately 82.5 ac of wetland habitats from primarily disturbed upland habitat, while preserving 1.1 ac of transitional and upland habitat within the northern portion of the project site. The restored habitats would generally be located in and around the Model Marsh. A system of tidal channels would be established, with connections to existing tidal channels at three points, including two along the South Beach Slough and one at the Old River Slough. South Beach Slough would be deepened to increase tidal flows into the proposed restoration area, and transition zone habitat would be restored along the southern portion of the restoration area and intermittently around the perimeter of Model Marsh. Excavation would generate approximately 521,000 cy of material, with approximately 7,000 cy to be used on site to establish higher elevation transitional areas. As described for Alternative 1, the remainder of excavated soil would either be beneficially reused for beach

nourishment or transported off site for beneficial reuse at other project sites or to the landfill for disposal.

No Action Alternative—Under the No Action Alternative, restoration of the estuary would not be implemented. No removal of soil or vegetation would occur to restore or establish habitat within the project site. New or widened channel connections would not be implemented. Periodic removal of sand from the estuary's river mouth could continue to occur under separate approvals, but activities would be restricted to the river mouth and would not extend into the estuary.

EPA's Role in the EIS Process

Pursuant to the Council on Environmental Quality (CEQ) NEPA Regulations (40 CFR 1506.11), the U.S. Environmental Protection Agency (EPA) shall publish a notice of all EISs in the **Federal Register**. The EPA published notification of the DEIS/EIR in the **Federal Register** on August 19, 2022 (87 FR 51090).

Pursuant to section 309 of the Clean Air Act (CAA; 42 U.S.C. 7401 *et seq.*), NEPA, and the CEQ NEPA Regulations (40 CFR 1503.2), the EPA also reviewed and publicly commented on anticipated environmental impacts described in the DEIS/EIR. The EPA's comments, which are provided in Appendix D of the FEIS/EIR, focused primarily on three topics: (1) the need to develop, in coordination with the Southern California Dredged Material Management Team, additional information about the suitability of excavated sediments for placement at nearby beaches; (2) a request for additional information regarding the ongoing tribal consultation process for the project; and (3) a request for additional information to support the conclusions related to environmental justice. Responses to EPA's specific comments are also provided in Appendix D of the FEIS/EIR, and additional supporting documentation requested by the EPA has been incorporated into the appropriate sections of the FEIS/EIR.

In addition to this notice of availability, the EPA will also publish a notice in the **Federal Register** announcing the completion of the FEIS. A Record of Decision identifying the alternative selected for implementation will be published no sooner than 30 days after the EPA announces the availability of the FEIS in the **Federal Register**.

The EPA compiles a repository (EIS database) for EISs prepared by Federal agencies. The EIS database provides information about EISs prepared by Federal agencies, as well as EPA's comments concerning the EISs. You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

NEPA Compliance

On May 27, 2021, the Service published a notice of intent in the **Federal Register** (86 FR 28638) to prepare an EIS/EIR for the TETRP II Phase I project. The notice of availability of the draft EIS/EIR for public review and comment was published in the **Federal Register** on August 19, 2022 (87 FR 51124). A total of six comment letters were received during the public comment period for draft EIS/EIR. Commenters included the EPA, California Department of Fish and Wildlife, County of San Diego, San Diego Audubon Society, and two members of the public. In accordance with 40 CFR 1502.17(b), chapter 8 of the FEIS/EIR includes a summary presenting all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the FEIS. The comment letters and responses are provided in Appendix D of the FEIS/EIR. The responses indicate where additional information has been included in the FEIS/EIR in response to the comments received. The FEIS/EIR is available for public viewing (see **ADDRESSES**).

Authority

We provide this notice in accordance with the requirements of National Environmental Policy Act and its implementing regulations (40 CFR 1503.1 and 1506.6).

Jill Russi,

Acting Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–06431 Filed 3–30–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0046; FXIA16710900000–234–FF09A30000]

Foreign Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by May 1, 2023.

ADDRESSES:

Obtaining Documents: The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at *https://www.regulations.gov* in Docket No. FWS–HQ–IA–2023–0046.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet: https://www.regulations.gov.* Search for and submit comments on Docket No. FWS–HQ–IA–2023–0046.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2023–0046; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Timothy MacDonald, by phone at 703–358–2185 or via email at *DMAFR@fws.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in

ADDRESSES. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at *https://www.regulations.gov* unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at *https://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Applications

We invite comments on the following applications.

Endangered Species

Applicant: Loma Linda University, Loma Linda, CA; Permit No. PER0706445

The applicant requests authorization to import up to 60 samples from wild loggerhead sea turtles (*Caretta caretta*), up to 290 samples from wild green sea turtles (*Chelonia mydas*), and up to 1,300 samples from hawksbill sea turtle (*Eretmochelys imbricata*), from Jamaica, for the purpose of scientific research. This notification is for a single import.

Applicant: Fossil Rim Wildlife Center, Inc., Glen Rose, TX; Permit No. PER1200907

The applicant requests to renew their captive-bred wildlife registration under 50 CFR 17.21(g) for the following species, to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Common name	Scientific name
Arabian oryx	*Oryx leucoryx.*
Maned wolf	*Chrysocyon brachyurus..*
Grevy's zebra	*Equus grevyi.*
Przewalski's horse	*Equus przewalskii.*
Hartmann's mountain zebra.	*Equus zebra hartmannae.*
Cheetah	*Acinonyx jubatus.*
Black-footed cat	*Felis nigripes.*
Red-crowned crane	*Grus japonensis*
Black rhinoceros	*Diceros bicornis.*
Southern white rhinoceros.	*Ceratotherium simum simum.*

Applicant: Burke Museum of Natural History, Seattle, WA; Permit No. PER0708373

The applicant requests authorization to export and re-import nonliving avian museum specimens of endangered species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Zoological Society of San Diego DBA San Diego Zoo Wildlife Alliance, San Diego, CA; Permit No. PER0884554

The applicant requests the renewal and amendment of their permit to export and re-import non-living museum and herbarium specimens of endangered and threatened species previously legally accessioned into the permittee's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Scott Swasey, Alturas, CA; Permit No. PER1322675

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancing the propagation or survival of the species.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching *https://www.regulations.gov* for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to regulations.gov and search for ''12345A''.

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Timothy MacDonald,

Government Information Specialist, Branch of Permits, Division of Management Authority.

[FR Doc. 2023–06692 Filed 3–30–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L14400000.PN0000/LXSITCOR0000/ LLWO350000/23X; OMB Control No. 1004–0206]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 1, 2023.

ADDRESSES: Written comments and recommendations for this information collection request (ICR) should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Darrin King by email at *BLM_HQ_PRA_Comments@blm.gov* or call 202–208–3801. 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. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on December 6, 2022 (87 FR 74442). No comments were received in response to this notice.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is especially interested in public comment addressing the following:

(1) 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) 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 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 submitted in response to this notice are a matter of public record. 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: This control number enables the BLM to collect the necessary information to authorize the use of public lands for solar and wind energy, pipelines, and electric transmission lines with a capacity of 100 Kilovolts (kV) or more. This OMB Control Number is currently scheduled to expire on June 30, 2023. The BLM request that OMB renew this OMB Control Number for an additional three years. Some of the collection activities require the use of Standard Form 299 (SF–299), *Application for Transportation and Utility Systems and Facilities on Federal Lands.* OMB has previously approved SF–299 and has assigned control number 0596–0082 to that form. That control number is administered by the U.S. Forest Service.

Title of Collection: Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development (43 CFR parts 2800 and 2880).

OMB Control Number: 1004–0206.

Form Number: SF–299, *Application for Transportation and Utility Systems and Facilities on Federal Lands* (OMB Control Number 0596–0082).

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Businesses that seek authorization to use public lands for solar or wind energy development, pipelines, or electric transmission lines with a capacity of 100 Kilovolts (kV) or more.

Total Estimated Number of Annual Respondents: 3,042.

Total Estimated Number of Annual Responses: 3,042.

Estimated Completion Time per Response: Varies from 2 to 16 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 47,112.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $2,182,302.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, 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.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2023–06715 Filed 3–30–23; 8:45 am]

BILLING CODE 4310–84–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–681 and 731–TA–1591 (Final)]

White Grape Juice Concentrate From Argentina

AGENCY: International Trade Commission.

ACTION: Suspension of anti-dumping and countervailing duty investigations.

SUMMARY: On March 24, 2023, the U.S. Department of Commerce (''Commerce'') published notices in the **Federal Register** of the suspension of its antidumping and countervailing duty investigations on white grape juice concentrate (''WGJC'') from Argentina (**Federal Register**, March 24, 2023). Both

suspension agreements took effect on March 17, 2023. The antidumping duty suspension agreement is based upon an agreement between Commerce and producers/exporters which account for substantially all imports of white grape juice concentrate from Argentina, in which each signatory producer/exporter has agreed to revise its prices to eliminate completely the injurious effects of exports of WGJC to the United States. The countervailing duty suspension agreement is based upon an agreement between Commerce and the Government of Argentina (''GOA''), wherein the GOA has agreed not to provide any new or additional export or import substitution subsidies on the subject merchandise and has agreed to restrict the volume of direct or indirect exports to the United States of WGJC from all Argentine producers/exporters in order to eliminate completely the injurious effects of exports of this merchandise to the United States. Accordingly, the U.S. International Trade Commission gives notice of the suspension of its antidumping and countervailing duty investigations involving imports of WGJC from Argentina, provided for in subheading 2009.69.00 of the Harmonized Tariff Schedule of the United States.

DATES: March 24, 2023.

FOR FURTHER INFORMATION CONTACT: Ahdia Bavari (202–205–3191), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

Authority: These investigations are being suspended under authority of title VII of the Tariff Act of 1930 and pursuant to section 207.40(b) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(b)). This notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: March 27, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–06669 Filed 3–30–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–018]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: April 7, 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. Nos. 701–TA–552 and 731–TA–1308 (Review) (Pneumatic Off-the-Road (OTR) Tires from India). The Commission currently is scheduled to complete and file its determinations and views of the Commission on April 27, 2023.
5. *Outstanding action jackets:* none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Acting Supervisory Hearings and Information Officer, 202–205–2000.

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: March 29, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–06864 Filed 3–29–23; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1174]

Bulk Manufacturer of Controlled Substances Application: Sterling Pharma USA LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Sterling Pharma USA LLC. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before May 30, 2023. Such persons may also file a written request for a hearing on the application on or before May 30, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on March 3, 2023, Sterling Pharma USA LLC., 1001 Sheldon Drive, Suite 101, Cary, North Carolina 27513–2078, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Dimethyltryptamine	7435	I

The company plans to manufacture the above-listed controlled substance(s) to support clinical trials. No other activities for this drug code is authorized for this registration.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–06698 Filed 3–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1172]

Bulk Manufacturer of Controlled Substances Application: Purisys, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Purisys, LLC, has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before May 30, 2023. Such persons may also file a written request for a hearing on the application on or before May 30, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on February 16, 2023, Purisys, LLC, 1550 Olympic Drive, Athens, Georgia 30601–1602, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Cathinone	1235	I
Gamma Hydroxybutyric Acid	2010	I
Ibogaine	7260	I
Lysergic acid diethylamide	7315	I
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
2,5-Dimethoxyamphetamine	7396	I
3,4-Methylenedioxyamphetamine	7400	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
3,4-Methylenedioxymethamphetamine	7405	I
5-Methoxy-N,N-dimethyltryptamine	7431	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
5-Methyoxy-N,N-diisopropyltryptamine	7439	I
Codeine-N-oxide	9053	I
Dihydromorphine	9145	I
Heroin	9200	I
Hydromorphinol	9301	I
Morphine-N-oxide	9307	I
Normorphine	9313	I
Norlevorphanol	9634	I
Amphetamine	1100	II
Lisdexamfetamine	1205	II
Methylphenidate	1724	II
Pentobarbital	2270	II
Nabilone	7379	II
Cocaine	9041	II
Codeine	9050	II
Dihydrocodeine	9120	II
Oxycodone	9143	II
Hydromorphone	9150	II
Ecgonine	9180	II
Hydrocodone	9193	II
Levorphanol	9220	II
Meperidine	9230	II
Meperidine intermediate-A	9232	II
Meperidine intermediate-B	9233	II
Meperidine intermediate-C	9234	II
Methadone intermediate	9250	II
Methadone intermediate	9254	II
Morphine	9300	II
Oripavine	9330	II
Thebaine	9333	II
Opium tincture	9630	II
Opium, powdered	9639	II
Opium, granulated	9640	II
Oxymorphone	9652	II
Noroxymorphone	9668	II
Alfentanil	9737	II
Sufentanil	9740	II
Carfentanil	9743	II
Tapentadol	9780	II
Fentanyl	9801	II

The company plans to bulk manufacture the listed controlled substances for the production of active pharmaceutical ingredients (API) and analytical reference standards for sale to its customers. The company plans to manufacture the above listed controlled substances as clinical trial and starting materials to make compounds for distribution to its customers. No other activities for these drug codes are authorized for this registration.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–06687 Filed 3–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1167]

Importer of Controlled Substances Application: PerkinElmer, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: PerkinElmer, Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before May 1, 2023. Such persons may also file a written request for a hearing on the application on or before May 1, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on February 22, 2023, PerkinElmer, Inc., 120 East Dedham Street, Boston, Massachusetts 02118–2852, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Lysergic Acid Diethylamide.	7315	I
Thebaine	9333	II

The company plans to import the listed controlled substances for bulk manufacturing into radioactive formulations for sale to its customers for research purposes. Drug code 9333 (Thebaine) will be used to import the Thebaine derivative Diprenorphine. No other activity for this drug code is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–06696 Filed 3–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1173]

Bulk Manufacturer of Controlled Substances Application: ANI Pharmaceuticals, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: ANI Pharmaceuticals, Inc. has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before May 30, 2023. Such persons may also file a written request for a hearing on the application on or before May 30, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on March 3, 2023, ANI Pharmaceuticals, Inc., 70 Lake Drive, East Windsor, New Jersey 08520, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Psilocybin	7437	I
Levorphanol	9220	I

The company plans to bulk manufacture the listed controlled substances for the internal use or for sale to its customers. No other activities for these drug codes are authorized for this registration.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–06700 Filed 3–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1165]

Importer of Controlled Substances Application: Lyndra Therapeutics

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Lyndra Therapeutics has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before May 1, 2023. Such persons may also file a written request for a hearing on the application on or before May 1, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on February 20, 2023, Lyndra Therapeutics, 65 Grove Street Suite 301, Watertown, Massachusetts 02472 applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Methadone	9250	II

The company plans to import the above controlled substance for use in preclinical research and human clinical trials. No other activity for this drug code is authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–06648 Filed 3–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On March 27, 2023, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of New Mexico in the lawsuit entitled *United States of America and New Mexico Environment Department* v. *Matador Production Company,* Civil Action No. 23–cv–00260.

In this action, the United States, on behalf of the U.S. Environmental Protection Agency, and the New Mexico Environment Department filed a complaint alleging that Matador Production Company (''Defendant'') violated the Clean Air Act, the New Mexico Air Quality Control Act, and the implementing regulations at 25 of Defendant's oil and natural gas production facilities in New Mexico by, *inter alia,* failing to comply with applicable emissions standards for VOC, NO_X and CO and failing to submit a Notice of Intent or register for a General Construction Permit as required. The complaint seeks an Order enjoining Defendant from further violating applicable requirements and requiring Defendant to remedy, mitigate, and offset the harm to public health and the environment caused by the violations and to pay a civil penalty.

Under the proposed settlement, Defendant agrees to pay a civil penalty of $1,150,000 (of which $650,000 is to be paid to the United States and $500,000 is to be paid to the State of New Mexico) and to spend at least $1,250,000 on a diesel emission reduction Supplemental Environmental Project (''SEP'') and at least $500,000 on a state aerial emission monitoring SEP.

In addition, the settlement requires the Defendant to ensure ongoing compliance with all applicable regulatory requirements at all 255 of its oil and natural gas production facilities in New Mexico. Specifically, the settlement requires the Defendant to identify and remedy any compromised equipment, undertake a design analysis to ensure adequate design and sizing of the vapor control system, install and operate extensive monitoring systems, implement a robust inspection and maintenance program, and hire an independent third party to verify compliance.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and New Mexico Environment Department* v. *Matador Production Company,* D.J. Ref. No. 90–5–2–1–12297. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department website: *http://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the proposed consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $33.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–06651 Filed 3–30–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0009]

Asbestos in Shipyards Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in its Standard on Asbestos in Shipyards.

DATES: Comments must be submitted (postmarked, sent, or received) by May 30, 2023.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://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. D*ocuments in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download from 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 OSHA docket number (OSHA–2012–0009) for the Information Collection Request (ICR). OSHA will place all comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements are to help employers monitor worker exposure to asbestos, take action to reduce worker exposure to the permissible exposure limit (PEL), monitor worker health, and provide workers with information about their exposure and the health effects of asbestos.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Standard on Asbestos in Shipyards. The agency is requesting a 70 hour decrease adjustment in the burden hours (from 1,108 hours to 1,038). This decrease is due to a decrease in the number of shipyard employees in the preceding paperwork package. OSHA is also requesting a decrease in the total annual cost burden for the exposure monitoring and medical examinations. The estimated burden decreased by $9,939 (from $44,578 to $34,639). This decrease is due to a decrease in the number of shipyard employees found in the preceding package.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Asbestos in Shipyards Standard (29 CFR 1915.1001).

OMB Control Number: 1218–0195.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 255.

Number of Responses: 3,597.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 1,038.

Estimated Cost (Operation and Maintenance): $34,639.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2012–0009). You may supplement electronic submissions by uploading document files electronically.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social

security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350 (YYT (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed in Washington, DC, on March 23, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–06693 Filed 3–30–23; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 23–027]

Name of Information Collection: The NASA Visitor Management System for Intermittent Access to NASA Hosted/Sponsored Events and Activities

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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.

DATES: Comments are due by May 30, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this information collection by selecting ''Currently under 60-day Review-Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–3292, or *b.edwards-bodmer@nasa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

NASA hosts/sponsors numerous events on federally owned/leased property which are open to NASA affiliates and members of the public. The events include but are not limited to meetings, conferences, briefings, public outreach activities, tours, focus groups, etc. Visitor access is substantiated by a credentialed NASA sponsor who validates the visitor's need to access a building/area, guest networking services, etc. for a specific event/purpose. Information is collected to validate identity and enable intermittent access to activities.

Currently, visitor registration is accomplished via several electronic and paper processes. The NASA Office of Protective Services is transitioning to a one-NASA process to manage access for visitors with an affiliation less than 30-days.

NASA may collect event registration information to include but not limited to a visitor's name, address, citizenship, biometric data, purpose of visit, the location to be visited, escort/sponsor name with contact data, and preferred meeting/event sessions when options are available. When parking is provided on federal owned/leased space, driver's license information as well as vehicle make/model/tag information will be collected.

When visitors/vendors are permitted to bring equipment and/or event set-up materials such as booths and displays, information will be collected to issue property passes and coordinate equipment/property delivery. Information will also be collected, when applicable, to include other associated requirements such as electrical power needs, internet access, etc.

NASA collects, stores, and secures information from individuals requiring routine and intermittent access in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and the Paperwork Reduction Act.

II. Methods of Collection

Electronic.

III. Data

Title: The NASA Visitor Management System for Intermittent Access to NASA Hosted/Sponsored Events and Activities.

OMB Number: 2700–0165.

Type of review: Extension without change of a currently approved information collection.

Affected Public: Individuals.

Estimated Annual Number of Activities: 400,000.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 400,000.

Estimated Time Per Response: 8 minutes.

Estimated Total Annual Burden Hours: 53,333 hours.

Estimated Total Annual Cost: $2,000,000.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2023–06680 Filed 3–30–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–025]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: We are proposing to request an extension from the Office of Management and Budget (OMB) of one currently approved information

collection, consisting of National Archives Trust Fund (NATF) Order Forms for Genealogical Research in the National Archives. The NATF forms included in this information collection are: NATF 84, National Archives Order for Copies of Land Entry Files; NATF 85, National Archives Order for Copies of Pension or Bounty Land Warrant Applications; and NATF 86, National Archives Order for Copies of Military Service Records. Pursuant to the Paperwork Reduction Act of 1995, we invite you to comment on this proposed combined information collection.

DATES: We must receive written comments on or before May 30, 2023.

ADDRESSES: Send comments to Paperwork Reduction Act Comments (MP), Room 4100, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001, or email them to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with requests for additional information or copies of the proposed information collection and supporting statement.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. If you have comments or suggestions, they should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether the collection affects small businesses.

We will summarize any comments you submit and include the summary in our request for OMB approval. All comments will become a matter of public record.

In this notice, we solicit comments concerning the following information collection:

Title: Order Forms for Genealogical Research in the National Archives.

OMB number: 3095–0027.

Agency form numbers: NATF Forms 84. 85, and 86.

Type of review: Regular.

Affected public: Individuals or households.

Estimated number of respondents: 7,139.

Estimated time per response: 10 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 1,190.

Abstract: Submission of requests on a form is necessary to handle in a timely fashion the volume of requests received for these records and the need to obtain specific information from the researcher to search for the records sought. As a convenience, the form will allow researchers to provide credit card information to authorize billing and expedited mailing of the copies. You can also use Order Online! (*http://www.archives.gov/research_room/obtain_copies/military_and_genealogy_order_forms.html*) to complete the forms and order the copies.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2023–06737 Filed 3–30–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection: 2024–2026 IMLS Grant Application Forms

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Submission for OMB review, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services announces that the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. This Notice proposes the clearance of the 2024–2026 IMLS Grant Application Forms. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 30, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this Notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Institute of Museum and Library Services'' under ''Currently Under Review;'' then check ''Only Show ICR for Public Comment'' checkbox. Once you have found this information collection request, select ''Comment,'' and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, or call (202) 395–7316.

OMB is particularly interested in comments that help the agency to:

☐ Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

☐ Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

☐ Enhance the quality, utility, and clarity of the information to be collected; and

☐ Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

FOR FURTHER INFORMATION CONTACT: Connie Bodner, Ph.D., Director of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Dr. Bodner may be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Persons who are deaf or hard of hearing (TTY users) may contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and

empower America's museums, libraries, and related organizations through grant making, research, and policy development. To learn more, visit *www.imls.gov.*

Current Actions: This Notice proposes the clearance of the 2024–2026 IMLS Grant Application Forms. The purpose of this collection is to facilitate the administration of the IMLS application and review processes for its discretionary grants and cooperative agreements. IMLS uses standardized application forms for eligible libraries, museums, and other organizations to apply for its funding. The forms submitted for public review in this Notice are the IMLS Museum Program Information Form, the IMLS Library-Discretionary Program Information Form, and the IMLS Supplementary Form, each of which is included in one or more of the *Grants.gov* packages associated with IMLS grant programs.

This action is to seek approval for the information collection for the IMLS Museum Program Information Form, the IMLS Library-Discretionary Program Information Form, and the IMLS Supplementary Form for the next three years.

The 60-day Notice was published in the **Federal Register** on December 7, 2022 87 FR 75068–75069). The agency received no comments under this Notice.

Agency: Institute of Museum and Library Services.

Title: 2024–2026 IMLS Grant Application Forms.

OMB Control Number: 3137–0092.

Agency Number: 3137.

Respondents/Affected Public: Library and museum grant applicants.

Total Number of Annual Respondents: 1,720.

Frequency of Response: Once per request.

Average Minutes per Response: 45 minutes.

Total Estimated Number of Annual Burden Hours: 1,290 hours.

Total Annualized Capital/Startup Costs: n/a.

Cost Burden (dollars): $39,697.28.

Total Annual Federal Costs: $35,432.00.

Dated: March 28, 2023.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2023–06718 Filed 3–30–23; 8:45 am]

BILLING CODE 7036–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0020]

Information Collection: IAEA Design Information Questionnaire Forms

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''IAEA Design Information Questionnaire Forms.''

DATES: Submit comments by May 30, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0020. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0020 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–2023–0020. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0020 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0020 in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* IAEA Design Information Questionnaire Forms.
2. *OMB approval number:* 3150–0056.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* Not applicable.
5. *How often the collection is required or requested:* On occasion.
6. *Who will be required or asked to respond:* Licensees of facilities on the U.S. eligible list who have been notified in writing by the NRC to submit the form.
7. *The estimated number of annual responses:* 2.
8. *The estimated number of annual respondents:* 2.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 360.
10. *Abstract:* In order for the U.S. to fulfill its responsibilities as a participant in the U.S./International Atomic Energy Agency (IAEA) Safeguards Agreement, the NRC must collect information from licensees about their installations and provide it to the IAEA, if requested by the IAEA. Licensees of facilities that appear on the U.S. eligible list and have been notified in writing by the NRC are required to complete and submit a Design Information Questionnaire to provide information concerning their installation for use by the IAEA.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.
2. Is the estimate of the burden of the information collection accurate? Please explain your answer.
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

IV. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS.

Document	ADAMS Accession No.
Supporting Statement	ML23053A112
Research and Power Reactors DIQ Form	ML23054A445
Conversion and/or Fuel Fabrication Plants DIQ Form	ML23054A446
Reprocessing Plants DIQ Form	ML23054A447
Isotopic Enrichment Plants DIQ Form	ML23054A448
Geological Repositories DIQ Form	ML23054A449
Spent Fuel Encapsulation Plants DIQ Form	ML23054A450
Research and Development Facilities DIQ Form	ML23054A451
Critical (Sub-Critical) Facilities DIQ Form	ML23054A452
Separate Storage Installations DIQ Form	ML23054A453

Dated: March 27, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–06661 Filed 3–30–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–124 and CP2023–127]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 3, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance

with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–124 and CP2023–127; *Filing Title:* USPS Request to Add Priority Mail Contract 777 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* March 24, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* April 3, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–06658 Filed 3–30–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–125 and CP2023–128]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 4, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–125 and CP2023–128; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 17 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* March 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* April 4, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–06741 Filed 3–30–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97206; File No. SR–NYSE–2023–19]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 308 as Defined in Rule 9232(b) and Delete and Replace Certain Obsolete References

March 27, 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 March 17, 2023, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) amend Rule 308 to reflect the consolidation of the Acceptability Board with the Hearing Board as defined in Rule 9232(b), and (2) delete and, where applicable, replace certain obsolete references in its rules and the Listed Company Manual. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to (1) amend Rule 308 to reflect the consolidation of the Acceptability Board with the Hearing Board as defined in Rule 9232(b), and (2) delete and, where applicable, replace certain obsolete references in its rules and the Listed Company Manual.

Background

Pursuant to Rule 308, Acceptability Committees are composed of at least three persons who are members of the Acceptability Board. Rule 308 establishes procedures for Acceptability Committees to consider applications prior to disapproval by the Exchange (1) of prospective members or member organizations; (2) of any prospective member, principal executive, registered representative, or other person required by the Rules of the Exchange to be approved by the Exchange for employment or association with a member or member organization; (3) for any change in status of any person which change requires Exchange approval; and (4) of any prospective non-member broker/dealer accessee. Rule 308(c) provides that the Acceptability Board be appointed annually by, in part, the Chair of the Board of Directors (''Board'') subject to the approval of the Board, and that it be composed of such number of members and allied members [3] who are not members of the Board, and registered employees and non-registered employees of members and member organizations.

Rule 9232 (Criteria for Selection of Panelists, Replacement Panelists, and Floor-Based Panelists) establishes procedures for the selection and appointment of panelists to a Hearing Panel as defined in Rule 9120 (Definitions) to conduct disciplinary proceedings and issue a decision. Pursuant to Rule 9232(a), each panelist, except for the Hearing Officer, shall be a member of the NYSE hearing board (''Hearing Board'') provided for in Rule 9232(b). Rule 9232(b) states that the Board shall from time to time appoint a Hearing Board to be composed of such number of members and former allied members [4] of the Exchange who are not members of the Exchange Board of Directors and registered employees and nonregistered employees of member organizations. Pursuant to Rule 9232(b), former members, allied members,[5] or registered and non-registered employees of member organizations who have retired from the securities industry may be appointed to the Hearing Board. Rule 9232(b) further provides that the members of the Hearing Board be appointed annually.

All of the current members of the Acceptability Board are also members of the Hearing Board. Given the overlap in the composition of the Acceptability Board and the Hearing Board, and the fact that the Acceptability Board is appointed for no other purpose than providing a ready pool for staffing Acceptability Committees, the Exchange has determined to cease appointing a separate Acceptability Board. In this filing, the Exchange accordingly proposes to amend Rule 308 to reflect the consolidation but retain the current composition of Acceptability Committees. As noted, the Exchange also proposes to amend Rule 9232 to provide that the Hearing Board shall be composed, in part, of members and principal executives. As discussed in detail below, this proposed change will also harmonize Rule 9232 with Rule 308.

Rule 9232(b) provides that the Hearing Board be appointed annually by the Board and serve at their pleasure. By contrast, Rule 308(c) provides that the Acceptability Board be appointed annually by the Chair, or officer, employee or committee or board to whom appropriate authority has been delegated, subject to the approval of the Board, to serve at the pleasure of the Board. Despite the apparent difference, the Exchange believes that as a practical matter the proposed change is consistent with current practice, as the board to whom authority has been delegated pursuant to Rule 308(c) is the Board itself. As a result, the Board appoints both the Hearing Board and the Acceptability Board. Moreover, the Exchange believes that having the full Board make appointments is the more conservative option for appointing Hearing Board members, who serve at the pleasure of the Board.

Finally, in addition to replacing the remaining obsolete references to ''allied member,'' the Exchange proposes to replace obsolete references to ''specialists'' with ''DMM'' (*i.e.,* Designated Market Maker) in its rules and the Listed Company Manual, among other non-substantive clarifying changes, as described more fully below.

Proposed Rule Change

Acceptability Board

The composition of and criteria for appointment to both the Acceptability Board and the Hearing Board are substantially similar. Current Rule 308(c) provides that the Acceptability Board shall be composed of ''members and allied members of the Exchange who are not members of the Board of Directors, and registered employees and non-registered employees of members and member organizations, as the

[3] The Exchange no longer has allied members, a former regulatory category based on a natural person's control of a member organization. Allied members were replaced by the new category of ''principal executives'' in 2008. *See* Securities and Exchange Act Release No. 58103 (July 3, 2008), 73 FR 40403, 40403 (July 14, 2008) (SR–FINRA–2008–036) (Notice of Filing of a Proposed Rule Change Relating to the Incorporated NYSE Rules) (proposal by the Financial Industry Regulatory Authority (''FINRA'') to substitute ''principal executive'' for ''allied member'' in the Incorporated NYSE Rules); Securities and Exchange Act Release No. 58533 (September 12, 2008), 73 FR 54652 (September 22, 2008) (SR–FINRA–2008–0036) (''Release No. 58533'') (Order Approving Proposed Rule Change Relating to Incorporated NYSE Rules); Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444, 54445 (September 19, 2008) (SR–NYSE–2008–80) (amending NYSE Incorporated Rules to conform to FINRA's proposed rule change); NYSE Rule 311.18 (''Principal executive'' includes ''an employee of a member organization designated to exercise senior principal executive responsibility over the various areas of the business of the member organization including: operations, compliance with rules and regulations of regulatory bodies, finances and credit, sales, underwriting, research and administration; and any employee of a member organization who is a functional equivalent of such person.''). As discussed below, the Exchange now proposes conforming, non-substantive changes to delete and, where applicable, replace the remaining references to ''allied member'' in its rules with ''principal executive.'' Former allied members and principal executives have had notice since 2008 that where the Exchange's rules use ''allied member'', the category of ''principal executive'' was intended. *See* Release No. 58533, 73 FR at 54653, n.5.

[4] As discussed below, the Exchange proposes to replace ''former allied members'' in Rule 9232(b) with ''principal executives.'' *See also* note 3, *supra.*

[5] The Exchange proposes to replace this reference with ''principal executives.'' As proposed, principal executives who have retired from the securities industry may also be appointed to the Hearing Board.

Chairman of the Board of the Exchange shall deem necessary.'' Rule 9232(b) provides that the Hearing Board [6] shall be composed ''of such number of members and former allied members of the Exchange who are not members of the Exchange Board of Directors and registered employees and nonregistered employees of member organizations.'' Rule 9232 further provides that former members, allied members, or registered and non-registered employees of member organizations who have retired from the securities industry may be appointed to the Hearing Board.

Rule 308(c) would be amended to provide that Acceptability Committees will consist of at least three persons that are members of the Hearing Board and that are also members and principal executives of the Exchange who are not Board members, or that are registered employees and non-registered employees of member organizations, as the Chair of the Board shall deem necessary. Amended Rule 308 would further clarify that the term Chief Hearing Officer is defined in Rule 9120(c).

As proposed, the Exchange would consolidate the Acceptability Board and the Hearing Board but not permit former members, former principal executives, or registered and non-registered employees of member organizations who have retired from the securities industry to be appointed to Acceptability Committees consistent with current Rule 308(c).[7] In addition, the Exchange would delete references to registered and non-registered employees of members. Only member organizations can have registered or non-registered employees. Under Rule 2(a), a member is a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the trading floor of the Exchange or any facility thereof. With the exception of the proposed changes described above, the substantive processes set forth in Rule 308 for the appointment and composition of individual Acceptability Committees, including the requirement that Acceptability Committees consist of at least three persons meeting the criteria set forth in subdivision (d) of Rule 308 selected by the Chief Hearing Officer,[8] would remain unchanged.

To effectuate these changes, the Exchange would replace ''Acceptability Board'' with ''Hearing Board'' in Rule 308(c) and (d). In addition, the Exchange would update the obsolete reference to Rule 476(b) in Rule 308(c) with a reference to the definition of Chief Hearing Officer in the Rule 9000 Series, the Exchange's current disciplinary rules. The second paragraph in current Rule 308(c), which sets forth the appointment and composition requirements for the Acceptability Board, would be deleted. Proposed Rule 308(c) would read as follows (new text italicized, deleted text bracketed):

(c) All proceedings under this rule shall be conducted in accordance with the provisions of this rule and shall be held before an Acceptability Committee consisting of at least three persons being members of the [Acceptability]*Hearing* Board *described in Rule 9232(b) that are members and principal executives of the Exchange who are not members of the Board of Directors, or are registered employees and non-registered employees of member organizations, as the Chair of the Board of the Exchange shall deem necessary,* to be selected by the Chief Hearing Officer (as *defined in Rule 9120(c)*[designated under Rule 476(b)]) in accordance with paragraph (d) of this rule.

[The Chairman of the Board of the Exchange, or officer, employee or committee or board to whom appropriate authority has been delegated, subject to the approval of the Board of Directors, shall from time to time appoint an Acceptability Board to be composed of such number of members and allied members of the Exchange who are not members of the Board of Directors, and registered employees and non-registered employees of members and member organizations, as the Chairman of the Board of the Exchange shall deem necessary. The members of the Acceptability Board shall be appointed annually and shall serve at the pleasure of the Board of Directors.]

Amendments to Rule 9232(b)

In 2013, the Exchange adopted Rule 9232 as part of its adoption of rules relating to investigation, discipline, and sanctions, and other procedural rules based on FINRA's rules.[9] Current Rule 9232(b) provides that the Hearing Board shall be ''composed of such number of members and former allied members of the Exchange who are not members of the Exchange Board of Directors and registered employees and nonregistered employees of member organizations.'' The Rule further provides that former members, allied members, or registered and non-registered employees of member organizations who have retired from the securities industry may be appointed to the Hearing Board.

The Exchange has determined to update the Rule since there are no longer former allied members serving on the Hearing Board. The Exchange accordingly proposes to replace ''former allied members'' in the first sentence of Rule 9232(b) with ''principal executives.'' In addition, the Exchange would amend the second sentence of Rule 9232(b) to replace ''allied members'' with ''principal executives''. As amended, Rule 9232(b) would permit principal executives who have retired from the securities industry to be appointed to the Hearing Board.

Obsolete References

The Exchange proposes to replace obsolete references to ''allied member'' or ''allied members'' with ''principal executive'' or ''principal executives,'' as applicable, in the following:

- Rule 17 (Use of Exchange Facilities and Vendor Services)
- Rule 25 (Exchange Liability for Legal Costs)
- Rule 93 (Trading for Joint Account)
- Rule 113 (DMM Unit's Public Customers) [10]
- Rule 113 Former (DMMs' Public Customers)
- Rule 123 (Record of Orders) [11]
- Rule 344 (Research Analysts and Supervisory Analysts)
- Proxies (Rules 450–460)
- Rule 456 (Representations to Management)
- Rule 457 (Filing Participant Information (Schedule B))
- Rule 458 (Filing of Proxy Material (Schedule A))
- Rule 459 (Other Persons to File Information When Associated with Member)
- Rule 472 (Communications With The Public)
- Rule 600 (Arbitration) [12]

[6] Hearing Board is currently lower case in Rule 9232(a) and (b). The Exchange proposes to capitalize the term.

[7] Legacy disciplinary Rule 476(b) permitted the appointment of former members, allied members, or registered and non-registered employees of members and member organizations who have retired from the securities industry to the Hearing Board provided for in that rule, which was carried forward to Rule 9232. Under Rule 9232, such persons are eligible to be appointed to Hearing Panels in connection with disciplinary matters. As noted, Rule 308(c) does not permit former members or allied members, or their registered and non-registered employees who have retired, to be appointed to the Acceptability Board.

[8] Chief Hearing Officer is defined in Rule 9120(c). The Chief Hearing Officer is currently a FINRA employee appointed by the Board to serve the functions specified in the Exchange's rules.

[9] *See* Securities Exchange Act Release No. 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (SR–NYSE–2013–02) (Order Approving Proposed Rule Change Adopting Investigation, Disciplinary, Sanction, and Other Procedural Rules That Are Modeled on the Rules of the Financial Industry Regulatory Authority and To Make Certain Conforming and Technical Changes).

[10] The Exchange proposes to also delete the orphan ''in which'' in Rule 113.20.

[11] The Exchange proposes to also add a space between ''(d)'' and ''By Accounts'' in Rule 123.

[12] The Exchange would also add a space between ''(d)'' and ''Class Action Claims'' in Rule 600.

• Rule 607 (Designation of Number of Arbitrators) [13]
• Rule 629 (Schedule of Fees) [14]
• Rule 630 (Uniform Arbitration Code)
• Rule 632 (Member Controversies)
• Rule 633 (Board of Arbitration)
• Rule 637 (Failure To Honor Award)
• Sections 402.09 (Exchange Proxy Contest Rules) and 703.18 (Contingent Value Rights) of the Listed Company Manual.

The Exchange proposes to delete references to ''allied member'' in the following rules:

• Rule 607 (Designation of Number of Arbitrators). Principal executives do not have associated persons. The references to a person associated with an allied member in Rule 607(a)(2)(i) and (a)(3)(i) are therefore obsolete.[15]
• Section 202.03 (Dealing with Rumors or Unusual Market Activity) of the Listed Company Manual. Rule 435 referred to in Section 202.03 does not apply to allied members or principal executives, so deletion of the term from Section 202.03 would be appropriate.

The Exchange further proposes to replace obsolete references to ''specialist'' with ''DMM'' [16] in the heading for Rules 99—114 (Specialists, Odd-Lot Brokers, and Registered Traders) and in the following sections of the Listed Company Manual:

• The summary under ''The Listing Process,'' which is Section 1 of the ''Sectional Organization Summary'' under the ''General Organization'' heading of the ''Organization of the Manual'' section in the Introduction to the Listed Company Manual;
• The third entry under the ''Miscellaneous and Related Matters'' heading below ''Reference Guide for Subsequent Listing Applications (703.00 & 903.02)''; and
• The heading for Section 806.00 titled ''Request of Listed Company for a Change of Specialist Unit or for Removal from the List'' in Section 8 (Suspension and Delisting) of the Listed Company Manual.

Finally, the Exchange proposes to delete an obsolete reference to ''the Medical Clinic located in the Exchange building'' in Rule 301(b) (Qualifications for Membership).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[17] in general, and furthers the objectives of section 6(b)(1) [18] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with section 6(b)(5) of the Act,[19] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change is designed to provide fair procedures for the denial of membership to any person seeking Exchange membership, the barring of any person from becoming associated with a member, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof, consistent with the objectives of section 6(b)(7) [20] and section 6(d)(2) [21] of the Act.

Amending Rule 308 to reflect the consolidation of the Acceptability Board with the Hearing Board would continue to contribute to the orderly operation of the Exchange. As proposed, given the overlap in the membership of the two boards, the Exchange would appoint the same individuals to a single board that would be available to serve on both Hearing Panels for disciplinary actions (the Hearing Board's current function) and Acceptability Committees for acceptability hearings (the Acceptability Board's sole current function). The proposed change would streamline the process of appointing individuals to boards charged with specific functions under the Exchange's rules and eliminate duplication in the appointment of Exchange boards, which would enable the Exchange to continue to be so organized as to have the capacity to carry out the purposes of the Act and comply with the provisions of the Act by its members and persons associated with members, thereby furthering the objectives of section 6(b)(1) [22] of the Act.

The Exchange further believes that the proposed change would be beneficial to both investors and the public interest, thereby promoting the maintenance of a fair and orderly market and the protection of investors and the public interest consistent with section 6(b)(5) of the Act.[23] The proposed changes would continue to permit the appointment of individuals that meet the same qualifications and requirements to consider applications prior to disapproval by the Exchange under current Rule 308. More specifically, the Exchange believes that there would be no material difference between the requirements for Acceptability Board composition under current Rule 308(c) and proposed Rule 9232(b) insofar as both rules require that the applicable body be composed of (1) members and allied members (now principal executives) [24] of the Exchange who are not members of the Board, and (2) registered employees and non-registered employees of member organizations. Proposed Rule 308(c) makes it clear that the proposed Acceptability Committee can only include members and principal executives of the Exchange who are members of the Board of Directors, or that are registered employees and non-registered employees of member organizations. Both rules also require that the board be appointed annually and serve at the pleasure of the Board, so there will be no change in the frequency of appointment.

Moreover, the Exchange believes that as a practical matter the proposed change is consistent with current practice, as the board to whom authority has been delegated pursuant to Rule 308(c) is the Board itself, and as a result the Board appoints both the Hearing Board and the Acceptability Board. The Exchange believes that having the full Board make appointments is the more

[13] The Exchange would replace ''allied member'' in Rule 607(a)(3)(iii). The references to ''allied member'' in Rule 607(a)(2)(i) and (a)(3)(i) would be deleted.

[14] The Exchange would also add a space between ''(i)'' and ''Schedule of Fees'' in Rule 629.

[15] *See* note 13, *supra.*

[16] The specialist system was phased out and the DMM structure adopted in 2008. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3, to Create a New NYSE Market Model, with Certain Components to Operate as a One-Year Pilot, That Would Alter NYSE's Priority and Parity Rules, Phase Out Specialists by Creating a Designated Market Maker, and Provide Market Participants with Additional Abilities to Post Hidden Liquidity).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(1).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78f(b)(7).

[21] 15 U.S.C. 78f(d)(2).

[22] 15 U.S.C. 78f(b)(1).

[23] 15 U.S.C. 78f(b)(5).

[24] *See* note 3, *supra.*

conservative option for appointing Hearing Board members, who serve at the pleasure of the Board. For this reason, the Exchange believes that the proposed change would be beneficial to both investors and the public interest, thereby promoting the maintenance of a fair and orderly market and the protection of investors and the public interest. In addition, because the substance and process set forth in Rule 308 would remain unchanged, the Exchange believes that the proposed changes would continue to provide fair procedures for the denial of membership to any person seeking Exchange membership, the barring of any person from becoming associated with a member, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof consistent with the objectives of section 6(b)(7)[25] and section 6(d)(2)[26] of the Act.

Finally, the Exchange believes that deletion and, where applicable, replacement of the obsolete references in its rules and the Listed Company Manual to superseded membership categories (allied members) and market participants (specialists), and the outdated reference to the Exchange's medical clinic, would increase the clarity and transparency of the Exchange's rules and remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public could more easily navigate and understand the Exchange Bylaws and rules. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing 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 that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with streamlining the process of appointing individuals to boards charged with specific functions under the Exchange's rules and eliminating duplication in the appointment of Exchange boards and with deleting and, where applicable, replacing, references to obsolete references in its rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act[27] and Rule 19b–4(f)(6)[28] thereunder. Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[29] and Rule 19b–4(f)(6)[30] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2023–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2023–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2023–19 and should be submitted on or before April 21, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–06657 Filed 3–30–23; 8:45 am]

BILLING CODE 8011–01–P

[25] 15 U.S.C. 78f(b)(7).

[26] 15 U.S.C. 78f(d)(2).

[27] 15 U.S.C. 78s(b)(3)(A).

[28] 17 CFR 240.19b–4(f)(6).

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[31] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17836 and #17837; MISSISSIPPI Disaster Number MS–00151]

Presidential Declaration of a Major Disaster for the State of Mississippi

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA–4697–DR), dated 03/26/2023.

Incident: Severe Storms, Straight-line Winds, and Tornadoes.

Incident Period: 03/24/2023 through 03/25/2023.

DATES: Issued on 03/26/2023.

Physical Loan Application Deadline Date: 05/25/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 12/26/2023.

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 Recovery & Resilience, 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 03/26/2023, applications for disaster loans may be filed 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 (Physical Damage and Economic Injury Loans): Carroll, Humphreys, Monroe, Sharkey.

Contiguous Counties (Economic Injury Loans Only):

Mississippi: Attala, Chickasaw, Clay, Grenada, Holmes, Issaquena, Itawamba, Lee, Leflore, Lowndes, Montgomery, Sunflower, Washington, Yazoo.

Alabama: Lamar, Marion.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.750
Homeowners without Credit Available Elsewhere	2.375
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 17836 C and for economic injury is 17837 0.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–06689 Filed 3–30–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17796 and #17797; SOUTH DAKOTA Disaster Number SD–00139]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of South Dakota

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of South Dakota (FEMA–4689–DR), dated 02/27/2023.

Incident: Severe Winter Storms and Snowstorm.

Incident Period: 12/12/2022 through 12/25/2022.

DATES: Issued on 03/21/2023.

Physical Loan Application Deadline Date: 04/28/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 11/27/2023.

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 Recovery & Resilience, 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 Private Non-Profit organizations in the State of South Dakota, dated 02/27/2023, is hereby amended to include the following areas as adversely affected by the disaster *Primary Counties:* Ziebach.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–06688 Filed 3–30–23; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2022–0064]

Guaranteed Income Financial Treatment Trial (GIFTT)

AGENCY: Social Security Administration.

ACTION: Notice.

SUMMARY: We are announcing a demonstration project for the Social Security Supplemental Security Income (SSI) program under title XVI of the Social Security Act (Act). In this project, we will test the effect of providing guaranteed income to adults with cancer in active treatment to learn about its interaction with the SSI program. We will modify the program rules that apply to certain project participants who apply for and who already receive SSI payments under the title XVI program.

DATES: We plan to begin this project in March 2023 and end it in April 2030.

FOR FURTHER INFORMATION CONTACT: Debra Engler, Office of Retirement and Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, 443–729–6727. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *https://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Guaranteed Income Financial Treatment Trial (GIFTT)

Under the GIFTT, we will test the effect of providing guaranteed income payments to adults with cancer in active treatment. We are conducting this project under section 1110 of the Social Security Act, which provides the Commissioner the authority to carry out demonstrations which are likely to assist in promoting the objectives or facilitating the administration of title XVI. This test will inform how providing a level of guaranteed income

interacts with the SSI program and its effects on individuals with cancer who may apply for and already receive SSI. We will also analyze participant outcomes related to their SSI payments, earnings, and mortality.

We have a cooperative agreement with the University of Pennsylvania and Humanity Forward Foundation to implement and evaluate the GIFTT. For the evaluation, we will modify the program rules that apply to certain project participants and provide aggregated data that will compare outcomes between intervention group and control group participants with regard to benefits, earnings, and mortality. One Family Foundation will fund the guaranteed income payments. Humanity Forward Foundation will administer the guaranteed income payments and benefits counseling. The University of Pennsylvania will recruit participants and conduct the surveys and evaluation.

Potential participants are adults with cancer in active treatment. All participants must have an annual household income at or below 200 percent of the Federal Poverty Line. The adults with cancer are individuals who are in treatment at Jefferson Health or Penn Abramson Comprehensive Cancer Center [1] and who reside in one of the following counties:

- *Pennsylvania:* Philadelphia (to include City of Philadelphia), Montgomery, Delaware, Upper Darby, Chester, Berks, Lancaster, Bucks, Lehigh, Northampton.
- *New Jersey:* Burlington, Camden, Gloucester, Salem, Mercer, Hunterdon, Warren.

The University of Pennsylvania expects to recruit up to 600 individuals to participate in the GIFTT. Participation is voluntary and individual participants will sign an informed consent. The University of Pennsylvania will randomly assign participants to a control group or an intervention group. The control group consists of participants who will not receive guaranteed income payments; they will receive the typical supports available to patients with cancer at their hospital, including a referral to a social worker or navigator. The intervention group consists of participants who will receive guaranteed income payments of $1,000 per month for 12 months, along with benefits counseling.

[1] Other adults with cancer who reside in the listed counties but who receive treatment from other cancer centers are also eligible for the GIFTT if they meet the other eligibility criteria (are in active treatment and have household income at or below 200 percent of the Federal Poverty Line).

Under title XVI of the Act, we make SSI payments to persons who are aged, blind, or disabled, and who also have limited income and resources. We expect some participants in the GIFTT will apply for or already receive SSI payments. We will apply the alternate rules, as described below, to those participants in the intervention group who consent to sharing their data with us in the informed consent. All participants can withdraw from the project at any time. We will apply all usual program rules to all applicable participants three years after the receipt of their final guaranteed income payment.

Provisions of the Act and Regulations We Are Waiving To Provide Alternate Rules Under the GIFTT

The following alternate program rules will apply to those who apply for and those who already receive SSI that are assigned to the intervention group during participation in the GIFTT and consent to share data with SSA:

- Exclusion of the guaranteed income payments as income when determining eligibility and payments;
- Exclusion of guaranteed income as resources during the 12-month payment period plus a period of up to three years after receipt of the final guaranteed income payment; and
- Protection of the household from offsetting SSI payments and resource limits because of guaranteed income payments. When deeming rules apply, guaranteed income payments will be excluded from income and resources. The limitation on resources will be removed with respect to guaranteed income payments.

Applying these alternate rules involves waiving or altering certain provisions included in sections 1611(a)(1)(B), (a)(2)(B), (a)(3)(A), 1612(a)(2), 1614(f)(1), (f)(2)(A) of the Act and 20 CFR 416.1102, 416.1123, 416.1160, 416.1163, 416.1165, 416.1201, 416.1202, 416.1205, 416.1207.

Authority for the Waivers Under GIFTT

Section 1110(b) of the Act authorizes us to waive any requirements, conditions, or limitations of title XVI necessary to carry out demonstration projects. Consistent with the requirements in section 1110(b)(2)(B) of the Act, participation in the GIFTT is voluntary and based on informed consent, and the voluntary agreement to participate may be withdrawn by the participant at any time.

The Acting Commissioner of the Social Security Administration, Kilolo Kijakazi, Ph.D., M.S.W., having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for the Social Security Administration, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

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

[FR Doc. 2023–06706 Filed 3–30–23; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2023–0006]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes two new collection and a revision of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Comments: *https://www.reginfo.gov/public/do/PRAMain.* Submit your comments online referencing Docket ID Number [SSA–2023–0006].

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAMain,* referencing Docket ID Number [SSA–2023–0023].

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than May 30, 2023. Individuals can obtain copies of the collection

instrument by writing to the above email address.

State of Georgia's Criminal Justice Coordinating Council's (CJCC) Evaluation of the Implementation of the Supplemental Security Income (SSI)/ Social Security Disability Insurance (SSDI) Outreach, Access, and Recovery (SOAR) Model in County Jails—0960–NEW.

Background

SSA is requesting clearance to collect data necessary to evaluate an intervention under the Interventional Cooperative Agreement Program (ICAP) with the State of Georgia's Criminal Justice Coordinating Council (CJCC). ICAP allows SSA to partner with various non-federal groups and organizations to advance interventional research connected to the Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) programs. SSA awarded CJCC a cooperative agreement to conduct an intervention and evaluation of the Supplemental Security Income (SSI)/ Social Security Disability Insurance (SSDI) Outreach, Access, and Recovery (SOAR) model in county jails with inmates with serious and persistent mental illness (SPMI) across the state. In addition to SSA, CJCC has partnered with the following: (1) Applied Research Services (ARS); (2) the Georgia Department of Behavioral Health and Developmental Disabilities (DBHDD); and (3) four county jails to implement the program.

ICAP CJCC Project Description

Investigators hypothesize that untreated mental illness and repeated psychiatric crises may be a factor in jail recidivism. Connection to SSI/SSDI and attendant insurance benefits may help a person with SPMI obtain treatment and interrupt criminogenic behavior. The intervention will connect respondents in four county jails identified as having SPMI to Medicaid Eligibility Specialists (MES) hired and trained by the Georgia DBHDD, who will help them apply for SSI and SSDI. Respondents in two of the four counties (Fulton County Jail and Cobb County Jail) will also have the option of working with a Forensic Peer Mentor (FPM), a formerly incarcerated individual who is familiar with resources that may help participants increase their quality-of-life post incarceration and avoid recidivism. SSA anticipates the two DBHDD MESs will each serve 45 participants per year, for a total of 90 participants per year.

To maximize the likelihood of the SSI/SSDI application approval, the MES will employ the SOAR method, which uses in-depth medical and personal summaries of disability to facilitate the SSI/SSDI application process. Researchers will collect data from participant surveys to evaluate and study the impact of the intervention. Through the data collected through these surveys, along with administrative data from SSA, the State of Georgia, participating counties, and DBHDD, SSA hopes to address the following research questions:

- Does connection to a SOAR-trained specialist increase the likelihood that a person with SPMI in jail will be approved for SSI/SSDI benefits?
- If a person with SPMI receives SSI/ SSDI benefits, are they able to connect to treatment resources that they may not have been able to obtain before?
- If a person with SPMI connects to treatment resources and successfully engages with them, are they able to achieve mental health recovery and stay out of jail?

The respondents are individuals with serious and persistent mental illness incarcerated in county jails in the state of Georgia.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
Initial Enrollment Survey (Paper)	90	1	19	29	* $12.81	** $371
Informed Consent (Paper)	90	1	10	15	* 12.81	** 192
Follow-up Survey (Internet)	90	2	23	69	* 12.81	** 884
Totals	270			113		** 1,447

* We based this figure on the average DI payments based on SSA's current FY 2023 data (*https://www.ssa.gov/legislation/2023factsheet.pdf*).
** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than May 1, 2023. Individuals can obtain copies of these OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Vocational Resource Facilitator Demonstration—0960–NEW. SSA is undertaking the Vocational Resource Facilitator Demonstration (VRFD) under the ICAP. ICAP allows SSA to partner with various non-federal groups and organizations to advance interventional research connected to the SSI and SSDI programs. VRFD will test the Vocational Resource Facilitator (VRF) intervention, which helps newly injured spinal cord injury or disease (SCI), or brain injury (BI) patients pursue their employment goals. The VRFD will provide empirical evidence on the impact of the intervention on patients in several critical areas: (1) employment and earnings; (2) SSI and SSDI benefit receipt; and (3) satisfaction and well-being. A rigorous evaluation of VRFD is critical to help SSA and other interested parties assess promising options to improve employment-related outcomes and decrease benefit receipt. The VRFD evaluation uses a randomized control experimental design that includes one treatment group and one control group. Control group members will receive a referral for services to the Division of Vocational Rehabilitation Services (DVRS), New Jersey's state Vocational Rehabilitation agency. The treatment group will receive a referral to DVRS and employment services from a resource facilitator (RF). RFs are fully integrated members of clinical teams who engage with injured workers during inpatient rehabilitation about return to work. The central research questions include:

- Was the intervention implemented as planned?
- What are key considerations for scaling up or adopting the VRF model at other facilities?

- What were the impacts of VRF on outcomes of interest?
- Did treatment group members earn or work more than control group members?
- Were treatment group members relatively less likely to apply to or receive SSI or SSDI benefits?
- Did treatment group members experience greater satisfaction and well-being than control group members?
- What were the benefits and costs of the demonstration across key groups?

The proposed public survey data collections will support three components of the planned implementation, impact, and benefit-cost analyses. The data collection efforts will provide information that is not available in SSA program records about the characteristics and outcomes of VRFD participants in the treatment and control groups. Respondents are newly injured SCI and BI patients, who will provide written consent before agreeing to participate in the study and be randomly assigned to one of the study groups.

Type of Request: Request for a new information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time for teleservice centers (minutes) **	Total annual opportunity cost (dollars) ***
Informed Consent Form	500	1	10	83	* $28.01	.....	*** $2,325
Baseline Survey	500	1	15	125	* 28.01	.....	*** 3,501
12-month Follow-up Survey	400	1	20	133	* 28.01	** 19	*** 7,283
Staff Interviews with Site Staff	10	2	66	22	* 28.01	.....	*** 616
Onsite Audit of sample of case files	1	2	30	1	* 28.01	.....	*** 28
Totals	1,411	.....	.....	364	.....	.....	*** 13,753

* We based this figure on the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

** We based this figure by averaging the average FY 2023 wait times for field offices and teleservice centers, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Application for a Social Security Number Card, the Social Security Number Application Process (SSNAP), and internet SSN Replacement Card (iSSNRC) Application—20 CFR 422.103–422.110—0960–0066. SSA collects information on the SS–5 (used in the United States) and SS–5–FS (used outside the United States) to issue original or replacement Social Security cards. SSA also enters the application data into the SSNAP application when issuing a card via telephone or in person. In addition, hospitals collect the same information on SSA's behalf for newborn children through the Enumeration-at-Birth process. In this process, parents of newborns provide hospital birth registration clerks with information required to register these newborns. Hospitals send this information to State Bureaus of Vital Statistics (BVS), and they send the information to SSA's National Computer Center. SSA then uploads the data to the SSA mainframe along with all other enumeration data, and we assign the newborn a Social Security number (SSN) and issue a Social Security card. Respondents can also use these modalities to request a change in their SSN records. In addition, the iSSNRC internet application collects information similar to the paper SS–5 for no-change, and a name change due to marriage, replacement SSN cards for adult U.S. citizens. The iSSNRC modality allows certain applicants for SSN replacement cards to complete the internet application and submit the required evidence online rather than completing a paper Form SS–5. Finally, oSSNAP collects information similar to that which we collect on the paper SS–5 for no change situations, with the exception of a name change. oSSNAP allows applicants, both U.S. citizens and non-citizens, for new or replacement SSN cards to start the application process online, receive a list of evidentiary documents, and then submit the application data to SSA for further processing by SSA employees. Applicants need to visit a local SSA office to complete the application process. We are planning to make minor changes to clarify that one screen is optional, and to provide a space for respondents to inform SSA of the types of documents they will present during the in-person follow up meeting. The respondents for this information collection are applicants for original and replacement Social Security cards, or individuals who wish to change information in their SSN records, who use any of the modalities described above.

Type of Request: Revision of an OMB-approved information collection.

Application scenario	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
EAB Modality							
Hospital staff who relay the State birth certificate information to the BVS and SSA through the EAB process	3,759,517	1	5	313,293	* $24.49	** 0	*** $7,672,546

Application scenario	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
iSSNRC Modality							
Adult U.S. Citizens requesting a replacement card with no changes through the iSSNRC	3,002,698	1	5	250,225	*28.01	**0	***7,008,802
Adult U.S. Citizens requesting a replacement card with a name change through iSSNRC	1,312	1	5	109	*28.01	**0	***3,053
oSSNAP Modality							
Adult U.S. Citizens providing information to receive a replacement card through the oSSNAP+	822,104	1	5	68,509	*28.01	**24	***11,129,802
Adult U.S. Citizens providing information to receive an original card through the oSSNAP+	37,323	1	5	3,110	*28.01	*24	***505,272
Adult Non-U.S. Citizens providing information to receive an original card through the oSSNAP+	204,081	1	5	17,007	*28.01	**24	***2,762,878
Adult Non-U.S. Citizens providing information to receive a replacement card through the oSSNAP+	84,635	1	5	7,053	*28.01	**24	***1,145,805
SSNAP/SS–5 Modality							
Respondents who do not have to provide parents' SSNs	6,973,505	1	9	1,046,026	*28.01	**24	***107,430,338
Respondents whom we ask to provide parents' SSNs (when applying for original SSN cards for children under age 12)	207,521	1	9	31,128	*28.01	**24	***3,196,949
Applicants age 12 or older who need to answer additional questions so SSA can determine whether we previously assigned an SSN	1,113,144	1	10	185,524	*28.01	**24	***17,668,204
Applicants asking for a replacement SSN card beyond the allowable limits (i.e., who must provide additional documentation to accompany the application)	6,703	1	60	6,703	*28.01	**24	***262,846
Enumeration Quality Review							
Authorization to SSA to obtain personal information cover letter	500	1	15	125	*28.01	**24	***9,103
Authorization to SSA to obtain personal information follow-up cover letter	500	1	15	125	*28.01	**24	***9,103
Grand Total							
Totals	16,213,543			1,928,937			***159,309,973

+ The number of respondents for this modality is an estimate based on google analytics data for the SS–5 form downloads from *SSA.Gov.*

* We based this figure on average Hospital Records Clerks (*https://www.bls.gov/oes/current/oes292098.htm*), and average U.S. worker's hourly wages (*https://www.bls.gov/oes/current/oes_nat.htm*) as reported by the U.S. Bureau of Labor Statistics.

** We based this figure on the average FY 2023 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: March 28, 2023.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2023–06682 Filed 3–30–23; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 12031]

U.S. Advisory Commission on Public Diplomacy; Notice of Charter Renewal for the U.S. Advisory Commission on Public Diplomacy

The Department of State has renewed the Charter for the U.S. Advisory Commission on Public Diplomacy (ACPD).

The Commission was originally established under section 604 of the United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1469), and under section 8 of Reorganization Plan Number 2 of 1977. It was permanently reauthorized pursuant to section 5604 of the National Defense Authorization Act, Fiscal Year 2022 (Pub. L. 117–81), which amended section 1134 of the Foreign Affairs Reform and Restructuring Act of 1998 (22 U.S.C. 6553).

For more than 70 years, the ACPD has appraised U.S. Government activities intended to understand, inform, and influence foreign publics and has aimed to increase the understanding of and support for these activities. The Commission conducts research and symposia that provide honest

assessments and informed discourse on public diplomacy efforts across the U.S. Government, and it disseminates findings through reports, white papers, and other publications. It reports to the President, Secretary of State, and Congress. The Under Secretary for Public Diplomacy and Public Affairs' Office of Policy, Planning, and Resources (R/PPR) provides administrative support for the ACPD.

The Commission consists of seven members appointed by the President, with the advice and consent of the Senate. The members of the Commission represent the public interest and are selected from a cross section of educational, communications, cultural, scientific, technical, public service, labor, business, and professional backgrounds. No more than four members may be from any one political party. The President designates a member to chair the Commission.

The current members of the Commission are: Mr. Sim Farar of California, Chair; Mr. William Hybl of Colorado, Vice-Chair; and Ms. Anne Terman Wedner of Florida. Four seats on the Commission currently are vacant.

The Charter renewal was filed on March 15, 2023.

For further information about the Commission, please contact Vivian S. Walker, the Commission's Designated Federal Officer and Executive Director, at *WalkerVS@state.gov.*

Authority: 22 U.S.C. 2651a, 22 U.S.C. 1469, 5 U.S.C. 1001 *et seq.,* and 41 CFR 102–3.150.

Kristina K. Zamary,

Department of State.

[FR Doc. 2023–06740 Filed 3–30–23; 8:45 am]

BILLING CODE 4710–45–P

DEPARTMENT OF STATE

[Public Notice 12028]

2022 Global Magnitsky Human Rights Accountability Act Annual Report

ACTION: Notice.

SUMMARY: This notice contains the text of the report required by the Global Magnitsky Human Rights Accountability Act, as submitted by the Secretary of State.

FOR FURTHER INFORMATION CONTACT: Andrew Self, email: *SelfAH@state.gov,* Phone: (202) 412–3586.

SUPPLEMENTARY INFORMATION: On December 21, 2022, the Under Secretary of State for Political Affairs approved the following report pursuant to the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, Title XII, Subtitle F), as amended by Public Law 117–110, Section 6 (collectively, ''the Act''), which is implemented and built upon by E.O. 13818 of December 20, 2017, ''E.O. Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption''(E.O. 13818). The text of the report follows:

Pursuant to Section 1264 of the Act, and in accordance with E.O. 13818, the Secretary of State, in consultation with the Secretary of the Treasury, submits this report to detail the Administration's implementation of the Act in the 2022 reporting period.

In 2022, the United States took significant action under the Global Magnitsky sanctions program (''Global Magnitsky''), designating 35 foreign persons over the course of the year. As of December 10, 2022, the United States has designated a total of 450 foreign persons (individuals and entities) pursuant to E.O. 13818. This sanctions program, which targets those connected to serious human rights abuse, corrupt actors, and their enablers, represents the best of the United States' values and enduring commitment to promote respect for human rights and combat corruption around the world. Through the Act and E.O. 13818, the United States has sought to disrupt and deter serious human rights abuse and corruption abroad; promote accountability for those who act with impunity; and maintain U.S. global leadership on anticorruption and human rights promotion in coordination with U.S. partners, allies, and civil society where appropriate. In recognition of the repeal of Section 1265 of the Act, signed into law on April 8, 2022 in Public Law 117–110, Section 6 (which enables the Reauthorization of Sanctions Under the Global Magnitsky Human Rights Accountability Act with Respect to Human Rights Violations and Corruption), the Administration can and will continue to utilize this tool to promote respect for human rights and the rule of law globally.

As the President outlined in his National Security Strategy (NSS), the United States will stand with our allies and partners to combat new threats aimed at our democracies. The Administration will take special aim at confronting corruption, which rots democracy from the inside, erodes government stability, impedes economic development, and is increasingly weaponized by authoritarian states to undermine democratic institutions. The United States seeks to promote respect for human rights; address discrimination, inequity, and marginalization in all its forms; and stand up for democracy, the rule of law, and human dignity. On all these issues, the United States works to forge a common approach with likeminded countries. Through implementation of the Global Magnitsky sanctions program, the Administration is taking action to execute the President's vision as described in the NSS.

The Global Magnitsky program and cooperation with like-minded international partners directly address the objectives outlined in the President's 2021 Memorandum on Establishing the Fight Against Corruption as a Core National Security Interest. This memorandum states that corruption threatens U.S. national security, economic equity, global anti-poverty and development efforts, and democracy itself. It directs U.S. government action to strengthen efforts to hold accountable corrupt individuals and their facilitators, including by, where appropriate, identifying, freezing, and recovering stolen assets through sanctions or other authorities; bolster the capacity of domestic and international institutions and multilateral bodies focused on establishing global anti-corruption norms; and work with international partners to counteract strategic corruption by foreign leaders, foreign state-owned or affiliated enterprises, and other foreign actors and their domestic collaborators.

On December 20, 2021, President Biden elevated anti-corruption to the forefront of U.S. national security strategy with the first ever U.S. Strategy on Countering Corruption, consisting of five mutually reinforcing pillars, including (i) Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Fight Corruption, (ii) Curbing Illicit Finance, (iii) Holding Corrupt Actors Accountable, (iv) Preserving and Strengthening the Multilateral Anti-Corruption Architecture, and (v) Improving Diplomatic Engagement and Leveraging Foreign Assistance. This anti-corruption strategy spotlights the Global Magnitsky sanctions program among the U.S. government's foreign policy tools for promoting global accountability for serious human rights abuse and corruption through the imposition of financial sanctions on foreign persons.

Actions taken in 2022 continue to demonstrate the reach, flexibility, and broad scope of Global Magnitsky. The United States responded to serious human rights abuse and corruption globally, deterring and disrupting some of the most egregious behavior by foreign actors. These actions targeted, among others, corrupt politicians

undermining the rule of law in Central America and a People's Republic of China (PRC) fishing network connected to serious human rights abuse involving forced labor. The actions against the PRC fishing network in particular demonstrated the U.S. government's ongoing effort to impose tangible and significant consequences on those engaged in serious human rights abuse, including on those vessels engaged in illegal, unreported, and unregulated (IUU) fishing.

As noted in the Presidential Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses, if IUU fishing and associated labor abuses are left unchecked, they threaten the livelihoods and human rights of fishers around the world and undermine U.S. economic competitiveness, national security, and fishery sustainability. This was the first time the United States has sanctioned an entity connected to serious human rights abuse related to forced labor issues. Where applicable, the United States used Global Magnitsky sanctions in coordination with international law enforcement actions, including Drug Enforcement Administration and Federal Bureau of Investigation (FBI) investigations, extraditions, and indictments. These designations demonstrate the Administration's resolve to leverage this important tool judiciously and to strategic effect.

When considering financial sanctions under Global Magnitsky, the United States prioritizes actions that are expected to produce a tangible and significant impact on corrupt actors, serious human rights abusers, and their affiliates, and prompt changes in behavior or disrupt the activities of malign actors. Sanctions under the Global Magnitsky program aim to target systemic corruption and human rights abuse, including the networks that engage in, facilitate, or perpetuate sustained patterns of such illicit behavior rather than incidental acts by individual targets. Persons sanctioned pursuant to this authority appear on the Office of Foreign Assets Control's (OFAC's) List of Specially Designated Nationals and Blocked Persons (SDN List). As a result of these actions, all property and interests in property of the sanctioned persons that are in the United States or in the possession or control of U.S. persons are blocked and must be reported to OFAC. Unless authorized by a general or specific license issued by OFAC or otherwise exempt, OFAC's regulations generally prohibit all transactions by U.S. persons or within (or transiting) the United States that involve any property or interests in property of designated or otherwise blocked persons. The prohibitions include the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any blocked person or the receipt of any contribution or provision of funds, goods or services from any such person.

In 2022, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, imposed financial sanctions on the following 35 foreign persons (individuals and entities) pursuant to E.O. 13818 (ordered by date of designation):

Sudan

- *Central Reserve Police:* The Central Reserve Police (CRP) was designated on March 21, 2022, for being a foreign person responsible for or complicit in, or that has directly or indirectly engaged in, serious human rights abuse. The CRP is a militarized Sudanese police unit that has been at the forefront of the Sudanese security forces' violent response to peaceful protests in Khartoum. On January 17, 2022, the CRP and the anti-riot police led a deployment of Sudanese security forces to suppress demonstrations across Khartoum. Using live ammunition, CRP officers fired on protestors throughout the day. When protestors fled the scene, CRP, anti-riot police, and regular police chased them, arresting and beating some with batons and gun butts.

Liberia

- *Bill Twehway:* Twehway was designated on August 15, 2022, for being a foreign person who is a current government official who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Twehway is the current Managing Director of the National Port Authority (NPA). Twehway orchestrated the diversion of $1.5 million in vessel storage fee funds from the NPA into a private account. Twehway secretly formed a private company to which, through his position at the NPA, he later unilaterally awarded a contract for loading and unloading cargo at the Port of Buchanan. Twehway and others used family members to obfuscate their own involvement in the company while still benefitting financially from the company.
- *Sayma Syrenius Cephus:* Cephus was designated on August 15, 2022, for being a foreign person who is a current government official who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Cephus is the current Solicitor General and Chief Prosecutor of Liberia. Cephus has received bribes from individuals in exchange for having their cases dropped; worked behind the scenes to establish arrangements with subjects of money laundering investigations to cease investigations in order to personally benefit financially; utilized his position to hinder investigations and block the prosecution of corruption cases involving members of the government; and has been accused of tampering with and purposefully withholding evidence in cases involving members of opposition political parties to ensure conviction.
- *Nathaniel McGill:* McGill was designated on August 15, 2022, for being a foreign person who is a current government official who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. During his tenure in government, McGill has bribed business owners, received bribes from potential investors, and accepted kickbacks for steering contracts to companies in which he has an interest. McGill is credibly accused of involvement in a wide range of other corrupt schemes including soliciting bribes from government office seekers and misappropriating government assets for personal gain.

Moldova

- *Vladimir Plahotniuc:* Plahotniuc was designated on October 26, 2022, for being a foreign person who is a former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Plahotniuc is a former Moldovan Member of Parliament who served as both de facto leader and elected chair of the Democratic Party of Moldova (PDM). Plahotniuc directed Moldovan law enforcement to focus investigations on individuals and

entities that were in political opposition to him and the PDM in advance of elections in 2018. Plahotniuc also used Moldovan government officials as intermediaries to bribe law enforcement officials in order to maintain their loyalty and further cement his control over Moldova; explicitly engaged in corrupt arrangements with Moldovan government officials; and attempted to bribe Moldovan politicians to switch political parties. Plahotniuc controlled the judicial system and used Moldovan courts to manipulate and invalidate the June 2018 mayoral election in Chisinau and close voting stations in areas where his party was not expected to do well. Plahotniuc maintained control of key media outlets, further enabling his influence and ability to exert leverage over the government to target his opponents and protect himself and his allies.

Guatemala

- *Dmitry Kudryakov:* Kudryakov was designated on November 18, 2022, for being a foreign person who materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of corruption, including the misappropriation of state assets, corruption related to government contracts, or the extraction of natural resources, or bribery. Kudryakov, a Russian national, led multiple bribery schemes over several years involving politicians, judges, and government officials to exploit the Guatemalan mining sector. Kudryakov is the leader of Solway Investment mining operations in Guatemala.
- *Iryna Litviniuk:* Litviniuk was designated on November 18, 2022, for being a foreign person who materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of corruption, including the misappropriation of state assets, corruption related to government contracts, or the extraction of natural resources, or bribery. Litviniuk, a Belarusian national, led multiple bribery schemes over several years involving politicians, judges, and government officials to exploit the Guatemalan mining sector. Litviniuk conducted corrupt acts in furtherance of Russian influence peddling schemes by unlawfully giving cash payments to public officials in exchange for support for Russian mining interests.
- *Compania Guatemalteca de Niquel, Compania Procesadora de Niquel, and Mayaniquel:* Compania Guatemalteca de Niquel (CGN), Compania Procesadora de Niquel (ProNiCo), and Mayaniquel were designated on November 18, 2022, for their connection with Kudryakov and Litviniuk's corruption schemes. These entities are subsidiaries of the Solway Investment group, a Russian enterprise that has exploited Guatemalan mines since 2011. CGN, ProNiCo, and Mayaniquel are subsidiaries of the Russian enterprise Solway Investment group and are owned or controlled by, directly or indirectly, Kudryakov. CGN, ProNiCo, and Mayaniquel are registered in Guatemala.
- *Allan Estuardo Rodriguez Reyes:* Rodriguez Reyes was designated on December 9, 2022, for being a foreign person who is a former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Rodriguez Reyes utilized his authority as President of Congress to award construction grants in exchange for financial kickbacks. Rodriguez Reyes has used his political influence to strike deals in exchange for bribes and facilitated bribes to others, including, for example, by allegedly offering bribes for votes on a state of emergency bill during a floor session of congress.
- *Jorge Estuardo Vargas Morales:* Vargas Morales was designated on December 9, 2022, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Vargas Morales is a Guatemalan congressman and one of several individuals at the apex of a network designed to control contracts and operations at government-run ports for personal profit. He oversees project execution once contracts are awarded and pays out a percentage to board members who vote in favor. Additionally, Vargas Morales controls employment at the port through his influence in the port labor unions and uses those unions to gain political leverage. He maintains loyalties by paying bribes in exchange for unions creating blockades and strikes to advance his political objectives.
- *Luis Alfonso Chang Navarro:* Chang Navarro was designated on December 9, 2022, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Chang Navarro was the Minister of Energy and Mines from 2016–2020; additionally, as Minister of Energy and Mines, Chang Navarro was the head of the board of Guatemala's National Electrification Institute (INDE) and allegedly used his position to secure kickbacks. He solicited bribes and other favors in exchange for not revoking an oil exploitation license. Chang Navarro's modus operandi was to use his position as Minister to ''create problems'' for a business and then offer a solution in exchange for bribes and other unlawful favors.

El Salvador

- *Conan Tonathiu Castro Ramirez:* Castro Ramirez was designated on December 9, 2022, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Castro Ramirez, during his tenure as Presidential Legal Secretary, obstructed investigations into the misappropriation of public funds during the government's response to the pandemic and used his office for personal financial gain.
- *Oscar Rolando Castro:* Rolando Castro was designated on December 9, 2022, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. As Minister of Labor, Rolando Castro engaged in corruption and misappropriated public funds for his personal benefit. As Minister, Rolando Castro used his position to influence unions to align with the Ministry of Labor's political interests and engage in activities that benefitted him and his political allies in order to receive expedited processing of their credentials. Some of those who agreed received additional benefits, such as favored access for international travel while some of those who refused to

align with Rolando Castro faced harassment, retaliation, and delayed union certification.

Guinea

• *Alpha Conde:* Conde was designated on December 9, 2022, for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to his tenure. Conde is the former President of Guinea who was ousted in a coup d'état in September 2021. Under his presidency, security forces engaged in violence against supporters of Conde's opposition leading up to a March 2020 constitutional referendum that enabled Conde to run for a third term. Violence against opposition members continued through and after the October 2020 Guinean presidential election. In early 2020, Conde ordered ministers to create a police unit to respond to anti-Conde protesters, with violence if necessary. Around the October 2020 Guinean presidential election, security forces used excessive force to disperse opposition supporters. Among other incidents, security forces reportedly fired live bullets into crowds that had gathered to celebrate the victory announcement of Conde's opposition and shot two minors, killing one, and shooting one in the back as he ran away. After the October 2020 election, security forces reportedly killed over a dozen individuals, including individuals killed at close range who presented no immediate danger to the security forces.

Mali

• *Karim Keita:* Keita was designated on December 9, 2022, for being a foreign person who is a current or former government official who is responsible for or complicit in, or who has directly or indirectly engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery. Keita is the son of former Mali President Ibrahim Boubacar Keita and the former president of the Security and Defense Commission of Mali's National Assembly. Keita oversaw Mali's defense spending from February 2014 until August 2020, when the military overthrew his father. Keita allegedly used his position to receive bribes, assign contracts to affiliates who subsequently paid him kickbacks, and embezzle government funds by overpaying on contracts for materiel. Through his father, Keita allegedly arranged to remove from their positions officials who did not support his corruption. Keita also ostensibly arranged bribes to support his father's re-election. After his father was ousted, Keita fled to Cote d'Ivoire, where he serves as the CEO of Konijane Strategic Marketing.

• *Konijane Strategic Marketing:* Konijane Strategic Marketing was designated on December 9, 2022, for being owned or controlled by Keita. Keita currently serves as the CEO of Konijane Strategic Marketing.

Philippines

• *Apollo Quiboloy:* Quiboloy was designated on December 9, 2022, for being a foreign person who is or has been responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse. For more than a decade, Quiboloy, the founder of The Kingdom of Jesus Christ, The Name Above Every Name (KOJC) church in the Philippines, engaged in serious human rights abuse, including a pattern of systemic and pervasive rape of girls as young as 11 years old, as well as other physical abuse. In 2021, a federal indictment alleged Quiboloy was involved in sex trafficking ''pastorals''—young women within the KOJC selected to work as personal assistants for Quiboloy. Pastorals were directed to have ''night duty,'' which required them to have sexual intercourse with Quiboloy on a determined schedule. Quiboloy kept pastorals in various countries, including the Philippines and the United States. Quiboloy also subjected pastorals and other KOJC members to other forms of physical abuse. Reports indicate Quiboloy personally beat victims and knew where to hit them so there would be no visible bruising. Pastorals and KOJC members who angered Quiboloy were at times sent to ''Upper Six,'' a walled compound used solely for punishment.

PRC

• *Li Zhenyu:* Li was designated on December 9, 2022, for being a foreign person who is a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in serious human rights abuse relating to the leader's or official's tenure. Li is the chairman and general manager of Dalian Ocean Fishing Co., Ltd.

• *Zhuo Xinrong:* Zhuo was designated on December 9, 2022, for being a foreign person who is a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in serious human rights abuse relating to the leader's or official's tenure. Zhuo is the founder, chairman and CEO of Pingtan Marine Enterprise, Ltd.

• *Dalian Ocean Fishing Co., Ltd.:* Dalian Ocean Fishing Co., Ltd. (DOF) was designated on December 9, 2022, for being owned or controlled by Li. DOF is responsible for the day-to-day operations of its fleet. DOF committed abuses against crew members including widespread reports of withheld pay, malnutrition, overwork, physical assault, deceptive recruiting practices, confiscation of identity documents, punishing work, physical abuse, and 10 crew member deaths. DOF received almost $8 million annually in PRC government subsidies.

• *Pingtan Marine Enterprise, Ltd.:* Pingtan Marine Enterprise, Ltd. (PME) was designated on December 9, 2022, for being owned or controlled by Zhuo. PME operates a large fleet of nearly 100 fishing vessels and reefer ships. Its vessels have been involved in serious human rights abuse and implicated in IUU fishing and other illegal activity in Indonesia, East Timor, and Ecuador. Crewmembers aboard PME-owned vessels reported instances of forced labor, withheld pay and food, physical violence, and gross negligence which led to the death of a crew member. In 2021, Pingtan Fishing received a $19 million subsidy from the PRC government as an incentive to develop its distant water fishing industry.

• *Heroic Treasure Limited, Mars Harvest Co. Ltd., Merchant Supreme Co. Ltd., Prime Cheer Corporation Ltd., Pingtan Guansheng Ocean Fishing Co., Ltd., Fujian Heyue Marine Fishing Development Co., Ltd.,* and *Pingtan County Ocean Fishing Group Co., Ltd.* along with *157 vessels:* These persons were designated on December 9, 2022, for being directly or indirectly owned or controlled by Li, Zhuo, DOF, or PME.

• *Fuzhou Honglong Ocean Fishing Co., Ltd:* Fuzhou was designated on December 9, 2022, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PME.

• *Wu Yingjie:* Wu was designated on December 9, 2022, for being a foreign person who is responsible for or complicit in, or who has directly or indirectly engaged in, serious human rights abuse. Wu was the Tibetan Autonomous Region (TAR) Party Secretary between 2016 and 2021. During this timeframe, Wu directed government officials to engage in ''stability policies.'' The implementation of these stability policies involved serious human rights abuse, including

physical abuse, arbitrary arrests and detentions in the TAR.

• *Zhang Hongbo:* Zhang was designated on December 9, 2022, for being a leader or official of an entity, including a government entity, that has engaged in, or whose members have engaged in, serious human rights abuse. Zhang has been the director of the Tibetan Public Security Bureau (TPSB) since 2018 through at least November 2022. Zhang has worked to advance the PRC's goals and policies in the TAR as ''Tibet's police chief.'' During Zhang's tenure, the TPSB engaged in serious human rights abuse, including arbitrary detention and physical abuse.

Iran

• *Ali Akbar Javidan:* Javidan was designated on December 9, 2022, for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to his tenure. Javidan is the Law Enforcement Forces of the Islamic Republic of Iran (LEF) commander in Iran's Kermanshah Province who has direct oversight over forces that have killed protesters, including children and the elderly. The LEF was designated in 2011 pursuant to E.O. 13553, an Iran human rights authority, for being responsible for or complicit in serious human rights abuses in Iran since the June 2009 disputed presidential election. The LEF has repeatedly used excessive force in response to protests in Iran in recent years, reportedly resulting in the deaths of hundreds of unarmed protesters. Javidan has made public statements justifying the police response to the ongoing protests while valorizing the LEF forces for suppressing them. Javidan also publicly vowed to punish so-called moral crimes, including the alleged improper wearing of the hijab, during a July 2022 roundup of 1,700 people.

• *Allah Karam Azizi:* Azizi was designated on December 9, 2022, for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to his tenure. Azizi is the warden of Iran's notorious Rejaee Shahr Prison. Rejaee Shahr Prison is known to house political prisoners and those who protest against the regime. Those imprisoned there have suffered serious physical abuse at the hands of the prison's guards. Azizi has reportedly ordered these abuses.

Visa Restrictions Imposed

Persons designated pursuant to E.O. 13818 are subject to the entry restrictions articulated in section 2, unless an exception applies. Section 2 provides that the entry of persons designated under section 1 of the order is suspended pursuant to Presidential Proclamation 8693.

In 2022, the Department took steps to impose visa restrictions, when appropriate, on foreign persons involved in certain human rights violations andsignificantcorruption pursuant to other authorities, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act and will continue to identify individuals subject to those authorities as appropriate. In addition, the Department continues to implement all grounds of inadmissibility in the Immigration and Nationality Act (INA), including INA section 212(a)(3)(E) which renders applicants ineligible for visas if a consular officer has reason to believe that they participated in acts of genocide, torture or extrajudicial killings.

Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act

The United States recognizes that our sanctions are most impactful when implemented in coordination with our foreign partners. In 2022, the Administration continueditssuccessful outreach campaign to international partners regarding the expansion and use of domestic and multilateral anticorruption and human rights sanctions regimes. Over thecourse of the reporting period, the Administration coordinated with like-minded partnersin pursuing coordinated actions against human rights abusers and corrupt actors, particularly in the run up to annual International Anti-Corruption Day and Human Rights Day. On December 9, the United States designated a total of 25 individuals and entities. The United Kingdom, Canada, and Australia joined us with actions against targets connected to human rights abuses in Iran. Additionally, the United Kingdom's tranche of sanctions under its Global Anti-Corruption and Global Human Rights regimes included individuals and entities previously designated by the United States under Global Magnitsky: Vladimir Plathoniuc (designated under E.O. 13818 on October 26, 2022), Milan Radoicic (designated under E.O. 13818 on Dec 8, 2021), and Zvonko Veselinovic (designated under E.O. 13818 on Dec 8, 2021).

The United States is closely following the development of a European Union (EU) anti-corruption sanctions authority and stands ready to support EU efforts by sharing insights and offering technical support, including regarding evidence collection, addressing legal challenges, and evidentiary requirements. The Departments of State and the Treasury have, over the last year, shared information, coordinated messaging, identified areas of potential collaboration, and provided technical assistance to this end. The Administration will continue to seek out additional allies and partners, including meaningful input from civil society, to leverage all tools at our disposal to deny access to the United States and international financial systems and deny entry to the United States to all those who engage in serious human rights abuse and corruption.

Andrew Self,

Sanctions Officer, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2023–06749 Filed 3–30–23; 8:45 am]

BILLING CODE 4710–AE–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36683]

Fortress Investment Group LLC et al.—Continuance in Control Exemption—East Ohio Valley Railway LLC

Fortress Investment Group LLC (Fortress), a non-carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(2) on behalf of FTAI Infrastructure, Inc. (FTAI Infrastructure), Percy Acquisition LLC (PALLC), and Transtar, LLC (Transtar), to continue in control of East Ohio Valley Railway LLC (EOVR) upon EOVR becoming a rail common carrier.

This transaction is related to a concurrently filed verified notice of exemption in *East Ohio Valley Railway LLC–Acquisition & Operation Exemption–Ohio River Partners Shareholder LLC,* Docket No. FD 36682. In that proceeding, EOVR has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to acquire from Ohio River Partners Shareholder LLC (ORPS), and operate, a 12.2-mile rail line between milepost 60.5 near Powhatan Point, Ohio, and milepost 72.7 near Hannibal, Ohio (the Line).[1]

According to the verified notice, Fortress will indirectly control EOVR

[1] FTAI Infrastructure has a 50.1% equity interest in ORPS.

upon its acquiring the Line and becoming a rail carrier subsidiary of Transtar. FTAI Infrastructure is managed by an affiliate of Fortress and indirectly controls PALLC and Transtar, which currently owns and directly controls five non-connecting railroad subsidiaries: Union Railroad Company, LLC; Gary Railway Company; Delray Connecting Railroad Company; Texas & Northern Railway Company; and The Lake Terminal Railroad Company. Another Fortress affiliate, Brightline Holding LLC, owns DesertXpress Enterprises, LLC (DXE), a common carrier railroad authorized to construct a high-speed passenger rail line in California and Nevada. *See DesertXpress Enters., LLC—Constr. & Operation Exemption—in Victorville, Cal. & Las Vegas, Nev.,* FD 35544 (STB served Oct. 25, 2011).

Fortress states that: (1) the Line does not connect with the lines of any of the rail common carriers currently owned by Transtar, nor would it connect with the proposed DXE passenger rail line; (2) this control transaction is not part of a series of anticipated transactions that would connect any of those rail common carriers; and (3) the transaction does not involve a Class I rail carrier. Therefore, the proposed 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 rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

The earliest this transaction may be consummated is April 16, 2023, the effective date of the exemption (30 days after the verified notice was filed). 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. Petitions to stay must be filed no later than April 7, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36683, should be filed with the Surface Transportation Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Fortress's representative, Terence M. Hynes, Sidley Austin LLP, 1501 K Street NW, Washington, DC 20005.

According to Fortress, this action is excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: March 28, 2023.

By the Board, Mai T. Dinh, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2023–06727 Filed 3–30–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36682]

East Ohio Valley Railway LLC—Acquisition and Operation Exemption—Ohio River Partners Shareholder LLC

East Ohio Valley Railway LLC (EOVR), a non-carrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Ohio River Partners Shareholder LLC (ORPS), and operate, an approximately 12.2-mile rail line between milepost 60.5 near Powhatan Point, Ohio, and milepost 72.7 near Hannibal, Ohio (the Line).

This transaction is related to a concurrently filed verified notice of exemption in *Fortress Investment Group LLC—Continuance in Control Exemption—East Ohio Valley Railway LLC,* Docket No. FD 36683, in which Fortress Investment Group, FTAI Infrastructure Inc. (FTAI Infrastructure), Percy Acquisition LLC, and Transtar, LLC (Transtar), seek to continue in control of EOVR upon EOVR's becoming a Class III rail carrier.

According to the verified notice, EOVR and ORPS will enter into an asset purchase agreement in connection with the transaction.[1] The parties intend to consummate the proposed transaction as soon as practicable after the effective date of the exemption and the satisfaction of all other conditions precedent to closing set forth in the asset purchase agreement.[2]

EOVR certifies that the transaction does not involve any provision or agreement that may limit future interchange with a third-party connecting carrier, nor is the Line currently subject to any agreement that imposes such an interchange commitment.

EOVR further certifies that its projected annual revenues resulting from the transaction will not exceed $5 million and will not result in EOVR's becoming a Class I or Class II rail carrier.

The earliest this transaction may be consummated is April 16, 2023, the effective date of the exemption (30 days after the verified notice was filed).

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. Petitions for stay must be filed no later than April 7, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36682, should be filed with the Surface Transportation Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on EOVR's representative, William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Avenue NW, #300, Washington, DC 20037.

According to EOVR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: March 28, 2023.

By the Board, Mai T. Dinh, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2023–06735 Filed 3–30–23; 8:45 am]

BILLING CODE 4915–01–P

[1] EOVR states that a copy of the agreement will be submitted to the Board when it is executed.

[2] The Line is currently operated by Katahdin Railcar Services, LLC (KRS), a Class III carrier and affiliate of EOVR and ORPS, pursuant to a lease with ORPS. *See Fortress Inv. Grp. LLC—Exemption for Intra-Corp. Fam. Transaction—Ohio River Partners Shareholder LLC,* FD 36402 (STB served May 15, 2020); *see also Katahdin Railcar Servs. LLC—Change in Operators Exemption—Ohio Terminal Ry.,* FD 36487 (STB served Mar. 30, 2021). According to the verified statement, KRS will continue to operate the Line until EOVR can complete arrangements to assume operations.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Agency Actions on the Proposed I–526 Lowcountry Corridor West Project, Charleston County, South Carolina

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by FHWA, the U.S. Army Corps of Engineers (USACE), and the U.S. Coast Guard.

SUMMARY: This notice announces actions taken by FHWA, USACE, and USCG that are final. The actions relate to the I–526 Lowcountry Corridor West project, located in Charleston County, South Carolina. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA is advising the public of a final agency action subject to 23 U.S.C. 139(*l*)(1). A claim seeking review of the Federal agency action on the highway project will be barred unless the claim is filed on or before August 28, 2023. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA: Emily O. Lawton, Division Administrator, Federal Highway Administration, Strom Thurmond Federal Building, 1835 Assembly Street, Suite 1270, Columbia, South Carolina 29201, Telephone: (803) 765–5411, Email: *emily.lawton@dot.gov*. The FHWA South Carolina Division's Office normal business hours are 8:00 a.m. to 4:30 p.m. (Eastern Time), Monday through Friday, except federal holidays. For South Carolina Department of Transportation (SCDOT): Chad C. Long, Director of Environmental Services, South Carolina Department of Transportation, 955 Park Street, Columbia, South Carolina 29201, Telephone: (803) 737–2314, Email: *Longcc@scdot.org*. The SCDOT's normal business hours are 8:00 a.m. to 4:30 p.m. (Eastern Time), except South Carolina state holidays. For USACE: Nathaniel Ball, Special Projects Branch Chief, USACE Charleston Field Office, 69A Hagood Avenue, Charleston, SC 29403; Telephone: (843) 329–8047, Email: *Nathanial.I.Ball@usace.army.mil*. The USACE Charleston District's normal business hours are 8:00 a.m. to 4:30 p.m. (Eastern Time). For USCG: Randall Overton, Permits Division Chief, U.S. Coast Guard, District 7, 909 SE 1st Avenue, Suite 432, Miami, FL 33131; Telephone: (305) 415–6736, Email: *Randall.D.Overton@uscg.mil*. The USCG District 7 normal business hours are 7:00 a.m. to 3:00 p.m. (Eastern Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing final approvals for the I–526 Lowcountry Corridor West (I–526 LCC West) project in Charleston County, South Carolina. The purpose of the I–526 LCC West project is to increase capacity at the I–26/I–526 interchange and along the I–526 mainline from Paul Cantrell Boulevard to Virginia Avenue. The proposed project consists of 3.5 miles of work on I–26 and 9.2 miles of work on I–526 for a total of 12.7 miles. The need for this project is derived from the following factors:

- Strong growth in population and employment.
- Decreased mobility and increased traffic congestion caused by base year traffic conditions and worsened by projected traffic conditions.
- Geometric deficiencies such as acceleration and deceleration lanes that are not long enough, short distances between entrance and exit ramps, tight curves on loop ramps, and poor sight distance.
- Pedestrian and bicycle connectivity and mobility needs.

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Combined Final Environmental Impact Statement (FEIS)/Record of Decision (ROD) for the project, approved on September 30, 2022, and in other documents in the project records. The Combined FEIS/ROD and other documents in the project file are available by contacting the FHWA or SCDOT at the addresses above. The Combined FEIS/ROD along with referenced technical documents can also be viewed and downloaded from the project website at *www.526lowcountrycorridor.com/west/feis-rod*.

The USACE Record of Decision and section 404 permit was issued on February 24, 2023. The USACE Section 404 permit and Record of Decision are available by contacting USACE at the address provided above. The USCG issued their Record of Decision and Bridge permit on March 23, 2023. The USCG Section 9 permit and Record of Decision are available by contacting the USCG at the address provided above. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].
3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303; 23 U.S.C. 138].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712]; Marine Mammal Protection Act [16 U.S.C. 1361]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*]; Bald and Golden Eagle Protection Act [16 U.S.C. 668–668d].
5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–(11)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].
6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209]; The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [42 U.S.C. 4601] *et seq.* (Uniform Act); American Indian Religious Freedom Act [42 U.S.C. 1996].
7. *Wetlands and Water Resources:* Clean Water Act (section 404, section 401, section 319 [33 U.S.C. 1251–1377]; Land and Water Conservation Fund (LWCF) Act [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; General Bridge Act of 1946 [33 U.S.C. 525–533]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Wetlands Mitigation [23 U.S.C. 103(b)(6)(M) and 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].
8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. 96019675.]; Superfund Amendments and Reauthorization Act of 1986 (SARA) [Pub. L. 99–499]; Resource Conservation and Recovery Act (RCRA) [42 U.S.C. 6901–6992(k)].
9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority

Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species; E.O. 13166 Improving Access to Services for Persons with Limited English Proficiency; E.O. 13186 Responsibilities of Federal Agencies to Protect Migratory Birds.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: March 28, 2023.

Shundreka R. Givan,

Acting Division Administrator, Columbia, South Carolina.

[FR Doc. 2023–06704 Filed 3–30–23; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0066]

Ford Motor Company—Petition for Temporary Exemption From Various Requirements of the Federal Motor Vehicle Safety Standards for an Automated Driving System-Equipped Vehicle; Withdrawal

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Petition for temporary exemption; withdrawal.

SUMMARY: This notice notifies the public that Ford Motor Company (Ford) has withdrawn its July 2021 petition for temporary exemption from various requirements of the Federal motor vehicle safety standards (FMVSS) for a vehicle equipped with an automated driving system (ADS).

FOR FURTHER INFORMATION CONTACT: Callie Roach, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–2992; Fax: 202–366–3820.

SUPPLEMENTARY INFORMATION: NHTSA received a petition from Ford Motor Company (Ford) on July 28, 2021, requesting a temporary exemption from portions of seven FMVSS.[1] In accordance with statutory and administrative provisions, NHTSA published a notice announcing receipt of Ford's petition and seeking public comment on July 21, 2022.[2] On February 13, 2023, Ford notified NHTSA in writing of its decision to withdraw its July 2021 petition. Accordingly, NHTSA will take no further action on Ford's petition.

Authority: 49 U.S.C. 30113 and 30166; delegation of authority at 49 CFR 1.95.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95.

K. John Donaldson,

Deputy Chief Counsel.

[FR Doc. 2023–06670 Filed 3–30–23; 8:45 am]

BILLING CODE 4910–59–P

[1] A copy of Ford's petition can be found in the docket referenced at the beginning of this notice.

[2] 87 FR 43602.

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On March 8, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Individuals:

1. ABDOLLAHINEJAD, Bahram (Arabic: بهرام عبداللهی نژاد), Iran; DOB 11 Jun 1959; POB Sarab, East Azerbaijan, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport I42008251 (Iran) expires 30 Jul 2022; National ID No. 1652879668 (Iran); CEO of Naji Pars Amin Institute (individual) [IRAN-HR] (Linked To: NAJI PARS AMIN INSTITUTE).

   Designated pursuant to 1(a)(ii)(C) of Executive Order 13553 of September 28, 2010, "Blocking Property of Certain Persons With Respect to Serious Human Rights abuses by the Government of Iran and Taking Certain Other Actions" (E.O. 13553), 75 FR 60567, 3 CFR 2010 Comp., p. 253, for having acted or purported to act for or on behalf of, directly or indirectly, NAJI PARS AMIN INSTITUTE, a person whose property and interests in property are blocked pursuant to E.O. 13553.

2. ASGHARIAN, Reza (Arabic: رضا اصغریان), 1334697778, Iran; DOB 21 Mar 1973; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0056549555 (Iran); Birth Certificate Number 1932 (Iran); CEO of Naji Pas Company (individual) [IRAN-HR] (Linked To: NAJI PAS COMPANY).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, NAJI PAS COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13553.

3. RAMEZANIAN SANI, Gholamreza (Arabic: غلامرضا رمضانیان ثانی) (a.k.a. RAMADANIYYAN THANI, Ghlamrda; a.k.a. RAMEZANIAN, Reza; a.k.a. SANI RAMAZAN GHOLAMREZA, Ramazanian), Shahin Vila 15 Gharbi P 25 - Vahed 12, Karaj 3193967517, Iran; DOB 21 Sep 1970; alt. DOB 25 Aug 1970; POB Shirvan, North Khorasan, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0827944500 (Iran); Birth Certificate Number 17009 (Iran); CEO of Entebagh Gostar Sepehr Company (individual) [IRAN-HR] (Linked To: ENTEBAGH GOSTAR SEPEHR COMPANY).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, ENTEBAGH GOSTAR SEPEHR COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13553.

4. AMIRI, Mahdi (Arabic: مهدی امیری) (a.k.a. AMIRI, Mehdi), Iran; DOB 25 Mar 1983; POB Shiraz, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport G10520995 (Iran) expires 29 Sep 2026; National ID No. 229-555835-2 (Iran); Birth Certificate Number 272 (Iran); Technical Director of the Cyberspace Affairs Deputy of the Prosecutor General's Office of Iran (individual) [IRAN-EO13846] (Linked To: COMMITTEE TO DETERMINE INSTANCES OF CRIMINAL CONTENT).

   Designated pursuant to 7(vii) of Executive Order 13846 of August 6, 2018, "Reimposing Certain Sanctions With Respect to Iran" (E.O. 13846), 83 FR 38939, 3 CFR, 2019 Comp., p. 854, for having acted or purported to act for or on behalf of, directly or indirectly, the COMMITTEE TO DETERMINE INSTANCES OF CRIMINAL CONTENT, a person whose property and interests in property are blocked pursuant to E.O. 13846.

5. MOUSAVI, Sayyed Abdolrahim (Arabic: سید عبدالرحیم موسوی), Qom, Iran; DOB 1959 to 1960; POB Qom, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Commander in Chief of the Army of the Islamic Republic of Iran (individual) [IRAN-HR].

   Designated pursuant to 1(a)(ii)(A) of E.O. 13553 for being an official of the Government of Iran (GoI) or a person acting on behalf of the GoI (including members of paramilitary organizations) who is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Iran or Iranian citizens or residents, or the family members of the foregoing, on or after June 12, 2009, regardless of whether such abuses occurred in Iran.

6. SHAHSAVARI, Habib (Arabic: حبیب شهسواری), West Azerbaijan, Iran; DOB 1963 to 1964; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Commander of the Islamic Revolutionary Guard Corps Shohada Provincial Corps in West Azerbaijan Province (individual) [IRGC] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

7. BAKHSHI, Dariush (Arabic: داریوش بخشی), Orumiyeh, West Azerbaijan Province, Iran; DOB 10 Mar 1974; POB Salmas, West Azerbaijan Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 2851316567 (Iran) (individual) [IRAN-HR].

   Designated pursuant to 1(a)(ii)(A) of E.O. 13553 for being a person acting on behalf of the GoI or a person acting on behalf of the GoI (including members of paramilitary organizations) who is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Iran or Iranian citizens or residents, or the family members of the foregoing, on or after June 12, 2009, regardless of whether such abuses occurred in Iran.

8. CHAHARMAHALI, Ali (Arabic: علی چهارمحالی) (a.k.a. CHEHARMAHALI, Ali), Karaj, Alborz Province, Iran; DOB 10 Jan 1976; POB Shushtar, Khuzestan Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 1880617978 (Iran) (individual) [IRAN-HR].

   Designated pursuant to 1(a)(ii)(A) of E.O. 13553 for being a person acting on behalf of the GoI or a person acting on behalf of the GoI (including members of paramilitary organizations) who is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Iran or Iranian citizens or residents, or the family members of the foregoing, on or after June 12, 2009, regardless of whether such abuses occurred in Iran.

Entities:

1. ENTEBAGH GOSTAR SEPEHR COMPANY (Arabic: شركت انطباق گستر سپهر) (a.k.a. ENTEBAGH GOSTAR COMPANY; a.k.a. ENTEBAGH GOSTAR SEPEHR; a.k.a. "ESG GROUP"), No. 2, Corner of North Yasaman, End of Third Yas, Golha Boulevard, Golestan Town Railway, Tehran, Tehran Province, Iran; Website www.egsepehr.com; alt. Website www.egsepehr.ir; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 14006006930 (Iran); Registration ID 529379 (Iran) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(B) of E.O. 13553 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

2. NAJI PARS AMIN INSTITUTE (Arabic: مؤسسه ناجی پارس امین) (a.k.a. NAJI PARS AMIN NON-COMMERCIAL INSTITUTE; a.k.a. NAJI PARS INSTITUTE; a.k.a. "NAPA"), Unit 17, Third Floor, Noor Building, Second Golestan, Western corner of Water Organization Street, Second square of Sadeghiyeh, Tehran, Tehran Province, Iran; Unit 7, Fifth Floor, No. 2, Shahid Ayatollah Dastgheib St, End of Safa, Dastgheib neighborhood, Central Sector, Tehran, Tehran Province 1349985884, Iran; Unit 8, Fourth Floor Pars Building, End of the Sixth Alley, Mashouf Street, 20 meters from East Golestan, after Hammet Bridge, North Satari, Tehran, Tehran Province, Iran; Website najipars.com; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 10320725224 (Iran); Registration Number 28723 (Iran); alt. Registration Number 411399395956 (Iran) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

3. NAJI PAS COMPANY (Arabic: شركت ناجی پاس) (a.k.a. NAJI PAS), First Floor, No. 1, Mahshahr Street, Borna Alley, Neighborhood Iranshahr, Central District, Tehran, Tehran Province 1584733111, Iran; 2nd Floor, Mehgran Building No. 13, Nelson Mandela Blvd, Western Taban Street, Valiasr Street, District 6, Tehran, Tehran Province 1968946355, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 17 Dec 2003; National ID No. 10102553397 (Iran); Registration Number 213935 (Iran); alt. Registration Number 411366178356 (Iran) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(B) of E.O. 13553 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

Dated: March 22, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–06652 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea M. Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On September 15, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals:

1. ASADOLLAH, Hossein (Arabic: حسین اسدالله) (a.k.a. ASSADOLLAH, Hossein; a.k.a. ASSADOLLAHI, Hossein), Iran; DOB 14 May 1983; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport K34433062 (Iran) expires 02 Aug 2020; National ID No. 0063410176 (Iran) (individual) [SDGT] [IFSR] (Linked To: AMINI, Meghdad).

   Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," 66 FR 49079, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Meghdad AMINI.

2. DAMIRCHILU, Mohammad Ali (Arabic: محمدعلی دمیرچی‌لو), 19 Beharistan Alley, No. 9, Unit 10, North Jannat Abad, Tehran, Iran; DOB 24 May 1992; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0014634945 (Iran) (individual) [SDGT] (Linked To: QASIR, Ali).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, Ali QASIR.

3. DAMIRCHILU, Samaneh (Arabic: سمانه دمیرچی‌لو) (a.k.a. DAMIRCHILOO, Samaneh), Golbarg 4 Street, Number 5, First Floor, Tehran, Iran; DOB 26 Aug 1990; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; National ID No. 0012457914 (Iran) (individual) [SDGT] (Linked To: QASIR, Ali).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Ali QASIR.

4. HASHEMI, Seyed Morteza Minaye (Arabic: سید مرتضی مینای هاشمی), China; DOB 02 Mar 1984; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport T96361497 (Iran) expires 16 Oct 2022; National ID No. 0073496464 (Iran) (individual) [SDGT] [IFSR] (Linked To: HIZBALLAH; Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HIZBALLAH and Iran's ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE.

5. SONG, Jing (a.k.a. SONG, Crystal), Guangzhou City, Guangdong Province, China; DOB 03 Aug 1969; POB Mudanjiang, China; nationality China; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; Passport E24963042 (China); National ID No. 231004196908031226 (China) (individual) [SDGT] (Linked To: HASHEMI, Seyed Morteza Minaye).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Seyed Morteza Minaye HASHEMI.

6. KAZEMI, Mohammad Reza (a.k.a. KAZEMI, Mohammad; a.k.a. KAZEMIAN, Mohammad Reza), Turkey; DOB 18 Sep 1981; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport M49571636 (Iran) expires 03 Aug 2024; National ID No. 0075700247 (Iran) (individual) [SDGT] [IFSR] (Linked To: AMINI, Meghdad).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Meghdad AMINI.

7. PURIYA, Mostafa (Arabic: مصطفی پوریا) (a.k.a. POORIA, Mostafa), Iran; DOB 25 Feb 1982; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0074683217 (Iran) (individual) [SDGT] [IFSR] (Linked To: AMINI, Meghdad).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Meghdad AMINI.

8. QASIR, Ali (a.k.a. GHASEMI, Naser; a.k.a. GHASIR, Ali; a.k.a. GHASSIR, Ali; a.k.a. KASSIR, Ali; a.k.a. QASIR, ‘Ali), Iran; DOB 29 Jul 1992; alt. DOB 29 Jul 1990; POB Deir Kanoun El Nahr, Lebanon; nationality Lebanon; Additional Sanctions Information - Subject to Secondary Sanctions; alt. Additional Sanctions Information - Subject to Secondary Sanctions Pursuant to the Hizballah Financial Sanctions Regulations; Gender Male; Passport RL 3367620 (Lebanon) expires 28 Aug 2020 (individual) [SDGT] (Linked To: QASEMI, Rostam; Linked To: HIZBALLAH).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, HIZBALLAH.

9. YAN, Su Xuan (Chinese Simplified: 颜素炫) (a.k.a. YAN, Suxuan; a.k.a. YAN, Yen), Room 902, Building 5, 12 Tangjing Road, Tangxia, Baiyun District, Guangzhou City, China; Taiwan; DOB 08 Oct 1983; POB Guangdong, China; nationality China; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; Passport EA4917489 (China) expires 20 Jun 2027 (individual) [SDGT] (Linked To: HASHEMI, Seyed Morteza Minaye).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, Seyed Morteza Minaye HASHEMI.

10. YAZDANPARAST, Omid, Tehran, Iran; DOB 14 Jul 1984; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0450190986 (Iran) (individual) [SDGT] (Linked To: QASIR, Ali).

    Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Ali QASIR.

Entities:

1. BLACK DROP INTL CO., LIMITED (f.k.a. UNITED PETROCHEMIAL CO., LIMITED), Rm. 910, Block 1, No. 132-1 Liuhua Square, Dongfeng West Rd., Yuexiu District, Guangzhou, China; Unit C2, 12F, Block A, Universal Industrial Center, 19-25 Shan Mei Street, Fo Tan, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2513558 (Hong Kong); Business Registration Number 67534414000003185 (Hong Kong) [SDGT] [IFSR] (Linked To: HASHEMI, Seyed Morteza Minaye).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Seyed Morteza Minaye HASHEMI.

2. CHINA 49 GROUP CO., LIMITED, Rm. 910, Block 1, No. 132-1 Liuhua Square, Dongfeng West Rd., Yuexiu District, Guangzhou, China; Unit C2, 12F, Block A, Universal Industrial Center, 19-25 Shan Mei Street, Fo Tan, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2512760 (Hong Kong); Business Registration Number 67526421000003186 (Hong Kong) [SDGT] [IFSR] (Linked To: HASHEMI, Seyed Morteza Minaye).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Seyed Morteza Minaye HASHEMI.

3. DAMINEH OPTIC LIMITED (Chinese Traditional: 大名額有限公司), Unit C2, 12/F., Block A, Universal Industrial Centre, 19-25 Shan Mei Street, Fo Tan, New Territories, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2001521 (Hong Kong) [SDGT] [IFSR] (Linked To: HASHEMI, Seyed Morteza Minaye).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Seyed Morteza Minaye HASHEMI.

4. HEMERA INFOTECH FZCO (Arabic: همیرا إنفوتيك ش.م.ح), Dubai, United Arab Emirates; Additional Sanctions Information - Subject to Secondary Sanctions; Commercial Registry Number 11437558 (United Arab Emirates); License 4041 (United Arab Emirates) [SDGT] (Linked To: ASADOLLAH, Hossein).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Hossein ASADOLLAH.

5. PCA XIANG GANG LIMITED (Chinese Traditional: 披思埃香港有限公司), Unit C2, 12/F., Block A, Universal Industrial Centre, 19-25 Shan Mei Street, Fo Tan, New Territories, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 1669316 (Hong Kong) [SDGT] [IFSR] (Linked To: HASHEMI, Seyed Morteza Minaye).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Seyed Morteza Minaye HASHEMI.

6. TAIWAN BE CHARM TRADING CO., LIMITED, Taiwan; Rm. 910, Block 1, No. 132-1 Liuhua Square, Dongfeng West Rd., Yuexiu District, Guangzhou, China; Unit C, 12F, Block A, Universal Industrial Center, 19-25 Shan Mei Street, Fo Tan, NT, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2429749 (Hong Kong); Business Registration Number 66692178000091 71 (Hong Kong) [SDGT] [IFSR] (Linked To: HASHEMI, Seyed Morteza Minaye).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, Seyed Morteza Minaye HASHEMI.

7. VICTORY SOMO GROUP HK LIMITED, 19/F., No. 3 Lockhart Road, Wanchai, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2700467 (Hong Kong) [SDGT] (Linked To: SONG, Jing).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, SONG Jing.

8. YUMMY BE CHARM TRADING HK LIMITED, 19/F., No. 3 Lockhart Road, Wanchai, Hong Kong, China; Additional Sanctions Information - Subject to Secondary Sanctions; C.R. No. 2700472 (Hong Kong) [SDGT] (Linked To: SONG, Jing).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for being owned, controlled, or directed by, directly or indirectly, SONG Jing.

Dated: March 22, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–06655 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On March 24, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals:

1. BALDOUSKAYA, Alena Anatolieuna (Cyrillic: БАЛДОЎСКАЯ, Алена Анатольеўна) (a.k.a. BALDOVSKAYA, Yelena; a.k.a. BALDOVSKAYA, Yelena Anatolievna (Cyrillic: БАЛДОВСКАЯ, Елена Анатольевна)), Minsk Oblast, Belarus; DOB 1980; nationality Belarus; Gender Female (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 of August 9, 2021, "Blocking Property of Additional Persons Contributing to the Situation in Belarus," 86 FR 43905, 3 CFR, 2021 Comp., p. 626 (E.O. 14038), for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

2. DUK, Dzyanis Uladzimiravich (Cyrillic: ДУК, Дзяніс Уладзіміравіч) (a.k.a. DUK, Denis Vladimirovich (Cyrillic: ДУК, Денис Владимирович)), Mogilev Oblast, Belarus; DOB 1977; nationality Belarus; Gender Male (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

3. FEDASENKA, Katsyaryna Alyaksandrauna (Cyrillic: ФЕДАСЕНКА, Кацярына Аляксандраўна) (a.k.a. FEDOSENKO, Yekaterina Aleksandrovna (Cyrillic: ФЕДОСЕНКО, Екатерина Александровна)), Grodno Oblast, Belarus; DOB 1976; nationality Belarus; Gender Female (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

4. KARPENKA, Ihar Vasilyevich (Cyrillic: КАРПЕНКА, Ігар Васільевіч) (a.k.a. KARPENKA, Ihar; a.k.a. KARPENKA, Ihar Vasilievich; a.k.a. KARPENKO, Igor Vasilievich (Cyrillic: КАРПЕНКО, Игорь Васильевич)), Minsk, Belarus; DOB 28 Apr 1964; POB Novokuznetsk, Russia; nationality Belarus; Gender Male (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

5. KUNTSEVICH, Alena Kanstantsinauna (Cyrillic: КУНЦЭВІЧ, Алена Канстанцінаўна) (a.k.a. KUNTSEVICH, Yelena Konstantinovna (Cyrillic: КУНЦЕВИЧ, Елена Константиновна)), Minsk Oblast, Belarus; DOB 1971; nationality Belarus; Gender Female (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

6. TKACHOU, Alyaksandr Henadzievich (Cyrillic: ТКАЧОЎ, Аляксандр Генадзьевіч) (a.k.a. TKACHEV, Aleksandr Gennadievich (Cyrillic: ТКАЧЕВ, Александр Геннадьевич)), Gomel Oblast, Belarus; DOB 1977; nationality Belarus; Gender Male (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

7. YUZHYK, Alyaksandr Uladzimiravich (Cyrillic: ЮЖЫК, Аляксандр Уладзіміравіч) (a.k.a. YUZHIK, Aleksandr; a.k.a. YUZHIK, Aleksandr Vladimirovich (Cyrillic: ЮЖИК, Александр Владимирович)), Grodno Oblast, Belarus; DOB 1975; nationality Belarus; Gender Male (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of Central Election Commission of the Republic of Belarus, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

8. NIKIFOROVICH, Sergei Olegovich (Cyrillic: НИКИФОРОВИЧ, Сергей Олегович) (a.k.a. NIKIFAROVICH, Siarhei Alehavich (Cyrillic: НІКІФАРОВІЧ, Сяргей Алегавіч)), Khvoynaya 29 Street, Pinsk, Belarus (Cyrillic: ул. Хвойная 29, Пинск, Belarus); DOB 03 Dec 1979; nationality Belarus; Gender Male; National Foreign ID Number 3031279B026PB4 (Belarus) (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(iii) of E.O. 14038 for being or having been a leader or official of the Government of Belarus.

9. IVANKOVICH, Valery Valerievich (Cyrillic: ИВАНКОВИЧ, Валерий Валерьевич) (a.k.a. IVANKOVICH, Valerii Valerevich; a.k.a. IVANKOVICH, Valeriy Valeryevich; a.k.a. IVANKOVICH, Valery Valerevich (Cyrillic: ІВАНКОВІЧ, Валерый Валерэвіч)), Minsk, Belarus; DOB 15 Feb 1971; POB Navapolatsk, Belarus; nationality Belarus; Gender Male; Passport MP3896392 (Belarus); National Foreign ID Number 3150271E004PB5 (Belarus) (individual) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(iii) of E.O. 14038 for being or having been a leader or official of the Government of Belarus.

Entities:

1. CENTRAL ELECTION COMMISSION OF THE REPUBLIC OF BELARUS (Cyrillic: ЦЕНТРАЛЬНАЯ ИЗБИРАТЕЛЬНАЯ КОМИССИЯ РЕСПУБЛИКИ БЕЛАРУСЬ) (a.k.a. BELARUSIAN CENTRAL ELECTION COMMISSION; a.k.a. CEC BELARUS; f.k.a. CENTRAL COMMISSION OF THE REPUBLIC OF BELARUS ON ELECTIONS AND HOLDING REPUBLICAN REFERENDA; f.k.a. TSENTRALNAYA KAMISIYA RESPUBLIKI BELARUS PA VYBARAKH I PRAVYADZENNI RESPUBLIKANSKIKH REFERENDUMAU (Cyrillic: ЦЭНТРАЛЬНАЯ КАМІСІЯ РЭСПУБЛІКІ БЕЛАРУСЬ ПА ВЫБАРАХ І ПРАВЯДЗЕННІ РЭСПУБЛІКАНСКІХ РЭФЕРЭНДУМАЎ); f.k.a. TSENTRALNAYA KOMISSIYA RESPUBLIKI BELARUS PO VYBORAM I PROVEDENIYU RESPUBLIKANSKIKH REFERENDUMOV (Cyrillic: ЦЕНТРАЛЬНАЯ КОМИССИЯ РЕСПУБЛИКИ БЕЛАРУСЬ ПО ВЫБОРАМ И ПРОВЕДЕНИЮ РЕСПУБЛИКАНСКИХ РЕФЕРЕНДУМОВ); a.k.a. "TSVK"), 11 Sovetskaya St., House of Government, Minsk 220010, Belarus; Target Type Government Entity [BELARUS] [BELARUS-EO14038].

   Designated pursuant to section 1(a)(ii) of E.O. 14038 for being a political subdivision, agency, or instrumentality of the Government of Belarus.

2. OPEN JOINT STOCK COMPANY BELARUSIAN AUTOMOBILE PLANT (a.k.a. AAT BELAZ - KIRUYUCHAYA KAMPANIYA KHOLDYNGU BELAZ-KHOLDYNG (Cyrillic: AKA: ААТ БЕЛАЗ - КІРУЮЧАЯ КАМПАНІЯ ХОЛДЫНГУ БЕЛАЗ-ХОЛДЫНГ); a.k.a. BELARUSSKI AVTOMOBILNYI ZAVOD; a.k.a. OAO BELAZ - UPRAVLYAYUSHCHAYA KOMPANIYA KHOLDINGA BELAZ-KHOLDING (Cyrillic: ОАО БЕЛАЗ - УПРАВЛЯЮЩАЯ КОМПАНИЯ ХОЛДИНГА БЕЛАЗ-ХОЛДИНГ); a.k.a. OJSC BELAZ - MANAGEMENT COMPANY OF HOLDING BELAZ-HOLDING), 40 let Octyabrya Street 4, Zhodino, Minsk region 222161, Belarus; Target Type State-Owned Enterprise; Tax ID No. 600038906 (Belarus); Government Gazette Number 05808712 (Belarus) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus.

3. OPEN JOINT STOCK COMPANY MINSK AUTOMOBILE PLANT (a.k.a. AAT MINSKI AUTAMABILNY ZAVOD (Cyrillic: ААТ МІНСКІ АЎТАМАБІЛЬНЫ ЗАВОД); a.k.a. ADKRYTAYE AKTSYYANERNAYE TAVARYSTVA MINSKI AUTAMABILLNY ZAVOD - KIRUYUCHAYA KAMPANIYA KHOLDYNGU BELAUTAMAZ (Cyrillic: АДКРЫТАЕ АКЦЫЯНЕРНАЕ ТАВАРЫСТВА МІНСКІ АЎТАМАБІЛЬНЫ ЗАВОД - КІРУЮЧАЯ КАМПАНІЯ ХОЛДЫНГУ БЕЛАЎТАМАЗ); a.k.a. OAO MINSKI AVTOMOBILNYI ZAVOD (Cyrillic: ОАО МИНСКИЙ АВТОМОБИЛЬНЫЙ ЗАВОД); a.k.a. OJSC MAZ; a.k.a. OJSC MINSK AUTOMOBILE PLANT; a.k.a. OPEN JOINT STOCK COMPANY MINSK AUTOMOBILE PLANT - MANAGEMENT COMPANY OF HOLDING BELAVTOMAZ; a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO MINSKII AVTOMOBILNYI ZAVOD - UPRAVLYAYUSHCHAYA KOMPANIYA KHOLDINGA BELAVTOMAZ (Cyrillic: ОТКРЫТОЕ АКЦИОНЕРНОЕ ОБЩЕСТВО МИНСКИЙ АВТОМОБИЛЬНЫЙ ЗАВОД - УПРАВЛЯЮЩАЯ КОМПАНИЯ ХОЛДИНГА БЕЛАВТОМАЗ)), Ul. Sotsialisticheskaya 2, Minsk 220021, Belarus; Target Type State-Owned Enterprise; Tax ID No. 100320487 (Belarus); Government Gazette Number 05808729 (Belarus) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus.

Aircraft:

1. EW-001PA; Aircraft Manufacture Date 29 Jan 2002; Aircraft Model B.737-8EV BBJ2; Aircraft Manufacturer's Serial Number (MSN) 33079; Aircraft Tail Number EW-001PA (aircraft) [BELARUS-EO14038].

   Identified pursuant to section 1(a) of E.O. 14038 as property in which Alyaksandr Ryhorovich Lukashenka, a person whose property and interests in property are blocked pursuant to E.O. 14038, has an interest.

Dated: March 24, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–06743 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea M. Gacki, Director, tel.: 202–622–2480; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Actions

On January 23, 2022, OFAC determined that the property and

interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals:

BILLING CODE 4810–AL–P

1. ALA'ODDINI, Yahya (Arabic: يحيى علاء الدينى) (a.k.a. ALAEDDINI, Yahya), Iran; DOB 21 Mar 1965; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport K47201906 (Iran) expires 19 Oct 2023; National ID No. 0036732958 (Iran) (individual) [IRGC] [IRAN-HR] (Linked To: BONYAD TAAVON SEPAH).

   Designated pursuant to section 1(a)(ii)(C) of Executive Order 13553 of September 28, 2010, "Blocking Property of Certain Persons With Respect To Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions" (E.O. 13553), 75 FR 60567, 3 CFR 2010 Comp., p. 253, for having acted or purported to act for or on behalf of, directly or indirectly, BONYAD TAAVON SEPAH, a person whose property and interests in property are proposed to be blocked pursuant to E.O. 13553.

2. BABAMORADI, Jamal (Arabic: جمال بابامرادى) (a.k.a. BABAMORADI, Jamal Ali), Iran; DOB 24 Mar 1960; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0036824240 (Iran) (individual) [IRGC] [IRAN-HR] (Linked To: BONYAD TAAVON SEPAH).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, BONYAD TAAVON SEPAH, a person whose property and interests in property are proposed to be blocked pursuant to E.O. 13553.

3. KARIMI, Ahmad (Arabic: احمد كريمى) (a.k.a. KARIMI, Ahmad Hasan), Tehran, Iran; DOB 11 Dec 1962; POB Qom, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0382947983 (Iran) (individual) [IRGC] [IRAN-HR] (Linked To: BONYAD TAAVON SEPAH).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, BONYAD TAAVON SEPAH, a person whose property and interests in property are proposed to be blocked pursuant to E.O. 13553.

4. NOROUZI, Aliasghar (Arabic: على اصغر نوروزى) (a.k.a. NOROWZI, Ali Asghar), Iran; DOB 11 Nov 1962; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport Y53914915 (Iran) expires 11 May 2026; National ID No. 4591967573 (Iran) (individual) [IRGC] [IRAN-HR] (Linked To: BONYAD TAAVON SEPAH).

Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, BONYAD TAAVON SEPAH, a person whose property and interests in property are proposed to be blocked pursuant to E.O. 13553.

5. TABATABAI, Seyyed Aminollah Emami (Arabic: سیّدامین اله امامی طباطبایی) (a.k.a. TABATBAYI, Aminallah Imami), Tehran, Iran; DOB 26 Aug 1963; POB Meybod, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 4489260229 (Iran) (individual) [IRGC] [IRAN-HR] (Linked To: BONYAD TAAVON SEPAH).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, BONYAD TAAVON SEPAH, a person whose property and interests in property are proposed to be blocked pursuant to E.O. 13553.

6. FADA, Mojtaba (Arabic: مجتبی فدا), Isfahan, Iran; DOB 21 Mar 1963; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport F49973222 (Iran) expires 27 Aug 2024; IRGC 2nd Brigadier General (individual) [IRGC] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

7. RASHEDI, Naser (Arabic: ناصر راشدی), Iran; DOB 30 Mar 1961; POB Dezful, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport W35402984 (Iran) expires 31 Oct 2020; National ID No. 2002442320 (Iran); Iranian Ministry of Intelligence and Security Deputy Minister for Intelligence (individual) [IRAN-HR] (Linked To: IRANIAN MINISTRY OF INTELLIGENCE AND SECURITY).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the IRANIAN MINISTRY OF INTELLIGENCE AND SECURITY, a person whose property and interests in property are blocked pursuant to E.O. 13553.

8. TANAVAR, Hossein (Arabic: حسین تناور), Unit 29, 5th Floor, Talaieh Block- B1, Elahiyeh Complex 1, Number 0, Alley 2-Shahid Sajjad Rushanai, Rabbaninejad Street, Zein Aldin Municipality, Qom 3739144673, Iran; DOB 30 Aug 1981; POB Dashtestan, Bushehr Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 6109732461 (Iran); Birth Certificate Number 2833 (Iran); 2nd Brigadier General (individual) [IRGC] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY

GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

9. ASIABANI, Kourosh (Arabic: كورش آسیابانی) (a.k.a. ASIABANI, Korosh; a.k.a. ASIABANI, Kurosh (Arabic: کوروش آسیابانی); a.k.a. ASIYABANI, Koresh), Number 0, Floor 2, Golrizan Boulevard, Fajr Alley, District 22 Bahman, Kermanshah 6714699785, Iran; Unit 1, Paradise Building, across from Kokab Rashidi Mosque, Nobehar Boulevard, between Shahid Iraj Faizi Alley and Shahid Khosro Abassi Alley, District 22 Bahman, Kermanshah 6714699785, Iran; DOB 31 May 1962; alt. DOB 31 May 1961; POB Harsin, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 3319728962 (Iran); Birth Certificate Number 28 (Iran); Deputy Commander of IRGC West Regional Headquarters (Najaf Ashraf); Second Brigadier General (individual) [IRGC] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

10. AZIMI, Mohammad Nazar (Arabic: محمد□ظر عظیمی) (a.k.a. AZIMI, Mohammad (Arabic: محمد عظیمی)), Iran; DOB 21 Mar 1960; POB Kangavar, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 3309730409 (Iran); Commander of Najaf Ashraf West Headquarters; Brigadier General (individual) [IRGC] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

    Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

Entity:

1. BONYAD TAAVON SEPAH (a.k.a. BONYAD-E TA'AVON-E; a.k.a. IRGC COOPERATIVE FOUNDATION; a.k.a. SEPAH COOPERATIVE FOUNDATION), Niayes Highway, Seoul Street, Tehran, Iran; Additional Sanctions Information - Subject to Secondary Sanctions [SDGT] [NPWMD] [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to section 1(a)(ii)(C) of E.O. 13553 for being owned or controlled by, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

Dated: March 22, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–06654 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On March 1, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Entities:

1. DRAGON TRADING LIMITED, Marshall Islands; Organization Established Date 21 Jun 2019; Business Registration Number 101538 (Marshall Islands) [IRAN-EO13846] (Linked to: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of Executive Order 13846 of August 6, 2018, "Reimposing Certain Sanctions With Respect to Iran," 83 FR 38939, 3 CFR, 2019 Comp., p. 854 (E.O. 13846) for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

2. GREENLAND OIL AND GAS TRADING FZE (Arabic: جرينلاند اويل &غاز تريدينغ م م ح), Leased Office Bldg Office No. lF-31, Hamriyah Free Zone, Sharjah, United Arab Emirates; Organization Established Date 08 Mar 2021; Business Registration Number 19230 (United Arab Emirates); Economic Register Number (CBLS) 11634715 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

3. LOWELL LIMITED, Rm 09 27 F Ho King Comm Ctr 2 16 Fa Yuen St, Mongkok, Hong Kong, China; Organization Established Date 15 Apr 2021; C.R. No. 3038530 (Hong Kong); Business Registration Number 72888797-000 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

4. MARAFI INTERNATIONAL TRADING CO., LIMITED, Flat H29 1/F Phase 2 Kwai Shing Ind Bldg No 42-46 Tai Lin Pai Rd Kwai Chung Nt, Hong Kong, China; Organization Established Date 23 Jun 2020; C.R. No. 2954221 (Hong Kong); Business Registration Number 71990353-000 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

5. MEHR PETROCHEMICAL COMPANY (Arabic: شركت پتروشيمى مهر) (a.k.a. MEHR PETROCHEMICAL COMPLEX), Fifth Street, Block 22, Tehran, Iran; 2nd Petrochemical Phase, PSEEZ, Assalouyeh, Boushehr Province, Iran; Khaled Eslamboli Street, Alley 5, P. 22, Tehran, Iran; Website www.mehrpc.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 13 Jun 2005; Organization Type: Manufacture of refined petroleum products; National ID No. 10102887184 (Iran); Registration Number 248119 (Iran) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

6. SPARROW TRADING FZE (Arabic: سبارو تريدينغ م م ح), P2-Hamriyah Business Centre, Hamriyah Free Zone, Sharjah, United Arab Emirates; Organization Established Date 12 Apr 2020; Business Registration Number 18641 (United Arab Emirates); Economic Register Number (CBLS) 11583211 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

7. ALBAHR ALAAHMAR ENERGY FZE (Arabic: البحر الأحمر للطاقة م م ح), P1-ELOB Office No. E-44G-29, Hamriyah Free Zone Authority, Sharjah, United Arab Emirates; Organization Established Date 17 Jun 2021; Registration Number 19438 (United Arab Emirates); Economic Register Number (CBLS) 11670819 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

8. ALBAHR ALAAHMAR OFFSHORE REFINED OIL PRODUCT TRADING L.L.C (Arabic: البحر الاحمر لتجارة مشتقات النفط خارج الدولة ش.ذ.م.م), Deira Al Muraqqabat, Dubai, United Arab Emirates; Organization Established Date 10 Jun 2021; Registration Number 959832 (United Arab Emirates); Economic Register Number (CBLS) 11668849 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

9. ALLIANCE ENERGY PVT. LIMITED (a.k.a. "ALLIANCE ENERGY CO."), Huse No 64-A, St No 1, Gechs Phase-II Model Town Link Road, Lahore, Punjab 54000, Pakistan; Website allianceenergy.pk/; Organization Established Date 19 Dec 2016; Registration Number 0104304 (Pakistan) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

10. ALSHIVAN LINE TRADING FZE (Arabic: الشيفان لاين تريدنج م م ح), Office No. FZJOAB2405, Jebel Ali Free Zone, Dubai, United Arab Emirates; Organization Established Date 09 Dec 2019; Business Registration Number 181939 (United Arab Emirates); Economic Register Number (CBLS) 11489405 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

11. BORDO PLASTIC MATERIALS TRADING L.L.C, (Arabic: بوردو لتجارة المواد البلاستيكية ش.ذ.م.م), Deira Riggat Al Buteen, Dubai, United Arab Emirates; Organization Established Date 19 Oct 2021; Business Registration Number 994217 (United Arab Emirates) Economic Register Number (CBLS) 11767577 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or

technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

12. DAYAN GLOBAL TRADE DIS TICARET ITHALAT IHRACAT SANAYI VE TICARET LIMITED SIRKETI (a.k.a. DAYAN GLOBAL), Barbaros MH. Alzambak Sk. Varyap Meridian A Blk. Grand Tow. 2/354 Atasehir, Istanbul, Turkey; Gostep MAH, Istoc 3, CAD, SIT E Block Apt NO: 7/51 Bagcilar, Istanbul, Turkey; Organization Established Date 20 Apr 2018; Commercial Registry Number 271136147400001 (Turkey) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

13. FAIRTRADE NON EDIBLE OIL AND LIQUEFIED NATURAL GAS TRADING L.L.C (Arabic: فيرتريد لتجارة الزيوت والغاز المسال ذ.م.م), Deira Al Qusais 2, Dubai, United Arab Emirates; Organization Established Date 22 Sep 2020; Business Registration Number 906648 (United Arab Emirates); Economic Register Number (CBLS) 11548351 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

14. FAMIN FZE (Arabic: فامين م م ح) (a.k.a. FAMIN TRADING), P2-ELOB Office No. E-21F-05, Hamriyah Free Zone Park, Sharjah, United Arab Emirates; Website famintrading.com/; Organization Established Date 13 Jan 2020; Business Registration Number 18445 (United Arab Emirates); Economic Register Number (CBLS) 11578835 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

15. FORABEN TRADING LIMITED, Suite C, 14/F Ritz Plaza 124 Austin Road TST KL, Hong Kong, China; Organization Established Date 29 Jul 2021; C.R. No. 3071736 (Hong

Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

16. HONGKONG WELL INTERNATIONAL TRADING LIMITED (Chinese Traditional: 香港如意國際貿易有限公司), Room 1607, Trend Centre 19 51 Cheung Lee Street Chai Wan, Hong Kong, China; Organization Established Date 20 Dec 2019; C.R. No. 2904608 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

17. AL KASHAF PETROLEUM AND PETROCHEMICAL TRADING L.L.C (Arabic: الكشاف لتجارة البترول و البتروكيماويات ش.ذ.م.م), Port Saeed Office 407-078, Sheikh Suhail bin Maktoum bin Juma, Al Maktum, Dubai, United Arab Emirates; Office No. 02-046, Plot 6-0, Spectrum Building, Oud Metha, Dubai, United Arab Emirates; Organization Established Date 23 Sep 2020; Dubai Chamber of Commerce Membership No. 1612390 (United Arab Emirates); Business Registration Number 906759 (United Arab Emirates); Economic Register Number (CBLS) 11548618 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

18. LONGFORD TRADING L.L.C (Arabic: لونجفورد للتجارة ش.ذ.م.م), P.O. Box 385002, Office 204, Essa Al Othman Building, Deira, Dubai, United Arab Emirates; Organization Established Date 12 Jul 2021; Business Registration Number 967661 (United Arab Emirates); Economic Register Number (CBLS) 11704982 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF

PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

19. MULTI WELL TRADING CO., LIMITED, Hong Kong, China; Organization Established Date 22 Oct 2021; C.R. No. 3095310 (China) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

20. NASHVILLE HK LIMITED, Flat B, 5/F, Gaylord Commercial Building, 114-118 Lockhart Road, Hong Kong, China; Unit No. A222, 3F, Hang Fung Industrial Building, Phase 2, NO.2G Hok Yuen Street, Hunghom, KLN, Hong Kong, China; Organization Established Date 29 Dec 2020; C.R. No. 3005809 (Hong Kong); Business Registration Number 72514940-000 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).
Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

21. NORD TRADING L.L.C (Arabic: نورد للتجارة ش.ذ.م.م), Deira Al Sabkha, Dubai, United Arab Emirates; Organization Established Date 28 Feb 2021; Business Registration Number 930426 (United Arab Emirates); Economic Register Number (CBLS) 11632043 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

22. QI GROUP LIMITED, Flat B5 1F Manning Ind Bldg 116-118 Hongwings St, Kwun Tong Kln, Hong Kong, China; Organization Established Date 26 Mar 2021; C.R. No. 3032377 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on

the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

23. SALITA TRADE LIMITED (Chinese Traditional: 薩利塔貿易有限公司) (f.k.a. SAIQI TRADE LIMITED), Room 09/27F Ho King Commercial Centre 2-16 Fa Yuen Street Mongkok Kl, Hong Kong, China; Organization Established Date 02 Aug 2018; C.R. No. 2729339 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

24. SHAMS ALRABEEA CHEMICALS TRADING L.L.C, (Arabic: شمس الربيع لتجارة الكيماويات ذ.م.م), Al Moosa Tower 1 Trade Center First Plot No. 1-0, Dubai, United Arab Emirates; Organization Established Date 28 Oct 2020; Business Registration Number 910936 (United Arab Emirates); Economic Register Number (CBLS) 11564942 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

25. UNITE RESOURCES CO., LIMITED (a.k.a. UNITE RESOURCES COMMERCIAL LIMITED; a.k.a. "UNITERES"), Lemmi Centre, Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong, China; Organization Established Date 19 Jun 2013; C.R. No. 1925133 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

26. UNIVEST LIMITED, Rm A 12F ZJ300, 300 Lockhart Road, Wan Chai, Hong Kong, China; Website http://univestltd.com; Organization Established Date 05 Jul 2021; C.R. No. 3063840 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or

technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

27. BAVI GENERAL TRADING CO L.L.C (Arabic: شركة باوي للتجارة العامة ش.ذ.م.م), PO Box 42350, Plot No. 115-142, Dubai, United Arab Emirates; Organization Established Date 11 Sep 2002; Organization Type: Other financial service activities, except insurance and pension funding activities, n.e.c.; Dubai Chamber of Commerce Membership No. 71680 (United Arab Emirates); Commercial Registry Number 60409 (United Arab Emirates); Business Registration Number 537517 (United Arab Emirates); Economic Register Number (CBLS) 10810578 (United Arab Emirates) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

28. KAMBIZ NABIZADEH AND PARTNERS EXCHANGE (Arabic: شركاء صراقى كامبيزنبى زاده و; Arabic: شركت تضامنى نبى زاده و شركاء) (a.k.a. NABI ZADEH EXCHANGE; a.k.a. SARAFI KAMBIZ NABIZADEH VA SHORAKA), No. 3, First Floor, End of Yeganeh Street, End of Sonbol Street, Shahid Doctor Lavanasi Boulevard, Hesar-e Buali, Tairish, Central District, Shemiranat County, Tehran, Tehran Province 1954657114, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 11 Jan 2017; Organization Type: Other financial service activities, except insurance and pension funding activities, n.e.c.; National ID No. 14006486022 (Iran); Business Registration Number 504036 (Iran) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

29. GLOBAL VISINESS PTE. LTD., Rm A 12F Kiu Fu Commercial Bldg, 300 Lockhart Road, Wan Chai, Hong Kong, China; 73 Upper Paya Lebar Road No 06-01c, Centro Bianco, Singapore 534818, Singapore; Website globalvisiness.com/; Organization Established Date 25 Dec 2020; Company Number 202041648D (Singapore) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on

the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

30. GOLDENIX CO., LIMITED, Flat/Rm A 12/F Zj 300, 300 Lockhart Road, Wan Chai, Hong Kong, China; Organization Established Date 02 Dec 2021; C.R. No. 3108311 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

31. HERSTEL TRADING LIMITED, Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro 96960, Marshall Islands; Organization Established Date 16 Sep 2020; Registration Number 106223 (Marshall Islands) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

32. HK SIHAI YINGTONG INDUSTRY CO., LIMITED (f.k.a. TROPICAL RAIN FOREST LOGISTICS CO., LIMITED), Des Voeux Road Central, Central and Western District, Hong Kong, China; Organization Established Date 17 Oct 2016; C.R. No. 2438373 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

33. HONGKONG CANWAY CO., LIMITED, Wai Yip Street, Kwun Tong, Hong Kong, China; Organization Established Date 14 Mar 2012; C.R. No. 1716519 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

    Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

34. HORRYZIN INTERNATIONAL TRADE CO., LIMITED (Chinese Traditional: 灝晟錦國際貿易有限公司), Hennessy Road, Wanchai, Hong Kong, China; 16/F, Kowloon Building, 555 Nathan Road, Mongkok, Kowloon, Hong Kong, China; Organization Established Date 30 Mar 2017; C.R. No. 2515317 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

35. JIN XIN NUO TRADING LIMITED (Chinese Traditional: 金信諾貿易有限公司), Office 3A-9, 12F, Kaiser Center No 18 Centre Street Sai Ying Pun, Hong Kong, China; Organization Established Date 08 Nov 2017; C.R. No. 2604785 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

36. MELIKAL FOR MEDICAL & MEDICINE TRADING CO., LIMITED (a.k.a. MELIKAL FOR MEDICAL AND MEDICINE TRADING CO., LIMITED), Flat/Rm 1512 15/F Lucky Centre, Hong Kong, China; Organization Established Date 15 Apr 2021; C.R. No. 3038706 (Hong Kong) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

37. NAAB KIMYA DIS TICARET LIMITED SIRKETI, Suadiye Mah, Yazanlar Sk, Petek Apt No: 17/6 Kadikoy, Istanbul, Turkey; Organization Established Date 11 Feb 2021; Istanbul Chamber of Comm. No. 1327595 (Turkey); Registration Number 337248-5 (Turkey); Central Registration System Number 0627-1308-2740-0001 (Turkey) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF

PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

38. NINGBO MORE INTEREST I/E CO., LTD. (Chinese Traditional: 宁波市摩利进出口有限公司) (a.k.a. NINGBO MORE INTEREST IMP. & EXP. CO., LTD.; a.k.a. NINGBO MORE INTEREST IMP. AND EXP. CO., LTD.), Room 12B01, Building 2, Yuyao China Plastic City International Business Center, 315400 Ningbo, Zhejiang, China; No Z-1305 Plastics City Yuyao City, Zhejiang, Zhejiang Province, China; Organization Established Date 15 Mar 2005; Trade License No. 330281000092872 (China); Unified Social Credit Code (USCC) 91330281772304821A (China) [IRAN-EO13846] (Linked To: PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO.).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PERSIAN GULF PETROCHEMICAL INDUSTRY COMMERCIAL CO., an Iranian person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13382.

39. GLOTREASURE COMPANY LIMITED, Blk 28 Mg Villas 136A Ha Che Pat Heung Yuen Long, Hong Kong, China; Organization Established Date 19 Apr 2021; C.R. No. 3039877 (Hong Kong); Business Registration Number 72902367-000 (Hong Kong) [IRAN-EO13846] (Linked To: TRILIANCE PETROCHEMICAL CO. LTD.).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13846 for, on or after November 5, 2018, having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, TRILIANCE PETROCHEMICAL CO. LTD., a person included on the SDN List whose property and interests in property are blocked pursuant to section 1(a) of E.O. 13846.

Dated: March 22, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–06653 Filed 3–30–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0047]

Agency Information Collection Activity Under OMB Review: Financial Statement

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, 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 on the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link *www.reginfo.gov/public/do/PRAMain,* select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–0047.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0047'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 89–754, Section 1013; 8 U.S.C. 3702(b)(2), 38 U.S.C. 3714.

Title: Financial Statement (VA form 26–6807).

OMB Control Number: 2900–0047.

Type of Review: Revision of a Currently Approved Collection.

Abstract: VA Form 26–6807 is used for a variety of purposes in the VA home loan program when determinations of obligors' creditworthiness are required.

The major use of the form is to determine a borrower's financial condition in connection with efforts to reinstate a seriously defaulted,

guaranteed, insured, or portfolio loan. VA Loan Technicians mail this form out when reviewing borrowers for a VA Refund (also referred to as a VA Purchase) pursuant to 38 CFR 36.4320, and when completing other supplemental servicing activities.

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 88 FR 5067 on January 26, 2023, pages 5067 and 5068.

Affected Public: Individuals or Households.

Estimated Annual Burden: 22 hours.

Estimated Average Burden per Respondent: 45 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 29.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt.) Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–06672 Filed 3–30–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Homeless Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. 10, that the Advisory Committee on Homeless Veterans meetings will be held on April 11–April 13, 2023. The meeting sessions will begin and end as follows:

Date	Time	Open session
April 11, 2023	9:00 a.m.–4:30 p.m. Eastern Standard Time (EST)	Yes.
April 12, 2023	9:00 a.m.–4:30 p.m. EST	No.
April 13, 2023	9:00 a.m.–4:30 p.m. EST	No.

The purpose of the Committee is to provide the Secretary of Veterans Affairs with an ongoing assessment of the effectiveness of the policies, organizational structures, and services of VA in assisting Veterans at risk of and experiencing homelessness. The Committee shall assemble and review information related to the needs of homeless Veterans and provide advice on the most appropriate means of assisting this Veteran population.

On April 11, 2023, the meeting will be a hybrid, held in-person at the Baltimore VA Medical Center, 10 North Greene Street (Room 3A–300), Baltimore, MD 21201; and virtually via Zoom conferencing. A limited number of public stakeholder seats will be available due to ongoing health and safety protocols that are enforced by the Baltimore VA Medical Center. Please note: *masked may be required during the meeting.* The agenda will include briefings from officials at VA and other federal, state and local agencies regarding services for homeless Veterans.

On April 12 and April 13, 2023, the Committee will conduct tours of VA and other Veteran service facilities and administrative workgroup sessions. Tours of VA and Veteran service facilities are closed, to protect Veterans' privacy and personal information in accordance with 5 U.S.C. 552b(c)(6).

No time will be allocated at the meeting for receiving oral presentations from the public. Interested parties should provide written comments on issues affecting homeless Veterans for review by the Committee to Anthony Love, Designated Federal Officer, Veterans Health Administration Homeless Programs Office (11HPO), U.S. Department of Veterans Affairs, 811 Vermont Avenue NW (11HPO), Washington, DC 20420, or via email at *achv@va.gov*.

Approximately 15 seats will be available for public stakeholders in attendance. The limited number of seating is due to the capacity of the meeting room as well as to ongoing health and safety protocols that are enforced by the Baltimore VA Medical Center. In order to accommodate your in-person attendance, please notify Anthony Love, Designated Federal Officer, Veterans Health Administration, Homeless Program Office at *achv@va.gov.* Additionally, members of the public who wish to attend the April 11, 2023 meeting virtually, please notify Mr. Love no later than March 30, 2023, providing their name, professional affiliation, email address, and phone number. Attendees who require reasonable accommodations should also state so in their requests. The meeting link and call-in number is noted below:

Join Zoom Meeting: https://us06web.zoom.us/j/82603032033.

Meeting ID: 826 0303 2033.

One Tap Mobile
+13017158592,,82603032033# US (Washington DC)
+13126266799,,82603032033# US (Chicago)

Dial By Location
+1 301 715 8592 US (Washington DC)
+1 312 626 6799 US (Chicago)
+1 646 558 8656 US (New York)
+1 646 931 3860 US
+1 305 224 1968 US
+1 309 205 3325 US
+1 564 217 2000 US
+1 669 444 9171 US
+1 689 278 1000 US
+1 719 359 4580 US
+1 720 707 2699 US (Denver)
+1 253 205 0468 US
+1 253 215 8782 US (Tacoma)
+1 346 248 7799 US (Houston)
+1 360 209 5623 US
+1 386 347 5053 US
+1 507 473 4847 US

Find your local number: *https://us06web.zoom.us/u/kBPl6Cofa.*

Dated: March 28, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–06721 Filed 3–30–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Friday,
No. 62 March 31, 2023

Part II

Department of Energy

10 CFR Part 430
Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2020–BT–STD–0039]

RIN 1904–AF00

Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking; announcement of public meeting.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including miscellaneous refrigeration products. EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more stringent, standards would be technologically feasible and economically justified, and would result in significant energy savings. In this notice of proposed rulemaking (''NOPR''), DOE proposes amended energy conservation standards for miscellaneous refrigeration products, and also announces a public meeting to receive comment on these proposed standards and associated analyses and results.

DATES:

Comments: DOE will accept comments, data, and information regarding this NOPR no later than May 30, 2023.

Meeting: DOE will hold a public meeting via webinar on Tuesday, May 2, 2023, from 1:00 p.m. to 4:00 p.m. See section IV, ''Public Participation,'' for webinar registration information, participant instructions and information about the capabilities available to webinar participants. Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before May 1, 2023.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal Rulemaking Portal at *www.regulations.gov,* under by docket number EERE–2020–BT–STD–0039. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2020–BT–STD–0039, by any of the following methods:

Email: MRP2020STD0039@ee.doe.gov. Include the docket number EERE–2020–BT–STD–0039 in the subject line of the message.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section VII of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2020-BT-STD-0039.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section VII of this document for information on how to submit comments through *www.regulations.gov.*

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at *energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this proposed rule.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Mr. Matthew Schneider, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 597–6265. Email: *matthew.schneider@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Synopsis of the Proposed Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA, established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include miscellaneous refrigeration products (''MREFs''), the subject of this rulemaking.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) EPCA also provides that not later than 6 years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m))

In accordance with these and other statutory provisions discussed in this document, DOE proposes amended energy conservation standards for miscellaneous refrigeration products. The proposed standards, which are expressed in kWh/yr, are shown in Table I.1. These proposed standards, if adopted, would apply to all miscellaneous refrigeration products listed in Table I.1 manufactured in, or imported into, the United States starting on the date 5 years after the publication of the final rule for this rulemaking.

TABLE I.1—PROPOSED ENERGY CONSERVATION STANDARDS FOR MISCELLANEOUS REFRIGERATION PRODUCTS

Product class	Equations for maximum energy use (kWh/yr)
1. Freestanding compact coolers (''FCC'')	5.52AV + 109.1
2. Freestanding coolers (''FC'')	5.52AV + 109.1
3. Built-in compact coolers (''BICC'')	5.52AV + 109.1

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law. 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

TABLE I.1—PROPOSED ENERGY CONSERVATION STANDARDS FOR MISCELLANEOUS REFRIGERATION PRODUCTS—Continued

Product class	Equations for maximum energy use (kWh/yr)
4. Built-in coolers (''BIC'')	6.30AV + 124.6
C–3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
C–5–BI. Built-in cooler with refrigerator-freezer—automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C–13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of 10 CFR part 430.
I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

A. Benefits and Costs to Consumers

Table I.2 presents DOE's evaluation of the economic impacts of the proposed standards on consumers of MREFs, as measured by the average life-cycle cost (''LCC'') savings and the simple payback period (''PBP'').[3] The average LCC savings are positive for all product classes, and the PBP is less than the average lifetime of MREFs, which varies by product class (see section IV.F.6 of this document).

TABLE I.2—IMPACTS OF PROPOSED ENERGY CONSERVATION STANDARDS ON CONSUMERS OF MISCELLANEOUS REFRIGERATION PRODUCTS

Product class	Average LCC savings [2021$]	Simple payback period (years)
FCC	12.6	6.8
FC	28.0	8.0
BICC	2.9	7.9
BIC	57.3	4.0
C–13A	12.0	6.9
C–13A–BI	15.3	6.7
C–3A	31.5	1.7
C–3A–BI	36.7	1.6

Note: See Table I.1 for definition of the product class acronyms.

DOE's analysis of the impacts of the proposed standards on consumers is described in section IV.F of this document.

B. Impact on Manufacturers

The industry net present value (''INPV'') is the sum of the discounted cash flows starting with the publication year (2023) of the NOPR and extending over a 30-year period following the expected compliance date of the standards (2023 to 2058). Using a real discount rate of 7.7 percent, DOE estimates that the INPV for manufacturers of MREFs, in the case without amended standards is $742.0 million.[4] Under the proposed standards, the change in INPV is estimated to range from −12.1 percent to −8.4 percent, which is approximately −$89.8 million to −$62.7 million. In order to bring products into compliance with amended standards, it is estimated that the industry would incur total conversion costs of $126.9 million.

DOE's analysis of the impacts of the proposed standards on manufacturers is described in section IV.J of this document. The analytic results of the manufacturer impact analysis (''MIA'') are presented in section V.B.2 of this document.

C. National Benefits and Costs

DOE's analyses indicate that the proposed energy conservation standards for MREFs would save a significant amount of energy. Relative to the case without amended standards, the lifetime energy savings for MREFs purchased in the 30-year period that begins in the anticipated year of compliance with the amended standards (2029–2058) amount to 0.31 quadrillion British thermal units (''Btu''), or quads.[5] This represents a savings of 19.6 percent relative to the energy use of these products in the case without amended standards (refer ed to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the proposed standards for MREFs ranges from $0.14 billion (at a 7-percent discount rate) to $0.69 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating cost savings minus the estimated increased product costs for miscellaneous refrigeration products purchased in 2029–2058.

In addition, the proposed standards for MREFs are projected to yield significant environmental benefits. DOE estimates that the proposed standards would result in cumulative emission

[3] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of new or amended standards (see section IV.F.8 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (see section IV.C of this document).

[4] Unless otherwise noted, all monetary values in this document are expressed in 2021 dollars.

[5] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.1 of this document.

reductions (over the same period as for energy savings) of 10.4 million metric tons (''Mt'') [6] of carbon dioxide (''CO_2''), 4.8 thousand tons of sulfur dioxide (''SO_2''), 15.9 thousand tons of nitrogen oxides (''NO_X''), 70.3 thousand tons of methane (''CH_4''), 0.11 thousand tons of nitrous oxide (''N_2O''), and 0.03 tons of mercury (''Hg'').[7] DOE used interim SC–GHG values developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) for the CO_2 projections.

DOE estimates the value of climate benefits from a reduction in greenhouse gases (GHG) using four different estimates of the social cost of CO_2 (''SC–CO_2''), the social cost of methane (''SC–CH_4''), and the social cost of nitrous oxide (''SC–N_2O''). Together these represent the social cost of GHG (SC–GHG).[8] DOE used interim SC–GHG values developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (IWG).[9] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the monetized climate benefits associated with the average SC–GHG at a 3-percent discount rate are estimated to be $0.5 billion. DOE does not have a single central SC–GHG point estimate and it emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates.

DOE estimated the monetary health benefits of SO_2 and NO_X emissions reductions, also discussed in section IV.L of this document. DOE estimated the present value of the monetized health benefits would be $0.3 billion using a 7-percent discount rate, and $0.8 billion using a 3-percent discount rate.[10] DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table I.3 summarizes the economic benefits and costs expected to result from the proposed standards for miscellaneous refrigeration products. There are other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants, direct $PM_{2.5}$ and other emissions, unquantified energy security benefits, and distributional effects, among others.

TABLE I.3—SUMMARY OF MONETIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR MISCELLANEOUS REFRIGERATION PRODUCTS (TSL 4)

[Billion 2021$]

3% discount rate	
Consumer Operating Cost Savings	2.0
Climate Benefits *	0.5
Health Benefits **	0.8
Total Monetized Benefits †	3.3
Consumer Incremental Product Costs ‡	1.3
Monetized Net Benefits	2.0
7% discount rate	
Consumer Operating Cost Savings	0.8
Climate Benefits * (3% discount rate)	0.5
Health Benefits **	0.3
Total Monetized Benefits †	1.6
Consumer Incremental Product Costs	0.7
Monetized Net Benefits	0.9

Note: This table presents the costs and benefits associated with product name shipped in 2029–2058. These results include benefits to consumers which accrue after 2058 from the products shipped in 2029–2058.

* Climate benefits are calculated using four different estimates of the social cost of carbon (SC–CO_2), methane (SC–CH_4), and nitrous oxide (SC–N_2O) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate) (see section IV.L of this document). Together these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate. On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits, where appropriate and permissible under law.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates.

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the value of climate and health benefits of emission reductions, all annualized.[11]

The national operating savings are domestic private U.S. consumer monetary savings that occur as a result

[6] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[7] DOE calculated emissions reductions relative to the no-new-standards case, which reflects key assumptions in the *Annual Energy Outlook 2022* (''*AEO 2022*''). *AEO 2022* represents current Federal and state legislation and final implementation of regulations as of the time of its preparation. See section IV.K of this document for further discussion of *AEO 2022* assumptions that effect air pollutant emissions.

[8] On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits where appropriate and permissible under law.

[9] See Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide. Interim Estimates Under Executive Order 13990, Washington, DC, February 2021 (''February 2021 SC–GHG TSD''). *www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf* (Last accessed September 22, 2022).

[10] DOE estimates the economic value of these emissions reductions resulting from the considered TSLs for the purpose of complying with the requirements of Executive Order 12866.

[11] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2022, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2030), and then discounted the present value from each year to 2022. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

of purchasing the covered products and are measured for the lifetime of miscellaneous refrigeration products shipped in 2029–2058. The benefits associated with reduced emissions achieved as a result of the proposed standards are also calculated based on the lifetime of miscellaneous refrigeration products shipped in 2029–2058. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with 3-percent discount rate. Estimates of SC–GHG values are presented for all four discount rates in section IV.L of this document.

Table I.4 presents the total estimated monetized benefits and costs associated with the proposed standard, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced NOx and SO_2 emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards proposed in this rule is $81.2 million per year in increased equipment costs, while the estimated annual benefits are $97.6 million in reduced equipment operating costs, $28.9 million in monetized climate benefits, and $35.4 million in monetized health benefits. In this case, the monetized net benefit would amount to $80.6 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards is $81.0 million per year in increased equipment costs, while the estimated annual benefits are $123.1 million in reduced operating costs, $28.9 million in monetized climate benefits, and $49.5 million in monetized health benefits. In this case, the monetized net benefit would amount to $120.4 million per year.

TABLE I.4—ANNUALIZED MONETIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR MISCELLANEOUS REFRIGERATION PRODUCTS (TSL 4)

[Million 2021$/year]

	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
3% discount rate			
Consumer Operating Cost Savings	123.1	116.3	131.2
Climate Benefits *	28.9	28.1	29.6
Health Benefits **	49.5	48.2	50.8
Total Monetized Benefits †	201.4	192.6	211.6
Consumer Incremental Product Costs †	81.0	82.3	79.4
Monetized Net Benefits	120.4	110.3	132.2
7% discount rate			
Consumer Operating Cost Savings	97.6	92.7	103.3
Climate Benefits * (3% discount rate)	28.9	28.1	29.6
Health Benefits **	35.4	34.6	36.2
Total Monetized Benefits †	161.9	155.4	169.2
Consumer Incremental Product Costs	81.2	82.4	79.8
Monetized Net Benefits	80.6	72.9	89.4

Note: This table presents the costs and benefits associated with miscellaneous refrigeration products shipped in 2029–2058. These results include benefits to consumers which accrue after 2058 from the products shipped in 2029–2058. The Primary, Low-Net-Benefits, and High Net Benefits Estimates utilize projections of energy prices from the AEO 2022 Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low-Net-Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.H.3 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of this NOPR). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates. On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits where appropriate and permissible under law.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate.

DOE's analysis of the national impacts of the proposed standards is described in sections IV.H, IV.K and IV.L of this document.

D. Conclusion

DOE has tentatively concluded that the proposed standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. Specifically, with regards to technological feasibility products achieving these standard levels are already commercially available for all product classes covered by this proposal. As for economic justification,

DOE's analysis shows that the benefits of the proposed standard exceed, to a great extent, the burdens of the proposed standards.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the proposed standards for miscellaneous refrigeration products is $81.2 million per year in increased product costs, while the estimated annual benefits are $97.6 million in reduced product operating costs, $28.9 million in monetized climate benefits and $35.4 million in monetized health benefits. The net monetized benefit amounts to $80.6 million per year.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[12] For example, some covered products and equipment have substantial energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the proposed standards are projected to result in estimated national energy savings of 0.31 quad (FFC), the equivalent of the electricity use of 3.4 million homes in one year. In addition, they are projected to reduce GHG emissions. The NPV of consumer benefit for these projected energy savings is $0.14 billion using a discount rate of 7 percent, and $0.69 billion using a discount rate of 3 percent. The cumulative emissions reductions associated with these energy savings are 10.4 Mt of CO_2, 4.8 thousand tons of SO_2, 15.9 thousand tons of NO_X, 0.03 tons of Hg, 70.3 thousand tons of CH_4, and 0.11 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) is $0.5 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions is $0.3 billion using a 7-percent discount rate and $0.8 billion using a 3-percent discount rate. As such, DOE has initially determined the energy savings from the proposed standard levels are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for this tentative conclusion is contained in the remainder of this document and the accompanying technical support document (''TSD'').

DOE also considered more stringent energy efficiency levels as potential standards and is still considering them in this rulemaking. However, DOE has tentatively concluded that the potential burdens of the more stringent energy efficiency levels would outweigh the projected benefits.

Based on consideration of the public comments DOE receives in response to this document and related information collected and analyzed during the course of this rulemaking effort, DOE may adopt energy efficiency levels presented in this document that are either higher or lower than the proposed standards, or some combination of level(s) that incorporate the proposed standards in part.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed rule, as well as some of the relevant historical background related to the establishment of standards for miscellaneous refrigeration products.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016 (the ''July 2016 Final Coverage Determination''). 81 FR 46768. MREFs are consumer refrigeration products other than refrigerators, refrigerator-freezers, or freezers, which include coolers and combination cooler refrigeration products. 10 CFR 430.2. MREFs include refrigeration products such as coolers (*e.g.,* wine chillers and other specialty products) and combination cooler refrigeration products (*e.g.,* wine chillers and other specialty compartments combined with a refrigerator, refrigerator-freezers, or freezers). EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) Not later than three years after issuance of a final determination not to amend standards, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 42 U.S.C. 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)). The DOE test procedures for miscellaneous refrigeration products appears at 10 CFR part 430, subpart B, appendix A,

[12] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

Uniform Test Method for Measuring the Energy Consumption of Refrigerators, Refrigerator-Freezers, and Miscellaneous Refrigeration Products (''appendix A'').

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including refrigerators, refrigerator-freezers, and freezers. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy (''Secretary'') determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 6295(o)(3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3))

Moreover, DOE may not prescribe a standard: (1) for certain products, including refrigerators, refrigerator-freezers, and freezers, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of product that has the same function or intended use, if DOE determines that products within such group: (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Finally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedures for miscellaneous refrigeration products address standby mode and off mode energy use. In this rulemaking, DOE intends to incorporate such energy use into any amended energy conservation standards that it may adopt.

B. Background

1. Current Standards

DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016 (the ''July 2016 Final Coverage Determination''). 81 FR 46768. In that determination, DOE noted that MREFs, on average, consume more than 150 kilowatt hours per year (''kWh/yr'') and that the aggregate annual national energy use of these products exceeds 4.2 terawatt hours (''TWh''). 81 FR 46768, 46775. In addition to establishing coverage, the July 2016 Final Coverage Determination established definitions for ''miscellaneous refrigeration products,'' ''coolers,'' and ''combination cooler refrigeration products'' in 10 CFR 430.2. 81 FR 46768, 46791–46792.

On October 28, 2016, DOE published a direct final rule (the ''October 2016 Direct Final Rule'') in which it adopted energy conservation standards for MREFs consistent with the recommendations from a negotiated rulemaking working group established under the Appliance Standards and Rulemaking Federal Advisory Committee. 81 FR 75194. Concurrent with the October 2016 Direct Final Rule, DOE published a NOPR in which it proposed and requested comments on the standards set forth in the direct final rule. 81 FR 74950. On May 26, 2017, DOE published a notice in the **Federal Register** in which it determined that the comments received in response to the October 2016 Direct Final Rule did not provide a reasonable basis for withdrawing the rule and, therefore, confirmed the adoption of the energy conservation standards established in that direct final rule. 82 FR 24214.

These current standards for MREFs are set forth in DOE's regulations at 10 CFR 430.32(aa)(1)–(2) and are repeated

solely for reference in Table II.1 to aid the reader.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR MREFS

Product class	Equations for maximum energy use (kWh/yr)
1. Freestanding compact coolers (''FCC'')	7.88AV + 155.8
2. Freestanding coolers (''FC'')	7.88AV + 155.8
3. Built-in compact coolers (''BICC'')	7.88AV + 155.8
4. Built-in coolers (''BIC'')	7.88AV + 155.8
C–3A. Cooler with all-refrigerator—automatic defrost	4.57AV + 130.4
C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	5.19AV + 147.8
C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7
C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8
C–9I. Cooler with upright freezer with automatic defrost with an automatic icemaker	5.58AV + 231.7
C–9I–BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker	6.38AV + 252.8
C–13A. Compact cooler with all-refrigerator—automatic defrost	5.93AV + 193.7
C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	6.52AV + 213.1

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of 10 CFR part 430.

2. History of Standards Rulemaking for Miscellaneous Refrigeration Products

On December 8, 2020, DOE published a notice that it was initiating an early assessment review to determine whether any new or amended standards would satisfy the relevant requirements of EPCA for a new or amended energy conservation standard for MREFs and a request for information (''RFI''). 85 FR 78964 (''December 2020 Early Assessment Review RFI'').

Comments received following the publication of the December 2020 Early Assessment Review RFI helped DOE identify and resolve issues related to the subsequent preliminary analysis.[13] DOE published a notice of public meeting and availability of the preliminary technical support document (''TSD'') on January 21, 2022 (''January 2022 Preliminary Analysis''). 87 FR 3229. DOE subsequently held a public meeting on March 7, 2022, to discuss and receive comments on the January 2022 Preliminary Analysis. The January 2022 Preliminary Analysis that presented the methodology and results of the preliminary analysis is available at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0009.*

DOE received five docket comments in response to the January 2022 Preliminary Analysis from the interested parties listed in Table II.1.

TABLE II.1—JANUARY 2022 PRELIMINARY ANALYSIS WRITTEN COMMENTS

Organization(s)	Reference in this NOPR	Organization type
Association of Home Appliance Manufacturers	AHAM	Trade Organization.
Appliance Standards Awareness Project	ASAP	Efficiency Organization.
California Investor-Owned Utilities	CA IOUs	Utility Supplier.
Northwest Energy Efficiency Alliance	NEEA	Efficiency Organization.
Sub Zero Group, Inc	Sub Zero	Manufacturer.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[14]

3. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product.

On October 12, 2021, DOE published in the **Federal Register** a final rule amending the test procedures for MREFs and other consumer refrigeration products at appendix A and appendix B of 10 CFR part 430 (the ''October 2021 TP Final Rule''). 86 FR 56790 (October 12, 2021). The October 2021 TP Final Rule incorporates by reference the most recent industry test procedure, AHAM Standard HRF–1, ''Energy and Internal Volume of Consumer Refrigeration Products'' (''AHAM HRF–1–2019''). However, DOE did not require the change in icemaker energy use included in the 2019 revision of HRF–1. 86 FR 56793. While DOE had proposed to implement this change in the proposed test procedure rulemaking (84 FR 70842, 70848–70850 (December 23, 2019)), DOE indicated in the October 2021 TP Final Rule that it would not require the calculations until the compliance dates of any amended energy conservation standards for these products, which incorporated the amended automatic icemaker energy consumption. 86 FR 56793. DOE determined that the test procedure amendments are not expected to impact the measured energy use of consumer refrigeration products, including MREFs, as compared to the test procedure in place at the time of the October 2021 Test Procedure Final Rule. 86 FR 56790.

[13] Comments are available at *www.regulations.gov/docket/EERE-2020-BT-STD-0039/comments.*

[14] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for miscellaneous refrigeration products. (Docket No. EERE–2020–BT–STD–0039, which is maintained at *https://www.regulations.gov/document/EERE-2020-BT-STD-0039*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

The analysis presented in this NOPR is based on the test procedure as finalized in the October 2021 TP Final Rule, except for the calculation of the change in energy use attributed to icemaker energy use, which aligns with the icemaker energy use in HRF–1–2019. The value of the revised icemaker energy use and the plans to implement this change coincident with the date of future energy conservation standards were discussed at length in the October 2021 TP Final Rule. (*See* 86 FR 56822, October 12, 2021) Hence, this change is proposed in this document.

4. Off Mode and Standby Mode

Pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE test procedures for refrigeration products measure the energy use of these products during extended time periods that include periods when the compressor and other key components are cycled off. All of the energy these products use during the ''off cycles'' is already included in the measurements. 79 FR 22320, 22345. The approach of testing with connected functions on but not connected to a network account for energy consumption of such functions as part of active mode testing, and as a result, this method provides consumers with representative estimates of energy consumption.

C. Deviation From Appendix A

In accordance with section 3(a) of 10 CFR part 430, subpart C, appendix A (''appendix A''), DOE notes that it is deviating from the provision in appendix A regarding the pre-NOPR stages for an energy conservation standards rulemaking. Section 6(a)(2) of appendix A states that if the Department determines it is appropriate to proceed with a rulemaking, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a framework document and preliminary analysis, or an advance notice of proposed rulemaking. For the reasons that follow, DOE finds it appropriate to deviate from this step-in appendix A and to instead publish this NOPR without issuing a framework document. A framework document is intended to introduce and summarize the various analyses DOE conducts during the rulemaking process and requests initial feedback from interested parties. As discussed in the preceding section, prior to this NOPR, DOE issued an early assessment request for information in which DOE identified and sought comment on the analyses conducted in support of the most recent energy conservation standards rulemaking, for which, DOE provided a 75-day comment period. 85 FR 78964, 78965–78966 (Dec. 8, 2020) (the ''December 2020 Early Assessment Review RFI'') DOE then issued the January 2022 Preliminary Analysis, seeking further general comments from stakeholders regarding the analyses conducted to support the upcoming standards rulemaking, for which, DOE provided a 60-day comment period for the January 2022 Preliminary Analysis. 87 FR 3229 (Jan. 21, 2022)

As DOE is intending to rely on substantively the same analytical methods as in the most recent rulemaking, publication of a framework document would be largely redundant with the published early assessment RFI and preliminary analysis. As such, DOE is not publishing a framework document.

Section 6(f)(2) of appendix A provides that the length of the public comment period for the NOPR will be at least 75 days. For this NOPR, DOE finds it appropriate to provide a 60-day comment period. As previously discussed, DOE provided a 60-day comment period on January 2022 Preliminary Analysis. 87 FR 3229. DOE subsequently held a public meeting on March 7, 2022, to discuss and received comments on the January 2022 Preliminary Analysis. Consequently, DOE has determined it is appropriate to provide a 60-day comment period on the NOPR, which the Department believes will provide interested parties with a meaningful opportunity to comment on the proposed rule.

III. General Discussion

DOE developed this proposal after considering oral and written comments, data, and information from interested parties that represent a variety of interests. The following discussion addresses issues raised by these commenters.

A. Product Classes and Scope of Coverage

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q))

To simplify the structure for presentation of maximum allowable energy use equations, DOE is proposing, for class pairs for which one class includes an icemaker and the other does not, to represent the icemaker energy use adder in a single energy use equation rather than in two separate equations. The product class discussion in section IV below explores this issue further. In addition, DOE is proposing standard levels for a new class covering built-in combination cooler-refrigerator-freezers with a bottom-mounted freezer, both with and without an automatic icemaker, (''combination cooler 5–BI''). This is also discussion in greater detail in section IV of this document.

B. Definitions

In 10 CFR 430.2, DOE has established definitions for a variety of refrigeration products, including refrigerators, refrigerator-freezers, freezers, and coolers and combination cooler refrigeration products defined as MREFs. DOE recognizes that there are some products that may, based on their physical and operational characteristics, meet more than one of the definitions in § 430.2. This includes certain combination cooler refrigeration products, such as cooler-refrigerators, cooler-refrigerator-freezers, or cooler-freezers. When standards for miscellaneous refrigeration products were established, they were not established for all potential combination products. Rather, standards were established for combination products that were on the market at the time of the final rule. 81 FR 75194, 75210, 75215–75216 (October 28, 2016). In doing so, DOE anticipated that manufacturers would eventually introduce combination products for which standards were not originally established under § 430.32(aa). In these cases, a particular product could also meet the definition of a refrigerator, refrigerator-freezer, or freezer. To specifically delineate between those products and MREF products currently

subject to an energy conservation standard in § 430.32(aa), the definitions of refrigerator, refrigerator-freezer, or freezer in § 430.2 contain a provision that excludes any miscellaneous refrigeration product that must comply with an applicable miscellaneous refrigeration product energy conservation standard. Consequently, MREF products not exempted by that provision may still be defined as a refrigerator, refrigerator-freezer, or freezer.

In this NOPR, DOE is clarifying that a product that combines a cooler with a refrigerator, refrigerator-freezer, or freezer that otherwise meets the definition of one of those product types in § 430.2 and is not excluded from the definition through coverage by a standard in 10 CFR 430.32(aa) as a miscellaneous refrigeration product, must be tested and certified as a refrigerator, refrigerator-freezer, or freezer according to the applicable test procedure in appendix A or appendix B (with additional instruction addressing the cooler compartment of a cooler-freezer, as applicable—these additional instructions are discussed in section III.C of this document), be certified according to the certification requirements in 10 CFR 429.14, and meet the energy conservation standard for the applicable product class of refrigerator, refrigerator-freezer, or freezer. DOE concludes that the current regulations require this approach for such products and is proposing the changes to the regulatory language simply as clarification.

To ensure this clarification is properly applied, DOE identified potential clarifying amendments to the refrigerator and freezer definitions in § 430.2 that would lead to the appropriate determination of coverage for combination refrigeration products that do not have a prescribed MREF energy conservation standard. In particular, in this NOPR DOE proposes to amend the refrigerator and freezer definitions to clarify that the definitions do apply to products that have a cooler compartment included in addition to the fresh food compartment (for a refrigerator) or freezer compartment (for a freezer). DOE notes that this coverage status is already clear in the refrigerator-freezer definition, which explicitly allows for additional compartments other than the fresh food and freezer compartments, which are defined based on operating temperature, by including allowing the product to have compartments that may operate outside these defined parameters. DOE's proposal would make similar clarifications for the refrigerator and freezer definitions.

DOE requests comment on its proposal to amend the refrigerator and freezer definitions in § 430.2 to clarify that products that would otherwise be considered a refrigerator or a freezer that also include a cooler compartment would be considered a refrigerator or a freezer, unless a miscellaneous refrigeration product energy conservation standard in § 430.32(aa) is applicable for the product.

C. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product. DOE's current energy conservation standards for miscellaneous refrigeration products are expressed in terms of Annual Energy Use, expressed in kWh/year. (See 10 CFR 430.32(a).)

As previously discussed, DOE planned to delay adopting for consumer refrigeration products the revised icemaker energy use adder of 28 kWh/yr that is in AHAM HRF–1–2019—which is the industry test standard—until the compliance date of a possible amended standard. As discussed in the October 2021 TP final rule, DOE determined it would not require testing with the amended icemaker energy use adder until the compliance dates of the next amended energy conservation standards for refrigeration products. 86 FR 56815. Therefore, as discussed previously, this NOPR proposes product classes that implement the 28 kWh/year icemaker adder, consistent with the icemaker energy use in HRF–1–2019, and also proposes to adopt the updated icemaker adder for MREF, to be used on or after the compliance date of revised standards.

As previously discussed, DOE is proposing clarifying amendments to product definitions indicating that products that include a cooler compartment in addition to a fresh food or freezer compartment but do not have an MREF energy conservation standard, would still meet the refrigerator or freezer definitions, as applicable. Additionally, DOE is proposing clarifying amendments to appendix A and appendix B, as it relates to testing combination cooler-freezers as well as testing combination refrigeration products that do not have a prescribed MREF energy conservation standards.

Specifically, DOE is proposing to add sub-sections to appendix A and appendix B to clarify the calculation of average per-cycle energy consumption for combination cooler-freezers and freezers with a cooler compartment, by referring to section 5.9.3 of HRF–1 2019 and stating specific ''k'' values to be used in equations presented therein. DOE also proposes to amend appendix B section 5.2 to refer to section 5.2 of appendix A when testing freezers with cooler compartments, because the appendix A requirements are more appropriate for products with more than one compartment. Lastly, DOE proposes to amend appendix B by adding a clarification to section 5.3 to specify the value of variable ''K'' when referencing section 5.8.2 of HRF–1–2019.

ASAP stated in response to the January 2022 Preliminary Analysis that they understand that produce growers with a source of refrigeration likely meet the definition of a cooler but, due to unique components present in a produce grower that maintain an environment with temperature and humidity controls that are conducive to growing plants, produce growers cannot be tested in the same manner as coolers whose primary function is to chill beverage products. NEEA commented on a need for implementing different test procedures for produce growers, citing technology differences between produce growers and other miscellaneous refrigeration products. NEEA stated that test procedures for produce growers should include energy use measurements for cabinet temperature and humidity control systems, water distribution systems, and carbon dioxide injection systems. ASAP and NEEA encouraged DOE to establish test procedures for these products. (ASAP, No. 19, p. 3; NEEA, No. 21, pp. 3–4)

DOE is aware of the produce grower market and appreciates input on this topic. At this point, only GE Appliances, a Haier Company (''GEA'') has submitted a petition for waiver from test procedures covering MREFs. GEA initially also requested an interim waiver. In an initial denial of the petition for interim waiver, DOE tentatively concluded that the GEA model meets the definition of a cooler, because the product consists of a cabinet used with one or more doors, and maintains compartment temperatures no lower than 39 degrees Fahrenheit, as determined when tested in a 90-degree Fahrenheit ambient temperature. 86 FR 35766, 35768 (July 7, 2021). In addition to this, DOE tentatively determined that the requested alternate test procedure

would not result in measured energy use of the basic model that is representative of actual energy used during representative average use. *Id.* In November 2021, GEA submitted a revised petition for waiver and interim waiver for its grower product that proposed a revised alternative test method designed to address the concerns that DOE expressed in its denial of the GEA's original petition. Having considered the merits of GEA's revised approach, and receiving no comments in opposition, DOE approved use of the revised alternate test procedure for rating GEA's product through the publication of a notification of decision and order on October 17, 2022 (87 FR 62835), reiterating that while the In-Home Grower basic model meets the cooler definition, it is not subject to the cooler energy conservation standards because of its unique characteristics, as discussed in the November 2021 Notification of Petition for Waiver. (87 FR 62835, 62838)

In consideration of the other produce growers mentioned in ASAP's comment—the Viking Under-counter Micro Green & Herb Cabinet—GCV12, the Seedo Automated Home Grow Device, and the Bloom In-Home Grow System—DOE has not received waiver petitions for these products but will consider investigating these products, including whether they may be subject to testing requirements based on meeting the definition of an MREF product, as GEA's product does.

NEEA advocated for the implementation of a test procedure to calculate the energy impact of interior lighting in all miscellaneous refrigeration products. NEEA claims that the use of lighting differs largely depending on manufacturer and personal usage, and with the proliferation of glass doors for coolers, interior lighting plays a large role in energy calculations. (NEEA, No. 21, pp. 4–5)

AHAM states the vast majority of the miscellaneous refrigeration product designs on the market no longer use incandescent lighting and have shifted to light-emitting diode (''LED'') technology, meaning efficiency gains from lighting are limited, and efforts to further regulate lighting options in miscellaneous refrigeration products will place undue burden on manufacturers. (AHAM, No. 18, p. 7)

The test procedure does not include measurement of energy use with lighting turned on. DOE last finalized its test procedure for consumer refrigeration products including MREFs on October 12, 2021. 86 FR 56790. As part of the rulemaking to establish this test procedure, DOE published a request for information (''RFI'') (82 FR 29780) on June 30, 2017, and a NOPR (84 FR 70842) on December 23, 2019. No comments in response to the RFI or NOPR suggested that lighting energy use should be included as part of the test procedure. In the final rule initially establishing the test procedures for MREF on July 18, 2016, DOE indicated that it set the requirement to test these products with light switches in the off position based on field surveys indicating that 90 percent of consumers kept light switches off in coolers. 81 FR 46768, 46782. This requirement was also consistent with the recommendations of the Working Group that negotiated MREF test procedures and energy conservation standards under the auspices of the Appliance Standards and Rulemaking Federal Advisory Committee (''ASRAC''). *Id.* When DOE next considers revisions to the test procedure for MREF, DOE may request information regarding trends affecting lighting energy use in these products, and, based on information obtained, may consider at that time, whether the test procedure should be revised to include lighting energy.

D. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. Sections 6(b)(3)(i) and 7(b)(1) of CFR the Process Rule.

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety, and (4) unique-pathway proprietary technologies. Sections 6(b)(3)(ii)–(v) and 7(b)(2)–(5) of the Process Rule. Section IV.B of this document discusses the results of the screening analysis for miscellaneous refrigeration products, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the NOPR technical support document (''TSD'').

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt an amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for miscellaneous refrigeration products, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C.1.c of this proposed rule and in chapter 5 of the NOPR TSD.

E. Energy Savings

1. Determination of Savings

For each trial standard level (''TSL''), DOE projected energy savings from application of the TSL to miscellaneous refrigeration products purchased in the 30-year period that begins in the year of compliance with the proposed standards (2029–2058).[15] The savings are measured over the entire lifetime of miscellaneous refrigeration products purchased in the previous 30-year period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of amended energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet model to estimate national energy savings (''NES'') from potential amended or new standards for miscellaneous refrigeration products.

[15] Each TSL is composed of specific efficiency levels for each product class. The TSLs considered for this NOPR are described in section V.A of this document. DOE conducted a sensitivity analysis that considers impacts for products shipped in a 9-year period.

The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports NES in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[16] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this document.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B))

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[17] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand.

Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, health benefits, and the need to confront the global climate crisis, among other factors. DOE has initially determined the energy savings from the proposed standard levels are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

[16] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

[17] The numeric threshold for determining the significance of energy savings established in a final rule published on February 14, 2020 (85 FR 8626, 8670), was subsequently eliminated in a final rule published on December 13, 2021 (86 FR 70892).

F. Economic Justification

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of a potential amended standard on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows, (2) cash flows by year, (3) changes in revenue and income, and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturing employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups[18] of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating expense (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with new or amended standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section III.E, DOE uses the NIA spreadsheet model to project NES.

d. Lessening of Utility or Performance of Products

In establishing product classes and in evaluating design options and the impact of potential standard levels, DOE

[18] For this NOPR, DOE analyzed the impacts of the considered standard levels on senior-only households.

evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards proposed in this document would not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a proposed standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) DOE will transmit a copy of this proposed rule to the Attorney General with a request that the Department of Justice (''DOJ'') provide its determination on this issue. DOE will publish and respond to the Attorney General's determination in the final rule. DOE invites comment from the public regarding the competitive impacts that are likely to result from this proposed rule. In addition, stakeholders may also provide comments separately to DOJ regarding these potential impacts. See the **ADDRESSES** section for information to send comments to DOJ.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the proposed standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The proposed standards are likely to result in environmental and health benefits in the form of reduced emissions of air pollutants and greenhouse gases (''GHGs'') associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K; the estimated emissions impacts are reported in section I.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effects that proposed energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F.9 of this proposed rule.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to miscellaneous refrigeration products. Separate paragraphs address each component of DOE's analyses.

DOE used several analytical tools to estimate the impact of the standards proposed in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended or new energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments projections and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www.regulations.gov/docket/EERE-2020-BT-STD-0039*. Additionally, DOE used output from the latest version of the Energy Information Administration's (''EIA's'') *Annual Energy Outlook* (''*AEO*''), a widely known energy projection for the United States, for the emissions and utility impact analyses.

DOE received some comments in response to the January 2022 Preliminary Analysis that, rather than addressing specific aspects of the analysis, are general statements regarding the appropriateness of amending energy conservation standards and/or the efficiency levels that might be appropriate.

AHAM stated they support DOE in its efforts to ensure a national marketplace through the Appliance Standards Program. AHAM also stated that amended standards for MREFs may not be justified under EPCA given the relatively low number of shipments in the MREF product category and the limited opportunity for energy savings that result from that fact. AHAM therefore stated, especially given DOE's large backlog of rulemakings (many of which involve products with larger energy savings opportunities), DOE should prioritize other rulemakings. (AHAM, No. 18, p. 1)

While miscellaneous refrigeration products have a smaller number of shipments when compared to refrigerators, refrigerator-freezers, and freezers, (''RFs''), that is not a factor DOE considers in determining when to proceed with reviewing a standard. DOE is mandated by 42 U.S.C. 6295(m)(1) to reconsider energy standards no later than 6 years after issuance of any final rule establishing or amending standards.

A. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly available information. The subjects addressed in the market and technology assessment for this rulemaking include (1) a determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends; and (6) technologies or design options that could improve the energy efficiency of miscellaneous refrigeration products. The key findings of DOE's market assessment are summarized in the following sections. See chapter 3 of the NOPR TSD for further discussion of the market and technology assessment.

1. Scope of Coverage and Product Classes

In the January 2022 Preliminary Analysis, DOE identified one potential product class modification for miscellaneous refrigeration products. DOE did receive a comment in response to the January 2022 Preliminary Analysis regarding the product class structure, which is addressed.

a. Product Classes With Automatic Icemakers

DOE has identified an opportunity to simplify and consolidate the presentation of maximum allowable energy use for products within product classes that may or may not have an automatic icemaker.

To represent the annual energy consumed by automatic icemakers in MREFs, DOE's test procedures specify a constant energy-use adder of 84 kWh/year (by use of a 0.23 kWh/day adder; see section 5.3(a)(i) of 10 CFR part 430, subpart B, appendix A and section 5.3.(a) of appendix B). With this constant adder, the standard levels for product classes with an automatic icemaker are equal to the standards of their counterparts without an icemaker plus the 84 kWh/year. Consistent with prior discussions in the test procedure rulemaking, this NOPR proposes to amend this equation such that representations made on or after the compliance date of any potential new energy conservation standards, the adder to be used shall change from 84 kWh/yr to 28 kWh/yr. DOE determined as part of the October 2021 TP Final Rule that the revised adder would more accurately reflect energy use during a representative average use cycle. 86 FR 56811. However, DOE indicated that it would not require this change in the test procedure until the date of potential future energy conservation standard amendments. *Id.* at 86 FR 56793. Thus, this change is being proposed in this document, with an implementation date to coincide with the compliance date of the standards proposed in this document.

DOE has concluded that because the standards for the product classes with and without automatic icemakers are effectively the same, except for the constant adder, there is an opportunity to express the maximum allowable energy use for both icemaking and non-icemaking classes with the same equation, thus consolidating the presentation of classes and simplifying the energy conservation standards. The equation would, for those classes that may or may not have an icemaker, include a term equal to the icemaking energy use adder multiplied by a factor that is defined to equal 1 for products with icemakers and to equal zero for products without icemakers. This approach would consolidate the product class structure with a single product class descriptor and maximum energy use equation, while continuing to reflect that products with and without icemakers may have different maximum energy use values.

DOE requests comments on its proposal to consolidate the presentation of maximum allowable energy use for products of classes that may or may not have an automatic icemaker.

b. Addition of a Built-In Combination Cooler-Refrigerator-Freezer With Bottom-Mounted Freezer and Automatic Icemaker Product Class

Sub Zero stated they are planning to introduce a built-in combination cooler-refrigerator-freezer with bottom-mounted freezer and automatic icemaker. Sub Zero noted, although this configuration is an MREF covered product, it was not on the market in 2016 so a standard level was not set; using the same methodology used to set levels for the eight combination cooler types for which a standard was prescribed, the allowable maximum energy use would be 6.08AV + 302 kWh/yr. Sub Zero stated it is their understanding that they will need to request exception relief from DOE to certify this new product and requested that a future standard level for this product class be set in the upcoming MREF rulemaking. (Sub Zero, No. 17, pp. 2–3)

DOE is proposing energy use levels for the built-in combination cooler-refrigerator-freezer with a bottom-mounted freezer, with and without an automatic icemaker (''combination cooler 5–BI''), as requested by Sub Zero.[19] DOE agrees with Sub Zero that the baseline energy use for the class with an automatic icemaker would be using the methodology established in the MREF negotiations for setting energy use standards for new classes of combination products, if calculated on the basis of the 84 kWh/yr icemaker energy use of the current test procedure. When considering the revised 28 kWh/yr icemaker, to be implemented at the compliance date of any amended energy conservation standards, the baseline energy use equation for the product class would be 6.08AV + 246 kWh/yr. Since there are no products on the market that could serve as the basis for analysis to support setting a future standard, DOE is using combination cooler class 3A as a proxy for setting of a future energy conservation standard for the new combination cooler 5–BI class.

DOE requests comment on its proposal to establish energy conservation standards for combination cooler 5–BI using the analysis for combination class 3A as proxy for setting the standard level, based on a baseline efficiency equal to 6.08AV + 218 +28*I kWh/yr, where I is equal to 0 if the model has no automatic icemaker and equal to 1 if it does.

2. Technology Options

In the preliminary market analysis and technology assessment, DOE identified 37 technology options that would be expected to improve the efficiency of miscellaneous refrigeration products, as measured by the DOE test procedure:

Table IV.1—Technology Options Identified in the Preliminary Analysis

Insulation
1. Improved resistivity of insulation (insulation type)
2. Increased insulation thickness
3. Vacuum-insulated panels
4. Gas-filled insulation panels

Gaskets and Anti-Sweat Heat
5. Improved gaskets
6. Double door gaskets

[19] Although Sub Zero requested a new class only for models with an automatic icemaker, DOE is extending the proposal to also include products without an automatic icemaker, consistent with the consolidation of the icemaker energy use into the energy use equation in the presentation of energy use standards.

7. Anti-sweat heat
Doors
8. Low-E coatings
9. Inert gas fill
10. Vacuum-insulated glass
11. Additional panes
12. Frame design
13. Solid door
Compressor
14. Improved compressor efficiency
15. Variable-speed compressors
16. Linear compressors
Evaporator
17. Increased surface area
18. Forced-convection evaporator
19. Tube and fin enhancements (including microchannel designs)
20. Multiple evaporators
Condenser
21. Increased surface area
22. Tube and fin enhancements (including microchannel designs
23. Forced-convection condenser
Defrost System
24. Off-cycle defrost
25. Reduced energy for active defrost
26. Adaptive defrost
27. Condenser hot gas defrost
Control System
28. Electronic temperature control
29. Air-distribution control
Other Technologies
30. Fan and fan motor improvements
31. Improved expansion valve
32. Fluid control or solenoid off-cycle valve
33. Alternative refrigerants
34. Improved refrigerant piping
35. Component location
36. Alternative refrigeration systems

Commenters provided feedback on some of these technology options. These comments are summarized below, along with DOE's responses.

AHAM stated several of the evaluated technology options are impractical or provide limited to no benefit given current manufacturing and design processes past EL 1. However, AHAM did not provide sufficient detail that would enable DOE to revise the listed technology options and subsequent analysis. (AHAM, No. 18, p. 7)

AHAM also cited issues with DOE's use of LED lighting in its analysis, DOE's over-reliance on vacuum-insulated panels (''VIPs'') in its analysis, and an insufficient supply of variable-speed compressors (''VSCs''). Specifically, AHAM states that the widespread use of LED lighting in the market currently means the possible efficiency gains from lighting will be limited. When considering VIPs, AHAM argues that DOE overused VIPs in its analysis in a manner that is not consistent with their current use on the market or overall effectiveness. Finally, AHAM points to the use of VSCs in the higher ELs as risky due to a potential shortfall of supply from manufacturers if they are included in a standards rulemaking as a primary design option for energy efficiency. (AHAM, No. 18, p. 7)

DOE is aware of the widespread use of LED lighting in the market currently. Therefore, lighting technologies were not considered as a technology option in the preliminary analysis. Likewise, they were also not considered in the NOPR analysis.

When considering the impact of VIPs, DOE took into consideration relevant rulemaking analyses for refrigerator, refrigerator-freezer, and freezer classes as a basis for VIP effectiveness as well as manufacturer feedback. With this information, VIP implementation in the NOPR analysis was more limited than in the preliminary analysis. For this analysis VIPs were only implemented partially in the max-tech levels of every directly analyzed class.

The impact of VSCs on the miscellaneous refrigeration product analyses was primarily based on their ability to provide a higher level of efficiency when compared to their single-speed counterparts. As a result of this compressor efficiency increase, they are prevalent in the higher ELs of the efficiency analyses. DOE acknowledges that more stringent standards would likely necessitate adoption of more efficient technologies, such as variable-speed compressors. However, DOE expects that standards, if adopted, would provide sufficient certainty for manufacturers and suppliers to establish additional capacity in the supply chain, if needed.

B. Screening Analysis

DOE uses the following five screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in working prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production and reliable installation and servicing of a technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility or product availability.* If it is determined that a technology would have a significant adverse impact on the utility of the product for significant subgroups of consumers or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Adverse impacts on health or safety.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-Pathway Proprietary Technologies.* If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further due to the potential for monopolistic concerns.

10 CFR part 430, subpart C, appendix A, sections 6(b)(3) and 7(b).

In summary, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections include comments from interested parties pertinent to the screening criteria, DOE's evaluation of each technology option against the screening analysis criteria, and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

1. Screened-Out Technologies

In the January 2022 Preliminary Analysis, DOE screened out the following technologies on the basis of technological feasibility, practicability to manufacture, install, and service, adverse impacts on utility or availability, adverse impacts on health or safety, and use of unique-pathway proprietary technologies.

Table IV.2—Technologies Screened Out in the Preliminary Analysis

Solid doors
Ultra-low-E (reflective) glass doors
Vacuum-insulated glass
Improved gaskets and double gaskets
Linear compressors
Fluid control or solenoid off-cycle valves
Evaporator tube and fin enhancements
Condenser tube and fin enhancements (except microchannel condensers)
Condenser hot gas defrost
Improved refrigerant piping

Component location
Alternative refrigeration systems
Improved VIPs

2. Technology Options

Through a review of each technology, DOE concluded in the preliminary analysis that all of the other identified technologies listed in section IV.A.2 of this document met all five screening criteria to be examined further as design options in DOE's NOPR analysis. In summary, DOE did not screen out the following technology options:

Table IV.2—Technologies Remaining in the Preliminary Analysis

Insulation
1. Improved resistivity of insulation (insulation type)
2. Increased insulation thickness
3. Gas-filled insulation panels
4. Vacuum-insulated panels
Gasket and Anti-Sweat Heat
5. Anti-sweat heat
Doors
6. Low-E coatings
7. Inert gas fill
8. Additional panes
9. Frame design
Compressor
10. Improved compressor efficiency
11. Variable-speed compressors
Evaporator
12. Forced-convection evaporator
13. Increased surface area
14. Multiple evaporators
Condenser
15. Increased surface area
16. Microchannel designs
17. Forced-convection condenser
Defrost System
18. Reduced energy for automatic defrost
19. Adaptive defrost
20. Off-cycle defrost
Control System
21. Electronic Temperature control
22. Air-distribution control
Other Technologies
23. Fan and fan motor improvements
24. Improved expansion valve
25. Alternative Refrigerants

DOE has initially determined that these technology options are technologically feasible because they are being used or have previously been used in commercially available products or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety, unique-pathway proprietary technologies). For additional details, see chapter 4 of the NOPR TSD.

DOE received comments regarding the screened-out technologies; relevant comments are addressed.

AHAM agreed with DOE's decision to screen out solid doors as a technology option for the reason that ELs requiring solid doors will result in a significant loss in consumer utility. AHAM also agreed with DOE's decision to screen out Ultra-Low-E Glass Doors for similar reason, in that this technology also prevents the consumer from being able to see clearly into the cabinet. AHAM stated, should DOE include a door technology option in its final analysis for a possible amended standard, that analysis should provide careful justification to ensure that consumer utility and consumer costs are not unduly impacted. (AHAM, No. 18, p. 8)

The CA IOUs urged DOE to reconsider several technologies that they claimed were screened out of the analysis or improperly categorized. These technologies include ultra-low E glass doors, Inert Gas-Filled Glass, vacuum insulated glass, microchannel heat exchangers, and variable speed compressors. In considering ultra-low E glass doors, the CA IOUs request the DOE define an acceptable emissivity that does not significantly hinder visibility while providing energy savings. For inert gas-filled glass, the CA IOUs claim that triple-pane Argon-filled glass with low-e coating is widely available throughout the market and should be considered at lower ELs. Considering vacuum insulated glass, the CA IOUs point to several manufacturers offering the glass for refrigeration applications. Finally, the CA IOUs urged DOE to make more consideration into the implementation of microchannel heat exchangers and VSCs, claiming that their energy benefits were not fully considered in the preliminary analysis. (CA IOUs, No. 20, pp. 4–6)

DOE screened out ultra-low E glass panels due to loss in consumer utility associated with reduced visibility. DOE considers ultra-low E glass panels to be those with at least three glass layers and more than one low E coating. A large portion of the MREF market utilizes transparent glass doors as an option to allow the consumer to see inside the cooler compartment. Despite its ability to improve efficiency, ultra-low E glass reduces visibility into the cooler cabinet. In interviews, manufacturers specifically indicated that they avoid use of glass panels with more than one low E layer due to visibility concerns. DOE did include in its analysis triple-glazed panels with argon fill and one low E layer, consistent with panels that have been observed in available cooler products.

DOE likewise did not consider vacuum insulated glass as it impacts practicability of manufacture, repair, and installation. While it remains available as a technology option for use in refrigeration equipment (*e.g.,* walk-in cooler doors), DOE is not currently aware of vacuum-insulated glass currently in use for any MREFs. Also, because MREFs are typically much smaller than commercial refrigeration equipment, vacuum-insulated glass may not yet be available for all MREF sizes.

While the CA IOUs claim that five commercial refrigeration manufacturers already have integrated microchannel condenser coils in their equipment outside the MREF product category, DOE has not observed microchannel condensers in any of the products in the teardown analysis for MREFs. DOE notes that microchannel condensers may allow for refrigerant charge reductions and improved heat transfer but known drawbacks to these designs include irregular refrigerant distribution and greater pressure drops on the refrigerant side and air side. Therefore, microchannel condensers may not provide efficiency improvements. Hence, DOE screened out microchannel condensers as a technology option.

Variable speed compressors were included in the NOPR analysis and are implemented in higher-level ELs throughout the analyzed product classes. Published EER levels for VSCs are generally much higher than published EERs for single-speed compressors in the capacity range suitable for compact products, but DOE has not found many MREF products that use VSCs, nor many related compact refrigerators that use VSCs, and thus has little evidence on which to base confident predictions of large efficiency improvements. DOE received a range of estimates of the improvement potential associated with this technology from manufacturers during interviews. DOE believes that its MREF NOPR engineering analysis is representative of performance improvement potential using variable-speed compressors.

The door technology options that remain for increasing the efficiency of miscellaneous refrigeration products include low-e coatings, inert gas fills, additional panes, and frame design changes. Of these options, gas fills, additional panes, and low-e coating were the options implemented in the final EL analyses, with max-tech doors including triple-pane glass, argon gas fill, and a low-e layer on the outermost glass. These options were implemented based on their current use in the market.

DOE seeks further comment on any of the technologies screened out in this NOPR analysis as they were determined to not meet the screening criteria (*i.e.,*

practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, safety, or use of unique-pathway proprietary technologies). DOE also seeks comment on those technologies retained for further consideration in the engineering analysis, based on the determination that they are technologically feasible and also meet the other screening criteria.

C. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of miscellaneous refrigeration products. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency products, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each product class, DOE estimates the baseline cost, as well as the incremental cost for the product at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing products (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the max-tech level (particularly in cases where the max-tech level exceeds the maximum efficiency level currently available on the market).

For the January 2022 Preliminary Analysis, DOE used the physical teardown approach supplemented with a catalog teardown approach for coolers. Several products from the cooler class (compact and standard size) and one product from the combination cooler class C–13A were used in physical teardowns. The physical teardown combination cooler was used to determine manufacturer production costs (''MPCs'') for one analyzed product class (C–13A), but that analysis primarily relied on the engineering conducted for the October 15, 2021, preliminary analysis for consumer refrigerators, refrigerator-freezers, and freezers (86 FR 57378) as the basis for other MPCs and incremental costs.

For this NOPR analysis, DOE chose to analyze classes C–3A and C–9 in addition to the original C–13A. Due to the lack of physical teardown products for these classes, the analysis relied heavily on adjusted analyses from the consumer refrigerators, refrigerator-freezers, and freezers (''RF'') classes 3 and 9. RF product class 3 represents refrigerator-freezers with automatic defrost with top-mounted freezers without an automatic icemaker while RF product class 9 represents upright freezers with automatic defrost without an automatic icemaker. Product class 3 was chosen as a proxy to C–3A due to its similar configuration, and its analysis was able to be adapted relatively easily. Likewise, C–9's analysis used RF product class 9's analysis due to similarities in configuration.[20] A survey approach was taken to determine sizing and pricing for representative models, and relevant design options from C–13A were used in the additional analyses. DOE also considered input provided during manufacturer interviews to improve upon design option energy savings and representative ELs.

General comments regarding the efficiency analysis are addressed below.

AHAM noted DOE builds its incremental MPC based on a set path of technology options, but there is no standard ordering of technology choice within a single company, let alone across the total industry. AHAM stated DOE should recognize there is limited new technology that would allow for significant per-unit reduction in energy consumption, particularly true of technology options that DOE evaluated to reach efficiency levels beyond EL 1. (AHAM, No. 18, pp. 6–7)

In response, DOE notes that the ordering of technologies is not intended to be aligned with the ordering that would be considered by a single company, nor is it intended to represent the ordering that the total industry would adopt. Instead, it is intended to provide reasonable representation, both of design options used by specific reverse-engineered products, and of an ordering that would prioritize the most cost-effective options, with gradual reductions in cost-effectiveness as the EL increases. Also, the certified data shows that existing products on the market demonstrate significant per-unit reduction in energy consumption. For example, among DOE's tested and reverse-engineered compact coolers was a 3.4 cuft cooler certified with energy use 45% less than the standard, and a 5.1 cuft cooler certified with energy use 49% less than the standard. These levels were EL3 for the preliminary analysis and beyond EL4 for the NOPR analysis, certainly beyond EL1. DOE test results confirmed that their energy use was consistent with the certifications.

CA IOUs stated that in its review of products currently available on the market, it was revealed that the incremental design options may not be the most appropriate (as presented by DOE in Table 5.5.1 of the preliminary TSD) as products on the market contain a combination of technologies DOE has attributed to different ELs. For example, smaller units within the compact category utilize efficiency features affecting the thermal envelope (argon and/or triple-pane glass), whereas larger units can utilize condenser, evaporator, and compressor efficiency features. (CA IOUs, No. 20, pp. 1–2)

When analyzing the models pointed to by CA IOUs, DOE was unable to confirm the efficiency level for one of the provided MREF models, due to the fact it was not listed on the Compliance Certification Database (''CCD'') as of August 2022. The compact model referred to above was located on the CCD system and rated at around 13% lower energy use than baseline; however, the model did not match the CCD rated AV, therefore, the efficiency information may not be up to date. Information regarding the design options used by each model was also limited, with relevant engineering design options absent from promotional

[20] As described in section IV.C.1.c of this document, DOE conducted engineering analysis for class C–9, but did not conduct further analysis due to the limited potential for efficiency increase.

material, user manuals, and specification sheets.

Considering the issues related to gathering information on the specific models referenced in the comment, DOE is unable to point to specific reasoning behind the design options implemented in each model. DOE does note, however, that it considers design options in a manner as described previously: with design options used by specific reverse-engineered products, and of an ordering that prioritizes the most cost-effective options for initial EL steps and gradual reduction in cost-effectiveness as the EL increases.

DOE requests any further input from commenters regarding the approach for design option selection and implementation for a given model, beyond the information DOE has already considered.

a. Built-In Classes

In this NOPR analysis, DOE chose to continue using freestanding MREF classes as proxies for built-in classes. DOE's analysis of the current market for miscellaneous refrigeration products showed built-in and freestanding products occupying the same range of efficiencies, and DOE did not identify any unique characteristic that would inhibit efficiency improvements for built-in products relative to freestanding products based on a review on the market. As a result, DOE chose to apply its freestanding products analyses to built-in classes. Several comments were received following the preliminary analysis (which used the same approach) and are addressed below.

According to AHAM, and echoed by Sub Zero and NEEA, freestanding product classes are not a good proxy for built-in product classes, and DOE should evaluate them separately. AHAM stated that DOE's assumption that the products can employ similar technology options in order to achieve higher efficiency levels is fundamentally flawed as built-in designs face difference constraints than freestanding designs. NEEA and Sub Zero both specifically mentioned insulation thickness increases and airflow as a major difference between built-in and freestanding products. (AHAM, No. 18, p. 9; Sub Zero, No. 17, p. 2; NEEA, No. 21, pp. 2–3)

Based on the comments provided, DOE revisited its review of the range of efficiency levels attainable by built-in and freestanding coolers. DOE noted that many products certified as freestanding have installation instructions that provide requirements for both freestanding and built-in installation and are advertised for both installations. DOE found that for such products, the majority of high-efficiency models are advertised as capable of both freestanding and built-in installations. For coolers between 2 and 6 cubic feet, DOE found that all of the most efficient products reviewed (roughly 37% better than baseline or more) were capable of both configurations, whereas some of the products that were less efficient in that adjusted volume range were advertised as freestanding only. This suggests that built-in products are not inhibited in their ability to achieve high efficiencies. For larger coolers between 14 and 16 cubic feet in adjusted volume, DOE found products up to 15% greater than the baseline level that were configurable in both, based on manufacturer instructions. There were a few large cooler products that reached the highest available efficiency reviewed, up to roughly 30% better than baseline, that are advertised as only capable of a freestanding configuration.

DOE also reviewed the depth of the various models considered to determine if models advertised for built-in installation have any clear dimensional limitation that might make achieving high efficiency levels more difficult. DOE was unable to determine a clear correlation between depth and energy use, for any of the models or capacity ranges considered, nor between depth and instructions or advertising for built-in installation. In fact, DOE found that the most efficient freestanding-only model in the large cubic volume range had the smallest depth of all the other models reviewed, suggesting that dimensional restriction on depth was not a key factor relative to the overall unit efficiency.

DOE also observed that the highest efficiency levels for coolers of the built-in class and efficiency levels for freestanding coolers having installation instructions or advertising for both freestanding and built-in installation were at or close to the maximum technology efficiency levels analyzed by DOE. DOE has not been provided evidence that manufacturers are using design options in built-ins other than those that have passed screening for this analysis. There are also no manufacturer comments that suggest other design options have been used to achieve max-tech efficiency levels in built-in products. Hence, DOE concludes built-ins are using the same set of design options as analyzed at max-tech for freestanding classes. Consequently, DOE did not conduct separate analysis for built-in classes.

While DOE chose, in this NOPR analysis, to continue using freestanding classes as proxies for built-in classes, DOE requests additional information regarding the constraints for built-in designs relative to freestanding designs, and the associated specific efficiency and cost impacts.

b. Baseline Efficiency/Energy Use

For each product/equipment class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each product/equipment class represents the characteristics of a product/equipment typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

For the January 2022 Preliminary Analysis, DOE chose baseline efficiency levels represented by the current Federal energy conservation standards, expressed as maximum annual energy consumption as a function of the product's adjusted volume. The baseline levels differ for coolers and combination coolers to account for design differences; all coolers share the same baseline level, *i.e.,* the baseline is the same function of adjusted volume for both freestanding and built-in models, for both compact and standard-size models.

For this NOPR, DOE kept the cooler baselines the same as the preliminary analysis; the combination cooler baseline has also been kept the same. From these baselines DOE conducted direct analyses for three different AV coolers, and two combination coolers (C–13A, and C–3A). In conducting these analyses, eight teardown units were used in construction of cost curves, and had their characteristics determined in large part by testing and reverse-engineering. Further information on the design characteristics of specific analyzed baseline models is summarized in the NOPR TSD.

c. Higher Efficiency Levels

For the NOPR analysis, DOE analyzed up to five incremental efficiency levels beyond the baseline for each of the analyzed product classes. The efficiency levels start at EL1, 10% more efficient than the current energy conservation standard. For the compact coolers NOPR analysis, DOE extended the efficiency levels in steps of 10% of the current energy conservation standard up to EL 4; for full-size coolers, EL 4 is analyzed at 35%. For combination coolers (excluding C–9) efficiency levels above EL 1 are in steps of 5% up to EL 4.

Finally, EL 5 represents maximum technology (''max-tech''), using design option analysis to extend the analysis beyond EL 4 using all applicable design options, including max efficiency variable-speed compressors, and maximum practical use of VIPs. For coolers, the current Energy Star specifications correspond to EL 1 for freestanding full-size coolers (10%), EL 2 for freestanding compact coolers (20%), and EL 3 for both classes of built-in coolers (30%).

DOE conducted analysis for product class C–9 starting with analysis for a class 9 upright freezer with comparable total refrigerated volume. In its analysis, DOE concluded that application of all of the design options being considered at max-tech would be required for the product to be compliant with the current energy conservation standards. Currently, the CCD includes only one product that is certified as C–9—an LG product certified with energy use 17% below the standard. DOE did not purchase, test, and reverse-engineer this product, in-part because of the limited product offering and expected insignificant potential for energy savings for the class. Thus, DOE is relying primarily on its analysis of the RF product class 9 freezer, to suggest that opportunities for energy savings are likely limited and likely not cost-effective, even if improved efficiency is technically feasible. DOE has not analyzed efficiency levels beyond baseline for this product class in this NOPR, but has taken into consideration all design options applied at max-tech in its analysis.

DOE received comments regarding intermediate efficiency levels as shown below.

The CA IOUs expressed concern that the cost analysis performed in the preliminary TSD is overly conservative; the marked drop in calculated benefits between the lower ELs does not accurately reflect the more nuanced state of the market. As such, they suggested DOE implement an intermediate EL, between EL 1 and EL 2, for the Cooler-FC and Cooler-F product classes. They also suggested an intermediate EL between EL 2 and EL 3 for product class C–13A. NEEA voiced similar concerns to CA IOUs and also suggested similar intermediate EL levels for coolers and C–13A. ASAP also urged DOE to consider an intermediate EL for compact coolers between ELs 1 and 2. (CA IOUs, No. 20, pp. 1–2; NEEA, No. 21, pp. 5–6; ASAP, No. 19, pp. 2–3)

In response, DOE notes that the efficiency levels considered in the NOPR analysis differ significantly from those considered in the January 2022 Preliminary Analysis.[21] While all of the specific gap fill levels suggested by stakeholders may not have been included, DOE believes that, the levels suggested in this NOPR more accurately reflect the full efficiency range of the market. The proposed EL steps have been chosen to represent the full range of efficiency and reflect the products on the market for each product class.

ASAP noted, in the preliminary TSD for consumer refrigerators and freezers, DOE estimated a 9-percent improvement in compressor efficiency associated with converting from a single-speed compressor to a VSC with similar rated energy efficiency ratio (''EER'') values, and ASAP stated they expect there to be similar savings for compact coolers. ASAP further noted, however, in the preliminary analysis for the 5.1 cubic foot compact cooler representative unit, DOE appears to show energy savings of only about 2 percent when going from the most efficient single-speed compressor at EL 3 to a VSC and a triple-pane glass pack at EL 4. ASAP therefore stated concern that DOE may be underestimating the energy savings associated with the design options incorporated at EL 4 and urged DOE to ensure that its analysis is appropriately capturing the savings from the incorporation of a VSC. (ASAP, No. 19, p. 2)

When constructing a direct analysis of the 5.1 cubic foot compact cooler DOE considered numerous design options when moving from EL 3 to EL 4. The effect of the triple-pane glass and switch to VSC alone do not contribute to the ultimate percentage difference between El 3 and EL 4. DOE has continued to work with manufacturers in order to accurately create ELs for both coolers and combination coolers that are based on real-world information and energy consumption.

The efficiency levels analyzed for this NOPR beyond the baseline are shown in Table IV.3.

TABLE IV.3—INCREMENTAL EFFICIENCY LEVELS FOR ANALYZED PRODUCTS (% ENERGY USE LESS THAN BASELINE)

Product class (AV, cu.ft.)	Coolers			Combination coolers	
	FCC (3.1) (%)	FCC (5.1) (%)	FC (15.3) (%)	C–13A (5) (%)	C–3A (21) (%)
EL 1	10	10	10	10	10
EL 2*	20	20	20	16	15
EL 3	30	30	30	20	20
EL 4	40	40	35	25	24
EL 5	59	50	38	28	30

*ENERGY STAR % level varies based on specific teardown units analyzed.

d. VIP and VSC Analysis

DOE received comments on the implementation of VIPs in its analyses, and the comments are addressed below.

AHAM stated DOE does not account for the limitations of VIPs and that DOE's modeling does not apply VIPs as they would likely be used in actual products and, as a result, overestimates their use and impact in its analysis. AHAM stated DOE should note the following when evaluating the effectiveness of VIPs: covering all sides of an MREF casing in VIPs is not reasonable or a good design practice, there are costs associated with VIPs beyond the price of the panels themselves, a failed VIP in the field cannot be repaired and it will require a total product replacement, and VIPs are not effective for smaller products because of ''edge effects.'' AHAM stated DOE should further discuss these issues with manufacturers during manufacturer interviews and evaluate more products in order to get a better understanding of the complexities and costs associated with VIPs and update its analysis accordingly. (AHAM, No. 18, pp. 7–8)

[21] The January 2022 Preliminary Analysis TSD presenting the preliminary analysis is available at: *www.regulations.gov/document/EERE-2020-BT-STD-0039-0009*.

In communicating with manufacturers DOE received similar comments relating to decreased effectiveness of VIPs on miscellaneous refrigeration products. For the NOPR analysis DOE aimed to adjust the usage of VIPs in order to provide more accuracy in associated energy savings. More focus was put on increasing efficiency in glass panels, gas fills, and thickness changes when moving up in efficiency levels. Only partial VIP coverage was included in max-tech levels for the NOPR analysis.

ASAP expressed concern that DOE is underestimating the potential savings from upgrading from a single-speed compressor to a VSC by not accounting for the higher EER values of VSCs. ASAP noted that, in the preliminary TSD, DOE states compressors typically present in MREFs have capacities of 300 to 400 Btu per hour, but at a capacity of 300 BTU per hour, for example, even the least efficient VSC has a higher EER than the most efficient single-speed compressor. ASAP further noted that the EER of the most efficient VSC at 300 BTU per hour appears to be about 30 percent higher than the most efficient single-speed compressor. ASAP therefore urged DOE to ensure that its analysis is capturing the improved full-load efficiency of VSCs relative to single-speed compressors. (ASAP, No. 19, p. 1)

In the preliminary analysis, as laid out in figure 5.5.1 in the preliminary TSD, DOE analyzed the capacity and efficiency ratings of numerous VSCs through publicly available compressor performance data. 79 FR 71705. This figure does show that VSCs account for a higher EER when compared to single-speed compressors as capacity (Btu/h) is decreased. However, relating back ASAP's claim relating to 300 Btu/h capacity compressors, manufacturer feedback indicates that these EER efficiency increases are not generally realized when implementing this technology. Manufacturers have reported a wide range of overall efficiency increases associated with use of variable-speed compressors. In in the NOPR analysis DOE considered manufacturer feedback regarding experience with implementing VSC's in order to avoid overestimating efficiency increases. The analysis primarily considers energy savings associated with increased heat exchanger effectiveness associated with lower compressor speed operation and reduced fan speeds, assuming that fans would be operated at reduced speed when operating at low compressor speed. VSCs are generally implemented at higher EL levels throughout the analysis, consistent with their projected cost effectiveness.

DOE seeks comment on the range of VSC nominal efficiencies and the relative overall efficiency gains offered by VSCs when operating at reduced compressor speeds along with reduced fan speeds in MREF products.

2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated product, the availability and timeliness of purchasing the product on the market. The cost approaches are summarized as follows:

□ *Physical teardowns:* Under this approach, DOE physically dismantles a commercially available product, component-by-component, to develop a detailed bill of materials for the product.

□ *Catalog teardowns:* In lieu of physically deconstructing a product, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the product.

□ *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.,* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

In the present case, DOE conducted the analysis using primarily physical teardowns. Physical teardowns were used to provide a baseline of technology options and their pricing for a specific product class at a specific EL level. Then with technology option information, DOE estimated the cost of various design options including compressors, VIPs, and insulation, by extrapolating the costs from price surveys of relevant refrigerators, refrigerator-freezers, and freezers.

AHAM stated VSC supply is not sufficient to accommodate a standard that requires their use for all MREF products, indicating that this will drive up costs, and further noting that DOE's analysis does not account for these increased costs. AHAM also stated MREFs are enclosed systems and the use of VSCs entails significant redesign costs for those that do not currently employ VSCs, which DOE's analysis also must account for. (AHAM, No. 18, p. 8)

DOE has considered the comments regarding VSC availability and cost of VSC implementation. For this NOPR analysis, DOE estimated the cost of implementing VSCs based on the costs of relevant variable-speed compressors available on the market for other refrigeration products. Regarding component availability, DOE acknowledges that more stringent standards would likely necessitate adoption of more efficient technologies, such as variable-speed compressors. However, DOE expects that standards, if adopted, would provide sufficient time and regulatory certainty for manufacturers and suppliers to establish additional capacity in the supply chain, if needed. Should this NOPR proceed to a final rule, compliance with any amended standards would not be required until 5-years after a final rule is published. DOE expects that this 5-year compliance period provides adequate time for OEMs to sign supply contracts with their compressor suppliers ahead of anticipated demand.

DOE seeks comment on whether manufacturers expect manufacturing capacity constraints would limit product availability to consumers in the timeframe of the amended standard compliance date.

3. Cost-Efficiency Results

The results of the engineering analysis are presented as cost-efficiency data for each of the efficiency levels for each of the product classes that were analyzed, as well as those extrapolated from a product class with similar cooling capacity and features. DOE developed estimates of MPCs for each unit in the teardown sample, and also performed additional modeling for each of the teardown samples, to develop a comprehensive set of MPCs at each efficiency level. The resulting weighted average incremental MPCs (*i.e.,* the additional costs manufacturers would likely incur by producing miscellaneous refrigeration products at each efficiency level compared to the baseline) are provided in Tables 5.5.5 and 5.5.6 in chapter 5 of the NOPR TSD. See chapter 5 of the NOPR TSD for additional detail on the engineering analysis.

DOE seeks comment on the method for estimating manufacturing production costs and on the resulting cost-efficiency curves.

See section VII.E of this document for a list of issues on which DOE seeks comment.

TABLE IV.1—INCREMENTAL DESIGN OPTIONS * BY EFFICIENCY LEVEL AND PRODUCT CLASS

Product class (AV***)		EL1	EL2	EL3	EL4	EL5
FCC (3.1).	EL Percent	10%	20%	30%	40%	59%.
	Design Options Added	Tube and Fin Evaporator; Argon Filled Glass.	Static Condenser;	Higher-EER Compressor; Tube and Fin Condenser.	Variable-Speed Compressor; Roll Bond Evaporator; Manual Defrost; Increased Insulation Thickness.	Partial VIP; Triple Pane Glass**; Tube and Fin Bond Evaporator.
FCC (5.1).	EL Percent	10%	20%	30%	40%	50%.
	Design Options Added	Argon Filled Glass; Higher-EER Compressor.	Higher-EER Compressor.	Higher-EER Compressor; Hot Wall Condenser.	Higher-EER Compressor; Tube and Fin Evaporator; HotWall + Tube and Fin Condenser; Increased Insulation Thickness.	Variable-Speed Compressor; Partial VIP; Triple Pane Glass**.
FC (15.3)	EL Percent	10%	20%	30%	35%	38%.
	Design Options Added	Higher-EER Compressor; Hot Wall + Tube and Fin Condenser.	Higher-EER Compressor.	Variable-Speed Compressor; Variable Defrost; 3x Tube and Fin Evaporator; Increased Insulation Thickness.	Triple Pane Glass**	Partial VIP.
C–13A (5).	EL Percent	10%	16%	20%	25%	28%.
	Design Options Added	Higher-EER Compressor.	Higher-EER Compressor.	Variable-Speed Compressor.	Triple Pane Glass**	Partial VIP.
C–3A (20.6).	EL Percent	10%	15%	20%	24%.	
	Design Options Added	Higher-EER Compressor.	Variable-Speed Compressor; Variable (off-cycle) Defrost.	Triple Pane Glass**; Timed (off-cycle) Defrost; Higher-EER Variable Speed Compressor.	Partial VIP; Variable (off-cycle) Defrost.	

* Design options are cumulative between efficiency levels (except for component replacements).
** Triple-pane glass pack consists of soft-coated low-E glass and argon gas fill (with a reduced gap size to maintain door thickness).
*** AV represented in ft^3.

TABLE IV.2—COST-EFFICIENCY CURVES FOR MISCELLANEOUS REFRIGERATION PRODUCTS

Product Class (AV*)		EL0	EL1	EL2	EL3	EL4	EL5
FCC (3.1)	EL Percent	0%	10%	20%	30%	40%	59%
	MPC	$273.66	$289.88	$299.61	$309.88	$343.55	$392.74
	Incremental MPC	$0.00	$16.21	$25.94	$36.22	$69.88	$119.08
FCC (5.1)	EL Percent	0%	10%	20%	30%	40%	50%
	MPC	$307.76	$310.89	$313.29	$327.72	$354.18	$439.26
	Incremental MPC	$0.00	$3.13	$5.53	$19.96	$46.42	$131.50
FC (15.3)	EL Percent	0%	10%	20%	30%	35%	38%
	MPC	$648.22	$661.71	$665.13	$709.87	$832.95	$845.25
	Incremental MPC	$0.00	$13.49	$16.91	$61.65	$184.72	$197.02
C–13A (5)	EL Percent	0%	10%	15%	20%	25%	28%
	MPC	$533.25	$535.25	$537.01	$565.74	$589.63	$627.33
	Incremental MPC	$0.00	$2.00	$3.76	$32.48	$56.37	$94.07
C–3A (20.6)	EL Percent	0%	10%	16%	20%	24%	
	MPC	$601.00	$604.17	$639.47	$733.13	$790.03	
	Incremental MPC	$0.00	$3.17	$38.47	$132.13	$189.03	
C–9 (20)**	EL Percent	0%					
	MPC	$514.16					
	Incremental MPC	$0					

* Adjusted volumes provided in ft^3.
** Only considered at baseline.

4. Manufacturer Selling Price

To account for manufacturers' non-production costs and profit margin, DOE applies a multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (''SEC'') 10–K reports [22] filed by publicly-traded manufacturers primarily engaged in appliance manufacturing and whose combined product range includes miscellaneous refrigeration products. See chapter 12 of the NOPR TSD for additional detail on the manufacturer markup.

[22] U.S. Securities and Exchange Commission, *Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.* Available at *www.sec.gov/edgar/search/* (last accessed September 22, 2022).

D. Markups Analysis

The markups analysis develops appropriate markups (*e.g.,* retailer markups and distributor markups) in the distribution chain and sales taxes to

convert the MSP estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analysis. At each step in the distribution channel, companies markup equipment prices to cover business costs and profit margin.

For MREFs, DOE identified two distribution channels: (1) manufacturers to retailers to consumers, and (2) manufactures to wholesalers to dealers/retailers to consumers. The parties involved in the distribution channel are retailers, wholesalers and dealers.

DOE developed baseline and incremental markups for each actor in the distribution channel. Baseline markups are applied to the price of products with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.

DOE relied on economic data from the U.S. Census Bureau to estimate average baseline and incremental markups. Specifically, DOE used the 2017 Annual Retail Trade Survey for the ''electronics and appliance stores'' sector to develop retailer markups, and the 2017 Annual Wholesale Trade Survey for the ''household appliances, and electrical and electronic goods merchant wholesalers'' sector to estimate wholesaler markups. DOE recognized that the overall markup in the wholesaler channel should be higher than the direct retailer channel. Considering that most of the wholesalers and dealers/retailers hold special contract in the wholesaler channel, DOE assumed that the dealer/retailer markups are half of the values of the retailer makeups in the direct retailer channel.

DOE requests comment on the assumption used in developing the dealer/retailer markups and welcomes any feedback on the overall markup in the wholesaler channel.

Chapter 6 of the NOPR TSD provides details on DOE's development of markups for MREFs.

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of MREFs at different efficiencies in representative U.S. households, and to assess the energy savings potential of increased MREF efficiency. The energy use analysis estimates the range of energy use of MREFs in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of amended or new standards.

DOE determined a range of annual energy use of MREFs as a function of unit volume. DOE developed distributions of adjusted volume of product classes (Table IV.3) with more than one representative unit base on the capacity distributions reported in the TraQline® wine chiller data spanning from 2020 Q1 to 2022 Q1.[23] [24] DOE also developed a sample of households that use MREFs based on the TraQline wine chiller data (see section IV.G for details). For each volume and considered efficiency level, DOE derived the energy consumption as measured by the DOE test procedure at 10 CFR part 430, subpart B, appendix A, with the exception that DOE used in its analysis the reduced icemaker energy use contribution that would take effect on the compliance date of new standards.

DOE requests comment on its methodology to develop market share distributions by adjusted volume in the compliance year for each product class with two representative volumes, as well as data to further inform these distributions in subsequent rounds of this rulemaking.

TABLE IV.3—DISTRIBUTION OF ADJUSTED INTERIOR VOLUMES BY PRODUCT CLASS

Adjusted volume (ft^3)	Percentage
FCC	
3.1	83.4
5.1	16.6
BICC	
3.1	81.3
5.1	18.7
FC and BIC	
15.3	100.0

TABLE IV.3—DISTRIBUTION OF ADJUSTED INTERIOR VOLUMES BY PRODUCT CLASS—Continued

Adjusted volume (ft^3)	Percentage
C–3A	
21	100.0
C–9	
20	100.0
C–13A	
5	100.0

Chapter 7 of the NOPR TSD provides details on DOE's energy use analysis for MREFs.

F. Life-Cycle Cost and Payback Period Analysis

DOE conducted the LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for MREFs. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of MREFs in the absence of new or amended energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline product.

NEEA encouraged DOE to calculate and consider the return on investment

[23] TraQline is a market research company that specialized in tracking consumer purchasing behavior across a wide range of products using quarterly online surveys.

[24] DOE acknowledges that the pandemics which span the sample period may contribute to the medium- to long-term consumer behavior changes. DOE will continue monitor the consumer behavior trend and may make alternative estimation in the next rulemaking phase.

(ROI) for each efficiency level as an additional metric of cost-effectiveness, which would only require the use of simple payback and device lifetime. (NEEA, No. 21, pp. 6–7).

DOE acknowledges that ROI is a metric that can be useful in evaluating investments in energy efficiency. However, the measures that DOE has historically used to evaluate the economic impacts of standards on consumers—LCC savings and PBP—are more closely related to the language in EPCA that requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) Therefore, DOE finds it reasonable to continue to use those measures.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of housing units. As stated previously, DOE developed household samples based on TraQline wine chiller survey data. The survey panel is weighted against the U.S. Census based on their demographic characteristic to make the sample representative of the U.S. population. The wine chiller survey asked respondents about the product features of the wine chillers they recently purchased, as well as the purchasing channel of the products. To account for the more recent MREF consumers, DOE used the latest two years of survey data (2020 Q1 to 2022 Q1) to construct the household sample used in this NOPR.[25]

For each sample household, DOE determined the energy consumption for the MREF(s) and the appropriate energy price. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of MREFs.

Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs (if applicable), product lifetimes, and discount rates. DOE created distributions of values for product lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC and PBP relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and MREF user samples. The model calculated the LCC and PBP for products at each efficiency level for 10,000 housing units per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-new-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC and PBP calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency.

DOE calculated the LCC and PBP for all consumers of MREFs as if each were to purchase a new product in the expected year of required compliance with new or amended standards. New and amended standards would apply to MREFs manufactured 5 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(l)(2)) At this time, DOE estimates publication of a final rule in 2024. Therefore, for purposes of its analysis, DOE used 2029 as the first year of compliance with any amended standards for MREFs.

Table IV.4 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The paragraphs that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the NOPR TSD and its appendices.

TABLE IV.4—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *

Inputs	Source/method
Product Cost	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used historical data to derive a price scaling index to project product costs.
Installation Costs	Assumed no change with efficiency level. Not considered in the analysis.
Annual Energy Use	Derived from engineering inputs (See chapter 5 of the NOPR TSD). *Variability:* Based on the product class and rep unit volume, where applicable.
Energy Prices	*Electricity:* Based on 2021 average and marginal electricity price data from the Edison Electric Institute. *Variability:* Electricity prices vary by region.
Energy Price Trends	Based on *AEO 2022* price projections.
Repair and Maintenance Costs	Assumed no change with efficiency level. Not considered in the analysis.
Product Lifetime	*Average:* 12.6 years.
Discount Rates	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances.
Compliance Date	2029.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the NOPR TSD.

[25] DOE acknowledges that the pandemics which span the sample period may contribute to the medium- to long-term consumer behavior changes. DOE will continue monitor the consumer behavior trend and may make alternative estimation in the next rulemaking phase.

1. Product Cost

To calculate consumer product costs, DOE multiplied the MSPs developed in the engineering analysis by the markups described previously (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency products.

Economic literature and historical data suggest that the real costs of many products may trend downward over time according to ''learning'' or ''experience'' curves. Experience curve analysis implicitly includes factors such as efficiencies in labor, capital investment, automation, materials prices, distribution, and economies of scale at an industry-wide level.[26] In the experience curve method, the real cost of production is related to the cumulative production or ''experience'' with a manufactured product. DOE used historical Producer Price Index (PPI) data for ''household refrigerator and home freezer manufacturing'' from the Labor Department's Bureau of Labor Statistics' (''BLS'') spanning the time period between 1989 and 2021 as a proxy of the production cost for MREFs.[27] This is the most relevant price index for MREFs as the main technology options are similar to full-size refrigerators and several refrigerator manufacturers also produce MREFs. An inflation-adjusted price index was calculated by dividing the PPI series by the gross domestic product index from Bureau of Economic Analysis for the same years. The cumulative production of MREFs were assembled from the estimated annual shipments using the stock accounting approach between 2016 and 2021, and a flat shipment trend was assumed prior to 1951. The estimated learning rate (defined as the fractional reduction in price expected from each doubling of cumulative production) is 15.5 ± 1.7 percent.

DOE included variable-speed compressors as a technology option for higher efficiency levels. To develop future prices specific for that technology, DOE applied a different price trend to the controls portion of the variable-speed compressor, which represents part of the price increment when moving from an efficiency level achieved with the highest efficiency single-speed compressor to an efficiency level with variable-speed compressor. DOE used PPI data on ''semiconductors and related device manufacturing'' between 1967 and 2021 to estimate the historic price trend of electronic components in the control.[28] The regression, performed as an exponential trend line fit, results in an R-square of 0.99, with an annual price decline rate of 6.3 percent. See chapter 8 of the TSD for further details on this topic.

AHAM noted that any declining costs are due to value engineering and/or productivity improvements, and agreed with DOE's decision not to use a price learning curve in the preliminary analysis. AHAM also stated that MREFs are not identical to refrigerators and freezers, and therefore DOE should not apply the learning curve from the refrigerators, refrigerator-freezers, and freezers rulemaking analysis. (AHAM, No. 18, p. 6) On the other hand, NEEA, ASAP and the CA IOUs, encouraged DOE to incorporate a price learning curve. ASAP and the CA IOUs expressed concern that assuming constant prices will result in overestimating the cost to achieve higher efficiency levels in the assumed compliance year and beyond and suggested the use of price data from consumer refrigerators to inform the development of an appropriate learning rate for MREFs, as many of the same design options are used for MREFs. (NEEA, No. 21, pp. 4–5, ASAP, No. 19 at p. 3, CA IOUs, No. 20, pp. 2–4).

As discussed earlier, in this NOPR DOE developed a price learning based on the historical refrigerator and freezer PPI and the cumulative production estimated specifically for MREFs, assuming that the refrigerator and freezer PPI is representative of MREFs. Given that similar design options are considered for units in higher efficiency levels as for consumer refrigerators, DOE also considered a separate price learning for the controls portion of the variable-speed compressor in MREFs at higher efficiency levels. DOE is requesting comment on this approach.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE is not aware of any data that suggest the cost of installation changes as a function of efficiency for MREFs. DOE therefore assumed that installation costs are the same regardless of EL and do not impact the LCC or PBP. As a result, DOE did not include installation costs in the LCC and PBP analysis.

3. Annual Energy Consumption

DOE determined the energy consumption for MREFs at different efficiency levels using the approach described previously in section IV.E of this document.

4. Energy Prices

Because marginal electricity price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average electricity prices. Therefore, DOE applied average electricity prices for the energy use of the product purchased in the no-new-standards case, and marginal electricity prices for the incremental change in energy use associated with the other efficiency levels considered.

DOE derived electricity prices in 2021 using data from EEI Typical Bills and Average Rates reports. Based upon comprehensive, industry-wide surveys, this semi-annual report presents typical monthly electric bills and average kilowatt-hour costs to the customer as charged by investor-owned utilities. For the residential sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2018).[29]

To estimate energy prices in future years, DOE multiplied the 2021 energy prices by the projection of annual average price changes from the Reference case in *AEO 2022,* which has an end year of 2050.[30] To estimate price trends after 2050, DOE used the 2050 electricity prices, held constant.

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. Typically, small incremental increases in product efficiency produce no, or only minor, changes in repair and maintenance costs compared to baseline efficiency

[26] Taylor, M. and Fujita, K.S. Accounting for Technological Change in Regulatory Impact Analyses: *The Learning Curve Technique.* LBNL–6195E. Lawrence Berkeley National Laboratory, Berkeley, CA. April 2013. *http://escholarship.org/uc/item/3c8709p4#page-1.*

[27] Household refrigerator and home freezer manufacturing PPI series ID: PCU3352203352202; *www.bls.gov/ppi/.*

[28] Semiconductors and related device manufacturing PPI series ID: PCU334413334413; *www.bls.gov/ppi/.*

[29] Coughlin, K. and B. Beraki.2018. Residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001169. *https://ees.lbl.gov/publications/residential-electricity-prices-review* (Last accessed September 22, 2022).

[30] EIA. *Annual Energy Outlook 2022 with Projections to 2050.* Washington, DC. Available at *www.eia.gov/forecasts/aeo/* (last accessed September 22, 2022).

products. DOE is not aware of any data that suggest the cost of repair or maintenance for MREFs changes as a function of efficiency. DOE therefore assumed that these costs are the same regardless of EL and do not impact the LCC or PBP. As a result, DOE did not include maintenance and repair costs in the LCC and PBP analysis.

6. Product Lifetime

For MREFs, DOE used lifetime estimates from products that operate using the same refrigeration technology: covered refrigerators and refrigerator-freezers. DOE assumed a maximum lifetime of 40 years for all product classes and an average lifetime of 10.3 years for compact coolers and 17.3 years for full-size coolers. DOE also assumed that the probability function for the annual survival of MREFs would take the form of a Weibull distribution. See chapter 8 of the NOPR TSD for a more detailed discussion.

DOE requests comment and data on the assumptions and methodology used to calculate MREF survival probabilities.

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to households to estimate the present value of future operating cost savings. DOE estimated a distribution of residential discount rates for MREFs based on consumer financing costs and the opportunity cost of consumer funds.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[31] The LCC analysis estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this time scale into account. Given the long-time horizon modeled in the LCC analysis, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's Survey of Consumer Finances (SCF) for 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019.[32] Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 4.1 percent. See chapter 8 of the NOPR TSD for further details on the development of consumer discount rates.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of product efficiencies under the no-new-standards case (*i.e.,* the case without amended or new energy conservation standards).

In the January 2022 Preliminary Analysis, DOE estimated the energy efficiency distribution of MREFs for 2029 using model counts from DOE's CCD. DOE assumed that the distribution of models was equivalent to the distribution of products sold. AHAM commented that the distribution DOE obtained through this approach did not reflect the shipment breakdown by efficiency seen in the market and submitted shipment data by product class and efficiency level collected from its members to illustrate the discrepancy between the CCD data and the AHAM efficiency distributions. (AHAM, No. 18, p. 2–5)

DOE appreciates AHAM's data submission and, for this NOPR, DOE is using the efficiency distribution by product class as provided by AHAM. DOE understands that this approach inherently assumes that the rest of the MREF market has a similar distribution of efficiencies. However, due to lack of efficiency data from non-AHAM members, DOE is not able to verify whether this assumption is incorrect. For this analysis, DOE also assumed that the current distribution of product efficiencies would remain constant in 2029, and during the analysis period, in the no-new-standards case.

The estimated market shares for the no-new-standards case for MREFs are shown in Table IV.5 of this document. See chapter 8 of the NOPR TSD for further information on the derivation of the efficiency distributions.

TABLE IV.5—EFFICIENCY DISTRIBUTIONS FOR THE NO-NEW-STANDARDS CASE IN THE COMPLIANCE YEAR

Product class	Total adjusted volume (cu. ft.)	2029 Market share (%)						
		EL 0	EL 1	EL 2	EL 3	EL 4	EL 5	Total*
Cooler-FC	3.1 5.1	79	18	3	0	0	0	100
Cooler-BIC	3.1 5.1	18	6	1	1	0	74	100
Cooler-F	15.3	42	58	0	0	0	0	100
Cooler-BI	15.3	72	8	20	0	0	0	100
C–13A	5	99	1	0	0	0	0	100
C–3A	21	100	0	0	0	0	.....	100

*The total may not sum to 100% due to rounding.

[31] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

[32] U.S. Board of Governors of the Federal Reserve System. Survey of Consumer Finances. 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019. (Last accessed September 22, 2022.) *http://www.federalreserve.gov/econresdata/scf/scfindex.htm.*

DOE requests comment and data on its efficiency distribution assumptions and projection into future years. Specifically, DOE is requesting comment and data on the efficiency distribution of non-AHAM members, to more accurately derive the efficiency distribution for the whole MREF market.

9. Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods are expressed in years. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price projection for the year in which compliance with the amended standards would be required.

G. Shipments Analysis

DOE uses projections of annual product shipments to calculate the national impacts of potential amended or new energy conservation standards on energy use, NPV, and future manufacturer cash flows.[33] The shipments model takes an accounting approach, tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

DOE defined two broad MREF product categories (coolers, and combination cooler refrigeration products) and developed models to estimate shipments for each category. DOE used various data and assumptions to develop the shipments for each product class considered in this rulemaking.

Given the limited available data sources on historical shipments of coolers, DOE assumed a penetration rate of 13.3 percent in the U.S. households based on online surveys [34] to estimate the annual shipments starting from 2016, the start year of *AEO 2022* housing projection data. [35] [36] DOE multiplied the estimated penetration by the total number of households from the *AEO 2022,* and then determined the number of new shipments by dividing the total stock by the mean product lifetime. DOE projected the annual shipments by incorporating the lifetime distributions by product class and assuming that the growth of new sales is consistent with the housing projections from *AEO 2022*. To estimate shipments prior to 2016, DOE assumed a flat historical shipment trend at the 2016 level. With even more limited available data sources on historical shipments of combination cooler refrigeration products, DOE estimated total shipments of combination cooler refrigeration products in 2014 to be 36,000 units, based on feedback from manufacturers from the October 2016 Direct Final Rule. DOE assumed sales would increase in line with the increase in the number of households in *AEO 2022*. Finally, DOE incorporated the 2021 shipment data provided by AHAM to re-calibrate total shipments for each product class considered in this rulemaking.

AHAM commented that the methodology DOE used to develop shipments in the preliminary analysis was based on findings of a Lawrence Berkeley National Laboratory (''LBNL'') study taken place nine years ago and that DOE should improve its data collection effort and consider other data sources. AHAM conducted another data collection among its members for 2021 shipments by product class in response to DOE's comment regarding AHAM shipments from the RFI (AHAM, No. 18 at p. 2–5). A separate confidential shipment data submission disaggregated by product class and capacity was provided by AHAM along with its comment.

AHAM stated that the data they provided for 2021 shipments by product class and efficiency varies substantially from the data and assumptions in DOE's aforementioned shipments analysis (AHAM, No. 18 at p. 2). Furthermore, AHAM asserted that the bulk of the market lies at lower efficiency levels, its membership represents a majority of the market, and shipments are significantly lower than what DOE is projecting. Finally, AHAM noted that DOE should further investigate other data sources to collect accurate information from non-AHAM members (including NPD,[37] TraQline data, and manufacturer interviews) rather than relying on calculations whose assumptions may not be accurate. Sub Zero echoed AHAM's comments and suggested DOE rethink its approach using manufacturer-provided data (Sub Zero, No. 17 at p. 2).

DOE appreciates the shipments data submitted by AHAM, which were disaggregated by product class and efficiency. As discussed earlier in this NOPR, DOE used the efficiency distributions by product class to match those submitted by AHAM. DOE also assumed that the market share of each product class (in relation to the total MREF shipments) matched the market shares provided by AHAM. To estimate total MREF shipments, DOE utilized the AHAM shipments data and AHAM-member information and reviewed the TraQline data from 2020 Q1 to 2022 Q1 to estimate non-AHAM-member

[33] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[34] DOE also reviewed the recent release of the EIA 2020 Residential Energy Consumption Survey (RECS 2020), which identified wine chillers in representative U.S. households. DOE found that the penetration rate of wine chillers in RECS 2020 is significantly lower compared to that estimated by DOE for MREFs based on previous market surveys. Due to the uncertainty on the breakdown of MREFs between wine chillers and other miscellaneous refrigeration applications in the U.S. market, DOE continued to use the 13.3 percent penetration rate for MREFs in this NOPR. However, DOE also modeled an alternative shipments scenario based on the lower penetration rate of MREFs in American homes derived from the RECS 2020 data. For more details on this alternative scenario and the resulting NES and NPV results, see chapter 9 and appendix 10C of the NOPR TSD, respectively. As part of its request for comment below, DOE requests input on its shipments modeling.

[35] Greenblatt, J.B., S.J. Young, H.-C. Yang, T. Long, B. Beraki, S.K. Price, S. Pratt, H. Willem, L.-B. Desroches, and S.M. Donovan. U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–6537E.

[36] Donovan, S.M., S.J. Young, and J.B. Greenblatt. Ice-Making in the U.S.: Results from an Amazon Mechanical Turk Survey. Lawrence Berkeley National Laboratory. Report No. LBNL–183899.

[37] *https://www.npd.com/.*

shipments.[38] Based on this approach, DOE's estimate of the MREF shipments for the whole market was consistent with the total number of shipments estimated using DOE's approach discussed earlier and used in the January 2022 Preliminary Analysis. Hence, DOE continued using the same approach to develop the total MREF shipments, but incorporated the product class breakdown provided by AHAM to re-distribute the total shipments by product class.

DOE is requesting comment on this approach and welcomes comment and data related to the total MREF shipments, MREF shipments by product class, and the non-AHAM-member shipments.

H. National Impact Analysis

The NIA assesses the NES and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[39] (''Consumer'' in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of MREFs sold from 2029 through 2058.

DOE evaluates the impacts of new or amended standards by comparing a case without such standards with standards case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

DOE uses a model coded in the Python programming language to calculate the energy savings and the national consumer costs and savings from each TSL and presents the results in the form of a spreadsheet. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.6 summarizes the inputs and methods DOE used for the NIA analysis for the NOPR. Discussion of these inputs and methods follows the table. See chapter 10 of the NOPR TSD for further details.

TABLE IV.6—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard	2029.
Efficiency Trends	No trend assumed.
Annual Energy Consumption per Unit	Calculated for each efficiency level based on inputs from energy use analysis.
Total Installed Cost per Unit	Prices for the year of compliance are calculated in the LCC analysis. Prices in subsequent years are calculated incorporating price learning based on historical data.
Annual Energy Cost per Unit	Calculated for each efficiency level using the energy use per unit, and electricity prices and trends.
Repair and Maintenance Cost per Unit	Annual values do not change with efficiency level.
Energy Price Trends	*AEO 2022* projections to 2050 and fixed at 2050 prices thereafter.
Energy Site-to-Primary and FFC Conversion	A time-series conversion factor based on *AEO 2022.*
Discount Rate	3 percent and 7 percent.
Present Year	2022.

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.F.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes for the year of anticipated compliance with an amended standard.

For the standards cases, DOE used a ''roll up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2029). In this scenario, the market shares of products in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of products above the standard would remain unchanged.

In the absence of data on trends in efficiency, DOE assumed no efficiency trend over the analysis period for both the no-new-standards and standards cases. For a given case, market shares by efficiency level were held fixed to their 2029 distribution. DOE requests comment on its assumption of no efficiency trend and seeks historical product efficiency data.

2. National Energy Savings

The NES analysis involves a comparison of national energy consumption of the considered products between each potential standards case (TSL) and the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site

[38] DOE also collected and reviewed manufacturer interview data but was unable to collect a representative sample that would allow it to estimate non-AHAM-member shipments data.

[39] The NIA accounts for impacts in the 50 states and U.S. territories.

energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO 2022.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is occasionally associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. DOE did not find any data on the rebound effect specific to MREFs that would indicate that consumers would alter their utilization of their product as a result of an increase in efficiency. MREFs are typically plugged in and operate continuously; therefore, DOE assumed a rebound rate of 0.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (NEMS) is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [40] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the NOPR TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.F.1 of this document, DOE developed MREF price trends based on an experience curve calculated using historical PPI data. DOE applied the same trends to project prices for each product class at each considered efficiency level. By 2058, which is the end date of the projection period, the average price of single-speed compressor MREFs is projected to drop 14 percent and the average price of MREFs with a variable-speed compressor is projected to drop about 15 percent relative to 2029, the compliance year. DOE's projection of product prices is described in appendix 10C of the NOPR TSD.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price projections on the consumer NPV for the considered TSLs for MREFs. In addition to the default price trend, DOE considered high and low- price- decline sensitivity cases. For the single-speed compressor MREFs and the non-variable- speed controls portion of MREFs, DOE estimated the high price decline and the low- price- decline scenarios based on household refrigerator and home freezer PPI data limited to the period between the period 1989–2008 and 2009–2021, respectively. For the variable-speed controls portion of MREFs, DOE estimated the high price decline and the low- price- decline scenarios based on an exponential trend line fit of the semiconductor PPI between the period 1994–2021 and 1967–1993, respectively. The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the NOPR TSD.

The operating cost savings are energy cost savings, which are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO 2022,* which has an end year of 2050. To estimate price trends after 2050, DOE used the average annual rate of change in prices from 2020 through 2050. As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO 2022* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 10C of the NOPR TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this NOPR, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis.[41] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value

I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels.

For this NOPR, DOE analyzed the impacts of the considered standard levels on senior-only households. DOE did not consider low-income consumers in this NOPR because MREFs are not products generally used by this subgroup, as they typically cost more than comparable compact refrigerators, which are able to maintain lower temperatures compared to MREFs, and therefore serve a wider range of applications. The analysis used a subset of the TraQline consumer sample composed of households that meet the criteria for this subgroup. DOE used the LCC and PBP spreadsheet model to

[40] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2018,* DOE/EIA–0581(2018), April 2019. Available at *www.eia.gov/outlooks/aeo/nems/documentation/* (last accessed September 22, 2022).

[41] United States Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. Section E. Available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/* (last accessed September 30, 2022).

estimate the impacts of the considered efficiency levels on senior-only households. Chapter 11 in the NOPR TSD describes the consumer subgroup analysis. However, DOE acknowledges the potential limitations of this dataset to capture possible areas of the market, in particular smaller businesses (*e.g.* restaurants and bars), that are users of products such as wine chillers. DOE believes it is likely that a fraction of the purchasers of MREFs are likely small business owners who utilize such cooler products to keep beverages cool within restaurants.

DOE requests comment on the subgroup analysis for MREF products, and specifically whether to any significant extent these products are in use by smaller or comparatively lower-income, small businesses. DOE is also interested in understanding the number of potential small business purchasers of MREFs that would be impacted at DOE's proposed TSL 4 and how such impacts may be different than those of the overall samples.

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of amended energy conservation standards on manufacturers of MREFs and to estimate the potential impacts of such standards on direct employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how amended energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (''GRIM''), an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases. To capture the uncertainty relating to manufacturer pricing strategies following amended standards, the GRIM estimates a range of possible impacts under different scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE, Federal regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the NOPR TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the MREF manufacturing industry based on the market and technology assessment and publicly available information. This included a top-down analysis of MREF manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (''SG&A''); and R&D expenses). DOE also used public sources of information to further calibrate its initial characterization of the MREF manufacturing industry, including company filings of Form 10-Ks from the SEC,[42] corporate annual reports, the U.S. Census Bureau's *Annual Survey of Manufactures (''ASM''),*[43] and reports from Dun & Bradstreet.[44]

In Phase 2 of the MIA, DOE prepared a framework industry cash flow analysis to quantify the potential impacts of amended energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of the standard and extending over a 30-year period following the compliance date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE developed interview guides to distribute to manufacturers of MREFs in order to develop other key GRIM inputs, including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and manufacturer subgroups.

In Phase 3 of the MIA, DOE conducted structured, detailed interviews with representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. See section IV.J.3 of this document for a description of the key issues raised by manufacturers during the interviews. As part of Phase 3, DOE also evaluated subgroups of manufacturers that may be disproportionately impacted by amended standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include small business manufacturers, low-volume manufacturers, niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified one subgroup for a separate impact analysis: small business manufacturers. The small business subgroup is discussed in section VI.B, ''Review under the Regulatory Flexibility Act'' and in chapter 12 of the NOPR TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash flow analysis that incorporates manufacturer costs, manufacturer markups, shipments, and industry financial

[42] U.S. Securities and Exchange Commission, *Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.* Available at *www.sec.gov/edgar/search/* (last accessed July 1, 2022).

[43] U.S. Census Bureau, *Annual Survey of Manufactures.* ''Summary Statistics for Industry Groups and Industries in the U.S (2020).'' Available at: *www.census.gov/data/tables/time-series/econ/asm/2018–2020-asm.html* (Last accessed July 15, 2022).

[44] The Dun & Bradstreet Hoovers login is available at: *app.dnbhoovers.com* (Last accessed July 15, 2022).

information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from an amended energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2023 (the NOPR publication year) and continuing to 2058. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of MREFs, DOE used a real discount rate of 7.7 percent, which was derived from industry financials and then modified according to feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the amended energy conservation standard on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis and shipments analysis, and information gathered from industry stakeholders during the course of manufacturer interviews. The GRIM results are presented in section I.B.2. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the NOPR TSD.

a. Manufacturer Production Costs

Manufacturing more efficient equipment is typically more expensive than manufacturing baseline equipment due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry. For a complete description of the MPCs, see chapter 5 of the NOPR TSD or section IV.C of this document.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections derived from the shipments analysis from 2023 (the NOPR publication year) to 2058 (the end year of the analysis period). See chapter 9 of the NOPR TSD for additional details or section IV.G of this document.

c. Product and Capital Conversion Costs

Amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and equipment designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

Product Conversion Costs

DOE based its estimates of the product conversion costs necessary to meet the varying efficiency levels on information from manufacturer interviews, the design paths analyzed in the engineering analysis, the prior MREF rulemaking analysis, and market share and model count information. 81 FR 75194. Generally, manufacturers indicated a preference to meet amended standards with design options that were direct and relatively straight forward component swaps. However, at higher efficiency levels, manufacturers anticipated the need for platform redesigns. Efficiency levels that significantly altered cabinet construction would require very large investments to update designs. Manufacturers noted that increasing foam thickness would require complete redesign of the cabinet, liner, and shelving due to loss of interior volume. Additionally, extensive use of VIPs would require redesign of the cabinet to maximize the benefits of VIPs.

Capital Conversion Costs

DOE relied on information from manufacturer interviews and the engineering analysis to evaluate the level of capital conversion costs would likely incur at the considered standard levels. During interviews, manufacturers provided estimates and descriptions of the required tooling changes that would be necessary to upgrade product lines to meet the various efficiency levels. Based on these inputs, DOE modeled incremental capital conversion costs for efficiency levels that could be reached with individual components swaps. However, based on feedback, DOE modeled higher capital conversion costs when manufacturers would have to redesign their existing product platforms. DOE used information from manufacturer interviews to determine the cost of the manufacturing equipment and tooling necessary to implement complete redesigns.

Increases in foam thickness require either reductions to interior volume or increases to exterior volume. Many MREFs are sized to fit standard widths, meaning any increase in foam thickness would likely result in the loss of interior volume. Additionally, many MREFs are sized to maximize storage of specific products (*e.g.,* canned beverages or wine bottles) and small changes in wall thickness could dramatically decrease the unit storage capacity for those products. The reduction of interior volume has significant consequences for manufacturing. Redesigning the cabinet to increase the effectiveness of insulation likely requires manufacturers to update designs and tooling associated with the interior of the product. This could require investing in new tooling to accommodate changes to the liner, shelving, drawers, and doors.

To minimize reductions to interior volume, manufacturers may choose to adopt VIP technology. Extensive incorporation of VIPs into designs require significant upfront capital due to differences in the handling, storing, and manufacturing of VIPs as compared to typical polyurethane foams. VIPs are relatively fragile and must be protected from punctures and rough handling. If VIPs have leaks of any size, the panel will eventually lose much of its thermal insulative properties and structural strength. If already installed within a cabinet wall, a punctured VIP may significantly reduce the structural strength of the MREF cabinet. As a result, VIPs require careful handling and installation. Manufacturers noted the need to allocate special warehouse space in order to ensure the VIPs are not jostled or roughly handled in the manufacturing environment. VIPs require significantly more warehouse space than polyurethane foams. The application of VIPs can be difficult and may require investment in hard-tooling or robotic systems to ensure the panels are positioned properly within the cabinet or door. Manufacturers noted that producing cabinets with VIPs are much more labor and time intensive than producing cabinets with typical polyurethane foams and the increase in

labor can affect total production capacity.

To develop industry conversion cost estimates, DOE estimated the number of product platforms in DOE's CCD[45] and California Energy Commission's Modernized Appliance Efficiency Database System (''MAEDbS'')[46] and scaled up the product and capital conversion costs associated with the number of product platforms that would require updating at each efficiency level.

DOE acknowledges that manufacturers may follow different design paths to reach the various efficiency levels analyzed. An individual manufacturer's investments depend on a range of factors, including the company's current product offerings and product platforms, existing production facilities and infrastructure, and make vs. buy decisions for products. DOE's conversion cost methodology incorporated feedback from all manufacturers that took part in interviews and extrapolated industry values. While industry average values may not represent any single manufacturer, DOE's modeling provides reasonable estimates of industry-level investments.

In general, DOE assumes all conversion-related investments occur between the year of publication of the final rule and the year by which manufacturers must comply with the new standard. The conversion cost figures used in the GRIM can be found in section V.B.2 of this document. For additional information on the estimated capital and product conversion costs, see chapter 12 of the NOPR TSD.

d. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied manufacturer markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards case scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) a preservation of gross margin percentage scenario; and (2) a preservation of operating profit scenario. These scenarios lead to different manufacturer markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform ''gross margin percentage'' across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. As manufacturer production costs increase with efficiency, this scenario implies that the per-unit dollar profit will increase. DOE assumed a gross margin percentage of 20 percent for freestanding compact coolers and 28 percent for all other product classes.[47] Manufacturers tend to believe it is optimistic to assume that they would be able to maintain the same gross margin percentage as their production costs increase, particularly for minimally efficient products. Therefore, this scenario represents a high bound of industry profitability under an amended energy conservation standard.

In the preservation of operating profit scenario, as the cost of production goes up under a standards case, manufacturers are generally required to reduce their manufacturer markups to a level that maintains base-case operating profit. DOE implemented this scenario in the GRIM by lowering the manufacturer markups at each TSL to yield approximately the same earnings before interest and taxes in the standards case as in the no-new-standards case in the year after the expected compliance date of the amended standards. The implicit assumption behind this scenario is that the industry can only maintain its operating profit in absolute dollars after the standard takes effect.

A comparison of industry financial impacts under the two scenarios is presented in section V.B.2.a of this document.

3. Manufacturer Interviews

DOE interviewed manufacturers including domestic-based and foreign-based original equipment manufacturers (''OEMs'') as well as importers. Participants included manufacturers offering a range of product classes, including both freestanding and built-in designs.

In interviews, DOE asked manufacturers to describe their major concerns regarding potential increases in energy conservation standards for MREFs. The following section highlights manufacturer concerns that helped inform the projected potential impacts of an amended standard on the industry. Manufacturer interviews are conducted under non-disclosure agreements (''NDAs''), so DOE does not document these discussions in the same way that it does public comments in the comment summaries and DOE's responses throughout the rest of this document.

a. Supply Chain Constraints

In interviews, some manufacturers expressed concerns about the ongoing supply chain constraints related to sourcing high-quality components (*e.g.,* VSCs, VIPs) as well as microprocessors and electronics. More stringent standards, particularly at TSLs requiring a large-scale implementation of VSCs, would require that industry source more high-efficiency compressors and electronic components, which are already difficult to secure. If these supply constraints continue through the end of the conversion period, industry could face production capacity constraints.

b. Built-In Product Classes

Some manufacturers urged DOE to conduct a separate analysis for built-in product classes. These manufacturers noted that built-in MREFs face design constraints related to standardized installation dimensions (*i.e.,* maintaining the same width and not exceeding countertop depth). These manufacturers asserted that because of the desire to maintain the same external dimensions, increased insulation thickness would likely come at the expense of internal volume. For MREFs designed to store wine, manufacturers explained that even small changes to internal volume would have a significant impact in terms of ''bottle count,'' which is a key consumer feature and often referenced in marketing material (*e.g.,* a 32-bottle wine cooler). Since these products are likely already optimized to hold the maximum number of standard-size wine bottles, even a small reduction in the interior width could mean losing an entire column of bottle space. Some manufacturers also noted built-ins have

[45] U.S. Department of Energy's Compliance Certification Database is available at: *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A** (Last accessed September 22, 2022).

[46] California Energy Commission's Modernized Appliance Efficiency Database System is available at: *cacertappliances.energy.ca.gov/Pages/ApplianceSearch.aspx* (Last accessed September 22, 2022). DOE used this database to gather product information not provided in DOE's CCD (*e.g.,* manufacturer names).

[47] The gross margin percentages of 20 percent and 28 percent are based on manufacturer markups of 1.25 and 1.38 percent, respectively.

restricted airflow. These manufacturers stated that because of these differences, freestanding products cannot be used as proxies for built-in products.

4. Discussion of MIA Comments

In response to the January 2022 Preliminary Analysis, AHAM asserted that achieving additional energy savings beyond EL 1—particularly for built-in product classes—would require significant redesign of product platforms and retooling. Specifically for built-in products, AHAM asserted that given the low shipment volumes, the significant investment required to meet more stringent efficiencies would lead to significant degradation in INPV. (AHAM, No. 18, pp. 6, 9). AHAM also asserted that any efficiency levels that necessitate changes in chassis size would result in costly changes to tooling. (AHAM, No. 18, p. 6).

As discussed in section IV.J.2.c, DOE relied on multiple sources, including manufacturer feedback from interviews, to estimate conversion costs for each of the analyzed efficiency levels. See Table V.20 for DOE's capital and product conversion cost estimates. See chapter 12 of the NOPR TSD for INPV results by product grouping.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions to emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of CO_2, NO_X, SO_2, and Hg uses emissions factors intended to represent the marginal impacts of the change in electricity consumption associated with amended or new standards. The methodology is based on results published for the *AEO,* including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 13A in the NOPR TSD. The analysis presented in this notice uses projections from *AEO 2022.* Power sector emissions of CH_4 and N_2O from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the Environmental Protection Agency (EPA).[48]

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive'' emissions (direct leakage to the atmosphere) of CH_4 and CO_2, are estimated based on the methodology described in chapter 15 of the NOPR TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the NIA.

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the *AEO,* which incorporates the projected impacts of existing air quality regulations on emissions. *AEO 2022* generally represents current legislation and environmental regulations, including recent government actions, that were in place at the time of preparation of *AEO 2022,* including the emissions control programs discussed in the following paragraphs.[49]

SO_2 emissions from affected electric generating units (''EGUs'') are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (DC). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these States to reduce certain emissions, including annual SO_2 emissions, and went into effect as of January 1, 2015.[50]

AEO 2022 incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by another regulated EGU.

However, beginning in 2016, SO_2 emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants. 77 FR 9304 (Feb. 16, 2012). In the MATS final rule, EPA established a standard for hydrogen chloride as a surrogate for acid gas hazardous air pollutants (''HAP''), and also established a standard for SO_2 (a non-HAP acid gas) as an alternative equivalent surrogate standard for acid gas HAP. The same controls are used to reduce HAP and non-HAP acid gas; thus, SO_2 emissions are being reduced as a result of the control technologies installed on coal-fired power plants to comply with the MATS requirements for acid gas. *I*n order to continue operating, coal power plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions. Because of the emissions reductions under the MATS, it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation would generally reduce SO_2 emissions. DOE estimated SO_2 emissions reduction using emissions factors based on *AEO 2022.*

CSAPR also established limits on NO_X emissions for numerous States in the eastern half of the United States. Energy conservation standards would have little effect on NO_X emissions in those States covered by CSAPR emissions limits if excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other EGUs. In such case, NO_X emissions would remain near

[48] Available at *https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator* (last accessed September 22, 2022).

[49] For further information, see the Assumptions to *AEO 2022* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at *www.eia.gov/outlooks/aeo/assumptions/* (last accessed September 22, 2022).

[50] CSAPR requires states to address annual emissions of SO_2 and NO_X, precursors to the formation of fine particulate matter ($PM_{2.5}$) pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain states to address the ozone season (May-September) emissions of NO_X, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five states in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule).

the limit even if electricity generation goes down. A different case could possibly result, depending on the configuration of the power sector in the different regions and the need for allowances, such that NO_X emissions might not remain at the limit in the case of lower electricity demand. In this case, energy conservation standards might reduce NO_X emissions in covered States. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce NO_X emissions in States covered by CSAPR. Energy conservation standards would be expected to reduce NO_X emissions in the States not covered by CSAPR. DOE used *AEO 2022* data to derive NO_X emissions factors for the group of States not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO 2022,* which incorporates the MATS.

L. Monetizing Emissions Impacts

As part of the development of this proposed rule, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this NOPR.

On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits where appropriate and permissible under law. DOE requests comment on how to address the climate benefits and other non-monetized effects of the proposal.

1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of CO_2, CH_4, and N_2O by using a measure of the SC of each pollutant (*e.g.,* SC–CO_2). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive Orders, and DOE would reach the same conclusion presented in this proposed rulemaking in the absence of the social cost of greenhouse gases, including the February 2021 Interim Estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases. DOE estimated the global social benefits of CO_2, CH_4, and N_2O reductions (*i.e.,* SC–GHGs) using the estimates presented in the TSD: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, published in February 2021 by the IWG. The SC–GHGs is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, SC–GHGs includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHGs therefore, reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHGs is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2, N_2O, and CH_4 emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG until revised estimates have been developed reflecting the latest, peer reviewed science.

The SC–GHGs estimates presented here were developed over many years, using transparent process, peer reviewed methodologies, the best science available at the time of that process, and with input from the public. Specifically, in 2009, the IWG, that included the DOE and other executive branch agencies and offices was established to ensure that agencies were using the best available science and to promote consistency in the social cost of carbon (SC–CO_2) values used across agencies. The IWG published SC–CO_2 estimates in 2010 that were developed from an ensemble of three widely cited integrated assessment models (''IAMs'') that estimate global climate damages using highly aggregated representations of climate processes and the global economy combined into a single modeling framework. The three IAMs were run using a common set of input assumptions in each model for future population, economic, and CO_2 emissions growth, as well as equilibrium climate sensitivity—a measure of the globally averaged temperature response to increased atmospheric CO_2 concentrations. These estimates were updated in 2013 based on new versions of each IAM. In August 2016 the IWG published estimates of the social cost of methane (SC–CH_4) and nitrous oxide (SC–N_2O) using methodologies that are consistent with the methodology underlying the SC–CO_2 estimates. The modeling approach that extends the IWG SC–CO_2 methodology to non-CO_2 GHGs has undergone multiple stages of peer review. The SC–CH_4 and SC–N_2O estimates were developed by Marten *et al.*[51] and underwent a standard double-blind peer review process prior to journal publication. In 2015, as part of the response to public comments received to a 2013 solicitation for comments on the SC–CO_2 estimates, the IWG announced a National Academies of Sciences, Engineering, and Medicine review of the SC–CO_2 estimates to offer advice on how to approach future

[51] Marten, A.L., E.A. Kopits, C.W. Griffiths, S.C. Newbold, and A. Wolverton. Incremental CH_4 and N_2O mitigation benefits consistent with the U.S. Government's SC–CO_2 estimates. *Climate Policy.* 2015. 15(2): pp. 272–298.

updates to ensure that the estimates continue to reflect the best available science and methodologies. In January 2017, the National Academies released their final report, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide, and recommended specific criteria for future updates to the SC–CO_2 estimates, a modeling framework to satisfy the specified criteria, and both near-term updates and longer-term research needs pertaining to various components of the estimation process (National Academies, 2017).[52] Shortly thereafter, in March 2017, President Trump issued Executive Order 13783, which disbanded the IWG, withdrew the previous TSDs, and directed agencies to ensure SC–CO_2 estimates used in regulatory analyses are consistent with the guidance contained in OMB's Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (Executive Order (''E.O.'') 13783, Section 5(c)). Benefit-cost analyses following E.O. 13783 used SC–GHG estimates that attempted to focus on the U.S.-specific share of climate change damages as estimated by the models and were calculated using two discount rates recommended by Circular A–4, 3 percent and 7 percent. All other methodological decisions and model versions used in SC–GHG calculations remained the same as those used by the IWG in 2010 and 2013, respectively.

On January 20, 2021, President Biden issued E.O. 13990, which re-established the IWG and directed it to ensure that the U.S. Government's estimates of the social cost of carbon and other greenhouse gases reflect the best available science and the recommendations of the National Academies (2017). The IWG was tasked with first reviewing the SC–GHG estimates currently used in Federal analyses and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including by taking global damages into account. The interim SC–GHG estimates published in February 2021 are used here to estimate the climate benefits for this proposed rulemaking. The E.O. instructs the IWG to undertake a fuller update of the SC–GHG estimates by January 2022 that takes into consideration the advice of the National Academies (2017) and other recent scientific literature. The February 2021 SC–GHG TSD provides a complete discussion of the IWG's initial review conducted under E.O.13990. In particular, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways.

First, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to fully capture many climate impacts that affect the welfare of U.S. citizens and residents, and those impacts are better reflected by global measures of the SC–GHG. Examples of omitted effects from the E.O. 13783 estimates include direct effects on U.S. citizens, assets, and investments located abroad, supply chains, U.S. military assets and interests abroad, and tourism, and spillover pathways such as economic and political destabilization and global migration that can lead to adverse impacts on U.S. national security, public health, and humanitarian concerns. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents. A wide range of scientific and economic experts have emphasized the issue of reciprocity as support for considering global damages of GHG emissions. If the United States does not consider impacts on other countries, it is difficult to convince other countries to consider the impacts of their emissions on the United States. The only way to achieve an efficient allocation of resources for emissions reduction on a global basis—and so benefit the U.S. and its citizens—is for all countries to base their policies on global estimates of damages. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and, therefore, in this proposed rule DOE centers attention on a global measure of SC–GHG. This approach is the same as that taken in DOE regulatory analyses from 2012 through 2016. A robust estimate of climate damages that accrue only to U.S. citizens and residents does not currently exist in the literature. As explained in the February 2021 TSD, existing estimates are both incomplete and an underestimate of total damages that accrue to the citizens and residents of the U.S. because they do not fully capture the regional interactions and spillovers discussed above, nor do they include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. As noted in the February 2021 SC–GHG TSD, the IWG will continue to review developments in the literature, including more robust methodologies for estimating a U.S.-specific SC–GHG value, and explore ways to better inform the public of the full range of carbon impacts. As a member of the IWG, DOE will continue to follow developments in the literature pertaining to this issue.

Second, the IWG found that the use of the social rate of return on capital (7 percent under current OMB Circular A–4 guidance) to discount the future benefits of reducing GHG emissions inappropriately underestimates the impacts of climate change for the purposes of estimating the SC–GHG. Consistent with the findings of the National Academies (2017) and the economic literature, the IWG continued to conclude that the consumption rate of interest is the theoretically appropriate discount rate in an intergenerational context,[53] and recommended that discount rate uncertainty and relevant aspects of intergenerational ethical considerations be accounted for in selecting future discount rates.

Furthermore, the damage estimates developed for use in the SC–GHG are estimated in consumption-equivalent terms, and so an application of OMB Circular A–4's guidance for regulatory analysis would then use the consumption discount rate to calculate the SC–GHG. DOE agrees with this assessment and will continue to follow developments in the literature

[52] National Academies of Sciences, Engineering, and Medicine. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide.* 2017. The National Academies Press: Washington, DC.

[53] Interagency Working Group on Social Cost of Carbon. *Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* 2010. United States Government. (Last accessed September 22, 2022.) *www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf;* Interagency Working Group on Social Cost of Carbon. *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* 2013. (Last accessed September 22, 2022.) *www.federalregister.gov/documents/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact;* Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. August 2016. (Last accessed September 22, 2022.) *www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf;* Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. (Last accessed September 22, 2022.) *www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf.*

pertaining to this issue. DOE also notes that while OMB Circular A–4, as published in 2003, recommends using 3% and 7% discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and consumption benefits . . . at a lower rate than for intragenerational analysis.'' In the 2015 Response to Comments on the Social Cost of Carbon for Regulatory Impact Analysis, OMB, DOE, and the other IWG members recognized that ''Circular A–4 is a living document'' and ''the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A–4 itself.'' Thus, DOE concludes that a 7% discount rate is not appropriate to apply to value the social cost of greenhouse gases in the analysis presented in this analysis. In this analysis, to calculate the present and annualized values of climate benefits, DOE uses the same discount rate as the rate used to discount the value of damages from future GHG emissions, for internal consistency. That approach to discounting follows the same approach that the February 2021 TSD recommends ''to ensure internal consistency—*i.e.,* future damages from climate change using the SC–GHG at 2.5 percent should be discounted to the base year of the analysis using the same 2.5 percent rate.'' DOE has also consulted the National Academies' 2017 recommendations on how SC–GHG estimates can ''be combined in RIAs with other cost and benefits estimates that may use different discount rates.'' The National Academies reviewed ''several options,'' including ''presenting all discount rate combinations of other costs and benefits with [SC–GHG] estimates.''

As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and will continue to follow developments in the literature pertaining to this issue. While the IWG works to assess how best to incorporate the latest, peer reviewed science to develop an updated set of SC–GHG estimates, it set the interim estimates to be the most recent estimates developed by the IWG prior to the group being disbanded in 2017. The estimates rely on the same models and harmonized inputs and are calculated using a range of discount rates. As explained in the February 2021 SC–GHG TSD, the IWG has recommended that agencies to revert to the same set of four values drawn from the SC–GHG distributions based on three discount rates as were used in regulatory analyses between 2010 and 2016 and subject to public comment. For each discount rate, the IWG combined the distributions across models and socioeconomic emissions scenarios (applying equal weight to each) and then selected a set of four values recommended for use in benefit-cost analyses: an average value resulting from the model runs for each of three discount rates (2.5 percent, 3 percent, and 5 percent), plus a fourth value, selected as the 95th percentile of estimates based on a 3 percent discount rate. The fourth value was included to provide information on potentially higher-than-expected economic impacts from climate change. As explained in the February 2021 SC–GHG TSD, and DOE agrees, this update reflects the immediate need to have an operational SC–GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer reviewed methodologies, and the science available at the time of that process. Those estimates were subject to public comment in the context of dozens of proposed rulemakings as well as in a dedicated public comment period in 2013.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[54] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the IAMs, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–CO_2 estimates. However, as discussed in the February 2021 TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this final rule likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

DOE's derivations of the SC–GHG (SC–CO_2, SC–N_2O, and SC–CH_4) values used for this NOPR are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section I.B.6 of this document.

a. Social Cost of Carbon

The SC–CO_2 values used for this NOPR were generated using the values presented in the 2021 update from the IWG's February 2021 SC–GHG TSD. Table IV.7 shows the updated sets of SC–CO_2 estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in Appendix 14–A of the NOPR TSD. For purposes of capturing the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate include all four sets of SC–CO_2 values, as recommended by the IWG.[55]

[54] Interagency Working Group on Social Cost of Greenhouse Gases (IWG). 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at: *https://www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/.* (Last accessed September 22, 2022).

[55] For example, the February 2021 TSD discusses how the understanding of discounting approaches suggests that discount rates appropriate for intergenerational analysis in the context of climate change may be lower than 3 percent.

TABLE IV.7—ANNUAL SC–CO_2 VALUES FROM 2021 INTERAGENCY UPDATE

[2020–2050 (2020$ per metric ton CO_2)]

Year	Discount rate and statistic			
	5% (Average)	3% (Average)	2.5% (Average)	3% (95th percentile)
2020	14	51	76	152
2025	17	56	83	169
2030	19	62	89	187
2035	22	67	96	206
2040	25	73	103	225
2045	28	79	110	242
2050	32	85	116	260

For 2051 to 2070, DOE used estimates published by EPA, adjusted to 2020$.[56] These estimates are based on methods, assumptions, and parameters identical to the 2020–2050 estimates published by the IWG. DOE expects additional climate benefits to accrue for any longer-life MREFs after 2070, but a lack of available SC–CO_2 estimates for emissions years beyond 2070 prevents DOE from monetizing these potential benefits in this analysis. If further analysis of monetized climate benefits beyond 2070 becomes available prior to the publication of the final rule, DOE will include that analysis in the final rule.

DOE multiplied the CO_2 emissions reduction estimated for each year by the SC–CO_2 value for that year in each of the four cases. DOE adjusted the values to 2021$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–CO_2 values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–CH_4 and SC- N_2O values used for this NOPR were generated using the values presented in the February 2021 SC–GHG TSD. Table IV.8 shows the updated sets of SC–CH_4 and SC–N_2O estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in appendix 14–A of the NOPR TSD. To capture the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–CH_4 and SC–N_2O values, as recommended by the IWG. DOE derived values after 2050 using the approach described above for the SC–CO_2.

TABLE IV.8—ANNUAL SC–CH_4 AND SC–N_2O VALUES FROM 2021 INTERAGENCY UPDATE, 2020–2050

[2020$ per metric ton]

Year	SC–CH_4 (discount rate and statistic)				SC–N_2O (discount rate and statistic)			
	5% (average)	3% (average)	2.5% (average)	3% (95th Percentile)	5% (average)	3% (average)	2.5% (average)	3% (95th Percentile)
2020	670	1500	2000	3900	5800	18000	27000	48000
2025	800	1700	2200	4500	6800	21000	30000	54000
2030	940	2000	2500	5200	7800	23000	33000	60000
2035	1100	2200	2800	6000	9000	25000	36000	67000
2040	1300	2500	3100	6700	10000	28000	39000	74000
2045	1500	2800	3500	7500	12000	30000	42000	81000
2050	1700	3100	3800	8200	13000	33000	45000	88000

DOE multiplied the CH_4 and N_2O emissions reduction estimated for each year by the SC–CH_4 and SC–N_2O estimates for that year in each of the cases. DOE adjusted the values to 2021$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–CH_4 and SC–N_2O estimates in each case.

2. Monetization of Other Emissions Impacts

For this NOPR analysis, DOE estimated the monetized value of NO_X and SO_2 emissions reductions from electricity generation using the latest benefit-per-ton estimates for that sector from the EPA's Benefits Mapping and Analysis Program.[57] DOE used EPA's values for $PM_{2.5}$-related benefits associated with NO_X and SO_2 and for ozone-related benefits associated with NO_X for 2025 2030, and 2040, calculated with discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 period; for years beyond 2040 the values are held constant. DOE derived values specific to the sector for MREFs using a method described in appendix 14B of the NOPR TSD.

[56] See EPA, *Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis,* Washington, DC, December 2021. Available at: *https://www.federalregister.gov/documents/2021/12/30/2021-27854/revised-2023-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-standards* (last accessed September 22, 2022).

[57] *Estimating the Benefit per Ton of Reducing $PM_{2.5}$ Precursors from 21 Sectors.* (Last accessed September 22, 2022) *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors.*

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

M. Utility Impact Analysis

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO 2022.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO 2022* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the NOPR TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by BLS. BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[58] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this NOPR using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[59] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2029–2033), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the NOPR TSD.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for MREFs. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for MREFs, and the standards levels that DOE is proposing to adopt in this NOPR. Additional details regarding DOE's analyses are contained in the NOPR TSD supporting this document.

A. Trial Standard Levels

In general, DOE typically evaluates potential amended standards for products and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the product classes, to the extent that there are such interactions, and market cross elasticity from consumer purchasing decisions that may change when different standard levels are set.

In the analysis conducted for this NOPR, DOE analyzed the benefits and burdens of five TSLs for MREFs. DOE developed TSLs that combine efficiency levels for each analyzed product class. These TSLs were developed by combining specific efficiency levels for each of the MREF product classes analyzed by DOE. TSL 1 represents a 10 percent increase in efficiency, corresponding to the lowest analyzed efficiency level above the baseline for each analyzed product class. TSL 2 represents efficiency levels consistent with Energy Star requirements for coolers and a modest increase in efficiency for certain combination cooler product classes. TSL 3 increases the efficiency for freestanding (FC) and built-in (BIC) coolers by an additional 10% compared to TSL 1, while maintaining the same efficiency levels as TSL 2 for combination coolers. TSL 4 further increases the efficiency levels for the product classes that make up the vast majority of MREF shipments (FCC, FC, C–13A). TSL 5 represents max-tech for each product class. DOE presents the

[58] See U.S. Department of Commerce—Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II).* 1997. U.S. Government Printing Office: Washington, DC. Available at *apps.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed September 30, 2022).

[59] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the NOPR TSD.

Table V.1 presents the TSLs and the corresponding efficiency levels that DOE has identified for potential amended energy conservation standards for MREFs.

TABLE V.1—TRIAL STANDARD LEVELS FOR MREFS

	FCC	FC	BICC	BIC	C–13A	C–13A–BI	C–3A	C–3A–BI
TSL 1	EL 1	EL 1	EL 1	EL 1	EL 1	EL 1	EL 1	EL 1
TSL 2	EL 2	EL 1	EL 3	EL 3	EL 2	EL 2	EL 1	EL 1
TSL 3	EL 2	EL 2	EL 3	EL 2	EL 2	EL 2	EL 1	EL 1
TSL 4	EL 3	EL 3	EL 3	EL 2	EL 3	EL 3	EL 1	EL 1
TSL 5	EL 5	EL 5	EL 5	EL 5	EL 5	EL 5	EL 4	EL 4

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on MREF consumers by looking at the effects that potential amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, and repair costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the NOPR TSD provides detailed information on the LCC and PBP analyses.

Table V.2 through Table V.17 show the LCC and PBP results for the TSLs considered for each product class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, impacts are measured relative to the efficiency distribution in the no-new-standards case in the compliance year (see section IV.F.8 of this document). Because some consumers purchase products with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of the baseline product and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

TABLE V.2—AVERAGE LCC AND PBP RESULTS FOR FCC

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	533.1	27.6	242.8	775.9		10.6
1	1	538.3	25.0	220.2	758.5	2.0	10.6
2,3	2	559.6	22.3	195.9	755.5	5.0	10.6
4	3	586.0	19.7	173.6	759.6	6.8	10.6
	4	627.6	17.1	150.0	777.5	9.0	10.6
5	5	713.1	11.9	104.3	817.4	11.5	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.3—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR FCC

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings * (2021$)	Percent of consumers that experience net cost
1	1	17.4	2.8
2,3	2	17.2	33.5
4	3	12.6	49.5
	4	−5.4	65.7
5	5	−45.3	77.8

* The savings represent the average LCC for affected consumers.

TABLE V.4—AVERAGE LCC AND PBP RESULTS FOR FC

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,391.3	41.5	473.2	1,864.5	.....	14.6
1,2	1	1,415.2	37.4	425.8	1,841.0	5.8	14.6
3	2	1,421.3	33.6	382.3	1,803.6	3.8	14.6
4	3	1,487.3	29.5	335.5	1,822.8	8.0	14.6
	4	1,705.2	27.6	313.6	2,018.8	22.5	14.6
5	5	1,727.0	26.6	302.6	2,029.6	22.5	14.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.5—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR FC

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings * (2021$)	Percent of consumers that experience net cost
1,2	1	23.5	8.8
3	2	47.2	1.6
4	3	28.0	45.5
	4	−168.0	94.7
5	5	−178.8	94.5

* The savings represent the average LCC for affected consumers.

TABLE V.6—AVERAGE LCC AND PBP RESULTS FOR BICC

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	735.1	27.6	244.8	979.8	.....	10.7
1	1	741.3	25.0	221.3	962.5	2.4	10.7
	2	766.3	22.3	197.8	964.1	5.9	10.7
2–4	3	797.7	19.7	174.3	972.0	7.9	10.7
	4	847.2	17.1	150.8	998.0	10.6	10.7
5	5	949.6	12.0	106.1	1,055.7	13.8	10.7

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.7—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR BICC

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings * (2021$)	Percent of consumers that experience net cost
1	1	17.2	1.0
	2	11.3	11.1
2–4	3	2.9	15.3
	4	−23.2	20.1
5	5	−80.9	22.7

* The savings represent the average LCC for affected consumers.

TABLE V.8—AVERAGE LCC AND PBP RESULTS FOR BIC

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,871.9	41.6	474.4	2,346.3	.....	14.6
1	1	1,897.3	37.6	428.9	2,326.2	6.4	14.6

TABLE V.8—AVERAGE LCC AND PBP RESULTS FOR BIC—Continued

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
3,4	2	1,903.8	33.6	383.4	2,287.2	4.0	14.6
2	3	1,974.0	29.7	337.9	2,311.9	8.6	14.6
	4	2,205.9	27.7	315.2	2,521.1	24.0	14.6
5	5	2,229.1	26.5	301.5	2,530.6	23.6	14.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.9 AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR BIC

TSL	Efficiency Level	Life-cycle cost savings	
		Average LCC savings* (2021$)	Percent of consumers that experience net cost
1	1	20.3	18.7
3,4	2	57.3	3.6
2	3	21.2	53.4
	4	−187.9	94.6
5	5	−197.4	94.3

*The savings represent the average LCC for affected consumers.

TABLE V.10—AVERAGE LCC AND PBP RESULTS FOR C–13A

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,148.0	33.8	295.5	1,443.5		10.6
1	1	1,151.6	30.6	267.2	1,418.7	1.1	10.6
2,3	2	1,154.7	28.9	253.0	1,407.7	1.4	10.6
4	3	1,192.3	27.3	238.9	1,431.2	6.9	10.6
	4	1,234.6	25.7	224.9	1,459.5	10.7	10.6
5	5	1,301.3	24.6	215.3	1,516.6	16.7	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.11—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–13A

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings* (2021$)	Percent of consumers that experience net cost
1	1	24.8	0.3
2,3	2	35.5	1.0
4	3	12.0	47.5
	4	−16.3	74.3
5	5	−73.4	90.3

*The savings represent the average LCC for affected consumers.

TABLE V.12—AVERAGE LCC AND PBP RESULTS FOR C–13A–BI

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,371.7	37.1	327.9	1,699.6		10.6
1	1	1,375.4	33.6	296.5	1,672.0	1.1	10.6
2,3	2	1,378.7	31.8	280.8	1,659.6	1.3	10.6
4	3	1,418.8	30.0	265.2	1,684.0	6.7	10.6
	4	1,463.8	28.2	249.5	1,713.3	10.4	10.6

TABLE V.12—AVERAGE LCC AND PBP RESULTS FOR C–13A–BI—Continued

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
5	5	1,534.8	27.1	239.0	1,773.9	16.3	10.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.13—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–13A–BI

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC Savings * (2021$)	Percent of consumers that experience net cost
1	1	27.6	0.3
2,3	2	39.6	0.7
4	3	15.3	44.4
	4	−14.1	72.0
5	5	−74.6	89.7

* The savings represent the average LCC for affected consumers.

TABLE V.14—AVERAGE LCC AND PBP RESULTS FOR C–3A

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,289.8	34.0	388.9	1,678.7		14.6
1–4	1	1,295.4	30.8	351.7	1,647.1	1.7	14.6
	2	1,344.7	29.3	334.3	1,678.9	11.5	14.6
	3	1,510.5	27.7	316.6	1,827.0	35.0	14.6
5	4	1,611.2	26.4	300.9	1,912.1	41.9	14.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.15—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–3A

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings * (2021$)	Percent of consumers that experience net cost
1–4	1	31.5	0.0
	2	−0.3	63.9
	3	−148.4	98.3
5	4	−233.4	99.4

* The savings represent the average LCC for affected consumers.

TABLE V.16—AVERAGE LCC AND PBP RESULTS FOR C–3A–BI

TSL	Efficiency level	Average costs (2021$)				Simple payback years	Average lifetime years
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	1,760.9	38.9	444.5	2,205.4		14.6
1–4	1	1,766.9	35.2	401.8	2,168.7	1.6	14.6
	2	1,819.3	33.3	380.5	2,199.8	10.5	14.6
	3	1,995.8	31.4	359.2	2,355.0	31.6	14.6
5	4	2,103.0	30.0	343.1	2,446.1	38.7	14.6

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.17—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–3A–BI

TSL	Efficiency level	Life-cycle cost savings	
		Average LCC savings * (2021$)	Percent of consumers that experience net cost
1–4	1	36.7	0.0
	2	5.5	57.8
	3	−149.6	97.5
5	4	−240.7	98.9

* The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on senior-only households. DOE did not consider low-income consumers in this NOPR because MREFs are not products generally used by this subgroup, as they typically cost more than comparable compact refrigerators, which are able to maintain lower temperatures compared to MREFs, and therefore serve a wider range of applications. Table V.18 compares the average LCC savings and PBP at each TSL for the senior-only consumer subgroup with similar metrics for the entire consumer sample for all product classes. In most cases, the average LCC savings and PBP for senior-only households at the considered efficiency levels are improved (*i.e.,* higher LCC savings and equal or lesser payback periods) from the average for all households. Chapter 11 of the NOPR TSD presents the complete LCC and PBP results for the subgroup.

TABLE V.18—COMPARISON OF LCC SAVINGS AND PBP FOR SENIOR-ONLY CONSUMER SUBGROUP AND ALL CONSUMERS

TSL	Average LCC savings * *(2021$)*		Simple payback *years*	
	Senior-only households	All households	Senior-only households	All households
FCC				
1	18.4	17.4	2.0	2.0
2,3	19.0	17.2	4.8	5.0
4	15.1	12.6	6.5	6.8
5	−40.5	−45.3	11.1	11.5
FC				
1,2	26.1	23.5	5.6	5.8
3	51.2	47.2	3.6	3.8
4	33.4	28.0	7.7	8.0
5	−178.1	−178.8	21.7	22.5
BICC				
1	18.4	17.2	2.5	2.4
2–4	1.6	2.9	8.3	7.9
5	−94.3	−80.9	14.4	13.8
BIC				
1	20.4	20.3	6.7	6.4
3,4	59.8	57.3	4.2	4.0
2	18.8	21.2	8.9	8.6
5	−224.5	−197.4	24.6	23.6
C–13A				
1	26.4	24.8	1.1	1.1
2,3	37.9	35.5	1.3	1.4
4	14.2	12.0	6.7	6.9
5	−72.9	−73.4	16.3	16.7
C–13A–BI				
1	29.1	27.6	1.1	1.1
2,3	41.7	39.6	1.4	1.3
4	14.0	15.3	7.0	6.7
5	−86.7	−74.6	17.0	16.3
C–3A				
1–4	33.5	31.5	1.7	1.7
5	−237.1	−233.4	40.6	41.9
C–3A–BI				
1–4	39.5	36.7	1.7	1.6
5	−268.9	−240.7	40.1	38.7

* The savings represent the average LCC for affected consumers.

c. Rebuttable Presumption Payback

As discussed in section IV.F.9, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and, as required by EPCA, based the energy use calculation on the DOE test procedure for MREFs, with

adjustment for icemaker adder, as discussed in more detail in section III.B of this document. In contrast, the PBPs presented in section I.B.a were calculated using distributions that reflect the range of energy use in the field.

Table V.19 presents the rebuttable presumption payback periods for the considered TSLs for MREFs. While DOE examined the rebuttable presumption criterion, it considered whether the proposed standard levels considered for the NOPR are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V.19—REBUTTABLE PRESUMPTION PAYBACK PERIODS

Efficiency level	Rebuttable payback period (years)							
	FCC	FC	BICC	BIC	C–13A	C–13A–BI	C–3A	C–3A–BI
1	2.0	5.5	2.3	6.2	1.1	1.0	1.7	1.6
2	4.8	3.6	5.7	3.9	1.3	1.3	11.1	10.2
3	6.6	7.6	7.7	8.3	6.7	6.4	33.8	30.7
4	8.7	21.6	10.3	23.2	10.4	10.1	40.4	37.6
5	11.2	21.6	13.3	22.8	16.3	15.7	.....	.....

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of amended energy conservation standards on manufacturers of MREFs. The following section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the NOPR TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from a standard. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential amended energy conservation standards on manufacturers of MREFs, as well as the conversion costs that DOE estimates manufacturers of MREFs would incur at each TSL.

The impact of potential amended energy conservation standards were analyzed under two scenarios: (1) the preservation of gross margin percentage; and (2) the preservation of operating profit, as discussed in section IV.J.2.d of this document. The preservation of gross margin percentages applies a ''gross margin percentage'' of 20 percent for freestanding compact coolers and 28 percent for all other product classes, across all efficiency levels.[60] This scenario assumes that a manufacturer's per-unit dollar profit would increase as MPCs increase in the standards cases and represents the upper bound to industry profitability under potential new and amended energy conservation standards.

The preservation of operating profit scenario reflects manufacturers' concerns about their inability to maintain margins as MPCs increase to reach more stringent efficiency levels. In this scenario, while manufacturers make the necessary investments required to convert their facilities to produce compliant products, operating profit does not change in absolute dollars and decreases as a percentage of revenue. The preservation of operating profit scenario results in the lower (or more severe) bound to impacts of potential amended standards on industry.

Each of the modeled scenarios results in a unique set of cash flows and corresponding INPV for each TSL. INPV is the sum of the discounted cash flows to the industry from the NOPR publication year through the end of the analysis period (2023–2058). The ''change in INPV'' results refer to the difference in industry value between the no-new-standards case and standards case at each TSL. To provide perspective on the short-run cash flow impact, DOE includes a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before amended standards would take effect. This figure provides an understanding of the magnitude of the required conversion costs relative to the cash flow generated by the industry in the no-new-standards case.

Conversion costs are one-time investments for manufacturers to bring their manufacturing facilities and product designs into compliance with potential amended standards. As described in section IV.J.2.c of this document, conversion cost investments occur between the year of publication of the final rule and the year by which manufacturers must comply with the new standard. The conversion costs can have a significant impact on the short-term cash flow on the industry and generally result in lower free cash flow in the period between the publication of the final rule and the compliance date of potential amended standards. Conversion costs are independent of the manufacturer markup scenarios and are not presented as a range in this analysis.

TABLE V.20—MANUFACTURER IMPACT ANALYSIS RESULTS FOR MISCELLANEOUS REFRIGERATION PRODUCTS

	Unit	No-New-Standards Case	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
INPV	*2021$ Million*	742.0	711.3 to 714.7	695.4 to 706.2	697.3 to 706.6	652.3 to 679.4	356.7 to 458.8
Change in INPV	%	.....	(4.1) to (3.7)	(6.3) to (4.8)	(6.0) to (4.8)	(12.1) to (8.4)	(51.9) to (38.2)
Free Cash Flow (2028).	*2021$ Million*	55.3	37.1	30.1	31.5	9.5	(169.3)
Change in Free Cash Flow (2028).	%	.....	(33.0)	(45.7)	(43.1)	(82.8)	(406.0)

[60] The gross margin percentages of 20 percent and 28 percent are based on manufacturer markups of 1.25 and 1.38 percent, respectively.

TABLE V.20—MANUFACTURER IMPACT ANALYSIS RESULTS FOR MISCELLANEOUS REFRIGERATION PRODUCTS—Continued

	Unit	No-New-Standards Case	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Product Conversion Costs.	*2021$ Million*	.....	52.4	66.4	68.8	101.1	364.5
Capital Conversion Costs.	*2021$ Million*	.....	1.2	6.2	1.2	25.8	174.5
Total Conversion Costs.	*2021$ Million*	.....	53.6	72.6	67.6	126.9	539.0

*Parentheses denote negative (-) values.

The following cash flow discussion refers to product classes as defined in Table I.1 in section I of this document and the efficiency levels and design options as detailed in Table IV.1 in section IV.C of this document.

At TSL 1, the standard represents the lowest analyzed efficiency level above baseline for all product classes (EL 1). The change in INPV is expected to range from −4.1 to −3.7 percent. At this level, free cash flow is estimated to decrease by 33.0 percent compared to the no-new-standards case value of $55.3 million in the year 2028, the year before the standards year. Currently, approximately 24 percent of domestic MREF shipments meet the efficiencies required at TSL 1.

At TSL 1, DOE analyzed implementing various design options for the range of directly analyzed product classes. These design options could include implementing more efficient single-speed compressors, tube and fin evaporators and/or condensers, among other technologies. At this level, capital conversion costs are minimal since most manufacturers can achieve TSL 1 efficiencies with relatively simple component changes. Product conversion costs may be necessary for developing, qualifying, sourcing, and testing more efficient components. DOE estimates capital conversion costs of $1.2 million and product conversion costs of $52.4 million. Conversion costs total $53.6 million.

At TSL 1, the shipment-weighted average MPC for all MREFs is expected to increase by 0.8 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the relatively small increase in production costs, DOE does not project a notable drop in shipments in the year the standard takes effect. In the preservation of gross margin percentage scenario, the minor increase in cashflow from the higher MSP is slightly outweighed by the $53.6 million in conversion costs, causing a slightly negative change in INPV at TSL 1 under this scenario. Under the preservation of operating profit scenario, manufacturers earn the same per-unit operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. In this scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup and the $53.6 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 1 under the preservation of operating profit scenario.

At TSL 2, the standard represents efficiency levels consistent with Energy Star requirements for coolers and a modest increase in efficiency for certain combination cooler product classes. The change in INPV is expected to range from −6.3 to −4.8 percent. At this level, free cash flow is estimated to decrease by 45.7 percent compared to the no-new-standards case value of $55.3 million in the year 2028, the year before the standards year. Currently, approximately 11.5 percent of domestic MREF shipments meet the efficiencies required at TSL 2.

The design options DOE analyzed for most product classes include implementing similar design options as TSL 1, such as more efficient single-speed compressors. For built-in coolers, the analyzed design options also include implementing variable-speed compressors and increased insulation thickness. For freestanding compact coolers, C–13A and C–13A-bi, TSL 2 corresponds to EL 2. For built-in compact coolers and built-in coolers, TSL 2 corresponds to EL 3. For the remaining product classes, the efficiencies required at TSL 2 are the same as TSL 1. The increase in conversion costs compared to TSL 1 are largely driven by the higher efficiencies required for built-in coolers, which account for 3 percent of MREF shipments. For products that do not meet this level, increasing insulation thickness would likely mean new cabinets, liners, and fixtures as well as new shelf designs. Implementing variable-speed compressors could require more advanced controls and electronics and new test stations. DOE estimates capital conversion costs of $6.2 million and product conversion costs of $66.4 million. Conversion costs total $72.6 million.

At TSL 2, the shipment-weighted average MPC for all MREFs is expected to increase by 4.2 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 4 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation of gross margin percentage scenario, the slight increase in cashflow from the higher MSP is outweighed by the $72.6 million in conversion costs, causing a slightly negative change in INPV at TSL 2 under this scenario. Under the preservation of operating profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup and the $72.6 million in conversion costs incurred by manufacturers cause a negative change in INPV at TSL 2 under the preservation of operating profit scenario.

At TSL 3, the standard represents an increase in efficiency for freestanding and built-in coolers by additional 10 percent as compared to TSL 1, while maintaining the same efficiency levels as TSL 2 for combination coolers. The change in INPV is expected to range from −6.0 to −4.8 percent. At this level, free cash flow is estimated to decrease by 43.1 percent compared to the no-new-standards case value of $55.3 million in the year 2028, the year before the standards year. Currently, approximately 5.3 percent of domestic MREF shipments meet the efficiencies required at TSL 3.

At this level, DOE analyzed similar design options as TSL 1 and TSL 2, such as implementing incrementally more efficient single-speed compressors. For all product classes except freestanding coolers and built-in coolers, the efficiencies required at TSL 3 are the same as TSL 2. For freestanding coolers, TSL 3 corresponds to EL 2. For built-in coolers, TSL 3 reflects a lower efficiency

level (EL 2) as compared to TSL 2 (EL 3). Industry capital conversion costs decrease at TSL 3 as compared to TSL 2 due to the lower efficiency level required for built-in coolers. As previously discussed, DOE expects manufacturers of built-in coolers would likely need to increase insulation thickness at TSL 2 (EL 3) and incorporate variable-speed compressors. However, at TSL 3, DOE's engineering analysis and manufacturer feedback indicate that manufacturers could achieve EL 2 efficiencies for built-in coolers with relatively straightforward component swaps versus a larger product redesign associated with increasing insulation. DOE estimates capital conversion costs of $1.2 million and product conversion costs of $68.8 million. Conversion costs total $70.0 million.

At TSL 3, the shipment-weighted average MPC for all MREFs is expected to increase by 3.9 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 4 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation of gross margin percentage scenario, the slight increase in cashflow from the higher MSP is outweighed by the $70.0 million in conversion costs, causing a slightly negative change in INPV at TSL 3 under this scenario. Under the preservation of operating profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup and the $70.0 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 3 under the preservation of operating profit scenario.

At TSL 4, the standard reflects an increase in efficiency level for the product classes that make up the vast majority of MREF shipments (FCC, FC, C–13A). The change in INPV is expected to range from −12.1 to −8.4 percent. At this level, free cash flow is estimated to decrease by 82.8 percent compared to the no-new-standards case value of $55.3 million in the year 2028, the year before the standards year. Currently, approximately 3.4 percent of domestic MREF shipments meet the efficiencies required at TSL 4.

For all product classes except built-in coolers, C–3A and C–3A–BI, TSL 4 corresponds to EL 3. For built-in coolers, TSL 4 corresponds to EL 2. For C–3A–BI, TSL 4 corresponds to EL 1. For C–3A, the efficiencies required at TSL 4 are the same as TSL 3 (EL 1). At this level, conversion costs are largely driven by the efficiencies required for freestanding coolers, which accounts for approximately 12 percent of industry shipments. DOE's shipments analysis estimates that no freestanding cooler shipments currently meet the efficiencies required at TSL 4. All manufacturers would need to update their product platforms, which could include increasing insulation thickness and implementing variable-speed compressors. Increasing insulation thickness would likely result in the loss of interior volume and would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. DOE estimates capital conversion costs of $25.8 million and product conversion costs of $101.1 million. Conversion costs total $126.9 million.

At TSL 4, the shipment-weighted average MPC for all MREFs is expected to increase by 10.0 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 10 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation of gross margin percentage scenario, the increase in cashflow from the higher MSP is outweighed by the $126.9 million in conversion costs and the drop in annual shipments, causing a negative change in INPV at TSL 4 under this scenario. Under the preservation of operating profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup, the $126.9 million in conversion costs incurred by manufacturers, and the drop in annual shipments cause a negative change in INPV at TSL 4 under the preservation of operating profit scenario.

At TSL 5, the standard represents the max-tech efficiency levels for all product classes. The change in INPV is expected to range from −51.9 to −38.2 percent. At this level, free cash flow is estimated to decrease by 406.0 percent compared to the no-new-standards case value of $55.3 million in the year 2028, the year before the standards year. Currently, approximately 2.7 percent of domestic MREF shipments meet the efficiencies required at TSL 5.

DOE's shipments analysis estimates that no shipments meet the efficiencies required across all product classes except for built-in compact coolers, which account for only 4 percent of industry shipments. A max-tech standard would necessitate significant investment to redesign nearly all product platforms and incorporate design options such as the most efficient variable-speed compressors, triple-pane glass, increased foam insulation thickness, and VIP technology. Capital conversion costs may be necessary for new tooling for VIP placement as well as new testing stations for high-efficiency components. Increasing insulation thickness would likely result in the loss of interior volume and would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. Product conversion costs at max-tech are significant as manufacturers work to completely redesign their product platforms. For products implementing VIPs, product conversion costs may be necessary for prototyping and testing for VIP placement, design, and sizing. Manufacturers implementing triple-pane glass may need to redesign the door frame and hinges to support the added thickness and weight. DOE estimates capital conversion costs of $174.5 million and product conversion costs of $364.5 million. Conversion costs total $539.0 million.

At TSL 5, the large conversion costs result in a free cash flow dropping below zero in the years before the standards year. The negative free cash flow calculation indicates manufacturers may need to access cash reserves or outside capital to finance conversion efforts.

At TSL 5, the shipment-weighted average MPC for all MREFs is expected to increase by 32.7 percent relative to the no-new-standards case shipment-weighted average MPC for all MREFs in 2029. Given the projected increase in production costs, DOE expects an estimated 20 percent drop in shipments in the year the standard takes effect relative to the no-new-standards case. In the preservation of gross margin percentage scenario, the increase in cashflow from the higher MSP is outweighed by the $539.0 million in conversion costs and drop in annual shipments, causing a significant negative change in INPV at TSL 5 under this scenario. Under the preservation of operating profit scenario, the manufacturer markup decreases in 2030, the year after the analyzed compliance year. This reduction in the manufacturer markup, the $539.0 million in conversion costs incurred by manufacturers, and the drop in annual shipments cause a significant decrease in INPV at TSL 5 under the preservation of operating profit scenario.

DOE seeks comments, information, and data on the capital conversion costs and product conversion costs estimated for each TSL.

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of amended energy conservation standards on direct employment in the MREF industry, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and in each of the standards cases during the analysis period. DOE calculated these values using statistical data from the 2020 *ASM,*[61] BLS employee compensation data,[62] results of the engineering analysis, and manufacturer interviews.

Labor expenditures related to product manufacturing depend on the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in each year are calculated by multiplying the total MPCs by the labor percentage of MPCs. The total labor expenditures in the GRIM were then converted to total production employment levels by dividing production labor expenditures by the average fully burdened wage multiplied by the average number of hours worked per year per production worker. To do this, DOE relied on the *ASM* inputs: Production Workers Annual Wages, Production Workers Annual Hours, Production Workers for Pay Period, and Number of Employees. DOE also relied on the BLS employee compensation data to determine the fully burdened wage ratio. The fully burdened wage ratio factors in paid leave, supplemental pay, insurance, retirement and savings, and legally required benefits.

The number of production employees is then multiplied by the U.S. labor percentage to convert total production employment to total domestic production employment. The U.S. labor percentage represents the industry fraction of domestic manufacturing production capacity for the covered product. This value is derived from manufacturer interviews, product database analysis, and publicly available information. DOE estimates that 7.8 percent of MREFs are produced domestically.

The domestic production employees estimate covers production line workers, including line supervisors, who are directly involved in fabricating and assembling products within the OEM facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are also included as production labor. DOE's estimates only account for production workers who manufacture the specific products covered by this proposed rulemaking.

Non-production workers account for the remainder of the direct employment figure. The non-production employees estimate covers domestic workers who are not directly involved in the production process, such as sales, engineering, human resources, and management. Using the amount of domestic production workers calculated above, non-production domestic employees are extrapolated by multiplying the ratio of non-production workers in the industry compared to production employees. DOE assumes that this employee distribution ratio remains constant between the no-new-standards case and standards cases.

Using the GRIM, DOE estimates in the absence of amended energy conservation standards there would be 228 domestic workers for MREFs in 2029. Table V.21 shows the range of the impacts of energy conservation standards on U.S. manufacturing employment in the MREF industry. The following discussion provides a qualitative evaluation of the range of potential impacts presented in Table V.21.

TABLE V.21—DOMESTIC DIRECT EMPLOYMENT IMPACTS FOR MISCELLANEOUS REFRIGERATION PRODUCT MANUFACTURERS IN 2029

	No-new-standards case	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Direct Employment in 2029 (Production Workers + Non-Production Workers) ...	228	227	220	220	209	207
Potential Changes in Direct Employment Workers in 2029*	.....	(201) to (1)	(201) to (8)	(201) to (8)	(201) to (19)	(201) to (21)

*DOE presents a range of potential employment impacts. Numbers in parentheses denote negative values.

The direct employment impacts shown in Table V.21 represent the potential domestic employment changes that could result following the compliance date for the MREF product classes in this proposal. The upper bound estimate corresponds to a change in the number of domestic workers that would result from amended energy conservation standards if manufacturers continue to produce the same scope of covered products within the United States after compliance takes effect. The lower bound estimate represents the maximum decrease in production workers if manufacturing moved to lower labor-cost countries. At lower TSLs, DOE believes the likelihood of changes in production location due to amended standards are low due to the relatively minor production line updates required. However, as amended standards increase in stringency and both the complexity and cost of production facility updates increases, manufacturers are more likely to revisit their production location decisions and/or their make vs. buy decisions.

Additional detail on the analysis of direct employment can be found in chapter 12 of the NOPR TSD. Additionally, the employment impacts discussed in this section are independent of the employment impacts from the broader U.S. economy, which are documented in chapter 16 of the NOPR TSD.

c. Impacts on Manufacturing Capacity

In interviews, manufacturers noted that the majority of MREFs—namely freestanding compact coolers—are manufactured in Asia and rebranded by home appliance manufacturers. Manufacturers had few concerns about

[61] U.S. Census Bureau, *Annual Survey of Manufactures.* ''Summary Statistics for Industry Groups and Industries in the U.S (2020).'' Available at: *www.census.gov/data/tables/time-series/econ/asm/2018-2020-asm.html* (Last accessed September 22, 2022).

[62] U.S. Bureau of Labor Statistics. *Employer Costs for Employee Compensation.* June 16, 2022. Available at: *www.bls.gov/news.release/pdf/ecec.pdf* (Last accessed September 22, 2022).

manufacturing constraints below the max-tech level and the implementation of VIPs. However, at max-tech, some manufacturers expressed technical uncertainty about industry's ability to meet the efficiencies required as few OEMs offer products at max-tech today. For example, DOE is not aware of any OEMs that currently offer freestanding compact coolers that meet TSL 5 efficiencies. DOE's shipments analysis estimates that except for built-in compact coolers, which only accounts for 4 percent of MREF shipments, no shipments of other product classes meet the max-tech efficiencies.

Some low-volume domestic and European-based OEMs offer niche or high-end MREFs (*i.e.,* built-ins, combination coolers, freestanding compact coolers that can be integrated into kitchen cabinetry). In interviews, these manufacturers stated that, due to their low volume and wide range of product offerings, they could face engineering resource constraints should amended standards necessitate a significant redesign, such as requiring insulation thickness changes or VIPs (TSL 4 for freestanding coolers and built-in coolers and TSL 5 for all other product classes). These manufacturers further stated that the extent of their resource constraints depend, in part, on the outcome of other ongoing DOE energy conservation standards rulemakings that impact related products, in particular, the potential energy conservation standards for refrigerators, refrigerator-freezers, and freezers. Pursuant to a consent decree entered on September 20, 2022, DOE has agreed to sign and post on DOE's publicly accessible website a rulemaking document for refrigerators, refrigerator-freezers, and freezers by December 30, 2023, that, when effective, would be DOE's final agency action for standards for these products.[63]

DOE seeks comment on whether manufacturers expect manufacturing capacity constraints would limit product availability to consumers in the timeframe of the amended standard compliance date (2029).

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop industry cash flow estimates may not capture the differential impacts among subgroups of manufacturers. Small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs substantially from the industry average could be affected disproportionately. DOE investigated small businesses as a manufacturer subgroup that could be disproportionally impacted by energy conservation standards and could merit additional analysis.

DOE analyzes the impacts on small businesses in a separate analysis in section VI.B of this document as part of the Regulatory Flexibility Analysis. The manufacturers of the products covered in this rulemaking have a primary North American Industry Classification System (''NAICS'') code of 335220: ''Major Household Appliance Manufacturing'' or a secondary NAICS code of 333415: ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The Small Business Administration (''SBA'') defines a small business as a company that has fewer than 1,500 employees and fewer than 1,250 employees for NAICS codes 335220 and 333415, respectively. DOE used the higher threshold of 1,500 employees to identify small business manufacturers. Based on this classification, DOE identified two domestic OEMs that qualify as small businesses. For a discussion of the impacts on the small business manufacturer subgroup, see the Regulatory Flexibility Analysis in section VI.B of this document and chapter 12 of the NOPR TSD.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the product-specific regulatory actions of other Federal agencies that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

For the cumulative regulatory burden analysis, DOE examines Federal, product-specific regulations that could affect MREF manufacturers that take effect approximately three years before or after the 2029 compliance date.

TABLE V.22—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING MISCELLANEOUS REFRIGERATION PRODUCTS ORIGINAL EQUIPMENT MANUFACTURERS

Federal energy conservation standard	Number of OEMs *	Number of OEMs affected from today's rule **	Approx. standards year	Industry conversion costs (millions $)	Industry conversion costs/product revenue *** (%)
Room Air Conditioners † 87 FR 20608 (April 7, 2022)	8	4	2026	$22.8 (2020$)	0.5
Commercial Water Heating Equipment † 87 FR 30610 (May 19, 2022)	14	1	2026	34.6 (2020$)	4.7
Consumer Furnaces † 87 FR 40590 (July 7, 2022)	15	1	2029	150.6 (2020$)	1.4
Consumer Clothes Dryers † 87 FR 51734 (August 23, 2022)	15	5	2027	149.7 (2020$)	1.8
Microwave Ovens † 87 FR 52282 (August 24, 2022)	18	7	2026	46.1 (2021$)	0.7
Consumer Conventional Cooking Products 88 FR 6818 (February 1, 2023)	34	7	2027	183.4 (2021$)	1.2
Residential Clothes Washers † 88 FR 13520 (March 3, 2023)	19	6	2027	690.8 (2021$)	5.2
Refrigerators, Refrigerator-Freezers, and Freezers † 88 FR 12452 (February 27, 2023)	49	19	2027	1,323.6 (2021$)	3.8

* This column presents the total number of OEMs identified in the energy conservation standard rule contributing to cumulative regulatory burden.

** This column presents the number of OEMs producing MREFs that are also listed as OEMs in the identified energy conservation standard contributing to cumulative regulatory burden.

[63] *Natural Resources Defense Council, Inc., et al.* v *Granholm, et al,* No. 1:20–cv–09127 (S.D.N.Y.), and *State of New York, et al.* v *Granholm, et al.* No. 1:20–cv–09362 (S.D.N.Y.).

*** This column presents industry conversion costs as a percentage of product revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of the final rule to the compliance year of the final rule. The conversion period typically ranges from 3 to 5 years, depending on the energy conservation standard.

† These rulemakings are in the proposed rule stage and all values are subject to change until finalized.

In addition to the rulemakings listed in Table V.29, DOE has ongoing rulemakings for other products or equipment that MREF manufacturers produce, including but not limited to automatic commercial ice makers; [64] dehumidifiers; [65] and dishwashers.[66] If DOE proposes or finalizes any energy conservation standards for these products or equipment prior to finalizing energy conservation standards MREFs, DOE will include the energy conservation standards for these other products or equipment as part of the cumulative regulatory burden for the MREF final rule.

DOE requests information regarding the impact of cumulative regulatory burden on manufacturers of MREFs associated with multiple DOE standards or product-specific regulatory actions of other Federal agencies.

3. National Impact Analysis

This section presents DOE's estimates of the NES and the NPV of consumer benefits that would result from each of the TSLs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential amended standards for MREFs, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2029–2058). Table V.23 presents DOE's projections of the NES for each TSL considered for freestanding and built-in MREFs. The savings were calculated using the approach described in section IV.H.2 of this document.

TABLE V.23—CUMULATIVE NATIONAL ENERGY SAVINGS FOR MREFS; 30 YEARS OF SHIPMENTS

[2029–2058]

	TSL	Coolers	Combination coolers	Total
		(quads)		
Primary Energy	1	0.07	0.02	0.09
	2	0.15	0.03	0.19
	3	0.17	0.03	0.20
	4	0.25	0.05	0.30
	5	0.46	0.07	0.52
FFC	1	0.07	0.02	0.10
	2	0.16	0.04	0.19
	3	0.18	0.04	0.21
	4	0.26	0.05	0.31
	5	0.47	0.07	0.54

OMB Circular A–4 [67] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[68] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to consumer MREFs. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V.24. The impacts are counted over the lifetime of consumer MREFs purchased in 2029–2037.

[64] *www.regulations.gov/docket/EERE-2017-BT-STD-0022*.

[65] *www.regulations.gov/docket/EERE-2019-BT-STD-0043*.

[66] *www.regulations.gov/docket/EERE-2019-BT-STD-0039*.

[67] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/* (last accessed September 30, 2022).

[68] Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

TABLE V.24—CUMULATIVE NATIONAL ENERGY SAVINGS FOR MREFS; 9 YEARS OF SHIPMENTS
[2029–2037]

	TSL	Coolers	Combination coolers	Total
		(quads)		
Primary Energy	1	0.02	0.01	0.03
	2	0.04	0.01	0.05
	3	0.05	0.01	0.06
	4	0.07	0.01	0.08
	5	0.12	0.02	0.14
FFC	1	0.02	0.01	0.03
	2	0.04	0.01	0.05
	3	0.05	0.01	0.06
	4	0.07	0.01	0.09
	5	0.13	0.02	0.15

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for MREFs. In accordance with OMB's guidelines on regulatory analysis,[69] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.25 shows the consumer NPV results with impacts counted over the lifetime of products purchased in 2029–2058.

TABLE V.25—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR MREFS; 30 YEARS OF SHIPMENTS (2029–2058)
[Million $2021]

	TSL	Coolers	Combination coolers	Total
3% Discount Rate	1	348.5	143.4	492.0
	2	460.4	207.3	667.6
	3	610.3	207.3	817.5
	4	547.4	143.4	690.9
	5	(1061.9)	(296.0)	(1357.9)
7% Discount Rate	1	127.1	56.3	183.5
	2	126.7	80.8	207.5
	3	189.7	80.8	270.5
	4	97.8	37.6	135.3
	5	(848.7)	(195.3)	(1044.0)

Note: Numbers in parentheses denote negative values.

The NPV results based on the aforementioned 9-year analytical period are presented in Table V.26. The impacts are counted over the lifetime of products purchased in 2029–2037. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V.26—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR MREFS; 9 YEARS OF SHIPMENTS (2029–2037)
[Million $2021]

	TSL	Coolers	Combination coolers	Total
3% Discount Rate	1	130.2	54.1	184.3
	2	162.7	78.1	240.7
	3	222.1	78.1	300.1
	4	180.0	40.9	220.
	5	(484.1)	(132.2)	(616.3)
7% Discount Rate	1	63.5	28.5	92.0
	2	58.6	40.7	99.4
	3	91.9	40.7	132.7
	4	36.9	12.3	49.1

[69] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/* (last accessed September 30, 2022).

TABLE V.26—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR MREFS; 9 YEARS OF SHIPMENTS (2029–2037)—Continued

[Million $2021]

	TSL	Coolers	Combination coolers	Total
	5	(465.5)	(108.9)	(574.4)

The previous results reflect the use of a default trend to estimate the change in price for consumer MREFs over the analysis period (see section IV.H.3 of this document). DOE also conducted a sensitivity analysis that considered one scenario with a lower rate of price decline than the reference case and one scenario with a higher rate of price decline than the reference case. The results of these alternative cases are presented in appendix 10C of the NOPR TSD. In the high-price-decline case, the NPV of consumer benefits is higher than in the default case. In the low-price-decline case, the NPV of consumer benefits is lower than in the default case.

c. Indirect Impacts on Employment

It is estimated that that amended energy conservation standards for MREFs would reduce energy expenditures for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes (2029–2033), where these uncertainties are reduced.

The results suggest that the proposed standards would be likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the NOPR TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section III.F.1.d of this document, DOE has tentatively concluded that the standards proposed in this NOPR would not lessen the utility or performance of the MREFs under consideration in this rulemaking. Manufacturers of these products currently offer units that meet or exceed the proposed standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from new or amended standards. As discussed in section III.F.1.e of this document, the Attorney General determines the impact, if any, of any lessening of competition likely to result from a proposed standard, and transmits such determination in writing to the Secretary, together with an analysis of the nature and extent of such impact. To assist the Attorney General in making this determination, DOE has provided DOJ with copies of this NOPR and the accompanying TSD for review. DOE will consider DOJ's comments on the proposed rule in determining whether to proceed to a final rule. DOE will publish and respond to DOJ's comments in that document. DOE invites comment from the public regarding the competitive impacts that are likely to result from this proposed rule. In addition, stakeholders may also provide comments separately to DOJ regarding these potential impacts. See the **ADDRESSES** section for information to send comments to DOJ.

6. Need of the Nation to Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 15 in the NOPR TSD presents the estimated impacts on electricity generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from potential energy conservation standards for MREFs is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V.27 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K. DOE reports annual emissions reductions for each TSL in chapter 13 of the NOPR TSD.

TABLE V.27—CUMULATIVE EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

	Trial standard level				
	1	2	3	4	5
Power Sector Emissions					
CO_2 (*million metric tons*)	3.0	6.0	6.6	9.7	16.9
CH_4 (*thousand tons*)	0.2	0.5	0.5	0.8	1.3
N_2O (*thousand tons*)	0.03	0.07	0.07	0.11	0.19
NO_X (*thousand tons*)	1.5	3.0	3.3	4.8	8.4
SO_2 (*thousand tons*)	1.5	3.0	3.2	4.7	8.3
Hg (*tons*)	0.01	0.02	0.02	0.03	0.05

TABLE V.27—CUMULATIVE EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058—Continued

	Trial standard level				
	1	2	3	4	5
Upstream Emissions					
CO_2 (*million metric tons*)	0.2	0.5	0.5	0.7	1.3
CH_4 (*thousand tons*)	21.7	43.4	47.5	69.5	121.4
N_2O (*thousand tons*)	0.00	0.00	0.00	0.00	0.01
NO_X (*thousand tons*)	3.5	7.0	7.6	11.1	19.4
SO_2 (*thousand tons*)	0.02	0.03	0.03	0.05	0.09
Hg (*tons*)	0.00	0.00	0.00	0.00	0.00
Total FFC Emissions					
CO_2 (*million metric tons*)	3.3	6.5	7.1	10.4	18.2
CH_4 (*thousand tons*)	22.0	43.9	48.0	70.3	122.7
N_2O (*thousand tons*)	0.03	0.07	0.08	0.11	0.19
NO_X (*thousand tons*)	5.0	10.0	10.9	15.9	27.9
SO_2 (*thousand tons*)	1.5	3.0	3.3	4.8	8.4
Hg (*tons*)	0.01	0.02	0.02	0.03	0.05

As part of the analysis for this rulemaking, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 that DOE estimated for each of the considered TSLs for MREFs. Section IV.L of this document discusses the SC–CO_2 values that DOE used. Table V.28 presents the value of CO_2 emissions reduction at each TSL for each of the SC–CO_2 cases. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V.28—PRESENT MONETIZED VALUE OF CO_2 EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

[Million 2021$]

TSL	SC–CO_2 Case (Discount rate and statistics)			
	5% (Average)	3% (Average)	2.5% (Average)	3% (95th Percentile)
1	27.4	121.9	192.4	369.7
2	54.9	244.0	385.2	740.2
3	59.6	265.3	418.9	804.8
4	87.1	387.7	612.4	1176.1
5	152.1	677.7	1,070.6	2,055.8

As discussed in section IV.L.1 of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and N_2O that DOE estimated for each of the considered TSLs for MREFs. Table V.29 presents the value of the CH_4 emissions reduction at each TSL, and Table V.30 presents the value of the N_2O emissions reduction at each TSL. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V.29—PRESENT MONETIZED VALUE OF METHANE EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

[Million 2021$]

TSL	SC–CH_4 case (Discount rate and statistics)			
	5% (Average)	3% (Average)	2.5% (Average)	3% (95th Percentile)
1	8.5	26.5	37.4	70.1
2	17.1	53.1	74.8	140.4
3	18.6	57.8	81.5	152.8
4	27.1	84.6	119.2	223.5
5	47.4	147.9	208.6	391.0

TABLE V.30—PRESENT MONETIZED VALUE OF NITROUS OXIDE EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

[Million 2021$]

TSL	SC–N_2O case (Discount rate and statistics)			
	5% (Average)	3% (Average)	2.5% (Average)	3% (95th Percentile)
1	0.1	0.5	0.7	1.2
2	0.2	0.9	1.4	2.5
3	0.2	1.0	1.6	2.7
4	0.4	1.5	2.3	3.9
5	0.6	2.6	4.0	6.8

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. DOE notes that the proposed standards would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the health benefits associated with NO_X and SO_2 emissions reductions anticipated to result from the considered TSLs for MREFs. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V.31 presents the present value for NO_X emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and Table V.32 presents similar results for SO_2 emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V.31—PRESENT MONETIZED VALUE OF NO_X EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

[Million 2021$]

TSL	3% Discount rate	7% Discount rate
1	181.8	65.7
2	363.8	131.4
3	395.8	142.4
4	578.3	207.5
5	1,009.8	361.4

TABLE V.32—PRESENT MONETIZED VALUE OF SO_2 EMISSIONS REDUCTION FOR MREFS SHIPPED IN 2029–2058

[Million 2021$]

TSL	3% Discount rate	7% Discount rate
1	73.7	27.1
2	147.4	54.1
3	160.4	58.7
4	234.2	85.4
5	408.7	148.6

DOE has not considered the monetary benefits of the reduction of Hg for this proposed rule. Not all the public health and environmental benefits from the reduction of greenhouse gases, NO_X, and SO_2 are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of Hg, direct particulate matter (''PM''), and other co-pollutants may be significant. The energy savings from this proposal reduces electricity use and therefore reduces the need for electricity generation. To the extent that the reduced generation includes a reduction in combustion of coal, this rule will also include health benefits derived from emission reductions of mercury and particulate matter.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V.33 presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced GHG and NO_X and SO_2 emissions to the NPV of consumer benefits calculated for each TSL considered in this rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered MREFs, and are measured for the lifetime of products shipped in 2029–2058. The climate benefits associated with reduced GHG emissions resulting from the adopted standards are global benefits, and are also calculated based on the lifetime of MREFs shipped in 2029–2058.

TABLE V.33—CONSUMER NPV COMBINED WITH PRESENT MONETIZED VALUE OF CLIMATE BENEFITS AND HEALTH BENEFITS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
3% Discount rate for Consumer NPV and Health Benefits (billion 2021$)					
5% Average SC–GHG case	0.8	1.3	1.5	1.6	0.3
3% Average SC–GHG case	0.9	1.5	1.7	2.0	0.9

TABLE V.33—CONSUMER NPV COMBINED WITH PRESENT MONETIZED VALUE OF CLIMATE BENEFITS AND HEALTH BENEFITS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
2.5% Average SC–GHG case	1.0	1.6	1.9	2.2	1.3
3% 95th percentile SC–GHG case	1.2	2.1	2.3	2.9	2.5
7% Discount rate for Consumer NPV and Health Benefits (billion 2021$)					
5% Average SC–GHG case	0.3	0.5	0.6	0.5	−0.3
3% Average SC–GHG case	0.4	0.7	0.8	0.9	0.3
2.5% Average SC–GHG case	0.5	0.9	1.0	1.2	0.7
3% 95th percentile SC–GHG case	0.7	1.3	1.4	1.8	1.9

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this NOPR, DOE considered the impacts of amended standards for MREFs at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment. In addition, as discussed in section V.B.1.b of this document, DOE conducted a subgroup analysis for seniors, the results of which are comparable to all MREF consumers (see Table V.18.) DOE did not consider low-income consumers in this NOPR because MREFs are not products generally used by this subgroup, as they typically cost more than comparable compact refrigerators, which are able to maintain lower temperatures compared to MREFs, and therefore serve a wider range of applications.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information, (2) a lack of sufficient salience of the long-term or aggregate benefits, (3) a lack of sufficient savings to warrant delaying or altering purchases, (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments, (5) computational or other difficulties associated with the evaluation of relevant tradeoffs, and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher-than-expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forego the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the NOPR TSD. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[70]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[71] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for MREF Standards

Table V.34 and Table V.35 summarize the quantitative impacts estimated for each TSL for MREFs. The national impacts are measured over the lifetime

[70] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

[71] Sanstad, A.H. *Notes on the Economics of Household Energy Consumption and Technology Choice.* 2010. Lawrence Berkeley National Laboratory. *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed September 22, 2022).

of MREFs purchased in the 30-year period that begins in the anticipated year of compliance with amended standards (2029–2058). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section I.A of this document.

TABLE V.34—SUMMARY OF ANALYTICAL RESULTS FOR MISCELLANEOUS REFRIGERATION PRODUCT TSLS: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Cumulative FFC National Energy Savings					
Quads	0.10	0.19	0.21	0.31	0.54
Cumulative FFC Emissions Reduction					
CO_2 (*million metric tons*)	3.3	6.5	7.1	10.4	18.2
CH_4 (*thousand tons*)	22.0	43.9	48.0	70.3	122.7
N_2O (*thousand tons*)	0.03	0.07	0.08	0.11	0.19
NO_X (*thousand tons*)	5.0	10.0	10.9	15.9	27.9
SO_2 (*thousand tons*)	1.5	3.0	3.3	4.8	8.4
Hg (*tons*)	0.01	0.02	0.02	0.03	0.05
Present Monetized Value of Benefits and Costs (*3% discount rate, billion 2021$*)					
Consumer Operating Cost Savings	0.6	1.3	1.4	2.0	3.5
Climate Benefits*	0.1	0.3	0.3	0.5	0.8
Health Benefits**	0.3	0.5	0.6	0.8	1.4
Total Monetized Benefits†	1.0	2.1	2.3	3.3	5.8
Consumer Incremental Product Costs	0.1	0.6	0.6	1.3	4.9
Consumer Net Benefits	0.5	0.7	0.8	0.7	−1.4
Total Net Monetized Benefits	0.9	1.5	1.7	2.0	0.9
Present Monetized Value of Benefits and Costs (*7% discount rate, billion 2021$*)					
Consumer Operating Cost Savings	0.3	0.5	0.6	0.8	1.4
Climate Benefits*	0.1	0.3	0.3	0.5	0.8
Health Benefits**	0.1	0.2	0.2	0.3	0.5
Total Monetized Benefits†	0.5	1.0	1.1	1.6	2.7
Consumer Incremental Product Costs	0.1	0.3	0.3	0.7	2.5
Consumer Net Benefits	0.2	0.2	0.3	0.1	−1.0
Total Net Monetized Benefits	0.4	0.7	0.8	0.9	0.3

Note: This table presents the costs and benefits associated with consumer MREFs shipped in 2029–2058. These results include benefits to consumers which accrue after 2058 from the products shipped in 2029–2058.

*Climate benefits are calculated using four different estimates of the SC–CO_2, SC–CH_4 and SC–N_2O. Together, these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate. On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits where appropriate and permissible under law.

**Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

†Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates.

TABLE V.35—SUMMARY OF ANALYTICAL RESULTS FOR MISCELLANEOUS REFRIGERATION PRODUCTS TSLS: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
Manufacturer Impacts					
Industry NPV (*million 2021$*) (No-new-standards case INPV = $742.0)	711.3 to 714.7	695.4 to 706.2	697.3 to 706.6	652.3 to 679.4	356.7 to 458.8
Industry NPV (*% change*)	(4.1) to (3.7)	(6.3) to (4.8)	(6.0) to (4.8)	(12.1) to (8.4)	(51.9) to (38.2)
Consumer Average LCC Savings (2021$)					
FCC	17.4	17.2	17.2	12.6	−45.3

TABLE V.35—SUMMARY OF ANALYTICAL RESULTS FOR MISCELLANEOUS REFRIGERATION PRODUCTS TSLS: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5
FC	23.5	23.5	47.2	28.0	−178.8
BICC	17.2	2.9	2.9	2.9	−80.9
BIC	20.3	21.2	57.3	57.3	−197.4
C–13A	24.8	35.5	35.5	12.0	−73.4
C–13A–BI	27.6	39.6	39.6	15.3	−74.6
C–3A	31.5	31.5	31.5	31.5	−233.4
C–3A–BI	36.7	36.7	36.7	36.7	−240.7
Shipment-Weighted Average*	19.6	20.9	25.0	15.6	−74.0
Simple Payback Period (years)					
FCC	2.0	5.0	5.0	6.8	11.5
FC	5.8	5.8	3.8	8.0	22.5
BICC	2.4	7.9	7.9	7.9	13.8
BIC	6.4	8.6	4.0	4.0	23.6
C–13A	1.1	1.4	1.4	6.9	16.7
C–13A–BI	1.1	1.3	1.3	6.7	16.3
C–3A	1.7	1.7	1.7	1.7	41.9
C–3A–BI	1.6	1.6	1.6	1.6	38.7
Shipment-Weighted Average*	2.5	4.7	4.3	6.9	14.4
Percent of Consumers with Net Cost					
FCC	2.8	33.5	33.5	49.5	77.8
FC	8.8	8.8	1.6	45.5	94.5
BICC	1.0	15.3	15.3	15.3	22.7
BIC	18.7	53.4	3.6	3.6	94.3
C–13A	0.3	1.0	1.0	47.5	90.3
C–13A–BI	0.3	0.7	0.7	44.4	89.7
C–3A	0.0	0.0	0.0	0.0	99.4
C–3A–BI	0.0	0.0	0.0	0.03	98.9
Shipment-Weighted Average*	3.5	24.7	22.1	45.5	80.8

Parentheses indicate negative (-) values. The entry "N/A" means not applicable because there is no change in the standard at certain TSLs.
*Weighted by shares of each product class in total projected shipments in 2029.

DOE first considered TSL 5, which represents the max-tech efficiency levels. For coolers (*i.e.,* FCC, FC, BICC, and BIC), which account for approximately 82 percent of MREF shipments-size, DOE expects that products would require use of VIPs, VSCs, and triple-glazed doors at this TSL. DOE expects that VIPs would be used in the products' side walls. In addition, the products would use the best-available-efficiency variable-speed compressors, forced-convection heat exchangers with multi-speed brushless-DC (''BLDC'') fans, and increase in cabinet wall thickness as compared to most baseline products. TSL 5 would save an estimated 0.54 quads of energy, an amount which DOE considers significant. Under TSL 5, the NPV of consumer benefit would be negative, *i.e.,* −$1.04 billion using a discount rate of 7 percent, and −$1.36 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 18.2 Mt of CO_2, 8.4 thousand tons of SO_2, 27.9 thousand tons of NO_X, 0.05 tons of Hg, 123 thousand tons of CH_4, and 0.19 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 5 is $0.8 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 5 is $0.5 billion using a 7-percent discount rate and $1.4 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 5 is $0.3 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 5 is $0.9 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for determining whether a proposed standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At TSL 5, for the product classes with the largest market share, which are FCC, FC, and C–13A and together account for approximately 92 percent of annual shipments, the LCC savings are all negative (−$45.3, −$178.8, and −$73.4, respectively) and their payback periods are 11.5 years, 22.5, and 16.7 years, respectively, which are all longer than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net LCC cost is 77.8 percent, 94.5 percent, and 90.3 percent due to increases in first cost of $180.0, $335.6, and $73.4, respectively. Overall, a majority of MREF consumers (80.8 percent) would experience a net cost and the average LCC savings would be negative for all analyzed product classes.

At TSL 5, the projected change in INPV ranges from a decrease of $385.3 million to a decrease of $283.2 million, which corresponds to decreases of 51.9 percent and 38.2 percent, respectively. DOE estimates that industry must invest $539.0 million to comply with standards set at TSL 5.

DOE estimates that approximately 2.7 percent of current MREF shipments meet the max-tech levels. For FCC, FC,

and C–13A, which together account for approximately 92 percent of annual shipments, DOE estimates that zero shipments currently meet max-tech efficiencies.

At TSL 5, manufacturers would likely need to implement all the most efficient design options analyzed in the engineering analysis. Manufacturers that do not currently offer products that meet TSL 5 efficiencies would need to develop new product platforms, which would require significant investment. Conversion costs are driven by the need for changes to cabinet construction, such as increasing foam insulation thickness and/or incorporating VIP technology. Increasing insulation thickness would likely result in the loss of interior volume and would require redesign of the cabinet as well as the designs and tooling associated with the interior of the product, such as the liner, shelving, racks, and drawers. Incorporating VIPs into MREF designs could also require redesign of the cabinet in order to maximize the efficiency benefit of this technology. In addition to insulation changes, manufacturers may need to implement triple-pane glass, which could require implementing reinforced hinges and redesigning the door structure.

At this level, DOE expects an estimated 20-percent drop in shipments in the year the standard takes effect, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

The Secretary tentatively concludes that at TSL 5 for MREFs, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on many consumers, and the impacts on manufacturers, including the significant potential reduction in INPV. A majority of MREF consumers (80.8 percent) would experience a net cost and the average LCC savings would be negative. Additionally, manufacturers would need to make significant upfront investments to update product platforms. The potential reduction in INPV could be as high as 51.9 percent. Consequently, the Secretary has tentatively concluded that TSL 5 is not economically justified.

DOE then considered TSL 4, which represents EL 3 for all analyzed product classes except for C–3A and C–3A–BI, for which this TSL corresponds to EL 1 and BIC, for which this TSL corresponds to EL 2. At TSL 4, products of most classes would use high-efficiency single-speed compressors with forced-convection evaporators and condensers using brushless DC fan motors. Doors would be double-glazed with low-conductivity gas fill (*e.g.,* argon) and a single low-emissivity glass layer. Products would not require use of VIPs, but the FC product class would require thicker walls than corresponding baseline products. TSL 4 would save an estimated 0.31 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be $0.14 billion using a discount rate of 7 percent, and $0.69 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 10.4 Mt of CO_2, 4.8 thousand tons of SO_2, 15.9 thousand tons of NO_X, 0.03 tons of Hg, 70.3 thousand tons of CH_4, and 0.11 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 4 is $0.5 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 4 is $0.3 billion using a 7-percent discount rate and $0.8 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 4 is $0.9 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 4 is $2.0 billion. The estimated total monetized NPV is provided for additional information, however, consistent with the statutory factors and framework for determining whether a proposed standard level is economically justified, DOE considers a range of quantitative and qualitative benefits and burdens, including the costs and cost savings for consumers, impacts to consumer subgroups, energy savings, emission reductions, and impacts on manufacturers.

At TSL 4, for the product classes with the largest market share, which are FCC, FC, and C–13A, the LCC savings are $12.6, $28.0, and $12.0, respectively, and their payback periods are 6.8 years, 8.0, and 6.9 years, respectively, which are all shorter than their corresponding average lifetimes. For these product classes, the fraction of consumers experiencing a net LCC cost is 49.5 percent, 45.5 percent, and 47.5 percent, and increases in first cost for these classes are $52.9, $96.0, and $44.3, respectively. Overall, the LCC savings would be positive for all MREF product classes, and more than half of MREF consumers would experience a net benefit (51 percent).

At TSL 4, the projected change in INPV ranges from a decrease of $89.8 million to a decrease of $62.7 million, which correspond to decreases of 12.1 percent and 8.4 percent, respectively. DOE estimates that industry must invest $126.9 million to comply with standards set at TSL 4.

DOE estimates that approximately 3.4 percent of shipments currently meet the required efficiencies at TSL 4 as at max-tech. For most product classes (*i.e.,* FCC, BICC, BIC, C–13A, C–13A–BI, C–3A, C–3A–BI), DOE expects manufacturers could reach the required efficiencies with relatively straightforward component swaps, such as implementing incrementally more efficient compressors, rather than the full platform redesigns required at max-tech. DOE expects that FC manufacturers would need to increase foam insulation thickness and incorporate variable-speed compressor systems at this level. At TSL 4, DOE expects an estimated 10-percent drop in shipments in the year the standard takes effect, as some consumers may forgo purchasing a new MREF due to the increased upfront cost of baseline models.

After considering the analysis and weighing the benefits and burdens, the Secretary has tentatively concluded that at a standard set at TSL 4 for MREFs would be economically justified. At this TSL, the average LCC savings are positive for all product classes for which an amended standard is considered, with a shipment-weighted average of $15.60 in consumer savings.

The FFC national energy savings are significant and the NPV of consumer benefits is positive (and represents the maximum value) using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers outweigh the cost to manufacturers. At TSL 4, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent is over 1.5 times higher than the maximum estimated manufacturers' loss in INPV. The standard levels at TSL 4 are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $0.5 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.8 billion (using a 3-percent discount rate) or $0.3 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to the statute. 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the proposed energy conservation standards, DOE notes that TSL 4 represents the option with positive LCC savings ($15.6) for all product classes compared to TSL 5 ($ − 74.0). Further, when comparing the cumulative NPV of consumer benefit using a 7% discount rate, TSL 4 ($0.14 billion) has a higher benefit value than TSL 5 (− $1.04 billion), while for a 3% discount rate, TSL 4 ($0.69 billion) is also higher than TSL 5 (− 1.36 billion), which yields negative NPV in both cases. These additional savings and benefits at TSL 4 are significant. DOE considers the impacts to be, as a whole, economically justified at TSL 4.

Although DOE considered proposed amended standard levels for MREFs by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. For all product classes, the proposed standard level represents the maximum energy savings that does not result in negative LCC savings. The ELs at the proposed standard level result in positive LCC savings for all product classes, and reduce the decrease in INPV and conversion costs to the point where DOE has tentatively concluded they are economically justified, as discussed for TSL 4 in the preceding paragraphs.

Therefore, based on the previous considerations, DOE proposes to adopt the energy conservation standards for MREFs at TSL 4. The proposed amended energy conservation standards for MREFs, which are expressed in kWh/yr, are shown in Table V.36.

TABLE V.36—PROPOSED AMENDED ENERGY CONSERVATION STANDARDS FOR MREF

Product class	Equations for maximum energy use (kWh/yr)
1. Freestanding compact coolers (“FCC”)	5.52AV + 109.1
2. Freestanding coolers (“FC”)	5.52AV + 109.1
3. Built-in compact coolers (“BICC”)	5.52AV + 109.1
4. Built-in coolers (“BIC”)	6.30AV + 124.6
C–3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
C–5–BI. Built-in cooler with refrigerator-freezer—automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C–13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5

AV = Total adjusted volume, expressed in ft^3, as determined in appendix A to subpart B of 10 CFR part 430.
I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

2. Annualized Benefits and Costs of the Proposed Standards

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2021$) of the benefits from operating products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits from emission reductions.

Table V.37 shows the annualized values for MREFs under TSL 4, expressed in 2021$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NOx and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the proposed standards for MREFs is $81.2 million per year in increased equipment costs, while the estimated annual benefits are $97.6 million from reduced equipment operating costs, $28.9 million from GHG reductions, and $35.4 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $80.6 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards for MREFs is $81.0 million per year in increased equipment costs, while the estimated annual benefits are $123.1 million in reduced operating costs, $28.9 million from GHG reductions, and $49.5 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $120.4 million per year.

TABLE V.37—ANNUALIZED MONETIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR MREFS (TSL 4)

[Million 2021$/year]

	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
3% discount rate			
Consumer Operating Cost Savings	123.1	116.3	131.2
Climate Benefits *	28.9	28.1	29.6
Health Benefits **	49.5	48.2	50.8
Total Monetized Benefits †	201.4	192.6	211.6
Consumer Incremental Product Costs ‡	81.0	82.3	79.4

TABLE V.37—ANNUALIZED MONETIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR MREFS (TSL 4)—Continued

[Million 2021$/year]

	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
Net Monetized Benefits	120.4	110.3	132.2
7% discount rate			
Consumer Operating Cost Savings	97.6	92.7	103.3
Climate Benefits* (3% discount rate)	28.9	28.1	29.6
Health Benefits**	35.4	34.6	36.2
Total Monetized Benefits†	161.9	155.4	169.2
Consumer Incremental Product Costs	81.2	82.4	79.8
Net Monetized Benefits	80.6	72.9	89.4

Note: This table presents the costs and benefits associated with refrigerators, refrigerator-freezers, and freezers shipped in 2029–2058. These results include benefits to consumers which accrue after 2056 from the products shipped in 2029–2058. The Primary, Low-Net-Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2022* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a medium decline rate in the Primary Estimate, a low decline rate in the Low-Net-Benefits Estimate, and a high decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.H.3 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates. On March 16, 2022, the Fifth Circuit Court of Appeals (No. 22–30087) granted the Federal government's emergency motion for stay pending appeal of the February 11, 2022, preliminary injunction issued in *Louisiana* v. *Biden,* No. 21–cv–1074–JDC–KK (W.D. La.). As a result of the Fifth Circuit's order, the preliminary injunction is no longer in effect, pending resolution of the Federal government's appeal of that injunction or a further court order. Among other things, the preliminary injunction enjoined the defendants in that case from ''adopting, employing, treating as binding, or relying upon'' the interim estimates of the social cost of greenhouse gases—which were issued by the Interagency Working Group on the Social Cost of Greenhouse Gases on February 26, 2021—to monetize the benefits of reducing greenhouse gas emissions. As reflected in this rule, DOE has reverted to its approach prior to the injunction and presents monetized GHG abatement benefits where appropriate and permissible under law.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate.

D. Reporting, Certification, and Sampling Plan

Manufacturers, including importers, must use product-specific certification templates to certify compliance to DOE. For MREFs, the certification template reflects the general certification requirements specified at 10 CFR 429.12 and the product-specific requirements specified at 10 CFR 429.14. As discussed in the previous paragraphs, DOE is not proposing to amend the product-specific certification requirements for these products.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' 58 FR 51734 (Oct. 4, 1993) as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (January 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed/final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action constitutes a ''significant regulatory action within the scope of section 3(f)(1)'' of E.O. 12866. Accordingly, pursuant to section 6(a)(3)(C) of E.O. 12866, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the proposed regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable

to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the TSD for this rulemaking.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*). DOE has prepared the following IRFA for the products that are the subject of this proposed rulemaking.

For manufacturers of miscellaneous refrigeration products (''MREFs''), the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. (See 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support--table-size-standards.* The manufacturing of the products covered in this rulemaking are classified under NAICS code 335220: ''Major Household Appliance Manufacturing'' or NAICS code 333415: ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer and 1,250 employees or fewer for an entity to be considered as a small business for NAICS codes 335220 and 333415, respectively. DOE used the higher threshold of 1,500 employees to identify small business manufacturers.

1. Description of Reasons Why Action Is Being Considered

DOE is proposing amended energy conservation standards for MREFs. EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016. 81 FR 46768. EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) This rulemaking is in accordance with DOE's obligations under EPCA.

2. Objectives of, and Legal Basis for, Rule

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles which, in addition to identifying particular consumer products and commercial equipment as covered under the statute, permits the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) DOE added MREFs as covered products through a final determination of coverage published in the **Federal Register** on July 18, 2016. 81 FR 46768. MREFs are consumer refrigeration products other than refrigerators, refrigerator-freezers, or freezers, which include coolers and combination cooler refrigeration products. 10 CFR 430.2. MREFs include refrigeration products such as coolers (*e.g.,* wine chillers and other specialty products) and combination cooler refrigeration products (*e.g.,* wine chillers and other specialty compartments combined with a refrigerator, refrigerator-freezers, or freezers).

EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) Not later than three years after issuance of a final determination not to amend standards, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B))

3. Description on Estimated Number of Small Entities Regulated

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. 68 FR 7990. DOE conducted a market survey to identify potential small manufacturers of MREFs. DOE began its assessment by reviewing DOE's CCD,[72] California Energy Commission's Modernized Appliance Efficiency Database System (''MAEDbS''),[73] individual company websites, and prior MREF rulemakings to identify manufacturers of the covered product. DOE then consulted publicly available data, such as manufacturer websites, manufacturer specifications and product literature, import/export logs (*e.g.,* bills of lading from Panjiva,[74]) and basic model numbers, to identify original equipment manufacturers (''OEMs'') of covered MREFs. DOE further relied on public data and subscription-based market research tools (*e.g.,* Dun & Bradstreet reports)[75] to determine company, location, headcount, and annual revenue. DOE also asked industry representatives if they were aware of any small manufacturers during manufacturer interviews. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the SBA's definition of a ''small business,'' or are foreign-owned and operated.

DOE initially identified 38 OEMs that sell MREFs in the United States. Of the 38 OEMs identified, DOE tentatively

[72] U.S. Department of Energy's Compliance Certification Database is available at: *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A** (Last accessed May 2, 2022).

[73] California Energy Commission's Modernized Appliance Efficiency Database System is available at: *cacertappliances.energy.ca.gov/Pages/ApplianceSearch.aspx* (Last accessed May 2, 2022).

[74] S&P Global. Panjiva Market Intelligence is available at: *panjiva.com/import-export/United-States* (Last accessed May 5, 2022).

[75] D&B Hoovers | Company Information | Industry Information | Lists, *app.dnbhoovers.com/* (Last accessed May 5, 2022).

determined that two companies qualify as small businesses and are not foreign-owned and operated.

DOE reached out to both small businesses and invited them to participate in voluntary interviews. Neither of the small business consented to participate in formal MIA interviews. DOE also requested information about small businesses and potential impacts on small businesses while interviewing larger manufacturers.

4. Description and Estimate of Compliance Requirements Including Differences in Cost, if Any, for Different Groups of Small Entities

One of the small businesses identified has 14 MREF models certified in DOE's CCD. Of those 14 models, nine models are FCC, two are BIC, and three are C–13A combination coolers. None of the nine FCC models meet the TSL 4 efficiencies. Of the two BIC, one meets the efficiencies required at TSL 3. However, the two models have identical dimensions and share many components. Given the product similarities and low volume of sales, DOE expects the manufacturer would likely discontinue the non-compliant model. None of the three C–13A models meet the TSL 4 efficiencies. To meet the required efficiencies for their FCC models, DOE expects the manufacturer would likely need to incorporate incrementally more efficient compressors, along with other design options. DOE expects these updates to be relatively straight forward component swaps. Some product conversion costs would be necessary for sourcing, qualifying, and testing more efficient components. To meet the efficiencies required for their C–13A models, DOE expects the manufacturer would likely need to implement variable-speed compressors, along with other design options. Implementing variable-speed compressors could require more advanced controls and electronics and new test stations. DOE estimated conversion costs for this small manufacturer by using product platform estimates to scale-down the industry conversion costs. DOE estimates that the small would incur minimal capital conversion costs and product conversion costs of approximately $1.37 million related to sourcing and testing more efficient components and variable-speed compressors to meet proposed amended standards. Based on subscription-based market research reports, the small business has an annual revenue of approximately $85 million. The total conversion costs of $1.37 are approximately 0.3 percent of company revenue over the 5-year conversion period.

Based on a review of publicly available information, the other small business primarily sources their MREF products from Asian-based OEMs. However, DOE has tentatively determined that they make some MREF products in-house at a domestic manufacturing facility. DOE identified one FCC model certified in CCD. To meet the required efficiencies, DOE expects the manufacturer would likely need to incorporate incrementally more efficient compressors, along with other design options. As previously discussed, DOE expects these updates to be relatively straight forward component swaps. DOE estimated conversion costs for this small manufacturer by using product platform estimates to scale-down the industry conversion costs. DOE estimates that the small manufacturer would incur minimal capital conversion costs and approximately $420,000 in product conversion costs related to sourcing and testing more efficient components to meet proposed amended standards. Based on subscription-based market research reports, the small business has an annual revenue of approximately $200 million. The total conversion costs of approximately $420,000 are less than 1 percent of the estimated company revenue over the 5-year conversion period.

DOE seeks comments, information, and data on the number of small businesses in the industry, the names of those small businesses, and their market shares by product class. DOE also requests comment on the potential impacts of the proposed standards on small manufacturers.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the proposed rule.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from DOE's proposed rule, represented by TSL 4. In reviewing alternatives to the proposed rule, DOE examined energy conservation standards set at lower efficiency levels. While TSL 1, TSL 2, and TSL 3 would reduce the impacts on small business manufacturers, it would come at the expense of a reduction in energy savings. TSL 1 achieves 69 percent lower energy savings compared to the energy savings at TSL 4. TSL 2 achieves 37 percent lower energy savings compared to the energy savings at TSL 4. TSL 3 achieves 31 percent lower energy savings compared to the energy savings at TSL 4.

Based on the presented discussion, establishing standards at TSL 4 balances the benefits of the energy savings at TSL 4 with the potential burdens placed on MREF manufacturers, including small business manufacturers. Accordingly, DOE does not propose one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the NOPR TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act

Manufacturers of miscellaneous refrigeration products must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for miscellaneous refrigeration products, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including miscellaneous refrigeration products. (*See generally* 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act of 1969 (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings that establish energy conservation standards for consumer products or industrial equipment. 10 CFR part 1021, subpart D, appendix B5.1. DOE anticipates that this rulemaking qualifies for categorical exclusion B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in categorical exclusion B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the miscellaneous refrigeration products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. 104–4, section 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

Although this proposed rule does not contain a Federal intergovernmental mandate, it may require expenditures of $100 million or more in any one year by the private sector. Such expenditures may include: (1) investment in research and development and in capital expenditures by miscellaneous refrigeration product manufacturers in the years between the final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency miscellaneous refrigeration products, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of this NOPR and the TSD for this proposed rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the proposed rule unless DOE publishes an explanation for doing otherwise, or the selection of such an

alternative is inconsistent with law. As required by 42 U.S.C. 6295(m) this proposed rule would establish amended energy conservation standards for miscellaneous refrigeration products that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 6295(o)(2)(A) and 6295(o)(3)(B). A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for this proposed rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (Mar. 15, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this NOPR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that this regulatory action, which proposes amended energy conservation standards for miscellaneous refrigeration products, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this proposed rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared a report describing that peer review.[76] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. DOE is in the process of evaluating the resulting report.[77]

VII. Public Participation

A. Attendance at the Public Meeting Webinar

The time and date of the webinar meeting are listed in the **DATES** section at the beginning of this document. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website at *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=39.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address

[76] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed August 30, 2022).

[77] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards* (Last accessed September 22, 2022)

shown in the **ADDRESSES** section at the beginning of this document. The request and advance copy of statements must be received at least one week before the public meeting and are to be emailed. Please include a telephone number to enable DOE staff to make follow-up contact, if needed.

C. Conduct of the Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA. (42 U.S.C. 6306) A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. antitrust laws. After the public meeting, interested parties may submit further comments on the proceedings, as well as on any aspect of the rulemaking, until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will allow, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the previous procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this document and will be accessible on the DOE website. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via *www.regulations.gov.* The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (''faxes'') will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on its proposal to amended refrigerator and freezer definitions to clarify that products that would otherwise be considered a refrigerator or a freezer that also include a cooler compartment would be considered a refrigerator or a freezer, unless a miscellaneous refrigeration product energy conservation standard is applicable for the product.

(2) DOE invites comment from the public regarding the competitive impacts that are likely to result from this proposed rule.

(3) DOE requests comments on its proposal to consolidate the presentation of maximum allowable energy use for products of classes that may or may not have an automatic icemaker.

(4) DOE requests comment on its proposal to establish energy conservation standards for combination cooler 5–BI using the analysis for combination class 3A as proxy for setting the standard level, based on a baseline efficiency equal to 6.08AV + 218 +28*I kWh/yr, where I is equal to 0 if the model has no automatic icemaker and equal to 1 if it does.

(5) DOE seeks further comment on any of the technologies screened out in this NOPR analysis as they were determined to not meet the screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, safety, or use of unique-pathway proprietary technologies). DOE also seeks comment on those technologies retained for further consideration in the engineering analysis, based on the determination that they are technologically feasible and also meet the other screening criteria.

(6) DOE requests any further input from commenters regarding the approach for design option selection and implementation for a given model, beyond the information DOE has already considered.

(7) DOE seeks comment on the range of VSC nominal efficiencies and the relative overall efficiency gains offered by VSCs when operating at reduced compressor speeds along with reduced fan speeds in MREF products.

(8) In interviews, manufacturers noted that the majority of MREFs—namely freestanding compact coolers—are manufactured in Asia and rebranded by home appliance manufacturers. Manufacturers had few concerns about manufacturing constraints below the max-tech level and the implementation of VIPs. However, at max-tech, some manufacturers expressed technical uncertainty about industry's ability to meet the efficiencies required as few OEMs offer products at max-tech today. For example, DOE is not aware of any OEMs that currently offer freestanding compact coolers that meet TSL 5 efficiencies. DOE's shipments analysis estimates that except for built-in compact coolers, which only accounts for 4 percent of MREF shipments, no shipments of other product classes meet the max-tech efficiencies.

(9) DOE seeks comment on whether manufacturers expect manufacturing capacity constraints would limit product availability to consumers in the timeframe of the amended standard compliance date (2029).

(10) DOE requests information regarding the impact of cumulative regulatory burden on manufacturers of MREFs associated with multiple DOE standards or product-specific regulatory actions of other Federal agencies.

(11) DOE requests comment on the assumption used in developing the dealer/retailer markups and welcomes any feedback on the overall markup in the wholesaler channel.

(12) DOE requests comment on its methodology to develop market share distributions by adjusted volume in the compliance year for each product class with two representative volumes, as well as data to further inform these distributions.

(13) DOE requests comment and data on its price learning methodology used to project MREF prices in the future.

(14) DOE requests comment on its methodology to develop market share distributions by efficiency level for each product class for the no-new-standards case in the compliance year, as well as data to further inform these distributions.

(15) DOE requests comment and data on the assumptions and methodology used to calculate MREF survival probabilities.

(16) DOE requests comment and data on its efficiency distribution assumptions and projection into future years. Specifically, DOE is requesting comment and data on the efficiency distribution of non-AHAM members, to more accurately derive the efficiency distribution for the whole MREF market.

(17) DOE requests comment on the overall methodology and results of the LCC and PBP analyses.

(18) DOE requests comment on the overall methodology and results of the shipments analysis. More specifically, DOE seeks comment and data related to the total MREF shipments, market saturation, MREF shipments by product class, and non-AHAM-member shipments.

(19) DOE requests comment on the assumption that the current efficiency distribution would remain fixed over the analysis period, and data to inform an efficiency trend by product class or overall for the MREF market.

(20) DOE requests comment on the overall methodology and results of the consumer subgroup analysis.

(21) DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

Additionally, DOE welcomes comments on other issues relevant to the conduct of this rulemaking that may not specifically be identified in this document.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and announcement of public meeting.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on March 10, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters

the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 13, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.2 is amended by revising the definitions of ''Freezer'' and ''Refrigerator'' to read as follows:

§ 430.2 Definitions.

* * * * *

Freezer means a cabinet, used with one or more doors, that has a source of refrigeration that requires single-phase, alternating current electric energy input only and consists of one or more compartments where at least one of the compartments is capable of maintaining compartment temperatures of 0 °F (−17.8 °C) or below as determined according to the provisions in § 429.14(d)(2) of this chapter. It does not include any refrigerated cabinet that consists solely of an automatic ice maker and an ice storage bin arranged so that operation of the automatic icemaker fills the bin to its capacity. However, the term does not include:

(1) Any product that does not include a compressor and condenser unit as an integral part of the cabinet assembly; or

(2) Any miscellaneous refrigeration product that must comply with an applicable miscellaneous refrigeration product energy conservation standard.

* * * * *

Refrigerator means a cabinet, used with one or more doors, that has a source of refrigeration that requires single-phase, alternating current electric energy input only and consists of one or more compartments where at least one of the compartments is capable of maintaining compartment temperatures above 32 °F (0 °C) and below 39 °F (3.9 °C) as determined according to § 429.14(d)(2) of this chapter. A refrigerator may include a compartment capable of maintaining compartment temperatures below 32 °F (0 °C), but does not provide a separate low temperature compartment capable of maintaining compartment temperatures below 8 °F (−13.3 °C) as determined according to § 429.14(d)(2). However, the term does not include:

(1) Any product that does not include a compressor and condenser unit as an integral part of the cabinet assembly;

(2) A cooler; or

(3) Any miscellaneous refrigeration product that must comply with an applicable miscellaneous refrigeration product energy conservation standard.

* * * * *

■ 3. Appendix A to subpart B of part 430 is amended by:

■ a. Revising section 5.3(a)(ii); and

■ b. Adding section 5.4.

The revision and addition read as follows.

Appendix A to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Refrigerators, Refrigerator-Freezers, and Miscellaneous Refrigeration Products

* * * * *

5.3 * * *

(a) * * *

(ii) For miscellaneous refrigeration products: To demonstrate compliance with the energy conservation standards at 10 CFR 430.32(aa) applicable to products manufactured on or after October 28, 2019, but before the compliance date of any amended standards published after January 1, 2022, IET, expressed in kilowatt-hours per cycle, equals 0.23 for a product with one or more automatic icemakers and otherwise equals 0 (zero). To demonstrate compliance with any amended standards published after January 1, 2022, IET, expressed in kilowatt-hours per cycle, is as defined section 5.9.2.1 of HRF–1–2019.

* * * * *

5.4 Test Cycle Energy Calculations for Cooler-Freezers

For cooler-freezers, determine the average per-cycle energy consumption consistent with section 5.9.3 of HRF–1–2019. If both compartments are at or colder than their standardized temperatures for both tests, use the equation in section 5.9.3.1. Otherwise, use the approach and equations in section 5.9.3.2, where applicable, the ''k'' value shall be 0.0.

■ 4. Appendix B to subpart B of part 430 is amended by:

■ a. Adding new paragraph (c) in section 5.2;

■ b. Adding new paragraph (d) in section 5.3; and

■ c. Adding section 5.4.

The additions read as follows.

Appendix B to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Freezers

* * * * *

5.2 * * *

(c) When testing freezers with a cooler compartment, refer to section 5.2 of appendix A.

* * * * *

5.3 * * *

(d) Freezers with a cooler compartment: the applicable ''K'' value in section 5.8.2 of HRF–1–2019 shall be equal to either 0.7 or 0.85 as determined by the product's freezer configuration.

5.4 Test Cycle Energy Calculations for Freezer With a Cooler Compartment

Refer to section 5.4 of appendix A.

* * * * *

■ 5. Amend § 430.32 by revising paragraph (aa) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(aa) *Miscellaneous refrigeration products.* The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

(1) The following standards remain in effect from October 28, 2019 until [*date 5 years after the publication of the final rule*].

Product class	AEU (kWh/yr)
1. Freestanding compact	7.88AV + 155.8
2. Freestanding	7.88AV + 155.8
3. Built-in compact	7.88AV + 155.8
4. Built-in	7.88AV + 155.8

AV = Total adjusted volume, expressed in ft3, as determined in appendix A to subpart B of 10 CFR part 430.

The following standards apply to products manufacturer starting on [*date 5 years after the publication of the final rule*].

Product class	AEU (kWh/yr)
1. Freestanding compact	5.52AV + 109.1
2. Freestanding	5.52AV + 109.1
3. Built-in compact	5.52AV + 109.1
4. Built-in	6.30AV + 124.6

AV = Total adjusted volume, expressed in ft3, as determined in appendix A to subpart B of 10 CFR part 430.

(2) The following standards remain in effect from October 28, 2019 until [*date 5 years after the publication of the final rule*].

Product class	AEU (kWh/yr)
C–3A. Cooler with all-refrigerator—automatic defrost	4.57AV + 130.4
C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	5.19AV + 147.8
C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7
C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8
C–9I. Cooler with upright freezer with automatic defrost with an automatic icemaker	5.58AV + 231.7
C–9I–BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker	6.38AV + 252.8
C–13A. Compact cooler with all-refrigerator—automatic defrost	5.93AV + 193.7
C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	6.52AV + 213.1

AV = Total adjusted volume, expressed in ft3, as determined in appendix A to subpart B of 10 CFR part 430.

The following standards apply to products manufacturer starting on [*date 5 years after the publication of the final rule*].

Product class	AEU (kWh/yr)
C–3A. Cooler with all-refrigerator—automatic defrost	4.11AV + 117.4
C–3A–BI. Built-in cooler with all-refrigerator—automatic defrost	4.67AV + 133.0
C–5–BI. Built-in cooler with refrigerator-freezer with automatic defrost with bottom-mounted freezer	5.47AV + 196.2 + 28I
C–9. Cooler with upright freezer with automatic defrost without an automatic icemaker	5.58AV + 147.7 + 28I
C–9–BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	6.38AV + 168.8 + 28I
C–13A. Compact cooler with all-refrigerator—automatic defrost	4.74AV + 155.0
C–13A–BI. Built-in compact cooler with all-refrigerator—automatic defrost	5.22AV + 170.5

AV = Total adjusted volume, expressed in ft3, as determined in appendix A to subpart B of 10 CFR part 430. I = 1 for a product with an automatic icemaker and = 0 for a product without an automatic icemaker.

[FR Doc. 2023–05363 Filed 3–30–23; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL REGISTER

Vol. 88 Friday,

No. 62 March 31, 2023

Part III

Department of Housing and Urban Development

24 CFR Part 100

Reinstatement of HUD's Discriminatory Effects Standard; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–6251–F–02]

RIN 2529–AB02

Reinstatement of HUD's Discriminatory Effects Standard

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development (HUD).

ACTION: Final rule.

SUMMARY: The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities. This prohibition extends to practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate. In 2013, HUD published a rule which formalized a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect. In 2020, HUD published a rule that would have altered the standards set forth in the 2013 rule. However, a preliminary injunction prevented the 2020 rule from ever going into effect. On June 25, 2021, HUD published a proposed rule to recodify the 2013 rule. After considering public comments, HUD in this final rule reinstates and maintains the 2013 rule and rescinds the 2020 rule.

DATES: *Effective:* May 1, 2023.

FOR FURTHER INFORMATION CONTACT: Jeanine Worden, Associate General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410–0500, or telephone number 202–402–3330 (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.*

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Housing Act and Its Goals

Title VIII of the Civil Rights Act of 1968, as amended (''Fair Housing Act'' or ''Act''), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities because of race, color, religion, sex (including sexual orientation and gender identity), disability, familial status, or national origin.[1] Through the Act, Congress expressed its intent to eradicate discrimination and proclaimed that ''[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.'' [2] The Act's protections are meant to be ''broad and inclusive.'' [3] Congress passed the Act in the wake of the assassination of Dr. Martin Luther King, Jr., recognizing that ''residential segregation and unequal housing and economic conditions in the inner cities'' were ''significant, underlying causes of the social unrest'' [4] and that both open and covert race discrimination were preventing integrated communities.[5] As the Supreme Court reiterated more recently, the Act's expansive purpose is to ''eradicate discriminatory practices within a sector of the Nation's economy'' and to combat and prevent segregation and discrimination in housing.[6] Congress considered the realization of this policy ''to be of the highest priority.'' [7]

The Act gives HUD the authority and responsibility for administering and enforcing the Act, including the authority to conduct formal adjudications of complaints and to promulgate rules to interpret and carry out the Act.[8] Through that authority, HUD promulgates this rule.

Discriminatory Effects Law Under the Fair Housing Act Prior to HUD's 2013 Rule

HUD's 2013 rule, titled ''Implementation of the Fair Housing Act's Discriminatory Effects Standard'' (''2013 Rule''), broke no new ground, but instead largely codified longstanding judicial and agency consensus regarding discriminatory effects law. Courts had long found that discrimination under the Act may be established through evidence of discriminatory effects, *i.e.,* facially neutral practices with an unjustified discriminatory effect. Indeed, before HUD's issuance of the 2013 Rule, all federal courts of appeals to have addressed the question had held that liability under the Act could be established by a showing that a neutral policy or practice either has a disparate impact on a protected group or creates, perpetuates, or increases segregation, even if such a policy or practice was not adopted for a discriminatory purpose.[9] As the Sixth Circuit explained, the Act ''proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'' [10]

Consistent with this judicial consensus, HUD has for decades concluded that facially neutral practices that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent, violate the Act.[11] For example, in 1994, HUD, along with nine other agencies and the Department of Justice, issued a

[1] 42 U.S.C. 3601–3619, 3631. This preamble uses the term ''disability'' to refer to what the Act and its implementing regulations term a ''handicap.'' *See, e.g., Hunt* v. *Aimco Props., L.P.,* 814 F.3d 1213, n.1 (11th Cir. 2016) (noting the term disability is generally preferred over handicap).

[2] 42 U.S.C. 3601.

[3] *Trafficante* v. *Metro. Life Ins. Co.,* 409 U.S. 205, 209 (1972).

[4] *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 529 (2015) (citing Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report).

[5] *Id.* at 529 (citing Kerner Commission Report).

[6] *Id.* at 539.

[7] *Trafficante,* 409 U.S. at 211 (1972).

[8] *See* 42 U.S.C. 3608(a), 3612, 3614a. The Supreme Court has recognized HUD's rulemaking authority in the specific context of this rule. *See Inclusive Cmtys. Project,* 576 U.S. at 527–28, 542; *see also id.* at 566–67 (Alito, J., dissenting) (''Congress also gave [HUD] rulemaking authority and the power to adjudicate certain housing claims'').

[9] *See, e.g., Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n,* 508 F.3d 366, 378 (6th Cir. 2007) (citing *Arthur* v. *City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986)); Hallmark Developers, Inc.* v. *Fulton Cnty.,* 466 F.3d 1276, 1286 (11th Cir. 2006) (citing *Hous. Investors, Inc.* v. *City of Clanton, Ala.,* 68 F. Supp. 2d 1287, 1298 (M.D. Ala. 1999)); *Huntington Branch, NAACP* v. *Town of Huntington,* 844 F.2d 926, 937 (2nd Cir. 1988) (citing *Metro Hous. Dev. Corp.* v. *Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977), *aff'd,* 488 U.S. 15 (1988) *(per curium); Betsey* v. *Turtle Creek Assocs.,* 736 F.2d 983, 987 n.3 (4th Cir. 1984) (citing *Metro Hous. Dev. Corp* v. *Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977)); *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977) (citing *Trafficante* v. *Metro. Life Ins. Co.,* 409 U.S. 205, 209–10 (1972)); *United States.* v. *City of Black Jack,* 508 F. 2d 1179, 1184–86 (8th Cir. 1974).

[10] *Graoch Assocs. #33, L.P., 508 F.3d* at 374 (quoting *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971) (a Title VII case)).

[11] 78 FR 11460, 11461 (Feb. 15, 2013) (*citing, e.g., HUD* v. *Twinbrook Vill.Apts.,* HUDALJ Nos. 02–00–0256–8, 02–00–0257–8, 02–00–0258–8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) (''A violation of the [Act] may be premised on a theory of disparate impact.''); *HUD* v. *Carlson,* No. 08–91–0077–1, 1995 WL 365009 (HUD ALJ June 12, 1995) (''A policy or practice that is neutral on its face may be found to be violative of the Act if the record establishes a prima facie case that the policy or practice has a disparate impact on members of a protected class, and the Respondent cannot prove that the policy is justified by business necessity.''); *HUD* v. *Ross,* No. 01–92–0466–18, 1994 WL 326437, at *5 (HUD ALJ July 7, 1994) (''Absent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act.''); *HUD* v. *Carter,* No. 03–90–0058–1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) (''The application of the discriminatory effects standard in cases under the Fair Housing Act is well established.'').

joint policy statement that recognized disparate impact liability under the Act.[12] Although there had been some minor variation in the application of the discriminatory effects framework prior to the 2013 Rule, HUD and the federal appellate courts were largely in agreement. HUD has always used a three-step burden-shifting approach,[13] as did many federal courts of appeals prior to the 2013 Rule.[14]

HUD's 2013 Discriminatory Effects Rule

In February 2013, after notice and public comment, and considering decades of case law, HUD published the 2013 Final Rule.[15] The 2013 Rule ''formalize[d] [HUD's] long-held recognition of discriminatory effects liability under the Act and, for purposes of providing consistency nationwide, formalize[d] a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act.'' [16] In promulgating the 2013 Rule, HUD noted the Act's ''broad remedial intent;'' [17] HUD's prior positions, including that discriminatory effects liability was ''imperative to the success of civil rights law enforcement;'' [18] and the consistent application of discriminatory effects liability in the four previous decades (with minor variations) by HUD, the Department of Justice, nine other federal agencies, and federal courts.[19]

Among other things, the 2013 Rule codified a three-part burden-shifting framework consistent with frameworks on which HUD and courts had long relied: (1) The plaintiff or charging party is first required to prove as part of the prima facie showing that a challenged practice caused or predictably will cause a discriminatory effect; (2) if the plaintiff or charging party makes this prima facie showing, the defendant or respondent must then prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent; and (3) if the defendant or respondent meets its burden at step two, the plaintiff or charging party may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[20]

The 2015 Inclusive Communities Supreme Court Decision

In 2015, the Supreme Court confirmed that the Act provides for discriminatory effects liability in *Texas Department of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*[21] The State of Texas presented two questions to the Court (1) Whether disparate-impact claims are cognizable under the Act, and (2) if they are, what standards and burdens of proof should apply,[22] but the Court declined to consider the second question.[23] On the first question, the Court found that disparate-impact claims are cognizable, concluding that Congress's use of the phrase ''otherwise make unavailable'' in Section 804(a) of the Act and the term ''discriminate'' in Section 805(a) are each parallel to language that the Court had previously held to provide for discriminatory effects liability under other civil rights statutes.[24]

In reaching this holding, the Court explained that from its first decision to recognize disparate impact liability, in *Griggs* v. *Duke Power Co.,* it ''put important limits'' on the scope of liability.[25] For example, with respect to employment discrimination claims under Title VII of the Civil Rights Act of 1964, *Griggs* explained that an employer can justify a practice that has a disparate impact with a ''business necessity'' defense, such that Title VII ''does not prohibit hiring criteria with a 'manifest relationship' to job performance.'' [26] Similarly, after holding that the Act provided for disparate impact liability, the *Inclusive Communities* Court noted that, under the Act, ''disparate-impact liability has always been properly limited in key respects . . .'' [27] Quoting *Griggs,* the Court explained that it has always been true that disparate impact liability under the Act ''mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies.'' [28]

The Court then sketched out some of these long-standing limitations on the scope of disparate-impact liability, including: (1) The requirement that ''housing authorities and private developers [have] leeway to state and explain the valid interest served by their policies . . . analogous to the business necessity standard under Title VII;'' and (2) the requirement that a ''claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.'' [29]

HUD's 2016 Notice: Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance

In 2016, HUD published a document (''2016 Notice'') supplementing its response to certain comments concerning homeowners' insurance received during rulemaking for the 2013 Rule in accordance with the district court's decision in *Property Casualty Insurers Association of America (PCIAA)* v. *Donovan.*[30] In that Notice, HUD stated, among other things, that ''[a]fter careful reconsideration of the insurance industry comments in accordance with the court's decision . . . HUD has determined that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with the broad fair

[12] 78 FR 11460, 11461 (citing 1994 Joint Policy Statement on Discrimination in Lending, 59 FR 18266, 18269 (Apr. 15, 1994)).

[13] *See, e.g., HUD* v. *Pfaff,* 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994); *HUD* v. *Mountain Side Mobile Estates P'ship,* 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993); *HUD* v. *Carter,* 1992 WL 406520, at *6 (HUD ALJ May 1, 1992); *Twinbrook Vill. Apts.,* HUDALJ Nos. 02–00–0256–8, 02–00–0257–8, 02–00–0258–8, 2001 WL 1632533, at *17 *(HUD ALJ* Nov. 9, 2001); *see also* 1994 Joint Policy Statement on Discrimination in Lending, 59 FR. 18266, 18269 (Apr. 15, 1994) (applying three-step test without specifying where the burden lies at each step).

[14] *See, e.g., Oti Kaga, Inc.* v. *S. Dakota Hous. Dev. Auth.,* 342 F.3d 871, 883 (8th Cir. 2003); *Lapid–Laurel* v. *Zoning Bd. of Adjustment,* 284 F.3d 442, 466–67 (3d Cir. 2002); *Huntington Branch NAACP* v. *Town of Huntington,* 844 F.2d 926, 939 (2d Cir. 1988).

[15] 78 FR 11459.

[16] 78 FR 11460.

[17] *See also* 2011 Notice of Proposed Rulemaking, 76 FR 70922 (Nov. 16, 2011) (''In keeping with the 'broad remedial intent' of Congress in passing the Fair Housing Act, and consequently the Act's entitlement to a 'generous construction' HUD . . . has repeatedly determined that the Fair Housing Act is directed to the consequences of housing practices, not simply their purpose.'') (citing *Havens Realty Corp* v. *Coleman,* 455 U.S. 363, 380 (1982); *City of Edmonds* v. *Oxford House, Inc.,* 514 U.S. 725, 731–732 (1995) (internal citations removed)).

[18] 78 FR 11460, 11461 (citing 126 Cong. Rec. 31,166–31,167 (1980) (statement of Sen. Mathias reading into the record letter of HUD Secretary)).

[19] 78 FR 11460, 11461–62.

[20] 78 FR 11460, 11482; *see, e.g., Inclusive Cmtys. Project, Inc.,* 576 U.S. at 527 (overviewing the 2013 Rule's burden shifting framework).

[21] *Inclusive Cmtys. Project, Inc.* 576 U.S. at 519, 519, 532–35.

[22] *See* Petition for a Writ of Certiorari, in *Tex. Dep't of Hous. & Cmty. Affairs et al.,* v. *Inclusive Cmtys. Project, Inc.,* 573 U.S. 991, 2014 U.S. S. Ct. Briefs LEXIS 1848, at *9; *See Questions Presented in, https://www.supremecourt.gov/qp/13-01371qp.pdf.*

[23] *Inclusive Cmtys. Project, Inc.,* 573 U.S. 991 (2014), 2014 U.S. LEXIS 4912 at *1 (''Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to Question 1 presented by the petition.''); *See also Questions Presented in, Inclusive Cmtys Project, Inc.,* 573 U.S. 991.

[24] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 534 (citing *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Bd. of Educ.* v. *Harris,* 444 U.S. 130 (1979); *Smith* v. *City of Jackson,* 544 U.S. 228, 233 (2005).

[25] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 531.

[26] *Id.* (quoting *Griggs,* 401 U.S. at 431–32).

[27] *Id.* at 540.

[28] *Id.* (quoting *Griggs,* 401 U.S. at 431).

[29] *Id.* at 541, 542.

[30] 81 FR 69012–13.

housing objectives and obligations embodied in the Act'' and that ''commenters' concerns regarding application of the discriminatory effects standard to insurance practices can and should be addressed on a case-by-case basis.'' [31]

HUD's 2020 Disparate Impact Rule

On June 20, 2018, HUD published an Advance Notice of Proposed Rulemaking (''ANPRM''), inviting public comment on ''what changes, if any'' to the 2013 Rule were necessary as a result of *Inclusive Communities*.[32] HUD then published a Notice of Proposed Rulemaking on August 19, 2019 (''2019 Proposed Rule'') proposing to change the 2013 Rule.[33]

In response to the 2019 Proposed Rule, HUD received approximately 45,000 comments, most of which opposed the proposed changes and many of which raised significant legal and policy concerns with the 2019 Proposed Rule. Commenters objected that the proposed changes did not align with case law, created problematic defenses and made discriminatory effects claims effectively impossible to plead and prove in many instances, thus contravening the core holding of *Inclusive Communities*.[34] On September 24, 2020, HUD published a final rule titled ''HUD's implementation of the Fair Housing Act's Disparate Impact Standard'' (''2020 Rule''), which, among other things removed the definition of discriminatory effect, added demanding pleading elements that made it far more difficult to initiate a case, altered the burden-shifting framework, created new defenses, and limited available remedies in disparate impact claims.[35]

Massachusetts Fair Housing Ctr. v. HUD Order Staying Implementation of the 2020 Rule

Following publication of the 2020 Rule, HUD was sued in three separate federal courts—: *Massachusetts Fair Housing Ctr., et al.* v. *HUD,* No. 3:20–cv–11765 (D. Mass.); *Nat'l Fair Hous. All., et al.* v. *HUD,* No. 3:20–cv–07388 (N.D. Cal.); *Open Cmtys., et al.* v. *HUD,* No. 3:20–cv–01587 (D. Conn.). The plaintiffs in each case contended that the 2020 Rule was invalid because it was inconsistent with the Act and its promulgation violated the Administrative Procedure Act (''APA''). Prior to the effective date of the 2020 Rule, the U.S. District Court for the District of Massachusetts in *Massachusetts Fair Housing Ctr.* v. *HUD* issued a preliminary injunction staying the implementation and postponing the effective date of the 2020 Rule.[36] Because of this preliminary injunction, the 2020 Rule never took effect, and the 2013 Rule remained in effect.

In its order, the district court preliminarily found that many significant changes made by the 2020 Rule were likely not supported by *Inclusive Communities* or other case law. Similarly, the court concluded that the 2020 Rule did not appear to bring the clarity to the discriminatory effects framework that it was intended to foster, but rather introduced new concepts that had never been part of disparate impact case law without fully explaining their meaning. In support of its conclusions, the court identified numerous provisions in the 2020 Rule as problematic, including § 100.500(b) (''requiring at 'the pleadings stage,' among other things, that plaintiffs 'sufficiently plead facts to support' . . . '[t]hat the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law' ''); § 100.500(c)(2) (permitting defendants to '' 'rebut a plaintiff's allegation under (b)(1) . . . that the challenged policy or practice is arbitrary, artificial, and unnecessary by producing evidence showing that the challenged policy or practice' merely '*advances a valid interest*' '') (emphasis in original); § 100.500(c)(3) (requiring ''at the third step of the burden-shifting framework that the plaintiff prove 'a less discriminatory policy or practice exists that would serve the defendant's identified interest (or interests) in an *equally effective manner without imposing materially greater costs* on, or creating *other material burdens* for, the defendant' '' (emphasis in original)); § 100.500(d)(1) and (d)(2)(iii) (''conflating of a plaintiff's prima facie burden and pleading burden''); and § 100.500(d)(2)(i) (the outcome prediction defense).[37]

The district court found that the ''practical business, profit, policy consideration'' language, the ''outcome prediction'' defense, changes to the third element of the burden-shifting framework, and the conflating of a plaintiff's prima facie burden and pleading burden, ran the risk of ''effectively neutering'' discriminatory effects liability under the Act, and were all likely unsupported by *Inclusive Communities* or other judicial decisions.[38] The district court also stated that the 2020 Rule's use of ''new and undefined terminology altered the burden-shifting framework, and perplexing defenses'' accomplished ''the opposite of clarity'' and were likely ''arbitrary and capricious.'' [39] The court stated that ''[t]here can be no doubt that the 2020 Rule weakens, for housing discrimination victims and fair housing organizations, disparate impact liability under the Fair Housing Act. . . . In addition, the 2020 Rule arms defendants with broad new defenses which appear to make it easier for offending defendants to dodge liability and more difficult for plaintiffs to succeed. In short, these changes constitute a massive overhaul of HUD's disparate impact standards, to the benefit of putative defendants and to the detriment of putative plaintiffs.'' [40]

HUD's Reconsideration of the 2020 Rule and the 2021 Notice of Proposed Rulemaking

On January 26, 2021, President Biden issued a Memorandum ordering the Department to ''take all steps necessary to examine the effects of the [2020 Rule], including the effect that amending the [2013 Rule] has had on HUD's statutory duty to ensure compliance with the Fair Housing Act'' and ''take any necessary steps . . . to implement the Fair Housing Act's requirements that HUD administer its programs in a manner that . . . furthers . . . HUD's overall duty to administer the Act [ ] including by preventing practices with an unjustified discriminatory effect.'' [41]

Consistent with the President's Memorandum, HUD began a process to reconsider the 2020 Rule. On June 25, 2021, after reviewing prior public comments on the previous rulemakings described above, HUD's responses to those comments, HUD's 2016 supplemental explanation regarding the 2013 Rule's applicability to the insurance industry, legal precedent including *Inclusive Communities,* the *Massachusetts Fair Housing Center* court's order, and HUD's own experience with discriminatory effects cases over 40 years, HUD promulgated a proposed rule titled ''Reinstatement of HUD's Discriminatory Effects Standard'' (''proposed rule'') that proposed to recodify the 2013 Rule.[42] The proposed

[31] *Id.*

[32] 83 FR 28560.

[33] 84 FR 42854.

[34] *See, e.g.,* 85 FR 60317, 60319 (overview of some of the comments making these points).

[35] 85 FR 60288.

[36] *Mass. Fair Hous. Ctr.* v. *United States HUD,* 496 F. Supp. 3d 600, 611 (D. Mass. Oct. 25, 2020).

[37] *Id.* at 605–07, n.2, 610–11.

[38] *Id.* at 611.

[39] *Id.*

[40] *Id.* at 607.

[41] *See* 86 FR 7487, 7488.

[42] 86 FR 33590.

rule advocated returning to the 2013 Rule because HUD believed that the 2013 Rule established a workable framework that was more consistent with existing case law and the purpose of the Act than the 2020 Rule.

As HUD described in the proposed rule, in HUD's experience, the 2013 Rule set a more appropriately balanced standard for pleading, proving, and defending a fair housing case alleging that a policy or practice has a discriminatory effect. HUD believed that the 2013 Rule provided greater clarity about what each party must show by relying on concepts that have a long history in judicial and agency precedent and that it appropriately balanced the need to ensure that frivolous claims do not go forward with a realistic understanding of the practical challenges to litigating these claims. With regard to the 2020 Rule, HUD's experience investigating and prosecuting discriminatory effects cases informed its views that many of the points made by commenters and the District Court in *Massachusetts Fair Housing Center* were, in HUD's opinion, correct. In particular, the changes the 2020 Rule made, such as amending pleading standards, changing the burden shifting framework, and adding defenses, all operated to tip the scales in favor of respondents, introduced unnecessary confusion, may have precluded otherwise valid claims, and, at worst would have made discriminatory effects liability a practical nullity.

HUD further stated its belief that the 2013 Rule was more consistent with the Act's purpose; prior case law under the Act, including *Inclusive Communities;* other civil rights authorities, including the Equal Credit Opportunity Act and Title VII; and HUD's prior interpretations of the Act. In its 2020 Rule, HUD noted that the rule was intended to better reflect *Inclusive Communities,* but HUD now believes that the 2020 Rule was itself inconsistent with the holding of *Inclusive Communities,* which maintained the fundamentals of long-established disparate-impact precedent rather than changing them. Moreover, based on HUD's experience investigating and litigating discriminatory effects cases, HUD believed that the practical effect of the 2020 Rule's amendments was to severely limit HUD's and plaintiffs' use of the discriminatory effects framework in ways that would substantially diminish that frameworks' effectiveness in accomplishing the purposes that *Inclusive Communities* articulated.

By comparison, in HUD's experience, the 2013 Rule provided a workable and balanced framework for investigating and litigating discriminatory effects claims that is consistent with the Act, HUD's own guidance, *Inclusive Communities,* and other jurisprudence.

HUD noted that *Inclusive Communities* heavily relied on *Griggs,* which is the foundation of Title VII disparate impact jurisprudence, to illustrate the well-settled principles of disparate impact under the Act, and HUD believed *Inclusive Communities* to be fully supportive of the 2013 Rule. *Inclusive Communities* explained that in *Griggs,* ''[w]hat is required by Congress [in Title VII cases] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'' [43] Quoting from its foundational decision in *Griggs,* the Supreme Court in *Inclusive Communities* observed that ''[d]isparate impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies.'' [44] HUD proposed that this quotation from a seminal decision of longstanding disparate impact doctrine is properly read as maintaining existing law, not changing it. HUD highlighted that *Inclusive Communities* explicitly stated, ''disparate-impact liability *has always been* properly limited in key respects'' (emphasis added), making clear that the Court was not adding additional pleading or proof requirements or calling for a significant departure from pre-existing precedent under the Act and Title VII.[45] Furthermore, HUD stated that reading *Inclusive Communities* to support a heightened pleading standard is contradicted by the fact that the ''heartland'' cases cited by the Court would not have survived a motion to dismiss under that standard because plaintiffs in those cases did not have specific facts to plausibly allege that a policy or practice was arbitrary, artificial, or unnecessary until after discovery.[46] Finally, HUD explained that because *Inclusive Communities* considered a judgment reached after discovery and bench trial, the Court had no occasion or opportunity to consider the proper pleading standards for cases brought under the Act. The parties did not brief or argue such questions to the Court, making it particularly unlikely that the Court intended to reach them.

For these reasons and others, HUD proposed that *Inclusive Communities'* quotation of *Griggs'* decades-old ''artificial, arbitrary, and unnecessary'' formulation would be best construed as maintaining continuity with longstanding disparate-impact jurisprudence, as reflected in the 2013 Rule.[47] HUD stated in the proposed rule its belief that other changes the 2020 Rule made would create problems that could be cured by a return to the 2013 Rule. For example, the 2020 Rule eliminated the 2013 Rule's definition of ''discriminatory effect,'' stating that the definition was unnecessary because it ''simply reiterated the elements of a disparate impact claim.'' [48] In eliminating this definition, the 2020 Rule erased ''perpetuation of segregation'' as a recognized type of discriminatory effect distinct from disparate impact, which was contrary to well established precedent. HUD proposed to reaffirm that perpetuation of segregation remains, as it always had been, a basis for contending that a policy has an unlawful discriminatory effect.

HUD described how the 2020 Rule also eliminated from the Act's prohibitions policies or practices that could ''predictably result[] in a disparate impact on a group of persons,'' *i.e.,* those for which the disparate impact has not yet manifested but will predictably do so. HUD noted, as it stated in 2013, that the Act prohibits discrimination that is predictable because it defines an ''aggrieved person'' as any person who ''believes that such person will be injured by a discriminatory housing practice that is about to occur.'' [49] HUD noted that courts have found that predictable discriminatory effects may violate the Act: ''[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory

[43] *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 578.

[44] *Id.* at 540.

[45] *Id.*

[46] *See, e.g., Town of Huntington, NY* v. *Huntington Branch,* NAACP, 488 U.S. 15 (1988); *United States* v. *City of Black Jack,* 508 F.2d 1179, 1184, 1187–88 (8th Cir. 1974) (specific facts produced during the case supported the court's determination that the policy was one of those ''artificial, arbitrary, and unnecessary'' practices that is properly invalidated under disparate impact doctrine); *Greater New Orleans Fair Hous. Action Ctr.* v. *St. Bernard Parish,* 641 F. Supp. 2d 563, 567–568 (E.D. La. 2009) (relying on information gathered after the pleadings to find disparate impact).

[47] 86 FR 33594–5.

[48] 84 FR 42858.

[49] 42 U.S.C. 3602(i)(2).

effect.'' [50] HUD stated in the proposed rule that the 2020 Rule did not adequately explain how the Act and case law construing it can be read to require waiting until harm is inflicted before an action with predictable discriminatory effects can be challenged, nor did HUD perceive that any such explanation would be availing, given the plain language of the Act and the case law interpreting it.

In addition, in the 2021 proposed rule, HUD recognized and agreed with concerns that the 2020 Rule created new and confusing defenses at both the pleading and post-pleading stage, including the new defense allowing a defendant to show that the challenged policy or practice is ''reasonably necessary to comply with a third-party requirement.'' [51] The 2020 Rule's preamble stated that this defense would not require a showing that the challenged policy is the only way to comply with such a requirement, only that the policy serves that purpose. In the 2021 proposed rule, HUD stated that this new defense was inconsistent with the Act, which specifies that state and local laws requiring or permitting discriminatory housing practices are invalid. HUD expressed its concern that the defense would preclude many otherwise proper discriminatory effects claims, because, for example, a plaintiff may not have any practical means of knowing whether some other party's policies also contributed to the defendant's practice. HUD reasoned that nothing in *Inclusive Communities* suggests this defense is required, let alone reasonable, for the agency to create.

HUD noted further in the proposed rule that the 2020 Rule also created a new ''outcome prediction'' defense which HUD believed would in practice exempt most insurance industry practices (and many other housing-related practices that rely on outcome predictions, such as lending practices) from liability under a disparate impact standard.[52] In the proposed rule, HUD stated that it considered this defense to be inconsistent with HUD's repeated finding, including in the 2020 Rule, that ''a general waiver of disparate impact law for the insurance industry would be inappropriate.'' HUD reconsidered the defense and explained in the proposed rule that it believed the defense was unclear and would suggest that comparators be used, which were, in HUD's experience, inappropriate. HUD stated that at the very least, the defense would introduce unnecessary confusion into the doctrine.

In the proposed rule, HUD explained that the 2020 Rule inappropriately limited remedies in discriminatory effects cases in three respects. It specified that ''remedies should be concentrated on eliminating or reforming the discriminatory practice so as to eliminate disparities between persons in a particular protected class and other persons.'' It prohibited HUD in administrative proceedings from pursuing anything but ''equitable remedies'' except that ''where pecuniary damage is proved, HUD will seek compensatory damages or restitution.'' And it restricted HUD from seeking civil penalties in discriminatory effects cases unless the respondent had been adjudged within the last 5 years to have committed intentional unlawful housing discrimination under the Act. In the proposed rule, HUD proposed that these limitations have no basis in law and run contrary to public interest and the purpose of the Act. While the 2020 Rule cited *Inclusive Communities* as supporting these limitations, HUD noted that no part of *Inclusive Communities* suggested such limitations. Moreover, HUD viewed these limitations as in conflict with the plain language of the Act, which provides in all cases for a wide variety of remedies, including injunctive relief, actual damages, punitive damages, and civil penalties. HUD clarified that whereas Congress explicitly has limited the remedies available in disparate impact cases under Title VII, it has chosen not to do so in cases brought under the Act.

In sum, HUD stated in the proposed rule that it believed that the 2013 Rule would be preferable to the 2020 Rule. It believed the 2013 Rule would be more consistent with judicial precedent construing the Fair Housing Act, including *Inclusive Communities,* as well as the Act's broad remedial purpose. Based on its experience interpreting and enforcing the Act, HUD also believed the 2020 Rule, if put into effect, threatened to limit the effectiveness of the Act's discriminatory effects doctrine in ways that are inconsistent with the doctrine continuing to play its critical role in ''moving the Nation toward a more integrated society.'' [53] Furthermore, HUD stated that it believed that the 2013 Rule provided clarity, consistency, and a workable, balanced framework, recognized by the Supreme Court, under which to analyze discriminatory effects claims, and under which HUD could better ensure it has the tools to further its ''duty to administer the Act [ ] including by preventing practices with an unjustified discriminatory effect.'' [54]

II. This Final Rule

HUD received 10,113 comments in response to the proposed rule. HUD reviewed and carefully considered these comments and, as explained in the responses to the comments below, HUD has decided to recodify the 2013 Rule. HUD has confirmed that the concerns it expressed in the proposed rule are consistent with the public comments received in response to the proposed rule, HUD's previous rulemakings and notices, and relevant discriminatory effects case law under the Act, including cases using the 2013 Rule and the 2020 Rule.

HUD continues to believe that, as compared to the 2020 Rule, the 2013 Rule more accurately describes discriminatory effects law in a manner that is consistent with both the Act and the Supreme Court's ruling in *Inclusive Communities.* As in the 2013 Rule, this final rule does not impose any new liability, but merely provides a consistent, nationwide framework for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act. HUD believes the 2013 Rule best aligns with Fair Housing Act jurisprudence and is most consistent with the Act's remedial purposes. As described in greater detail below, HUD believes that the 2013 standard is consistent with and was implicitly endorsed by *Inclusive Communities.*

Moreover, even if the 2020 Rule were a permissible approach to discriminatory effects law and HUD had no doubts about the legality or appropriateness of the 2020 Rule under the Act, HUD would recodify the 2013 Rule as an exercise of the discretion Congress gave HUD to make rules under the Act.[55] The 2013 Rule's framework is practical and, in contrast to the novel and complicated 2020 Rule, has worked well in discriminatory effects cases. The 2013 Rule's framework adequately balances the interests of plaintiffs [56] and defendants and encourages the latter to seek a less discriminatory alternative

[50] *See Inclusive Cmtys. Project, Inc.,* 576 U.S. at 539–40 (describing *City of Black Jack,* 508 F.2d at 1184 as ''at the heartland of disparate-impact liability'').

[51] 24 CFR 100.500(d)(1); 85 FR 60333.

[52] 24 CFR 100.500(d)(2)(i), 85 FR 60319, 60333.

[53] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 547.

[54] 86 FR 33594.

[55] *See generally* 42 U.S.C. 3614a.

[56] In the HUD administrative hearing process, HUD is referred to as the charging party and the housing providers who are alleged to have violated the Act are referred to as respondents. *See* 24 CFR 100.500. Rather than repeat those terms throughout this preamble, HUD uses the terms plaintiff and defendant to include the charging party and respondent.

when a policy or practice causes a discriminatory effect, without imposing an excessive burden on their substantial, legitimate, non-discriminatory interests. As described in greater detail below, HUD declines to create any exemptions or safe harbors in this rule or to proscribe specific conduct that per se has an unjustified discriminatory effect. As *Inclusive Communities* recognized in affirming that discriminatory effects claims are cognizable under the Act, ''the [Fair Housing Act] must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.' '' [57] For the reasons discussed in HUD's 2013 Rule, in the proposed rule, and below in response to the public comments, HUD rescinds the 2020 Rule and recodifies the 2013 Rule.

HUD adopts one amendment made by the 2020 Rule to HUD's general fair housing regulations at § 100.70(d)(5). This amendment provides additional illustrations of prohibited activities under the Fair Housing Act generally, though it is not specific to discriminatory effects cases. HUD proposed keeping these additional examples in the proposed rule and received no public comments specifically opposing these additions. In this final rule's amendatory instructions, HUD includes instructions to ''republish'' § 100.70(d)(5) without change from the 2020 Rule to clearly show that HUD is adopting this language in this final rule.

III. Public Comments

General Comments in Support

Commenters generally supported the proposed rule, which would reinstate the 2013 Rule. Commenters stated that the proposed rule is consistent with President Biden's memorandum directing agencies to redress America's history of housing discrimination and the 1994 interagency fair lending guidance under the Act and the Equal Credit Opportunity Act. Commenters also stated that the proposed rule is an important and appropriate exercise of HUD's rulemaking authority.

Among the supportive comments were those stating that the proposed rule: is appropriately broad, inclusive, and will be instrumental in ensuring optimal compliance with the Act and in challenging covert or latent discrimination that can be intentionally or unintentionally embedded in facially neutral policies and practices; is critical for ensuring equal opportunity under the Act; would help secure equal opportunity in a wide variety of housing areas, including in land use and zoning, affordable and public housing, environmental permitting, air quality, and utility burdens; would be effective in protecting against housing discrimination based on all of the Act's protected characteristics, as well as related groups such as persons without English language proficiency or who are survivors of domestic violence or sexual assault; would advance sustainable homeownership and affordable housing programs; would benefit both real estate professionals and consumers; may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping; is essential to challenging blanket refusals to accept Housing Choice Vouchers, which are disproportionately used by people of color, households with children, and persons with disabilities; and would address de facto and de jure discrimination in housing policies, construction, and tenancy.

Commenters noted that the proposed rule's burden-shifting framework is consistent with long-standing case law, including *Inclusive Communities,* and well-established agency practice. Commenters explained that the proposed rule contains the traditional burden shifting framework for disparate impact claims, which was endorsed by the Supreme Court in *Inclusive Communities* and is consistent with the framework for disparate impact claims under Title VII and the Equal Credit Opportunity Act.

Commenters stated that out of more than 40 federal appellate and district court decisions in disparate-impact fair housing cases following *Inclusive Communities,* very few, other than *Inclusive Communities Project* v. *Lincoln Prop. Co.*,[58] found any inconsistency between the 2013 Rule and the Supreme Court's *Inclusive Communities* decision. Commenters pointed to *Avenue 6E Investments, LLC* v. *City of Yuma*,[59] which cited the 2013 Rule as authority for the proper burden-shifting framework without noting any inconsistencies between that rule and *Inclusive Communities,* and *Mhany Mgmt., Inc.* v. *Cnty. of Nassau*,[60] which found that the Supreme Court implicitly endorsed the 2013 Rule's framework in *Inclusive Communities*.[61] Commenters also noted that the court in *Mhany Mgmt., Inc.* v. *Cnty. of Nassau,* as well as numerous other cases successfully utilized the 2013 Rule's burden shifting framework to reach decisions.

Commenters supporting the proposed rule stated that it provides a clear, simple, and effective standard that would promote consistency between judicial and administrative venues and throughout the housing industry. Commenters explained that this standard would maintain continuity for regulated entities and enable them to better comply with the Act, since this regulatory framework has been in place since 2013. Commenters described the framework as pragmatic, fostering fair and sound business practices and finding the appropriate balance between fair housing concerns and business necessities.

Commenters expressed support for the burden-shifting framework, describing it as clear, easy to follow, practical, and striking the appropriate balance between competing interests. Commenters stated that the 2013 Rule settled the law on several important issues, including whether the burden-shifting framework is appropriate and which party bears the burden of demonstrating the business necessity for a particular policy and the existence of a less discriminatory alternative. A commenter noted that the 2013 Rule is a fair and accurate codification of longstanding jurisprudence of discriminatory effects liability under the Act and posed no significant departure from previous HUD interpretation or the weight of judicial authority. Commenters noted that plaintiff's burden under the proposed rule is not easy to meet, which eliminates the danger of an onslaught of groundless litigation. A commenter described the proposed rule as balancing the need to prevent frivolous claims from moving forward with a process that allows potentially meritorious claims to be substantiated or disproved. A commenter compared the proposed rule's three-tiered framework to the 2020 Rule's five-tiered test, noting that the former provides a clear way to challenge policies that may unnecessarily restrict housing, while the latter is vague and allows discrimination to continue unchallenged. Comments also stated that the 2020 Rule conflicted with decades of legal precedent, including

[57] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 519, 546 (quoting Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report at 1).

[58] *Inclusive Communities Project* v. *Lincoln Prop. Co,* 920 F.3d 890 (5th Cir. 2019).

[59] *Avenue 6E Investments, LLC* v. *City of Yuma,* 818 F.3d 493, 510 (9th Cir. 2016).

[60] *Mhany Mgmt., Inc.* v. *Cnty. of Nassau.* 819 F.3d 581, 618–20 (2d Cir. 2016).

[61] *Avenue 6E Investments, LLC* v. *City of Yuma,* 818 F.3d 493, 510 (9th Cir. 2016); *Mhany Mgmt., Inc.* v. *Cnty. of Nassau,* 819 F.3d 581, 618–20 (2d Cir. 2016).

the Supreme Court's decision in *Inclusive Communities* and that discriminatory effects claims that sought to challenge neutral policies that actually caused discrimination would not survive under the test contained in the 2020 Rule.

General Comments in Opposition

Other commenters generally opposed the proposed rule, suggesting that HUD withdraw it and retain the 2020 Rule. A commenter stated that the 2020 Rule thoroughly explained its reasoning and was consistent with *Inclusive Communities.* Another commenter described the proposed rule as unclear and overly burdensome. Commenters also suggested that the proposed rule lacks limitations on how and where it applies, thus adding a new layer of complexity and uncertainty to discriminatory effects law. A commenter stated that the proposed rule would harm the people it purports to benefit by applying a complex, court-created legal framework to a public policy issue and requiring all issues to be resolved in expensive litigation in federal court. Another commenter stated that the proposed rule will not create a uniform mechanism to resolve discriminatory effects disputes but will instead encourage courts to develop alternative approaches to handling such cases. A commenter stated that HUD and others have used the 2013 Rule to bully housing providers into expanding access to housing even if landlords cite legitimate business reasons for restricting housing based on certain admission or occupancy policies.

HUD Response: HUD disagrees with the commenters who opposed the proposed rule. As discussed in the preamble to the proposed rule and elsewhere in this preamble, HUD believes that this final rule establishes the appropriate, balanced framework for assessing claims of discriminatory effects and is entirely consistent with *Inclusive Communities* and long-standing judicial precedent. In contrast, HUD finds that the 2020 rule, if retained, would limit liability in a manner inconsistent with the Act's purpose and judicial precedent. HUD further believes that some of the standards announced in the 2020 rule might lead some courts to develop alternative approaches to assessing discriminatory effects claims that are inconsistent with the text and broad remedial purposes of the Act. HUD believes that the framework in the proposed rule sets out a consistent nationwide approach to evaluating discriminatory effects claims and adopts the majority view of judicial opinions interpreting the Act. As a result, this final rule affords housing providers the opportunity to maintain policies and practices so long as they do not have an unjustified discriminatory effect because of a protected characteristic. And it does not require allegations of discriminatory effects to be resolved in federal court. Rather, housing providers may avoid potential litigation and liability by reviewing their policies and practices to ensure that they do not have an unjustified discriminatory effect. The discriminatory effects framework is not intended to force housing providers to take any particular course of action but rather to ensure that an important goal of the Act—to safeguard fair housing throughout the country—is accomplished.

General Comments Concerning Clarity

Issue: Commenters disagreed about the clarity that would result from setting aside the 2020 Rule. A commenter stated that the 2020 Rule should be retracted because it created a legal landscape in which HUD, other federal regulators, and courts would have different standards for analyzing discriminatory effects claims, and because it created confusion that would disadvantage housing discrimination victims. However, other commenters asked HUD to retain the 2020 Rule so as to avoid confusion and uncertainty because different forms of the rule have been promulgated and retracted over the last several years. A commenter stated that HUD should recognize the practical implications of repeatedly and drastically changing policies and justification for those policies and requested that HUD solidify clear and consistent long-term standards in order to minimize confusion and uncertainty for federal funding recipients. The commenter said it makes little sense to change procedures with each new administration and that reinstating the 2013 Rule will provoke litigation and disputes between courts rather than provide clarity. Another commenter noted a particular concern about confusion for businesses and damage to their ability to know and comply with the law since litigation concerning the 2020 Rule is pending.

HUD Response: HUD agrees with the commenters who stated that the 2020 Rule introduced a new standard that is incompatible with the standards used by courts and other federal regulators, creating confusion and uncertainty. In contrast, this final rule will provide clarity consistent with well-established judicial and agency interpretations of the Act by eliminating the novel and undefined standards introduced by the 2020 Rule. HUD also notes that the 2020 Rule never went into effect and has never been enforced by HUD. HUD has considered potential reliance interests and believes that no significant reliance was created by the 2020 rule, because unlike a regulation that even briefly governed conduct or supplied benefits, the 2020 Rule never did so. While HUD proposed revising the rule in 2019 and subsequently issued a final rule in 2020, the 2013 Rule, which is recodified in this final rule, is and has been the only promulgated rule governing the standard for discriminatory effects liability that has ever taken effect since the Act became law in 1968. HUD agrees that the 2020 Rule introduced a new standard that is incompatible with the Act and with the standards used by courts and other federal regulators. Had HUD used the 2020 Rule, while other federal agencies and courts used rules analogous to the 2013 Rule or created their own rules in response to *Inclusive Communities,* there would be substantial confusion in discriminatory effects jurisprudence. HUD believes that it is important that those affected by or accused of discrimination know what standard governs their housing related activities and that that standard does not unnecessarily vary depending on the forum in which a case is decided. Having differing standards would increase litigation costs for the parties and likely result in the dismissal of claims in some forums that are upheld in others. Restoring the 2013 Rule will help ensure the consistency of federal discriminatory effects law and will avoid the confusion caused by the 2020 Rule.

This final rule sets out a usable and uniform framework that is fully consistent with the requirements established by courts, as well as the text and purpose of the Act.

Comments Concerning Harmony Between Other State and Federal Civil Rights Statutes

Issue: A commenter noted that the Rule will bring HUD's regulations back into conformity with state civil rights laws.

HUD Response: HUD acknowledges that many state courts and agencies that interpret and enforce civil rights laws utilize a burden-shifting framework that is similar to this final rule and that HUD's 2020 Rule created confusion and conflicting standards.[62] HUD believes that it is important for plaintiffs to have

[62] *See e.g., Tetro* v. *Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.,* 173 F.3d 988, 993 (6th Cir. 1999) (explaining that state civil rights statute is interpreted consistently with analysis used for federal civil rights statute).

access to consistent relief in state and federal jurisdictions.

Issue: Commenters applauded the rule for being consistent with other civil rights laws and their discriminatory effects liability frameworks, including Title VII and ECOA. A commenter also noted that courts, including the Supreme Court in *Inclusive Communities,* have often drawn on Title VII's jurisprudence when interpreting the Act and vice versa because of the similarities between the statutes' texts, structures, purposes, and dates of enactment. The commenter expressed support for the rule because it aligns with judicial precedent that interprets the Act and Title VII similarly. The commenter also stated that the proposed rule furthers the principle that language that is similar across statutes should be given similar meaning.

HUD Response: HUD agrees that the rule is consistent with other civil rights laws and their discriminatory effects liability frameworks, including Title VII of the Civil Rights Act of 1964, as amended (Title VII),[63] and the Equal Credit Opportunity Act (ECOA).[64] HUD acknowledges that courts have generally interpreted these statutes consistently and agrees that HUD should do the same to promote consistency and clarity, particularly for entities whose actions must be compliant with both ECOA and the Act.

HUD notes that the preamble to the 2013 Rule explained in great detail how its framework operates harmoniously with other civil rights laws, including Title VII and ECOA, and best effectuated the important goals of the Fair Housing Act.[65] As HUD noted in the 2013 Rule, the discriminatory effects framework borrowed from Title VII and *Griggs* is the fairest and most reasonable approach for resolving disparate impact claims, in part because it does not require either party to prove a negative, and it provides the parties the opportunity to obtain adequate information in discovery to meet their burdens.[66]

Comments Concerning Massachusetts Fair Housing Center

Issue: Commenters stated that although the district court in *Massachusetts Fair Housing Center* [67] stayed implementation of the 2020 Rule, it did not require HUD to totally abandon the 2020 Rule. The commenters stated that the decision primarily addressed three elements of the 2020 Rule—the outcome prediction defense, the requirement that plaintiffs present an equally effective alternative, and the conflation of the plaintiff's prima facie burden and their pleading burden. The commenters also stated that the court acknowledged the requirement that a plaintiff must plead that a challenged policy is ''arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective,'' may have some grounding in case law. The commenters also stated that the court did not address the 2020 Rule's recognition that the Act does not and cannot supplant state laws concerning insurance, or its codification of *Inclusive Communities'* guidance on remedies.

Other commenters stated that *Massachusetts Fair Housing Center* criticized the 2020 Rule for introducing onerous pleading standards, defenses that lacked precedent in case law, for conflicting with the remedial purpose of the Act, and for likely being arbitrary and capricious.

HUD Response: While the *Massachusetts Fair Housing Center* court enjoined HUD from implementing or enforcing the 2020 Rule in any manner and ordered HUD to ''preserve the status quo pursuant to the regulations in effect as of the date of this Order,'' [68] HUD is not basing its decision to abandon the 2020 Rule and recodify the 2013 Rule on the *Massachusetts Fair Housing Center* order. Rather, HUD declines to retain any part of the 2020 Rule's substantive disparate impact language based on its own interpretation of and decades of experience in implementing the Act. HUD also finds other aspects of the 2020 Rule that the court left unaddressed or uncriticized to be equally troublesome.

Comments Concerning Inclusive Communities

Issue: Commenters supported reinstatement of the 2013 Rule because it is consistent with *Inclusive Communities.* Commenters stated that the Court cited the 2013 Rule with approval, noting each step in the 2013 Rule's burden-shifting framework without critique. Commenters also noted that multiple courts since *Inclusive Communities,* including courts of appeals, have read *Inclusive Communities* as affirming or implicitly adopting the 2013 Rule's burden-shifting test *and* have applied the 2013 Rule's framework.[69] A commenter pointed out that the district court in *Inclusive Communities* stated on remand that, ''[a]s a result of the Fifth Circuit's decision adopting the HUD regulations, and the Supreme Court's affirmance (without altering the burden-shifting approach), the following proof regimen now applies to *ICP's* disparate impact claim under the [Act].'' [70] A commenter also cited multiple district court decisions that have incorporated the language of *Inclusive Communities* when applying the 2013 Rule's framework.[71] Another commenter noted that *Inclusive Communities* endorsed ''heartland'' cases,[72] all of which used burden shifting frameworks consistent with the proposed rule. Commenters also stated that the 2020 Rule did not meaningfully address *MHANY Management, Inc., de Reyes* v. *Waples Mobile Home Park Limited Partnership,*

[63] 78 FR 11468–11471.

[64] *Id.*

[65] *Id.*

[66] 78 FR 11474.

[67] *Mass. Fair Hous. Ctr.* v. *United States HUD,* 496 F. Supp. 3d 600, 603 (D. Mass. Oct. 25, 2020).

[68] *Id.* at 612.

[69] *See. e.g., Mhany Mgmt., Inc.* v. *Cnty. of Nassau at 618–20; Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo,* 759 F. App'x 828, 834–35 (11th Cir. 2018); *de Reyes* v. *Waples Mobile Home Park L.P.,* 903 F.3d 415, 426 n.6, 428 (4th Cir. 2018); *see also Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 29–30 (D.D.C. 2017); *Nat'l Fair Hous. All.* v. *Bank of Am., N.A.,* 401 F. Supp. 3d 619, 631–632 (D. Md. 2019); *See, e.g., River Cross Land Co., LLC* v. *Seminole Cty.,* 2021 WL 2291344, at *66–69, 72–73, 75–76 (M.D. Fla. June 4, 2021); *Jones* v. *City of Faribault,* No. 18–1643 (JRT/HB), 2021 U.S. Dist. LEXIS 36531, at *48–49 (D. Minn. Feb. 18, 2021); *Conn. Fair Hous. Ctr.* v. *CoreLogic Rental Prop. Sols., LLC,* 478 F. Supp. 3d 259, 296 (Aug. 7, 2020) (and related decisions, *see CoreLogic,* No. 3:17–cv–705 (VLB), 2020 WL 401776 (D. Conn. Jan. 24, 2020)); *Borum* v. *Brentwood Vill., LLC,* 2020 U.S. Dist. LEXIS 54840, at *13 (D.D.C. Mar. 30, 2020); *NFHA* v. *Deutsche Bank Nat'l Trust,* 2019 WL 5963633 (N.D. Ill. Nov. 13, 2019); *Yellowstone Women's First Step House Inc.* v. *City of Costa Mesa,* 2019 U.S. Dist. LEXIS 221209, at *4 (C.D. Cal. Nov. 4, 2019); *Mass. Fair Hous. Ctr.,* 496 F. Supp. 3d at 611.

[70] *Inclusive Cmtys. Project, Inc.* v. *Tex. Dep't of Hous. & Cmty. Affairs,* 2015 WL 5916220 at *3 (N.D. Tex. 2015).

[71] *Prince George's Cty.* v. *Wells Fargo & Co.,* 397 F. Supp. 3d 752, 766 (D. Md. 2019); *Fortune Soc'y* v. *Sandcastle Hous. Dev. Fund Corp.,* 388 F. Supp. 3d 145, 172–173 (E.D.N.Y. 2019); *Conn. Fair Hous. Ctr.* v. *Corelogic Rental Prop. Sols., LLC,* 369 F. Supp. 3d 362, 377–78 (D. Conn. 2019); *Nat'l Fair Hous. All.* v. *Fannie Mae (''Fannie Mae''),* 294 F. Supp. 3d 940, 947 (N.D. Cal. 2018); *Paige* v. *N.Y.C. Hous. Auth.,* 2018 U.S. Dist. LEXIS 137238, at *9 (S.D.N.Y. Aug. 14, 2018); *R.I. Comm'n for Hum. Rights* v. *Graul,* 120 F. Supp. 3d 110, 123–24 (D.R.I. 2015); *Price* v. *Country Brook Homeowners Ass'n,* 2021 U.S. Dist. LEXIS 228914, at *5–6 (S.D. Ohio Nov. 30, 2021); *Pickett* v. *City of Cleveland,* No. 1:19 CV 2911, 2020 U.S. Dist. LEXIS 259242, at *9 (N.D. Ohio Sep. 29, 2020); *Winfield* v. *City of N.Y.,* No. 15CV5236–LTS–DCF, 2016 U.S. Dist. LEXIS 146919, at *18–19 (S.D.N.Y. Oct. 24, 2016); *Alexander* v. *Edgewood Mgmt. Corp.,* Civil Action No. 15–01140 (RCL), 2016 U.S. Dist. LEXIS 145787, at *6–7 (D.D.C. July 22, 2016).

[72] *See e.g. United States* v. *City of Black Jack, Mo.,* 508 F.2d 1179, 1184 (8th Cir. 1974); *Huntington Branch, NAACP* v. *Huntington,* 844 F.2d 926, 937 (2nd Cir. 1988); *Greater New Orleans Fair Housing Action Center* v. *St. Bernard Parish,* 641 F. Supp. 2d 563, 567–568 (E.D. La. 2009).

or *Avenue 6E Investments, LLC* v. *City of Yuma,* which found that the 2013 Rule remained valid after *Inclusive Communities.* A commenter added that in *Property Casualty Insurance Association of America* v. *Carson,*[73] a lawsuit directly challenging the validity of the 2013 Rule, the district court held that *Inclusive Communities* affirmed HUD's burden-shifting approach and did not identify any aspect of the approach that required correction.

Other commenters opposed the proposed rule, stating that it is inconsistent with *Inclusive Communities.* In support of this, commenters noted that the 2013 Rule preceded *Inclusive Communities* and stated that the 2013 Rule does not adequately incorporate the holdings of that case. Commenters requested that HUD retain the 2020 Rule or incorporate additional language from the *Inclusive Communities* decision into this final rule. Commenters stated that although *Inclusive Communities* mentioned the 2013 Rule, it did not endorse the rule. Others stated that the 2013 Rule does not align with the Supreme Court's caution against injecting racial considerations into every housing decision and perpetuating race-based considerations rather than moving beyond them. A commenter said that compliance with the rule, as opposed to *Inclusive Communities,* will lead to costly litigation. Commenters noted that the Supreme Court specifically limited the scope of *Inclusive Communities* to the first question presented (whether disparate impact claims were cognizable under the Act) so references to the 2013 Rule cannot be viewed as approving the 2013 framework. Commenters further stated that the Court in *Inclusive Communities* did not state that the 2013 Rule incorporates the appropriate limits of disparate impact liability.

Another commenter stated that courts, such as the court in *Woda Cooper Dev., Inc.* v. *City of Warner Robins,* Civ. No. 5:20–CV–159 (MTT), 2021 WL 1093630, *1, at *7 (M.D. Ga. Mar. 22, 2021), have struggled to apply the 2013 Rule's framework in the wake of *Inclusive Communities,* with some choosing to ignore the rule entirely. The commenter stated that *Inclusive Communities* identified a number of safeguards to prevent abusive disparate impact cases but did not provide detailed explanations of those safeguards or guidance on how courts should apply those safeguards. The commenter urged HUD to elaborate on those safeguards in the final rule.

HUD Response: HUD agrees with the commenters who stated that the 2013 Rule is consistent with the *Inclusive Communities* holding. The Court in *Inclusive Communities* did not call into question the 2013 Rule's framework for analyzing discriminatory effects claims, nor did it suggest that HUD should make any modifications to that framework. To the contrary, the Court cited HUD's 2013 Rule several times with approval.[74] For instance, the Court noted that the burden-shifting framework of *Griggs* and its progeny, adopted by HUD in the 2013 Rule and retained in this final rule, adequately balanced the interests of plaintiffs and defendants by giving housing providers the ability ''to state and explain the valid interest served by their policies.'' [75] The Court also discussed the history of HUD's promulgation of the 2013 Rule, noted that lower courts had relied on it, and repeatedly cited its three-part burden shifting test.[76] Notably, other courts have recognized these findings and relied on the 2013 Rule's burden shifting framework without difficulty since *Inclusive Communities* was decided.[77] Moreover, HUD agrees that *Inclusive Communities'* discussion approving the holdings of the ''heartland cases'' supports reinstating the 2013 Rule.[78] HUD also agrees that the 2020 Rule did not adequately address the well-considered and thorough reasoning of *MHANY Mgmt., de Reyes,* and *Avenue 6E Investments, LLC,* each of which found that the 2013 Rule remained valid after *Inclusive Communities.*[79]

HUD disagrees with the commenters who stated that the 2020 Rule should be retained because it is consistent with and incorporates the ''safeguards'' described in *Inclusive Communities.* As discussed above, in *Inclusive Communities,* the Court did not express any disapproval of the 2013 Rule's framework or specify that it lacked any safeguards. Rather, the Court observed that ''disparate-impact liability *has always been* properly limited in key respects,'' making clear that it was not calling for any significant departure from pre-existing precedent under the Act or the 2013 Rule.[80] HUD believes that had the Court intended to overhaul disparate impact jurisprudence, the Court would have done so expressly, rather than citing the 2013 Rule favorably. Moreover, HUD notes that the Court declined to accept certiorari on the proper standard for assessing disparate impact cases.[81]And, as noted above, multiple courts have since read *Inclusive Communities* as affirming or endorsing the 2013 Rule's burden-

[73] *Prop. Cas. Insurers Ass'n of Am.* v. *Carson,* 2017 WL 2653069, at *8–9 (N.D. Ill. June 20, 2017) (finding that HUD's 2013 adoption of the 3-step burden-shifting framework was a reasonable interpretation of the Act and that ''in short, the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction.'')

[74] *Inclusive Cmtys. Project,* 576 U.S. at 527, 535–536, 541.

[75] *Id.* at 541.

[76] *Id.* at 527–28.

[77] *Supra* at n.69. *See also* Robert G. Schwemm, Housing Discrimination Law and Litigation § 10:5 (August 2022) (''[t]he basic structure and language of the HUD and *Inclusive Communities* standards are nearly identical'' and ''th[e] slight semantic variation [in the second step of the burden shifting framework] may not signal any real substantive difference . . .''; *de Reyes* v. *Waples Mobile Home Park L.P.,* 903 F.3d 415 fn4 (4th Cir. 2018) (while not relying on the 2013 Rule, the court noted that ''[t]he HUD regulation is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities,* and indeed, some courts believe the Supreme Court implicitly adopted the HUD framework altogether'').

[78] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 519, 539; *See e.g. Huntington* v. *Huntington Branch, NAACP,* 488 U.S. at 16–18; *United States* v. *City of Black Jack, Mo.,* 508 F.2d 1179, 1184, 1187–88 (8th Cir. 1974) (specific facts produced during the case supported the court's determination that the policy was one of those ''artificial, arbitrary, and unnecessary'' practices that is properly invalidated under disparate impact doctrine.); *Greater New Orleans Fair Hous. Action Ctr.* v. *St. Bernard Par.,* 641 F. Supp. 2d 563, 567–568 (E.D. La. 2009) (relying on information gathered after the pleadings to find illegal disparate impact).

[79] *See, e.g., de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415, 424, 432 n.10 (4th Cir. 2018) (noting that ''[i]n *Inclusive Communities,* the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework [and proceeding to outline the same framework as under the 2013 Rule]; further disagreeing that the HUD regulation and guidance conflict with *Inclusive Communities* and cannot be relied upon, and thus ''afford[ing] the HUD regulation and guidance the deference it deserves'') (citations omitted); *MHANY Mgmt. Inc.* v. *Cnty. of Nassau,* 819 F.3d 581, 618–619 (2d Cir. 2016) (deferring to HUD's [2013] regulation, noting that ''the Supreme Court implicitly adopted HUD's [burden shifting] approach [in 24 CFR 100.500(c)]''); *Avenue 6E Invs., LLC* v. *City of Yuma,* 818 F.3d 493, 512–513 (9th Cir. 2016) (citing *Inclusive Communities* and the 2013 Rule at 100.500(c) for the same proposition); *Nat'l Fair Hous. Alliance* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 29 (D.D.C. 2017) (citing *Inclusive Communities* and HUD's 2013 Rule at 100.500(c) as standing for the same proposition); *Prop. Cas. Insurers Ass'n of Am.* v. *Carson,* 2017 WL 2653069, at *8–9 (N.D. Ill. June 20, 2017) (finding that HUD's 2013 adoption of the three-step burden-shifting framework was a reasonable interpretation of the Act and that ''in short, the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction.''); *Burbank Apartments Tenant Ass'n* v. *Kargman,* 474 Mass. 107, 126–27 (Mass. 2016) (explaining that it was following the ''burden-shifting framework laid out by HUD and adopted by the Supreme Court in [*Inclusive Communities*].'').

[80] *See Inclusive Cmtys. Project,* 576 U.S. at 540 (emphasis added).

[81] *Inclusive Cmtys. Project, Inc.,* 573 U.S. 991 (2014), 2014 U.S. LEXIS 4912 at *1 (''Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to Question 1 presented by the petition.''); *See also Questions Presented in, Inclusive Cmtys Project, Inc.,* 573 U.S. 991.

shifting framework.[82] Even if the Court did not endorse the 2013 Rule in *Inclusive Communities,* it did not discard or significantly alter preexisting disparate impact jurisprudence. The 2013 Rule adopts the majority view of preexisting law. HUD believes that to the extent that some courts have attempted to impose limitations greater than those described in the 2013 Rule, they have misread *Inclusive Communities.* Moreover, the 2013 Rule did not inject racial considerations into housing decisions, and nothing in *Inclusive Communities* indicates that the Court believed the Rule improperly did so. Accordingly, HUD continues to believe that the burden-shifting test articulated in the 2013 Rule is the most appropriate framework for litigating discriminatory effects claims consistent with the Act and *Inclusive Communities.*

Issue: Commenters cited *Lincoln Property, Oviedo, River Cross Land Co., County of Cook, Ill.* v. *Wells Fargo & Co,* and *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.* as evidence that several courts have held that the 2013 Rule was inconsistent with *Inclusive Communities.*[83] By contrast, other commenters stated that out of more than 40 federal appellate and district court decisions in disparate impact cases following *Inclusive Communities,*[84] only *Lincoln Property,* an appellate decision, and district courts bound by *Lincoln Property,* found any inconsistency between the 2013 Rule and *Inclusive Communities.*[85]

HUD Response: HUD disagrees that the cases the commenters cited compel the conclusion that this rule is inconsistent with *Inclusive Communities.* As HUD has previously stated on many occasions, including in the preamble to the 2020 Rule, the 2013 Rule is consistent with *Inclusive Communities.*[86] The vast majority of courts to consider this issue subsequent to *Inclusive Communities,* including at least three federal appellate courts, have agreed.[87] Multiple courts have specifically read *Inclusive Communities* to have affirmed or endorsed the 2013 Rule's burden-shifting framework.[88] For example, in *River Cross,* one of the decisions commenters characterized as demonstrating incompatibility between the 2013 Rule and *Inclusive Communities,* the court in fact recognized that *Inclusive Communities*

[82] *See, e.g., Prop. Cas. Insurers Ass'n,* 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017) (''[T]he Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction.''); *MHANY Mgmt., Inc.*,) (explaining that in *Inclusive Communities,* ''[t]he Supreme Court implicitly adopted HUD's approach''); de *Reyes* v. *Waples Mobile Home Park Limited Partnership,* 903 F.3d 415 (4th Cir. 2018); *See Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo,* 759 F. App'x 828, 834–35 (11th Cir. 2018) (citing *Schwarz* v. *City of Treasure Island,* 544 F.3d 1201 (11th Cir. 2008)); *Nat'l Fair Hous. All.* v. *Bank of Am., N.A.,* 401 F. Supp. 3d 619, 631–632 (D. Md. 2019) (explaining that the Supreme Court in *Inclusive Communities* ''[h]ew[ed] closely to regulations promulgated by HUD in 2013'').

[83] *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902 (5th Cir. 2019); *Oviedo Town Ctr, II, L.L.P.* v. *City of Oviedo, Florida,* 759 Fed. App'x 828, 833–35 (11th Cir. 2018) (per curiam); *River Cross Land Co., LLC* v. *Seminole Cty.,* 2021 WL 2291344, at *22–24 (M.D. Fla. June 4, 2021); *Cnty. of Cook, Ill.* v. *Wells Fargo & Co.,* 314 F. Supp. 3d 975, 990 (N.D. Ill. 2018); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017).

[84] *See, e.g., de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415 (4th Cir. 2018); *MHANY Mgmt. Inc.* v. *Cnty, of Nassau,* 819 F.3d 581 (2d Cir 2016); *Avenue 6E Invs., LLC* v. *City of Yuma,* 818 F.3d 493 (9th Cir. 2016); *Prince George's Cnty.* v. *Wells Fargo & Co.,* (397 F. Supp. 3d 752, 766 (D. Md. 2019); *Fortune Soc'y* v. *Sandcastle Hous. Dev. Fund Corp.,* 388 F. Supp. 3d 145, 172–173 (E.D.N.Y. 2019); *Conn. Fair Hous. Ctr.* v. *Corelogic Prop. Sols. LLC,,* 369 F. Supp. 3d 362, 377–78 (D. Conn. 2019); *National Fair Hous All.* v. *Fed. Nat'l Mortg. Ass'n,* 294 F. Supp. 3d 940, 947 (N.D. Cal 2018); *City of Philadelphia* v. *Wells Fargo & Co.,* No. 17–cv–2203, 2018 WL 424451, at *4 (E.D. Pa. Jan. 16, 2018); *Paige* v. *New York City Hous. Auth.,* No. 17–cv–7481, 2018 WL 3863451, at *3–4 (S.D.N.Y. Aug. 14, 2018); *Rhode Island Comm'n for Hum. Rights* v. *Graul,* 120 F. Supp. 3d 110, 123–24 (D.R.I. 2015); *Sams* v. *Ga West Gate LLC,* No. cv–415–282, 2017 WL 436281, at *5 (S.D. Ga. Jan. 30, 2017); *Winfield* v. *City of New York,* No. 15–cv–5236, 2016 WL 6208564, at *5 (S.D.N.Y. Oct. 24, 2016); *Alexander* v. *Edgewood Mgmt. Corp.,* No. 15–01140, 206 WL 5957673, at *2–3 (D.D.C. July 25, 2016); *Hall* v. *Philadelphia Hous. Auth.,* No. 17–5753, 2019 WL 1545183, at *5 & n.5 (E.D. Pa. Apr. 9, 2019); *Jackson* v. *Tryon Park Apartments, Inc.,* No. 6:18–cv–06238, 2019 WL 331635, at *1 (W.D.N.Y. Jan. 25, 2019); *Johnson* v. *Johnson,* No. 4:18–CV–04138–RAL, 2018 WL 5983508, at *2 (D.S.D. Nov. 14, 2018); *Ekas* v. *Affinity Prop. Mgmt.,* No. 3:16–cv–1636, 2017 WL 7360366, at *3 (D. Ore. Dec. 7, 2017); *Alms Residents Ass'n* v. *U.S. Dep't of Hous. & Urban Dev.,* No. 1:17–cv–605, 2017 WL 4553401, at *11 (S.D. Ohio Oct. 12, 2017); *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo,* No. 6:16–cv–1005, 2017 WL 3621940, at *4 (M.D. Fla. Aug. 23, 2017), *aff'd,* 759 Fed. App'x 828 (11th Cir.); *National Fair Housing. Alliance* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 29 (D.D.C. 2017); *Prop. Cas. Insurers Assoc.* v. *Carson,* 2017 WL 2653069 at *9 (N.D. Ill. June 20, 2017) (''[T]he Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction''); *Martinez* v. *Optimus Props., LLC,* Nos. 2:16–cv–08598–SVW–MRW, 2017 WL 1040743, at *2 (C.D. Cal. Mar. 14, 2017); *Borum* v. *Brentwood Vill., LLC,* 218 F. Supp. 3d 1, 21–22 (D.D.C. 2016); *Khodeir* v. *Sayyed,* No. C 15–8763, 2016 WL 5817003, at *6 (S.D.N.Y. Sept. 28, 2016); *Crossroads Residents Organized for Stable and Secure ResiDencieS* v. *MSP Crossroads Apartments LLC,* No. C 16–233, 2016 WL 3661146, at *8 (D. Minn. July 5, 2016); *Azam* v. *City of Columbia Heights,* No. C No. 14–1044, 2016 WL 424966, at *10 (D. Minn. Feb. 3, 2016).

[85] *See Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902 (5th Cir. 2019). For district court decisions bound by *Lincoln Prop., see, e.g., Treece* v. *Perrier Condominium Owners Ass'n, Inc.,* —F. Supp. 3d—, No. 17–10153, 2021 WL 533720 (E.D. La. Feb. 12, 2021); *Inclusive Cmtys. Project, Inc.* v. *Heartland Community Ass'n,* 399 F. Supp. 3d 657 (N.D. Tex. 2019).

[86] *See* 85 FR 60299 (noting that the 2013 Rule is one but not the only ''permissible interpretation of disparate impact liability under the FHA''). *See also* Defendants' Opposition to Plaintiff's Motion for Leave to Amend Complaint, *Prop. Cas. Ins. Assoc. of Am.* v. *Carson and the U.S. Dep't of Hous. and Urb. Dev.,* No. 1:13–cv–08564 (2017); Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *Am. Ins. Assoc.* v. *U.S. Dep't of Hous. and Urb. Dev. et al.,* No. 1:13–cv–00966 (RJL) (D.D.C. 2016).

[87] *See, e.g., de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415, 424, 432 n.10 (4th Cir. 2018) (noting that ''[i]n *Inclusive Communities,* the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework [and proceeding to outline the same framework as under the 2013 Rule]; further disagreeing that the HUD regulation and guidance conflict with *Inclusive Communities* and cannot be relied upon, and thus ''afford[ing] the HUD regulation and guidance the deference it deserves'') (citations omitted); *MHANY Mgmt. Inc.* v. *Cnty. of Nassau,* 819 F.3d 581, 618–619 (2d Cir. 2016) (deferring to HUD's [2013] regulation, noting that ''the Supreme Court implicitly adopted HUD's [burden shifting] approach [in 24 CFR 100.500(c)]''); *Avenue 6E Invs., LLC* v. *City of Yuma,* 818 F.3d 493, 512–513 (9th Cir. 2016) (citing *Inclusive Communities* and the 2013 Rule at 100.500(c) for the same proposition); *Nat'l Fair Hous. Alliance* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 29 (D.D.C. 2017) (citing *Inclusive Communities* and HUD's 2013 Rule at 100.500(c) as standing for the same proposition); *Prop. Cas. Insurers Ass'n of Am.* v. *Carson,* 2017 WL 2653069, at *8–9 (N.D. Ill. June 20, 2017) (finding that HUD's 2013 adoption of the 3-step burden-shifting framework was a reasonable interpretation of the Act and that ''in short, the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction.''); *Burbank Apartments Tenant Ass'n* v. *Kargman,* 474 Mass. 107, 126–27 (Mass. 2016) (explaining that it was following the ''burden-shifting framework laid out by HUD and adopted by the Supreme Court in [*Inclusive Communities*].'').

[88] *See, e.g., MHANY Mgmt. Inc.* v. *Cnty. of Nassau,* 819 F.3d 581, 618 (2d Cir 2016) (''the Supreme Court implicitly adopted HUD's approach''); *6E Invs., LLC* v. *City of Yuma,* 818 F.3d 493, 512–513 (9th Cir. 2016) (citing the 2013 Rule in describing the three-prong analytical structure set forth in *Inclusive Communities*); *Nat'l Fair Hous. Alliance* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 20 (D.D.C. 2017) (stating that the Supreme Court ''carefully explained that disparate-impact liability has always been properly limited'' and that ''disparate-impact liability under the FHA can be proven under a burden-shifting framework analogous to that used in employment discrimination cases.'') (internal citations and quotations omitted); *Prop. Cas. Insurers Ass'n of Am.* v. *Carson,* 2017 WL 2653069, at *8–9 (N.D. Ill. June 20, 2017) (finding that HUD's 2013 adoption of the 3-step burden-shifting framework a reasonable interpretation of the Act, finding that ''in short, the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction.''); *Burbank Apartments Tenant Ass'n* v. *Kargman,* 474 Mass. 107, 126–27 (Mass. 2016) (explaining that it was following the ''burden-shifting framework laid out by HUD and adopted by the Supreme Court in [*Inclusive Communities*].''); *Jackson* v. *Tryon Park Apartments, Inc.,* No. 6:18–CV–06238 EAW, 2019 U.S. Dist. LEXIS 12473, at *11 (W.D.N.Y. Jan. 25, 2019) (noting that ''the Supreme Court's 2015 *Inclusive Communities Project* ruling uph[eld] [HUD's 2013] regulation'').

approvingly cited the 2013 Rule, applied the 2013 Rule, and found it to be easily reconciled with *Inclusive Communities*.[89] HUD has determined that the small number of courts that reached contrary conclusions misinterpreted the scope of the *Inclusive Communities* holding, and HUD declines to adopt the minority views of these courts.

In light of the views of a majority of courts and HUD's experience applying the Act, HUD finds that the Fifth Circuit's conclusions in *Lincoln Property* do not require it to change course.[90] In that case, the majority of a divided panel acknowledged that *Inclusive Communities* reviewed and affirmed the Fifth Circuit's earlier judgment in that case, remanding to the trial court to apply the 2013 Rule's burden-shifting framework, and that the Court did not explicitly call into question the 2013 Rule's requirements. Nonetheless, the *Lincoln Property* court found that because the Supreme Court in *Inclusive Communities* had not explicitly stated that it was adopting the 2013 Rule's framework, whether the Court accepted the framework or modified it remained unresolved.[91] The court construed language from *Inclusive Communities* as calling for courts to make it more difficult to plead a discriminatory effects claim in some fashion, but acknowledged that *Inclusive Communities* provided no clear direction as to how it was thus changing the law. While acknowledging that other appellate courts had interpreted *Inclusive Communities* to have ''implicitly adopted the 2013 framework,'' the panel's review of certain passages from *Inclusive Communities* and of subsequent decisions from the Fourth, Eighth, and Eleventh Circuits [92] led the panel to conclude simply that *Inclusive Communities* ''announce[d] a more demanding test than that set forth in the HUD regulation'' but ''did not clearly delineate its meaning or requirements.'' [93] Finding no consensus even among those who believed *Inclusive Communities* made some change, it concluded that the claim at issue in that case was not properly pleaded under any of several possible standards it could apply, making it unnecessary to state with more specificity how, in its view, *Inclusive Communities* had changed the law.

HUD believes *Lincoln Property's* language concerning a more demanding standard is not a reason to change the standard it promulgated in 2013. As stated earlier, HUD disagrees that anything in *Inclusive Communities* is inconsistent with the 2013 Rule's requirements for discriminatory effects claims. Rather, HUD agrees with the Fourth Circuit that the 2013 Rule ''is similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities,*'' and with its observation that ''some courts believe the Supreme Court implicitly adopted the HUD framework altogether.'' [94] But even if the Fifth Circuit were correct in identifying inconsistencies between the 2013 Rule and *Inclusive Communities, Lincoln Property* does not provide persuasive reasoning for HUD to modify the 2013 Rule, because the court only found ambiguity in the law after *Inclusive Communities* rather than specifying the way in which HUD needed to change course. Additionally, the other circuit courts that have analyzed the robust causation discussion in *Inclusive Communities* have either defined it in a way that is consistent with this final rule or were similarly non-specific in explaining robust causality's meaning.[95]

HUD notes that, while acknowledging that other appellate courts had interpreted *Inclusive Communities* to have ''implicitly adopted the 2013 framework,'' the Fifth Circuit panel's review of certain passages from *Inclusive Communities* as well as subsequent decisions from the Fourth, Eighth, and Eleventh Circuits,[96] led the panel to conclude that *Inclusive Communities* ''undoubtedly announce[d] a more demanding test than that set forth in the HUD regulation.'' [97] HUD believes that in two of these decisions, the courts gave more deference to the 2013 Rule than the commenters recognized.[98] Additionally, in the district court decisions cited by the commenters, and in *Lincoln Property's* progeny, HUD believes that the courts misread *Inclusive Communities* as creating heightened pleading standards.[99] Even *Lincoln Property* only requires a plaintiff to *plausibly* demonstrate a robust causal connection between a discriminatory practice and an alleged disparate impact.[100] HUD adopts the view of courts that found *Inclusive Communities* endorsed the 2013 Rule's framework.

HUD also notes that *Lincoln Property*—a suit between private parties—was decided without the benefit of input from HUD on what effect, if any, *Inclusive Communities* had on Fair Housing Act disparate impact claims. As the agency to which Congress has delegated the responsibility to interpret and enforce the Fair Housing Act, HUD believes that its reasonable reading of any ambiguities in the meaning of the Act following *Inclusive Communities* is entitled to deference.[101] Thus, to the extent *Lincoln Property* identified such an ambiguity and came to conclusions that conflict with those HUD has reached, HUD declines to adopt the court's conclusions. Any risk that litigants in the Fifth Circuit would be subject to a different standard than litigants elsewhere is created by the *Lincoln Property* decision, not by HUD's promulgation of this rule.

[89] *River Cross Land Co., LLC* v. *Seminole Cty.,* 2021 WL 2291344, at *66–69, 72–73, 75–76 (M.D. Fla. June 4, 2021).

[90] *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890 (5th Cir. 2019).

[91] *Id.* at 902.

[92] *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902–05 (5th Cir. 2019) (citing *de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415 (4th Cir. 2018); *Ellis* v. *City of Minneapolis,* 860 F.3d 1106, 1114 (8th Cir. 2017); *Oviedo Town Ctr. II, L.L.P.* v. *City of Oviedo,* 759 Fed. App'x 828 (11th Cir. 2018)) (pinpoint citations omitted).

[93] *See Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902 (5th Cir. 2019).

[94] *Reyes,* 903 F.3d at 424 n.4 (collecting cases).

[95] *See de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415, 424–27 (4th Cir. 2018) (explaining that identifying policy that causes disparity establishes robust causation); *Ellis* v. *City of Minneapolis,* 860 F.3d 1106, 1111 (8th Cir. 2017) (quoting *Inclusive Cmtys.,* but not defining robust causation beyond identifying the connection between a challenged policy and a disparate impact); *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo,* 759 F. App'x 828, 834–36 (11th Cir. 2018) (plaintiff must make statistical showing sufficient to connect challenged policy and disparate impact)

[96] *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902–05 (5th Cir. 2019) (citing *de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415 (4th Cir. 2018); *Ellis* v. *City of Minneapolis,* 860 F.3d 1106, 1114 (8th Cir. 2017); *Oviedo Town Ctr. II, L.L.P.* v. *City of Oviedo,* 759 Fed. App'x 828 (11th Cir. 2018)) (pinpoint citations omitted).

[97] *See Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d 890, 902 (5th Cir. 2019).

[98] *River Cross Land Co., LLC* v. *Seminole Cty.,* 2021 WL 2291344, at *66–69, 72–73, 75–76 (M.D. Fla. June 4, 2021); *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo,* No. 6:16–cv–1005, 2017 WL 3621940, at *4 (M.D. Fla. Aug. 23, 2017) (utilizing 2013 Rule to analyze disparate impact claim)

[99] For example, the pleading standards used in *Oviedo Town Ctr, II, L.L.P.* v. *City of Oviedo, Florida,* 759 Fed. App'x at 833–35, and *River Cross Land Co., LLC* v. *Seminole Cty.,* 2021 WL 2291344, at *22–24, are not inconsistent with the 2013 Rule. In addition, both *Cnty. of Cook, Ill.* v. *Wells Fargo & Co.,* 314 F. Supp. 3d 975, 990 (N.D. Ill. 2018) and *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d at 22, incorrectly relied on dicta when they stated that *Inclusive Communities* created higher pleading standards in disparate impact cases.

[100] *Inclusive Cmtys. Project, Inc.* v. *Lincoln Prop. Co.,* 920 F.3d at 899 (5th Cir. 2019).

[101] *National Cable & Telecommunications Assn.* v. *Brand X internet Services,* 545 U.S. 967, 980 (2005) (holding that agency interpretation of statute can override prior judicial interpretation when the statute is ambiguous and agency interpretation is reasonable).

In short, HUD does not believe that the cases cited by the commenters support revisions to the rule.

Issue: Commenters stated that the proposed rule conflicts with what they characterized as *Inclusive Communities'* holding that a ''robust causality requirement . . . protects defendants from being held liable for racial disparities they did not create.'' Some commenters asked HUD to expressly add a robust causality requirement to the final rule, while others asked HUD to retain the 2020 Rule, stating that it appropriately reflected *Inclusive Communities'* robust causality requirement.

Some commenters urged HUD to adopt the view that, in stating that disparate impact claims may not be established simply by demonstrating a ''statistical disparity'' in outcomes, *Inclusive Communities* held that such claims must meet a higher causation standard than in the proposed rule. Other commenters stated that the proposed rule does not require proximate cause or a direct link between the policy and the discriminatory effect, which, they said, *Inclusive Communities* requires. Commenters said that if plaintiffs are not required to establish ''robust causality'' or ''direct proximate cause,'' defendants would be liable in cases where discrimination does not actually exist. Commenters also stated that without an explicit robust causality requirement, race will be used in a pervasive way, leading to the use of numerical quotas and raising constitutional questions. Commenters stated that the requirement is necessary so that regulated entities can make practical business choices and profit-related decisions. A commenter suggested revising the proposed rule to provide that to establish robust causality, the plaintiffs have the burden of proving that a challenged practice is the sole and proximate cause, or reasonably predicted cause, of a discriminatory effect.

Commenters who supported the proposed rule said that it incorporates *Inclusive Communities'* protections for defendants who may fear liability for disparities their policies did not create. Commenters noted that the proposed rule does not permit liability based on statistical disparities alone.

HUD Response: The 2013 Rule and this final rule contain a robust causality requirement by requiring the plaintiff to prove at the first step of the framework that a challenged practice caused or predictably will cause a discriminatory effect. As discussed above, in HUD's view, the framework in this final rule, which includes the requirement that the challenged practice causes a discriminatory effect, is consistent with *Inclusive Communities.* The *Inclusive Communities* Court did not announce a heightened causality requirement for disparate impact liability, a requirement which would find no support in the statutory text or case law. Rather, in considering a district court opinion where the trial court had found a violation of the Act without ever requiring the plaintiff to identify a causal link between a specific policy and the challenged disparate impact, the Court merely reiterated that plaintiffs must identify a causal link between the challenged practice and the alleged disparate impact that is sufficiently robust to permit that connection to be scrutinized at each stage of the case. The 2013 Rule, and this final rule require exactly that. The 2013 Rule and this final rule do not use the precise words ''robust causality'' and (as explained elsewhere in this preamble) nothing in *Inclusive Communities* requires these words. What *Inclusive Communities* requires is that a court's examination of causality be robust. Both the 2013 Rule and this final rule implicitly incorporate this requirement by requiring a plaintiff to link a specific practice to a current or predictable disparity. Ultimately, the error identified both by the Fifth Circuit and then by the Supreme Court in *Inclusive Communities* came from the district court's failure to fully apply the 2013 Rule's framework, not the 2013 Rule's framework itself. Through its framework this rule ensures that, as required by *Inclusive Communities,* defendants are not held liable for racial disparities they did not create.[102] The rule thus already requires a showing of causation, not just correlation, between the policy or practice and the disparate impact, and so is fully consistent with *Inclusive Communities.*

HUD also believes that the rule's burden-shifting framework does not preclude businesses from making business and profit-motivated choices, even if they cause a discriminatory effect, so long as they do not create an *unjustified* discriminatory effect. Once a plaintiff meets its burden of proving that a policy causes a disparate impact because of a protected characteristic, the burden then shifts to the defendant to prove that the policy is necessary to serve the defendant's substantial, legitimate, nondiscriminatory interest. This safeguard allows housing providers and others to make practical business choices and profit-related decisions. The third step of the framework then shifts the burden back to the plaintiff to prove that an alternative policy would have a less discriminatory effect than the challenged policy. This rule balances the interests of the parties by allowing defendants to implement policies that meet their needs, as long as there is no unjustified discriminatory effect, while providing plaintiffs the opportunity to identify policies that serve those needs with less discriminatory effects based on protected characteristics.

HUD notes further that although the 2013 Rule has been in effect for ten years—with similar judicial precedent effective even longer, it is unaware of any case applying the 2013 Rule in a manner that would impose quotas.

Issue: Commenters requested that HUD include in the final rule a requirement that plaintiffs plead that the challenged policy is ''artificial, arbitrary, and unnecessary'' in addition to the traditional elements of a disparate impact claim, as the 2020 Rule did. Commenters stated that *Inclusive Communities* required this additional element when the Court stated that ''[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers' '' to ''avoid the serious constitutional questions that might arise under the Act, for instance, if such liability were imposed based solely on a showing of a statistical disparity.'' [103] Another commenter explained that the district court in *Massachusetts Fair Housing Center* did not invalidate the ''arbitrary, artificial, and unnecessary'' language in the 2020 Rule, but rather noted that it came from *Inclusive Communities* and other case law, like *Ellis* v. *City of Minneapolis,* 860 F.3d 1106, 1112 (8th Cir. 2017).

Other commenters disagreed, stating that if such a requirement were added to the rule, it would be impossible to challenge discriminatory policies absent facts showing discriminatory intent, thus negating *Inclusive Communities'* holding that violations of the Act may be established through proof of disparate impact. The commenters explained that pleading that a policy is ''artificial'' is essentially pleading that a policy is pretextual—a showing required in cases alleging intentional discrimination, not discriminatory effects. Commenters also noted that the phrase ''artificial, arbitrary, and

[102] *See Inclusive Cmtys. Project, Inc.,* 576 U.S. at 519, 542 (describing robust causality as requiring that a plaintiff draw a connection between the defendant's challenged policy causing the alleged disparity, noting that this ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create.)

[103] *Id.* at 540.

unnecessary'' originated in *Griggs* and pointed out that in applying this phrase in Fair Housing Act cases, courts have applied it consistent with the 2013 Rule's burden shifting framework, essentially using it as short-hand for the three-step framework, not as a separate, independent element. As examples, these commenters cited *City of Black Jack,*[104] which *Inclusive Communities* describes as a heartland case, as well as *Graoch Assocs. #33, L.P.* v. *Louisville/Jefferson Cty. Metro Human Relations Comm'n.*[105] A commenter stated that the three-step burden-shifting framework, and especially the defense at the second step—that the policy was necessary to achieve a legitimate interest—already ensures that as the *Inclusive Communities* Court described, ''disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies.''

HUD Response: HUD declines to add an ''artificial, arbitrary, and unnecessary'' pleading standard or substantive element to this final rule. As previously explained, HUD does not construe *Inclusive Communities* to require the agency to add specific elements or pleading standards for disparate impact cases that go beyond what ''has always'' been required.[106] Rather, when the *Inclusive Communities* Court quoted *Griggs'* decades-old formulation that disparate impact claims require the removal of artificial, arbitrary, and unnecessary barriers, it did so as part of restating the safeguards and requirements that it found (and HUD agrees) have always been a part of disparate impact jurisprudence. In this context, the Court quoted *Griggs'* short-hand formulation for the type of policy that traditionally has been held to create an unjustified discriminatory effect at the end of the burden shifting analysis. HUD believes that *Inclusive Communities,* following *Griggs* as well as earlier Fair Housing Act cases, went on to describe policies invalidated by longstanding precedent as either ''arbitrary'' or ''artificial'' as a shorthand for those found to violate the Fair Housing Act under traditional jurisprudence.[107] HUD does not believe this language, when read in context, is best read to require the agency to impose a requirement for plaintiffs and the charging party to plead and prove, in addition to the traditional elements, that policies are artificial *and* arbitrary *and* unnecessary. HUD notes, moreover, that the source of this language is *Griggs,* a decades-old case at the bedrock of disparate impact jurisprudence, and notes that *Griggs* did not require plaintiffs to establish that the practice at issue met each of these three descriptors, let alone that such evidence be pleaded in a complaint. In addition, HUD believes that reading *Inclusive Communities* or other cases to support a heightened pleading standard for plaintiffs, such as in the 2020 Rule, is contradicted by the fact that the ''heartland'' cases cited favorably by the Court would not have survived a motion to dismiss under that standard because plaintiffs in those cases did not allege facts that would plausibly support a claim that a policy or practice was arbitrary, artificial, and unnecessary to the extent those terms are construed as requiring more than satisfaction of the traditional elements. Simply put, in HUD's experience implementing the Fair Housing Act, plaintiffs likely would not have had access to such facts until after discovery.[108] HUD further believes that adding such a standard would also conflict with the text and broad remedial purpose of the Act which provides ''within constitutional limitations, for fair housing throughout the United States.'' [109] HUD thus concludes that a heightened pleading and proof standard would frustrate the clearly expressed intent to use the maximum allowable power under the law to secure equal housing opportunity. Finally, HUD observes that *Inclusive Communities* did not specify how courts and agencies should apply a new pleading and proof standard, nor did it come close to clearly stating that it intended to create new elements. To the extent that leaves ambiguity in the law, as a matter of policy, HUD believes it is preferable to retain existing standards that have decades of case law and administrative actions specifying their content rather than impose ones that are undefined and untested.

Comments on Bank of America

Issue: Commenters stated that the proposed rule is inconsistent with *Bank of America Corp.* v. *City of Miami,*[110] a 2017 Supreme Court case which held that ''proximate cause under the [Act] requires some direct relation between the injury asserted and the injurious conduct alleged.'' A commenter suggested that HUD add the phrase ''some direct relation'' to the proposed rule's burden of proof standard. Another commenter suggested revising the proposed rule to provide that in order to establish a ''robust causal link,'' the plaintiffs have the burden of proving that a challenged practice is the sole and proximate cause, or reasonably predicted cause, of a discriminatory effect.'' Another commenter suggested that HUD state that the causation analysis must consider whether a practice is too remote to give rise to liability.

HUD Response: HUD believes that it is not required to add language to this rule to ensure consistency with *Bank of America.* In that case, which involved a municipality suing a lender on the theory that predatory lending practices had caused foreclosures which in turn eventually led to damages to the municipality such as reduced tax revenues, the Supreme Court held that, because actions for damages under the Act are akin to tort actions, such suits are ''subject to the common-law requirement that loss is attributable to the proximate cause, and not to any remote cause.'' [111] The Court declined to further explain the proximate cause requirement as applied to Fair Housing Act claims and did not suggest that such a requirement would otherwise alter analyses under the Act. For example, HUD believes that *Bank of America* has no impact on the ability of organizational plaintiffs to prove standing by tracing their injuries to the challenged policy.[112]

HUD believes, although the *Bank of America* decision was in the context of a disparate impact claim, it is not inherently specific to and does not create an additional burden for disparate impact claims. To the contrary, HUD believes that the proximate cause requirement *Bank of America* described for standing applies to all Fair Housing Act cases, not just disparate-impact claims, and so HUD does not believe it is appropriate to add a proximate-cause requirement to the regulatory requirements that are specific to disparate-impact claims. More broadly, this rule does not purport to address the requirements for Fair Housing Act standing, and neither *Bank of America* nor any other case requires HUD to add such considerations to this rule. Accordingly, HUD believes that

[104] *City of Black Jack,* 508 F.2d at 1184–1185.

[105] *Graoch Assocs. #33, L.P.,* 508 F.3d 366, 374–75 (6th Cir. 2007) (''We use the burden-shifting framework described above—and especially the final inquiry considering the strength of the plaintiff's statistical evidence and the strength of the defendant's business reason—to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests.'').

[106] *Inclusive Cmtys,* 576 U.S. at 540.

[107] *Inclusive Cmtys. Project,* 576 U.S. at 539–541.

[108] *Supra* at n. 78.

[109] 42 U.S.C. 3601.

[110] 137 S. Ct. 1296 (2017).

[111] *Id.* at 1305.

[112] *Havens Realty Corp.* v. *Coleman,* 455 U.S. 363 (1982).

adding the suggested language to this final rule, which purports only to set out the framework for analyzing the merits of disparate impact claims, is unnecessary. Nothing in this rule creates a conflict with *Bank of America* or bars a court from applying its requirements. This rule simply does not touch on that subject matter.

HUD additionally observes that, in its view, *Bank of America* applies to claims such as the one in that case that involve unusual claims in which the policy challenged has an unusually attenuated connection to the alleged harm to the plaintiff. HUD does not construe *Bank of America* as having a larger impact on longstanding principles of Fair Housing Act standing.

Discriminatory Effects as Applied to Insurance [113]

Issue: Commenters asked HUD to exempt homeowners insurance—in whole or in part, as well as risk-based pricing and underwriting in particular—from liability for any unjustified discriminatory effects, advancing a number of reasons. Among other things, commenters stated that the fundamental nature of insurance does not allow discriminatory effects liability; such claims cannot succeed as a matter of law; and the McCarran-Ferguson Act [114] bars claims. A commenter said that applying the rule to insurers is unnecessary because there have been no allegations or findings of unlawful discriminatory effects against an insurer prior to or since 2013. Other commenters disagreed, stating that HUD should not create exceptions for any industry, including insurance, because such categorical exemptions are unworkable and inconsistent with the Act's purpose, which is broad and inclusive. Commenters also stated that exemptions would allow some discriminatory practices to go uncorrected.

HUD Response: HUD declines to provide an exemption for the insurance industry in whole or in part. HUD responds below to the specific reasons commenters advanced for exempting homeowners insurance. However, as a threshold matter, HUD lacks the authority to create exemptions that are not in the text of the Act. When Congress passed the Act in 1968 and amended it in 1988, it established exemptions for certain practices but not for insurance.[115] Furthermore, courts have routinely applied the Act to insurers and have found that discriminatory effects liability applies to insurers under the Act.[116] Moreover, nothing in this rule precludes insurers from raising a defense based on the McCarran-Ferguson Act [117] or from arguing that claims cannot succeed as a matter of law in particular cases. What HUD is declining to do, and what it believes it has no authority to do, is provide a single industry or a set of specific practices a blanket exemption from liability from all claims regardless of whether those claims otherwise would satisfy the rule's (and the Act's) requirements.

As further explained above and below, the Fair Housing Act was intended to have a very broad impact on housing and communities across the country. The plain text, purpose, and structure purpose, structure, and plain language of the Act make clear that the Act was intended to apply to all sectors of the housing industry so that each would have common duties under the Act. For example, the plain text of the Act does not refer to an actor, but rather a prohibited action, meaning that all actors in all sectors of the housing industry are subject to the Act.[118] With regard to purpose, the Act was enacted to replace segregated neighborhoods with ''truly integrated and balanced living patterns.'' [119] It was structured to address discriminatory housing practices that affect ''the whole community'' as well as particular segments of the community,[120] with the goal of advancing equal opportunity in housing, and to ''achieve racial integration for the benefit of all people in the United States.'' [121]

[113] Many of the issues raised by commenters regarding the application to insurance in response to the proposed rule were also raised in commenting on the 2013 rule. HUD's 2016 Supplemental Responses covers these issues in depth. ''Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance.'' 81 FR 69012. In considering these comments, HUD has reviewed the 2016 Supplemental Responses and believes the responses made there continue to accurately reflect HUD's interpretation of discriminatory effects law.

[114] 15 U.S.C. 1011 *et.seq.*

[115] *See Sierra Club* v. *EPA,* 719 F.2d 436, 453 (D.C. Cir. 1983) (''The agency relies on its general authority under section 301 of the Act to 'prescribe such regulations as are necessary to carry out [its] functions under [the Act]' . . . . EPA's construction of the statute is condemned by the general rule that when a statute lists several specific exceptions to the general purpose, others should not be implied.''); *see, e.g., Colorado Pub. Int. Rsch. Grp., Inc.* v. *Train,* 507 F.2d 743, 747 (10th Cir. 1974) rev'd on other grounds, 426 U.S. 1 (1976) (''Another cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions are not warranted.''); *Nat. Res. Def. Council, Inc.* v. *Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977) (courts cannot manufacture a ''revisory power'' granting agency authority to act ''inconsistent with the clear intent of the relevant statute''); *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 357 (D.C. Cir. 1979) (''[T]here exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits.''); *see also Graoch,* 508 F.3d at 375. (''[n]othing in the text of the FHA instructs us to create practice-specific exceptions.'').

[116] *See Ojo* v. *Farmers Group, Inc.,* 600 F.3d 1205, 1208 (9th Cir. 2010) (finding that the Act applies to insurers; *NAACP* v. *Am. Fam. Mut. Ins. Co.,* 978 F.2d 287, 297–301 (7th Cir. 1992) (finding that the Act applies to insurers); *Nationwide Mut. Ins. Co.* v. *Cisneros,* 52 F.3d 1351, 1355–1360 (6th Cir. 1995) (finding that HUD's interpretation of the Act as applying to insurers was reasonable); *but see Mackey* v. *Nationwide Ins. Cos.,* 724 F.2d 419, 423–25 (4th Cir. 1984) (pre-Fair Housing Amendments Act and regulations pursuant thereto holding that Act does not cover insurance)*; see also Dehoyos* v. *Allstate Corp.,* 345 F.3d 290, 293 (5th Cir. 2003) (affirming a district court's denial of a motion to dismiss allegations that a credit scoring system used by an insurer had an unjustified discriminatory effect because it resulted in higher rates for non-white customers); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying a motion to dismiss allegations that defendant's policy of declining to insure properties where landlords accept Section 8 vouchers has an unjustified discriminatory effect); *Viens* v. *Am. Empire Surplus Lines Ins. Co.,* 113 F. Supp. 3d 555, 558 (D. Conn. 2015) (denying motion to dismiss allegations that defendant insurer's insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect); *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 50, 60–61, 63 (D.D.C. 2002) (denying a motion to dismiss allegations that certain of defendant's minimum underwriting requirements for certain types of coverages, such as a ''replacement cost'' policy had an unjustified discriminatory effect).

[117] The McCarran-Ferguson Act specifically provides that ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.'' 15 U.S.C. 1012(b). As interpreted by the Supreme Court in *Humana* v. *Forsyth,* McCarran-Ferguson applies only when a particular application of a federal law directly conflicts with a specific state insurance regulation, frustrates a declared state policy, or interferes with a State's administrative regime. *Humana* v. *Forsythe,* 525 U.S. 299, 310 (1999) (''When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.'').

[118] *E.g.* 42. U.S.C. 3604(a) (''it shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling to any person because of'' a protected trait); *NAACP* v. *American Family Mut. Ins. Co.,* 978 F.2d 287, 298 (7th Cir. 1992) (noting that Congress banned an outcome while not saying who the actor is and holding that the Act applies to insurers); *see also Ojo* v. *Farmers Group Inc.,* 600 F.3d 1205, 1208 (9th Cir. 2010) (deferring to HUD's reasonable interpretation of the statutory language that the Act applies to insurance).

[119] *Trafficante,* 409 U.S. at 211 (citing 114 Cong. Rec. 3422 (Feb. 20, 1968) (statement of Senator Mondale)).

[120] *Trafficante,* 409 U.S. at 211 (citing 114 Cong. Rec. 2706 (1968) (Statement of Senator Javits)).

[121] H.R. Res. 1095, 110th Cong., 154 Cong. Rec. H2280–01 (April 15, 2008).

The Supreme Court in *Inclusive Communities* similarly noted that the Act ''was enacted to eradicate discriminatory practices within a sector of our Nation's economy'' and discussed that the viability of disparate impact claims is ''consistent'' with the Act's ''central purpose.'' [122] In order to ''eradicate'' discriminatory practices within the housing sector, as the Court acknowledged was the purpose of the Act, it would logically flow that the Act was intended to apply to all sectors of the housing industry. Notably, the court used strong language, saying the purpose was to ''eradicate,'' rather than weaker language like ''reduce'', making clear that the Act was meant to reach all sectors, otherwise eradication would not be possible. Nor did the Court suggest that any portion of the housing sector was not reached by the Act.

In HUD's experience, insurance plays a significant role in the housing industry and in securing equal opportunity in housing in communities nationwide. Home seekers must be able to access mortgage insurance and homeowners insurance in order to become home owners. Multifamily housing owners and managers must be able to obtain property and hazard insurance in order to obtain financing and manage the risks of their operations. These examples show how different sectors of the housing economy interact, and how the exclusion of one sector of the housing economy from the Act's coverage would pose a barrier to equal opportunity in housing. In its fair housing investigations, HUD has encountered housing providers who will not rent to individuals with disabilities because of insurance-related concerns.[123] HUD is also aware that multifamily housing providers face barriers obtaining insurance when they attempt to lease to low-income families, including people of color and individuals with disabilities who use voucher programs to pay rent.[124] Because of the pivotal role insurance plays in all types of housing, an exemption or safe harbor would undermine and be contrary to the Act's broad purposes.

Even if HUD had authority to exempt insurance categorically, HUD finds that such an exemption for a single industry would neither be workable nor consistent with the purpose of the Act. HUD makes this determination for the reasons it stated in its 2016 Supplemental Notice regarding this subject, some of which is reiterated here, as well as for the following additional reasons. Congress has stated that the Act is intended to provide for fair housing throughout the United States,[125] and the Supreme Court has recognized the Act's broad remedial purpose.[126] The Act's prohibitions on discrimination in housing are intended to eliminate segregated living patterns and move the nation toward a more integrated society.[127] Among other things, the Act requires HUD to affirmatively further fair housing in all of its housing-related programs and activities,[128] one of which is the administration and enforcement of the Act.[129] HUD finds that wholesale exemptions for insurance practices would contravene the text and purposes of the Act, and, as explained further below, would also likely be overbroad in most if not all instances, as such an exemption would allow some practices with unjustified discriminatory effects to go uncorrected. HUD also finds that wholesale exemptions also would be likely to immunize potential intentional discrimination in the insurance market, because as the court in *Inclusive Communities* stated, ''disparate-impact liability under the [Fair Housing Act] also plays a role in uncovering discriminatory intent.'' [130] As the Court found in that case, the availability of disparate-impact claims, ''permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.'' [131]

HUD notes that multiple court decisions have long found discriminatory effects claims against insurance practices to be actionable.[132] And even if the commenters were correct that the industry's practices generally will not give rise to discriminatory effects liability, that fact does not provide a sufficient justification for exempting the entire industry from liability in all circumstances, even where there is a practice with an unjustified discriminatory effect. Especially in light of the broad remedial purposes of the Act, HUD finds that the final rule strikes the appropriate balance for insurance industry practices. Furthermore, HUD notes that some types of discrimination are more difficult than others to prove, and this is particularly true when individuals who are denied a service or quoted a particular price for a service in a residential real estate-related transaction would typically have no way of knowing the specific reasons for a denial or pricing decision. Simply because claims are difficult to prove and may not end up in litigation does not mean that the underlying conduct can

[122] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 539.

[123] *See. e.g.* Charge, *HUD* v. *McClendon,* No. 09–04–1103–8, (2005), *https://www.hud.gov/sites/documents/DOC_14391.PDF* (alleging that landlord ''informed Complainant that she needed to seek housing elsewhere at a place for persons with moderate to severe disabilities because the property insurance only covered mild disabilities''); *HUD* v. *Twinbrook Vill. Apts.,* HUDALJ Nos. 02–00–0256–8, 02–00–0257–8, 02–00–0258–8, 2001 HUD ALJ LEXIS 82, (HUD ALJ Nov. 9, 2001) (respondent requested that complainants obtain insurance to cover any liability resulting from injury associated with ramps installed to make unit accessible).

[124] *See e.g. Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying motion to dismiss allegations that defendant's policy of declining to insure properties with Section 8 voucher tenants has an unjustified discriminatory effect); *Viens* v. *Am. Empire Surplus Lines Ins. Co.,* 113 F. Supp. 3d 555, 558 (D. Conn. 2015) (denying motion to dismiss allegations that defendant insurer's underwriting criteria charging higher premiums or denying coverage to landlords who rent to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect).

[125] *See* 42 U.S.C. 3601.

[126] *See Havens Realty Corp.,* 455 U.S. at 380 at 209 (recognizing Congress's ''broad remedial intent'' in passing the Act); *Trafficante,*409 U.S. at 209 (recognizing the ''broad and inclusive'' language of the Act); *see also Inclusive Cmtys. Project Inc.,* 576 U.S. at 539 (describing the ''central purpose'' of the Act as ''to eradicate discriminatory practices within a sector of our Nation's economy'').

[127] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 546–47; 114 Cong. Rec. 2276, 3422 (1968) (Statement of Sen. Mondale) (the purpose of the Act was to replace ''ghettos'' with ''truly integrated and balanced living patterns.''); 114 Cong. Rec. 2276, 9559 (1968) (Statement of Congressman Celler) (there is a need to eliminate the ''blight of segregated housing''); 114 Cong. Rec. 2276, 9591 (1968) (Statement of Congressman Ryan) (the Act is a way to ''achieve the aim of an integrated society'').

[128] 42 U.S.C. 3608(e)(5).

[129] *See, e.g.,* 42 U.S.C. 3608 (the Secretary's administrative responsibilities under the Act), 3609 (education, conciliation, conferences, and reporting obligations to further the purposes of the Act), 3610 (investigative authority), 3611 (subpoena power), 3612 (administrative enforcement authority), 3614a (rulemaking authority), 3616 (authority to cooperate with state and local agencies in carrying out the Secretary's responsibilities under the Act), 3616a (authority to fund of state and local agencies and private fair housing groups to eliminate discriminatory housing practices prohibited by the Act).

[130] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 540.

[131] *Id.*

[132] *See Dehoyos,* 345 F.3d at 293 (affirming a district court's denial of a motion to dismiss allegations that a credit scoring system had an unjustified discriminatory effect because it resulted in higher rates for non-white customers); *see also Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying a motion to dismiss allegations that defendant's policy of declining to insure properties where landlords accept Section 8 vouchers has an unjustified discriminatory effect); *Viens,* 113 F. Supp. 3d at 558 (denying motion to dismiss allegations that defendant insurer's insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect); *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 50, 48–49, 60–61 (D.D.C. 2002) (denying a motion to dismiss allegations that certain of defendant's minimum underwriting requirements for certain types of coverages, such as a ''replacement cost:'' policy had an unjustified discriminatory effect).

or should be exempted from regulation in all instances.

HUD finds that the concerns raised by the insurance industry do not outweigh these fundamental considerations. This rule sets out a framework by which liability under the Act may be determined; liability arises only for those insurance practices that actually or predictably result in a discriminatory effect and lack a legally sufficient justification. The framework takes into account any defendant's legitimate interest in the challenged practice—including an insurance defendant. As discussed below, HUD finds that any conflict with a specific state insurance law can and should be addressed on a case-by-case basis in the context of that state law.

In sum, the case-by-case approach set out in this final rule appropriately weighs the relevant factors, which include HUD's obligation to enforce the Act, the diversity of potential discriminatory effects claims, the variety of insurer business practices, and the differing insurance laws of the states, as they currently exist or may exist in the future. Given these considerations, HUD believes that it would be impossible for the agency to define the scope of insurance practices covered by an exemption with enough precision to avoid case-by-case disputes over its application. Accordingly, HUD has determined that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with HUD's statutory mandate.

Issue: Commenters stated that if HUD does not provide an exemption for insurance practices, insurers would be forced to evaluate whether their practices lead to segregation and to learn what statistical disparities are permissible.

HUD Response: HUD disagrees. Any obligation to evaluate practices comes from the language of the Act itself, not this final rule. As explained above, this final rule does not impose any new liability upon insurers, so it will not require insurers to start new reviews of their practices. Any such obligation to review their practices arose long before the 2013 Rule was promulgated and originates from the statutory language.[133] Judicial precedent applying disparate impact analysis to insurance companies long predates the 2013 Rule, let alone this rule.[134] Any costs entities may now choose to incur will not be due to any new requirement, and in any case will simply be the ordinary costs of complying with any preexisting statute, administrative practice, and case law governing nondiscrimination in housing and housing-related practices. In any event, evaluating and re-evaluating current practices are not unreasonably burdensome activities for a business or industry to undertake. As explained elsewhere, many other industries, such as lending, engage in risk-based practices and show that it is possible to consistently evaluate and re-evaluate their policies and practices to endeavor to avoid those that may cause unjustified discriminatory effects. Yet those industries have not suffered the dire consequences that the insurance industry claims it will suffer. HUD does not believe the insurance industry stands on different footing from other industries in that respect such as to warrant differential treatment.

Issue: Commenters, citing *NAACP* v. *Am. Family Mut. Ins. Co.,*[135] asked HUD to exempt all homeowners insurance practices from liability for unjustified discriminatory effects, stating that the Act covers only insurance practices that make housing unavailable, thus effectively precluding homeownership. Homeowners insurance practices, they stated, do not make housing unavailable. In addition, citing *Southend Neighborhood Improvement Assoc.* v. *St. Clair,*[136] commenters stated that section 804(b)'s prohibition against discrimination in the provision of services in connection with the sale or rental of a dwelling applies only to services generally provided by governmental units, such as police and fire protection or garbage collection, not insurance.

HUD Response: HUD declines to exempt homeowners insurance from liability for the reasons stated previously and explained more fully below. Neither *NAACP* nor *Southend Neighborhood Improvement Ass'n* support such an exemption. The commenters are incorrect in stating that insurance practices cannot make housing unavailable or that the Act only covers insurance practices that make housing unavailable. A discriminatory practice that precludes a person from obtaining homeowners or renters insurance may indeed make housing unavailable to that person, as insurance is usually required as a condition for obtaining a mortgage or a lease. Moreover, while section 804(a) prohibits discrimination that ''make[s] unavailable'' a dwelling, other provisions in the Act may prohibit insurance practices, including pricing, regardless of whether they make housing unavailable.[137] For example, section 805(a)[138] prohibits discrimination in the ''terms or conditions'' of ''residential real estate-related transactions,'' and section 804(b)[139] prohibits discrimination in the ''terms, conditions or privileges of sale or rental of a dwelling or in the provision of services . . . in connection therewith.'' Indeed, since 1989, HUD's fair housing regulations have specifically prohibited ''[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently'' because of a protected characteristic.[140]

[133] 42 U.S.C. 3601 *et. seq.; see, e.g., Dehoyos* v. *Allstate Corp.,* 345 F.3d 290, 293 (5th Cir. 2003); *see also Owens* v. *Nationwide Mut. Ins. Co.,* Civ. No. 3:03–CV–1184–H, 2005 U.S. Dist. LEXIS 15701, at *44–53 (N.D. Tex. Aug. 2, 2005); *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 60–61 (D.D.C. 2002); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017).

[134] *See Dehoyos,* 345 F.3d 290, 293 (5th Cir. 2003) (affirming a district court's denial of a motion to dismiss allegations that a credit scoring system had an unjustified discriminatory effect because it resulted in higher rates for non-white customers); *see also Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying a motion to dismiss allegations that defendant's policy of declining to insure properties where landlords accept Section 8 vouchers has an unjustified discriminatory effect); *Viens,* 113 F. Supp. 3d 555, 558 (D. Conn. 2015) (denying motion to dismiss allegations that defendant insurer's insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect); *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 50, 48–49, 60–61 (D.D.C. 2002) (denying a motion to dismiss allegations that certain of defendant's minimum underwriting requirements for certain types of coverages, such as a ''replacement cost:'' policy had an unjustified discriminatory effect).

[135] *NAACP* v. *American Family Mut. Ins. Co.,* 978 F.2d 287, (7th Cir. 1992).

[136] *Southend Neighborhood Improvement Assoc.* v. *St. Clair,* 743 F.2d 1207 (7th Cir. 1984).

[137] Depending on the circumstances, discriminatory insurance practices can violate 42 U.S.C. 3604(a), (b), (c), (f)(1), (f)(2), 3605, and 3617. *See, e.g., Cisneros,* 52 F.3d at 1360 (holding that HUD's interpretation that section 3604 of the Act prohibits discriminatory insurance underwriting is reasonable); *Nevels* v. *W. World Ins. Co.,* 359 F. Supp. 2d 1110, 1119–23 (W.D. Wash 2004) (recognizing that sections 3604(f)(1), 3604(f)(2), 3605 and 3617 of the Act cover insurance practices); *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am.,* 208 F. Supp. 2d at 55–58 (holding that sections 3604(a), 3604(b), and 3605 of the Act prohibit discriminatory insurance underwriting practices); *Owens* v. *Nationwide Mut. Ins. Co.,* Civ. No. 3:03–CV–1184–H, 2005 U.S. Dist. LEXIS 15701, at *16–17 (N.D. Tex. Aug. 2, 2005) (holding that section 3604 of the Act prohibits discriminatory insurance practices); *Francia* v. *Mount Vernon Fire Ins. Co.,* No. CV084032039S, 2012 Conn. Super. LEXIS 665, at *24–25 (Conn. Super. Ct. Mar. 6, 2012) (relying on section 3604(c) to interpret an analogous state law as prohibiting a discriminatory statement in an insurance quote).

[138] 42 U.S.C. 3605(a).

[139] 42 U.S.C. 3604(b).

[140] 24 CFR 100.70(d)(4) (emphasis added). As used in this regulation, the phrase ''property or

Continued

Courts have applied the Act's provisions to various insurance practices, including insurance pricing,[141] marketing and claims processing, irrespective of whether the discriminatory conduct occurred when the unit became available or in conjunction with or subsequent to the acquisition of a dwelling.[142]

In addition, HUD finds that the commenters have misconstrued the referenced cases. HUD notes, for example, that *NAACP* did not hold that the Act *only* prohibits insurance practices that effectively preclude homeownership; rather, the court, in considering whether the Act prohibited intentional insurance redlining practices, concluded that it did, and affirmed HUD regulations which ''include, among the conduct prohibited by section 3604: 'Refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race.' '' [143] In that case, the plaintiff brought suit under both section 804(a), asserting that the insurer made housing unavailable, and section 804(b), asserting that the insurer discriminated in the provision of services in connection with the sale or rental of a dwelling.[144] The Seventh Circuit, in discussing the viability of plaintiff's claims, stated that § 804 ''applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.'' [145] The court could not read section 804(b) as requiring a showing that housing was otherwise made unavailable as that language is not present in section 804(b); rather it is in section 804(a). Accordingly, the court's quote cannot be read as applying to the section 804(b) claim especially because it was talking about the plaintiff's claims generally, including its section 804(a) claim, which has the ''make unavailable'' language. Thus, *NAACP* cannot be fairly read to hold that the Act only applies when insurance practices make housing unavailable.

Furthermore in *NAACP,* the Seventh Circuit also clarified its earlier statement regarding governmental services in *Southend Neighborhood Improvement Ass'n.*[146] In *NAACP,* the court stated, ''[w]e once suggested in passing, [in *Southend*] that 'service' in section 3604 means 'services generally provided by governmental units,' but the subject was not before us—and the suggestion that section [804] is limited to governments is hard to reconcile with another plain-statement principle requiring Congress to be especially clear if it wants to regulate the conduct of state and local governments. . .So it is hard to understand section [804] as restricted to garbage collection and like services.'' [147]

Issue: Commenters stated that an exemption for insurance practices is warranted because the judicial and legislative branches have not specifically authorized HUD to become involved in insurance.

HUD Response: Congress authorized HUD to interpret and enforce the Act, and as discussed above, provided no exemption for insurance practices.[148] As also discussed above, courts have routinely applied the Act to insurance practices and have found that, as with other housing-related practices, insurers may be liable for practices that create discriminatory effects under the Act.[149] In promulgating this final rule, HUD is exercising the authority Congress gave it.[150] Any liability originates from the Act itself, not HUD or the rule.

Fundamental Nature of Insurance

Issue: Commenters requested an exemption for insurance practices because of the fundamental nature of the industry, alleging that the proposed rule would fundamentally and problematically alter insurance practices. Commenters said that the foundation of the business of insurance is the ability to classify insurance policyholders by risk and that insurers make decisions based on actuarial and business principles that group policyholders for the purpose of treating those with similar risk profiles similarly. Commenters stated that the industry is predicated on setting rates and making underwriting decisions based on relevant, mathematical, and objective risk factors that accurately predict loss. Commenters said that risk-based pricing has been a bedrock principle of state insurance regulation for more than 150 years, acting as a primary tool for ensuring rates are adequate, not excessive, not unfairly discriminatory, accurately predictive of risk, and protective of the solvency of insurers. Commenters stated that the insurance market functions best when each insured pays a rate that accurately reflects the cost of providing insurance to similarly-situated policy holders. Commenters stated that although professional underwriters routinely avoid or exclude risks for which they lack expertise, underwriting judgment, or actuarial data, they still are required to consider similar factors bearing on risk of loss and do not consider protected traits.

Commenters noted that risk-based pricing is the primary tool to ensure that rates are not unfairly discriminatory, as defined by state insurance codes. Commenters stated that in the context of insurance, unfair discrimination means treating similar risks in a dissimilar manner, which is different from discrimination under the Act. They stated that a rate is unfairly discriminatory if the premium differences do not correspond to expected losses and average expenses.

Commenters stated that the proposed rule would force insurers to eliminate

hazard insurance for dwellings'' includes insurance purchased by an owner, renter, or anyone else seeking to insure a dwelling. 42 U.S.C. 3602(b) (defining ''dwelling'' without reference to whether the residence is owner- or renter-occupied).

[141] *See, e.g., NAACP,* 978 F.2d at 301 (''Section 3604 of the Fair Housing Act applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.''); *Dehoyos,* 345 F.3d at 293 (holding that a claim alleging discriminatory insurance pricing was not barred by McCarran-Ferguson).

[142] *See, e.g., Franklin* v. *Allstate Corp.,* No. C–06–1909 MMC, 2007 U.S. Dist. LEXIS 51333, at *17–19 (N.D. Cal. July 3, 2007) (applying the Act to claims processing); *Burrell* v. *State Farm & Cas. Co.,* 226 F. Supp. 2d 427 (S.D.N.Y. 2002) (same); *see also Owens* v. *Nationwide Mut. Ins. Co.,* Civ. No. 3:03–CV–1184–H, 2005 U.S. Dist. LEXIS 15701, at *17 (N.D. Tex. Aug. 2, 2005) (Insurance practices are covered by the Act ''whether the insurance is sought in connection with the maintenance of a previously purchased home or with an application to purchase a home.''); *Lindsey* v. *Allstate Ins. Co.,* 34 F. Supp. 2d 636, 643 (W.D. Tenn. 1999) (''It would seem odd to construe a statute purporting to promote fair housing as prohibiting discrimination in providing property insurance to those seeking a home, but allowing that same discrimination so long as it takes place in the context of renewing those very same insurance policies.'').

[143] *NAACP* v. *American Family Mut. Ins. Co.,* 978 F.2d 287, 290, 300 (7th Cir. 1992).

[144] *Id.* at 297.

[145] *Id.* at 301.

[146] *Id.* at 299.

[147] *Id.*

[148] 42 U.S.C. 3610; 42 U.S.C 3612; 42 U.S.C 3614a (HUD has the authority to make rules to carry out the Act).

[149] *See Dehoyos,* 345 F.3d at 293 (affirming a district court's denial of a motion to dismiss allegations that a credit scoring system had an unjustified discriminatory effect because it resulted in higher rates for non-white customers); *see also Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying a motion to dismiss allegations that defendant's policy of declining to insure properties where landlords accept Section 8 vouchers has an unjustified discriminatory effect); *Viens,* 113 F. Supp. 3d at 558 (denying motion to dismiss allegations that defendant insurer's insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect); *Nat'l Fair Hous. Alliance* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 50, 48–49, 60–61 (D.D.C. 2002) (denying a motion to dismiss allegations that certain of defendant's minimum underwriting requirements for certain types of coverages, such as a ''replacement cost:'' policy had an unjustified discriminatory effect).

[150] 42 U.S.C. 3614a.

actuarially sound risk-based practices, which is central to the effective determination of insurance premiums, in favor of substitutes that are less effective at furthering an insurer's legitimate, nondiscriminatory interests. A commenter stated that the proposed rule would penalize insurers for relying on sound risk factors that disproportionately affect a protected class, because they would be held liable for disparities they did not create. A commenter stated that the rule will require uniform rates, regardless of risk. Commenters disagreed with the proposed framework's case-by-case analysis. For example, commenters stated that insurers implement polices accounting for risk factors through actuarially sound methodologies, and that it would be impossible for a plaintiff to identify a less discriminatory alternative because any alternative would necessarily correspond to a different risk than the factor at issue, identified through actuarially sound methodology. As a result, if the plaintiff's alternative was adopted, the risk challenged in the lawsuit would no longer be reflected in the price of insurance, resulting in overcharging low-risk customers and likely driving them from the markets.

Other commenters disagreed, stating that the proposed rule appropriately applies to insurance. A commenter stated that application of the 2013 Rule and 2016 Supplement [151] to insurance is consistent with sound actuarial practices because it accommodates underwriting decisions that satisfy the shifting burden framework. Commenters explained that ratemaking, though largely actuarially based, can incorporate elements of non-actuarially based subjective judgments. Commenters cited ratemaking, price optimization, and credit scoring as examples of insurance practices that are not entirely risk-based. Commenters further noted that consideration of these non-purely risk-based factors had not led to the demise of the industry. A commenter indicated that over the past few decades, the insurance industry has removed barriers that restrict homeowners insurers from writing policies in communities of color and, in response to disparate-impact challenges, some insurers have refined underwriting and pricing systems to eliminate arbitrary barriers to the availability of adequate homeowners coverage, resulting in business growth. Commenters concluded that subjecting insurers to disparate impact liability does not ''threaten the fundamental nature of the insurance industry.'' Commenters noted that other risk-based industries, such as mortgage lending, are subject to liability for unjustified discriminatory effects under the Act and have not had to forego risk-based analysis to avoid liability under the Act.

HUD Response: HUD disagrees that the fundamental nature of insurance warrants the exemptions requested by some commenters, whose comments were premised upon the faulty assumption that the proposed rule generally prohibits risk-based practices. It does not. This final rule does not declare any activity per se unlawful. It merely provides a framework for determining if a particular policy or practice causes an unjustified and unlawful discriminatory effect. HUD recognizes that risk-based decision making is an important aspect of sound insurance practices, and nothing in this final rule prohibits insurers from making decisions that are in fact risk-based. Under the framework established by this rule, practices that actually are risk-based, and for which no less discriminatory alternative exists, will not give rise to discriminatory effects liability. The rule simply requires that if an insurer's practices are having a discriminatory effect and ''an adjustment . . . can still be made that will allow both [parties'] interests to be satisfied,'' the insurer must make that change.[152]

Risk-based decision making is not unique to insurance, and discriminatory effects liability has proven workable in other contexts involving complex risk-based decisions, such as mortgage lending, without the need for exemptions or safe harbors. Indeed, all businesses covered by the Act make risk-based decisions. For example, landlords assess risk when they select tenants, set rental rates, and decide whether to require deposits. The Act requires that such risk-based determinations not be based on protected characteristics, in whole or in part. Moreover, some states specifically provide for discriminatory effects liability against insurers under state laws, further undermining the claim that providing for such liability as a matter of federal law threatens the fundamental nature of the industry.[153]

Unfortunately, the history of discrimination in the homeowners insurance industry is long and well documented,[154] beginning with insurers overtly relying on race to deny insurance to persons of color and evolving into more covert forms of discrimination.[155] For example,

[151] On October 5, 2016, HUD issued supplemental responses to insurance industry comments in accordance with the court's decision in *Property Casualty Insurers Association of America (PCIAA)* v. *Donovan,* which upheld the rule's burden-shifting framework for analyzing discriminatory effects claims as a reasonable interpretation of the Fair Housing Act, but that HUD had not adequately explained why case-by-case adjudication was preferable to using its rulemaking authority to provide exemptions or safe harbors related to homeowners insurance. 81 FR 69012; *Prop. Cas. Insurers Ass'n of Am.* v. *Donovan (PCIAA),* 66 F. Supp. 3d 1018, 1049–54 (N.D. Ill. 2014).

[152] *Avenue 6E Invs., LLC,* 818 F.3d at 513.

[153] *Viens,* 113 F. Supp. 3d at 573 n.20 (stating that Connecticut ''provides a similar (albeit broader) protection against housing discrimination as the [Act]'' and finding that McCarran-Ferguson does not bar an FHA disparate impact claim against an insurer related to a property located in Connecticut).; *Jones* v. *Travelers Cas. Ins. Co. of Am.,* Tr. of Proceedings Before the Honorable Lucy H. Koh U.S. District Judge, No.5:13-cv-02390 LHK (N.D. Cal. May 7, 2015), ECF No. 236 (holding that California law complements the Act and denying an insurer's motion to for summary judgement); *Toledo Fair Hous. Ctr.* v. *Nationwide Mut. Ins. Co,* 94 Ohio Misc. 2d at 157–159 (recognizing discriminatory effects liability in homeowners insurance under state law in part because the Superintendent of Insurance lacks ''primary jurisdiction'' over such claims).

[154] Although the discussion that follows focuses on race and national origin discrimination because of their historic prevalence, examples of discrimination in insurance against other protected classes exist as well. *See e.g., Nevels* v. *W. World Ins. Co.,* 359 F. Supp. 2d 1110 (W.D. Wash. 2004) (disability).

[155] *See generally, Homeowners' Insurance Discrimination: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 103d Cong. (1994) [hereinafter 1994 Hearings]; Insurance Redlining Practices: Hearings before the Subcom. on Commerce, Consumer Protection & Competitiveness of the H. Comm. on Energy and Commerce, 103d Cong. (1993) [hereinafter Mar. 1993 Hearings]; Insurance Redlining: Fact or Fiction: Hearing before the Subcom. On Consumer Credit and Insurance of the H. Comm. on Banking, Finance & Urban Affairs, 103d Cong. (1993) [hereinafter Feb. 1993 Hearing]; Insurance Redlining: Fact Not Fiction (Feb. 1979) [hereinafter Comm'n on Civil Rights] (report of the Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin Advisory Committees to the U.S. Commission on Civil Rights); President's National Advisory Panel on Insurance in Riot-Affected Areas, Meeting the Insurance Crisis of Our Cities (1968) [hereinafter Nat'l Advisory Panel].* Further, as the 2016 Supplement stated at times, agents were given plainly discriminatory instructions, such as '''get away from blacks' and sell to 'good, solid premium-paying white people,''' or they simply were told, ''We don't write Blacks or Hispanics.'' *See* 139 Cong. Rec. 22,459 (1993) (statement of Rep. Joseph P. Kennedy, II); *see also, e.g.,* Nat'l Advisory Panel, at 116 (quoting an insurance broker as explaining, ''No matter how good [a customer] is, they [the insurers] take that into consideration, the fact he is a Negro.''). Underwriting guidelines contained discriminatory statements, such as listing ''population and racial changes'' among ''red flags for agents.'' Feb. 1993 Hearing at 19, 27 (statement of Gregory Squires, Prof. U. Wis. Milwaukee). Minorities were offered inferior products, such as coverage for repairs rather than replacement, or were subject to additional hurdles during the quote and underwriting process. 1994 Hearings at 15, 47–48 (statements of Deval Patrick, DOJ Ass't Attorney Gen. for Civil Rights); *id.* at 18–19, 51 (statements of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity). Additionally,

Continued

minorities were denied access to insurance through property-location and property-age restrictions, even when data demonstrated that such restrictions were not justified by risk of loss.[156] This history of discrimination led to persons of color being unjustifiably denied insurance policies or paying higher premiums.[157] As described more fully in other responses, HUD believes that discriminatory effects liability continues to play an important role in preventing unjustifiable discrimination, including in the insurance industry.

Furthermore, HUD's long experience in administering the Act counsels that discriminatory effects liability does not threaten the fundamental nature of the insurance industry. Putting aside the length of time insurers have been subject to discriminatory effects liability under the statute itself, the industry has been subject to the 2013 Rule for ten years and the calamitous results commenters claimed would come to pass have not occurred. HUD's position that discriminatory effects liability applies to insurance dates back more than three decades, as does the industry's concern that such liability makes it ''near impossible for an insurer to successfully defend himself.'' [158] HUD has maintained for decades that remedying discrimination in insurance, including in cases involving discriminatory effects claims, requires examination of each allegedly discriminatory insurance practice on a case-by-case basis, and HUD sees no reason to deviate now from this longstanding approach.

Based on its experience in administering and enforcing the Fair Housing Act, HUD believes that a broad exemption would immunize a host of potentially discriminatory insurance practices that do not involve actuarial or risk-based calculations, such as marketing, claims processing, and payment. In addition, a discriminatory effects claim can challenge an insurer's underwriting policies as ''not purely risk-based'' without infringing on the insurer's ''right to evaluate homeowners insurance risks fairly and objectively.'' [159] For example, plaintiffs have challenged insurer policies that deny insurance to landlords because they rent to Section 8 voucher holders.[160] Even practices such as ratemaking that are largely actuarially-based can incorporate an element of non-actuarially-based subjective judgment or discretion under state law. Indeed, many of the state statutes referenced by commenters that mandate that rates be reasonable, not excessive, not inadequate, or unfairly discriminatory, permit insurers, in the very same section of the insurance code, to rely on ''judgment factors'' in ratemaking. The example of price optimization practices, which some states have started regulating, illustrates how non-actuarial factors, such as price elasticity of market demand, can impact insurance pricing in a manner similar to the pricing of products in non-actuarial industries.[161] The term ''price optimization'' can refer to ''the process of maximizing or minimizing a business metric using sophisticated tools and models to quantify business considerations,'' such as ''marketing goals, profitability and policyholder retention.'' [162] The term ''price elasticity of demand'' refers to ''the rate of response of quantity demanded due to a price change. Price elasticity is used to see how sensitive the demand for a good is to a price change.'' [163] Therefore, by using these practices, insurers are already using factors unrelated to risk to help determine price. Relying on factors unrelated to risk, therefore, has not doomed their business model.

HUD likewise declines to craft a safe harbor for any specific risk-based factor because it would be overbroad, foreclosing claims where the plaintiff could prove the existence of a less discriminatory alternative, such as an alternative risk-based practice.

For HUD to select a few factors for per se exemption as a matter of law based on commenters' bare assertions about

---

discrimination took the form of insurers redlining predominantly minority neighborhoods and disproportionately placing agents and offices in predominately white neighborhoods. 1994 Hearings at 15, 47–48 (statements of Deval Patrick, DOJ Ass't Attorney Gen. for Civil Rights); *id.* at 18–19, 51 (statements of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity). Minorities also were denied access to insurance through property-location and property-age restrictions, even when data had demonstrated that such restrictions are not justified by risk of loss. *See, e.g.,* Comm'n on Civil Rights, at 34–39 (''The greater the minority concentration of an area and the older the housing, independent of fire and theft, the less voluntary insurance is currently being written.''); 1994 Hearings, at 18 (statement of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity) (noting the ''disparate impact on minority communities'' of property age and value requirements, and explaining that ''47 percent of black households, but just 23 percent of white households, live in homes valued at less than $50,000'' and that ''40 percent of black households compared to 29 percent of white households live in homes build before 1950.'').; *see also* Transcript of Proceedings Before the Hon. Lucy H. Koh at 29–33, *Jones* v. *Travelers Cas. Ins. Co. of Am,* (N.D .Cal. 2015) (No.5:13-cv-02390) ECF No. 236 (denying defendants motion for summary judgement on a claim alleging that defendant's policy of failing to insure properties that lease to Section 8 participants has an unlawful discriminatory effect because plaintiffs have ''presented evidence purportedly establishing a correlation between members of protected classes and Section 8 tenants'' and that plaintiffs have presented sufficient evidence that, presets a ''factual question for the trier of fact as to whether [defendant] has legitimate, non-discriminatory justifications.''); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 28–29 (D.D.C. 2017) (denying motion to dismiss claim alleging that defendant's policy of refusing to insure properties that are rented to Section 8 voucher holders had an unlawful discriminatory effect). In addition, HUD, for example, has issued charges against insurers for intentionally discriminating on the basis of religion by imposing less favorable policy terms on people of a particular religion, and on the basis of sex and familial status when an insurer refused to issue a mortgage insurance policy until the policyholder returned from maternity leave.

[156] *See, e.g.,* Comm'n on Civil Rights, *supra* n. 155 at 34–39 (''The greater the minority concentration of an area and the older the housing, independent of fire and theft, the less voluntary insurance is currently being written.''); 1994 Hearings, *supra* n. 155, at 18 (statement of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity) (noting the ''disparate impact on minority communities'' of property age and value requirements, and explaining that ''47 percent of black households, but just 23 percent of white households, live in homes valued at less than $50,000'' and that ''40 percent of black households compared to 29 percent of white households live in homes build before 1950.'').

[157] *See, e.g.,* 139 Cong. Rec. 22,459 (1993) (statement of Rep. Joseph P. Kennedy, II) (''[S]hocking anecdotal evidence was supported by 12 years of data submitted by Missouri State Insurance Commissioner Jay Angoff. . . . It shows that, in the cities of St. Louis and Kansas City, low-income minorities had to pay more money for less coverage than their white counterparts, despite the fact that losses in minority areas were actually less than those in white areas. This evidence directly challenges industry assertions that minorities are too risky to insure.'').

[158] *Fair Housing Act: Hearings before the Subcom. on Civil and Constitutional Rights of the H. Comm. on the Judiciary,* 95th Cong. 20, 616 (1978) (statement of the Am. Ins. Ass'n.).

[159] *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am.,* 208 F. Supp. 2d 46, 60 (D.D.C. 2002).

[160] Transcript of Proceedings Before the Hon. Lucy H. Koh at 29–33, *Jones* v. *Travelers Cas. Ins. Co. of Am,* (N.D.Cal. 2015) (No.5:13-cv-02390) ECF No. 236 (denying defendants motion for summary judgement on a claim alleging that defendant's policy of failing to insure properties that lease to Section 8 participants has an unlawful discriminatory effect because plaintiffs have ''presented evidence purportedly establishing a correlation between members of protected classes and Section 8 tenants'' and that plaintiffs have presented sufficient evidence that, presets a ''factual question for the trier of fact as to whether [defendant] has legitimate, non-discriminatory justifications.''); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 28–29 (D.D.C. 2017) (denying motion to dismiss claim alleging that defendant's policy of refusing to insure properties that are rented to Section 8 voucher holders had an unlawful discriminatory effect).

[161] Nat'l Ass'n of Ins. Comm'rs, Price Optimization White Paper (Nov. 19, 2015) *https://content.naic.org/sites/default/files/inline-files/committees_c_catf_related_price_optimization_white_paper.pdf* [hereinafter NAIC White Paper] at 9 ¶ 30 (''Price optimization has been used for years in other industries, including retail and travel. However, the use of model-driven price optimization in the U.S. insurance industry is relatively new.'').

[162] *Id.* at 4 ¶ 14(a) (discussing the responses of state regulators to the rising increase in use of price optimization practices by insurance providers).

[163] *Id.* at 4 ¶ 14(f) (internal quotations omitted).

their actuarial relevance, without data and without a full survey of all factors utilized by the homeowners insurance industry, would also be arbitrary. Even if such data were available and a full survey performed, safe harbors for specific factors would still be overbroad because the actuarial relevance of a given factor can vary by context.[164] In addition, while use of a particular risk factor may be generally correlated with probability of loss, the ways in which an insurer uses that factor may not be. Furthermore, the actuarial relevance of any given factor may change over time as societal behaviors evolve, new technologies develop, and analytical capabilities improve.

The Act's broad remedial purpose is ''to provide . . . for fair housing throughout the United States.'' [165] Thus, the Act plays a ''continuing role in moving the Nation toward a more integrated society.'' [166] Ensuring that members of all protected classes can access insurance free from discrimination is necessary to achieve the Act's objective because obtaining a mortgage for housing typically requires obtaining insurance.[167] Likewise, obtaining insurance may be a precondition to securing a home in the rental market.[168] Insurance is also critical to maintaining housing because fire, storms, theft, and other perils frequently result in property damage or loss that would be too costly to repair or replace without insurance coverage.

In light of the long, documented history of discrimination in the homeowners insurance industry,[169] including the use of ''risk factors'' by insurers and regulators that were subsequently banned as discriminatory [170] and the non-actuarial or hybrid nature of many insurance practices, HUD considers it inappropriate to craft any exemptions or safe harbors for insurance practices. HUD's longstanding case-by-case approach can adequately address any concerns and better serves the Act's broad remedial purpose and HUD's statutory obligation to affirmatively further fair housing, including by supporting fair housing efforts undertaken by states.[171]

Issue: Commenters opposed the rule or requested an exemption because they believe the rule would force insurers to consider protected traits that are prohibited in the rating and underwriting process and are not risk predictive, contrary to *Inclusive Communities'* caution against injecting race into housing decisions. Commenters wrote that insurance works best when it is blind to protected traits, as they have no relationship to ratemaking or underwriting and that state insurance law prohibits them from using such data to make decisions concerning eligibility, underwriting, and pricing. Commenters also stated that the rule will require insurers to charge different rates for members of different protected classes but similar risk profiles, violating state insurance laws and regulations and compromising insurers' ability to set fair, accurate, and non-discriminatory rates and reliably predict the probable financial consequences of risk. Commenters stated that an insurer could be liable for considering a protected trait or not considering the trait.

HUD Response: HUD disagrees that this final rule will force insurers to consider protected traits of individuals in the rating and underwriting process. Instead, to ensure compliance, a regulated entity may wish to examine whether a facially neutral policy or practice causes an unjustified discriminatory effect, as defined by the regulation. This is no different from the analysis that any other entity regulated by the Fair Housing Act, such as mortgage lenders and housing providers, might want to perform to ensure compliance. *Inclusive Communities* rejected the argument that such an analysis would raise equal-protection concerns, reasoning that ''awareness of race'' can help ''local housing authorities [that] choose to foster diversity and combat racial isolation with race-neutral tools.'' [172] Such awareness of the impact of facially neutral actions can also benefit other housing providers and entities covered by the Act, including insurers, to achieve the goals that many commenters stated they share, *i.e.,* achieving a more equitable and just society. This sort of awareness of race (and other protected classes), combined with an understanding of how its own policies, practices, and assessment tools impact those protected classes, can inform the covered entity on whether its approach actually or predictably results in a discriminatory effect. HUD notes that awareness of protected traits and the impact of policies based on protected traits is different from considering or making decisions *based upon* a protected trait, which would constitute discriminatory treatment. Commenters pointed to no state law, and HUD knows of no state law, that prohibits insurers from examining their own underwriting factors and practices to determine whether these factors and practices unjustifiably cause a disparate impact on protected classes or otherwise serve as a proxy for race. This kind of self-examination is encouraged, generally, by this final rule, is consistent with *Inclusive Communities* and the Act, and is intended not to lead to liability under the Act but rather to protect entities from liability.[173] Indeed, lenders and others covered by the Act regularly engage in such self-examination without threat to their business models. In sum, the industry has been subject to the 2013 Rule for ten years, and iterations of the same burden-shifting framework as imposed by courts for even longer, and none of these dire outcomes predicted by the industry have come to pass.

Issue: Commenters stated that prohibiting risk-based pricing and underwriting, and forcing insurers to consider protected traits, would lead to negative consequences. Commenters stated that the proposed rule could lead to serious and damaging unintended consequences for the industry including, interfering with underwriting; destabilizing insurance coverage; threatening insurer solvency; distorting the market; collapsing the industry; and increasing insurance costs and premium rates, having a negative impact on policyholders and small businesses. As another example, commenters stated that the inability to rate risks will make it prohibitively expensive to insure high-risk properties so insurers will withdraw specific lines of business or insure only low-risk

[164] For example, in some high-crime neighborhoods the higher-than-average risk of loss from theft could be offset by a lower-than-average risk of other losses, such as those caused by weather. Therefore, the legitimacy of declining to issue insurance policies in all locations with high crime rates would depend on other features of those locations.

[165] 42 U.S.C. 3601; *See Havens Realty Corp.,* 455 U.S. at 380 (recognizing Congress's ''broad remedial intent'' in passing the Act); *Trafficante,* 409 U.S. at 209 (recognizing the ''broad and inclusive'' language of the Act); *see also Inclusive Cmtys. Project Inc.,* 576 U.S. at 538 (describing the ''central purpose'' of the Act as ''to eradicate discriminatory practices within a sector of our Nation's economy'').

[166] *Inclusive Cmtys. Project Inc.,* 576 U.S. at 547.

[167] *NAACP,* 978 F.2d at 297 (''No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable.'').

[168] *See, e.g.,* Or. Rev. Stat. 90.222(1) (''A landlord may require a tenant to obtain and maintain renter's liability insurance in a written rental agreement.'').

[169] *See sources cited supra* note 155.

[170] *See sources cited supra* note 155.

[171] *Cf. Crossroads Residents Organized for Stable and Secure ResiDencieS,* , 2016 U.S. Dist. LEXIS 86965 at *32 n.6 (declining to adopt a per se rule that a certain category of disparate impact claims could not be brought in part because ''HUD has indicated a preference for case-by-case review of practices alleged to cause a disparate impact'').

[172] *Inclusive Cmtys. Project Inc.,* 576 U.S. at 545.

[173] *See* 24. CFR. 100.140 (discussing voluntary self-testing conducted by lenders).

properties. Commenters stated, citing to *NAACP,* that charging the same rates to individuals posing different levels of risk results in lower-risk individuals subsidizing higher risks, eliminating incentives for insureds to mitigate risk, forcing low-risk consumers out of the market [174] and diminishing insurers' ability to broadly spread risk.

HUD Response: HUD disagrees with the commenters' views on the final rule's impact on the fundamental nature of insurance and that such negative consequences will come to pass. Each example is premised upon the faulty assumption that the rule prohibits risk-based practices or would require insurers to use protected traits. As explained in further detail above, it does not. The rule merely provides a framework for determining if a particular policy or practice causes an unlawful discriminatory effect. Furthermore, as noted above, insurers have been subject to discriminatory effects liability since well before the 2013 Rule and have been subject to the 2013 Rule for ten years, yet to HUD's knowledge the commenters' fears have not come to pass.[175] Certainly, no commenter has provided any evidence that such fears have materialized.

Whether Inclusive Communities Supports an Insurance Exemption

Issue: Commenters cited *Inclusive Communities* in support of their request for an exemption for risk-based insurance practices. Commenters stated that applying the rule to insurance would run afoul of the limitations on disparate impact liability articulated in *Inclusive Communities,* and affect their ability to accurately price for risk, making risk assessment more expensive, penalizing consumers, and adversely impacting the insurance market. Some commenters, citing *Inclusive Communities'* discussion of ''legitimate business practices,'' asserted that risk-based insurance practices are examples of legitimate business practices and merit an exemption. Commenters stated that restricting insurers' use of objective risk-based factors would run afoul of *Inclusive Communities* because it would undermine the Act's purpose and the free-market system by making insurers fearful of liability, restrict innovation, and hold insurers liable for disparities they did not create, irreparably distorting the market.

Other commenters opposed an exemption for insurers, with a commenter specifically noting that *Inclusive Communities* did not discuss exemptions from liability. One commenter noted in *Nat'l Fair Hou. All.* v. *Travelers Indemnity Co.,* the court rejected defendants' argument that *Inclusive Communities* introduced new standards such that insurers could not be held liable, stating that the refusal to provide insurance to Section 8 voucher holders remained the ''type of clear, non-speculative, connection . . . that *Inclusive Communities* requires to make out a prima facie claim of disparate impact.'' [176]

HUD Response: HUD finds no support in *Inclusive Communities* for exempting the insurance industry from discriminatory effects liability. As discussed above, *Inclusive Communities* did not introduce any new limitations to discriminatory effects law, did not address the application of the 2013 Rule or disparate impact principles to risk-based homeowners insurance practices, and did not discuss or suggest exemptions to liability for insurers or anyone else. *Inclusive Communities* discusses ''business necessity,'' [177] and ''legitimate needs'' [178] in the context of the Title VII disparate impact framework, which, like this rule, provides that a practice that is deemed a ''business necessity'' may still violate the statute if the plaintiff proves there is a less discriminatory alternative.[179] Rather than support an exemption for risk-based insurance practices, this language supports the framework of this final rule. The Court in *Inclusive Communities* also stated that governmental entities ''must not be prevented from achieving legitimate objectives.'' [180] This requirement is consistent with the final rule which, at the second step allows the defendant to show that a challenged practice serves a substantial, legitimate, non-discriminatory interest, so as to defeat a disparate impact claim unless the plaintiff can prove there is a less discriminatory alternative that serves that substantial, legitimate, nondiscriminatory interest.

Issue: Commenters stated that because the facts in *Inclusive Communities* involve decisions on the location of housing, which are distinguishable from the facts and decisions in insurance cases, the principles of *Inclusive Communities* are inapplicable to the insurance industry. This distinction, they said, supports an exemption for insurance.

HUD Response: HUD agrees that *Inclusive Communities* had different facts than a case involving insurance. That does not mean that *Inclusive Communities* supports an exemption or safe harbor for insurance. *Inclusive Communities* did not limit the use of discriminatory effects claims to any particular industry [181] and provides no support for exempting insurance practices. The Court's holding that discriminatory effects claims are cognizable under the Act applies to all such claims under the Act, and does not exclude practices particular to any industry, including insurance. HUD notes that the potential application of disparate-impact analysis to the insurance industry long predated *Inclusive Communities,* which generally reaffirmed disparate-impact doctrine.

Whether Other Supreme Court Precedent Supports an Exemption

Issue: Commenters stated that *Wards Cove* and *Watson* require an exemption for insurance because they set a higher burden of proof for plaintiffs than the proposed rule does.

HUD Response: HUD disagrees with the commenters. Neither *Wards Cove* nor *Watson* provide a basis for an exemption for insurance practices. Both cases, which involve Title VII claims, were decided prior to the Supreme Court's controlling precedent in *Inclusive Communities,* with which the final rule is consistent. And as explained more fully below, neither case necessitates a revision to plaintiff's burden of proof in Fair Housing Act cases. Simply stated, they provide no basis to exempt insurance practices.

[174] Some commenters quoted the Seventh Circuit in *NAACP* in support of their statement that considering protected traits would lead to adverse consequences: ''putting young and old, or city and country, into the same pool would lead to adverse selection: people knowing that the risks they face are less than the average of the pool would drop out.

[175] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 546 (the Court noted that the existence of disparate impact claims ''for the last several decades 'has not given rise to . . . dire consequences.' ''). To HUD's knowledge, insurers continue to use risk-based pricing. Commenters provided no evidence that over the past ten years this rule has resulted in an increased risk of insurer solvency, that it has caused any insurers to go out of business, that it has caused rates to increase, or that it has caused insurers to withdraw from insuring certain types of properties.

[176] *Nat'l Fair Hous. All.* v. *Travelers Indemnity Co.,* 261 F. Supp. 3d at 30 (D.D.C. 2017).

[177] *Inclusive Cmtys. Project Inc.,* 576 U.S. at 541.

[178] *Id.*. at 533.

[179] For instance, the court stated explained, describing the rule for Title VII that ''[b]efore rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is ''an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'' *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 533.

[180] *Inclusive Cmtys. Project, inc.,* 576 U.S. at 544.

[181] The Court stated ''the issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited,'' and did not limit the holding to certain fact patterns. *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 530.

Whether Claims Against Insurers Will Fail as a Matter of Law

Issue: Commenters stated that insurance practices should be exempt because challenges to risk-based pricing and underwriting will fail as a matter of law under *Inclusive Communities* and *Graoch.* They stated that insurance claims will fail as a matter of law because *Inclusive Communities* mandates the removal only of ''artificial, arbitrary, or unnecessary barriers'' and risk-based pricing does not create such barriers and because plaintiffs would be unable to identify less-discriminatory practices that will allow the insurer to pursue their valid interest. According to the commenters, this is because it is grounded in mathematics, is objective and fair, and advances substantial, legitimate, nondiscriminatory interests. Other commenters stated that making sure that insurance rates accurately reflect the risk of future loss is a valid interest and that *Inclusive Communities* requires that businesses have ''leeway to state and explain the valid interest served by their policies.'' In addition, commenters said that the *Graoch* court held that categorical bars are justified when plaintiffs have no chance of success, a holding that commenters argued the proposed rule ignores.

Commenters further stated that all insurance claims will fail as a matter of law because there can never be a robust causal link between legitimate risk factors and any disparate impact. According to them, risk-based factors do not consider protected characteristics, and they are mandated or approved by state law, limiting insurer discretion. These commenters stated that any disparate impact caused by socioeconomic factors is beyond the control of insurers. Moreover, they stated that because state laws limit insurer discretion, these laws make it impossible to ascribe any discriminatory effects in underwriting and pricing to an insurer's own choices.

A commenter suggested that if HUD does not exempt or provide a defense for insurers, HUD should state in the final rule that disparate impact claims against risk-based pricing and underwriting practices cannot succeed. Commenters also asked HUD to commit not to bring disparate-impact challenges to risk-based insurance practices.

HUD Response: HUD disagrees with the commenters who claimed that lawsuits against insurers based on a discriminatory effects theory will necessarily fail as a matter of law and that therefore insurers are entitled to an exemption.[182] As discussed in detail above, courts have found that insurers are subject to discriminatory effects liability under the Act. HUD also declines to commit not to bring discriminatory effects challenges against insurers or to specify that any claims based on insurance practices will necessarily fail. As discussed at length, insurance practices may be subject to disparate impact liability and insurers may be proper defendants in lawsuits alleging disparate impact under the Act. Indeed, the Act requires HUD to file charges of discrimination if reasonable cause exists to believe discrimination occurred.[183]

Graoch provides no basis for such an exemption. First, the *Graoch* court stated that ''we cannot create categorical exemptions from [the Act] without a statutory basis'' and ''[n]othing in the text of the [Act] instructs us to create practice-specific exceptions. Absent such instruction, we lack the authority to evaluate the pros and cons of allowing disparate-impact claims challenging a particular housing practice and to prohibit claims that we believe to be unwise as a matter of social policy.'' [184] While the *Graoch* court said that ''categorical bars are justified when . . . plaintiffs have no chance of success,'' [185] it did not find such a situation and in fact noted the possibility of success on a claim against a landlord seeking to withdraw from a Section 8 program. It made no finding that challenges against insurance practices—which were not the subject of the lawsuit—were impossible under the Act.[186] To the extent that *Graoch* is relevant, it establishes a high bar—the literal impossibility of making out a particular type of claim—that would have to be established before a categorical bar would be appropriate. And in HUD's belief, it is, in fact, possible for a claim against an insurer to succeed, as demonstrated by several court opinions, so the standard set out by *Graoch* is not met.[187]

Some comments are premised on the faulty assumption that *Inclusive Communities* introduced different standards for discriminatory effects claims. As explained above, *Inclusive Communities* described and endorsed the same disparate impact framework that this rule sets out. In that case, the Supreme Court explained, that policies and practices that are artificial, arbitrary, and unnecessary are invalid under the Act when the longstanding disparate impact elements as set forth in this rule are satisfied. However, the Court *did not* require plaintiffs to show that a policy or practice is artificial, arbitrary, and unnecessary *in addition to* proving an unjustified discriminatory effect. Rather, the Court, in quoting ''artificial, arbitrary, and unnecessary'' from the decades-old case *Griggs,* was describing the types of policies that will fail under the rule's traditional shifting

[182] *See Dehoyos,* 345 F.3d at 293; *see also*; *Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46,48 (D.D.C. 2002); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017).

[183] 42 U.S.C. 3610(g)(2)(A) (''If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall . . . immediately issue a charge on behalf of the aggrieved person'').

[184] *Graoch,* 508 F.3d at 375.

[185] *Id.* at 376.

[186] The *Graoch* court did not identify homeowners insurance as an example of where application of the disparate impact rule is never appropriate. The court *in dicta* incorrectly read *NAACP* v. *Am. Family Mut. Ins. Co.* to hold ''that insurers never can face disparate-impact liability for 'charging higher rates or declining to write insurance for people who live in particular areas.''' *Graoch,* 508 F.3d at 375. HUD believes that the *Graoch* court read *NAACP* incorrectly. *NAACP* overturned a dismissal of a claim under the Act, holding that it ''is reversed to the extent it holds that the Fair Housing Act is inapplicable to property and casualty insurance written or withheld in connection with the purchase of real estate.'' *NAACP,* 978 F.2d at 302. The plaintiff in that case made claims of disparate treatment and disparate impact. *Id.* at 290. In discussing the two, the *NAACP* court stated that it must presume that plaintiffs can prevail under a disparate treatment theory because the Supreme Court had not yet decided whether disparate impact is a viable legal theory under Title VIII and because of the nature of insurance. *Id.* The court ultimately narrowed the holding to state ''[a]ll we decide is whether the complaint states claims on which the plaintiffs may prevail if they establish that the insurer has drawn lines according to race rather than actuarial calculations.'' *Id.* at 291. Further, *NAACP* was about redlining in insurance and does not describe any/all practices of the insurance industry. *Id.* at 290. So, even if *Graoch's* reading were correct, the holding, and *Graoch's* description of the holding is limited to one practice used by insurers.

[187] HUD is unaware of any trial on the merits of a discriminatory effects claim against an insurer, but notes that many have survived a motion to dismiss and subsequently settled. *See Dehoyos,* 345 F.3d at 293 (affirming a district court's denial of a motion to dismiss allegations that a credit scoring system had an unjustified discriminatory effect because it resulted in higher rates for non-white customers); *Nat'l Fair Hous. All.* v. *Travelers Indem. Co.,* 261 F. Supp. 3d 20, 22 (D.D.C. 2017) (denying a motion to dismiss allegations that defendant's policy of declining to insure properties where landlords accept Section 8 vouchers has an unjustified discriminatory effect); *Viens,* 113 F. Supp. 3d at 558 (denying motion to dismiss allegations that defendant insurer's insurance underwriting criteria that charge higher premiums or deny coverage to landlords who rent apartments to tenants receiving Section 8 housing assistance has an unjustified discriminatory effect*); Nat'l Fair Hous. All.* v. *Prudential Ins. Co. of Am,* 208 F. Supp. 2d 46, 48–50, (D.D.C. 2002) (denying a motion to dismiss allegations that certain of defendant's minimum underwriting requirements for certain types of coverages, such as a ''replacement cost'' policy had an unjustified discriminatory effect).

burden framework, which is consistent with this final rule. In other words, if a practice with a discriminatory effect is not necessary to achieve a substantial and legitimate interest, or when an alternative, less discriminatory practice exists, the challenged practice is invalid under the Act because it is artificial, arbitrary, or unnecessary. Insurance practices, like other practices related to housing, may sometimes create artificial, arbitrary, and unnecessary barriers. Further, as part of the disparate impact framework set forth in this rule, insurers, like all defendants, are provided the opportunity to show a valid interest supporting any practice challenged under the Act. Therefore, a specific exemption for insurers is unwarranted.

HUD finds that claims against insurers will not fail categorically as a matter of law. HUD believes, contrary to commenters' assertions, it is possible for plaintiffs to establish a causal connection between an insurance practice and a discriminatory effect. HUD also believes that it is possible for plaintiffs to prove a less discriminatory alternative. HUD notes that the fact that risk-based pricing does not facially consider protected characteristics provides no support for the contention that plaintiffs cannot—or should be precluded from the opportunity to—prove that a particular policy that defendants claim is risk-based causes an unjustified discriminatory effect. A violation of the Act based on a discriminatory effects claim requires proof of an unjustified discriminatory effect because of a trait protected by the Act, not proof of intentional discrimination. The fact that state laws mandate that rates be actuarially sound, or risk-based, does not necessarily negate causation because insurers may not in fact be using risk factors that are actuarially sound or the least discriminatory set of risk factors that would achieve that end. Specifically, an actuarially sound practice may nonetheless cause an unjustified discriminatory effect if a less discriminatory alternative is available that also is actuarially sound and otherwise complies with state law. As other examples, commenters referenced ratemaking, price optimization, and credit scoring as examples of largely actuarially based practices that can incorporate elements of non-actuarially based subjective judgment or discretion, and thus cause an unjustified discriminatory effect. HUD finds this comment persuasive. HUD acknowledges that there may be scenarios where plaintiffs will be unable to show causation or demonstrate the existence of a less discriminatory alternative, but it is incorrect to say that all claims will fail as a matter of law. Thus, HUD declines to grant a categorical exemption on this basis.

State Regulation

Issue: Commenters stated that insurance practices should be exempted from discriminatory effects liability, with some advocating for retention of the 2020 Rule, because, according to the commenters, states are better at regulating insurance and should be the primary or sole regulators, and federal regulation creates a patchwork of rules, leading to higher costs. Commenters stated that the state regulatory system is comprehensive; protects consumers; effectively and efficiently regulates the insurance industry; ensures that premiums are actuarially justified and not excessive, inadequate, or unfairly discriminatory; and has increased affordability and availability over the past 150 years. Commenters stated that one of the primary aims of state regulation is to protect insurer solvency by ensuring that insurance providers charge premiums that adequately cover current and future claims and provide adequate surplus for capitalization, asset and reinsurance purchases and liquidity. Commenters also stated that state regulations already preclude the type of discrimination they believe the rule addresses, though others noted that unfair discrimination under insurance laws is not the same as discrimination under the Act. Commenters said that state regulators understand the unique conditions in their state affecting market and consumer needs; are structured so as to promote consistency and sufficiently flexible to promote innovation; and have always set the right regulations for local conditions. Commenters said that interfering with a system that works well will have negative effects, undermining state insurance regulations and consumer protection laws and upending the commonsense structure of state regulation. Commenters stated that federal regulation would subvert the role of state regulators and undermine the accuracy of risk-based pricing, leading to premium increases.

Commenters, citing to *Cole* v. *State Farm Insurance Co.* (Alaska 2006) and *Cain* v. *Fortis Insurance Co.* (S.D. 2005), stated that courts have recognized that state laws ensure that the insurance market functions fairly.[188] A commenter stated that every state has effective civil and criminal insurance anti-discrimination laws, regulations, and enforcement divisions.

Other commenters, however, warned that a broad exemption for the homeowners insurance industry could go beyond underwriting practices to exclude unregulated practices like marketing, claims processing, and claims payment from disparate impact liability.

HUD Response: HUD disagrees with commenters who say that this final rule will upend the state regulatory system or create insurer insolvency. The rule recodifies the rule that has been in effect since 2013—and that itself codified jurisprudence which has included application to insurers for decades—during which time no such upending has occurred. The rule makes no change to the status quo, and so there is no basis for claims that it will upend anything. As discussed above, the rule does not prohibit risk-based pricing or modify the ability of states to regulate insurers as they have done for decades. And Congress has delegated authority to HUD to regulate under the Act.[189]

State regulators may effectively and efficiently ensure that premiums are actuarially justified and not excessive, inadequate, or unfairly discriminatory as defined by state insurance codes.[190] However, as commenters arguing for the exemption themselves recognize, ''unfairly discriminatory'' as defined by insurance codes, is related to treating similar risks differently, which is wholly distinct from housing practices that are unlawful because they discriminate because of the protected characteristics under the Act. State insurance codes generally require only that policies and practices are aimed at a legitimate objective without regard to whether that objective discriminates because of a protected characteristic or whether a less discriminatory

[188] *Cole* v. *State Farm Ins. Co.,* 128 P.3d 171 (Alaska 2006); *Cain* v. *Fortis Ins. Co.,* 694 NW 2d 709 (S.D. 2005).

[189] 42 U.S.C. 3614a.

[190] Commenters overstate *Cole* and *Cain* as ''recogiz[ing] that state laws ensure that the insurance market functions fairly.'' In *Cole,* while recognizing that Alaska's state insurance laws prohibit certain discrimination, the court engaged in a further analysis of Alaska's human rights law, implicitly recognizing that the state insurance law may leave gaps to be filled by other anti-discrimination laws. *Cole,* 128 P.3d at 175–78. The case said nothing about how the state insurance code ensured that the insurance market functioned fairy. *Cain* also says nothing about how state insurance regulation ensures market functions fairly. *Cain,* 694 NW 2d at 714 (rejecting the policy holder's argument that she was discriminated against under South Dakota's unfair trade practices act by the health insurance company when it denied her coverage for gastric bypass surgery, analyzing whether she was discriminated against using Black's Law Dictionary's definition of discrimination).

alternative exists to achieve that objective. As an example, many state statutes mandating reasonable rates that are not excessive, inadequate, or unfairly discriminatory, permit insurers, via the very same section of the insurance code, to rely on discretionary ''judgment factors'' in ratemaking.[191] These judgment factors, although permissible under the insurance code, may result in unlawful discrimination under the Act. Moreover, it is the responsibility of HUD—not of state regulators—to promulgate regulations related to compliance with the Act.[192]

McCarran-Ferguson Act

Issue: Commenters stated that HUD should exempt all insurance practices, or at least risk-based pricing and underwriting, because imposing the rule on insurers would violate the McCarran-Ferguson Act. Commenters stated that the McCarran-Ferguson Act established the states as the primary regulator of insurance and that state insurance laws preempt federal laws, such as the Act, when (1) the federal law does not expressly relate to the business of insurance; (2) the state law is enacted for the purpose of regulating insurance; and (3) the application of federal law might ''invalidate, impair, or supersede'' state laws regulating insurance. Commenters stated that the Act is not expressly related to the business of insurance and therefore its application to insurers would be inconsistent with the McCarran-Ferguson Act.

Commenters, citing *Humana Inc.* v. *Forsyth* [193] stated that the rule contravenes the McCarran-Ferguson Act because it could invalidate or conflict with risk-based insurance pricing or underwriting policies that are permitted or required under state law. Commenters stated that state insurance laws permit or require risk-based pricing and underwriting, so any claim under the Act will always be preempted. Commenters said insurers would be caught between conflicting state and federal law and forced to either comply with state approved rates based on objective risk factors permitted or required by state law or comply with the Act by considering protected traits. Commenters stated that under state laws, insurers make underwriting decisions based on actuarial risk factors, and that risk-based differences in charges could affect demographic groups differently. Commenters also stated that the majority of states require insurers to set rates based on neutral actuarial factors, requiring insurers to take risk into account to remain solvent. Commenters said that permitting the showing of a less discriminatory alternative at step three of the burden shifting framework requires insurers to adopt alternate risk-based practices that are less effective and will result in less accurate pricing, in violation of state law. Commenters stated that the rule violates McCarran-Ferguson because a federal court may be called upon to enjoin the insurer's state-approved risk-based practice in favor of an alternative that may not be equally effective at predicting loss. Commenters stated that this violates state laws prohibiting inadequate rates and unfair discrimination between individuals with comparable risk profiles and would force insurers to use factors that are prohibited in the underwriting process.

Commenters, citing *Humana,* stated that federal law must not be read to authorize regulations that, if applied, would ''frustrate any declared state policy or interfere with a State's administrative regime'' concerning insurance.[194] Commenters further stated that the rule impermissibly interferes with the state regulatory system for various reasons. The proposed rule, they stated, would interfere with a state's administrative regime by substituting the judgment of a federal court for state regulators. They also cited *Saunders II,*[195] in support of the assertion that it is improper to empower federal courts to reject rates that were reviewed and approved by state regulators under state law. Commenters stated that even if a federal court does not reject the rate, allowing such a claim to proceed in federal court would render insufficient the assurance of lawfulness that the state approval provides. Commenters noted that the *Saunders II* court stated that ''HUD has never applied a disparate-impact analysis to insurers'' and expressed doubt that it could.[196] Commenters also cited *Ojo* v. *Farmers Insurance Company,*[197] which found that the McCarran-Ferguson Act barred a disparate impact claim against Farmers because it would frustrate Texas's regulatory policy, which does not prohibit an insurer from using race neutral factors in credit scoring to price insurance, even if it creates a disparate impact. A commenter pointed to *Dehoyos* v. *Allstate Corp,*[198] which stated that ''a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business'' to show that the proposed rule would interfere with a state's administrative regime.[199] Commenters stated that because unfair discrimination as defined by state insurance laws is different than discrimination prohibited by the Act, the rule disrupts states' regulatory regimes.

Commenters also cited to *Mutual of Omaha,*[200] stating that the proposed rule contravenes the McCarran-Ferguson Act because it allows courts—rather than states—to determine if rates are actuarially sound. Commenters stated that in *Mutual of Omaha,* the Seventh Circuit held that the McCarran-Ferguson Act preempted application of the Americans with Disabilities Act because it would require insurers to litigate whether the challenged insurance practices were actuarially sound, thus stepping on the toes of state regulators. Specifically, commenters stated that steps two and three of the burden shifting framework would force federal courts to second guess the actuarial soundness of state-regulated insurance. Commenters stated that under *Mutual of Omaha,* a case-by-case approach to whether McCarran-Ferguson preempts the Act's application is inappropriate because of the uniformity in state laws permitting or requiring the use of risk factors and because second guessing state regulators itself is improper, regardless of outcome.

Commenters stated that state anti-discrimination laws are irrelevant to whether the McCarran-Ferguson Act preempts a case under the Act, because McCarran-Ferguson asks only whether the application of federal law would invalidate, impair, or supersede state laws enacted for the purpose of regulating the business of insurance, and state antidiscrimination laws are not enacted for such purpose. Commenters said that even if a state's fair-housing law were identical to the Act and would permit a disparate-impact challenge to risk-based practices in state court, any federal litigation under the rule would still require federal courts to second-guess the actuarial soundness of insurance practices regulated by state law—-

[191] *See e.g.,* Ga. Code Ann. 33–9–4; Mont. Code Ann. 33–16–201; *see also NAIC White Paper, supra* note 161 at 1 ¶ 5 (''Making adjustments to actuarially indicated rates is not a new concept; it has often been described as 'judgment.' '').

[192] 42 U.S.C. 3614a.

[193] *Humana Inc.* v. *Forsyth,* 525 U.S. 299 (1999).

[194] *Id.* at 310.

[195] *Saunders* v. *Farmers Ins. Exch. (Saunders II),* 537 F.3d 961 (8th Cir. 2008).

[196] *Id.*

[197] *Ojo* v. *Farmers Grp., Inc.,* 356 SW.3d 421 (Tex. 2011).

[198] *Dehoyos* v. *Allstate Corp.,* 345 F.3d 290 (5th Cir. 2003)

[199] The commenter also said that the opinion is likely to be adopted by other courts.

[200] *Doe* v. *Mut. of Omaha,* 179 F.3d 557 (7th Cir. 1999).

contrary to the express holding of *Mutual of Omaha.*

Other commenters stated that the proposed rule does not undermine the state regulation of insurance and thus presents no conflict with McCarran-Ferguson. They stated that state authority to regulate insurance does not, on its own, create a conflict with federal law; rather this is a fact-specific determination that depends on the relevant state law, the conflict claimed and other case-specific variables. Commenters stated that many states have regulations that complement disparate-impact liability under the Act and, even if they do not, that does not necessarily mean there is a conflict with state law. Commenters cited *Dehoyos, Humana,* and *Wai* [201] to show that the need for a fact-specific inquiry depends on the relevant state law, the conflict claimed, and other case-specific variables. Commenters stated that the District of Columbia, California, and North Carolina, for example, expressly provide by statute for disparate impact claims. Commenters said that given the variation in state insurance laws, an exemption for insurers is inappropriate, and a case-by-case evaluation is the better approach.

HUD Response: HUD believes that the McCarran-Ferguson Act neither creates nor justifies a wholesale exemption for insurers from liability for policies and practices that have an unjustified discriminatory effect. Some discriminatory effects claims against insurers will be preempted under McCarran-Ferguson but others will not, depending on a host of case-specific variables, so wholesale exemptions would be overbroad. The McCarran-Ferguson Act provides that ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.'' [202] As interpreted by the Supreme Court in *Humana,* McCarran-Ferguson applies to preempt federal law only when a particular application of that law directly conflicts with a specific state insurance regulation, frustrates a declared state policy, or interferes with a State's administrative regime.[203] That is, McCarran-Ferguson preemption is assessed on an application-by-application basis and does not operate at the wholesale level commenters sought here. Accordingly, the mere fact that a state has the authority to regulate insurance or has adopted ratemaking regulations does not on its own create the kind of conflict, frustration of purpose, or interference that triggers preemption under McCarran-Ferguson.[204] Rather, the inquiry required by *Humana* depends on the relevant state law and other case-specific variables.[205]

For example, in *Dehoyos* v. *Allstate,* the Fifth Circuit rejected a McCarran-Ferguson defense to a disparate impact claim where the insurer did not identify a specific state law that was impaired.[206] The Fifth Circuit reasoned that the Seventh Circuit's holding in *Doe* v. *Mutual of Omaha* that McCarran-Ferguson barred a particular claim of discrimination under the Americans with Disabilities Act did not foreclose *all* discriminatory effects claims against insurers.[207] Instead, the Fifth Circuit distinguished *Doe,* by explaining that ''[i]n *Doe,* there was an actual state insurance law which purportedly conflicted with the application of the ADA to the particular insurance question at issue.'' [208] Thus, where no state law is impaired, McCarran-Ferguson will not require preemption of a discriminatory effects claim against an insurer.

HUD finds that whether in fact a particular policy or practice would create a conflict so as to preempt the Act is highly fact specific and depends on the particular state law and fair housing allegations in question. Accordingly, HUD has determined that a case-by-case approach is necessary and justified. McCarran-Ferguson, by its nature, requires such case-by-case analyses and contains no requirement that HUD provide categorical exemptions. McCarran-Ferguson requires a fact-intensive inquiry that will vary state by state and by claim. Even those cases in which an impermissible impairment under McCarran-Ferguson was found support the case-by-case approach herein adopted by HUD rather than the wholesale exemption sought by some commenters. For example, in *Saunders* v. *Farmers Insurance Exchange,* prior to ruling that McCarran-Ferguson barred a discriminatory effects claim under the Act,[209] the Eighth Circuit remanded the case for further inquiry into the facts and Missouri law.[210]

Precedent also demonstrates that, in some instances, state law may not preempt discriminatory effects claims against insurers even when an insurer points to a specific state law and alleges that it is impaired. Although the commenters provided examples of cases in which state laws were found to preempt particular discriminatory effects claims, other cases provide examples of state laws that were not. For instance, in *Lumpkin* v. *Farmers Group (Lumpkin II),* the court rejected a McCarran-Ferguson defense to a disparate impact challenge to credit scoring in insurance pricing, holding that disparate impact liability in that context did not impair the state's law mandating that ''insurance rates cannot be 'unfairly discriminatory.' '' [211] In so ruling, the court held it erroneous to read a state law prohibiting ''unfairly discriminatory'' rates ''too broadly'' and rejected the insurer's argument that such state laws require that practices with an unjustified discriminatory effect

[201] *See, e.g., Dehoyos,* 345 F.3d at 297–300 (rejecting McCarran-Ferguson reverse-preemption after appellant failed to indicate any state laws or declared regulatory policies which would conflict with federal civil rights statutes); *see also Humana Inc.,* 525 U.S. at 308 (1999) (''We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise.''); *Wai* v. *Allstate Ins. Co.,* 75 F. Supp. 2d 1, 5 (D.D.C. 1999) (rejecting defendant's argument for McCarran-Ferguson reverse-preemption after noting that Maryland law did not grant the state's insurance commissioner exclusive jurisdiction over discrimination claims).

[202] 15 U.S.C. 1012(b).

[203] *Humana,* 525 U.S. at 310 (''When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.'').

[204] *Dehoyos* v. *Allstate Corp,* 345 F.3d 290 (5th Cir. 2003) (disparate impact under the Act); *Nationwide Mut. Ins. Co.* v. *Cisneros,* 52 F.3d 1351 (6th Cir. 1995) (disparate treatment under the Act); *Moore* v. *Liberty Nat'l Life Ins. Co.,* 267 F.3d 1209 (11th Cir. 2001) (disparate treatment in life insurance).

[205] *See PCIAA,* 66 F. Supp. 3d at 1038 (''McCarran-Ferguson challenges to housing discrimination claims [depend on] the particular, allegedly discriminatory practices at issue and the particular insurance regulations and administrative regime of the state in which those practices occurred.'').

[206] *Dehoyos,* 345 F.3d at 293, 299.

[207] *Id.* at 298 n.6.

[208] *Id.* Although in HUD's view the Fifth Circuit persuasively distinguished the Seventh Circuit's holding in *Mutual of Omaha,* the case-by-case approach appropriately accommodates any variations among the circuits that may exist, now or in the future, as to how McCarran-Ferguson should be applied. This includes the Second Circuit's skepticism over whether McCarran-Ferguson applies at all to ''subsequently enacted civil rights legislation.'' *Viens,*113 F. Supp. 3d at 572 (quoting *Spirt* v. *Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054, 1065 (2d Cir. 1982)).

[209] *Saunders* v. *Farmers Ins. Exch.* (*Saunders II),* 537 F.3d 961, 963 (8th Cir. 2008).

[210] *Saunders* v. *Farmers Ins. Exch. (Saunders I),* 440 F.3d 940 (8th Cir. 2006). These variables included whether Missouri insurance law provided a private right of action to challenge the conduct at issue, and whether determinations by the state insurance agency were subject to judicial review. The court explained that ''the mere fact of overlapping complementary remedies under federal and state law does not constitute impairment for McCarran-Ferguson purposes.'' *Id.* at 945–46

[211] *Lumpkin* v. *Farmers Grp. (Lumpkin II),* No. 05–2868 Ma/V, 2007 U.S. Dist. LEXIS 98949, at *19–21 (W.D. Tenn. July 6, 2007).

must be permitted ''as long as the rates are actuarially sound.'' [212] The court then cited other provisions of the state's insurance code specifically dealing with credit scoring, concluding that they too were not impaired.[213]

The many ways in which one state's insurance laws can differ from another's, as well as the ways in which a single state's insurance laws can change over time, mean that even an exemption for specific insurance practices would be overbroad and quickly outdated. For example, variations in state insurance laws have resulted in discriminatory effects challenges to similar insurance practices surviving a McCarran-Ferguson defense in some states but not in others.[214] Precedent also demonstrates that the insurance laws of each state can change over time in significant ways,[215] and state insurance regulators respond to new practices as they become common and their effects become clear.[216] Given the variation in state insurance laws across more than 50 jurisdictions and over time, HUD declines to fashion a one-size-fits-all exemption that would be overbroad, quickly outdated, and inevitably insulate insurers engaged in otherwise unlawful discriminatory practices from liability under the Act that would not be precluded by McCarran-Ferguson.

A one-size-fits-all exemption is also inappropriate because insurance practices are not governed solely by ''hermetically sealed'' state insurance codes,[217] but are also governed by a range of other state laws, including state fair housing laws. Many state fair housing laws track the Act's applicability to insurance and provision of effects liability, indicating that those states do not consider disparate impact liability to conflict with the nature of insurance. Categorical exemptions or safe harbors of the types requested by some commenters would deprive all states of this federal support in addressing discriminatory insurance practices—even those states that welcome or depend on such support.[218] This outcome would be at odds with the purpose of McCarran-Ferguson to support the autonomy and sovereignty of each individual state in the field of insurance.[219] Connecticut's Discriminatory Housing Practices Act, for example, ''provides similar (albeit broader) protection against housing discrimination as the [Act], which is [a] strong indication that application of the federal antidiscrimination law will not impair Connecticut's regulation of the insurance industry, but rather is complementary with Connecticut's overall regulatory scheme.'' [220] Similarly, a state court found that ''the disparate-impact approach does not conflict with Ohio Insurance law'' and thus allowed a disparate impact claim against an insurer to proceed under the state's fair housing law.[221] In another case where the court rejected a McCarran-Ferguson defense to a discriminatory effects claim against an insurer, the court explained that it was ''not persuaded that California law would allow [the challenged] practice'' and therefore '' the [] Act complements California law in this regard.'' [222] Furthermore, the allocation of authority to enforce a state's protections against discrimination in insurance can impact whether McCarran-Ferguson is a viable defense to a discriminatory effects claim in a given state.[223] The case-by-case approach thus affirms state autonomy and furthers the Act's broad remedial goals by ensuring that HUD is not hindered in fulfilling its statutory charge to support and encourage state efforts to protect fair housing rights.[224]

Furthermore, HUD finds that comments claiming there is necessarily always a conflict with state laws in violation of the McCarran-Ferguson Act rest on the false presumption that this final rule prohibits the use of risk-based pricing or would require insurers to consider protected traits of individual insureds in making decisions. As described in greater detail above, it does not. HUD also disagrees with commenters who stated that even if a state fair housing law prohibits practices having an unjustified discriminatory effect, the rule contravenes McCarran-Ferguson. As courts have found, and HUD agrees, in such circumstances there would be no conflict between the federal and state law at issue.[225] Step three of the burden-shifting framework, allowing plaintiffs to prove a less discriminatory alternative, also does not necessarily interfere with the state regulation of insurance. All the rule requires is that if an insurer's practices have a discriminatory effect and ''an adjustment . . . can still be made that will allow both [parties'] interests to be

[212] *Id.*

[213] *Id.*

[214] For example, in cases challenging the discriminatory effect of insurers' reliance on credit scores, the McCarran-Ferguson defense has failed in some states but succeeded in others. *Compare Dehoyos,* 345 F.3d 290 (McCarran-Ferguson defense fails) and *Lumpkin II,* 2007 U.S. Dist. LEXIS 98949 (same) with *Saunders II,* 537 F.3d 961 (McCarran-Ferguson defense succeeds) and *McKenzie* v. *S. Farm Bureau Cas. Ins. Co.,* No. 3:06CV013–B–A, 2007 U.S. Dist. LEXIS 49133 at *11 (N.D. Miss. July 5, 2007) (same); *see also PCIAA,* 66 F. Supp. 3d at 1039 (''Variations among state regulatory regimes . . . provide an additional variable that may complicate any hypothetical McCarran-Ferguson analysis.'').

[215] *Compare Ojo* v. *Farmers Grp., Inc.,* 356 SW.3d 421, 430 (Tex. 2011) (recognizing a McCarran-Ferguson defense to a credit scoring disparate impact claim based on the state legislature ''expressly authoriz[ing] the use of credit scoring in setting insurance rates in 2003'') with *Dehoyos,* 345 F.3d 290 (rejecting a McCarran-Ferguson defense to the same type of claim based on Texas law in effect before 2003).

[216] *See, e.g., NAIC White Paper, supra* note 161 ¶¶ 39–42 (discussing the responses of state regulators to the rising increase in use of price optimization practices by insurance providers).

[217] *Humana,* 525 U.S. at 312.

[218] A commenter stated that this argument for failing to grant an exemption was arbitrary and capricious because the McCarran Ferguson Act is not intended to promote ''federal support'' for state enforcement of anti-discrimination laws and because state anti-discrimination laws are irrelevant to the McCarran-Ferguson analysis which only asks whether the application of federal law would invalidate, impair, or supersede state laws enacted for the uprose of regulating business insurance. HUD disagrees. First, state anti-discrimination laws are relevant to McCarran-Ferguson because they help inform whether there is a conflict with state law. *See Viens,* 113 F. Supp. 3d at 573 n.20 (the Connecticut Fair Housing Act ''provides similar (albeit broader) protection against housing discrimination as the FHA, which is strong indication that application of the federal antidiscrimination law will not impair Connecticut's regulation of the insurance industry, but rather is complementary''). Second, the commenter misconstrues HUD's point. HUD is not saying that the McCarran-Ferguson Act is intended to promote federal support for state enforcement. HUD is explaining that state laws inform whether there is a conflict between state and federal law and that where the state laws are interpreted consistently with the federal law, this regulation is helpful to states enforcing their own state anti-discrimination laws.

[219] *See* 15 U.S.C. 1011 (explaining the purpose of McCarran-Ferguson as ''the continued regulation . . . by the several States of the business of insurance is in the public interest'').

[220] *Viens,* 113 F. Supp. 3d at 573 (finding that McCarran-Ferguson does not bar an FHA disparate impact claim against an insurer).

[221] *Toledo Fair Hous. Ctr.* v. *Nationwide Mut. Ins. Co,* 94 Ohio Misc. 2d 151, 157 (Ohio Cnty. Ct. 1997).

[222] *Jones* v. *Travelers Cas. Ins. Co. of Am.,* Tr. of Proceedings Before the Honorable Lucy H. Koh U.S. District Judge, No. C–13–02390 LHK (N.D. Cal. May 7, 2015), ECF No. 269–1.

[223] *Toledo,* 94 Ohio Misc. 2d at 157 (recognizing discriminatory effects liability in homeowners insurance under state law in part because the Superintendent of Insurance lacks ''primary jurisdiction'' over such claims).

[224] *See, e.g.,* 42 U.S.C. 3610(f); 24 CFR pt. 115 (HUD's Fair Housing Assistance Program); 42 U.S.C. 3608(d) (obligation to affirmatively further fair housing).

[225] *Viens,* 113 F. Supp. 3d at 573 n.20 (the Connecticut Fair Housing Act ''provides similar (albeit broader) protection against housing discrimination as the FHA, which is strong indication that application of the federal antidiscrimination law will not impair Connecticut's regulation of the insurance industry, but rather is complementary''); *see also NAACP,* 978 F.2d 287, 295 (7th Cir. 1992) (''Having stood on the text to show that the McCarran-Ferguson Act governs the construction of the Fair Housing Act, American Family needs to show that the Fair Housing Act conflicts with state law. Duplication is not conflict.'').

satisfied,'' the insurer must make that change.[226] It does not require insurers to violate state laws.

HUD disagrees with *Mutual of Omaha* to the extent it implied that any claim requiring a court to assess the actuarial soundness of a policy and/or whether a policy or practice is consistent with state law necessarily interferes with a state administrative regime. HUD notes that in promulgating a rule of nationwide effect it is not bound to follow the decision of a single appellate court, but may reasonably conclude that the Act allows for a different result.[227] HUD believes courts should continue to decide through a case-by-case assessment whether requiring a court to assess actuarial soundness or consistency with state law necessarily interferes with an administrative regime, as this is an underdeveloped area of the law and case law could evolve differently in the circuits.

In any event, disparate impact claims challenging insurance practices do not necessarily require courts to ascertain whether a practice complies with state law or is actuarially sound. Therefore, not all claims even implicate the reasoning of *Mutual of Omaha.*[228] As the Court in *PCI* explained, ''[w]hile some states require insurers to use risk-based pricing, other states merely permit risk-based pricing.'' [229] Accordingly, *Mutual of Omaha* does not necessarily preclude claims that challenge practices that rest on subjective business judgments, rather than actuarially sound principles or state law requirements because in adjudicating such claims, the court would not necessarily need to ascertain whether the insurer's practices are actuarially sound and/or consistent with state law. For example, a plaintiff may not dispute that an insurer's practice complies with state law, but rather may show that there are alternative practices that also comply with state law that do not cause a discriminatory effect. Such a claim would not require the court to evaluate whether the challenged practice complies with state law or is actuarially sound and thus would not run afoul of *Mutual of Omaha.* The analysis of the challenged practice instead focuses on whether or not it produces a discriminatory effect and, if the insurer states a legitimate interest justifying the practice, the plaintiff may show that there is a less discriminatory alternative that would serve defendant's substantial, legitimate, nondiscriminatory interest. While another risk-based practice could be a possible alternative at step three, it is not necessarily the only alternative. And, even if the alternative is a risk-based practice, a court may not need to assess the actuarial soundness of the alternative practice. For example, the evidence might show that an insurer opted for one of two risk-based practices which were both equally actuarially sound and compliant with state law, even though one produced a greater discriminatory effect. In such a case, the actuarial soundness of the alternative risk-based practice and its compliance with state law would already have been determined by the insurer itself. The court's analysis, therefore, would be limited to assessing the efficacy of the alternative risk-based practice in serving the insurer's business interests—the type of ''unremarkable task'' regularly undertaken by courts.[230] As the court in *PCI* stated, *Mutual of Omaha* called into question the viability of some disparate impact claims. HUD agrees, but notes that while *Mutual of Omaha* may prevent some claims from going forward due to the McCarran Ferguson Act in Seventh Circuit district courts, it does not necessarily preclude all claims. The Act's purpose is broad and inclusive, and because *Mutual of Omaha* would not prevent all claims against insurers from proceeding even in its own circuit, HUD believes it is important not to foreclose meritorious claims by creating a wholesale exemption; indeed, doing so would run counter to the Act's purposes. HUD believes that case-by-case adjudication is appropriate to balance the purpose of the Act and to account for any differences that emerge in the circuits.

Finally, HUD disagrees that the rule will lead to a deluge of lawsuits. The industry has been subject to the 2013 Rule for ten years and a HUD regulation on insurance for well over 30 years [231] and commenters have provided no evidence of an uptick in lawsuits. And as explained above, the insurance industry was subject to disparate impact liability long before the 2013 Rule, with many courts using a framework similar to the rule. Therefore, because the statute itself is the source of liability and the rule merely provides a framework for assessing the evidence, the rule cannot be the cause of any increase in lawsuits going forward.

Issue: Commenters stated that applying the rule to insurance is contrary to Congressional intent because of the McCarran-Ferguson Act. A commenter noted that the McCarran-Ferguson Act specifically exempts the Sherman, Clayton, and Federal Trade Commission Acts but not the Fair Housing Act, so under the statutory canon of construction *expressio unius est exclusio alterius,*[232] Congressional intent was to exclude only the specified statutes from pre-emption. Therefore, commenters stated, an exemption for the insurance industry from the rule is justified.

HUD Response: HUD disagrees. Even assuming that at least some Fair Housing Act claims are pre-empted by McCarran-Ferguson, that does not mean that all disparate impact claims under the Act are categorically preempted. The fact that a statute is not specifically exempted from application of the McCarran-Ferguson Act simply means that the McCarran-Ferguson *analysis* may be applied on a case-by-case basis to claims brought under that non-exempt statute; it does not mean that McCarran-Ferguson categorically bars all such claims. The Supreme Court explained this in *Humana,* when it held that the McCarran Ferguson Act did not create a field exemption and that claims under Racketeer Influenced Corrupt Organizations Act (''RICO''),[233] which like the Act is not explicitly listed as exempt from preemption, were not barred by McCarran-Ferguson.[234] Thus,

[226] *Avenue 6E Invs.,* 818 F.3d at 513.

[227] *Nat'l Cable & Telecomm.s Assn.* v. *Brand X internet Services,* 545 U.S. 967, 982, 983–84 (2005) (''A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . ..'' ''the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which Chevron is inapplicable). The precedent has not been ''reversed'' by the agency, any more than a federal court's interpretation of a State's law can be said to have been ''reversed'' by a state court that adopts a conflicting (yet authoritative) interpretation of state law.'').

[228] *Mut. of Omaha,* 179 F.3d 557, 564 (7th Cir. 1999) (''requiring a federal court to decide whether an insurance policy is consistent with state law—obviously would interfere with the administration of the state law. The states are not indifferent to who enforces their laws.'')

[229] *PCIAA,* 66 F. Supp. 3d at 1039–41.

[230] *Dehoyos,* 345 F.3d at 297 n.5 (rejecting similar argument because a court does not become a ''super actuary'' every time it ''engag[es] in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law'').

[231] 24 CFR 100.70(D)(4).

[232] ''*Expressio unius est exclusion alterius*'' means the expression of one thing is the exclusion of the other. *Jennings* v. *Rodriguez,* 138 S. Ct. 830, 844 (2018).

[233] 18 U.S.C. 1961 *et seq.*

[234] *Humana Inc.,* 525 U.S. at 309–310 (''[w]e reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise.'' Ultimately, the court held that

HUD has determined that the arguments put forth by commenters regarding congressional intent and *expressio unius est exclusio alterius* to justify an exemption from discriminatory effects liability are unpersuasive.[235]

Issue: Commenters made various comments concerning the impact of *Inclusive Communities* on the McCarran Ferguson Act, including that *Inclusive Communities* did not invalidate McCarran-Ferguson or expand disparate impact liability to insurance; that applying the rule to insurance would bring about an undesirable ''specter'' of litigation in conflict with *Inclusive Communities;* and that the rule would increase the likelihood of a conflict between the Act and state laws regulating insurance because the rule does not conform to *Inclusive Communities.*

HUD Response: As discussed above, HUD believes that *Inclusive Communities* had no impact on the application of this final rule to insurance practices. *Inclusive Communities* also had no impact related to the application of the McCarran-Ferguson Act. HUD agrees that *Inclusive Communities* did not invalidate the McCarran-Ferguson Act, as the Court did not address insurance or McCarran-Ferguson. Nor did *Inclusive Communities* expand liability for unjustified discriminatory effects to insurers, who were subject to such liability long before the decision.[236] Moreover, since there is no conflict between this rule and *Inclusive Communities,* as discussed above, there is no likelihood of the rule leading to litigation in conflict with that precedent or with state laws.

Issue: Commenters requested that HUD retain the provision in the 2020 Rule that recognized the McCarran-Ferguson Act. Another commenter disagreed, stating that the 2020 Rule attempted to undermine the nuanced position HUD took in 2016, when it stated that there is a circuit split as to whether McCarran-Ferguson applies at all to ''subsequently enacted civil rights legislation'' [237] This commenter also stated that HUD had no authority to interpret McCarran-Ferguson in the 2020 Rule.

HUD Response: HUD declines to retain the portion of the 2020 Rule that references the McCarran-Ferguson Act because it was confusing. While the 2020 Rule did not mention the McCarran-Ferguson Act in its regulatory text, it borrowed from some of the statute's language, stating that ''[n]othing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.'' [238] HUD expressed in its 2019 Proposed Rule that this language was meant to ''codify the general applicability of the 'reverse preemption' provisions of the McCarran-Ferguson Act as it applies to the Fair Housing Act'' and ''clarify that the Fair Housing Act does not 'specifically relate to the business of insurance.'' [239] In comments to that proposed rule, commenters stated that this language would create an exemption for insurance practices or preempt all such possible claims. HUD responded in the 2020 Rule that it was ''neutral'' as to McCarran-Ferguson's application in specific cases and pointed to cases in which the Act had been not preempted and cases in which it had been preempted.[240] HUD repeated that it was not exempting the insurance industry and was ''only clarifying that its disparate impact rule is not specifically related to the business of insurance.'' [241]

HUD believes that some commenters appear to have misread the 2020 Rule to provide a complete exemption from disparate impact liability for insurers. It is plain from reading the 2020 Rule that it neither provided an exemption nor specified that McCarran-Ferguson reverse preemption always applies to insurance practices. It simply stated that the Fair Housing Act was not intended to ''invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.'' HUD has reconsidered the 2020 Rule and concludes that this provision does not clarify how the Act and the McCarran-Ferguson Act interact. Nothing in the McCarran-Ferguson Act requires HUD to make this statement and it is not HUD's responsibility to interpret the McCarran-Ferguson Act. HUD has decided this statement is unnecessary and confusing, as evidenced by commenters' misreading of the provision, and declines to retain it.

As HUD stated in 2016, the agency has adopted a case-by-case approach on McCarran-Ferguson reverse preemption, as that law requires. This approach is appropriate given the variations in jurisprudence across circuits that currently exist and may continue to evolve over time.[242] HUD continues to believe that a case-by-case approach is appropriate. It therefore declines to incorporate the 2020 Rule's language into this final rule. HUD leaves it to the courts to decide, as they encounter individual cases, whether the McCarran-Ferguson Act preempts application of the Act in each case.

Filed-Rate Doctrine

Issue: Commenters stated that insurance practices merit an exemption because the proposed rule would violate the filed-rate doctrine, which prohibits federal courts from reexamining rates filed by a regulated entity and subject to the review and approval of a regulatory agency, as these rates are ''presumed reasonable and unassailable in judicial proceedings brought by ratepayers.'' [243] Commenters stated that the Eighth Circuit decision in *Saunders* v. *Farmers Ins. Exch.,* on which HUD relied in the 2016 Supplement, is inconsistent with the weight of case law holding that the filed-rate doctrine bars challenges under federal laws to rates filed with state agencies.[244] Commenters stated that the proposed rule would upend the protections afforded the filed-rate doctrine, threatening the health, solvency, and competitiveness of the insurance market.

HUD Response: HUD disagrees that this final rule conflicts with the filed-rate doctrine. The doctrine primarily serves two purposes: preventing litigants from securing more favorable rates than their non-litigant competitors,

''[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.'').

[235] Although in HUD's view the Fifth Circuit persuasively distinguished the Seventh Circuit's holding in *Mutual of Omaha,* the case-by-case approach appropriately accommodates any variations among the circuits that may exist, now or in the future, as to how McCarran-Ferguson should be applied. *Dehoyos,* 345 F.3d at 298 n.6. This includes the Second Circuit's skepticism over whether McCarran-Ferguson applies at all to ''subsequently enacted civil rights legislation.'' *Viens,* 113 F. Supp. 3d at 572 (quoting *Spirt* v. *Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054, 1065 (2d Cir. 1982)).

[236] *See, supra Comments Concerning Inclusive Communities.*

[237] 81 FR 69012, 69016 n.50 (Oct. 5, 2016).

[238] 85 FR 60288, 60333.

[239] 84 FR 42854, 42860.

[240] 85 FR 60288, 60323

[241] *Id.*

[242] *Dehoyo*s, 345 F.3d at 298 (finding McCarran-Ferguson does not preclude plaintiff's claims); *Mut. of Omaha,* 179 F.3d at 564 (finding McCarran Ferguson precludes plaintiff's claim); *Viens,* 113 F. Supp. 3d at 572 (expressing skepticism over whether McCarran-Ferguson applies to all ''subsequently enacted civil rights legislation.'') (quoting *Spirt* v. *Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054, 1065 (2d Cir. 1982)).

[243] Commenters cited *Wegoland Ltd.* v. *NYNEX Copr.,* 27 F.3d 17, 18 (2d. Cir. 1994) and *Goldwasser* v. *Ameritech Corp.,* 222 F.3 390, 402 (7th Cir. 2000) in support of their assertion.

[244] Commenters relied on *Taffet* 967 F.2d 1483, 1494 (11th Cir. 1992)), *Square D,* 476 U.S. 409,417 (1986), *Wegoland Ltd.* v. *NYNEX Copr.,* 27 F.3d 17, 18 (2d. Cir. 1994); *Goldwasser,* and *Saunders II,* 537 F. 3d 961, 968 (8th Cir. 2008).

and preserving for agencies rather than courts the role of ratemaking.[245] HUD is not aware of any case, and no commenter cited one, in which a court has applied the filed-rate doctrine to defeat a claim under the Act, although several courts have rejected such attempts, including for discriminatory effects claims.[246] For example, *Wegoland Ltd.* held that ''[t]he [filed-rate] doctrine bars suits against regulated utilities *grounded on the allegation that the rates charged by the utility are unreasonable.*'' [247] (emphasis added). Whether a rate causes an unjustified discriminatory effect is a different issue than whether it is reasonable; discriminatory effects claims do not challenge the reasonableness of insurance rates but rather their discriminatory effects.[248]

Multiple courts examining the filed-rate doctrine in the context of Fair Housing Act claims have found the doctrine inapplicable, noting that the Supremacy Clause, rather than the filed-rate doctrine, applies.[249] Unlike filed-rate doctrine cases involving a conflict between *federal* ratemaking and a federal statute, applying the filed-rate doctrine to prioritize *state* ratemaking over a federal statute ''would seem to stand the Supremacy Clause on its head.'' [250] Moreover, the filed-rate doctrine ''does not preclude injunctive relief or prohibit the Government from seeking civil or criminal redress,'' [251] which are types of relief often obtained for violations of the Act.[252] A filed-rate doctrine defense requires an examination of the facts in context of the laws and ratemaking structure at issue.[253] The case-by-case approach best accommodates these variations.[254]

As discussed above, HUD disagrees that the rule would threaten the health, solvency, and competitiveness of the market because no conflict exists with the filed-rate doctrine. Furthermore, insurers have been subject to the 2013 Rule for ten years, and disparate impact liability generally even longer, and the market effects alleged by commenters have not come to pass.

Case-by-Case Adjudication Cost for Insurers

Issue: Commenters opposed the rule's application to the insurance industry because case-by-case litigation in federal court is costly and, they contended, these costs outweigh the benefits. A commenter stated that even if a case is resolved in favor of the insurer, another suit with slightly altered facts may quickly follow. Commenters asserted that insurers would have to defend various risk factors on a regional basis, with courts possibly reaching inconsistent judgments. Commenters stated case-by-base adjudication would be a waste of judicial resources. Commenters also stated that requiring insurers to defend risk-based practices in court will make insurance less affordable. According to commenters, the costs are unjustified because rates are risk-based as required by state insurance law and have been approved by state regulators, and plaintiffs may bring claims that are hypothetical and speculative. Commenters stated that the vagueness and uncertainty of the rule threatens insurer insolvency.

Other commenters stated that the 2013 Rule, 2016 Supplement, and proposed rule appropriately state that a case-by-case analysis is the correct approach for assessing whether discriminatory effects are unjustified for all industries, including insurers. Commenters explained that to create an exemption, HUD would need to outline highly specific standardized rules, which would not be possible as actuarial practices are constantly changing and evolving.

HUD Response: As demonstrated by the relatively few cases filed against insurance companies in the decades-long history of disparate impact liability and in the ten years since the 2013 Rule was promulgated, there is no reason to believe that a continued case-by-case approach will lead to increased litigation, increased expenses in defending against claims of unjustified discriminatory effects, insurer insolvency, or increased premiums for customers. Nor did commenters provide support for these assertions.

HUD also disagrees with comments predicting that the proposed rule would create increased compliance costs. As discussed above, insurers have been subject to discriminatory effects liability since well before the 2013 Rule and have been subject to the 2013 Rule for ten years, yet commenters have not demonstrated that the 2013 Rule has led to significantly higher compliance costs.[255] Prior to the 2013 Rule, in adjudications, HUD always used a three-step burden-shifting approach,[256] as did many federal courts of appeals,[257] but one federal court of appeals applied a multi-factor balancing test,[258] other courts of appeals applied a hybrid between the two,[259] and one court of appeals applied a different test for public and private defendants.[260] By formalizing the three-part burden-shifting test for proving such liability under the Act, the 2013 Rule provided for consistent and predictable

[245] *Wegoland Ltd.* v. *NYNEX Corp.,* 27 F.3d 17, 18–19 (2d Cir. 1994).

[246] *See Saunders I,* 440 F.3d at 946 (''The district court erred in invoking the judicially created [filed-rate] doctrine to restrict Congress's broad grant of standing to seek judicial redress for race discrimination.''); *Dehoyos,* 345 F.3d at 297 n.5 (finding ''unpersuasive'' the argument that the [filed-rate] doctrine barred a Fair Housing Act disparate impact claim); *Lumpkin* v. *Farmers Grp., Inc. (Lumpkin I),* No. 05–2868 Ma/V, 2007 U.S. Dist. LEXIS 98994, at *20–22 (W.D. Tenn. Apr. 26, 2007) (ruling that ''the [filed-rate] doctrine does not apply'' to a Fair Housing Act disparate impact claim).

[247] *Wegoland Ltd.* v. *NYNEX Corp.,* 27 F.3d 17, 18 (2d Cir. 1994).

[248] *Lumpkin I,* 2007 U.S. Dist. LEXIS 98994, at *21; *Dehoyos,* 345 F.3d at 297 n.5 (''[T]he application of anti-discrimination laws cannot be reasonably construed to supplant the specific insurance rate controls of [states].''); *c.f. Taffet* 967 F.2d at 1490–1495 (stating that the claim should be precluded because it would focus on the reasonableness of the rate and stating ''[a]ccordingly, a court reviewing the reasonableness of a utility rate 'shall not substitute its judgment for that of the [rate-approving entity] if there is any evidence to support its findings.' '').

[249] *See, e.g., Saunders I,* 440 F.3d at 944; *Perryman* v. *Litton Loan Servicing, LP,* No. 14–cv–02261–JST, 2014 U.S. Dist. LEXIS 140479, at *20–22 (N.D. Cal. Oct. 1, 2014). As one court has stated, the filed-rate doctrine is a ''weak and forcefully criticized doctrine.'' *Cost Mgmt. Servs.* v. *Wash. Natural Gas Co.,* 99 F.3d 937, 946 (9th Cir. 1996).

[250] *Perryman* v. *Litton Loan Servicing,* LP, No. 14–cv–02261–JST, 2014 U.S. Dist. LEXIS 140479, at *20–22 (N.D. Cal. Oct. 1, 2014).

[251] *In re Title Ins. Antitrust Cases,* 702 F. Supp. 2d 840, 849 (N.D. Ohio 2010); *see also Marcus* v. *AT&T Corp.,* 138 F.3d 46, 62 (2d Cir. 1998).

[252] *See* 42 U.S.C. 3612(g)(3), 3613(c), 3614(d).

[253] *Munoz* v. *PHH Corp.,* 659 F. Supp. 2d 1094, 1099 (E.D. Cal. 2009).

[254] *Saunders I,* 440 F.3d at 945.

[255] *Inclusive Cmtys.Project, Inc.,* 576 U.S. at 546 (the Court noted that the existence of disparate impact claims ''for the last several decades 'has not given rise to . . . dire consequences.' '').

[256] *See, e.g., HUD* v. *Twinbrook Vill. Apts.,* HUDALJ Nos. 02–00–0256–8, 02–00–0257–8, 02–00–0258–8, 2001 HUD ALJ LEXIS 82, at *46 (HUD ALJ Nov. 9, 2001); *HUD* v. *Pfaff,* 1994 HUD ALJ LEXIS 69, at *19 (HUD ALJ Oct. 27, 1994) rev'd on other grounds, 88 F.3d 739 (9th Cir. 1996); *HUD* v. *Mountain Side Mobile Estates P'ship,* 1993 HUD ALJ LEXIS 94, at *37 (HUD ALJ Mar. 22, 1993); *HUD* v. *Carter,* 1992 HUD ALJ LEXIS 72, at *15 (HUD ALJ May 1, 1992); *see also* 1994 Joint Policy Statement on Discrimination in Lending, 59 FR 18269.

[257] *See, e.g., Charleston Hous. Auth. V. U.S.D.A.,* 419 F.3d 729,740–42 (8th Cir. 2005); *Langlois* v. *Abington Hous. Auth.,* 207 F.3d 43, 49–50 (1st Cir. 2000); *Huntington Branch* v. *NAACP of Huntington,* 844 F.2d 926, 939 (2d. Cir. 1988).

[258] *See, e.g., Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights,* 558 F.2d 1283,1290 (7th Cir. 1977) (applying a four-factor balancing test).

[259] *See, e.g., Graoch,* 508 F.3d at 373 (balancing test incorporated as elements of proof after second step of burden-shifting framework); *Mountain Side Mobile Estates* v. *Sec'y HUD,* 56 F.3d 1243, 1252–1254 (10th Cir. 1995) (incorporating a three-factor balancing test into the burden-shifting framework to weigh defendant's justification).

[260] The Fourth Circuit has applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants. *See, e.g., Betsey* v. *Turtle Creek Assocs.,* 736 F.2d 983, 989 n.5 (4th Cir. 1984).

application of the test on a national basis. Reduced compliance costs would be expected to result because housing providers could look to a uniform standard at HUD and in the various courts across the country. It also offered clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects. HUD now recodifies the burden shifting framework of the 2013 Rule, continuing the clarity, consistency, and predictability that accompanied that rule.

Issue: Commenters stated that HUD has provided no basis for the statement that it would cost as much for an insurer to demonstrate eligibility for an exemption for risk-based practices as it would to litigate the actuarial soundness of a challenged practice on a case-by-case basis in multiple jurisdictions at different points in time.

HUD Response: It appears that commenters may be referencing HUD's discussion from its 2016 Supplement of granting safe harbors for specific risk-based factors. In 2016, HUD did not discuss the cost to insurers of demonstrating eligibility for a general exemption for ''risk-based practices.'' Rather, HUD discussed how the *arguments and evidence* that insurers would need to demonstrate to show they qualified for an exemption would be the same as the arguments and evidence that they would need to meet their burden at step two.[261] As HUD explained, if HUD were to provide a safe harbor for the use of any factor that an insurer could prove is purely risk-based, entitlement to the safe harbor would inevitably necessitate the insurer to establish it qualifies for the defense, *i.e.,* that the use of the factor is, in fact, risk-based.[262] If an insurance practice is provably risk-based, and a plaintiff cannot establish that a less discriminatory alternative exists, the insurer will have a legally sufficient justification under this final rule. The arguments and evidence that would be necessary to establish whether a practice qualifies for the requested exemption would effectively be the same as the arguments and evidence necessary for establishing a legally sufficient justification. Consequently, on the one hand an exemption for all provably risk-based factors would offer little added value for insurers, in terms of avoiding litigation costs. On the other hand, an exemption would foreclose potentially meritorious claims in contravention of the Act's broad remedial goals and HUD's obligation to affirmatively further fair housing.

Other Comments Related to Insurance

Issue: Commenters urged HUD to retain the 2020 Rule for numerous reasons. Commenters said that different forms of this rule have been enacted and retracted over the past few years, leading to confusion and that reinstating the 2013 Rule would be a step backwards. A commenter stated that in 2013, HUD expanded the scope of the Act to cover the insurance industry. Commenters stated that the 2020 Rule did not apply to insurance, so this rule should not create liability for homeowners insurers. Commenters noted that retracting the 2020 Rule so soon after it was promulgated was problematic for policy holders and the insurance industry, as risk-based pricing should not be subject to fleeting changes in policy.

Other commenters stated that it makes practical sense for insurers to be covered by the proposed rule given a long and well documented history of discrimination in the insurance industry. Commenters noted that the insurance industry has been subject to discriminatory effects liability for several decades. A commenter noted that in the more than twenty years since the Act was amended, courts that have considered the issue have consistently held that the Act prohibits acts of discrimination by homeowners insurers.

HUD Response: HUD declines to retain the 2020 Rule and notes that the 2020 Rule also did not exempt insurers. Commenters appear to misunderstand HUD's prior rules. Insurance practices have long been subject to liability under a disparate impact theory; that liability did not begin with the 2013 Rule and did not end with 2020 Rule, which contained no exception for such practices. Indeed, since 1989, HUD's fair housing regulations have explicitly prohibited ''[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently'' because of a protected characteristic.[263] And the 2020 Rule explicitly stated that it ''does not establish an insurance industry exemption.'' [264] Moreover, since the 2020 Rule never went into effect, there have been no changes in policy. In promulgating this final rule, HUD is recodifying a standard that has been in effect for ten years, has proven workable, and is supported by decades of caselaw both before and following its enactment.

Issue: A commenter requested that the rule include a specific defense for risk-based ratemaking, as provided in the 2020 Rule. Other commenters stated that HUD should add a substantive defense for risk-based practices whereby if a defendant can show it relied on risk-based practices at step two of the burden-shifting framework, the plaintiff should not have the opportunity to rebut the defense at step three.

HUD Response: HUD notes that the 2020 Rule did not in fact provide defenses specific to risk-based ratemaking and it declines to add such a defense now. Step two of the burden-shifting framework already provides a defense for substantial, legitimate nondiscriminatory interests, which will allow a defendant to prevail absent the plaintiff's ability to show a less discriminatory alternative. Eliminating the third step would remove the requirement for insurers to adopt the least discriminatory alternative that serves their substantial, legitimate, nondiscriminatory interest, undermining the purpose of the Act. In sum, by suggesting that the third step be eliminated, the commenter is asking for an exemption from liability for policies and practices having a discriminatory effect, which may have a legally sufficient justification, but for which a less discriminatory alternative may exist, which as explained above, HUD declines to do.

Issue: Commenters noted that in 2017, the U.S. Department of Treasury recommended that HUD reconsider whether its 2013 Rule is consistent with the McCarran-Ferguson Act, whether the disparate impact rule would have a disruptive effect on the availability of insurance, and whether the rule is reconcilable with actuarially sound principles.[265]

[261] *See* 81 FR 69012, 69017.

[262] HUD went on to further explain that ''selecting a few factors for exemption . . . based on bare assertions about their actuarial relevance, without data and without a full survey of all factors utilized by the homeowners insurance industry, would . . . be arbitrary. Even if such data were available and a full survey performed, safe harbors for specific factors would still be overbroad because the actuarial relevance of a given factor can vary by context. Also, while use of a particular risk factor may be generally correlated with probability of loss, the ways in which an insurer uses that factor may not be. Furthermore, the actuarial relevance of any given factor may change over time as societal behaviors evolve, new technologies develop, and analytical capabilities improve.'' 81 FR 69017.

[263] 24 CFR 100.70(d)(4); 54 FR 3232, 3285 (Jan. 23, 1989).

[264] 85 FR 60288, 60324 (Oct. 6, 2020) (''This rulemaking does not establish an insurance industry exemption.'')

[265] U.S. Dept. of Treasury, A Financial System that Creates Economic Opportunities: Asset Management and Insurance (2017) (formerly available at *https://home.treasury.gov/news/*

Continued

HUD Response: As discussed above in greater detail, HUD has considered these issues and finds that the 2013 Rule and its framework, as adopted in this rule, is consistent with the McCarran Ferguson Act, is reconcilable with actuarially sound principles, and would not have a disruptive effect on the availability of insurance. Treasury believes that HUD, in its reconsideration of the 2013 Rule, has addressed the concerns Treasury noted in the 2017 report regarding the Rule's application to the insurance industry. Treasury no longer has the concerns expressed in that report.

Issue: Commenters stated that the 2013 Rule and 2016 supplement adequately considered the issue of application to insurance and adequately addressed the industry's concerns. Other commenters stated that the 2016 Supplemental Explanation failed to adequately explain why the filed-rate doctrine would not bar challenges to insurance rates under the Act.

HUD Response: While these comments are outside the scope of this final rule, since HUD is now re-finalizing the 2013 Rule and responding to the current comments received in response to its 2021 Notice of Proposed Rulemaking, HUD agrees with the commenters who stated that the 2013 Rule and 2016 Supplement adequately considered the 2013 Rule's application to insurance and adequately addressed the industry's concerns. And this final rule thoroughly responds to comments from the insurance industry, including those concerning the filed-rate doctrine.

Section 100.5(d): Data Collection

Issue: Commenters disagreed about whether to include the 2020 Rule's language that nothing in HUD's fair housing regulations requires or encourages the collection of data relevant to characteristics protected by the Act. Some commenters opposed including such a provision, stating that: its inclusion was unnecessary and unwise; data collection can be used to identify policies and practices that may have a discriminatory effect; and discouraging data collection would have a grave effect on discriminatory effects litigation.

Other commenters asked HUD to include such a provision, stating that otherwise, the rule's burden shifting framework necessitates data collection, which will create unnecessary costs and be especially burdensome and expensive for insurers because they do not already collect this data. Commenters stated that without the provision, the rule would expose businesses to liability risks by requiring them to obtain and store personal and potentially sensitive information about an individual's protected characteristics. Another commenter stated that requiring the collection of data would inappropriately shift the burden of proof from a plaintiff to a defendant.

Commenters also expressed concern that the only way for insurers to collect data regarding protected characteristics would be through self-reporting, which may result in incomplete or erroneous data, making compliance with the rule difficult. A commenter stated that disparate-impact challenges to risk-based practices in insurance would improperly inject race into the business of insurance by incentivizing or compelling insurers to collect and analyze data on protected characteristics to be able to mount a defense in the event of a disparate impact challenge. Commenters stated that insurers may be prohibited under state law from collecting protected trait data. Commenters added that: insurance company employees will be uncomfortable asking current or potential policy holders for information about their membership in a protected class; collecting demographic data regarding protected traits would invade customer's privacy; and asking about protected class characteristics could discourage applicants for insurance from seeking quotes.

HUD Response: HUD believes that this final rule need not include data collection language. HUD agrees that data collection can play an important role in assessing whether a policy or practice may have an unjustified discriminatory effect. HUD also agrees with the Court in *Inclusive Communities,* when it acknowledged that ''awareness of race'' can help industries ''[that] choose to foster diversity and combat racial isolation with race-neutral tools.'' [266] This supports the idea that this Rule should not discourage the collection of this information. But HUD is also not requiring data collection. The purpose of this final rule is to recodify a long-recognized legal framework, not to describe how data and statistics may be collected, obtained, or used in the application of the framework.

HUD notes further that while data collection can be a means to identify practices that have or predictably will have a discriminatory effect, there are other ways of identifying such practices that do not require examining a business' own client pool. For example, businesses can look to publicly available datasets or studies related to their practices to see if their practices cause or predictably will cause a discriminatory effect. As HUD explained regarding the use of criminal records, ''[a]cross the United States, African Americans and Hispanics are arrested, convicted and incarcerated at rates disproportionate to their share of the general population. Consequently, criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.'' [267] A business need not collect data from its own clients to ascertain that relying on criminal records in its policies or practices likely has a discriminatory effect on certain populations. In addition, independent data gathering is not necessary to defend a lawsuit alleging discriminatory effects. Plaintiffs must meet their initial burden at step one to show a disparate impact. Defendants need not present their own statistics in response to this step one evidence, but may defend in numerous other ways, including by showing that the data put forward by plaintiff is incorrect or wrongly analyzed, or by showing at step two that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. This is true for all defending parties, including insurers, who bear no increased burden.

Moreover, concerns about how the rule would change industry practices—in particular what commenters say is the insurance industry practice of not collecting demographic data—do not square with the fact that current industry practice is based on a rule that has been in place, uninterrupted, since 2013, and based on the underlying law that has been in place for decades prior. Businesses that have not collected data over the past several decades will not be facing any change in the laws regulating their practices with HUD's recodification of the 2013 Rule.

Issue: Commenters requested that HUD clarify expectations and provide protections for lenders that collect demographic data for use in fair lending self-testing.

HUD Response: As discussed above, HUD believes that demographic data can be helpful in assessing whether a policy has an unjustified discriminatory effect. HUD notes further that lenders

featured-stories/a-financial-system-that-creates-economic-opportunities-asset-management-and).

[266] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 519, 542.

[267] ''Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions'' at 2 (April 4, 2016) (internal citations omitted).

routinely collect data on protected characteristics as part of their Home Mortgage Disclosure Act reporting obligations. However, HUD is not requiring either collection of demographic data or self-testing. It is unclear what ''protections'' commenters meant for HUD to provide to lenders who collect demographic data and use that data to engage in self-testing. HUD notes that the self-testing privilege as described in 42 U.S.C. 3614–1 already applies to lenders. This self-testing privilege will not provide a lender (or any other entity) with an exemption from liability under the Act, but if a complaint is made to HUD against a lender alleging practices that have an unjustified discriminatory effect, HUD is prohibited from obtaining self-testing results covered by this self-testing privilege to investigate a lender's compliance with the Act. Of note, HUD will not absolve a lender of potential liability merely because the lender collects demographic data and does self-testing. Doing so would abdicate HUD's basic obligation to enforce the Act by ceding substantive compliance authority from HUD to private lenders.

Section 100.500: The Discriminatory Effects Rule

Section 100.500(a): Removing ''Predictably'' From the Definition of Discriminatory Effect

Issue: Commenters asked HUD to remove the word ''predictably'' from the proposed rule's definition of discriminatory effects in § 100.500(a), asserting that it violates the Act. A commenter stated that the plain language of section 804(b) does not include practices that might result in a discriminatory effect. Other commenters asserted that the ''predictably results'' language violates *Inclusive Communities'* ''robust causality'' requirement. According to one commenter, this ''new'' robust causality standard requires a plaintiff to prove that a practice already caused the discriminatory effect, not just that a practice will predictably do so. Commenters similarly suggested that *Inclusive Communities'* bar on claims that are based solely on statistical evidence rules out claims based on predictable or hypothetical impacts.

Other commenters wrote in favor of retaining the ''predictably'' language in the rule. Commenters pointed out that courts, including *Inclusive Communities,* have interpreted the ''predictably'' language in the proposed rule to contain a ''robust causality'' requirement, including a bar on claims that are based solely on statistical evidence of discriminatory effects. One commenter noted that the robust causality requirement that *Inclusive Communities* discusses is simply the 30-year-old requirement that a plaintiff, to prevail in a disparate impact challenge, must show that the disparate impact is causally related to, not merely correlated with, the identified practices of the defendant. Another commenter noted that in the very first case in which an appeals court recognized discriminatory effects liability, the 8th Circuit required the plaintiff to bear the burden of showing that defendants' conduct actually or predictably resulted in a discriminatory effect. One commenter noted that HUD in 2013 explained how the ''predictably'' language was supported by the plain language of the Act and case law, and HUD ignored this justification when it attempted to remove the language in the 2020 Rule.

One commenter acknowledged that ''predictability'' is a necessary element to assess the disparate impact of a policy and an issue that *Inclusive Communities* did not address. Other commenters noted multiple cases in which courts have utilized the proposed rule's predictably standard in practical, effective ways, such as in *Georgia Conference of the NAACP* v. *City of LaGrange,* and *Fortune Society* v. *Sandcastle.*[268]

A commenter noted that caselaw and practical common-sense support that one need not wait until actual harm is inflicted before an action can be challenged. Another commenter noted that removing the predictably standard would unnecessarily increase the risk of harm to communities by taking away the ability to make claims for reasonable, foreseeable harm.

HUD Response: HUD declines to remove ''predictably'' from this final rule's definition of discriminatory effects. As explained in the 2013 Rule, the plain language of the Act supports the inclusion of this language. The Act defines an ''aggrieved person'' as anyone who, among other things, ''believes that such person *will be* injured by a discriminatory housing practice that is *about to occur.*'' [269] Furthermore, the Act explicitly authorizes HUD to take enforcement action and Administrative Law Judges (ALJs) and courts to order relief with respect to discrimination that ''*is about to occur.*'' [270] In addition, courts interpreting the Act have agreed that predictable discriminatory effects may violate the Act.[271] HUD further believes it would be contrary to HUD's duty to affirmatively further fair housing if it could not take action to prevent the harm of a predictable discriminatory effect and instead had to first allow individuals to be subjected to discrimination before any enforcement action could be taken. As explained above, the Court in *Inclusive Communities* did not announce a new ''robust causality'' requirement. Nor did it indicate any intention to exclude from liability cases that allege predictable discriminatory effects. Rather, the Court simply described the longstanding requirement that a plaintiff must establish a causal connection between the policy or practice and the discriminatory effect. *Inclusive Communities* explained that a plaintiff raising a ''disparate-impact claim relying on a statistical disparity'' must ''point to a defendant's policy or policies causing that disparity.'' [272] Consistent with *Inclusive Communities,* this final rule requires—whether for a disparity that has already occurred or one that will occur—that the plaintiff point to a defendant's policy or policies that cause the disparity, and not rely on a statistical disparity alone.[273]

Issue: Commenters also objected to the ''predictably results'' language in proposed § 100.500(a) (and the ''predictably will cause'' language at § 100.500(c)(1)) saying that it is inconsistent with case law under Title VII and the Age Discrimination in Employment Act (ADEA). They stated that the Title VII cases *Wards Cove Packing Co.* v. *Atonio* [274] and *Watson* v. *Fort Worth Bank & Trust* [275] preclude

[268] *Ga. State Conf. of the NAACP* v. *LaGrange,* 940 F.3d 627 (11th Cir. 2019); *Fortune Soc'y* v. *Sandcastle Hous. Dev. Fund Corp.,* 388 F. Supp. 3d 145 (E.D.N.Y. 2019).

[269] 42 U.S.C. 3602(i)(2) (emphasis added).

[270] 42 U.S.C. 3610(g)(2)(A), 3613(c)(1), 3614(d)(1)(A) (emphasis added).

[271] *See, e.g., United States* v. *City of Black Jack, Mo.,* 508 F.2d 1179, 1184 (8th Cir. 1974) (''To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually *or predictably results* in racial discrimination; in other words, that is has a discriminatory effect.'') (emphasis added); *Fortune Soc'y* v. *Sandcastle Towers Hous. Dev. Fund Corp.,* 388 F. Supp. 3d 145 (E.D.N.Y. 2019).

[272] *Inclusive Cmtys. Project, Inc,*576 U.S. at 542.

[273] *See* 24 CFR100.500(c)(1) (The . . . plaintiff . . . has the burden of proving *that a challenged practice caused or predictably will cause* a discriminatory effect)(emphasis added); 100.500(c)(a)(A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons . . . because of race, color, religion, sex, handicap, familial status, or national origin).

[274] *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989).

[275] *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977 (1988).

discriminatory effects claims based on policies which predictably, rather than actually, cause a discriminatory effect. Commenters stated that in *Wards Cove,* the Supreme Court stated that ''[a] plaintiff must demonstrate that it is the application of a specific or particular . . . practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case.'' [276] Commenters quoted *Watson,* which said that ''the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'' Similarly, a commenter cited *Meacham* v. *Knolls Atomic Power Lab'y* [277] for the proposition that plaintiffs in cases brought under the ADEA must prove an existing disparate impact—not a future one.

HUD Response: HUD believes that the commenters' reliance on these Title VII and ADEA cases is misplaced because these cases only considered the question of whether certain policies already had had a disparate impact, not whether they would ''predictably'' have one in the future.[278] Furthermore, the Act explicitly defines an aggrieved person as including ''any person who believes that such person will be injured by a discriminatory housing practice that is about to occur'' [279] Finally, courts interpreting the Act have agreed that predictable discriminatory effects may violate the Act.[280]

Section 100.500(a): Perpetuation of Segregation in the Definition of Discriminatory Effect

Issue: Commenters disagreed about the proposed rule's inclusion of perpetuation of segregation as a type of unlawful discriminatory effect. Some commenters stated that including liability for practices that perpetuate segregation is too broad and may have a chilling effect on the development of affordable housing. One commenter said that prohibiting practices that perpetuate, create, increase, or reinforce segregated housing patterns based on protected classes was a more stringent standard than *Inclusive Communities* announced. Another commenter stated that this language would expand liability to cover any action or any absence of action that reinforces or perpetuates segregated housing patterns, which is inconsistent with *Inclusive Communities'* requirement that plaintiffs demonstrate that the challenged practice is a direct cause of the disparate impact.

In contrast, other commenters stated that including the perpetuation of segregation provision is crucial to combatting segregation (including segregation based on disability and race), which is still a major problem today and can have devastating impacts on communities. Commenters said if HUD did not include this language, it would mean that HUD had adopted the view that perpetuation of segregation was not a central or relevant concern of disparate impact, that perpetuation of segregation was no longer a basis for liability under the Act, and/or that perpetuation of segregation liability would be collapsed into disparate impact liability, and only be evidence of a disparate impact claim, rather than an independent means of establishing a violation in and of itself. Commenters noted that reinstating the perpetuation of segregation language was important to eliminate the confusion that the 2020 Rule had caused through its removal, and to clarify that perpetuation of segregation is a distinct type of discriminatory effect under the Act. Commenters gave examples of activities which may unlawfully perpetuate segregation, including facially neutral zoning decisions whose real but disguised purpose is to exclude people of color, and the demolition or displacement of affordable housing leading to severely limited opportunities for people of color. Commenters said that removing the perpetuation of segregation provision would conflict with *Inclusive Communities.* One commenter stated that federal appellate courts have long recognized perpetuation of segregation as a distinct basis for discriminatory effects liability.[281] Commenters stated that the 2020 Rule, which eliminated perpetuation of segregation, conflicted with HUD's duty to affirmatively further fair housing, which is a central goal of the Act.

HUD Response: HUD agrees with the latter commenters that perpetuation of segregation is prohibited by the Act and, as such, should be included in the definition of discriminatory effects in this rule. The elimination of segregation is a central goal of the Act, one that was highlighted by *Inclusive Communities* and has long been recognized by other courts.[282] *Inclusive Communities* also recognized that practices that perpetuate segregation independently violate the Act.[283] HUD also notes that every

[276] *Wards Cove Packing Co.,* 490 U.S. at 657.

[277] *Meacham* v. *Knolls Atomic Power Lab'y* 554 U.S. 84 (2008).

[278] *See Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989) (examining whether the employer's policy or practice caused documented racial disparities at different positions at a cannery, not whether the employer's policy or practice would predictably cause disparities at different positions at the cannery); *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977 (1988) (examining whether a bank's subjective promotion practices had a disparate impact on black employees, not whether the bank's practice would predictably have a disparate impact on black employees); *Meacham* v. *Knolls Atomic Power Lab'y,* 554 U.S. 84 (2008) (examining a case where the employer was alleged to have utilized a policy that a caused a disparate impact on ADEA protected employees, not where the employer was alleged to have utilized a policy that predictably would cause a disparate impact on ADEA protected employees).

[279] *See* 42 U.S.C. 3602(i)(2); *compare* 42 U.S.C. 2000e; 29 U.S.C. 630.

[280] *See, e.g., Pfaff* v. *HUD,* 88 F.3d at 745, 745 (9th Cir. 1996) (''Discriminatory effect' describes conduct that actually or predictably resulted in discrimination.''); *United States.* v. *City of Black Jack,* 508 F.2d at 1184 (''To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect.''); *Fortune Soc'y,* 388 F. Supp. 3d 145; *Conn. Fair Hous. Ctr* v. *CoreLogic Rental Prop. Sols., LLC,* No. 18–cv–705, 2021 U.S. Dist. LEXIS 60197, at *51 (D. Conn. Mar. 30, 2021); *Jones* v. *City of Faribault,* No. 18–1643 (JRT/HB), 2021 U.S. Dist. LEXIS 36531, at *55 (D. Minn. Feb. 18, 2021).

[281] *See Mhany Mgmt., Inc.* v. *Cnty. Of Nassau,* 819 F.3d 618 (2d Cir. 2016) (finding that a discriminatory effect violating the Act could be shown by a disparate impact on a minority group or a segregative effect); *see also Avenue 6E Investments, LLC,* 818 F.3d 493 (9th Cir. 2016) (explaining that the City's action to prevent the project in question from being built had the effect of perpetuating segregation).

[282] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 528–531. *See, e.g., Avenue 6E Invs.* v. *City of Yuma,* 818 F.3d 493, 503 (9th Cir. 2016) (''[A]s the Supreme Court recently reaffirmed [in *ICP*], the FHA also encompasses a second distinct claim of discrimination, disparate impact, that forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or perpetuate housing segregation without any concomitant legitimate reason.'') (emphasis added); *Graoch Assocs. # 33, L.P.* v. *Louisville/Jefferson County Metro Hum. Rels. Comm'n,* 508 F.3d 366, 378 (6th Cir. 2007) (there are ''two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.''); *see also Huntington Branch, NAACP* v. *Huntington,* 844 F.2d 926, 937 (2nd Cir. 1988); *Metro. Housing Dev. Corp.* v. *Vill. of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir. 1977); *Nat'l Fair Hous. All.* v. *Bank of Am.,* 401 F. Supp. 3d 619, 641 (D. Md. 2019) (''Perpetuation of segregation is, in effect, an alternate avenue of pleading disparate impact under the FHA.'') (citing *Graoch,* 508 F.3d at 378); *Hallmark Developers, Inc.* v. *Fulton Cnty.,* 386 F. Supp. 2d 1369, 1383 (N.D. Ga. 2005); *Dews* v. *Town of Sunnyvale,* 109 F. Supp. 2d 526, 569 (N.D. Tex. 2000) (ruling that the defendant-town's zoning restrictions were racially motivated in violation of various civil rights laws and also had both a disparate impact and segregative effect that violated the Act).

[283] *Inclusive Cmtys. Project, Inc.* 576 U.S. at 540 (''[T]he FHA aims to ensure that those priorities can

federal court of appeals to have addressed the issue has agreed with HUD's interpretation in the 2013 Rule.[284] HUD finds that the rule is consistent with *Inclusive Communities'* causation requirement because it plainly requires that a practice ''causes or will cause'' a discriminatory effect. While *Inclusive Communities* did not directly address a claim brought under a ''perpetuation of segregation'' theory, it[285] discusses disparate impact's long-standing limits, including its causation requirement, as in harmony with its aim to prohibit ''perpetuating segregation.'' HUD believes that eliminating the perpetuation of segregation language will cause inconsistency between HUD's rule and judicial precedent and create the mistaken impression that HUD believes that practices that perpetuate segregation are not practices which create discriminatory effects.

HUD also disagrees that the final rule would chill the development of affordable and fair housing, including in predominantly minority neighborhoods. Commenters did not provide, and HUD is not aware of, any support for the proposition that this rule would have such an effect. Instead, this rule provides a framework for plaintiffs to challenge discriminatory housing decisions. And *Inclusive Communities* specifically noted that HUD's discriminatory effects rule recognized that disparate impact liability does not mandate that affordable housing be located in neighborhoods with any particular characteristic.[286] Eliminating the provision on perpetuation of segregation would also be inconsistent with HUD's duty to affirmatively further fair housing, which applies, *inter alia,* to HUD's program of administering, implementing, and enforcing the Fair Housing Act.[287]

In sum, HUD declines to eliminate the provision on perpetuation of segregation because doing so would lead to uncertainty over the state of the law, the provision is consistent with *Inclusive Communities* and well established caselaw, and doing so would undermine one of the core goals of the Act, *i.e.,* ending the perpetuation of segregation.[288]

Section 100.500: Racial Quotas or Unfair Advantages to Plaintiffs

Issue: Commenters expressed concern that the proposed rule's framework would cause them to adopt quotas to avoid unlawful disparities. One commenter stated that this is because the rule does not require any causal connection between the policy and any disparity and would therefore pose the risk that financial services and businesses would adopt a quota-based approach to avoid disparities. Another commenter similarly suggested that the proposed rule does not contain a robust causality requirement, stating that *Inclusive Communities* emphasized a robust causality requirement to prevent housing providers and businesses from resorting to racial quotas. Another commenter asserted that to align the rule with *Inclusive Communities'* robust causality requirement and therefore reduce the incentive for housing providers to use racial quotas, while still maintaining the essence of the 2013 Rule, HUD should modify the final rule to say that ''discrimination on a group of persons is predictable through a robust causal link by the challenged policy or practice.''

In contrast, a commenter stated that the proposed rule would not require businesses to consider race or quotas. Other commenters stated that by requiring that a plaintiff prove that the challenged practice caused or predictably will cause a disparate impact rather than imposing liability based on statistical disparities alone or general societal discrimination, this rule addresses any concerns that disparate impact liability would cause defendants to resort to quotas.

HUD Response: HUD disagrees that this final rule will incentivize quotas. While the Court expressed concern in *Inclusive Communities* that ''without adequate safeguards at the prima facie stage,'' disparate-impact liability might lead to the use of ''numerical'' or ''racial quotas,[289] this rule already contains these ''adequate safeguards.'' In particular, the rule requires plaintiffs to demonstrate that ''a challenged *practice caused* or predictably *will cause*'' (emphasis added) a discriminatory effect. Furthermore, it defines ''a practice that has a discriminatory effect'' as one where the practice ''*actually or predictably results* in a disparate impact'' (emphasis added) or in segregation cases, where the practice ''creates, increases, reinforces or perpetuates segregated housing patterns.'' As explained previously in this preamble, this connection between the challenged practice and the discriminatory effect is the causality that *Inclusive Communities* spoke of when discussing how safeguards would prevent the use of racial quotas.[290] And it was in the context of the *Inclusive Communities* district court's failure to require this connection (by finding the defendant liable based solely on discrepancies in outcomes, without requiring the plaintiff to show that a particular practice caused those outcomes) that the Fifth Circuit remanded the matter with instructions to follow the 2013 Rule,[291] a judgment

be achieved without arbitrarily creating discriminatory effects or perpetuating segregation''). *See also id.* at 539–540 (citing *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974) and *Huntington Branch, N.A.A.C.P.* v. *Town of Huntington,* 844 F.2d 926, 934 (2d Cir.), *aff'd in part,* 109 S. Ct. 276 (1988), which were ''perpetuation of segregation'' cases and described as ''heartland'' disparate-impact liability cases).

[284] *See, e.g., Graoch Assocs. #33, L.P.* v. *Louisville/Jefferson Cnty. Met. Hum.n Rels. Comm'n,* 508 F.3d 366, 374–78 (6th Cir. 2007); *Reinhart* v. *Lincoln Cnty.,* 482 F.3d 1225, 1229–1232 (10th Cir. 2007); *Hallmark Devs. s, Inc.* v. *Fulton Cnty., Ga.,* 466 F.3d 1276, 1286 (11th Cir. 2006); *Charleston Hous. Auth.* v. *U.S. Dep't of Agric.,* 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois* v. *Abington Hous. Auth.,* 207 F.3d 43, 49–50 (1st Cir. 2000); *Jackson* v. *Okaloosa Cnty., Fla.,* 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith* v. *Volpe,* 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP* v. *Town of Huntington,* 844 F.2d 926, 937–38 (2d. Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curiam); *Resident Advisory Bd.* v. *Rizzo,* 564 F.2d 126, 148 (3d. Cir. 1977); *Betsey* v. *Turtle Creek Assocs.,* 736 F.2d 983, 987–89, n.3 (4th Cir. 1984); *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights,* 558 F.2d 1283, 1290–91 (7th Cir. 1977); *United States.* v. *City of Black Jack,* 508 F.2d 1179, 1184–86 (8th Cir. 1974).

[285] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 540–41. (''[D]isparate-impact liability has always been properly limited in key respects . . . for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.'') (internal citations omitted).

[286] *Id.* at 542 (quoting 78 FR 11476).

[287] *See, e.g.,* 42 U.S.C. 3608(e)(5) (The Secretary of Housing and Urban Development shall—administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter); *Thompson* v. *United States HUD,* 348 F. Supp. 2d 398, 417 (D. Md. 2005) (finding that HUD's duty to affirmatively further fair housing under § 808(e) holds HUD's actions to a ''high standard'' which includes ''to have a commitment to desegregation'').

[288] *Inclusive Cmtys. Project, Inc.*. at 540 (''[t]he FHA aims to ensure that those [legitimate] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.'').

[289] *Id.* at 542–43.

[290] *See id.* at 540–43 (explaining that a robust causality requirement means that a plaintiff must ''point to a defendant's policy causing [a] disparity'' and ''allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection'' between the policy and the disparity/imbalance, as opposed to simply relying on a statistical disparity or racial imbalance alone, and noting that this requirement safeguards against defendants being held liable for disparities they did not create, which might encourage the use of racial quotas).

[291] *See Inclusive Cmtys. Project, Inc.* v. *Tex. Dep't of Hous. and Cmty. Affairs,* 747 F.3d 275 (5th Cir 2014) (remanding the matter for application of

Continued

the Supreme Court ultimately affirmed. Crucially, therefore, far from invalidating the 2013 Rule for failing to require this connection, the Fifth Circuit and Supreme Court decisions both support HUD's position that that applying the 2013 Rule's framework is the correct method of ensuring that disparate impact liability does not improperly require the use of racial quotas.

Further, HUD's discussion above regarding the insurance underwriting processes explains the difference between being aware of protected traits to avoid discrimination (consistent with this final rule, *Inclusive Communities,* and the Act) and violating the Act by making decisions based upon a protected trait.[292]

In addition, it is unclear how the commenter's proposed alternative language, that ''discrimination on a group of persons is predictable through a robust causal link by the challenged policy or practice'' would improve the rule or disincentivize quotas. On the contrary, HUD believes modifying the rule to incorporate this language would create confusion about the causal link between the policy and the effect discussed by *Inclusive Communities.* For example, it is unclear what ''by'' means in the proposed sentence, and the sentence does not make clear that the *practice must cause* (predictably or actually) *the discriminatory effect.* HUD further believes incorporating the ''robust causal link'' language is unnecessary and could confuse people about a heightened standard that *Inclusive Communities* did not create, as detailed elsewhere in this preamble.

Issue: Commenters stated that the proposed rule would create an uneven playing field in favor of plaintiffs through the requirements and burdens placed on defendants, as compared to plaintiffs. Some commenters stated that the proposed rule requires defendants to show that their policy will *not* cause a disparate impact on a protected group. Other commenters said the proposed rule allows plaintiffs to use hypothetical or speculative evidence, or no evidence at all, to show that a practice causes a discriminatory effect, while at the same time requiring defendants to meet their burden at step two with evidence that is not hypothetical or speculative, thus placing the entire burden of proof on defendants. A commenter said the rule allows plaintiffs to raise hypothetical or speculative impacts at step one (because of the ''predictably results'' language), while barring defendants from raising hypothetical or speculative defenses at step two.

On the other hand, commenters supported HUD's continuation of the 2013 Rule's framework, stating that the 2020 Rule unjustifiably favors defendants because plaintiffs must meet a preponderance of the evidence standard to prove discrimination, but defendants are only required to show that a policy advances a legitimate interest. The commenters stated that this conflicts with well-established case law placing the burden on the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.

HUD Response: HUD believes that the burdens and requirements in the rule are appropriately balanced, and that the concerns that the rule is tipped in favor of plaintiffs are based on misunderstandings of the rule.

First, the rule does not require a defendant to show that its policy or practice does not cause a disparate impact. In fact, this rule does not require any party to prove a negative. While a defendant may choose to present evidence that the defendant's policy does not cause a discriminatory effect to rebut the plaintiff's evidence that it does, the plaintiff has the ultimate burden of proving that a defendant's policy caused (or predictably will cause) a discriminatory effect.

Nor does this rule place a greater evidentiary burden on defendants than on plaintiffs or otherwise shift the burden of proof entirely onto defendants. Under the rule, the plaintiff must prove through evidence (not speculation) that a challenged practice caused or predictably will cause a discriminatory effect (step one). Assuming the plaintiff meets this burden, the defendant must prove through evidence (not speculation) that a challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests (step two). If the plaintiff fails to meet its step one burden, defendant prevails, and if the defendant fails to meet its step two burden, the plaintiff prevails. It is the plaintiff—not the defendant—who carries the burden at two of the three steps in the burden shifting framework, including the final one. As HUD said in the 2013 Rule: ''Requiring the respondent or defendant to introduce evidence (instead of speculation) proving that a challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests in order to benefit from the defense to liability is not different in kind from requiring the plaintiff to introduce evidence (not speculation) proving that a challenged practice caused or will predictably cause a discriminatory effect. As discussed in this preamble, the language of the Act makes clear that it is intended to address discrimination that has occurred or is about to occur, and not hypothetical or speculative discrimination.''

Although commenters specifically called out evidence that could support a complaint concerning a ''predictable'' disparate impact as ''hypothetical'' or ''speculative'' under the rule, this is incorrect. In the final rule's framework, neither the plaintiffs nor defendant may rely on hypothetical or speculative evidence. All parties must rely on evidence that is sufficiently rigorous and not speculative, and there is no requirement that either side rely solely on evidence of the already existing effects of defendants' adopted policy. For example, lenders routinely assess proposed policy changes using current data to determine whether, if adopted, the policy would have a disparate impact in the future. Data analysis like this—of the effects that a policy will have, rather than the effects a policy already has had—is neither ''hypothetical'' nor ''speculative'' and could be used by either a plaintiff or a defendant to support or rebut a predictable effects claim at step one. And just as a plaintiff can rely on evidence that the defendant's policy will predictably have certain effects, a defendant can rely on evidence that a proffered less discriminatory alternative to its policy will not work.

Moreover, characterizing the *impact* of a ''predictable effects'' showing at step one as ''hypothetical or speculative'' is incorrect. Even if the impact has not yet occurred, this final rule still requires that plaintiffs prove that it predictably will occur. If plaintiffs show only that the discriminatory impact is ''hypothetical,'' or ''speculative,'' they will not prevail. Defendants may prove that a policy or practice with a discriminatory effect was necessary to meet a substantial, legitimate, interest. Hypothetical or speculative defenses articulated in support of a policy or practice will not be sufficient, because defendants know the actual reason for the policy or practice at issue. Allowing defendants to present different reasons than their actual reasons for implementing policies with

---

HUD's 2013 Rule); *id* at 283–84 (concurring) (highlighting specifically the problem of the lower courts analysis as accepting plaintiffs relying on statistical evidence of disparity alone without a connection to an offending policy).

[292] *See supra* at *Discriminatory Effects as Applied to Insurance.*

discriminatory effects would allow pretextual reasons to justify discriminatory policies, thus defeating the important role of discriminatory effects liability in uncovering discriminatory intent,[293] and would permit, rather than remove, arbitrary and artificial barriers to housing.

Finally, HUD agrees with commenters who noted that the burden shifting framework in this rule strikes the appropriate balance between the interests of plaintiffs and defendants, and that the 2020 Rule upset this balance. For example, it required defendants to identify only a legitimate interest rather than an interest that is also substantial and nondiscriminatory. It removed the requirement that the defendant's challenged practice be necessary to achieving that legitimate interest. Additionally, the defendants' burden was reduced from one of proof to one of production. HUD notes that these changes were neither consistent with nor justified by the text of the Act or case law interpreting it.[294] And to the extent the Act and case law provide discretion, HUD exercises its policy judgment to maintain the 2013 Rule's burden shifting framework for the reasons stated above.

Section 100.500(a) and (c)(1): Clarifying Causation

Issue: Commenters suggested HUD provide guidance to help clarify causation in the final rule or modify the causation standard in the rule to make it more detailed or specific. Some commenters asked HUD to clarify that a challenged practice may be too remote from the alleged discriminatory effect to give rise to liability. Other commenters criticized the proposed rule for not making clear that a plaintiff must identify a *specific* policy or practice that caused the alleged disparate impact (as opposed to challenging a more general array of practices), with some saying that *Wards Cove* requires this. Other commenters suggested that the rule specify that the discriminatory impact be ''significant'' because *Wards Cove* and *Inclusive Communities* require it. According to the commenters, the latter's warning that race should not be used in a pervasive way or injected into every housing decision necessitates a ''significant'' discriminatory impact. Others suggested the rule needs to be clearer on what evidence is required to show causation and should establish statistical standards, with one commenter stating that the rule should require some threshold of showing credible, localized, statistical proof that a challenged practice has a discriminatory effect. A commenter said clarification is needed because HUD's 2016 Guidance on criminal records, by pointing to historic nationwide incarceration rates, shows that HUD has interpreted the proposed rule to allow the plaintiff to meet the initial burden using sweeping generalizations about statistics and impact with little or no showing of statistically valid discriminatory impact. The commenter further stated that courts have interpreted the initial burden under Title VII, including in *Wards Cove,* as much higher than the burden articulated in the rule, including requiring that the practice has an adverse impact on a specific protected class that is qualitatively different from other classes and that can be demonstrated to have a materially different impact based on statistics for the relevant geographic area.

In contrast, other commenters stated that the proposed rule already contains a sufficiently clear causation requirement. A commenter wrote that the 2013 Rule and federal jurisprudence have appropriately rejected any potential single test to define ''discriminatory effect'' through evaluating statistical evidence of causation, citing *Mt. Holly Gardens Citizens in Action, Inc.* v. *Twp. of Mount Holly, Bonasera* v. *City of Norcross,* and *Langlois* v. *Abington Hous. Auth.*[295] and noted that further defining ''discriminatory effect'' (including that a disparate impact is ''significant'') is inappropriate because of the wide variety of policies and practices challenged.

HUD Response: HUD believes that revising the causation requirement in this final rule is inappropriate. The final rule already requires plaintiffs to show a causal link between the challenged practice and the alleged discriminatory result. That requirement, in turn, necessitates consideration of whether a challenged practice is too remote from the alleged discriminatory effect for liability to arise under the Act.

In HUD's experience, identifying the specific practice that caused the alleged discriminatory effect will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis. As has been recognized in the employment context under Title VII after *Wards Cove,* the elements of a decision-making process may not be capable of separation for analysis,[296] in which case it may be appropriate to challenge the decision-making process as a whole. For example, in a reverse redlining case, there may be multiple acts or policies that together result in a discriminatory effect.[297] Finally, in some instances, the absence of a policy may amount to a practice.[298] And while *Wards Cove* limited plaintiffs' ability in an employment matter to aggregate multiple practices in showing that a practice or practices cause a disparate impact until Congress amended Title VII, *Inclusive Communities* did not endorse a wholesale application of *Wards Cove* to disparate impact cases under the Act. Indeed, the Court only cited *Wards Cove* for an uncontroversial and undisturbed portion of its holding, *i.e.,* that simply pointing to racial imbalances within a company is insufficient to show that a policy caused a disparate impact. And *Inclusive Communities* explicitly noted when it cited *Wards Cove* that the ''robust causality'' requirement it attributed to *Wards Cove* did not incorporate any part

[293] *See Inclusive Cmtys. Project, Inc.,* 576 U.S. at 540 (describing discriminatory effects liability as playing a role in uncovering discriminatory intent).

[294] *See, e.g., MHANY Mgmt. Inc.* v. *Cnty. of Nassau,* 819 F.3d 581, 618–619 (2d Cir 2016) (deferring to HUD's [2013] regulation, noting that ''the Supreme Court implicitly adopted HUD's [burden shifting] approach [in 24 CFR 100.500(c)]''); *Prop. Cas. Insurers Ass'n of Am.* v. *Carson,* 2017 WL 2653069, at *8–9 (N.D. Ill. June 20, 2017) (finding that HUD's 2013 adoption of the 3-step burden-shifting framework was a reasonable interpretation of the Act and that ''in short, the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction.''); *Burbank Apartments Tenant Ass'n* v. *Kargman,* 474 Mass. 107, 126–27 (Mass. 2016) (explaining that it was following the ''burden-shifting framework laid out by HUD and adopted by the Supreme Court in [Inclusive Communities].'').

[295] *Mt. Holly Gardens Citizens in Action, Inc.* v. *Twp. of Mount Holly,* 658 F.3d 375, 382 (3d Cir. 2011); *Bonasera* v. *City of Norcross,* 342 F. App'x. 581, 585 (11th Cir. 2009); *Langlois* v. *Abington Hous. Auth.,* 207 F.3d 43, 50 (1st Cir. 2000).

[296] *See* 42 U.S.C. 2000e–2(k)(1)(B)(i) (''[T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice'').

[297] *See, e.g., Hargraves* v. *Capital City Mortg. Corp,* 140 F. Supp. 2d 7, 18–22 (D.D.C. 2000) (finding that ''predatory lending'' in African American neighborhoods, which included exorbitant interest rates, lending based on the value of the asset rather than a borrower's ability to repay, profiting by acquiring the property through default, repeated foreclosures, and loan servicing procedures with excessive fees, could disparately impact African Americans).

[298] *See, e.g., Miller* v. *Countrywide Bank, N.A.,* 571 F. Supp. 2d 251, 258 (D. Mass. 2008) (''Where the allocation of subjective decisionmaking authority is at issue, the 'practice' amounts to the *absence* of a policy, that allows racial bias to seep into the process. Allowing this 'practice' to escape scrutiny would enable companies responsible for complying with anti-discrimination laws to 'insulate' themselves by 'refrain[ing] from making standardized criteria absolutely determinative.'') (citing *Watson,* 487 U.S. at 990).

of the opinion that was superseded by Title VII's statutory amendments:

A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact'' and thus protects defendants from being held liable for racial disparities they did not create.' *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642, 653 (1989), superseded by statute *on other grounds,* 42 U.S.C. 2000e–2(k) (emphasis added).[299]

HUD further declines to set statistical standards, including statistical thresholds, to require localized statistics, or note a ''significance'' requirement. HUD continues to believe, as it did in 2013, consistent with courts, that analyzing causation in these matters on a case-by-case basis is the best approach, especially given the wide variety of policies, practices, and discriminatory effects at issue in these types of cases.[300] Courts have recognized a variety of circumstances—both under the Act and Title VII—in which using national statistics, rather than local statistics, is appropriate.[301] HUD's 2016 Guidance recognizes this, while also noting that ''state or local statistics should be presented where available and appropriate based on a housing provider's market area or other facts particular to a given case.'' [302] The Supreme Court has recognized that a case-by-case approach is appropriate in the Title VII context when it comes to statistical thresholds and requirements and levels of significance.[303] And, as HUD noted in 2013, the decision not to codify a significance requirement is consistent with the 1994 Joint Policy Statement on Discrimination in Lending, the statutory codification of the disparate impact standard under Title VII, and the Consumer Financial Protection Bureau's interpretation of the disparate impact standard under ECOA.[304]

Section 100.500(c)(1): When Multiple Factors Produce Discriminatory Effects

Issue: Commenters stated that the ''actually or predictably results'' language in step one ignores situations in which multiple factors may produce discriminatory effects.

HUD Response: This rule requires plaintiffs to prove that the challenged policy caused or predictably will cause the alleged discriminatory effect. Therefore, plaintiffs are required to show that the policy they challenge is a cause of a discriminatory effect. The rule does not require the challenged policy to be the sole factor that causes or predictably will cause the discriminatory effect. Such an approach is consistent with HUD's position that in disparate treatment cases, the Fair Housing Act is violated even if discriminatory animus was *only one of the factors* motivating the defendant's actions.[305]

[299] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 542.

[300] *See, e.g., Conn. Fair Hous. Ctr.* v. *CoreLogic Rental Prop. Sols.,* LLC, 478 F. Supp. 3d 259, 296 (D. Conn. 2020) (noting the appropriateness of a case-by-case approach which considers not only statistics but all the surrounding facts and circumstances in judging the significance or substantiality of disparities in a Fair Housing Act disparate impact case) (citing *Chin* v. *Port Auth. of New York & New Jersey,* 685 F.3d 135, 153 (2d. Cir. 2012)); *Langlois* v. *Abington Hous. Auth.,* 207 F.3d 43, 50 (1st Cir. 2000) *(describing the issue of impact as* ''*fact-bound*'' *and applying Supreme Court's Watson holding that* ''no single test controls in measuring disparate impact'' to the Title VIII case before it). Courts have held the same in the Title VII context.

[301] *See, e.g., Conn. Fair Hous. Ctr.* v. *CoreLogic Rental Prop. Sols.,* 478 F. Supp. 3d 259, 292 (D. Conn. 2020) (''National or state general population statistics may be used as the appropriate comparison groups in at least three situations: First, national or state statistics are appropriate where there is no reason to suppose that the local characteristics would differ from the national statistics . . . . Second, studies based on general population data and potential applicant pool data'' may be the ''initial basis of a disparate impact claim, especially in cases [where] the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory . . . . Third, national or state general statistics are appropriate where actual applicant data is not available'') (internal citations omitted); *Dothard* v. *Rawlinson,* 433 U.S. 321, 330 (1977) (''[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.''); *Griggs,* 401 U.S. at 430 (relying on general population data in finding disparate impact of diploma requirement on Black applicants); *EEOC* v. *Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.,* 186 F.3d 110, 119–120 (2d Cir. 1999) (finding that actual applicant pool data was based upon too small a sample size and use of general population and potential applicant data was thus appropriate); *El* v. *SEPTA,* 418 F. Supp. 2d 659, 668–69 (E.D. Pa. 2005) (finding that plaintiff proved prima facie case of disparate impact under Title VII based on national data from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that People of Color were substantially more likely than whites to have a conviction), *aff'd on other grounds,* 479 F.2d 232 (3d Cir. 2007).

[302] ''Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions'' at 3 (April 4, 2016).

[303] *See, e.g., Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977, 995–96 n.3 (1988) (''We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of ''standard deviations'' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged the ''significance'' or ''substantiality'' of numerical disparities on a case-by-case basis . . . [W]e believe that such a case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.'''') (internal citations omitted); *See also Jones* v. *City of Bos.,* 752 F.3d 38, 52–53 (1st Cir. 2014) (outlining the difficulty in applying a rule to assess ''practical significance'' when analyzing causation in disparate impact cases, including outlining criticisms of EEOC's four-fifths rule to show ''practical significance'').

[304] 78 FR 11460, 11468–9.

[305] *See, e.g., HUD* v. *Cox et. al,* HUDALJ 09–89–1641–1, 1991 HUD ALJ LEXIS 106, at *21 (HUD ALJ 1991) (''The Secretary need not prove that race was the sole factor motivating Respondents. He need only demonstrate by a preponderance of the evidence that race was one of the factors that motivated Respondents; that is, that race did in fact play a part in their decisional process.''); *HUD* v. *Robert and Mary Jane Denton,* HUDALJ 05–90–0406–1, 1992 HUD ALJ LEXIS 60, at * 18–26 (HUD ALJ 1992) (finding that the mixed motive analysis from Title VII applies to the Act)*; Community Services, Inc.* v. *Wind Gap Mun. Auth.,* 421 F.3d 179, 177 (3rd Cir. 2005) (to prevail in a disparate treatment claim under the Fair Housing Act, ''a plaintiff must demonstrate that some discriminatory purpose was a 'motivating factor' behind the challenged action''); *Hamm* v. *Gahnna, Ohio,* 109 Fed. Appx. 744, 747 (6th Cir. 2004) (to establish intentional discrimination under the Fair Housing Act, ''a plaintiff must present evidence showing that an impermissible 'discriminatory purpose was a motivating factor in the defendant's decision'') (internal quotations and citations omitted); *Hadeed* v. *Abraham,* 103 Fed. Appx. 706, 707 (4th Cir. 2004) (reviewing Fair Housing Act claim based on the ''a motiving factor'' standard); *Moore* v. *Townsend,* 525 F.2d 482, 485 (7th Cir. 1975) (race is an ''impermissible consideration'' and it need only be established that race ''played some part in the refusal to deal''); *Hanson* v. *Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986) (Fair Housing Act is violated if race ''was a consideration and played some role in a real estate transaction''); *Green* v. *Century 21,* 740 F.2d 460, 464 (6th Cir. 1984) (Fair Housing Act is violated if race was ''an effective reason'' for defendant's refusal to sell); *Jordan* v. *Dellway Villa of Tenn., Ltd.,* 661 F.2d 588, 594 (6th Cir. 1981) (plaintiff is to recover if race ''played a part'' in his rejection); *Marable* v. *H. Walker & Assoc.,* 644 F.2d 390, 395 (5th Cir. 1981) (race may not be ''one significant factor considered by the defendant in dealing with the plaintiff''); *Robinson* v. *12 Lofts Realty, Inc.,* 610 F.2d 1032, 1042–43 (2nd Cir. 1979) (Fair Housing Act is violated if race ''is even one of the motivating factors,'' and racial motivation must not ''play any role in the decision to deny [plaintiff's] application''); *Payne* v. *Bracher,* 582 F.2d 17, 18 (5th Cir. 1978) (race is not to be considered ''in any way''); *U.S.* v. *Mitchell,* 580 F.2d 789, 791 (5th Cir. 1978) (Fair Housing Act is violated if race ''was a consideration and played some role in the real estate transaction''); *Smith* v. *Anchor Bldg. Corp.* 536 F.2d 231, 233 (8th Cir. 1976) (race is an ''impermissible factor''); *Williams* v. *Matthews Co.,* 499 F.2d 819, 826 (8th Cir. 1974) (same); *U.S.* v. *Pelzer Realty Co., Inc.,* 484 F.2d 438, 443 (5th Cir. 1973) (race need only be ''one significant factor'' that the defendant considered); *Stevens* v. *Dobs, Inc.* 483 F.2d 82, 84 (4th Cir. 1973) (liability is established if race was ''an important element'' in the defendant's decision.).

Section 100.500(c)(2): Proving That the Challenged Practice Is Necessary To Achieve One or More Substantial, Legitimate, Non-Discriminatory Interests

Issue: A commenter characterized the proposed rule as requiring defendants to show ''hefty'' evidence at step two that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest, placing an almost insurmountable burden on defendants.

HUD Response: HUD disagrees that the rule places an insurmountable or unreasonable burden on defendants. Whether a defendant's own policy or practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant is well within the knowledge of that defendant, who is uniquely able to meet this burden. Furthermore, the rule does not specify what evidence is necessary to meet this burden; it merely states that a legally sufficient justification must be supported ''by evidence.'' [306]

As HUD explained in 2013, the requirement that a defendant prove with evidence the substantial, legitimate, nondiscriminatory interest supporting the challenged practice and the necessity of the challenged practice to achieve that interest is consistent with HUD's longstanding application of an effects framework under the Act, and is similar to the approach taken by other federal regulatory and enforcement agencies under ECOA [307] and Title VII.[308] This requirement is furthermore consistent with most federal courts' interpretations of the Act after *Inclusive Communities*.[309] Nowhere has HUD seen this approach present an insurmountable burden on defendants, except where appropriate: when defendants do not have a legally sufficient justification.

Issue: Commenters disagreed about whether the defendant's burden at step two in § 100.500(c)(2) should be a burden of proof or production based on *Inclusive Communities* and *Wards Cove.* Some commenters stated that the proposed rule places a more onerous burden on defendants than what *Inclusive Communities* requires and that defendants should have only a burden of production at step two. Commenters said that although in *Inclusive Communities,* the Court did not address defendants' burden, it analogized it to the business necessity defense of Title VII under *Wards Cove,* which is one of production. They stated that the Court also made clear in *Wards Cove* that the defendant's obligation was only a burden of production and that this ''conforms to the usual method for allocating persuasion and production burdens.'' They said that the *Inclusive Communities* Court instructed that disparate impact claims must be limited to give insurers latitude to consider market factors. Another commenter focused on the *Inclusive Communities* statement that ''housing authorities and private developers [are provided] leeway to state and explain the valid interest served by their policies'' and concluded that a defendant need only explain how its policy interests are reasonably served by the particular practice, rather than prove it.

Other commenters supported the proposed burden of proof on defendants. These commenters noted that *Wards Cove* is no longer good law because the Civil Rights Act of 1991 specifically placed the step two burden of proof on defendants under Title VII. Commenters stated that the proposed rule contains the necessary protections for defendants, allowing them ''leeway to state and explain the valid interest served,'' consistent with *Inclusive Communities.* Commenters pointed out that *Inclusive Communities* specifically described defendants' burden as a burden of proof rather than production, and as ''important and appropriate.''

HUD Response: As HUD noted in 2016, in over 25 years of case law since *Wards Cove,* no circuit court of appeals had ever applied the *Wards Cove* burden-shifting framework to the Act.[310] Since then, only one circuit court of appeals has applied *Wards Cove's* holding that step two requires a defendant to produce, rather than prove, its interest. HUD believes that the court's explanation in that case of why it applied *Wards Cove* to the Fair Housing Act case before it is

[306] Some commenters mischaracterized the rule as prohibiting hypothetical or speculative evidence. What the rule prohibits is a hypothetical or speculative *justification* for the challenged practice. *See* 100.500(b)(2) (''A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.'').

[307] *See* 1994 Joint Policy Statement on Discrimination in Lending, 59 FR at 18269 (''The justification must be manifest and may not be hypothetical or speculative.'').

[308] *See* 42 U.S.C. 2000e–2(k)(1)(A)(i) (the respondent must ''demonstrate that the challenged practice is job related for the position in question and consistent with business necessity'').

[309] *See, e.g., Alexander* v. *Edgewood Mgmt. Corp.,* Civil Case No. 15–1140, 2019 U.S. Dist. LEXIS 111068 (D.D.C. June 25, 2019) (''If the plaintiff's prima facie burden is met, the burden shifts to the defendant to prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.'') (citing *Inclusive Cmtys. Project, Inc.,* 135 S. Ct. at 2514–15); *Borum* v. *Brentwood Vill. LLC,* Civil Action No.: 16–1723 (RC), 2020 U.S. Dist. LEXIS 54840 at *13–14 (D.D.C. March 30, 2020) (deferring to HUD's 2013 Rule, including at 24 CFR 100.500(c)(2)); *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo,* 2017 U.S. Dist. LEXIS 134930 (M.D. Fla. Aug. 23, 2017) (citing HUD's regulation and sating ''[t]he burden then shifts to the defendant to prove that the challenged practice is necessary to achieve one or more [of its] substantial, legitimate, nondiscriminatory interests.'' Such interests must be supported by evidence and may not be hypothetical or speculative.'') (internal citations omitted) (affirmed by *Oviedo Town Ctr, II, L.L.P.* v. *City of Oviedo, Florida,* 759 Fed. App'x 828 (11th Cir. 2018)); *NFHA* v. *Deutsche Bank Nat'l Trust,* No. 18 CV 839, 2019 WL 5963633 (N.D. Ill. Nov. 13, 2019) (''After a plaintiff establishes a prima facie showing of disparate impact, the burden shifts to the defendant to prove that the challenged practice is necessary to achieve . . . [a] legitimate, nondiscriminatory interest[.]'') (citing *Inclusive Cmtys Project, Inc..,* 135 S. Ct. at 2514–15); *Fair Hous. Ctr. of Wash.* v. *Breier-Scheetz Props., LLC,* 743 F. App'x 116, 118 (9th Cir. 2018) (upholding summary judgment for plaintiff because defendant never justified its challenged policy as ''necessary to achieve one or more substantial, legitimate, nondiscriminatory interests'') (citing HUD's rule and *Inclusive Cmtys Project, Inc..,* 135 S. Ct. at 2522); *Mhany Mgmt.* v. *Cty. of Nassau,* 819 F.3d 581 (2d. Cir. 2016) (announcing HUD's burden shifting framework as the proper framework for evaluating disparate impact claims, noting that the second step was already in line with the circuit's prior case law); *Treece* v. *Perrier Condo. Owners Ass'n,* 519 F. Supp. 3d 342, 353–54 (E.D. La. 2021) (explaining that ''after ICP'', once a plaintiff makes a prima facie case, including robust causation, the[] burden shift[s] to the defendant to show the challenged practice is necessary to achieve one or more of the defendant's substantial, legitimate, nondiscriminatory interests'') (citing *Inclusive Cmtys. Project* v. *Lincoln Prop. Co.,* 920 F.3d 890, 901–02) (5th Cir. 2019); *Fair Hous. Rights Ctr.* v. *Morgan Props. Mgmt. Co.,* LLC, Civil Action No. 16–4677, 2018 U.S. Dist. LEXIS 108905, at *31 (E.D. Pa. June 29, 2018) (''If a disproportionate burden is established, the burden shifts to the defendant to establish whether it has a legitimate, non-discriminatory reason for its actions.. If the defendant can establish that reason, it must then also establish that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.'') (internal citations omitted); *de Reyes* v. *Waples Mobile Home Park L.P.,* 903 F.3d 415, 426 n.6, 428 (4th Cir. 2018) (''In *Inclusive Communities,* the Supreme Court explained that an FHA disparate-impact claim should be analyzed under a three-step, burden-shifting framework . . . Under the second step, the defendant has the burden of persuasion to 'state and explain the valid interest served by their policies.' [*Inclusive Cmtys. Project, Inc.*135 S. Ct.] at 2522 (stating that this step is analogous to Title VII's business necessity standard.''); *Price* v. *Country Brook Homeowners Ass'n,,* Civil Action No. 1:21–cv–113, 2021 U.S. Dist. LEXIS 228914, at *6 (S.D. Ohio Nov. 30, 2021) (''Further, the Supreme Court recognized the U.S. Department of Housing and Urban Development's (''HUD'') burden-shifting framework that is used to analyze disparate impact claims . . . [where at the second step,] the defendant to prove that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.'') (citing *Inclusive Cmtys. Project, Inc.,* 135 S. Ct. at 2514–15).

[310] ''Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment'' at 42 n.32, *American Insurance Association.* v. *Carson and the U.S. Dep't of Hous. and Urb. Dev.,* No. 1:13–cv–00966–RJL (D.D.C. August 30, 2016).

unpersuasive [311] and notes that it conflicts with the other circuits.[312] Moreover, as explained above, *Inclusive Communities'* sole reference to *Wards Cove* was limited to a discussion that was *not* overruled by statute, and had nothing to do with the burden under step two; it instead related to the causation analysis required as part of a plaintiff's prima facie case under § 100.500(c)(1).[313] Far from endorsing a burden limited to production, *Inclusive Communities* explicitly noted and approved of the requirement that defendants ''prove'' the necessity of their policies.[314] And contrary to what some commenters wrote, *Inclusive Communities* did *not,* analogize the business necessity defense to *Wards Cove's* Title VII standard (which is a burden of production); instead, *Inclusive Communities* analogized the business necessity defense to Title VII's modern standard (which is a burden of proof).[315] Further, *Inclusive Communities* specifically and favorably cited HUD's 2013 Rule as ''properly limit[ing] disparate impact liability . . . to give housing authorities and private developers leeway to state and explain the valid interest served by their policies.'' [316]

Issue: Commenters suggested revising the requirement that defendants show a policy is ''necessary'' in step two to something less burdensome. One commenter suggested HUD should require a defendant to show only that the challenged policy is rationally-related to a legitimate, nondiscriminatory interest of the defendant. Another urged HUD to require that a defendant show its practice simply serves a valid interest of the defendant. Other commenters stated that in *Wards Cove,* the Supreme Court expressly rejected a ''necessity'' requirement, concluding that such a requirement would impose a degree of scrutiny impossible to meet.

Other commenters disagreed, stating that the proposed rule is consistent with *Inclusive Communities,* which requires defendants to prove that the challenged practice is necessary to achieve a valid interest. They cited the Court's statement that a housing provider should be allowed to maintain a policy if it is ''necessary to achieve a valid interest'' and noted a lower standard would conflict with well-established disparate impact jurisprudence, including under Title VII. A commenter also noted that in 2013 HUD specifically rejected a suggestion to remove ''necessary'' from the rule, because ''necessary'' is clear, uniform, in compliance with the 1994 interagency guidance, and effectuated the Act's broad remedial goal.

HUD Response: HUD declines to change the defendant's burden in step two because doing so would be inconsistent with longstanding judicial and agency interpretations and because HUD believes that the defendant's burden in step two best effectuates the broad, remedial goals of the Act.[317] Moreover, the Court in *Ward's Cove* never expressly rejected a ''necessity'' requirement, but rather rejected a standard which required a showing that the challenged practice be *essential or indispensable to the employer's business.*[318] The proposed rule does not require a defendant to show that a challenged practice is essential or indispensable, but only that it is necessary to achieve *a* substantial, legitimate, nondiscriminatory interest of that business.

Furthermore, the Court in *Inclusive Communities* specifically cited to the 2013 Rule's explanation of step two of the burden shifting approach as being analogous to the business necessity standard of Title VII when explaining that ''this step of the analysis'' of disparate impact liability is ''an important and appropriate means of ensuring that disparate impact liability is properly limited.'' The opinion continued that housing authorities must prove their policies are ''necessary'' to achieve a valid interest, which mirrors the necessity requirement of this final rule.[319]

Issue: Commenters requested that HUD provide additional guidance in the final rule concerning what may constitute substantial, legitimate, nondiscriminatory interests. A commenter cited the 1994 Interagency Policy Statement on Discrimination in Lending, which describes factors that may be relevant to the legally sufficient justification, including cost and profitability. The commenter stated that the Policy Statement contains helpful guidance for lenders and urged HUD to reference the Policy Statement in this final rule.

Others stated that the proposed rule's failure to recognize practical business considerations, including profit making, as valid interests conflicts with *Inclusive Communities,* which stated that disparate impact liability must be limited to ensure that ''regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system'' and warned against ''second-guessing'' between ''two reasonable approaches.'' They said that defendants must be given latitude to consider market factors.

In contrast, other commenters claimed that it is best to maintain a case-by-case approach so that no justification is automatically deemed a substantial, legitimate, non-discriminatory interest despite its disparate impact on a protected class.

Commenters expressed that profit should not be a legally sufficient justification and that the proposed rule makes clear that there are no automatically valid objectives, such as maximizing profit. Commenters stated that allowing defendants to justify discriminatory policies under the guise of profit would render the discriminatory effects framework completely toothless, because it would

[311] *Sw. Fair Hous. Council, Inc.* v. *Maricopa Domestic Water Improvement Dist.,* 17 F.4th 950, 960 (9th Cir. Nov. 12, 2021). The *Maricopa* case justified its application of the *Wards Cove* burden shifting framework to the Fair Housing Act by stating, first, that ''[i]n *Wards Cove Packing Co.* v. *Atonio* the Supreme Court developed a three-step burden-shifting framework to address [disparate impact] claims.'' *Id.* HUD notes, however, this statement is incorrect, and that the burden shifting framework for Title VII cases was developed in 1975, in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). Additionally, HUD notes that the *Wards Cove* framework was abrogated by the Civil Rights Act of 1991, which restored the *Albemarle* standard. Public Law 102–166, 105, 105 Stat. 1071, 1074 (1991), amending 42 U.S.C. 2000e–2. Also, the opinion states that ''the Supreme Court has applied the [*Ward's Cove*] framework across federal antidiscrimination statutes,'' 17 F.4th at 960, but cites only a single instance in which the Supreme Court applied the *Wards Cove* framework to another federal antidiscrimination statute: *Smith* v. *City of Jackson,* 544 U.S. 228, 240 (2005) (applying *Wards Cove* to the ADEA). As HUD discusses earlier, the Supreme Court has acknowledged that the ADEA has a narrower scope than Title VII, and no other court has applied this standard, so HUD declines to adopt this reading of the Fair Housing Act's protections.

[312] *Mhany Mgmt.* v. *Cty. of Nassau,* 819 F.3d 581 (2d Cir. 2016); *Inclusive Cmtys. Project, Inc.* v. *Heartland Cmty. Ass'n,* 824 F. App'x 210 (5th Cir. 2020); *de Reyes* v. *Waples Mobile Home Park Ltd. P'ship,* 903 F.3d 415 (4th Cir. 2018).

[313] *See Inclusive Cmty's Project Inc.,* 576 U.S. at 542 (''[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact'').

[314] *Id.* at 541. (describing the second step of HUD's burden shifting analysis as ''important'' and ''appropriate'' and as requiring that defendants ''prove'' their policies are necessary to achieve a valid interest).

[315] *Id.* (This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability'') (citing HUD's 2013 Rule at 78 FR 11470).

[316] *Id.* (''[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability'') (citing HUD's 2013 Rule at 78 FR 11470).

[317] *See supra* n. 17, n. 126.

[318] *Wards Cove Packing Co.,* 490 U.S. at 659.

[319] *Inclusive Cmtys. Project, Inc.* 576 U.S. at 541.

make for-profit businesses virtually immune from challenges to their policies or practices that cause a discriminatory effect. A commenter stated that almost all discriminatory policies can be justified by profit. Commenters also stated that a profit defense would be inconsistent with disparate impact jurisprudence; run counter to HUD's mission; and encourage the continuation of profitable, but discriminatory policies. A commenter explained that courts have appropriately rejected profit and market factors as substantial, legitimate, nondiscriminatory interests in the lending arena, limiting the legitimate business justification defense to a lender's use of objective variables and practices to ascertain creditworthiness. A commenter gave as examples cases in which lenders had engaged in practices not related to creditworthiness, like subjective markup pricing, that caused disparate impacts, to show profit should not be considered a legally sufficient justification.[320]

HUD Response: HUD does not believe listing specific valid interests is necessary or appropriate and declines to alter the text of this rule. In promulgating the 2013 Rule, HUD did not state that profit or other business considerations could never be substantial, legitimate, nondiscriminatory interests; rather, HUD declined to explicitly name increasing profits, minimizing costs, and increasing market shares as *per se* substantial, legitimate, nondiscriminatory interests. HUD explained that the Act covers many different types of entities and practices, and a determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity is fact-specific and must be determined on a case-by-case basis.[321] HUD agrees that factors that may be relevant to a defendant's step two burden *could include* cost and profitability, as HUD and other agencies stated in the 1994 Interagency Policy Statement on Discrimination in Lending. However, recognizing interests as *per se* legitimate would undermine the effectiveness of disparate impact liability as a tool for rooting out policies that appear to be neutral but have been adopted for discriminatory reasons. HUD notes that *Inclusive Communities* highlighted disparate impact's important role in uncovering such disguised animus that escapes easy classification as disparate treatment.[322] Accordingly, this rule, like the 2013 Rule, does not list interests that would always qualify as substantial, legitimate, nondiscriminatory interests for every defendant in any context. But the rule still allows regulated entities to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system and does not require second guessing between two reasonable approaches. HUD thus concludes that creating per se defenses would erroneously weaken the rule and result in the dismissal of cases where the practices are not actually necessary to achieve a valid interest and, more concerning, where the seemingly valid interests put forward by defendants are acting to disguise a defendant's underlying actions that are motivated by discriminatory intent.

Issue: Commenters stated that under *Inclusive Communities,* defendants are only required to show that the challenged practice is related to a *valid interest,* not that the practice is necessary or related to a *substantial interest.* Other commenters disagreed and stated that replacing the ''substantial legitimate non-discriminatory interest'' standard with a much lower and overly broad ''valid interest'' standard would make it too easy for defendants to rebut allegations of discrimination, allowing insubstantial business, profit, or policy considerations to defeat meritorious disparate impact claims, and would make it virtually impossible for plaintiffs to make a step three showing.

HUD Response: Nothing in *Inclusive Communities* suggests that the Court endorsed lowering the burden for defendants in step two of the discriminatory effects framework. When *Inclusive Communities* discussed the ability of defendants to state a ''valid interest'', it referred specifically to HUD's 2013 Rule and the second step of the burden shifting analysis [323] which requires that defendant show that its policy is necessary to achieve a substantial, legitimate, and nondiscriminatory interest.[324] HUD believes the Court in *Inclusive Communities,* like other courts and HUD itself, used ''valid'' as shorthand for the same concept that the 2013 Rule describes as ''substantial, legitimate, and non-discriminatory.'' [325]

To the extent that commenters nonetheless ask HUD to substitute a ''valid interest'' standard out of a belief that the Court intended a lower standard rather than one synonymous with the existing step two standard, HUD believes that it would be inappropriate to do so. HUD notes that such a standard would not accord with the majority of judicial opinions concerning the Act, and so it would introduce unnecessary confusion.[326] Furthermore,

[320] *See Miller* v. *Countrywide Bank NA,* 571 F. Supp. 2d 251 (D. Mass. 2008); *see also Ramirez* v. *GreenPoint Mortg. Funding, Inc.,* 268 FRD. 627 (N.D. Cal. 2010); *Guerra* v. *GMAC, L.L.C.,* 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); *Taylor* v. *Accredited Home Lenders, Inc.,* 580 F. Supp. 2d 1062 (S.D. Cal. 2008); *Ware* v. *Indymac Bank,* 534 F. Supp. 2d 835 (N.D. Ill. 2008); *Garcia* v. *Countrywide Fin. Corp.,* No. 07–1161 (C.D. Cal. Jan. 15, 2008), available at *www.nclc.org/unreported; Newman* v. *Apex Fin. Grp.,* 2008 WL 130924 (N.D. Ill. Jan. 11, 2008); *Martinez* v. *Freedom Mortg. Team,* 527 F. Supp. 2d 827 (N.D. Ill. 2007); *Jackson* v. *Novastar Mortg., Inc.,* 2007 WL 4568976 (W.D. Tenn. Dec. 20, 2007). *Cf. Tribett* v. *BNC Mortg.,* 2008 WL 162755 (N.D. Ill. Jan. 17, 2008) (consumer can refile complaint with more specificity); Complaint, *United States* v. *Countrywide Fin. Corp., Countrywide Home Loans, Inc. & Countrywide Bank,* No. CV–11–10540 (C.D. Cal. Dec. 21, 2011) (charging over 200,000 Hispanic and African American borrowers higher interest rates, fees, and costs for mortgage loans than non-Hispanic white borrowers and steering them into subprime loans), *available at www.justice.gov;* Stipulated Final Judgment & Order, *Fed. Trade Comm'n* v. *Golden Empire Mortg., Inc.,* No. CV09–03227 (C.D. Cal. Sept. 24, 2010) (charging Hispanic consumers higher prices for mortgages than similarly situated non-white consumers), *available at www.ftc.gov;* Order to Cease & Desist, Order for Restitution, and Order to Pay, *In re First Mariner Bank Balt., Md.,* No. FDIC–07–285b & FDIC–08–358k (Fed. Deposit Ins. Corp. Mar. 22, 2009), *available at www.fdic.gov;* Complaint, *United States* v. *AIG Fed. Sav. Bank,* No. 1:99-mc-09999 (D. Del. Mar. 4, 2010) (wholesale mortgage brokers charged higher fees to African American borrowers), *available at www.justice.gov.*

[321] 78 FR 11471.

[322] *Inclusive Cmtys. Project, Inc.* 576 U.S. at 540.

[323] *See Inclusive Cmtys. Project, Inc.,* 576 U.S. at 541 (explicitly citing 78 FR 11470 (where HUD states that 'the ''substantial, legitimate, nondiscriminatory interest'' standard found in § 100.500(b)(1) is equivalent to the ''business necessity'' standard' and that 'the requirement that an entity's interest be substantial is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related') when explaining this ''[t]his step of the analysis'' which gives defendants leeway to state and explain ''the valid interest'' served by their policies).

[324] *Id.* at 527 (describing that the second step of the burden shifting framework requires a defendant to ''prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests'' and is ''analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related'') (quoting 24 CFR 100.500(c)(2) and 78 FR 11470).

[325] *See, e.g., Inclusive Cmtys. Project, Inc.,* 576 U.S. at 541 (describing that defendants having leeway to state a ''valid interest'' as part the second step of the burden shifting framework, citing HUD's explanation of the 2nd step of the framework in the 2013 Rule, which describes the interest as substantial, legitimate, and nondiscriminatory at 78 FR 11470); *Treece* v. *Perrier Condo. Owners Ass'n,* 519 F. Supp. 3d 342, 353–54 (E.D. La. 2021) (referring to the defendant's ''substantial, legitimate, nondiscriminatory interests'' and ''valid interest[s]'' interchangeably); *supra* at *Whether Claims Against Insurers Will Fail as a Matter of Law* (''Further, as part of the disparate impact framework set forth in this rule, insurers, like all defendants, are provided the opportunity to show a valid interest supporting any practice challenged under the Act'').

[326] *See supra* n. 309, 312, 314, 316.

as HUD stated in its 2013 Rule, ''in order to effectuate the Act's broad, remedial goal, practices with discriminatory effects cannot be justified based on interests of an insubstantial nature.'' [327]

Section 100.500(c)(3): Proving an Alternative Practice That Could Serve the Interest With a Less Discriminatory Effect

Issue: Commenters asked HUD to place the evidentiary burden at step three on defendants, rather than plaintiffs. They cited to studies showing the difficulty plaintiffs have had succeeding with discriminatory effects claims over time, as well as Second Circuit precedent and the State of California's fair housing statute, which place the burden on defendants.[328] Commenters stated that this revision is necessary because issues of segregation and discrimination in housing and lending have not abated since the 2013 Rule and, in fact, housing is more unaffordable, many cities have seen increasing displacement of communities of color, and borrowers of color are substantially more likely than white borrowers to be denied conventional loans. These commenters also cited to the growing role of data analytics and online platforms in the housing sale and rental market, increasing risks that segments of society will be steered away from or denied housing in a way that is immune to examination of intent, and resulting in even more segregated housing patterns. These commenters cited a 2021 Harvard study finding that the gap between whites and African Americans in homeownership rate stands at 28.1 percentage points, with the gap between whites and Hispanics at 23.8 percentage points.[329]

HUD Response: HUD declines to place the step three burden on defendants. As explained in 2013, this rule's burden-shifting scheme is consistent with the majority view of courts interpreting the Act as well as the Title VII discriminatory effects standard codified by Congress in 1991, and the discriminatory effects standard under ECOA, which borrows from Title VII's burden-shifting framework. As HUD has explained, all but one of the federal appeals courts to address the issue have [330] placed the burden at the third step on the plaintiff. HUD additionally notes the significant overlap in coverage between ECOA, which prohibits discrimination in any aspect of a credit transaction, and the Fair Housing Act, which prohibits discrimination in housing and residential real estate-related transactions. Thus, under the rule's framework, in litigation involving claims brought under both the Fair Housing Act and ECOA, the parties and the court will not face the burden of applying inconsistent methods of proof to claims based on the same underlying facts. Having the same allocation of burdens under the Fair Housing Act and ECOA will provide for less confusion and more consistent decision making by courts. Moreover, HUD continues to believe that this framework makes the most sense because it does not require either party to prove a negative.

Issue: Commenters criticized step three of the proposed rule, stating that it enables plaintiffs to prevail even if the less discriminatory alternative practice they present is unreasonable, less practical, less productive or less effective. Commenters asked HUD to revise step three to permit plaintiffs to prevail only if there is an alternative that is equally effective, is no more costly, or can be implemented at a reasonable cost, and does not impose an undue burden on a defendant or otherwise adversely affect the defendant's non-discriminatory policies and valid interests. Otherwise, commenters said, there would be no limit on what constitutes a reasonable alternative practice allowing plaintiffs to second-guess which of two reasonable approaches should be adopted.

Commenters stated that their proposed revisions to heighten a plaintiff's burden in step three are required by or consistent with *Inclusive Communities,* which held that the Act is not a tool for plaintiffs to force defendants to reorder their priorities or to displace valid governmental and private priorities, and that disparate impact liability must be limited so that employers and other regulated entities are able to make practical business choices and profit-related decisions. A commenter said that step three of the proposed rule is moot in light of *Inclusive Communities'* recognition that re-writing governmental policies exceeds the courts' remedial powers.

Commenters further stated that an equally effective standard for prevailing at step three of the analysis is required by *Wards Cove.* According to the commenters, *Wards Cove* explicitly requires that a plaintiff demonstrate an alternative policy is an ''equally effective'' alternative and warns that courts should proceed with care before mandating alternative practices.[331] Commenters said that *Wards Cove* further noted that cost is relevant in determining whether an alternative is equally effective.

Other commenters supported retaining step three of the proposed rule, stating that the ''less discriminatory alternative'' requirement is consistent with judicial precedent and Congressional intent. They stated that an ''equally effective alternative'' requirement is not appropriate in the housing context where the practices covered by the Act are ''not readily quantifiable.''

Commenters stated that the step three burden articulated by the 2020 Rule should not be retained for various reasons. Commenters said that the 2020 Rule's requirement that plaintiffs identify an equally effective alternative created too high a burden on plaintiffs; put defendant's financial gain above ensuring access to fair housing; departed from established precedent and the core purpose of the Act without justification; lowered the burden for defendants, such that clearly meritorious claims would be dismissed and the effectiveness of disparate impact liability as an incentive to identify less discriminatory alternative practices would be severely weakened; and improperly required plaintiffs to prove that any alternative is equally effective and does not impose materially greater costs. A commenter explained that if the 2020 Rule were retained, with its increased burdens on plaintiffs at step three and reduced burdens on defendants at step two, meritorious claims would be dismissed because it would shift much of the defendant's burden of proof at step two to the plaintiff to disprove at step three, insulating from scrutiny many policies that have an unjustified discriminatory effect. A commenter noted that the 2020 Rule's language was neither consistent with nor required by *Inclusive Communities.* One commenter explained that under the 2020 Rule's reformulation of step three, even a policy with the most flagrantly discriminatory effects would pass legal muster so long as a less discriminatory alternative is even slightly more costly or burdensome, and even if the

[327] 78 FR 11470.

[328] *MHANY Mgmt.,* 819 F.3d at 617–19 (holding the 2013 Rule abrogated Second Circuit precedent placing the burden at the final stage on the defendant); Cal. Code Regs. tit. 2, § 12062 (Lexis Advance through Register 2022, No. 34, August 26, 2022).

[329] *See, e.g.,* Joint Ctr. for Housing Studies of Harvard Univ., The State of the Nation's Housing: 2021, at 3 *available at http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_Nations_Housing_2021.pdf.*

[330] 78 FR 11462.

[331] *Wards Cove,* 490 U.S. at 661 (quoting *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 578 (1978)).

alternative was still significantly profitable. A commenter pointed out that the term ''other material burdens'' in the 2020 Rule is undefined, broad and subjective, and forces plaintiffs to obtain information that is squarely in the purview of the defendant.

HUD Response: HUD declines to modify step three of the proposed framework or adopt the 2020 standard. As HUD explained in the 2013 Rule, the framework in this rule does not allow plaintiffs to impose untenable policies upon defendants because it still requires the less discriminatory alternative to ''serve the defendant's [substantial, legitimate, nondiscriminatory stated] interests.'' [332] This rule's step three continues to be consistent with the 1994 Joint Policy Statement on Discrimination in Lending,[333] with the purpose of the Act and its goal to ''eradicate discriminatory practices within a sector of the Nation's economy,'' [334] and with judicial interpretations of the Act, including *Inclusive Communities.*[335] HUD also notes that a requirement that alternative policies be ''equally effective'' did not appear in *Inclusive Communities,* despite citation to the proposed source of the requirement, *Wards Cove,* and significant discussion of the checks on liability that have always been part of Fair Housing Act jurisprudence. HUD further notes that its position is supported by the *Massachusetts Fair Housing Center* court, which criticized the 2020 Rule's inclusion of this requirement as ''run[ning] the risk of effectively neutering disparate impact liability'' and described it as onerous and inadequately justified.[336] HUD, based on its own experience, agrees with the district court. Moreover, as discussed elsewhere in this preamble, *Wards Cove* construed Title VII, and the portions cited by commenters were barely tried, even in that context, having been superseded by the Civil Rights Act of 1991. In order to avoid unnecessary confusion and uncertainty, HUD declines to abandon a well-established standard in favor of a virtually untested one.

As to other concerns that commenters suggested required revisions to step three, HUD notes that an unreasonable alternative practice that creates an undue burden on defendant would not satisfy plaintiff's three-step burden. Nor will a proposed less discriminatory alternative fail simply because there will be some amount of increased cost associated with the alternative policy. And nothing in the rule suggests that reasonable, valid policies and priorities of defendants will be second guessed or forced to be reordered. Step one of the burden shifting framework ensures that the only policies which will be examined further are ones that cause a disparate impact because of a protected characteristic. Step three ensures that any alternative policy proposed is less discriminatory and actually serves the interest the defendant has already identified in step two. Moreover, HUD disagrees that *Inclusive Communities* rendered step three moot by stating that re-writing governmental policies exceeds the remedial powers of courts. *Inclusive Communities* did not say this. Indeed, there is no statement in *Inclusive Communities* indicating that courts lack the authority to invalidate policies that cause unjustified discriminatory effects.

In sum, HUD believes this provision and the structure of the burden shifting framework provide sufficient protections for defendants' business interests.

Issue: A commenter stated that step three of the proposed rule conflicts with *Inclusive Communities* because defendants can still be held liable despite establishing that their practices are substantial, legitimate, and nondiscriminatory at step two. One commenter criticized step three as unnecessary and inviting uncertainty and continued litigation. The commenter wrote that if the challenged practice is not artificial, arbitrary, and unnecessary, plaintiffs should not be permitted to substitute their proposed practices or business judgment for defendants' practices and judgment.

HUD Response: HUD disagrees. First, step two of the burden shifting framework requires the defendant to establish that its practice is necessary to achieve a substantial, legitimate, nondiscriminatory *interest* of the defendant—not that the defendant establish that the practice itself is substantial, legitimate and nondiscriminatory. By step two of the analysis, the plaintiff has *already* established that the practice itself causes or predictably will cause a discriminatory effect. Assuming the defendant meets its step two burden, the plaintiff then must establish that a less discriminatory alternative practice exists that still serves defendant's cited interest. HUD finds nothing in *Inclusive Communities* indicating that it is appropriate to cut off the inquiry after the second step.

Without step three, defendants with practices that have a discriminatory effect will have little incentive to examine their policies to determine if there are less discriminatory options to achieve their goals, thus allowing practices having unjustified discriminatory effects to continue unchecked. The suggestion that there should be no third step would eliminate a full assessment as to whether the same interest could be served in a less discriminatory way. The third step allows the plaintiff to offer an alternative policy that is less discriminatory and that still accomplishes the legitimate interest identified by the defendant. If the third step were eliminated, ''artificial, arbitrary, and unnecessary barriers'' would remain in place despite the fact that they are unnecessary to achieve the defendant's stated purpose.

Issue: A commenter said that the third step removes the Supreme Court's

[332] 78 FR 11473.

[333] 59 FR 18269.

[334] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 539.

[335] *See, e.g., MHANY Mgmt.* v. *City of Nassau,* No. 05–cv–2301 (ADS)(ARL), 2017 U.S. Dist. LEXIS 153214, at *25 (E.D.N.Y. Sep. 19, 2017) (''contrary to Garden City's assertions, courts have not imposed a heightened standard on plaintiffs at the third step in disparate impact cases under 24 CFR 100.500. Indeed, courts have followed the plain language of the [regulation.]'') (citing *Inclusive Communities Project,* 135 S. Ct. at 2518 (''[B]efore rejecting a . . . public interest[,] a court must determine that a plaintiff has shown that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs' '); *see also Keller* v. *City of Fremont,* 719 F.3d 931, 949 (8th Cir. 2013) (''[W]hether plaintiffs can show that 'a viable alternative means was available to achieve the legitimate policy objective without discriminatory effects.' '') (quoting *Gallagher* v. *Magner,* 619 F.3d 823, 834 (8th Cir. 2010)); *Theodora Rescue Comm.* v. *Volunteers of Am. of Washington,* No. C14–0981RSL, 2014 U.S. Dist. LEXIS 157279, at *11 (W.D. Wash. Nov. 6, 2014) (''Even if the Court assumes that the Ninth Circuit will ultimately allow plaintiffs to rebut a showing of business necessity simply by identifying an alternative act or practice that would serve the identified interests with less discriminatory impact, plaintiff has not made that showing.'') (internal citations omitted); *Oviedo Town Ctr. II, L.L.L.P.* v. *City of Oviedo, Florida,* Case No. 6:16–cv–1005–Orl–37GJK, 2017 U.S. Dist. LEXIS 134930, at *11 (M.D. Fla. Aug. 23, 2017) (''If the defendant satisfies its burden, the plaintiff may still prevail by proving that the defendant's interests could be served by another practice that has a less discriminatory effect.'') (citing 24 CFR 100.500(c)(3)); *Inclusive Communities Project, Inc.* v. *Lincoln Prop. Co.,* No. 3:17–CV–206–K, 2017 U.S. Dist. LEXIS 130818, at *20 (N.D. Tex. Aug. 16, 2017) (''If the defendant meets its burden, the plaintiff must then show that the defendant's interests could be served by another practice that has a less discriminatory effect'' (citing 24 CFR 100.500(c)(3)). *See also Darst-Webbe Tenant Ass'n Bd. V. St. Louis Hous. Auth.,* 417 F.3d 898, 906 (8th Cir. 2005) (''plaintiffs must offer a viable alternative that satisfies the Housing Authority's legitimate policy objectives while reducing the [challenged practice's] discriminatory impact''); *Huntington,* 844 F.2d at 939 (analyzing whether the ''[t]own's goal . . . can be achieved by less discriminatory means''); *Rizzo,* 564 F.2d at 149 (it must be analyzed whether an alternative ''could be adopted that would enable [the defendant's] interest to be served with less discriminatory impact.'').

[336] *Mass. Fair Hous. Ctr.,* 496 F. Supp. 3d at 611.

requirement that the plaintiff not resort to reverse discrimination.

HUD Response: The commenter did not explain what it meant by reverse discrimination or how step three might cause a plaintiff to resort to such discrimination. It is possible that the commenter meant that the need to satisfy the third step causes the defendant to resort to reverse discrimination. However, there is nothing in step three, or any other part of the proposed rule that requires the plaintiff or anyone else to resort to any type of discrimination. To the contrary, step three encourages defendants to utilize practices that have the least discriminatory effect because of any protected characteristic.

Section 100.500(f) (2020 Rule Only): Limiting Damages and Other Penalties in Discriminatory Effects Cases

Issue: Commenters criticized the proposed rule for omitting provisions in the 2020 Rule that limit HUD's authority to seek damages and penalties in discriminatory effects cases. The commenters stated that the 2020 Rule was consistent with *Inclusive Communities'* statement that ''even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution'' and that ''remedial orders should concentrate on the elimination of the offending practice.'' One commenter suggested this means that the rule must only allow remedial orders that completely eliminate rather than only minimize the discriminatory effect. Commenters stated further that punitive or exemplary damages should not be allowed in discriminatory effects cases, noting that courts have applied a rigorous standard in assessing whether an award of punitive damages is proper. Commenters stated that because a discriminatory effects claim does not require a showing of defendant's state of mind, this type of claim cannot meet the standard for punitive damages.

HUD Response: HUD believes that limiting or suggesting favored remedies in this rule would be contrary to the plain language of the Act and its broad remedial purpose. The Act explicitly provides for punitive and compensatory damages, civil penalties (in cases brought by the Attorney General), and injunctive relief in federal court, and actual damages, injunctive and equitable relief and civil penalties in administrative hearings.[337] HUD does not believe that *Inclusive Communities* can be read to suggest that remedial orders should be the sole or favored remedy in discriminatory effects cases or that civil penalties are somehow inappropriate.[338] Rather, the Court merely addressed what courts must keep in mind *when remedial* orders are issued. Nor does HUD believe *Inclusive Communities* can be read to limit remedial orders to only those that *completely* eliminate discriminatory effects. Moreover, well-established criteria in statute and in decades of judicial precedent set forth when penalties and punitive damages may be appropriate, thus preventing arbitrary awards. In any case, the availability of various remedies does not mean that they will be sought or granted in all cases; remedies are considered on a case-by-case basis.

Comments Regarding Other Defenses and Safe Harbors

Issue: Commenters stated that HUD should add a defense similar to the 2020 Rule's third-party defense allowing defendants to rebut plaintiff's prima facie case by showing that their discretion was materially limited by a third party. They said such a defense is necessary to protect defendants from being held liable for discriminatory conduct mandated by law. As an example, a commenter asserted that independent mortgage banks must follow guidelines set by federal agencies, including the government sponsored enterprises, the Department of Veterans Affairs, the Federal Housing Administration, and the Department of Agriculture, which may cause a disparate impact. The commenter stated that these mortgage banks should be granted a safe harbor in such situations. A commenter stated that *Inclusive Communities* requires a third-party defense because it stated that causation does not exist where the defendant's discretion is substantially limited and cited to a concurring opinion in the appellate court decision that included as an element of plaintiff's prima facie case that the defendant's policy or practice is not a result of a law that substantially limits defendant's discretion.

Commenters also stated that a third-party defense is necessary to protect insurers that conform to state laws and regulations on insurance in compliance with McCarran-Ferguson. They said that HUD cannot now say that the third-party defense is inconsistent with the Act when it said in the 2020 Rule that ''in the event that unlawful discriminatory practices are mandated by statute or court order, the most effective way to eliminate the discrimination is to remove or modify the underlying statute or order that mandated the unlawful discrimination.'' They also stated that HUD's proposal to remove the 2020 defense implies that HUD intends to improperly test the boundaries of its ability to preempt state regulations.

Other commenters supported HUD's proposal not to retain the third-party defense from the 2020 Rule, arguing that the defense would allow defendants to evade liability for illegal acts by showing that they complied with third party requirements that are themselves discriminatory. Commenters stated that the defense would deny plaintiffs the ability to address whether less discriminatory alternatives exist to the defendant's chosen method of meeting the third-party requirement. Commenters also stated that such a defense is contrary to the Act's preemption clause because it would prioritize compliance with local ordinances over federal civil rights obligations, even where there may be less discriminatory ways to comply with the third party's requirement, and even in exclusionary zoning cases. In addition, a commenter stated that a third-party defense would impede efforts to prevent algorithm-driven discrimination. Another commenter characterized the 2020 Rule's third-party defense as unnecessarily confusing and vague. A commenter stated that whether a party's discretion is limited by a third party should be addressed at the second step of the burden shifting framework, not at the pleading stage.

HUD Response: HUD disagrees that a third-party defense should be included in this rule. First, *Inclusive Communities* does not suggest that such a defense is necessary or appropriate. *Inclusive Communities* stated that if a plaintiff ''cannot show a causal connection . . .—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case.'' As this passage suggests, if federal law requires defendants to act in a certain manner, plaintiffs may not be able to show that defendants' actions are the cause of a discriminatory effect. Such an argument already is available to defendants under this rule in appropriate cases and does not require revisions to this rule. And as noted in the 2013 Rule, the discriminatory effects standard already permits a defendant to defend against a claim of discriminatory effects by establishing a legally sufficient justification, as specified in § 100.500.

[337] 42 U.S.C. 3612(g)(3), 3613(c), 3614(d).

[338] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 544–45 (identifying considerations for court when designing remedial orders).

Thus, independent mortgage banks, for example, who follow federal guidelines, have multiple opportunities under the rule to defend their practices: first, at the prima facie stage, if federal guidelines, rather than the challenged practices are the cause of the discriminatory effect, and also at the second step of the burden shifting framework, by showing that the practice is truly necessary to comply with the federal guidelines.

That does not mean that, as the 2020 Rule allowed, any time defendants are subject to a third-party requirement, the plaintiff's case will necessarily fail. As other commenters explained, there may be multiple ways of complying with a third-party requirement, some of which have an unjustified discriminatory effect and some of which do not. In those cases, the defendant caused the effect by opting for one way of complying with a third-party requirement over another that does not cause such an effect. A third-party defense such as was included in the 2020 Rule would allow defendants to avoid the requirement to utilize a less discriminatory alternative to comply with a third party requirement.[339] Indeed, if the defense could be raised at the pleading stage (as permitted by the 2020 Rule), disparate impact claims could be dismissed based on mere assertions of third party requirements, without plaintiffs having any opportunity to challenge these assertions with the benefit of discovery. Without discovery, some plaintiffs would have no means of ascertaining whether the third-party obligation actually exists, and if so, whether it is the actual, legitimate reason for defendant's policy or practice, whether that obligation actually requires the defendant to implement the policy at issue or if there is a less discriminatory way to do so. This would essentially eliminate any meaningful inquiry into steps two and three of the burden shifting framework whenever the defendant asserts that its policy was required by a third party. Such a defense is inappropriate because it presumes that discrimination may be permitted without consideration of whether the third-party requirement is itself discriminatory or whether there are non-discriminatory ways to comply with that third-party requirement. Moreover, such a defense would be inconsistent with the Act, which specifies that state and local laws requiring or permitting discriminatory housing practices are invalid.[340]

Issue: Commenters supported HUD's proposed removal of the ''outcome prediction'' defense that was inserted into the 2020 Rule, which was designed to shield certain policies based on algorithms from disparate impact liability with a ''results-based approach.'' Commenters stated that the final rule's framework was the appropriate method of analyzing discriminatory effects claims involving algorithmic and machine learning technologies. A commenter noted that disparate impact litigation is a key mechanism for redressing discrimination in light of the increase of algorithms, which bring risks for perpetuating or amplifying patterns of discrimination through biased development, biased inputs, or bias arising from automatic adaptations from artificial intelligence. Another commenter stated that the potential for disparate impact liability protects borrowers and encourages lenders using these technologies to innovate in ways that expand access to credit. A commenter stated that the rule should clarify in the preamble that the Act applies to entities that rely on algorithms.

Commenters expressed numerous concerns about the defense. Commenters stated that this defense would have the practical effect of foreclosing many disparate impact claims based on algorithms and models and would shield such defendants from liability. Commenters stated that in creating this defense, the 2020 Rule impermissibly created exemptions for predictive models in the lending and insurance industry that have no basis in the Act or any other source of authority, because the Act does not grant HUD authority to create safe harbors or exceptions from discriminatory effects liability, and no court has ever held that entire categories of policies or practices that might otherwise be subject to challenge are exempt from such liability. Commenters also noted that HUD had previously explained why categorical exemptions from disparate impact liability are undesirable.

A commenter noted that the defense would shield a wide range of discriminatory policies and practices, because many discriminatory models would qualify for an exemption because of the 2020 Rule's novel ''similarly situated individuals'' analysis, for which there is no basis as a matter of law or as a matter of fact. As one commenter explained, it would be easy for defendants to show that a challenged policy or practice is intended to predict an outcome because that is what any predictive model claims to do, and it would be easy to show that the prediction represents a valid interest. Another commenter stated that the defense is based on an outdated academic theory of discrimination that relies on statistical disparities to absolve defendants of liability, without acknowledging the possibility that the defendant's policies contributed to the disparities.

Commenters noted that the defense would make it very difficult for plaintiffs to demonstrate that an alternative, less discriminatory policy would result in the *same* outcome, without imposing materially greater costs or other material burdens because there is no standard or agreed upon definition of algorithmic predictive performance or accuracy. Commenters also stated that the defense would make it difficult for plaintiffs to prevail because of the proprietary nature of algorithms; without knowing what the algorithm is and how it works, it is nearly impossible to demonstrate what the 2020 Rule requires: that the practice has a disproportionately adverse effect on members of the protected class, that there is a robust causal link between the algorithm and this adverse effect, and that this effect is significant.

Commenters also described the defense as ambiguous and difficult for parties and courts to apply. Another commenter described this and other defenses as confusing and harmful, noting that the defense would obfuscate discrimination in lender models and algorithmic systems.

Moreover, commenters noted that the defense was promulgated without public notice and comment and was not a ''logical outgrowth'' of the 2019 Proposed Rule, thereby violating the APA.

HUD Response: HUD agrees with the commenters that the defense is not appropriate to include in this rule. Upon HUD's consideration of these comments and in light of HUD's experience interpreting and handling cases under the Act, HUD has determined that the outcome prediction defense is unclear and not found in any case law.[341] The rule properly describes

[339] *Inclusive Cmtys. Project, Inc.,* 576 at 533 (analogizing to Title VII, the court said that ''before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is ''an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'')) (internal citations omitted).

[340] 42 U.S.C. 3615.

[341] *Massachusetts Fair Hous. Ctr.* v. *HUD,* 2020 U.S. Dist. LEXIS 205633 (D. Mass. Oct. 25, 2020) (case no 20–11765–MGM) (calling the added defenses from the 2020 Rule ''perplexing'' and ''accomplish[ing] the opposite of clarity'' and

Continued

the framework to be used in cases involving algorithms and machine learning in housing and housing-related transactions. The defense, if retained, could in practice improperly exempt many housing-related practices that are increasingly reliant upon algorithms and automated processes that rely on outcome predictions, such as lending practices, from liability under a disparate impact standard. The defense would be inconsistent with HUD's repeated finding, including in the 2020 Rule, that ''a general waiver of disparate impact law for the insurance industry would be inappropriate.'' [342] And although unclear, with its novel ''compared to similarly situated individuals not part of the protected class'' language, it appears that this defense would suggest using comparators that are, in HUD's experience, inappropriate, and would fail to consider the reasons why disparities are observed. At the very least, the defense introduces unnecessary confusion into disparate effects doctrine.

Issue: In addition to insurers, various other commenters requested safe harbors or exemptions. Commenters stated HUD should develop safe harbors for those who ''followed rules set out by HUD in developing their operating policies.'' Another commenter seemed to similarly request specific protections for public housing agencies (PHAs) that have policies that are consistent with HUD rules for operation for federally assisted housing, are in compliance with otherwise legitimate laws, are approved for use in federally insured housing, or are for the purpose of eligibility criteria for enhancing housing opportunities for protected classes or other under-housed persons.

Commenters suggested that HUD should have, as a safe harbor, a process where HUD provides concrete guidance to housing providers so that the housing providers do not have to wait until litigation to discover that their policy may violate the Act. Another commenter requested a safe harbor for entities that implement written policies that identify non-discriminatory goals, explain how the policy is reasonably calculated to achieve that goal, and conclude that the policy does not impose a greater burden on members of protected classes than it does on the wider population. Some commenters requested a safe harbor for credit unions that limit membership based on statutory requirements, explaining that while a disparate impact claim already would fail under the proposed rule because credit unions are legally unable to lend outside their membership, litigating these cases, even by just filing a motion to dismiss, is costly, particularly for small credit unions. They stated further that *Inclusive Communities* stated that where a causal connection between a policy and a disparate impact cannot be shown because federal law substantially limits discretion of the defendant, dismissal is appropriate.

Other commenters said no safe harbors should be provided for policies and practices that have discriminatory effects by limiting housing opportunities for protected groups. Commenters stated that the 2013 Rule, 2016 Supplement, and this rule appropriately apply a case-by-case disparate impact analysis to all housing related industries and agreed that this approach is consistent with the Act.

HUD Response: HUD agrees with commenters that advocate for a case-by-case approach rather than safe harbors. As explained above, HUD believes that it does not have the authority to create exemptions that do not appear in the statute. Moreover, even if a court were to find that HUD had such authority, HUD believes that a case-by-case approach appropriately implements HUD's obligations to enforce the Act to redress discrimination that exists in an entire sector of the economy and to affirmatively further fair housing. Moreover, safe harbors are unnecessary as regulated entities can defend themselves utilizing the second step of the burden shifting framework. Regulated entities may also use the burden shifting framework to assess their own existing policies and practices as well as new policies and practices that are under consideration in order to ascertain whether they may cause an unjustified discriminatory effect. HUD also emphasizes that entities' purported compliance with program specific rules does not guarantee compliance with the Fair Housing Act, and that the Fair Housing Act's mandate is to refrain from discrimination—including refraining from using policies or practices with unjustified discriminatory effects. The rule provides clarity as to how HUD and a court would analyze such a claim, allowing regulated entities to better comply with their obligations under the Act and prevent unjustified discriminatory effects in the first place. HUD notes further that *Inclusive Communities* provides no support for any exemptions; the passage cited by commenters merely explains that courts dismiss lawsuits pursuant to the pleading standards in the Federal Rules of Civil Procedure.

Comments Regarding Additional Explanations, Examples and Guidance

Issue: Commenters suggested that HUD should provide additional examples of practices that can have unjustified discriminatory effects in the rule, its Preamble, or in future guidance. They suggested that HUD: note in the rule that policies or practices that result in the benign neglect of people with disabilities can have discriminatory effects; provide examples of specific zoning ordinances or other policies that restrict manufactured housing and may have a discriminatory effect; and discuss criminal records screening practices as examples of policies that may have an unjustified discriminatory effect on protected classes. One commenter suggested that HUD should outline less discriminatory alternatives to eviction in cases where a housing provider has a policy of evicting the household for certain types of lease violations.

HUD Response: HUD declines to insert examples of practices that may specifically have unlawful discriminatory effects into this rule. This rule is designed to provide a framework to help entities and courts assess whether a policy or practice may have an unjustified discriminatory effect, not to establish a list of practices that may be unlawful under a discriminatory effects theory. HUD has already issued Guidance on some topics, including certain criminal records screening practices [343] and certain zoning practices [344]—that may have unjustified discriminatory effects on protected classes.

While HUD believes the rule provides a sufficiently clear framework under which specific practices can be evaluated, HUD will consider issuing more guidance as it deems appropriate.

Issue: A commenter urged HUD to consider providing separate guidance related to the use of algorithms, artificial intelligence, and machine learning.

HUD Response: HUD appreciates this request and believes that the rule provides the appropriate framework for

noting that the outcome prediction defense was ''not, as far as the court is aware, found in any judicial decision'').

[342] 85 FR 60321 (citing ''Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance'' 81 FR 69012)); *see also* 78 FR 11460, 11475.

[343] *See* ''Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions'' (April 4, 2016).

[344] *See* ''Joint Statement of the Department of Housing and Urban Development and the Department of Justice[:] State and Local Land Use Laws and Practices and the Application of the Fair Housing Act'' at 5 (November 10, 2016).

evaluating discriminatory effects liability for all claims under the Act, including as applied to algorithms, artificial intelligence, and machine learning. However, given the rapid evolution in this field, HUD will consider in the future whether to adopt more detailed guidance expanding on those particular types of claims.

Issue: A commenter asked HUD to specify that a one-off action, like the decision of a private developer to construct a new building in one location rather than another, is insufficient to establish disparate impact liability. Other commenters opposed this change, noting that a single zoning decision or single application of a zoning standard often results in or is, in fact, a community's policy or practice and can have wide discriminatory impacts. They noted that a ''single event'' limitation would essentially sanction many discriminatory zoning actions, even where *Inclusive Communities* specifically called suits targeting ''zoning laws and other housing restrictions . . . that function to unfairly exclude minorities from certain neighborhoods without any sufficient justification . . . [as] resid[ing] at the heartland of disparate impact liability.''

HUD Response: HUD believes that a so-called ''one-off'' action may, in certain cases, be sufficient to establish a practice that has an unjustified discriminatory effect. As noted throughout this preamble, HUD continues to find that discriminatory effects claims should be assessed on a case-by-case basis. A ''one-off'' exception would tend to protect siting decisions that may have been influenced by a community's desire to keep out people of a certain race, or against people with disabilities. And HUD agrees with commenters that this limitation may pose obstacles to meritorious zoning cases. HUD notes that an individual siting decision by a private housing developer, or a single zoning decision by a locality, will not result in an unjustified discriminatory effect liability so long as the developer or locality has a legally sufficient justification for that decision. HUD believes this fully protects localities and the individual siting decisions of private housing developers. Furthermore, while the Court in *Inclusive Communities* noted in dicta that it would be difficult to prove that a developer's one-time decision to build in one location rather than another was a policy that caused a disparate impact, it did not go so far to say that such a scenario could never succeed under a disparate impact theory.

Issue: A commenter suggested that in the preamble to the final discriminatory effects rule and in separate guidance, HUD should outline potentially less discriminatory alternatives to eviction in cases where a housing provider has a policy of evicting the household for certain types of lease violations.

HUD Response: As discussed above, HUD believes that each discriminatory effects claim should be assessed on a case-by-case basis, including what less discriminatory alternatives might exist. HUD declines to provide additional guidance in this regulation but will consider in the future whether such guidance may be appropriate.

Issue: Commenters asked HUD to make revisions to various guidance documents including the 2016 Office of General Counsel Guidance entitled ''Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions'' (2016 Guidance) and a 2011 internal HUD memorandum for HUD's Fair Housing and Equal Opportunity headquarters and field staff entitled ''Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA)''. Other commenters stated that the 2016 Guidance provided clarity.

HUD Response: While guidance is beyond the scope of this rulemaking, HUD will consider at a later date whether any revisions to guidance documents may be necessary or helpful.

Comments Regarding Effects of the Proposed Rule

Issue: Commenters stated that regulated entities will face increased litigation risks under the proposed rule. They said that the ''specter of disparate-impact litigation'' could discourage businesses from undertaking the activities that ensure a well-functioning housing market, undermining the Act's purpose and the free-market system. A commenter stated that the 2013 Rule created an uncertain legal environment where any adverse impact that a practice may have on a protected group invited the threat of a lawsuit over its discriminatory effect. As an example, this commenter stated that people of color are more likely to be tenants than homeowners, so the proposed rule invites tenant advocates to assert that any rule or policy that is adverse to actual or prospective renters may have a discriminatory effect while citing little or no statistical or evidentiary basis. Commenters stated that reinstating the 2013 Rule will increase litigation costs, with one commenter saying that this is due to unclear, overly burdensome, and duplicative standards, saying that HUD itself recognized this in the 2019 Proposed Rule. A commenter also noted that the proposed rule would impose additional burdens on entities administering Community Development Block Grant disaster relief funding.

HUD Response: HUD disagrees that this rule will increase litigation risks in a manner that interferes with the free-market system and undermines the purpose of Act. This rule does not restrict valid free-market activity, but rather only regulates policies that have unjustified discriminatory effects and encourages businesses to develop and implement policies that achieve their substantial legitimate purposes in the least discriminatory manner. HUD believes the rule will further the goal of a vibrant, integrated, and open housing market. Furthermore, the rule does not create any new liability or burdens for businesses or declare any activity per se unlawful. It merely prescribes a method for evaluating liability under the Act. HUD believes that litigation and burdens concerning the Act is more properly attributable to the Act, rather than the rule. HUD notes that commenters' concerns are undermined by the fact that the rule has been in place since 2013 and in HUD's experience, no such increased litigation has occurred.

Issue: A commenter critiqued the rule for increasing the threat of challenges to certain types of landlord practices that the commenter characterized as justified by practical business decision making. For instance, the commenter stated, the rule allows landlords to be sued for occupancy restrictions that are stricter than state or local codes even though these restrictions advance housing providers' legitimate interests in limiting wear and tear, minimizing operational costs, and addressing issues with safety, overcrowding, and noise in multifamily properties. According to the commenter, advocates have increasingly used the rule to challenge occupancy restrictions with HUD and state agencies. The commenter also said that the rule allows lawsuits against landlords who purchase buildings that are largely populated by persons with certain protected characteristics and institute new rules that are facially neutral but have a disparate impact on protected classes, such as requiring existing tenants to provide valid government issued identification or requiring tenants to pay rent through direct deposit from a bank account. The commenter also mentioned the 2016 Guidance on criminal records, alleging that it has invited costly challenges to

all criminal records screening, and requires property owners to set up a ''mini parole board'' to review applicants with criminal records, even if there are legitimate reasons not to rent to persons with certain types of criminal records, including lesser offenses like disorderly conduct, illegal drug use, and nuisance conduct. Finally, the commenter stated that advocates are using the 2013 Rule against landlords who choose not to participate in the Section 8 program. The commenter described one class action case in which it represented the new owner of a building who decided to not accept Section 8 vouchers and wanted to raise rents to pay for costly improvements to the building, which allegedly had a discriminatory effect on residents with disabilities, African Americans and Hispanics who used Section 8 vouchers or could not afford higher rent. The commenter said that the claim survived a summary judgment motion because of the possibility that the plaintiffs might be able to show a less discriminatory alternative, such as raising rents less, doing less to improve the property, or looking for some public funding or subsidies to allow the owners to get a return on investment without discontinuing participation in Section 8 and raising rents.

HUD Response: HUD disagrees that the commenter's concerns merit revising the rule. The examples provided by the commenter are well within the types of cases that may or may not state a valid claim under the Act and may be decided through the rule's framework. While the practices cited by the commenter that have a discriminatory effect on protected classes may advance legitimate interests, these practices are still illegal if, for example, they are not necessary to achieve substantial, legitimate, nondiscriminatory interests of the defendant or there is a different practice that advances that same interest but has a less discriminatory effect. This is the essential framework of discriminatory effects liability that has developed in case law, whether the rule exists or not. For example, as noted in the 2013 Rule, even decades prior to the rule, unreasonable restrictions on occupancy that impose a discriminatory effect on families with children will result in liability.[345] Furthermore, the 2016 Guidance on criminal records sets out this well-established discriminatory effects framework. It does not require a ''mini parole board'' but rather posits that an individualized review of a person with a criminal record is likely to have a less discriminatory effect than a policy that imposes an automatic categorical ban. To the extent the commenter disagrees with that assessment, its quarrel is with the Guidance's particularized application of this rule and not with the more general principles this rule sets out.

In sum, HUD believes that this rule strikes a reasonable balance, in accordance with the Act and with caselaw, between allowing policies that permit landlords to advance their interests, even if those policies disproportionately adversely impact protected classes, while requiring landlords to demonstrate that their policies are necessary to advance those interests.

Issue: A commenter stated that the proposed rule violates the constitutional principle of separation of powers because § 100.500(c) is an attempt by HUD to dictate rules of judicial procedure and evidence to the judicial branch. The commenter said the rule would unnecessarily produce complication throughout the federal courts because they have no obligation to use a standard dictated by the executive branch, and different courts will decide to follow the rule (or not) in different ways. The commenter requested that HUD rescind all provisions that address judicial standards of review, rules of procedure, and evidence. The commenter continued that HUD's reliance on Congress's delegation of certain authority under section 3608(a) is improper because that statutory provision does not mention the judiciary, standards of review, rules of procedure or evidence, or any directives for HUD to assume a role that is clearly the province of the judiciary.

HUD Response: The final rule sets out a framework for analyzing and proving cases under a theory of discriminatory effects and does not amend or establish rules of judicial or civil procedure or evidence. It remedies concerns expressed by many commenters that the 2020 Rule infringed upon the judicial branch by, for example, setting pleading standards, establishing a confusing burden that appeared to contradict the Federal Rules of Civil Procedure, and defining ''plausibility'' in such a way as to preclude substantively meritorious claims. HUD agrees that it does not have the authority to amend pleading standards, to modify the defenses under Federal Rule of Civil Procedure 12, or the rules of evidence. It does, however, have authority to ''make rules . . . to carry out'' the Act, including the prohibition of discrimination in housing.[346] That is precisely what HUD is doing here.

Comments Regarding the Administrative Procedure Act

Issue: Commenters disagreed about whether the proposed rule violates the Administrative Procedure Act (APA). A commenter stated that HUD's reasoning for the proposed rule, that ''the practical effect of the 2020 Rule's amendments is to severely limit HUD's and plaintiffs' use of the discriminatory effects framework in ways that substantially diminish that frameworks' effectiveness,'' does not satisfy APA requirements because HUD neither provided the essential facts on which its conclusion was based nor explained how those facts justified that conclusion, instead making a conclusory statement. Another commenter stated that reverting to the 2013 Rule, which was promulgated before *Inclusive Communities,* without adequately explaining the reversal would violate the APA.

Other commenters stated that the 2020 Rule violated the APA and that the proposed rule would rightfully reinstate the standard set forth in the 2013 Rule. Commenters stated that changes made by the 2020 Rule were arbitrary and capricious and contrary to law. Commenters also stated that the 2020 Rule failed to explain why it was deviating from legal standards and failed to address that courts have easily applied existing disparate impact case law and *Inclusive Communities.* Commenters also stated that the 2020 Rule violated the APA by failing to address numerous comments about the negative effects the rule would have, namely on plaintiffs' ability to successfully challenge housing discrimination in accordance with the Act.

HUD Response: HUD believes that the proposed rule and this final rule fully comply with the requirements of the APA. HUD disagrees with the assertion that HUD did not explain its proposed rule in light of *Inclusive Communities.* The proposed rule directly and thoroughly explained HUD's reason for believing that the 2013 Rule was consistent with and in fact supported by *Inclusive Communities.* The proposed rule also explained why HUD believed that the 2020 Rule was deficient. There, HUD provided a number of different reasons why it was proposing to change course from the position it had taken in 2020 and was proposing recodification of the 2013 Rule, not just that ''the practical effect of the 2020 Rule's

[345] 78 FR 11461–11462.

[346] 42 U.S.C. 3614a.

amendments was to severely . . . diminish the [discriminatory effects] framework's effectiveness.'' [347] While the commenter characterized this statement as conclusory, HUD explained that this belief was ''based on HUD's experience investigating and litigating discriminatory effects cases.'' [348] HUD further explained that its experience informed ''it that many of the points made by commenters opposing the 2020 Rule and the Massachusetts District Court are correct, including that the changes the 2020 Rule makes, such as amending pleading standards, changing the burden shifting framework, and adding defenses, all favoring respondents, will at the very least introduce unnecessary confusion and will at worst make discriminatory effects liability a practical nullity.'' [349] Further, the APA requires in relevant part that a proposed rule make reference to the legal authority under which the rule is proposed and include either the terms or substance of the proposed rule or a description of the issues involved, all of which HUD did in the proposed rule.[350] Now, in this final rule, HUD has again explained that the Act vests HUD with the requisite authority, and has further explained why, having reconsidered the 2020 Rule, HUD is finalizing its proposal to recodify the 2013 Rule.[351]

Furthermore, this final rule explains HUD's position after consideration of the comments HUD received on the proposed rule. As explained in the proposed rule, the facts that spurred HUD's decision to recodify the 2013 Rule include the consistent concerns expressed through thousands of public comments regarding the effect of the 2020 Rule's changes on disparate impact jurisprudence and protected classes, the concerns raised by the court in *Massachusetts Fair Housing Center,* HUD's own experience in interpreting and applying the Act, which indicated that these criticisms are correct, and HUD's determination after examining case law that several provisions of the 2020 Rule were inconsistent with the purpose of the Act and judicial and agency precedent.[352] HUD expounds upon its reasoning in this final rule in responding to specific comments.

HUD is not ignoring facts or circumstances that underlay HUD's 2020 Rule; rather, HUD is acknowledging its change in position, drawing on its experience in different ways than it did in the 2020 Rule, drawing on case law that did not exist when the 2020 Rule was promulgated, relying on other case law that the 2020 Rule downplayed and/or ignored, and drawing on new public comments about the final version of the 2020 Rule that did not exist when HUD decided to issue the 2020 Rule.

Comments Regarding HUD's Findings and Certifications

Issue: Commenters stated that HUD inappropriately and incorrectly assumed that reinstating the 2013 Rule ''would not have federalism implications,'' and asserted that HUD should have consulted with state regulators as required by Executive Order 13132 and acknowledged that the rule would interfere with state law in violation of McCarran-Ferguson in all or nearly all cases.

HUD Response: HUD stands by its certification that this rule—like the 2013 Rule it recodifies and the 2020 Rule it rescinds—does not have federalism implications. These commenters' assertion that this rule is inconsistent with Executive Order 13132 is based solely on the assertion that this rule would interfere with states' ability to regulate insurance in violation of McCarran-Ferguson. As discussed extensively above, HUD disagrees with this assertion and finds that this rule does not interfere with state insurance laws and is consistent with McCarran-Ferguson. Therefore, this rule has no federalism implications. The existing relationship between the Act and McCarran-Ferguson, and therefore the Act and state insurance law, remains the same before and after this rule. Section 6 of Executive Order 13132 only requires consultation with the states when there are federalism implications, when a regulation has ''substantial direct effect on the States''; therefore, HUD has no obligation to consult with state regulators.

Issue: Commenters stated that the proposed rule would have an impact on regulated entities and that the proposed rule does not pass a basic cost benefit analysis. Another commenter stated that the proposed rule would eliminate economic burdens that the 2020 Rule imposed by removing ambiguity and uncertainty that would have led to expensive litigation and dispute resolution and would have imposed these expenses on plaintiffs, state governments, the public, and attorneys general.

HUD Response: HUD agrees that 2020 Rule would have been burdensome if it had not been enjoined and that the proposed rule does not impose a significant economic impact, as further explained in HUD's certification. HUD stands by its certification that this rule will not have a significant economic impact. Because the rule does not change decades-old substantive law articulated by HUD and the courts, but rather formalizes a clear, consistent, nationwide standard for litigating discriminatory effects cases under the Fair Housing Act, it adds no additional costs to housing providers and others engaged in housing transactions. Rather, HUD believes that the rule will simplify compliance with the Fair Housing Act's discriminatory effects standard and decrease litigation associated with such claims by clearly allocating the burdens of proof and how such burdens are to be met.

Other Comments

Issue: A commenter stated that the proposed rule is unnecessary because credit unions have already carefully structured their policies to comply with the Act.

HUD Response: HUD appreciates the efforts of regulated entities to comply with the Act and its implementing regulations. However, HUD disagrees that any alleged current compliance provides a basis for retracting the rule or providing exemptions, particularly where policies may change in the future. HUD believes—and many commenters have stated—that this rule is a necessary tool for ensuring both new and continued compliance.

Issue: A commenter asserted that plaintiffs sometimes use the disparate impact framework to bring costly and lengthy litigation which is resolved without a court finding. A commenter suggested HUD include an extensive examination of disparate impact cases relating to residential lending activity from the standpoint of any actual discriminatory findings and court judgments and provide an accounting of cases brought in class action form, examining and reporting any monetary awards actually being delivered to the purported class.

HUD Response: This comment is outside the scope of the proposed rule because it is a criticism of plaintiffs who bring cases based on a disparate impact theory of liability and/or the disparate impact theory itself, rather than the final rule. HUD does not believe that conducting such an examination or finding that most disparate impact cases settle before a judicial determination, would inform any changes HUD should or should not make to the proposed rule. For these reasons, HUD declines to

[347] 86 FR 33593, 33594.

[348] *Id.*

[349] *Id.*

[350] See 5 U.S.C. 553(b)(1)–(3).

[351] *Supra* at n. 8.

[352] 86 FR 33593–33595.

conduct such an examination in this final rule.

IV. Severability

Consistent with the requirements of the Administrative Procedure Act, HUD has carefully responded to all public comments received in response to its notice of proposed rulemaking. HUD has determined that the discriminatory effects standard and burden-shifting framework in this rule appropriately implement, and are fully consistent with, the Fair Housing Act and governing law, including *Inclusive Communities.* Furthermore, HUD's decision to not create exemptions for any industry covered by the Fair Housing Act is also fully consistent with the plain language of the Act and governing law, including the McCarran-Ferguson Act. As explained in 2013, 2016, and 2020, as well as in greater detail above, HUD is declining to provide any exemptions, including for the insurance industry, in whole or in part, including because HUD lacks the authority to create such exemptions under the Act.[353] Further, declining to provide exemptions for certain industries furthers congressional intent by effectuating the Act's broad remedial purpose.[354]

Through this rule, HUD is taking two separate actions. First, HUD rescinds the 2020 Rule, removing 24 CFR 100.500 and the second and third sentences of 24 CFR 100.5(b), thus nullifying the 2020 Rule and eliminating any and all legal effect that the 2020 Rule could have. Second, HUD adds a new 24 CFR 100.500 and a new second sentence to 24 CFR 100.5(b). The new language in both sections is identical to the language in those sections of the Code of Federal Regulations that took effect on March 18, 2013, which HUD refers to throughout this preamble as ''the 2013 Rule.'' HUD intends the language promulgated today to be the only operative rule.

HUD intends these separate actions to be legally severable. In particular, in the event that any portion of § 100.500 or § 100.5(b) of this final rule is held to be invalid or unenforceable, HUD intends that the rescission of the 2020 Rule be unaffected. HUD believes that it would be more consistent with the plain language and legislative history of the Act for the Code of Federal Regulations to contain no language regarding discriminatory effects liability and for litigants to rely on existing jurisprudence than for any provision of the 2020 Rule to remain in effect. HUD has made this determination for all the reasons described elsewhere in this preamble, including that the 2020 Rule is inconsistent with such jurisprudence. In addition to rescinding the 2020 Rule for the reasons described more fully in this preamble, HUD's rescission will serve to resolve three pending lawsuits, all of which challenge the 2020 Rule as arbitrary and capricious and inconsistent with *Inclusive Communities* and other case law.[355] Moreover, having no rule in place at all regarding discriminatory effects would be workable, as precedent proves; for decades prior to the 2013 Rule, there was no HUD rule on discriminatory effects liability, and litigants relied on caselaw.

HUD also intends that the rule be treated as severable in its applications to certain industries. Litigation brought by the insurance industry regarding the 2013 Rule is ongoing.[356] One of those cases, decided in the context of the 2013 Rule, has already upheld the rule's burden-shifting framework for analyzing discriminatory effects claims as a reasonable interpretation of the Act, but also held that HUD had not adequately explained why case-by-case adjudication was preferable to using its rulemaking authority to provide exemptions or safe harbors related to homeowners insurance.[357] To resolve that suit, HUD issued the 2016 Supplemental Explanation.[358] The plaintiff filed an amended complaint and that litigation is pending. HUD believes, as described in greater detail above, that discriminatory effects liability can be properly applied to the insurance industry and that doing so is fully consistent with the Act's plain language and broad remedial purpose. However, should a court decide that the insurance (or any other) industry or certain types of insurance (or other) claims should be exempt from the Rule, HUD intends that this final rule remain in effect and apply to all other actors and claims covered by the Act. Moreover, in the event of such a court decision, this final rule would still function sensibly with respect to others covered by the Act, as nothing in this final rule's applicability to the insurance (or any other) industry affects its applicability to others covered by the Act.

V. Findings and Certifications

Regulatory Review—Executive Orders 13563 and 12866

Executive Order 13563 (''Improving Regulation and Regulatory Review'') directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, emphasizes the importance of quantifying both costs and benefits, of harmonizing rules, of promoting flexibility, and of periodically reviewing existing rules to determine if they can be made more effective or less burdensome in achieving their objectives. Under Executive Order 12866 (''Regulatory Planning and Review''), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (''OMB'') in accordance with the requirements of the order. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

In its proposed rule, HUD invited comments on whether any further analysis was needed to assess the impact of the rule, given the fact that the rule would simply be retaining the status quo and would therefore have no

[353] *See Sierra Club* v. *EPA,* 719 F.2d 436, 453 (D.C. Cir. 1983) (''The agency relies on its general authority under section 301 of the Act to 'prescribe such regulations as are necessary to carry out [its] functions under [the Act]' . . . . EPA's construction of the statute is condemned by the general rule that when a statute lists several specific exceptions to the general purpose, others should not be implied.''); *Colorado Pub. Int. Rsch. Grp., Inc.* v. *Train,* 507 F.2d 743, 747 (10th Cir. 1974), *rev'd on other grounds,* 426 U.S. 1 (1976) (''Another cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions are not warranted.''); *Nat. Res. Def. Council, Inc.* v. *Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977) (courts cannot manufacture a ''revisory power'' granting agency authority to act ''inconsistent with the clear intent of the relevant statute''); *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 357 (D.C. Cir. 1979) (''[T]here exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits.''); *see also Graoch,* 508 F.3d at 375 (''[n]othing in the text of the FHA instructs us to create practice-specific exceptions.'').

[354] *Inclusive Cmtys. Project, Inc.,* 576 U.S. at 539 (stating that the FHA ''was enacted to eradicate discriminatory practices within a sector of our Nation's economy'' and noting that the viability of disparate impact claims is ''consistent'' with the Act's ''central purpose''); H.R. Res. 1095, 110th Cong., 154 Cong. Rec. H2280–01 (April 15, 2008) (explaining that the goal of the Act was to advance equal opportunity in housing and to ''achieve racial integration for the benefit of all people in the United States.'').

[355] *Massachusetts Fair Hous. Ctr., et al.* v. *HUD,* 496 F. Supp. 3d 600 (D. Mass. 2020); *Nat'l Fair Hous. All., et al.* v. *HUD,* No. 3:20–cv–07388 (N.D. Cal.); *Open Cmtys., et al.* v. *HUD,* No. 3:20–cv–01587 (D. Conn.).

[356] *Nat'l Ass'n. of Mut. Ins. Cos.* v. *HUD,* No. 1:13–cv–00966 (D.D.C); *Prop. Cas. Ins.. Ass'n. of Am.* v. *Fudge,* 1:13–cv–08564 (N.D. Ill.).

[357] *Prop. Cas. Ins. Ass'n of Am.* v. *Donovan,* 66 F. Supp. 3d 1018, 1049–54 (N.D. Ill. 2014).

[358] 81 FR 69012–13.

new impact on regulated entities. Specifically, HUD explained: ''[b]ecause the 2020 Rule never took effect, and therefore did not affect the obligations of any regulated entities, this proposed rule is only recodifying the 2013 Rule and will have no impact on regulated entities except to affirm that the 2013 Rule remains in effect. Furthermore, the 2013 Rule itself had little direct effect on regulated entities because it only ''formalize[d] the longstanding interpretation of the Fair Housing Act to include discriminatory effects liability'' and ''[was] not a significant departure from HUD's interpretation to date or that of the majority of federal courts.'' HUD stated further that it did not believe that additional analysis was needed on this point but invited comment.

Some commenters stated that the rule does not pass a cost benefit analysis, but they did not explain why this was so. Nor did they address HUD's explanation in the proposed rule as to why a deeper assessment of the impact of the rule was unnecessary. HUD continues to believe that this rule will provide significant benefits, while having no new impact on regulated entities, for the reasons explained earlier and summarized below.

As explained in 2013, a ''uniform rule would simplify compliance with the Fair Housing Act's discriminatory effects standard, and decrease litigation associated with such claims. By providing certainty in this area to housing providers, lenders, municipalities, realtors, individuals engaged in housing transactions, and courts, this rule would reduce the burden associated with litigating discriminatory effect cases under the Fair Housing Act by clearly establishing which party has the burden of proof, and how such burdens are to be met. With a uniform standard, entities are more likely to conduct self-testing and check that their practices comply with the Fair Housing Act, thus reducing their liability and the risk of litigation. A uniform standard is also a benefit for entities operating in multiple jurisdictions. Also, legal and regulatory clarity generally serves to reduce litigation because it is clearer what each party's rights and responsibilities are, whereas lack of consistency and clarity generally serves to increase litigation. For example, once disputes around the court-defined standards are eliminated by this rule, non-meritorious cases that cannot meet the burden under § 100.500(c)(1) are likely not to be brought in the first place, and a respondent or defendant that cannot meet the burden under § 100.500(c)(2) may be more inclined to settle at the pre-litigation stage.'' [359] And as HUD explains both in this rule and the proposed rule, *Inclusive Communities* did not disrupt this long-standing case law or the 2013 Rule; rather, it affirmed it, citing to HUD's 2013 Rule multiple times with approval. The Court articulated long-standing limitations on the scope of disparate impact liability, which HUD had already accounted for in the 2013 Rule.

When deciding whether to enact this rule, HUD also considered whether any part of the 2020 Rule should be retained, which is evidenced by our discussion of various parts of the 2020 Rule elsewhere. It decided that no substantive portion of the 2020 Rule should be incorporated into this rule. Only three additional illustrations of discriminatory practices under the Act at § 100.70(d) are incorporated from the 2020 Rule, which were not specifically objected to by commenters and present no substantive change from the 2013 Rule. The 2020 Rule would impose significant costs to the agency, the public, and regulated entities while affording little, if any, benefit. As described in further detail elsewhere in this preamble, the 2020 Rule introduced new and confusing standards, including standards not found anywhere in case law, that were largely untested. Accordingly, the 2020 Rule would require regulated entities to spend more resources attempting to ascertain what the 2020 Rule means and how to defend against any potential claims, as well as increased spending that could last for years as courts try to interpret what the 2020 Rule means. Relatedly, entities that are covered by the Fair Housing Act have a serious reliance interest in the 2013 Rule, which has been in place for ten years. Conversely, these entities should have little to no reliance interest in the 2020 Rule, which never went into effect.

Furthermore, HUD's experience investigating and litigating discrimination cases under various regulatory frameworks informs that the 2020 Rule would make it significantly more difficult, almost impossible, to bring a discriminatory effects claim, and significantly more difficult to provide sound guidance to housing providers attempting to comply with the Act, at great cost to the agency in terms of its mission and its resources. Extra staff time would need to be spent to determine how to apply the 2020 rule to current cases being investigated and new cases that will be filed, and to determine how to address various guidance documents for the public and grantees which have been issued based on the 2013 Rule. Additionally, allowing unlawful discrimination to go unchecked and unremedied because of burdensome and confusing pleading and proof standards would come at great cost to the public who, as the Act mandates, are entitled to equal access to housing throughout the country.

[359] *Id.*

Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule amends the Code of Federal Regulations to accurately reflect HUD's discriminatory effects regulation as it currently exists. As a result, all entities, big and small, have a responsibility to comply with the law.

As discussed above, this Rule will continue to apply the 2013 Rule, which has been in effect uninterrupted for ten years. HUD concludes, as it did when it published the 2013 Rule, that the majority of entities, large or small, currently comply and will remain in compliance with the Fair Housing Act. All entities, large and small, have been subject to the Fair Housing Act for over fifty years and subject to the 2013 Rule for ten years. For the minority of entities that have failed to institutionalize methods to avoid engaging in illegal housing discrimination and plan to come into compliance as a result of this rulemaking, the costs will be the costs of compliance with a preexisting statute and regulation. This rule does not change substantive obligations; it merely recodifies the regulation that more accurately reflects the law. Any burden on small entities is simply incidental to the pre-existing requirements to comply with this body of law. Furthermore, HUD anticipates that this rule will eliminate confusion for all entities, including small Fair Housing Advocacy organizations, by ensuring HUD's regulations accurately reflect current standards. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. HUD invited comment on this certification in the proposed rule. HUD did not receive any comments providing analysis of the number of small entities which commenters believe may be affected by this regulation. Some commenters stated that application of discriminatory effects law to the

business of insurance would harm small businesses. HUD has responded to these comments in this rule.

Environmental Impact

This rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (''UMRA'') establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 100

Aged, Civil rights, Fair housing, Incorporation by reference, Individuals with disabilities, Mortgages, and Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD amends 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

■ 1. The authority citation for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

Subpart A—General

■ 2. Amend § 100.5 by revising paragraph (b) and removing paragraph (d) to read as follows:

§ 100.5 Scope.

* * * * *

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions. The illustrations of unlawful housing discrimination in this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in § 100.500.

* * * * *

Subpart B—Discriminatory Housing Practices

■ 3. In § 100.70, paragraph (d)(5) is republished to read as follows:

§ 100.70 Other prohibited sale and rental conduct.

* * * * *

(d) * * *

(5) Enacting or implementing land-use rules, ordinances, procedures, building codes, permitting rules, policies, or requirements that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.

Subpart G—Discriminatory Effect

■ 4. Revise § 100.500 to read as follows:

§ 100.500 Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) *Discriminatory effect.* A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

(b) *Legally sufficient justification.* (1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (3) of this section.

(c) *Burdens of proof in discriminatory effects cases.* (1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) *Relationship to discriminatory intent.* A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.

Marcia L. Fudge,

Secretary.

[FR Doc. 2023–05836 Filed 3–27–23; 4:15 pm]

BILLING CODE 4210–67–P

FEDERAL REGISTER

Vol. 88 Friday,
No. 62 March 31, 2023

Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 230321–0081]

RIN 0648–BL78

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine

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

ACTION: Final rule; notification of issuance of Letter of Authorization.

SUMMARY: NMFS, upon request from the U.S. Navy (Navy), hereby issues regulations to govern the unintentional taking of marine mammals incidental to construction at the Portsmouth Naval Shipyard in Kittery, Maine, over the course of 5 years (2023–2028). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from April 1, 2023, through March 31, 2028.

ADDRESSES: A copy of the Navy's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-portsmouth-naval-shipyard-kittery-maine-0.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Reny Tyson Moore, Office of Protected Resources, NMFS, *ITP.tyson.moore@noaa.gov,* (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

We received an application from the Navy requesting 5-year regulations and authorization to take multiple species of marine mammals. This rule establishes a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take by Level A and Level B harassment of marine mammals incidental to the Navy's construction activities related to the multifunctional expansion and modification of Dry Dock 1 at the Portsmouth Naval Shipyard in Kittery, Maine. Please see the Background section below for definitions of harassment.

Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to 5 years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this rule containing 5 year regulations, and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Regulations

Following is a summary of the major provisions of this rule regarding the Navy's construction activities. These measures include:

- Required monitoring of the in-water construction areas to detect the presence of marine mammals before beginning in-water construction activities;
- Shutdown of in-water construction activities under certain circumstances to avoid injury of marine mammals;
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power; and
- Implementation of a bubble curtain during rock hammering and down-the-hole (DTH) cluster drilling to reduce underwater noise impacts.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On May 9, 2022, NMFS received a request from the Navy for authorization to take marine mammals incidental to construction activities related to the multifunctional expansion and modification of Dry Dock 1 at Portsmouth Naval Shipyard in Kittery, Maine. We provided comments on the application, and the Navy submitted revised versions and responses to our comments on July 5, 2022, August 15, 2022, August 19, 2022, and August 25, 2022, with the latter version deemed adequate and complete. On September 1, 2022, we published a notice of receipt of the Navy's application in the **Federal Register** (87 FR 53731), requesting comments and information related to the request. During the 30-day comment period, we received two supportive letters from private citizens.

On October 19 and 25, 2022, NMFS was notified by the Navy of project modifications and shifting Fleet submarine schedules that required the resequencing of certain activities associated with the construction at Dry Dock 1 in order to accommodate the modifications and meet the new vessel docking demands. On October 31, 2022, the Navy submitted an addendum to its

application describing these changes. We published a notice of the proposed rulemaking in the **Federal Register** on January 18, 2023 (88 FR 3146) incorporating these changes and requested comments and information from the public. Please see Comments and Responses below. The regulations are valid for 5 years, from April 1, 2023 through March 31, 2028, and authorize the Navy to take five species of marine mammals by Level A and Level B harassment incidental to construction activities related to the multifunctional expansion and modification of Dry Dock 1 at the Portsmouth Naval Shipyard in Kittery, Maine. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity.

NMFS previously issued five IHAs to the Navy for waterfront improvement work at the Portsmouth Naval Shipyard: in 2016 (81 FR 85525, November 28, 2016), 2018 (83 FR 3318, January 24, 2018), 2019 (84 FR 24476, May 28, 2019), a renewal of the 2019 IHA (86 FR 14598, March 17, 2021), and in 2022 (87 FR 19886, April 6, 2022). The most recent IHA (87 FR 19886) provided authorization to take marine mammals during the first year of the construction project described in this final rule. As required, the applicant provided monitoring reports (available at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*) which confirm that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activity

Overview

Multifunctional Expansion of Dry Dock 1 (P–381) is one of three projects that support the overall expansion and modification of Dry Dock 1, located in the western extent of the Portsmouth Naval Shipyard. The two additional projects, construction of a super flood basin (P–310) and extension of portal crane rail and utilities (P–1074), are currently under construction. In-water work associated with these projects was completed under the aforementioned separate IHAs issued by NMFS. The projects have been phased to support Navy mission schedules. P–381 will be constructed within the same footprint of the super flood basin over an approximate 7-year period, during which 5 years of in-water work will occur. An IHA was issued by NMFS for the first year of P–381 construction activities between April 1, 2022 and March 31, 2023 (87 FR 19866, April 6, 2022). This request is associated with the remaining 4 years of P–381 in-water construction activities planned to occur from April 1, 2023 through March 31, 2028, as well as for additional in-water construction activities associated with the removal of emergency repair components of the super flood basin that will occur during the period of effectiveness for the regulations. Although the in-water construction described in this rule is anticipated to be completed by December 2026, unanticipated schedule delays could result in the Navy conducting construction activity over the full 5 years.

The purpose of the Navy's project (P–381) is to modify the super flood basin to create two additional dry docking positions (Dry Dock 1 North and Dry Dock 1 West) in front of the existing Dry Dock 1 East. The Navy's specified activity also includes emergency repairs of the P–310 super flood basin. Construction activities will include the excavation and/or installation of 1,118 holes, 198 shafts, and 580 sheet piles via impact and vibratory pile driving, hydraulic rock hammering, rotary drilling, and mono and cluster DTH. The construction activities are expected to require approximately 2,498 days if the activities are considered independently over the 5-year period. However, the actual construction duration is expected to be within 4 years as many of the construction activities will occur concurrently.

Dates and Duration

The in-water construction activities associated with this rule are anticipated to begin in April 2023 and proceed to December 2026 (4 years); however, the incidental take authorization is valid for 5 years in the event of unexpected scheduled delays. In-water construction activities will occur consecutively over a 4-year period. The Navy plans to conduct all in-water work activities with expected potential for incidental harassment of marine mammals during daylight hours.

Table 1 provides the estimated schedule and production rates for P–381 construction activities. Many of the activities included in Table 1 will span across multiple construction years and/or will occur concurrently. Because of mission requirements and operational schedules at the dry docking positions and berths, this schedule is subject to change. In-water construction activities for P–381 will occur consecutively over a 4-year period. Note, for the purposes of this analysis, the construction years are identified as years 2 through 5; Year 1 of the Navy's construction activities is currently ongoing in association with a previously issued IHA (87 FR 19886, April 6, 2022). Vibratory pile driving and extraction is assumed to occur for 141 days. Impact pile driving will occur for 34 days. DTH excavation (mono-hammer and cluster drill) will occur for 1,446 days. Rotary drilling will occur for 238 days (assuming that casings and sockets for cluster drills will be set, excavated, and removed in a single day). Rock hammering will occur for 277 days. Note that pile driving days are not necessarily consecutive, and certain activities may occur at the same time, decreasing the total number of actual in-water construction days. The contractor could be working in more than one area of the berths at a time.

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
A1 [1]	Center Wall—Install Foundation Support Piles.	Drill 18 shafts Apr 23 [3] to Aug 23 (2).	Install 102-inch diameter outer casing.	Rotary drill	1 shaft/day 1 hour/day	[4] 18
A2 [1]			Pre-drill 102-inch diameter socket.	Rotary drill	1 shaft/day 9 hours/day	[4] 18
A3 [1]			Remove 102-inch outer casing.	Rotary drill	1 casing/day 15 minutes/casing.	[4] 18
A4 [1]			Drill 78-inch diameter shaft.	Cluster drill DTH	6.5 days/shaft 10 hours/day.	[4] 117
R [1]	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles Apr 23 [3] to May 23 (2).	28-inch wide Z-shaped sheets.	Impact with initial vibratory set.	8 sheets/day 5 minutes and 300 blows/pile.	[4] 6

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES—Continued

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
1	Berth 11—Remove Shutter Panels.	Remove 112 panels Apr 23[3] to May 23 (2).	Concrete shutter panels	Hydraulic rock hammering.	5 hours/day	[4]56
2	Berth 1—Remove Sheet Piles.	Remove 168 sheet piles Apr 23[3] to Jun 24 (2, 3).	25-inch-wide Z-shaped	Vibratory extraction	4 piles/day	[4]42
3	Berth 1—Remove Granite Block Quay Wall.	2,800 cubic yards (cy) Apr 23[3] to Jun 24 (2, 3).	Removal of granite blocks.	Hydraulic rock hammering.	2.5 hours/day	[4]47
4	Berth 1—Top of Wall Removal for Waler Installation.	320 linear feet (lf) Apr 23[3] to Jun 24 (2, 3).	Mechanical concrete removal.	Hydraulic rock hammering.	10 hours/day	[4]74
5	Berth 1—Install southeast corner Support of Excavation (SOE).	Install 28 sheet piles Apr 23 to Jul 23 (2).	28-inch-wide Z-shaped	Impact with initial vibratory set.	4 piles/day 5 minutes/pile and 300 blows/pile.	[4]8
6	Berth 11—Mechanical Rock Removal at Basin Floor.	700 cy Apr 23[3] to Aug 23 (2).	Excavate Bedrock	Hydraulic rock hammering.	12 hours/day	[3 4]60
7	Berth 11 Face—Mechanical Rock Removal at Basin Floor.	Drill 924 relief holes Apr 23[3] to Aug 23 (2).	4–6 inch diameter holes	DTH mono-hammer	27 holes/day 22 min/hole.	[4]35
8	Install Temporary Cofferdam Extension.	Install 14 sheet piles Apr 23 to Jun 23 (2).	28-inch-wide Z-shaped	Impact with initial vibratory set.	4 piles/day 5 minutes/pile and 300 blows/pile.	4
9a	Gantry Crane Support Piles at Berth 1 West.	Drill 16 shafts Apr 23 to Aug 23 (2).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day 1 hours/day	16
9b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	16
9c			Remove 102-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	16
9d			72-inch diameter shafts	Cluster drill DTH	5 days/shaft 10 hours/day.	80
10[2]	Berth 1—Mechanical Rock Removal at Basin Floor.	300 cy Apr 23[3] to Sep 23 (2).	Excavate Bedrock	Hydraulic rock hammering.	13 cy/day 12 hours/day	[5]25
11	Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors Apr 23[3] to Oct 23 (2).	9-inch diameter holes	DTH mono-hammer	2 holes/day 5 hours/hole.	[4]25
12	Center Wall—Install Tie-In to Existing West Closure Wall.	Install 15 sheet piles Apr 23 to Dec 23 (2).	28-inch wide Z-shaped	Impact with initial vibratory set.	4 piles/day 5 minutes/pile and 300 blows/pile.	4
13a	Dry Dock 1 North—Temporary Work Trestle Piles.	Drill 20 shafts May 23 to Nov 24 (2, 3).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day 1 hours/day	20
13b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	20
13c			Remove 102-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	20
13d			84-inch diameter shafts	Cluster drill DTH	3.5 days/shaft 10 hours/day.	70
14	Dry Dock 1 North—Remove Temporary Work Trestle Piles.	Remove 20 piles May 23 to Nov 24 (2, 3).	84-inch diameter drill piles.	Rotary drill	1 day/pile 15 minutes/pile.	20
15a	Dry Dock 1 North—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts May 23 to Nov 24 (2, 3).	Set 84-inch casing	Rotary drill	1 shaft/day 1 hours/day	18
15b			Pre-drill 84-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	18
15c			Remove 84-inch casing	Rotary drill	1 casing/day 15 minutes/casing.	18
15d			78-inch diameter shaft	Cluster drill DTH	7.5 days/shaft 10 hours/day.	135
16a	Wall Support Shafts for Dry Dock 1 North (Berth 11 Face and Head Wall).	Drill 20 shafts Jun 23 to Nov 24 (2, 3).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day 1 hours/day	20
16b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	20
16c			Remove 102-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	20
16d			Drill 78-inch diameter shaft.	Cluster drill DTH	7.5 days/shaft 10 hours/day.	150
17a	Foundation (Floor) Shafts for Dry Dock 1 North (Foundation Support Piles).	Drill 23 shafts Jun 23 to Nov 24 (Const. years 2, 3).	Set 126-inch diameter Casing.	Rotary drill	1 shaft/day 1 hours/day	23
17b			Pre-drill 126-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	23
17c			Remove 126-inch casing.	Rotary drill	1 casing/day 60 minutes/casing.	23
17d			Drill 108-inch diameter shafts.	Cluster drill DTH	8.5 days/shaft 10 hours/day.	196
18	Berth 11 End Wall—Remove Temporary Guide Wall.	Remove 60 sheet piles Jul 23 to Aug 23 (2, 3).	28-inch wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	[5]10
19	Remove Berth 1 southeast corner SOE.	Remove 28 sheet piles Jul 23 to Sep 23 (2).	28-inch-wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	[4]5

TABLE 1—IN-WATER CONSTRUCTION ACTIVITIES—Continued

Activity ID	Activity	Total amount and estimated dates (construction years *)	Activity component	Method	Daily production rate	Total production days
20[2]	Removal of Berth 1 Emergency Repair Sheet Piles.	Remove 108 sheet piles Apr 23[3] to Jul 23 (2).	28-inch-wide Z-shaped	Vibratory extraction	6 piles/day 5 minutes/pile.	18
21[2]	Removal of Berth 1 Emergency Repair Tremie Concrete.	500 cy Apr 23[3] to Aug 23 (2).	Mechanical concrete removal.	Hydraulic rock hammering.	4 hours/day	15
22	Center Wall Foundation—Drill in Monolith Tie Downs.	Install 72 rock anchors Aug 23 to May 24 (2, 3).	9-inch diameter holes	DTH mono-hammer	2 holes/day 5 hours/hole.	36
23	Center Wall—Remove Tie-In to Existing West Closure Wall (Dry Dock 1 North)[4].	Remove 16 sheet piles[6] Aug 23 to Aug 24 (2, 3).	28-inch-wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	[5]3
24	Center Wall East—Sheet Pile Tie-In to Existing Wall.	Install 23 sheet piles Aug 23 to Oct 24 (2, 3).	28-inch wide Z-shaped	Impact with initial vibratory set.	2 piles/day 5 minutes/pile and 300 blows/pile.	12
25	Remove Tie-In to West Closure Wall (Dry Dock 1 West).	Remove 15 sheet pile Dec 23 to Dec 24 (2, 3).	28-inch wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	[5]3
26	Remove Center Wall East—Sheet Pile Tie-In to Existing Wall (Dry Dock 1 West).	Remove 23 sheet piles Dec 23 to Dec 24 (2, 3).	28-inch wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	[5]12
27	Dry Dock 1 North Entrance—Remove Temporary Cofferdam.	Remove 96 sheet piles Jan 24 to Sep 24 (Const. years 2, 3).	28-inch wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	12
28	Remove Temporary Cofferdam Extension.	Remove 14 sheet piles Jan 24 to Sep 24 (2, 3).	28-inch wide Z-shaped	Vibratory extraction	8 piles/day 5 minutes/pile.	2
29a	Dry Dock 1 West—Install Temporary Work Trestle Piles.	Drill 20 shafts Apr 24 to Feb 26 (3, 4).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day 1 hours/day	20
29b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	20
29c			Remove 102-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	20
29d			84-inch diameter shafts	Cluster drill DTH	3.5 days/shaft 10 hours/day.	70
30	Dry Dock 1 West—Remove Temporary Work Trestle Piles.	Remove 20 piles Apr 24 to Feb 26 (3, 4).	84-inch diameter piles	Rotary drill	1 day/pile 15 minutes/pile.	20
31a	Wall Support Shafts for Dry Dock 1 West (Berth 1 Face).	Drill 22 shafts Jun 24 to Feb 26 (3, 4).	Set 102-inch diameter casing.	Rotary drill	1 shaft/day 1 hours/day	22
31b			Pre-drill 102-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	22
31c			Remove 102-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	22
31d			78-inch diameter shaft	Cluster drill DTH	7.5 days/shaft 10 hours/day.	165
32a	Foundation (Floor) Shafts for Dry Dock 1 West (Foundation Support Piles).	Drill 23 shafts Jun 24 to Feb 26 (3, 4).	Set 126-inch casing	Rotary drill	1 shaft/day 1 hours/day	23
32b			Pre-drill 126-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	23
32c			Remove 126-inch casing.	Rotary drill	1 casing/day 15 minutes/casing.	23
32d			Drill 108-inch diameter shaft.	Cluster drill DTH	8.5 days/shaft 10 hours/day.	196
33a	Dry Dock 1 West—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts Jun 24 to Feb 26 (3, 4).	Set 84-inch casing	Rotary Drill	1 shaft/day 1 hours/day	18
33b			Pre-drill 84-inch rock socket.	Rotary drill	1 shaft/day 9 hours/day	18
33c			Remove 84-inch casing	Rotary drill	1 casing/day 15 minutes/casing.	18
33d			Drill 78-inch diameter shaft.	Cluster drill DTH	7.5 days/shaft 10 hours/day.	135
34	Dry Dock 1 North—Tie Downs.	Install 36 rock anchors Jul 24 to Jul 25 (3, 4).	9-inch diameter holes	DTH mono-hammer	2 holes/day 5 hours/hole.	18
35	Dry Dock 1 West—Install Tie Downs.	Install 36 rock anchors Dec 25 to Dec 26 (4, 5).	9-inch diameter hole	DTH mono-hammer	2 holes/day 5 hours/hole.	18
Total excavated holes/drilled shafts/sheet piles.		1,118/198/580				2,498

* **Note:** for the purposes of this analysis, the construction years are identified as years 2 through 5; potential marine mammal takes incidental to Year 1 of the Navy's construction activities were authorized under a previously issued IHA (87 FR 19886, April 6, 2022).

[1] These activities were not included in the original application made available for public review during the Notice of Receipt comment period (NOR; 87 FR 53731), but have been added due to changes needed in the construction schedule.

[2] These activities were included in the original application, but the amount of activity has been modified due to changes needed in the construction schedule.

[3] These activities began in construction year 1.

[4] These activities began in year 1. Only the number of production days occurring in construction years 2 through 6 are presented.

[5] Additional production days are included to account for equipment repositioning.

[6] Sheet piles were installed in construction year 1.

Specific Geographic Region

The shipyard is located in the Piscataqua River in Kittery, Maine. The Piscataqua River originates at the boundary of Dover, New Hampshire, and Eliot, Maine (Figure 1). The river flows in a southeasterly direction for 2,093 meters (m) (13 miles (mi)) before entering Portsmouth Harbor and emptying into the Atlantic Ocean. The lower Piscataqua River is part of the Great Bay Estuary system and varies in width and depth. Many large and small islands break up the straight-line flow of the river as it continues toward the Atlantic Ocean. Seavey Island, the location of the specified activities, is located in the lower Piscataqua River approximately 500 m, 1,640 feet (ft) from its southwest bank, 200 m (656 ft) from its north bank, and approximately 4 kilometers (km) (2.5 mi) from the mouth of the river.

Water depths in the project area range from 6.4 m (21 ft) to 11.9 m (39 ft) at Berths 11, 12, and 13. Water depths in the lower Piscataqua River near the project area range from 4.6 m (15 ft) in the shallowest areas to 21 m (69 ft) in the deepest areas. The river is approximately 914 m (3,300 ft) wide near the project area, measured from the Kittery shoreline north of Wattlebury Island to the Portsmouth shoreline west of Peirce Island. The furthest direct line of sight from the project area is 1,287 m (0.8 mi) to the southeast and 418 m (0.26 mi) to the northwest.

The nearshore environment of the Shipyard is characterized by a mix of hard bottom, gravel, soft sediments, rock outcrops, and rocky shoreline associated with fast tidal currents near the installation. The nearshore areas surrounding Seavey Island are predominately hard bottom (65 percent of benthic habitat) and gravel (26 percent) habitat, with only 9 percent soft bottom sediments within the surveyed area around Seavey Island (Tetra Tech, 2016). Much of the shoreline in the project area is composed of hard shores (rocky intertidal). In general, rocky intertidal areas consist of bedrock that alternates between marine and terrestrial habitats, depending on the tide. Rocky intertidal areas consist of ''bedrock, stones, or boulders that singly or in combination cover 75 percent or more of an area that is covered less than 30 percent by vegetation'' (Federal Geographic Data Committee, 2013).

The lower Piscataqua River is home to Portsmouth Harbor and is used by commercial, recreational, and military vessels. Between 150 and 250 commercial shipping vessels transit the lower Piscataqua River each year (Magnusson *et al.,* 2012). Commercial fishing vessels are also very common in the river year-round, as are recreational vessels, which are more common in the warmer summer months. The shipyard is a dynamic industrial facility situated on an island with a narrow separation of waterways between the installation and the communities of Kittery and Portsmouth (Figure 2). The predominant noise sources from Shipyard industrial operations consist of dry dock cranes; passing vessels; and industrial equipment (*e.g.,* forklifts, loaders, rigs, vacuums, fans, dust collectors, blower belts, heating, air conditioning, and ventilation (HVAC) units, water pumps, and exhaust tubes and lids). Other components such as construction, vessel ground support equipment for maintenance purposes, vessel traffic across the Piscataqua River, and vehicle traffic on the shipyard's bridges and on local roads in Kittery and Portsmouth produce noise, but such noise generally represents a transitory contribution to the average noise level environment (Blue Ridge Research and Consulting (BRRC), 2015; ESS Group, 2015). Ambient sound levels recorded at the shipyard are considered typical of a large outdoor industrial facility and vary widely in space and time (ESS Group, 2015).

BILLING CODE 3510–22–P

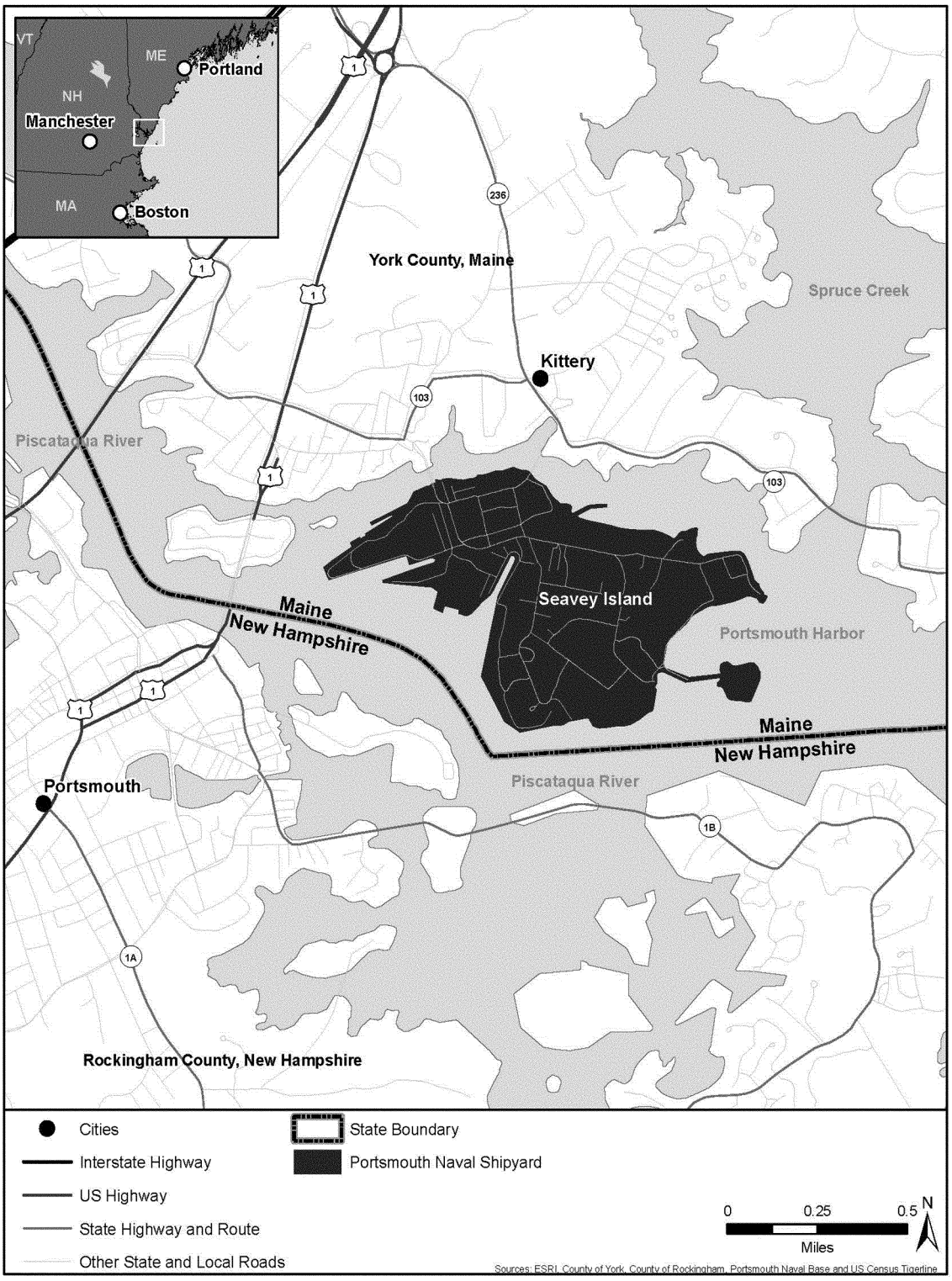


Figure 1 -- Site Location Map of the Project Area

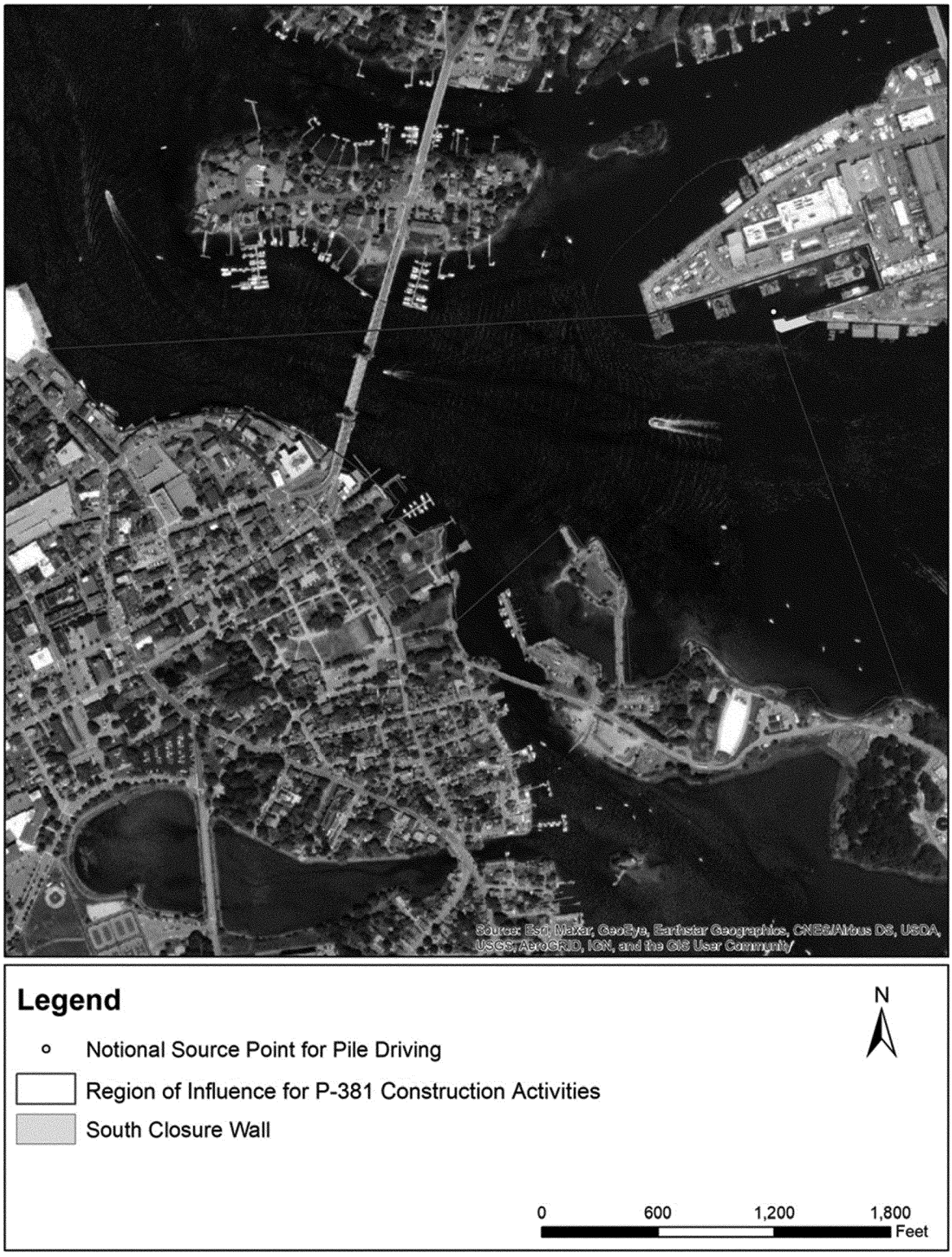


Figure 2 -- Region of Influence for Underwater Noise for P-381 In-water Construction Activities

BILLING CODE 3510–22–C

Detailed Description of the Specified Activity

The Navy's P–381 project will modify the super flood basin to create two additional dry docking positions (Dry Dock 1 North and Dry Dock 1 West) in front of the existing Dry Dock 1 East. The super flood basin provides the starting point for the P–381 work. Several steps are required to convert the super flood basin to a dry dock with two positions fully capable of supporting the maintenance of submarines while maintaining access to the existing interior dry dock (Dry Dock 1 East). The dry dock positions (including the center wall) will be constructed using large precast segments (referred to as monoliths) that require both sidewall and base support. The monoliths will be manufactured offsite and transported to the construction site. Segments will be floated and/or lifted into place to create the center wall, followed by Dry Dock 1 North, and finally Dry Dock 1 West. Once the monoliths are set and grouted in place, the respective dry docks can be dewatered allowing the remaining interior construction to be performed in dry conditions.

P–381 years 2 through 5 (*i.e.,* the time period of the Navy's specified activity for this rule) construction activities will complete bedrock removal and the preparation of the walls and floors of the super flood basin to support the placement of the monoliths and the construction of the two dry dock positions. Most of the in-water construction will occur behind the existing super flood basin walls that will act as a barrier to sound and will contain underwater noise to within a small portion of the Piscataqua River. However, the west closure wall will be removed in order to install the Dry Dock 1 North entrance structure and caisson. In addition, the caissons may not always be in place throughout in-water construction. As such, the analyses presented herein conservatively assume the west closure wall, as well as the future caissons, will not be present throughout in-water construction activities.

The Navy's request also considers emergency repairs of the P–310 super flood basin. During P–310 super flood testing in January 2022, excessive exfiltration (*i.e.,* transport of material outside of the basin) was observed along Berths 1 and 2 and between the west closure wall and super flood basin entrance structure. Emergency structural repairs were required to reduce excessive transport of material through the berths and west closure wall/entrance structure and prevent further damage. As a result, 216 28-inch Z-shaped sheet piles were installed along the Berth 1 face. After installation, these sheet piles were cut off approximately 3 m (10 ft) above the mudline and concrete was tremie placed behind them to plug any gaps in the existing structure that contributed to the exfiltration. The removal of these 216 Berth 1 emergency repair piles and excess tremie concrete (approximately 382 cubic meters, 500 cubic yards (cy)) will be completed during this LOA period and are accounted for in the Navy's request. Similarly, 10 28-inch wide, Z-shaped sheet piles were installed between the super flood basin entrance structure and the west closure wall, cut off approximately 3 m (10 ft) above the mudline, and had concrete tremie placed behind them. These 10 sheet piles will be removed during the P–381 year 1 IHA period (covered under the IHA issued by NMFS for the first year of P–381 construction activities; 87 FR 19866, April 6, 2022).

Several additional preparatory activities (*e.g.,* torch cutting, dredging, *etc.*) will not create noise expected to result in harassment of marine mammals. Noise created during dredging of sediment and demolition debris (*e.g.,* bedrock, granite blocks, concrete) is unlikely to exceed that generated by other normal shipyard activities and is not expected to result in incidental take of marine mammals. Activities such as grouting (*i.e.,* pouring of concrete) and torch cutting are not noisy by design and will not result in incidental take of marine mammals. These activities are not addressed in the analyses of noise producing actions in the Navy's request, and are not considered by NMFS in our analysis, but are included in the work descriptions to clarify the construction progression.

P–381 In-Water Construction Activities

The work remaining for P–381 can be generally grouped into five categories for ease of explanation: temporary structures, mechanical bedrock removal, continued demolition of super flood basin wall components, center wall tie-downs, and dry dock foundation and gantry crane support. Each category involves one or more activities expected to generate noise that could result in injury or harassment of marine mammals. Some of these activities are a continuation of work started in year 1, which were covered under a separate IHA issued by NMFS on April 6, 2022 (87 FR 19886).

Temporary Structures—Several temporary structures will be installed and removed to facilitate the construction of the dry docks. The conversion of the existing west closure wall to the Dry Dock 1 North entrance requires reinforcement of the section of the west closure wall that will become the new dry dock entrance. The existing west closure wall structure will be surrounded by a temporary cofferdam. The cofferdam will be constructed with 48 28-inch wide, Z-shaped sheet piles. The sheet piles will be installed using an initial vibratory set followed by driving with impact hammers to refusal.

The temporary guide wall along the Berth 11 end wall installed during year 1 (60 28-inch wide, Z-shaped sheet piles) will be removed with a vibratory hammer. An extension to the temporary cofferdam around the Dry Dock 1 entrance structure installed during P–381 year 1 will also be constructed. The extension will consist of 14 28-inch wide, Z-shaped sheet piles. The extension and the cofferdam (96 28-inch wide, Z-shaped sheet piles) will be removed in 2024 using a vibratory hammer.

A temporary work trestle will be constructed to support the excavation of large shafts within the individual dry docking positions. The trestle will be installed in Dry Dock 1 North first and then relocated to Dry Dock 1 West. The trestle system will be supported by 4 84-inch steel pipe piles and will be relocated five times within each dry dock. As a result, the piles will be installed and removed 20 times in Dry Dock 1 North and 20 times in Dry Dock 1 West. The piles will be installed with a cluster drill consisting of multiple DTH hammers and removed with a rotary drill. Before the cluster drill will be deployed, a 102-inch casing will be set into bedrock and a 5-ft (1.5-m) deep rock socket will be excavated with a rotary drill (see Figure 1–4 in the Navy's application). The socket will be filled with concrete and a second, 84-inch casing will be installed inside the larger casing and set in the concrete. No drilling will be required to install the second casing. The outer casing will then be removed with a rotary drill. The 84-inch diameter cluster drill will operate independently inside the second casing to excavate the shaft. Once the shaft is drilled the inner casing will be removed by torch cutting.

A temporary tie-in consisting of 15 28-inch wide, Z-shaped sheet piles will be installed between the center wall foundation and the west closure wall at Dry Dock 1 West. Twenty-three 28-inch wide, Z-shaped sheet piles will also be installed on the easterly end of Dry Dock 1 West to provide a similar temporary tie-in to the center wall foundation near the entrance to Dry

Dock 1 East. The sheet piles will be installed using an initial vibratory set followed by driving with impact hammers. These tie-ins will be removed using a vibratory hammer along with the Dry Dock 1 North tie-in to the west closure wall (16 28-inch wide, Z-shaped sheet piles) that was installed under the P–381 year 1 IHA (87 FR 19886).

To support excavation activities along Berth 1, 28 28-inch wide, Z-shaped sheet piles will be installed at the southeast corner of the berth using a combination of vibratory and impact hammers. These piles will be removed using a vibratory hammer.

Mechanical Bedrock Removal—Mechanical removal of bedrock will be completed by the end of 2023 using various methods appropriate for the removal location and as needed to avoid damage to adjacent structures. Bedrock removal will occur along the Berth 11 face and abutment and along Berth 1.

Bedrock will be removed by breaking it up with a hydraulic hammer (*i.e.,* hoe ram or breaker). To protect adjacent structures during mechanical bedrock removal, 924 4–6-inch diameter relief holes will be drilled using a DTH mono-hammer. A total of approximately 918 cubic meters (1,200 cy) of bedrock are anticipated to be removed.

Demolition of Super Flood Basin Wall Components—Demolition of existing wall components will include the removal of shutter panels, granite quay walls, sheet piles, and concrete making up the super flood basin. Demolition of existing wall structures will be conducted using a rock hammer. Specifically, the remaining sections of the existing concrete shutter panels making up the face of Berth 11 (112 panels), portions of the granite block quay wall (2,141 cm, 2,800 cy) at Berth 1, and the remaining existing sheet pile wall at Berth 1 (168 25-inch wide, Z-shaped sheet piles) will be removed.

The installation of a structural support waler (steel beam) at Berth 1 will also be completed. To complete the installation of the waler, about 98 m (320 linear ft) of concrete wall will be demolished using a hydraulic rock hammer.

Center Wall Tie-downs—Additional work in the center wall area will involve the installation of support tie downs for future tremie concrete work. The tie downs require the placement of a total of 194 rock anchors requiring 9-inch diameter holes. The rock anchors will be installed using a DTH mono-hammer.

Dry Dock and Gantry Crane Support—The location of the future center wall requires reinforcement to allow placement of the large pre-cast monolith structures forming the separation between the two new dry docking positions. Specifically, the floor of the existing basin must be able to provide an adequate foundation for the pre-cast monoliths that will make up the dry dock interiors and center wall. The basin floor will be reinforced by excavating 18 78-inch diameter shafts throughout the footprint of the center wall that will be filled with concrete to create the structural support piles for the center wall. The shafts will be excavated using a cluster drill consisting of multiple DTH mono-hammers. Before the cluster drill is deployed, a 102-inch diameter casing will be set into bedrock and a 1.5 m (5 ft) deep rock socket will be excavated using a 102-inch diameter rotary drill (see Figure 1–4 of the Navy's application). The rock socket will be filled with concrete and a second, 78-inch diameter casing will be installed inside the 102-inch casing and set in the concrete. No drilling is required to install the second casing. The 102-inch diameter outer casing will then be removed with a rotary drill.

The future Dry Dock 1 North and Dry Dock 1 West require significant structural reinforcement to provide an adequate foundation for the installation of the large pre-cast monolith structures forming the dry dock interior. Reinforcement of the individual dry dock foundations and walls will begin first at Dry Dock 1 North and, once completed, continue at Dry Dock 1 West. Twenty 78-inch diameter shafts will be excavated along the Berth 11 face and head wall to support the walls of Dry Dock 1 North. Along the floor of Dry Dock 1 North, 23 108-inch diameter shafts will be excavated for the installation of the foundation support piles and 18 78-inch diameter shafts will be excavated for the installation of leveling piles (*i.e.,* diving board shafts).

The dry dock foundation and wall support pile and leveling pile shafts will be filled with concrete to create the support piles for the dry dock walls and floors. The shafts will be excavated using a cluster drill consisting of multiple DTH hammers in the same manner as previously described for the temporary work trestle piles. Once the wall and foundation support piles and leveling piles for Dry Dock 1 North have been installed, foundation and wall support piles and leveling piles will be installed for Dry Dock 1 West. Twenty-two 78-inch diameter shafts will be excavated along the Berth 1 face to support the walls of Dry Dock 1 West. Twenty-three 108-inch diameter shafts will be excavated along the floor of Dry Dock 1 West for the installation of foundation support piles and 18 78-inch shafts will be excavated for the installation of leveling piles (*i.e.,* diving board shafts). The casing sizes and rotary drill sizes for each shaft are specified in Table 1.

The large concrete monolithic sections used to create the dry docks and the center wall separation will be placed using a gantry crane. The gantry crane system will be structurally supported by the installation of 16 72-inch diameter shafts installed along the western extent of the Berth 1 face. The shafts will be installed using a DTH cluster drill as described for the temporary work trestle piles. The casing sizes and rotary drill sizes for the gantry crane support shafts are specified in Table 1.

P–310 Emergency Repairs

Testing of the super flood basin on January 5, 2022 resulted in excess exfiltration through Berths 1 and 2, prompting the need for emergency repairs along Berth 1 as well as between the super flood basin entrance structure and the west closure wall. Emergency repairs consisted of the installation of sheet piles and the tremie pouring of concrete to fill in gaps along the structure walls and floor. Installation of emergency repairs at Berth 1 and the installation and removal of emergency repairs at the west closure wall and entrance structure occurred before the period described in the Navy's LOA application. Only the removal of Berth 1 emergency repair components will occur during the requested LOA period.

The removal of the 216 28-inch wide, Z-shaped sheet piles along the Berth 1 face will be completed through direct pulling via barge-mounted crane or by vibratory hammer. Specific methods will be determined by the contractor based on resistance to extraction from the seabed. Direct pulling via crane is not anticipated to generate harmful levels of underwater sound. If required, the use of the vibratory hammer to extract the installed sheet piles will be limited to an initial effort to break the sheets loose, allowing them to be directly pulled out. As a conservative measure, vibratory extraction of these sheet piles is assumed for all analyses.

The removal of 765 cubic meters (1,000 cy) of tremie concrete is anticipated to require use of a hydraulic rock hammer to break up material into smaller pieces. Smaller pieces will then be retrieved via excavator bucket for offsite disposal. The Navy estimates daily active use of the rock hammer for the removal of concrete from emergency repairs to be 4 hours per day.

Means and Methods for Noise Producing Activities

Only 28-inch wide, Z-shaped sheet piles will be installed or removed with pile-driving equipment during P–381 construction. The installation of 28-inch wide, Z-shaped steel sheet piles will be installed initially using vibratory means and then finished with impact hammers, if necessary. Impact hammers will also be used to push obstructions out of the way and where sediment conditions do not permit the efficient use of vibratory hammers. Pile removal activities will use cranes and vibratory hammers exclusively.

The removal of bedrock and concrete and the demolition of concrete shutter panels at Berth 11 and granite blocks and sheet piles at Berth 1 during P–381 construction will be by mechanical means. These features will be demolished using a hydraulic rock hammer (*i.e.,* hoe ram). The type/size of rock hammers used will be determined by the contractor selected to perform the work.

Two methods of rock excavation will be used during P–381 construction; DTH excavation and rotary drilling. During P–381 construction, rotary drilling will be used to set the casings and pre-drill rock sockets for DTH cluster drills. DTH excavation using mono-hammers will be used to create shafts for rock anchors and tie downs and for the excavation of relief holes during mechanical bedrock removal. For the largest shafts (greater than 42-inches in diameter), DTH excavation will use a cluster drill. A cluster drill uses multiple mono-hammers within a single bit to efficiently break up bedrock and create large diameter holes (see Figure 1–5 in the Navy's application).

Concurrent Activities

In order to maintain project schedules, it is likely that multiple pieces of equipment will operate at the same time within the basin. No ancillary activities are anticipated during the construction period that will require unimpeded access to the super flood basin. Therefore, it is anticipated that there will be space available within the project area for additional construction equipment. A maximum of 13 pieces of equipment could potentially operate in the project area at a single time. While this is an unlikely scenario, it could occur for a very brief period. Construction equipment will be staged along the perimeter of the super flood basin (Berth 11, Berth 1 and head wall) as well on multiple barges within the super flood basin. Table 2 provides a summary of possible equipment combinations that could be used simultaneously over the course of the construction period.

TABLE 2—SUMMARY OF MULTIPLE EQUIPMENT SCENARIOS

Year	Quantity	Equipment
2023	5	Rock Hammer (2), Vibratory Hammer (2), Impact Hammer (1).
	5	Rock Hammer (2), Vibratory Hammer (1), Impact Hammer (1), DTH Mono-hammer (1).
	5	Rock Hammer (1), Vibratory Hammer (1), Impact Hammer (1), DTH Mono-hammer (1), Rotary Drill (1).
	5	Rock Hammer (1), Vibratory Hammer (1), DTH Mono-hammer (1), Cluster Drill (2).
	5	Cluster Drill (2), Vibratory Hammer (1), Mono-hammer DTH (1), Rotary Drill (1).
	5	Rock Hammer (1), Impact Hammer (1), DTH Mono-hammer (1), Cluster Drill (2).
	6	Rock Hammer (2), DTH Mono-hammer (2), Cluster Drill (1), Rotary Drill (1).
	6	Rock Hammer (2), Vibratory Hammer (1), DTH Mono-hammer (1), Rotary Drill (2).
	8	Rock Hammer (2), Vibratory Hammer (2), DTH Mono-hammer (2), Cluster Drill (2).
	10	Rock Hammer (3), Vibratory Hammer (2), Impact hammer (1), DTH Mono-hammer (2), Cluster Drill (2).
	13	Rock Hammer (5), Cluster Drill (2), Vibratory Hammer (2), Impact Hammer (1), Mono-hammer DTH (3).
2024	8	Rock Hammer (2), Vibratory Hammer (2), DTH Mono-hammer (2), Cluster Drill (2).
	5	Cluster Drill (2), DTH mono-hammer (1), Vibratory hammer (1), Impact Hammer (1).
	3	Cluster Drill (2), DTH mono-hammer (1).
	3	Cluster Drill (1), Rotary Drill (1), DTH mono-hammer (1).
	3	Rotary Drill (2), DTH mono-hammer (1).
2025	3	Cluster Drill (2), DTH mono-hammer (1).
	3	Cluster Drill (1), Rotary Drill (1), DTH mono-hammer (1).
	3	Rotary Drill (2), DTH mono-hammer (1).
	2	Rotary Drill (2).
	2	Cluster Drill (2).

Source: 381 Constructors, 2022.

Mitigation, monitoring, and reporting measures are described in detail later in this document (please see Mitigation and Monitoring and Reporting).

Comments and Responses

A notice of NMFS' proposed rulemaking to the Navy was published in the **Federal Register** on January 18, 2023 (88 FR 3146). That proposed rule described, in detail, the Navy's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that proposed rule, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed rulemaking, and requested that interested persons submit relevant information, suggestions, and comments. This proposed rule was available for a 30-day public comment period.

During the 30-day public comment period, NMFS received no comments.

Changes From the Proposed IHA to Final IHA

No public comments were received during the comment period; however, NMFS made a few minor clarifications and corrections in this final rule. In the sections of the documents that refer to the use of a bubble curtain, it was established that the bubble curtain will be used in cases where the Level A harassment zone extends to the full region of influence (ROI). To clarify this further, NMFS adds that this refers to all rock hammering and DTH cluster drilling. In addition, for bubble curtains, NMFS clarified that the air flow to the bubblers will be balanced across the entrance openings to the super flood basin, rather than the piles. Finally, NMFS removed the mitigation condition requiring that protected species observers (PSOs) work in shifts lasting no longer than 4 hours (hrs) with at least

a 1-hr break between shifts and limiting PSO duties to no more than 12 hrs in a 24-hr period. This is not a required condition for the Navy for these construction activities, rather it is related to other activity types, such as offshore seismic surveys, but was accidentally included. That said, NMFS communicated to the Navy that observers should be given adequate breaks and work in shifts to reduce observer fatigue to ensure their ability to best monitor for marine mammals.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, referenced here, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 3 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is expected to occur, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All stocks managed under the MMPA in this region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 3 are the most recent available at the time of publication (including from the 2022 draft SARs) and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*).

TABLE 3—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	MMPA stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance Nbest, (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Phocoenidae (porpoises):						
Harbor Porpoise	*Phocoena*	Gulf of Maine/Bay of Fundy	-; N	95,543 (0.31; 74,034; 2016)	851	164
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Western North Atlantic	-; N	61,336 (0.08, 57,637; 2018)	1,729	339
Gray seal	*Halichoerus grypus*	Western North Atlantic	-; N	27,300 [4] (0.22; 22,785; 2016)	1,389	4,453
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic	-; N	7,600,000 (unk,7,100.000, 2019)	426,000	178,573
Hooded seal	*Cystophora cristata*	Western North Atlantic	-; N	593,500	Unknown	1,680

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable (N.A.).

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] This abundance value and the associated PBR value reflect the US population only. Estimated abundance for the entire Western North Atlantic stock, including animals in Canada, is 451,600. The annual M/SI estimate is for the entire stock.

As indicated above, all five species (with five managed stocks) in Table 3 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur.

A detailed description of the species likely to be affected by the Navy's construction activities, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed rule (88 FR 3146, January 18, 2023). Since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to the NMFS website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings,

2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018a) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 4.

TABLE 4—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018a]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, *Cephalorhynchid, Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018a) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Navy's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the project area. The notice of the proposed rulemaking (88 FR 3146, January 18, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the Navy's construction activities on marine mammals and their habitat. That information and analysis is referenced in this final rule and is not repeated here; please refer to the notice of the proposed rulemaking (88 FR 3146, January 18, 2023).

Estimated Take

This section provides an estimate of the number of incidental takes authorized under the rule, which will inform both NMFS' consideration of ''small numbers'' and NMFS' negligible impact determinations.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes will primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile installation and removal, rotary drilling, DTH, and rock hammering) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency species and/or phocids because predicted auditory injury zones are larger than for mid-frequency species and/or otariids. The requirements pertaining to mitigation and monitoring are expected to minimize the severity of the taking to the extent practicable. Below we describe how the authorized take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the estimated take numbers.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict

(*e.g.,* Southall *et al.,* 2007, 2021; Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 µPa)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 µPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

The Navy's activities include the use of continuous (vibratory pile driving/removal, rotary drilling) and intermittent (impact pile driving, rock hammering) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 µPa, respectively, are applicable. DTH systems have both continuous and intermittent components as discussed in the *Description of Sound Sources* section in the proposed rule (88 FR 3146, January 18, 2023). When evaluating Level B harassment, NMFS recommends treating DTH as a continuous source and applying the RMS SPL thresholds of 120 dB re 1 µPa (see NMFS recommended guidance on DTH systems at *https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf;* NMFS, 2022).

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (NMFS, 2018a) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's activities include the use of impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving/removal, rotary drilling, DTH) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 5—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving, vibratory pile removal, rotary drilling, rock hammering, and DTH).

Sound Source Levels—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment (*e.g.,* sediment type) in which the activity takes place. The Navy evaluated sound source level (SL) measurements available for certain pile types and sizes from similar environments from other Navy pile driving projects, including from past projects conducted at the Shipyard, and used them as proxy SLs to determine reasonable SLs likely to result from the pile driving and drilling activities in their application. Projects reviewed were those most similar to the specified activity in terms of drilling and rock hammering activities, type and size of piles installed, method of pile installation, and substrate conditions. Some of the proxy source levels used are expected to be more conservative as compared to what may be realized by the actual pile driving to take place, as the values are from larger pile sizes. In some instances, for reasons described below, NMFS relied on alternative proxy SLs in our evaluation of the impacts of the Navy's activities on marine mammals (Table 6). Note that the source levels in Table 6 represent the SPL referenced at a distance of 10 m from the source.

TABLE 6—SUMMARY OF UNATTENUATED IN-WATER PILE DRIVING SOURCE LEVELS

Pile type	Installation method	Pile diameter	Peak SPL (dB re 1 μPa)	RMS SPL (dB re 1 μPa)	SEL_{ss} (dB re 1 μPa^2 sec)
Casing/Socket	Rotary Drill	126-inch	NA	154 (169 at 1 m)	NA
		102-inch	NA	154 (169 at 1 m)	NA
		84-inch	NA	154 (169 at 1 m)	NA
Shaft	DTH Cluster Drill	108-inch	NA	201.6[5] (Level A)	NA
				174[6] (Level B)	
		84-inch	NA	196.7[5] (Level A)	NA
				174[6](Level B)	
		78-inch	NA	195.2[5] (Level A)	181
				174[6] (Level B)	
		72-inch	NA	193.7[5] (Level A)	NA
				174[6] (Level B)	
Rock anchor	DTH mono-hammer	9-inch	172	167	146
Relief hole	DTH mono-hammer	4 to 6-inch	170	[6]156	144
Z-shaped Sheet	Impact	[1]28-inch	211	196	181
	Vibratory	28-inch[2]	NA	167	167
	Vibratory	25-inch[3]	NA	167	167
Bedrock and concrete demolition	Rock Hammer[4]	NA	197	186[4]	[4]171

[1] An appropriate proxy value for impact driving 28-inch wide, Z-shaped sheet piles is not available, so a value for 30-inch steel pipe piles was used as a proxy value (NAVFAC SW, 2020 [p. A–4]).
[2] An appropriate proxy value for vibratory pile driving 28-inch wide, Z-shaped sheet piles is not available, so a value for 30-inch steel pipe piles was used as a proxy value (Navy, 2015 [p. 14]).
[3] An appropriate proxy value for vibratory pile driving 25-inch sheet piles is not available, so the value for 28-inch wide, Z-shaped sheet piles was used as a proxy.
[4] Escude, 2012.
[5] RMS SPL values were derived from regression and extrapolation calculations of existing data by NMFS.
[6] SPLs vary from those proposed in the Navy's application as the NMFS DTH recommended guidance updated the source level proxy it recommends for some DTH systems after the Navy's application was deemed adequate and complete (NMFS, 2022).
Notes: All SPLs are unattenuated and represent the SPL referenced at a distance of 10 m from the source; NA = Not applicable; single strike SEL are the proxy source levels for impact pile driving used to calculate distances to PTS; dB re 1 μPa = decibels (dB) referenced to a pressure of 1 microPascal, measures underwater SPL.; dB re 1 μPa^2-sec = dB referenced to a pressure of 1 microPascal squared per second, measures underwater SEL.

With regards to the proxy values summarized in Table 6, very little information is available regarding source levels for in-water rotary drilling activities. As a conservative measure and to be consistent with previously issued IHAs for similar projects in the region, a proxy of 154 dB RMS is used for all rotary drilling activities (Dazey, 2012).

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and the continuous threshold is used to evaluate Level B harassment. The Navy consulted with NMFS to obtain the appropriate proxy values for DTH mono- and cluster-hammers. With regards to DTH mono-hammers, NMFS recommended proxy levels for Level A harassment based on available data regarding DTH systems of similar sized piles and holes (Table 6) (Denes *et al.,* 2019; Guan and Miner, 2020; Reyff and Heyvaert, 2019; Reyff, 2020; Heyvaert and Reyff, 2021). No hydroacoustic data exist for cluster DTH systems; therefore, NMFS recommends proxy values based off of regression and extrapolation calculations of existing data for mono-hammers until hydroacoustic data on DTH cluster drills be obtained (NMFS, 2022). Because of the high number of hammers and strikes for this system, DTH cluster drills are treated as a continuous sound source for the time component of Level A harassment (*i.e.,* for the entire duration DTH cluster drills are operational, they are considered to be producing strikes, rather than indicating the number of strikes per second, which is unknown), but still used the impulsive thresholds.

At the time of the Navy's application submission, NMFS recommended that the RMS SPL at 10 m should be 167 dB when evaluating Level B harassment (Heyvaert and Reyff, 2021 as cited in NMFS, 2021b) for all DTH pile/hole sizes. However, since that time, NMFS has received additional clarifying information regarding DTH data presented in Reyff and Heyvaert (2019) and Reyff (2020) that allows for different RMS SPL at 10 m to be recommended for piles/holes of varying diameters (NMFS, 2022). Therefore, the following proxy RMS SPLs at 10 m are used to evaluate Level B harassment from this sound source in this analysis (Table 6): 156 dB RMS for the 4 to 6 inch mono hammers (Reyff and Heyvaert, 2019; Reyff, 2020), 167 dB RMS for the 9 inch mono-hammers (Heyvaert and Reyff, 2021), and 174 dB RMS for all DTH cluster drills greater or equal to 74 inches (Reyff and Heyvaert, 2019; Reyff, 2020). See Footnote 6 in Table 6.

Rock hammering is analyzed as an impulsive noise source. For purposes of this analysis, it is assumed that the hammer will have a maximum strike rate of 460 strikes per minute and will operate for a maximum duration of 15 minutes before needing to reposition or stop to check progress. Therefore, noise impacts for rock hammering activities are assessed using the number of blows per 15-minute interval (6,900 blows) and the number of 15-minute intervals anticipated over the course of the day based on the durations provided in Tables 1, 7, and 8. As with rotary drilling, very little information is available regarding source levels associated with nearshore rock hammering. In previous IHAs related to the Shipyard, NMFS relied on preliminary measurements from the Tappan Zee Bridge replacement project (Reyff, 2018a, 2018b) as well as data from a WSDOT concrete pier demolition project (Escude, 2012) to inform proxy SLs for rock hammering. However, a few discrepancies in the preliminary data of the Tappan Zee Bridge reports have been identified resulting from NMFS' further inspection into the report's data. Therefore, the SLs reported only from the Escude (2012) concrete pier demolition project are used as proxy values for rock hammering activities associated with P–381 (Table 6).

Level B Harassment Zones—Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and

bottom composition and topography. The general formula for underwater TL is:

TL = B * log10 (R1/R2),

Where:

B = transmission loss coefficient (assumed to be 15)
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for the Navy's activities in the absence of specific modelling. All Level B harassment isopleths are reported in Tables 7 and 8 considering RMS SLs.

Level A Harassment Zones—The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance (NMFS, 2018a) that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources (such as from impact and vibratory pile driving, drilling, DTH, and rock hammering), the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the User Spreadsheet can be found in Appendix A of the Navy's application, Appendix A of the Navy's addendum, and the resulting isopleths are reported in Tables 7 and 8.

TABLE 7—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR IMPULSIVE NOISE

[DTH, impact pile driving, hydraulic rock hammering]

Activity ID	Year [1]/activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment [2]		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	5 hours/day (20 intervals/day at 15 each).	56	5,034.5 m/0.417417 km^2.	2,261.9 m/0.417417 km^2	541.17 m/0.277858 km^2.
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	2.5 hours/day (10 intervals/day at 15 min each).	47	3,171.6 m/0.417417 km^2.	1,424.9 m/0.417417 km^2	541.17 m/0.277858 km^2.
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	10 hours/day (40 intervals/day at 15 min each).	74	7,991.8 m/0.417417 km^2.	3,590.5 m/0.417417 km^2	541.17 m/0.277858 km^2.
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	12 hours/day (48 intervals/day at 15 min each).	60	9,024.7 m/0.417417 km^2.	4,054.5 m/0.417417 km^2	541.17 m/0.277858 km^2.
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	12 hours/day (48 intervals/day at 15 min each).	25	9,024.7 m/0.417417 km^2.	4,054.5 m/0.417417 km^2	541.17 m/0.277858 km^2.
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	4 hours/day (16 intervals/day at 15 min each).	15	4,388.6 m/0.417417 km^2.	1,949.2 m/0.417417 km^2	541.17 m/0.277858 km^2.
7	2 DTH Monohammer.	Relief Holes at Berth 11 Basin Floor.	924 4–6 inch holes 27 holes/day.	35	178.9 m/0.047675 km^2	80.4 m/0.014413 km^2	2,512 m/0. 417417 km^2.
11	2 DTH Monohammer.	Dry Dock 1 North entrance Rock Anchors.	50 9-inch holes 2 holes/day.	25	244.8 m/0.073751 km^2	110 m/0.022912 km^2	13,594 m/0.417417 km^2.
22	2–3 DTH Monohammer.	Center Wall Foundation Rock Anchors.	72 9-inch holes 2 holes/day.	36	244.8 m/0.073751 km^2	110 m/0.022912 km^2	13,594 m/0.417417 km^2.
34	3–4 DTH Monohammer.	Dry Dock 1 North Rock Anchors.	36 9-inch holes 2 holes/day.	18	244.8 m/0.073751 km^2	110 m/0.022912 km^2	13,594 m/0.417417 km^2.
35	4–5 DTH Monohammer.	Dry Dock 1 West Rock Anchors.	36 9-inch holes 2 holes/day.	18	244.8 m/0.073751 km^2	110 m/0.022912 km^2	13,594 m/0. 417417 km^2.
R	2 Impact Pile Driving.	Dry Dock 1 North Entrance Temporary Cofferdam.	48 28-inch Z-shaped sheets 8 sheets/day.	6	1,568.6 m/0.417417 km^2.	704.7 m/0.364953 km^2	2,512 m/0.417417 km^2.
5	2 Impact Pile Driving.	Berth 1 Support of Excavation.	28 28-inch Z-shaped sheets 4 piles/day.	8	988.2 m/0.403411 km^2	444.0 m/0.201158 km^2	2,512 m/0.417417 km^2.
8	2 Impact Pile Driving.	Temporary Cofferdam Extension.	14 28-inch Z-shaped sheets 4 piles/day.	4	988.2 m/0.403411 km^2	444.0 m/0.201158 km^2	2,512 m/0.417417 km^2.

TABLE 7—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR IMPULSIVE NOISE—Continued

[DTH, impact pile driving, hydraulic rock hammering]

Activity ID	Year [1]/activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment [2]		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
12	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	15 28-inch Z-shaped sheets 4 piles/day.	4	988.2 m/0.403411 km^2	444.0 m/0.201158 km^2	2,512 m/0.417417 km^2.
24	2–3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	23 28-inch Z-shaped sheets 2 piles/day.	12	622.5 m/0.334747 km^2	279.7 m/0.090757 km^2	2,512 m/0.417417 km^2.
A4	2 DTH Cluster Drill.	Dry Dock 1 North Entrance Foundation Support Piles.	18 78-inch shafts 10 hours/day 6.5 days/shaft.	117	84,380.4 m/0.417417 km^2.	37,909.7 m/0.417417 km^2	39,811 m/0.417417 km^2.
9d	2 DTH Cluster Drill.	Gantry Crane Support Piles.	16 72-inch shafts 10 hours/day 5 days/shaft.	80	67,025.7 m/0.417417 km^2.	30,112.8 m/0.417417 km^2	39,811 m/0.417417 km^2.
13d	2–3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	20 84-inch shafts 10 hours/day 3.5 days/shaft.	70	106,228.6 m/0.417417 km^2.	47,725.5 m/0.417417 km^2	39,811 m/0.417417 km^2.
15d	2–3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	18 78-inch shafts 10 hours/day 7.5 days/shaft.	135	84,380.4 m/0.417417 km^2.	37,909.7 m/0.417417 km^2	39,811 m/0.417417 km^2.
16d	2–3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North.	20 78-inch shafts 10 hours/day 7.5 days/shaft.	150	84,380.4 m/0.417417 km^2.	37,909.7 m/0.417417 km^2	39,811 m/0.417417 km^2.
17d	2–3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	23 108-inch shafts 10 hours/day 8.5 days/shaft.	196	225,376.2 m/0.417417 km^2.	101,255.2 m/0.417417 km^2	39,811 m/0.417417 km^2.
29d	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	20 84-inch shafts 10 hours/day 3.5 days/shaft.	70	106,228.6 m/0.417417 km^2.	47,725.5 m/0.417417 km^2	39,811 m/0.417417 km^2.
31d	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West.	22 78-inch shafts 10 hours/day 7.5 days/shaft.	165	84,380.4 m/0.417417 km^2.	37,909.7 m/0.417417 km^2	39,811 m/0.417417 km^2.
32d	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	23 108-inch shafts 10 hours/day 8.5 days/pile.	196	225,376.2 m/0.417417 km^2.	101,255.2 m/0.417417 km^2	39,811 m/0.417417 km^2.
33d	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	18 78-inch shafts 10 hours/day 7.5 days/pile.	135	84,380.4 m/0.417417 km^2.	37,909.7 m/0.417417 km^2	39,811 m/0.417417 km^2.

[1] Note, for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

[2] To determine underwater harassment zone size, ensonified areas from the source were clipped along the shoreline using Geographical Information Systems (GIS).

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE

[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year [1]/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment [2]		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance Temporary Cofferdam.	48 28-inch Z-shaped sheets 8 sheets/day.	6	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles.	168 25-inch Z-shaped sheets 4 piles/day.	42	12.2 m/0.000454 km^2	5.0 m/0.000078 km^2	13,594 m/0.417417 km^2.
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation.	28 28-inch Z-shaped sheets 4 piles/day.	8	12.2 m/0.000454 km^2	5.0 m/0.000078 km^2	13,594 m/0.417417 km^2.
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	14 28-inch Z-shaped sheets 4 piles/day.	4	12.2 m/0.000454 km^2	5.0 m/0.000078 km^2	13,594 m/0.417417 km^2.
12	2 Vibratory Pile Driving.	Center Wall Tie-In to Existing West Closure Wall.	15 28-inch Z-shaped sheets 4 piles/day.	4	12.2 m/0.000454 km^2	5.0 m/0.000078 km^2	13,594 m/0.417417 km^2.
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	60 28-inch Z-shaped sheets 8 piles/day.	10	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	28 28-inch Z-shaped sheets 8 piles/day.	5	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs.	108 28-inch Z-shaped sheets 6 piles/day.	18	16.0 m/0.000733 km^2	6.6 m/0.000136 km^2	13,594 m/0.417417 km^2.

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE—Continued

[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year [1]/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment [2]		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
23	2–3 Vibratory Extraction.	Dry Dock 1 North-Remove Center Wall Tie-in to West Closure Wall.	16 28-inch Z-shaped sheets 8 piles/day.	3	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
24	2–3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	23 28-inch Z-shaped sheets 2 piles/day.	12	7.7 m/0.000185 km^2	3.2 m/0.000032 km^2	13,594 m/0.417417 km^2.
25	2–3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	15 28-inch Z-shaped sheets 8 piles/day.	3	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
26	2–3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	23 28-inch Z-shaped sheets 8 piles/day.	12	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
27	2–3 Vibratory Extraction.	Remove Temporary Cofferdam.	96 28-inch Z-shaped sheets 8 piles/day.	12	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	14 28-inch Z-shaped sheets 8 piles/day.	2	19.4 m/0.001041 km^2	8.0 m/0.0002 km^2	13,594 m/0.417417 km^2.
A1	2 Rotary Drill.	Dry Dock 1 North Entrance Foundation Support Piles—Install Outer Casing.	18 102-inch borings 1 hour/day 1 casing/day.	18	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
A2	2 Rotary Drill.	Dry Dock 1 North Entrance Foundation Support Piles—Pre-Drill Socket.	18 102-inch borings 9 hours/day 1 socket/day.	18	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.41747 km^2.
A3	2 Rotary Drill.	Dry Dock 1 North Entrance Foundation Support Piles—Remove Outer Casing.	18 102-inch borings 15 minutes/casing 1 casing/day.	18	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
9a	2 Rotary Drill.	Gantry Crane Support—Install Outer Casing.	16 102-inch borings 1 hour/day 1 casing/day.	16	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
9b	2 Rotary Drill.	Gantry Crane Support—Pre-Drill Socket.	16 102-inch borings 9 hours/day 1 socket/day.	16	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
9c	2 Rotary Drill.	Gantry Crane Support—Remove Outer Casing.	16 102-inch borings 15 minutes/casing 1 casing/day.	16	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
13a	2–3 Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	20 102-inch borings 1 hour/day 1 casing/day.	20	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
13b	2–3 Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	20 102-inch borings 9 hours/day 1 socket/day.	20	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
13c	2–3 Rotary Drill.	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	20 102-inch borings 15 minutes/casing 1 casing//day.	20	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
14	2–3 Rotary Drill.	Remove Dry Dock 1 North Temporary Work Trestle Piles.	20 84-inch borings 15 minutes/casing 1 casing/day.	20	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
15a	2–3 Rotary Drill.	Dry Dock 1 North Leveling Piles—Install Outer Casing.	18 84-inch borings 1 hour/day 1 casing/day.	18	2.1 m/0.000014 km^2	1.3 m/0.000005km^2	1,848 m/0.417417 km^2.
15b	2–3 Rotary Drill.	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	18 84-inch borings 9 hours/day 1 socket/day.	18	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
15c	2–3 Rotary Drill.	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	18 84-inch borings 15 minutes/casing 1 casing/day.	18	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
16a	2–3 Rotary Drill.	Dry Dock 1 North Wall Shafts—Install Outer Casing.	20 102-inch borings 1 hour/day 1 casing/day.	20	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
16b	2–3 Rotary Drill.	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	20 102-inch borings 9 hours/day 1 socket/day.	20	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
16c	2–3 Rotary Drill.	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	20 102-inch borings 15 minutes/casing 1 casing/day.	20	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
17a	2–3 Rotary Drill.	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	23 126-inch borings 1 hour/day 1 casing/day.	23	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.

TABLE 8—CALCULATED DISTANCE AND AREAS OF LEVEL A AND LEVEL B HARASSMENT FOR NON-IMPULSIVE NOISE—Continued

[Rotary drilling and vibratory pile driving/extracting]

Activity ID	Year [1]/ activity	Purpose	Duration, count, size, and or rate	Total production days	Level A harassment [2]		Level B harassment
					High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
17b	2–3 Rotary Drill.	Dry Dock 1 North Foundation Shafts Pre-Drill Sockets.	23 126-inch borings 9 hours/day 1 socket/day.	23	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
17c	2–3 Rotary Drill.	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	23 126-inch borings 15 minutes/casing 1 casing/day.	23	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
29a	3–4 Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	20 102-inch borings 1 hour/day 1 casing/day.	20	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
29b	3–4 Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	20 102-inch borings 9 hours/day 1 socket/day.	20	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
29c	3–4 Rotary Drill.	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	20 102-inch borings 15 minutes/casing 1 casing/day.	20	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
30	3–4 Rotary Drill.	Dry Dock 1 West Remove Temporary Work Trestle Piles.	20 84-inch borings 15 minutes/pile 1 pile/day.	20	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
31a	3–4 Rotary Drill.	Dry Dock 1 West Wall Shafts—Install Outer Casing.	22 102-inch borings 1 hour/day 1 casing/day.	22	2.1 m/0.000014 km^2	1.3 m/0.000005km^2	1,848 m/0.417417 km^2.
31b	3–4 Rotary Drill.	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	22 102-inch borings 9 hours/day 1 socket/day.	22	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
31c	3–4 Rotary Drill.	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	22 102-inch borings 15 minutes/casing 1 casing/day.	22	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
32a	3–4 Rotary Drill.	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	23 126-inch borings 1 hour/day 1 casing/day.	23	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
32b	3–4 Rotary Drill.	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	23 126-inch borings 9 hours/day 1 socket/day.	23	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
32c	3–4 Rotary Drill.	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	23 126-inch borings 15 minutes/casing 1 casing/day.	23	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.
33a	3–4 Rotary Drill.	Dry Dock 1 North Leveling Piles—Install Outer Casing.	18 84-inch borings 1 hour/day 1 casing/day.	18	2.1 m/0.000014 km^2	1.3 m/0.000005 km^2	1,848 m/0.417417 km^2.
33b	3–4 Rotary Drill.	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	18 84-inch borings 9 hours/day 1 socket/day.	18	8.9 m/0.000248 km^2	5.4 m/0.000091 km^2	1,848 m/0.417417 km^2.
33c	3–4 Rotary Drill.	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	18 84-inch borings 15 minutes/casing 1 casing/day.	18	0.8 m/0.000002 km^2	0.5 m/0.000001 km^2	1,848 m/0.417417 km^2.

[1] Note, for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

[2] To determine underwater harassment zone size, ensonified areas from the source were clipped along the shoreline using Geographical Information Systems (GIS).

The calculated maximum distances corresponding to the underwater marine mammal harassment zones from impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving, rotary drilling) noise and the area of the harassment zone within the ROI are summarized in Tables 7 and 8, respectively. Sound source locations were chosen to model the greatest possible affected areas; typically, these locations will be at the riverward end of the super flood basin. The calculated distances do not take the land masses into consideration, but the ensonified areas do. Neither consider the reduction that will be achieved by the required use of a bubble curtain and therefore all take estimates are considered conservative. Refer to Figures 6–1 through 6–20 of the Navy's application for visual representations of the calculated maximum distances corresponding to the underwater marine mammal harassment zones from impulsive (impact pile driving, rock hammering, DTH) and non-impulsive (vibratory pile driving, rotary drilling) noise and the corresponding area of the harassment zone within the ROI.

Calculated distances to Level A harassment and Level B harassment thresholds are large, especially for DTH and rock hammering activities. However, in most cases the full distance of sound propagation will not be reached due to the presence of land masses and anthropogenic structures that will prevent the noise from reaching nearly the full extent of the harassment isopleths. Refer to Figure 1–3 in the Navy's application for the ROI, which illustrates that the land masses preclude the sound from traveling more than approximately 870 m (3,000 ft) from the source, at most. Areas encompassed within the threshold (harassment zones) were calculated by using a Geographical Information System (GIS) to clip the maximum calculated distances to the extent of the ROI (see Figure 2).

Concurrent Activities—Simultaneous use of pile drivers, hammers, and drills could result in increased SPLs and harassment zone sizes given the proximity of the component sites and the rules of decibel addition (see Table 9 below). Due to the relatively small size of the ROI, the use of a single DTH cluster drill or rock hammer will ensonify the entire ROI to the Level A (PTS Onset) harassment thresholds (refer to Table 7). Therefore, when this equipment is operated in conjunction with other noise-generating equipment, there will be no change in the size of the harassment zone. The entire ROI will remain ensonified to the Level A harassment thresholds for the duration of the activity and there will be no Level B harassment zone. However, when DTH cluster drills or rock hammers are not in use, increased SPLs and harassment zone sizes within the ROI could result. Due to the substantial amount of rock hammering and DTH excavation required for the construction of the multifunctional expansion of Dry Dock 1, the only scenarios identified in which cluster drills and/or rock hammers will not be in operation will be at the end of the project (construction years 3 and 4) when two rotary drills or two rotary drills and a DTH mono-hammer (9-inch) could be used simultaneously (refer to Table 2).

When two noise sources have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources because the isopleth of one sound source encompasses the sound source of another isopleth. In such instances, the sources are considered additive and combined using the rules of decibel addition, presented in Table 9 below (NMFS, 2021d; WSDOT, 2020).

TABLE 9—ADJUSTMENTS FOR SOUND EXPOSURE LEVEL CRITERION

Source types	Difference in sound level (at specified meters)	Adjustments to specifications for Level A harassment RMS/SEL_{ss}* calculations
Non-impulsive, continuous/Non-impulsive, continuous, OR	0 or 1 dB	Add 3 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
	2 or 3 dB	Add 2 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
Impulsive source (multiple strikes per second)/Impulsive source (multiple strikes per second.	4 to 9 dB	Add 1 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).
	10 dB or more	Add 0 dB to the highest sound level (at specified meters) AND adjust number of piles per day to account for overlap (space and time).

* RMS level for vibratory pile driving/rotary hammer and single strike SEL (SEL_{ss}) level for DTH/rock hammer.

For simultaneous usage of three or more continuous sound sources, the three overlapping sources with the highest SLs are identified. Of the three highest SLs, the lower two are combined using the above rules, then the combination of the lower two is combined with the highest of the three. For example, with overlapping isopleths from 24-, 36-, and 42-inch diameter steel pipe piles with sound source levels of 161, 167, and 168 dB RMS respectively, the 24- and 36-inch would be added together; given that 167–161 = 6 dB, then 1 dB is added to the highest of the two sound source levels (167 dB), for a combined noise level of 168 dB. Next, the newly calculated 168 dB is added to the 42-inch steel pile with sound source levels of 168 dB. Since 168 − 168 = 0 dB, 3 dB is added to the highest value, or 171 dB in total for the combination of 24-, 36-, and 42-inch steel pipe piles (NMFS, 2021d). By using this method, revised proxy SPLs were determined for the use of two 102-inch diameter rotary drills and the use of two 108-inch rotary drills and one 9-inch DTH mono-hammer. The revised proxy values are presented in Table 10 and the resulting harassment zones are summarized in Table 11 (visually depicted in Figures 6–21 and 6–22 in the Navy's application).

TABLE 10—REVISED PROXY VALUES FOR SIMULTANEOUS USE OF NON-IMPULSIVE SOURCES

Source A		Source B		Revised proxy RMS SPL (dB re 1 μPa)
Equipment	RMS SPL (dB re 1 μPa)	Equipment	RMS SPL (dB re 1 μPa)	
Rotary Drill	154	Rotary Drill	154	157
Two Rotary Drills	157	DTH Mono-Hammer	167	167

TABLE 11—LEVEL A AND LEVEL B HARASSMENT ZONES RESULTING FROM CONCURRENT ACTIVITIES

Multiple source scenario	Level A harassment		Level B harassment
	High frequency cetaceans (harbor porpoise)	Phocid pinnipeds	All species
2 Rotary Drills (9 hrs)	23.6 m/0.001514 km^2	9.7 m/0.000294 km^2	2,929 m/0.417417 km^2.
2 Rotary Drills (9 hrs) and 1 DTH Mono-Hammer (5 hrs).	74.2 m/0.012773 km^2	30.5 m/0.002489 km^2	13,594 m/0.417417 km^2.

Marine Mammal Occurrence and Take Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information, that inform the take calculations. We also describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur.

Potential exposures to impact and vibratory pile driving, rotary drilling, DTH, and rock hammering noise for each acoustic threshold were estimated using marine mammal density estimates (N) from the Navy Marine Species Density Database (NMSDD; Navy, 2017) or from monitoring reports from the Berth 11 Waterfront Improvements and P–310 construction projects. Specifically, where monitoring data specific to the project area were available, they were used, and the NMSDD data were used when there were no monitoring data available. The take estimate was determined using the following equation: take estimate = N * days of activity * area of harassment. A 10 m shutdown zone designed to prevent animal interactions with equipment was subtracted from the Level A harassment zone, and the area of the Level A harassment zone was subtracted from the Level B harassment zone to avoid double counting of takes during these take calculations. Days of construction were conservatively based on relatively slow daily production rates. The pile type, size, and installation method that produce the largest zone of influence were used to estimate exposure of marine mammals to noise impacts. In instances where an activity will ensonify the entire ROI to the Level A harassment threshold, all potential takes are assumed to be by Level A harassment.

Because some construction activities will occur over more than 1 construction year, the number of takes per year were determined by the percent duration of each construction activity occurring each year (calculated by months). For example, if an activity were to occur for 6 months, with 3 months occurring in year 2 and 3 months occurring in year 3, then 50 percent of the takes were assigned to year 2 and 50 percent to year 3. In instances where only one take was calculated but activities spanned more than 1 construction year, one take was authorized for each construction year. Table 12 summarizes the calculated duration percentages for each activity that were used to divide take numbers by year.

TABLE 12—DIVISION OF TAKES BY CONSTRUCTION YEAR

Activity ID	Total amount and estimated dates	Activity component	Year 2 [1] % takes	Year 3 [1] % takes	Year 4 [1] % takes	Year 5 [1] % takes
(A1,2,3,4) Center Wall—Install Foundation Support Piles.	Drill 18 shafts *Apr 23 to Aug 23* ..	Install 102-inch diameter outer casing.	100	0	0	0
		Pre-drill 102-inch outer casing	100	0	0	0
		Remove 102-inch outer casing	100	0	0	0
		Drill 79-inch diameter shaft	100	0	0	0
(R) Dry Dock 1 North Entrance—Install Temporary Cofferdam.	Install 48 sheet piles *Apr 23 to May 23*.	28-inch wide Z-shaped sheets	100	0	0	0
(1) Berth 11—Remove Shutter Panels.	Remove 112 panels *Apr 23 to Apr 23*.	Concrete shutter panels	100	0	0	0
(2) Berth 1—Remove Sheet Piles	Remove 168 sheet piles *Apr 23 to Jun 24*.	25-inch-wide Z-shaped	80	20	0	0
(3) Berth 1—Remove Granite Block Quay Wall.	2,800 cy *Apr 23 to Jun 24*	Removal of granite blocks	80	20	0	0
(4) Berth 1—Top of Wall Removal for Waler Installation.	320 lf *Apr 23 to Jun 24*	Mechanical concrete removal	80	20	0	0
(5) Berth 1—Install southeast corner SOE.	Install 28 sheet piles Apr 23 to Jul 23.	28-inch-wide Z-shaped	100	0	0	0
(6) Berth 11—Mechanical Rock Removal at Basin Floor.	700 cy *Apr 23 to Aug 23*	Excavate Bedrock	100	0	0	0
(7) Berth 11 Face—Mechanical Rock Removal at Basin Floor.	Drill 924 relief holes *Apr 23 to Aug 23*.	4–6 inch diameter holes	100	0	0	0
(8) Temporary Cofferdam Extension.	Install 14 sheet piles *Apr 23 to Jun 23*.	28-inch-wide Z-shaped	100	0	0	0
(9a, b, c, d) Gantry crane Support Piles at Berth 1 West.	Drill 16 shafts *Apr 23 to Aug 23* ..	Set 102-inch diameter casing	100	0	0	0
		Pre-drill 102-inch rock socket	100	0	0	0
		Remove 102-inch casing	100	0	0	0
		72-inch diameter shafts	100	0	0	0
(10) Berth 1—Mechanical Rock Removal at Basin Floor.	500 cy *Apr 23 to Sep 23*	Excavate Bedrock	100	0	0	0
(11) Dry Dock 1 North Entrance—Drill Tremie Tie Downs.	Drill 50 rock anchors *Apr 23 to Oct 23*.	9-inch diameter holes	100	0	0	0
(12) Center Wall—Install Tie-In to Existing West Closure Wall.	Install 15 sheet piles *Apr 23 to Dec 23*.	28-inch wide Z-shaped	100	0	0	0
(13a, b, c, d) Dry Dock 1 North—Temporary Piles.	Drill 20 shafts *May 23 to Nov 24*	Set 102-inch diameter casing	60	40	0	0
		Pre-drill 102-inch rock socket	60	40	0	0
		Remove 102-inch casing	60	40	0	0
		84-inch diameter shafts	60	40	0	0
(14) Dry Dock 1 North—Remove Temporary Work Trestle Piles.	Remove 20 piles *May 23 to Nov 24*.	84-inch diameter drill piles	60	40	0	0
(15a, b, c, d) Dry Dock 1 North—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts *May 23—Nov 24* ..	Set 84-inch casing	60	40	0	0
		Pre-drill 84-inch rock socket	60	40	0	0
		Remove 84-inch casing	60	40	0	0
		78-inch diameter shaft	60	40	0	0
(16a, b, c, d) Wall Shafts for Dry Dock 1 North.	Drill 20 shafts *Jun 23 to Nov 24* ..	Set 102-inch diameter casing	60	40	0	0
		Pre-drill 102-inch rock socket	60	40	0	0
		Remove 102-inch casing	60	40	0	0
		Drill 78-inch diameter shaft	60	40	0	0
(17a, b, c, d) Foundation Shafts for Dry Dock 1 North.	Drill 23 shafts *Jun 23 to Nov 24* ..	Set 126-inch diameter Casing	60	40	0	0
		Pre-drill 126-inch rock socket	60	40	0	0
		Remove 126-inch casing	60	40	0	0

TABLE 12—DIVISION OF TAKES BY CONSTRUCTION YEAR—Continued

Activity ID	Total amount and estimated dates	Activity component	Year 2 [1] % takes	Year 3 [1] % takes	Year 4 [1] % takes	Year 5 [1] % takes
		Drill 108-inch diameter shafts	60	40	0	0
(18) Berth 11 End Wall—Remove Temporary Guide Wall.	Remove 60 sheet piles *Jul 23 to Aug 23*.	28-inch wide Z-shaped	100	0	0	0
(19) Remove Berth 1 southeast corner SOE.	Remove 28 sheet piles *Jul 23 to Sep 23*.	28-inch-wide Z-shaped	100	0	0	0
(20) Removal of Berth 1 Emergency Repair Sheet Piles.	Remove 216 sheet piles *Aug 23 to Mar 24*.	28-inch-wide Z-shaped	100	0	0	0
(21) Removal of Berth 1 Emergency Repair Tremie Concrete.	765 cubic meters (1,000 cy) *Aug 23 to Mar 24*.	Mechanical concrete removal	100	0	0	0
(22) Center wall foundation—Drill in monolith Tie Downs.	Install 72 rock anchors *Aug 23 to May 24*.	9-inch diameter holes	80	20	0	0
(23) Center Wall—Remove tie-in to existing west closure wall (Dry Dock 1 North).	Remove 16 sheet piles *Aug 23 to Aug 24*.	28-inch-wide Z-shaped	60	40	0	0
(24) Center wall East—sheet pile tie-in to Existing Wall.	Install 23 sheet piles *Aug 23 to Oct 24*.	28-inch wide Z-shaped	50	50	0	0
(25) Remove tie-in to West Closure Wall (Dry Dock 1 West).	Remove 15 sheet pile *Dec 23 to Dec 24*.	28-inch wide Z-shaped	30	70	0	0
(26) Remove Center wall East—sheet pile tie-in to Existing Wall (Dry Dock 1 West).	Remove 23 sheet piles *Dec 23 to Dec 24*.	28-inch wide Z-shaped	30	70	0	0
(27) Dry Dock 1 north entrance—Remove Temporary Cofferdam.	Remove 96 sheet piles *Jan 24 to Sep 24*.	28-inch wide Z-shaped	33	66	0	0
(28) Remove Temporary Cofferdam Extension.	Remove 14 sheet piles *Jan 24 to Sep 24*.	28-inch wide Z-shaped	33	66	0	0
(29a, b, c, d) Dry Dock 1 West—Install Temporary Piles.	Drill 20 shafts *Apr 24 to Feb 26* ..	Set 102-inch diameter casing	0	50	50	0
		Pre-drill 102-inch rock socket	0	50	50	0
		Remove 102-inch casing	0	50	50	0
		84-inch diameter shafts	0	50	50	0
(30) Dry Dock 1 West—Remove Temporary Work Trestle Piles.	Remove 20 piles *Apr 24 to Feb 26*.	84-inch diameter piles	0	50	50	0
(31a, b, c, d) Wall Shafts for Dry Dock 1 West.	Drill 22 shafts *Jun 24 to Feb 26* ..	Set 102-inch diameter casing	0	50	50	0
		Pre-drill 102-inch rock socket	0	50	50	0
		Remove 102-inch casing	0	50	50	0
		78-inch diameter shaft	0	50	50	0
(32a, b, c, d) Foundation Shafts for Dry Dock 1 West.	Drill 23 shafts *Jun 24 to Feb 26* ..	Set 126-inch casing	0	50	50	0
		Pre-drill 126-inch rock socket	0	50	50	0
		Remove 126-inch casing	0	50	50	0
		Drill 108-inch diameter shaft	0	50	50	0
(33a, b, c, d) Dry Dock 1 West—Install Leveling Piles (Diving Board Shafts).	Drill 18 shafts *Jun 24 to Feb 26* ..	Set 84-inch casing	0	50	50	0
		Pre-drill 84-inch rock socket	0	50	50	0
		Remove 84-inch casing	0	50	50	0
		Drill 78-inch diameter shaft	0	50	50	0
(34) Dry Dock 1 North—Tie Downs.	Install 36 rock anchors *Jul 24 to Jul 25*.	9-inch diameter holes	0	70	30	0
(35) Dry Dock 1 West—Install Tie Downs.	Install 36 rock anchors *Dec 25 to Dec 26*.	9-inch diameter hole	0	0	30	70

* Note, for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

We describe how the information provided above is brought together to produce a quantitative take estimate in the species sections below. A summary of authorized take is available in Table 16.

Harbor Porpoise

Harbor porpoises are expected to be present in the project area from April to December. Based on density data from the NMSDD, their presence is highest in spring, decreases in summer, and slightly increases in fall. During construction monitoring in the project area, there were three harbor porpoise observations between April and December of 2017; two harbor porpoise observations in early August of 2018; and one harbor porpoise observation in 2020 (Cianbro, 2018; Navy, 2019; NAVFAC, 2021). There were no harbor porpoise observations in the project area in 2021 (NAVFAC, 2022). Given that monitoring data specific to the project area are available, the more general NMSDD data were not used to determine species density in the project area. Instead, the Navy used observation data from the 2017 and 2018 construction monitoring for the Berth 11 Waterfront Improvements Project and determined that the density of harbor porpoise for the largest harassment zone was equal to 0.04/km^2. Estimated take was calculated with this density estimate multiplied by the harassment zone multiplied by the days for each activity (see Table 13).

TABLE 13—ESTIMATED TAKE OF HARBOR PORPOISE BY PROJECT ACTIVITY

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment					Level B harassment zone (km^2)	Take by Level B harassment				
						Total	Year 2	Year 3	Year 4	Year 5		Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.04	18	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.04	18	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.04	18	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2 DTH Cluster Drill.	Center Wall—Install Foundation Support Piles.	0.04	117	0.417417	2	2	0	0	0	0.417417	0	0	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.04	6	0.0014041	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.04	6	0.417417	0	0	0	0	0	0.417417	0	0	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	0.04	56	0.417417	1	1	0	0	0	0.277858	0	0	0	0	0
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	0.04	42	0.000454	0	0	0	0	0	0.417417	[1]2	1	1	0	0
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	0.04	47	0.417417	[1]2	1	1	0	0	0.277858	0	0	0	0	0
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	0.04	74	0.417417	[1]2	1	1	0	0	0.277858	0	0	0	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation.	0.04	8	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation ..	0.04	8	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	0.04	60	0.417417	1	1	0	0	0	0.277858	0	0	0	0	0
7	2 DTH Monohammer.	Relief Holes at Berth 11 Basin Floor.	0.04	35	0.047675	0	0	0	0	0	0.417417	1	1	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	0.04	4	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	0.04	4	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
9	2 Rotary Drill	Gantry Crane Support—Install Outer Casing.	0.04	16	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Pre-Drill Socket.	0.04	16	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Remove Outer Casing.	0.04	16	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2 DTH Cluster Drill.	Gantry Crane Support Piles	0.04	80	0.417417	1	1	0	0	0	0.417417	0	0	0	0	0
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	0.04	25	0.417417	0	0	0	0	0	0.277858	0	0	0	0	0
11	2 DTH Monohammer.	Dry Dock 1 North Entrance Rock Anchors.	0.04	25	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie-In to Existing West Closure Wall.	0.04	4	0.000454	0	0	0	0	0	0.417417	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	0.04	4	0.403411	0	0	0	0	0	0.417417	0	0	0	0	0
13	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0

TABLE 13—ESTIMATED TAKE OF HARBOR PORPOISE BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment					Level B harassment zone (km^2)	Take by Level B harassment				
						Total	Year 2	Year 3	Year 4	Year 5		Total	Year 2	Year 3	Year 4	Year 5
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	0.04	70	0.417417	[1]2	1	1	0	0	0.417417	0	0	0	0	0
14	2–3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
15	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.04	18	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	0.04	18	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.04	18	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	0.04	135	0.417417	2	1	1	0	0	0.417417	0	0	0	0	0
16	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North.	0.04	150	0.417417	3	2	1	0	0	0.417417	0	0	0	0	0
17	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	0.04	23	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts Pre-Drill Sockets.	0.04	23	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	0.04	23	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	0.04	196	0.417417	3	2	1	0	0	0.417417	0	0	0	0	0
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	0.04	10	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	0.04	5	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs.	0.04	18	0.000733	0	0	0	0	0	0.417417	1	1	0	0	0
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	0.04	15	0.417417	0	0	0	0	0	0.277858	0	0	0	0	0
22	2–3 DTH Monohammer.	Center Wall Foundation Rock Anchors.	0.04	36	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
23	2–3 Vibratory Extraction.	Dry Dock 1 North-Remove Center Wall Tie-in to West Closure Wall.	0.04	3	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
24	2–3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.04	12	0.000185	0	0	0	0	0	0.417417	0	0	0	0	0
	2–3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.04	12	0.334747	0	0	0	0	0	0.417417	0	0	0	0	0
25	2–3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	0.04	3	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
26	2–3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	0.04	12	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
27	2–3 Vibratory Extraction.	Remove Temporary Cofferdam	0.04	12	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	0.04	2	0.001041	0	0	0	0	0	0.417417	0	0	0	0	0

29	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	0.04	20	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	0.04	20	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	0.04	70	0.417417	[1]2	0	1	1	0	0.417417	0	0	0	0	0
30	3–4 Rotary Drill	Dry Dock 1 West Remove Temporary Work Trestle Piles.	0.04	20	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
31	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Install Outer Casing.	0.04	22	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	0.04	22	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	0.04	22	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West	0.04	165	0.417417	3	0	1	2	0	0.417417	0	0	0	0	0
32	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	0.04	23	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	0.04	23	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	0.04	23	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	0.04	196	0.417417	3	0	1	2	0	0.417417	0	0	0	0	0
33	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.04	18	0.000014	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	0.04	18	0.000248	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.04	18	0.000002	0	0	0	0	0	0.417417	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	0.04	135	0.417417	2	0	1	1	0	0.417417	0	0	0	0	0
34	3–4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors	0.04	18	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
35	4–5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	0.04	18	0.073751	0	0	0	0	0	0.417417	0	0	0	0	0
Total	.....	.....	.....	.....	.....	29	13	10	6	0	.....	4	3	[2]2	0	0

* **Note:** for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

[1] In instances where only 1 take was calculated but activities spanned more than 1 construction year, 1 take was requested by the Navy for each construction year.

[2] 1 take by Level B harassment was added to construction year 3 to account for average group size of harbor porpoises (see *https://www.fisheries.noaa.gov/species/harbor-porpoise#:~:text=The%20harbor%20porpoise%20is%20a,estuaries%2C%20harbors%2C%20and%20fjords*).

** No additional takes are expected to result from the simultaneous use of 2 rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of 2 rotary drills in construction year 4.

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is authorized.

Harbor Seal

Harbor seals may be present year-round in the project vicinity, with consistent densities throughout the year. Harbor seals are the most common pinniped in the Piscataqua River near the Shipyard. Sightings of this species were recorded during monthly surveys conducted in 2017 and 2018 (NAVFAC Mid-Atlantic, 2018, 2019b) as well as during Berth 11 and P–310 construction monitoring in 2017, 2018, 2020 and 2021 (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022), and therefore density estimates from these efforts were considered in the analysis. Based on observations recorded during the Berth 11 Waterfront Improvements (199 observations of harbor seals during year 1 and 249 observations of harbor seals during year 2 [448 total] over 322 days) and P–310 project construction monitoring (721 observations of harbor seals during year 1 and 451 observations of harbor seals during year 2 [1,172 total] over 349 days), harbor seal density was estimated to be 3.0/km^2 in the project area (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022).

Takes by Level A harassment were calculated for harbor seals where the density of animals (3 harbor seals/km^2) was multiplied by the harassment zone and the number of days per construction activity. This method was deemed to be inappropriate by the Navy for calculating takes by Level B harassment for harbor seals as it produced take numbers that were lower than the number of harbor seals that has been previously observed in the Navy's monitoring reports. Therefore, the Navy proposed (and NMFS concurred) to increase the estimated take by Level B harassment to more accurately reflect harbor seal observations in the monitoring reports, by using the value of three harbor seals observed a day multiplied by the total number of construction days (*i.e.,* 349 days), resulting in 1,047 takes per year by Level B harassment. This method is consistent with the methodology used to estimate takes by Level B harassment in IHA issued by NMFS for the first year of P–381 construction activities (87 FR 19866, April 6, 2022).

Additional takes by Level B harassment may occur during the simultaneous use of two rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of two rotary drills in construction year 4. The simultaneous use of 2 rotary drills will result in 28 additional takes by Level B harassment of harbor seals. The simultaneous use of 2 rotary drills and a DTH mono-hammer will result in 22 additional takes by Level B harassment of harbor seals. Note, the use of cluster drills and rock hammers in construction years 2 and 3 result in the entire ROI being ensonified to Level A harassment thresholds; therefore, there will be no change to the size of the harassment zones from concurrent construction activities during these years and thus no need to authorize additional takes. To account for concurrent activities in construction years 3 and 4, the Navy requested to add additional takes by Level B harassment to the estimated take numbers (22 harbor seal in construction year 3 and 50 harbor seal in construction year 4). Therefore the Navy requests and NMFS authorizes 1,047 takes by Level B harassment for harbor seals in construction year 2, 1,069 takes by Level B harassment for harbor seals in construction year 3, 1,097 takes by Level B harassment for harbor seals in construction year 4, and 1,047 takes by Level B takes for harbor seals in construction year 5 (note the division of takes over the construction years is summarized in Table 12).

Take by Level A harassment of harbor seals is shown in Table 14 below. Note that where the Level A harassment zone is as large as the Level B harassment zone and fills the entire potentially ensonified area, the enumerated takes in the Level A harassment column may be in the form of Level A harassment and/or Level B harassment, but are authorized as takes by Level A harassment. The authorized takes by Level B harassment are not included in Table 14 as they were calculated by a different method (*i.e.,* by using the value of three harbor seals observed per day multiplied by the total number of construction days; *i.e.,* 349 days).

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY

Activity ID	Year/ activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000005	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000091	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	3	18	0.000001	0	0	0	0	0
	2 DTH Cluster Drill	Center Wall—Install Foundation Support Piles.	3	117	0.417417	147	147	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	3	6	0.0002	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	3	6	0.364953	7	7	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	3	56	0.417417	70	70	0	0	0
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	3	42	0.000078	0	0	0	0	0
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	3	47	0.417417	59	47	12	0	0
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	3	74	0.417417	93	74	19	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation	3	8	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation	3	8	0..201158	5	5	0	0	0

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/ activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	3	60	0.417417	75	75	0	0	0
7	2 DTH Mono-hammer.	Relief Holes at Berth 11 Basin Floor	3	35	0.014413	1	1	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	3	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	3	4	0.201158	2	2	0	0	0
9	2 Rotary Drill	Gantry Crane Support—Install Outer Casing.	3	16	0.000005	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Pre-Drill Socket.	3	16	0.000091	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Remove Outer Casing.	3	16	0.000091	0	0	0	0	0
	2 DTH Cluster Drill	Gantry Crane Support Piles	3	80	0.417417	100	100	0	0	0
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	3	25	0.417417	31	31	0	0	0
11	2 DTH Mono-hammer.	Dry Dock 1 North Entrance Rock Anchors.	3	25	0.022912	2	2	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie-In to Existing West Closure Wall.	3	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	3	4	0.201158	2	2	0	0	0
13	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North TemporaryWork Trestle.	3	70	0.417417	88	53	35	0	0
14	2–3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	3	20	0.000002	0	0	0	0	0
15	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	3	18	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	3	18	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	3	18	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	3	135	0.417417	169	101	68	0	0
16	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North	3	150	0.417417	188	113	75	0	0
17	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	3	23	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts Pre-Drill Sockets.	3	23	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	3	23	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	3	196	0.417417	245	147	98	0	0
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	3	10	0.0002	0	0	0	0	0
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	3	5	0.0002	0	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs	3	18	0.000136	0	0	0	0	0
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	3	15	0.417417	19	19	0	0	0
22	2–3 DTH Mono-hammer.	Center Wall Foundation Rock Anchors.	3	36	0.022912	2	1	1	0	0
23	2–3 Vibratory Extraction.	Dry Dock 1 North—Remove Center Wall Tie-in to West Closure Wall.	3	3	0.0002	0	0	0	0	0
24	2–3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	3	12	0.000032	0	0	0	0	0
	2–3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	3	12	0.090757	3	2	1	0	0
25	2–3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	3	3	0.0002	0	0	0	0	0
26	2–3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	3	12	0.0002	0	0	0	0	0
27	2–3 Vibratory Extraction.	Remove Temporary Cofferdam	3	12	0.0002	0	0	0	0	0

TABLE 14—ESTIMATED TAKE BY LEVEL A HARASSMENT OF HARBOR SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/ activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	3	2	0.0002	0	0	0	0	0
29	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	3	20	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	3	20	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	3	20	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	3	70	0.417417	88	0	44	44	0
30	3–4 Rotary Drill	Dry Dock 1 West Remove Temporary Work Trestle Piles.	3	20	0.000002	0	0	0	0	0
31	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Install Outer Casing.	3	22	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	3	22	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	3	22	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West	3	165	0.417417	206	0	103	103	0
32	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	3	23	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	3	23	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	3	23	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	3	196	0.417417	245	0	122	123	0
33	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Install Outer Casing.	3	18	0.000005	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	3	18	0.000091	0	0	0	0	0
	3–4 Rotary Drill	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	3	18	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	3	135	0.417417	169	0	84	85	0
34	3–4 DTH Mono-hammer.	Dry Dock 1North Rock Anchors	3	18	0.022912	1	0	1	0	0
35	4–5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	3	18	0.022912	1	0	0	0	1
Total						2,018	999	663	355	1

* **Note:** for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is authorized.

Gray Seal

Gray seals may be present year-round in the project vicinity, with consistent densities throughout the year. Gray seals are less common in the Piscataqua River than the harbor seal. A total of nine sightings of gray seals were recorded during P–310 construction monitoring (NAVFAC, 2021, 2022). Density estimates of gray seals were based on the Berth 11 Waterfront Improvements (24 observations of gray seals during year 1 and 12 observations of gray seals during year 2 [36 total] over 322 days) and P–310 project construction monitoring (47 observations of gray seals during year 1 and 21 observations of gray seals during year 2 [68 total] over 349 days) and was estimated to be 0.2/km^2 (Cianbro, 2018; Navy, 2019; NAVFAC, 2021, 2022). These data were preferred in this analysis over the more general density data from the NMSDD.

Takes by Level A harassment were calculated for gray seals where the density of animals (0.2 gray seals/km^2) was multiplied by the harassment zone and the number of days per construction activity. This method was deemed to be inappropriate by the Navy for calculating takes by Level B harassment for gray seals as it produced take that were fewer than the number of gray seals that has been previously observed in the Navy's monitoring reports. Therefore, the Navy proposed (and NMFS concurred), to increase the take by Level B harassment to more accurately reflect gray seal observations in the monitoring reports, by using the value of 0.2 gray seals a day multiplied by the total number of construction days (*i.e.,* 349 days) resulting in 70 takes by Level B harassment authorized per year. This method is consistent with the methodology used to estimate takes by Level B harassment in IHA issued by NMFS for the first year of P–381 construction activities (87 FR 19866; April 6, 2022).

Additional takes by Level B harassment may occur during the simultaneous use of two rotary drills and a DTH mono-hammer in construction years 3 and 4 and the simultaneous use of two rotary drills in construction year 4. The simultaneous use of two rotary drills will result in two additional Level B takes of gray seals. The simultaneous use of two rotary drills and a DTH mono-hammer will result in one additional Level B take of

gray seals. Note, the use of cluster drills and rock hammers in construction years 2 and 3 result in the entire ROI being ensonified to Level A harassment thresholds; therefore, there will be no change to the size of the harassment zones from concurrent construction activities during these years and thus no need to request additional takes. To account for concurrent activities in construction years 3 and 4, the Navy requested additional takes by Level B harassment to the take numbers (one gray seal in construction year 3 and three gray seals in construction year 4). Therefore the Navy requests and NMFS authorizes 70 takes by Level B takes for gray seals in construction year 2, 71 takes by Level B harassment for gray seals in construction year 3, 73 takes by Level B harassment for gray seals in construction year 4, and 70 takes by Level B harassment for gray seals in construction year 5 (note the division of takes over the construction years is summarized in Table 12).

Take by Level A harassment of gray seals is shown in Table 15 below. Note that where the Level A harassment zone is as large as the Level B harassment zone and fills the entire potentially ensonified area, the enumerated takes in the Level A harassment column may be in the form of Level A harassment and/or Level B harassment, but will be authorized as takes by Level A harassment. The authorized takes by Level B harassment are not included in Table 15 as they were calculated by a different method (*i.e.,* by using the value of 0.2 gray seals observed a day multiplied by the total number of construction days; *i.e.,* 349 days).

TABLE 15—ESTIMATED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
A	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000005	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000091	0	0	0	0	0
	2 Rotary Drill	Center Wall—Install Foundation Support Piles.	0.2	18	0.000001	0	0	0	0	0
	2 DTH Cluster Drill.	Center Wall—Install Foundation Support Piles.	0.2	117	0.417417	10	10	0	0	0
R	2 Vibratory Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.2	6	0.0002	0	0	0	0	0
	2 Impact Pile Driving.	Dry Dock 1 North Entrance—Install Temporary Cofferdam.	0.2	6	0.364953	0	0	0	0	0
1	2 Hydraulic Rock Hammer.	Shutter Panel Demolition (112 panels).	0.2	56	0.417417	5	5	0	0	0
2	2–3 Vibratory Extraction.	Remove Berth 1 Sheet Piles	0.2	42	0.000078	0	0	0	0	0
3	2–3 Hydraulic Rock Hammer.	Removal of Granite Quay Wall (2,800 cy).	0.2	47	0.417417	4	3	1	0	0
4	2–3 Hydraulic Rock Hammer.	Berth 1 Top of Wall Demolition for Waler Install (320 lf).	0.2	74	0.417417	6	5	1	0	0
5	2 Vibratory Pile Driving.	Install Berth 1 Support of Excavation.	0.2	8	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Berth 1 Support of Excavation	0.2	8	0.201158	0	0	0	0	0
6	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (700 cy) at Berth 11 Basin Floor.	0.2	60	0.417417	5	5	0	0	0
7	2 DTH Monohammer.	Relief Holes at Berth 11 Basin Floor.	0.2	35	0.014413	0	0	0	0	0
8	2 Vibratory Pile Driving.	Install Temporary Cofferdam Extension.	0.2	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Temporary Cofferdam Extension	0.2	4	0.201158	0	0	0	0	0
9	2 Rotary Drill	Gantry Crane Support—Install Outer Casing.	0.2	16	0.000005	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Pre-Drill Socket.	0.2	16	0.000091	0	0	0	0	0
	2 Rotary Drill	Gantry Crane Support—Remove Outer Casing.	0.2	16	0.000091	0	0	0	0	0
	2 DTH Cluster Drill.	Gantry Crane Support Piles	0.2	80	0.417417	7	7	0	0	0
10	2 Hydraulic Rock Hammer.	Mechanical Rock Removal (300 cy) at Berth 1 Basin Floor.	0.2	25	0.417417	2	2	0	0	0
11	2 DTH Monohammer.	Dry Dock 1 North Entrance Rock Anchors.	0.2	25	0.022912	0	0	0	0	0
12	2 Vibratory Pile Driving.	Center Wall Tie- In to Existing West Closure Wall.	0.2	4	0.000078	0	0	0	0	0
	2 Impact Pile Driving.	Center Wall Tie-in to West Closure Wall.	0.2	4	0.201158	0	0	0	0	0
13	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill	Dry Dock 1 North Temporary Work Trestle—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Temporary Work Trestle.	0.2	70	0.417417	6	4	2	0	0
14	2–3 Rotary Drill	Remove Dry Dock 1 North Temporary Work Trestle Piles.	0.2	20	0.000002	0	0	0	0	0

TABLE 15—ESTIMATED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
15	2–3 Rotary Drill ..	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.2	18	0.000005	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Leveling Piles—Pre-Drill Socket.	0.2	18	0.000091	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.2	18	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Dry Dock 1 North Leveling Piles (Diving Board Shafts).	0.2	135	0.417417	11	7	4	0	0
16	2–3 Rotary Drill ..	Dry Dock 1 North Wall Shafts—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Wall Shafts—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Wall Shafts—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 North ..	0.2	150	0.417417	13	8	5	0	0
17	2–3 Rotary Drill ..	Dry Dock 1 North Foundation Shafts—Install Outer Casing.	0.2	23	0.000005	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Foundation Shafts Pre-Drill Sockets.	0.2	23	0.000091	0	0	0	0	0
	2–3 Rotary Drill ..	Dry Dock 1 North Foundation Shafts—Remove Outer Casing.	0.2	23	0.000001	0	0	0	0	0
	2–3 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 North.	0.2	196	0.417417	16	10	6	0	0
18	2 Vibratory Extraction.	Berth 11 End Wall Temporary Guide Wall.	0.2	10	0.0002	0	0	0	0	0
19	2 Vibratory Extraction.	Remove Berth 1 Support of Excavation.	0.2	5	0.0002	0	0	0	0	0
20	2 Vibratory Extraction.	Remove Berth 1 Emergency Repairs.	0.2	18	0.000136	0	0	0	0	0
21	2 Hydraulic Rock Hammer.	Removal of Emergency Repair Concrete (500 cy) at Berth 1.	0.2	15	0.417417	1	1	0	0	0
22	2–3 DTH Monohammer.	Center Wall Foundation Rock Anchors.	0.2	36	0.022912	0	0	0	0	0
23	2–3 Vibratory Extraction.	Dry Dock North-Remove Center Wall Tie-in to West Closure Wall.	0.2	3	0.0002	0	0	0	0	0
24	2–3 Vibratory Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.2	12	0.000032	0	0	0	0	0
	2–3 Impact Pile Driving.	Center Wall East Tie-in to Existing Wall.	0.2	12	0.090757	0	0	0	0	0
25	2–3 Vibratory Extraction.	Dry Dock 1 West Remove Center Wall Tie-in to West Closure Wall.	0.2	3	0.0002	0	0	0	0	0
26	2–3 Vibratory Extraction.	Remove Center Wall Tie-in to Existing Wall.	0.2	12	0.0002	0	0	0	0	0
27	2–3 Vibratory Extraction.	Remove Temporary Cofferdam	0.2	12	0.0002	0	0	0	0	0
28	2–3 Vibratory Extraction.	Remove Temporary Cofferdam Extension.	0.2	2	0.0002	0	0	0	0	0
29	3–4 Rotary Drill ..	Dry Dock 1 West Temporary Work Trestle—Install Outer Casing.	0.2	20	0.000005	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Temporary Work Trestle—Pre-Drill Socket.	0.2	20	0.000091	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Temporary Work Trestle—Remove Outer Casing.	0.2	20	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Temporary Work Trestle.	0.2	70	0.417417	6	0	3	3	0
30	3–4 Rotary Drill ..	Dry Dock 1 West Remove Temporary Work Trestle Piles.	0.2	20	0.000002	0	0	0	0	0
31	3–4 Rotary Drill ..	Dry Dock 1 West Wall Shafts—Install Outer Casing.	0.2	22	0.000005	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Wall Shafts—Pre-Drill Socket.	0.2	22	0.000091	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Wall Shafts—Remove Outer Casing.	0.2	22	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Wall Shafts for Dry Dock 1 West ...	0.2	165	0.417417	14	0	7	7	0
32	3–4 Rotary Drill ..	Dry Dock 1 West Foundation Shafts—Install Outer Casing.	0.2	23	0.000005	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Foundation Shafts Pre-Drill Sockets.	0.2	23	0.000091	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Foundation Shafts—Remove Outer Casing.	0.2	23	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Foundation Shafts for Dry Dock 1 West.	0.2	196	0.417417	16	0	8	8	0
33	3–4 Rotary Drill ..	Dry Dock 1 North Leveling Piles—Install Outer Casing.	0.2	18	0.000005	0	0	0	0	0
	3–4 Rotary Drill ..	Dry Dock 1 West Leveling Piles—Pre-Drill Socket.	0.2	18	0.000091	0	0	0	0	0

TABLE 15—ESTIMATED TAKE BY LEVEL A HARASSMENT OF GRAY SEAL BY PROJECT ACTIVITY—Continued

Activity ID	Year/activity	Purpose	Density	Total production days	Level A harassment zone (km^2)	Take by Level A harassment				
						Total	Year 2	Year 3	Year 4	Year 5
	3–4 Rotary Drill ..	Dry Dock 1 North Leveling Piles—Remove Outer Casing.	0.2	18	0.000001	0	0	0	0	0
	3–4 DTH Cluster Drill.	Dry Dock 1 West Leveling Piles (Diving Board Shafts).	0.2	135	0.417417	11	0	6	5	0
34	3–4 DTH Mono-hammer.	Dry Dock 1 North Rock Anchors ...	0.2	18	0.022912	0	0	0	0	0
35	4–5 DTH Mono-hammer.	Dry Dock 1 West Rock Anchors	0.2	18	0.022912	0	0	0	0	0
Total						133	67	43	23	0

*Note: for the purposes of this analysis, the construction years are identified as years 2 through 5; takes for marine mammals during Year 1 of the Navy's construction activities were authorized in a previously issued IHA (87 FR 19886, April 6, 2022).

Although no construction activity is currently planned for the final year of the LOA period (construction year 6), potential schedule slips may occur as a result of equipment failure, inclement weather, or other unforeseen events. However, potential takes that could occur during year 6 as a result of delays to activities scheduled for years 2–5 are accounted for through the analyses for those years, and no additional take is authorized.

Hooded Seal

Hooded seals may be present in the project vicinity from January through May, though their exact seasonal densities are unknown. In general, hooded seals are much rarer than the harbor seal and gray seal in the Piscataqua River. NMFS authorized one take by Level B harassment per month from January to May of a hooded seal for the Berth 11 Waterfront Improvements Construction project (NMFS, 2018b) and for P–310 (Super Flood Basin) (NMFS, 2016; NMFS, 2019; NMFS, 2021c). To date, the monitoring for those projects and for the density surveys have not recorded a sighting of hooded seal in the project area (Cianbro, 2018; NAVFAC Mid-Atlantic, 2018, 2019b; Navy 2019; NAVFAC, 2021, 2022). In order to guard against the potential for unauthorized take, the Navy again requested one take by Level B harassment of hooded seal per month (between the months of January and May) for each construction year. Therefore NMFS authorizes five takes by Level B harassment per year. Given the size of the shutdown zones in relation to the Level A harassment isopleths (see the Mitigation section below), NMFS also authorizes five takes by Level A harassment per year to safeguard against unauthorized take of hooded seals that may occur unnoticed in the Level A harassment zone for sufficient duration to incur PTS.

Harp Seal

In general, harp seals are much rarer than the harbor seal and gray seal in the Piscataqua River. Harp seals were not observed during marine mammal monitoring or survey events that took place in 2017, 2018, or 2021 (Cianbro, 2018; NAVFAC Mid-Atlantic, 2018, 2019b; Navy, 2019; NAVFAC, 2021, 2022); however, two harp seals (n=2) were observed in the River in 2020 (Stantec, 2020), and another harp seal was observed in 2016 (NAVFAC Mid-Atlantic, 2016; NMFS, 2016). As above for hooded seals, NMFS is authorizing one take by Level B harassment of harp seal per month of construction (between the months of January and May) for each construction year as was authorized by NMFS for the Berth 11 Waterfront Improvements Project (NMFS, 2018b) and for P–310 (Super Flood Basin) construction activities (NMFS, 2019, 2021a). Harp seals may occur in the area from January through May. Anticipating one Level B harassment harp seal take per month for 5 months per year during in-water construction will guard against potential unauthorized take of this species. Given the size of the shutdown zones in relation to the Level A harassment isopleths (see the Mitigation section below), NMFS also authorizes five takes by Level A harassment per year to safeguard against unauthorized take of harp seals that may occur unnoticed in the Level A harassment zone for sufficient duration to incur PTS.

Table 16 below summarizes the authorized take for all the species described above as a percentage of stock abundance.

TABLE 16—AUTHORIZED TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Construction year	Species	Stock (N_{EST})	Authorized take by Level A harassment	Authorized take by Level B harassment	Total authorized take	Percent of stock
2—Apr 2023–Mar 2024.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	13	3	16	0.02
	Harbor seal	Western North Atlantic (61,336)	999	1,047	2,046	3.33
	Gray seal	Western North Atlantic (451,600)	67	70	137	0.03
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
3—Apr 2024–Mar 2025.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	10	2	12	0.01
	Harbor seal	Western North Atlantic (61,336)	663	1,069	1,732	2.82
	Gray seal	Western North Atlantic (451,600)	43	71	114	0.03
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
4—Apr 2025–Mar 2026.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	6	0	6	0.01

TABLE 16—AUTHORIZED TAKE AS A PERCENTAGE OF STOCK ABUNDANCE—Continued

Construction year	Species	Stock (N_{EST})	Authorized take by Level A harassment	Authorized take by Level B harassment	Total authorized take	Percent of stock
	Harbor seal	Western North Atlantic (61,336)	355	1,097	1,452	2.37
	Gray seal	Western North Atlantic (451,600)	23	73	96	0.02
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	≤Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
5—Apr 2026–Mar 2027.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	0	0	0	0
	Harbor seal	Western North Atlantic (61,336)	1	1,047	1,048	1.71
	Gray seal	Western North Atlantic (451,600)	0	70	70	0.02
	Harp seal	Western North Atlantic (7.6 million)	5	5	10	<0.01
	Hooded seal	Western North Atlantic (593,500)	5	5	10	<0.01
6—Apr 2027–Mar 2028.	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	0	0	0	<0.01
	Harbor seal	Western North Atlantic (61,336)	0	0	0	<0.01
	Gray seal	Western North Atlantic (451,600)	0	0	0	<0.01
	Harp seal	Western North Atlantic (7.6 million)	0	0	0	<0.01
	Hooded seal	Western North Atlantic (593,500)	0	0	0	<0.01
Total Authorized Take [1].	Harbor porpoise	Gulf of Maine/Bay of Fundy (95,543)	29	5	34	NA
	Harbor seal	Western North Atlantic (61,336)	2,018	4,260	6,278	NA
	Gray seal	Western North Atlantic (451,600)	133	284	438	NA
	Harp seal	Western North Atlantic (7.6 million)	25	25	50	NA
	Hooded seal	Western North Atlantic (593,500)	25	25	50	NA

[1] The total authorized take does not include take that may occur in year 6 as a result of schedule delays, as these potential takes are already accounted for in previous years.

Mitigation

In order to issue an LOA under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations.

The following mitigation measures apply to the Navy's in-water construction activities.

General

In-water construction activities must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone. If such circumstances recur, the Navy will consult with NMFS concerning the potential need for an additional take authorization.

Coordination

The Navy shall conduct briefings between construction supervisors and crews, the marine mammal monitoring team, and Navy staff prior to the start of in-water construction activities and when new personnel join the work, to ensure that responsibilities, communication procedures, marine mammal monitoring protocols, and operational procedures are clearly understood.

Soft Start

The Navy shall use soft start techniques when impact pile driving. The objective of a soft start is to provide a warning and/or give animals in close proximity to pile-driving a chance to leave the area prior to an impact driver operating at full capacity, thereby exposing fewer animals to loud underwater and airborne sounds. Soft start requires contractors to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. Note the number of strikes will vary at reduced energy because raising the hammer at less than full power and then releasing it results in the hammer ''bouncing'' as it strikes the pile, resulting in multiple ''strikes.'' A soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft start is not applicable to other in-water construction activities.

Bubble Curtain

During construction of the multifunctional expansion of Dry Dock 1, portions of the west closure wall and/or the super flood basin caisson gate may not be in place. A bubble curtain

will be installed across the entrance openings to mitigate underwater noise impacts outside of the basin for those activities where Level A harassment thresholds are achieved across the entire ROI (*i.e.,* cluster drill and hydraulic rock hammering (Table 7)). A bubble curtain similar to the one employed during P–310 blasting activities and proposed for use during P–381 year 1 construction will be used to minimize potential impacts outside of the basin. Hydroacoustic monitoring will be conducted inside of the bubble curtain to measure construction generated noise levels. Should the results of the recordings inside the bubble curtain show that the source levels do not result in the Level A harassment thresholds being achieved across the entire ROI by the activity occurring, upon review of the data by NMFS, the Navy may discontinue use of the bubble curtain for those activities that are not actually exceeding thresholds. The bubble curtain must adhere to the following restrictions:

- The bubble curtain must distribute air bubbles across 100 percent of the entrance openings for the full depth of the water column;
- The lowest bubble ring must be in contact with the substrate for the full extent of the curtain, and the weights attached to the bottom of the curtain must ensure 100 percent substrate contact. No parts of the curtain or other objects shall prevent full substrate contact; and
- Air flow to the bubblers must be balanced around the entrance openings to the superflood basin.

Avoiding Direct Physical Interaction

During all in-water construction activities, in order to prevent injury from physical interaction with construction equipment, a shutdown zone of 10 m (33 ft) will be implemented. If a marine mammal comes within 10 m (33 ft) of such activity, operations shall cease and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions. If human safety is at risk, the in-water activity will be allowed to continue until it is safe to stop.

Shutdown Zones

The Navy shall establish shutdown zones for all in-water construction activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 17). The shutdown zone distances for rock hammering, impact pile-driving of sheet piles, and DTH excavation (200 m (656 ft) for harbor porpoise and 50 m (164 ft) for seals) are consistent with those implemented for the same activities for P–381 year 1 construction activities (NMFS, 2022a; 87 FR 19886, April 6, 2022). NMFS has determined that these shutdown zones represent the largest area that can practicably be monitored.

TABLE 17—PILE DRIVING SHUTDOWN ZONE AND MONITORING ZONES DURING PROJECT ACTIVITIES

LOA year	Activity, size, and component	Shutdown zone (m)		Monitoring zone [1] (km^2)
		Harbor porpoise	Seals	
2	Rock Hammering [2]	200	50	ROI.[3]
2	Impact Pile Driving—8 sheet piles per day	200	50	ROI.[4]
2	Impact Pile Driving—4 sheet piles per day	200	50	ROI.[4]
2/3	Impact Pile Driving—2 sheet piles per day	200	50	ROI.[4]
2/3	Vibratory Pile Driving/Extraction—8 sheet piles per day	20	10	ROI.[4]
2	Vibratory Pile Driving/Extraction—6 sheet piles per day	20	10	ROI.[4]
2	Vibratory Pile Driving/Extraction—4 sheet piles per day	15	10	ROI.[4]
2/3	Vibratory Pile Driving/Extraction—2 sheet piles per day	10	10	ROI.[4]
2	DTH mono-hammer 4–6 inch relief holes	180	50	ROI.[4]
2/3/4/5	DTH mono-hammer 9-inch rock anchors for tie-downs	200	50	ROI.[4]
2/3/4	Rotary Drilling—1 hour to set casings	10	10	ROI.[4]
2/3/4	Rotary drilling—9 hours to drill socket	10	10	ROI.[4]
2/3/4	Rotary Drilling—15 minutes to remove casings and temporary work trestle piles.	10	10	ROI.[4]
2/3/4	Cluster Drilling [2]	200	50	ROI.[3 4]

[1] In instances where the harassment zone is larger than the region of influence (ROI), the entire ROI is indicated as the limit of monitoring (see Figure 1–3 in the Navy's application).
[2] Activities will employ a bubble curtain to reduce underwater noise impacts outside of the basin.
[3] The entire ROI will be ensonified to the Level A threshold.
[4] The entire ROI will be ensonified to the Level B threshold.

The Navy must delay or shutdown in-water construction activities should a marine mammal approach or enter the appropriate shutdown zone. The Navy may resume activities after one of the following conditions have been met: (1) the animal is observed exiting the shutdown zone; (2) the animal is thought to have exited the shutdown zone based on a determination of its course, speed, and movement relative to the pile driving location; or (3) the shutdown zone has been clear from any additional sightings for 15 minutes.

Protected Species Observers

The Navy shall employ at least three protected species observers (PSOs) to monitor marine mammal presence in the action area during all in-water construction activities. Additional PSOs may be added if warranted by site conditions (rough seas, rain) and the level of marine mammal activity. All PSOs will be approved by NMFS and the Navy prior to starting work as a PSO. PSOs must track marine mammals observed anywhere within their visual range relative to in-water construction activities, and estimate the amount of time a marine mammal spends within the Level A or Level B harassment zones while construction activities are underway.

Monitoring must take place from 30 minutes prior to initiation of pile driving or drilling activity (*i.e.,* pre-start clearance monitoring) through 30

minutes post-completion of pile driving or drilling activity. Pre-start clearance monitoring must be conducted for 30 minutes to ensure that the shutdown zones indicated in Table 17 are clear of marine mammals, and pile driving or drilling may commence when observers have declared the shutdown zone clear of marine mammals. Monitoring must occur throughout the time required to drive/drill a pile. If work ceases for more than 30 minutes, the pre-start clearance monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

The placement of PSOs during all pile driving and drilling activities (described in the Monitoring and Reporting section) must ensure that the entire shutdown zone and Level A harassment zone is visible during pile driving and drilling. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone or Level A harassment zone will not be visible (*e.g.,* fog, heavy rain), in-water construction activities must be delayed until the PSO is confident marine mammals within the shutdown zone or Level A harassment zone could be detected. However, if work on a pile has already begun, work is allowed to continue until that pile is installed.

If an in-water construction activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone indicated in Table 17 or 15 minutes have passed without re-detection of the animal. If in-water construction activities cease for more than 30 minutes, the pre-activity monitoring of the shutdown zone must commence.

Based on our evaluation of the applicant's planned measures, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Under the MMPA implementing regulations, monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of the construction covered by this rule. The plan will incorporate all monitoring and mitigation measures and reporting requirements of the incidental take regulations.

Monitoring Zones

The Navy shall conduct monitoring to include the entire ROI, which includes the area within the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB RMS threshold for impact driving and hydraulic rock hammering, and the 120 dB RMS threshold during vibratory pile driving, rotary drilling, and DTH) (see Table 7 and 8). These monitoring zones provide utility for monitoring conducted for mitigation purposes (*i.e.,* shutdown zone monitoring) by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring of these zones enables observers to be aware of and communicate the presence of marine mammals in the project area, but outside the shutdown zone, and thus prepare for potential shutdowns of activity.

Protected Species Observer (PSO) Monitoring Requirements and Locations

PSOs shall be responsible for monitoring the shutdown zones, the monitoring zones and the pre-clearance zones, as well as effectively documenting takes by Level A and B harassment. As described in more detail in the Marine Mammal Monitoring Reporting section below, they shall also (1) document the frequency at which marine mammals are present in the project area, (2) document behavior and group composition, (3) record all construction activities, and (4) document observed reactions (changes in behavior or movement) of marine mammals during each sighting. The PSOs shall monitor for marine mammals during all in-water construction activities associated with the project. The Navy shall monitor the project area to the extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. Visual monitoring shall be conducted by three PSOs. It is assumed that three PSOs shall be located on boats, docks, or piers sufficient to monitor the respective ROIs given the abundance of suitable vantage points (see Figure 11–1 of the Navy's application). The PSOs must record all observations of marine mammals, regardless of distance from the in-water construction activity.

Monitoring of in-water construction activities shall be conducted by qualified, PSOs. The Navy shall adhere to the following conditions when selecting PSOs:

- PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training;

- Where a team of three PSOs are required, a lead observer or monitoring coordinator shall be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this rule.

The Navy will ensure that the PSOs have the following additional qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- Experience and ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Hydroacoustic Monitoring

The Navy shall conduct a sound source verification (SSV) study effort to measure SPLs from in-water construction activities not previously monitored as part of P–310 or as part of P–381 year 1 construction. The Navy will collect and evaluate acoustic sound record levels for the rock excavation (rotary drilling or DTH excavation) activities conducted up to a maximum limit of 10 piles/holes. One hydrophone will be placed at locations 10 m (33 ft) from the noise source and a second hydrophone will be placed at a representative monitoring location at an intermediate distance between the cetacean and phocid shutdown zones. These locations will be adhered to as practicable given safety considerations and levels of activity in the basin. For the 10 rock excavation (rotary drilling or DTH excavation) events acoustically measured, 100 percent of the data will be analyzed.

At a minimum, the methodology includes:

- For underwater recordings, a stationary hydrophone system with the ability to measure SPLs will be placed in accordance with NMFS' most recent guidance for the collection of source levels (NMFS, 2012).
- Hydroacoustic monitoring will be conducted for each type of activity not previously monitored under P–310 or the P–381 year 1 IHA up to a maximum limit of 10 piles/holes (Table 18). Monitoring will occur from the same locations approved by NMFS for P–310 construction activities. The resulting data set will be analyzed to examine and confirm sound pressure levels and rates of TL for each separate in-water construction activity. With NMFS concurrence, these measurements may be used to recalculate the limits of shutdown and Level A and Level B harassment zones, as appropriate. Hydrophones will be placed in the same manner as for P–310 construction activities. Locations of hydroacoustic recordings will be collected via global positioning system. A depth sounder and/or weighted tape measure will be used to determine the depth of the water. The hydrophone will be attached to a-weighted nylon cord or chain to maintain a constant depth and distance from the pile/drill/hammer location. The nylon cord or chain will be attached to a float or tied to a static line.

TABLE 18—HYDROACOUSTIC MONITORING SUMMARY

Pile type/shaft size	Number installed/ removed	Method of install/removal	Number monitored
126-inch shaft	138	Rotary Drill	10
84-inch shaft	148	Rotary Drill	10
108-inch shaft	46	DTH Cluster Drill	10
84-inch shaft	40	DTH Cluster Drill	10
72-inch shaft	16	DTH Cluster Drill	10

- Each hydrophone will be calibrated at the start of each action and will be checked frequently to the applicable standards of the hydrophone manufacturer.
- For each monitored location, a single hydrophone will be suspended midway in the water column in order to evaluate site-specific attenuation and propagation characteristics that may be present throughout the water column.
- Environmental data will be collected, including but not limited to, the following: wind speed and direction, air temperature, humidity, surface water temperature, water depth, wave height, weather conditions, and other factors that could contribute to influencing the airborne and underwater sound levels (*e.g.,* aircraft, boats, *etc.*).
- The chief inspector will supply the acoustics specialist with the substrate composition, hammer/drill model and size, hammer/drill energy settings, depth of drilling, and boring rates and any changes to those settings during the monitoring.
- For acoustically monitored construction activities, data from the continuous monitoring locations will be post-processed to obtain the following sound measures:
  - Maximum peak sound pressure level recorded for all activities, expressed in dB re 1 µPa. This maximum value will originate from the phase of drilling/hammering during which drill/hammer energy was also at maximum (referred to as Level 4).
  - From all activities occurring during the Level 4 phase these additional measures will be made, as appropriate:
- Mean, median, minimum, and maximum RMS sound pressure level in (dB re 1 µPa);
- Mean duration of a pile strike (based on the 90 percent energy criterion);
- Number of hammer strikes;
- Mean, median, minimum, and maximum single strike SEL (dB re μPa^2 sec);
  - Median integration time used to calculate SPL RMS (for vibration

monitoring, the time period selected is 1-second intervals. For impulsive monitoring, the time period is 90 percent of the energy pulse duration).

- A frequency spectrum (power spectral density) (dB re µPa² per Hz) based on all strikes with similar sound. Spectral resolution will be 1 Hz, and the spectrum will cover nominal range from 7 Hz to 20 kHz.
- Finally, the cumulative SEL will be computed from all the strikes associated with each pile occurring during all phases, *i.e.,* soft start, Level 1, to Level 4. This measure is defined as the sum of all single strike SEL values. The sum is taken of the antilog, with $\log_{10}$ taken of result to express (dB re µPa² sec).

Marine Mammal Monitoring Reporting

The Navy shall submit annual draft reports to NMFS for each construction year within 90 calendar days of the completion of marine mammal monitoring as well as a draft 5-year comprehensive summary report at the end of the project. The report(s) will detail the monitoring protocol and summarize the data recorded during monitoring. Annual reports will also include results from acoustic monitoring (see below). Final annual report(s) (each portion of the project and comprehensive) must be prepared and submitted to NMFS within 30 days following resolution of any NMFS comments on the draft reports. If no comments are received from NMFS within 30 days of receipt of the draft report, the report shall be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

A draft 5-year comprehensive summary report shall be submitted to NMFS 90 days after the expiration of the regulations. The draft report will synthesize the data recorded during hydroacoustic and marine mammal monitoring. NMFS will provide comments within 30 days after receiving this draft report, and the Navy will address the comments and submit revisions within 30 days of receipt. If no comment is received from NMFS within 30 days, the draft report will be considered as final.

All draft and final marine mammal monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.tyson.moore@noaa.gov.* The report must contain the following informational elements, at minimum, (and be included in the Marine Mammal Monitoring Plan), including:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including:
  - How many and what type of piles/shafts were driven and by what method (*e.g.,* impact, vibratory, rotary drilling, rock hammering, mono- or cluster-DTH); and
  - Total duration of driving time for each pile/hole (vibratory driving, rotary drilling) and number of strikes for each pile/hole (impact driving, hydraulic rock hammering); and
  - For DTH excavation, the duration of operation for both impulsive and non-pulse components, as well as the strike rate.
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information:
  - PSO who sighted the animal and PSO location and activity at time of sighting;
  - Time of sighting;
  - Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;
  - Distance and bearing of each marine mammal observed relative to the in-water construction activity for each sighting (if the in-water construction was occurring at time of sighting);
  - Estimated number of animals (minimum/maximum/best);
  - Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.;*
  - Animal's closest point of approach and estimated time spent within each harassment zone; and
  - Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses to the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species;
- Detailed information about implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal, if any; and
- All PSO datasheets and/or raw sightings data.

The draft and final reports must also contain the informational elements described in the Hydroacoustic Monitoring Plan which, at minimum, must include:

- *Hydrophone equipment and methods:* recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);
- Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.,* hammer model and energy), and total pile driving duration;
- Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;
- For impact pile driving and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 µPa): root mean square sound pressure level (SPLrms); cumulative sound exposure level (SELcum), peak sound pressure level (SPLpeak), and single-strike sound exposure level (SELs-s);
- For vibratory driving/removal and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 µPa): root mean square sound pressure level (SPLrms), cumulative sound exposure level (SELcum) (and timeframe over which the sound is averaged);
- One-third octave band spectrum and power spectral density plot; and
- General Daily Site Conditions;
  - Date and time of activities;
  - Water conditions (*e.g.,* sea state, tidal state); and
  - Weather conditions (*e.g.,* percent cover, visibility).

Reporting of Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to NMFS Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS (301–427–8401) and to the Greater Atlantic Region New England/Mid-Atlantic Stranding Coordinator (866–755–6622) as soon as feasible. The incident report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this rule. The Navy shall not resume their activities until notified by NMFS that they can continue.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analysis applies to all the species listed in Table 3, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Construction activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level A and Level B harassment from underwater sounds generated by pile driving activities, rotary drilling, rock hammering, and DTH. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level A and Level B harassment, identified above, while activities are underway.

The Navy's activities and associated impacts will occur within a limited, confined area of the stocks' range. Most of the work will occur behind the existing super flood basin walls that will act as a barrier to sound and will contain underwater noise to within a small portion of the Piscataqua River. The implementation of a soft start and a bubble curtain during some activities, along with other mitigation and monitoring measures already described, are expected to minimize the effects of the expected takes on the affected individuals. In addition, NMFS does not anticipate that serious injury or mortality will occur as a result of the Navy's construction activities given the nature of the activity, even in the absence of required mitigation.

Exposures to elevated sound levels produced during pile driving and drilling may cause behavioral disturbance of some individuals. Effects on individuals that are taken by Level B harassment, as enumerated in the Estimated Take section, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006). Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns or increased haul out time (Thorson and Reyff, 2006). Data from recent observations of harbor seals in the project area support the assumption that behavioral responses to the Navy's activities may be mild in nature (Navy, 2022). The Navy has observed 116 harbor seals in the project since January 20, 2022. This includes observations at the conclusion of P–310 construction (January to February 2022) and the start of P–381 construction (May 2022 through October 16, 2022). Forty-eight of these observations occurred during periods with active construction, and the most common behavior recorded (n=28; 58.3 percent) was no response. The other common behaviors noted for these observations were swimming or milling (n=18; 37.5 percent), with notably lower observations of retreat/flush behaviors (n=1, 2.1 percent) (Navy, 2022).

Additionally, some of the species present in the region will only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species will be exposed to even smaller periods of noise-generating activity, further decreasing the impacts. Most likely, individual animals will simply move away from the sound source and be temporarily displaced from the area, although even this reaction has been observed primarily only in association with impact pile driving. The activities analyzed here are similar to numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. These reactions and behavioral changes are expected to subside quickly when the exposures cease. The intensity of Level B harassment events will be minimized through use of mitigation measures described herein, including the soft starts and the use of the bubble curtain, which was not quantitatively factored into the take estimates. The Navy will use at least three PSOs stationed strategically to increase detectability of marine mammals during in-water construction activities and removal, enabling a high rate of success in implementation of shutdowns to avoid or minimize injury for most species. Further, given the absence of any major rookeries and only one isolated pinniped haulout site at Hicks Rocks approximately 2.4 km (1.5 mi) from the project area, we assume that takes by Level B harassment will have a negligible short-term effect on individuals and will not result in population-level impacts.

Due to the levels and durations of likely exposure, animals that experience

PTS will likely only receive slight PTS, *i.e.,* minor degradation of hearing capabilities within regions of hearing that align most completely with the frequency range of the energy produced by the Navy's activities (*i.e.,* the low-frequency region below 2 kHz), not severe hearing impairment or impairment in the reigns of greatest hearing sensitivity. If hearing impairment does occur, it is most likely that the affected animal will lose a few dBs in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Data do not suggest that a single instance in which an animal accrues PTS (or TTS) and is subject to behavioral disturbance would result in impacts to reproduction or survival. If PTS were to occur, it will be at a lower level likely to accrue to a relatively small portion of the population by being a stationary activity in one particular location.

The project is also not expected to have significant adverse effects on any marine mammal habitat. The project activities will not modify existing marine mammal habitat since the project will occur within the same footprint as existing marine infrastructure. Impacts to the immediate substrate are anticipated, but these will be limited to minor, temporary suspension of sediments, which could impact water quality and visibility for a short amount of time, but which will not be expected to have any effects on individual marine mammals. The nearshore and intertidal habitat where the project will occur is an area of consistent vessel traffic from Navy and non-Navy vessels, and some local individuals will likely be somewhat habituated to the level of activity in the area, further reducing the likelihood of more severe impacts. The closest pinniped haulout used by harbor and gray seals is Hicks Rocks, located approximately 2.4 km (1.5 mi) away on the opposite side of the island and not within the ensonified area. There are no other biologically important areas for marine mammals near the project area.

In addition, impacts to marine mammal prey species are expected to be minor and temporary. Overall, the area impacted by the project is very small compared to the available surrounding habitat, and does not include habitat of particular importance. The most likely impact to prey will be temporary behavioral avoidance of the immediate area. During construction activities, it is expected that some fish and marine mammals will temporarily leave the area of disturbance, thus impacting marine mammals' foraging opportunities in a limited portion of the foraging range. But, because of the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Level A harassment is expected to be of a lower degree that would not impact the fitness of any animals;
- Anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior;
- The required mitigation measures (*i.e.,* soft starts, bubble curtain, shutdown zones) are expected to be effective in reducing the effects of the specified activity;
- Minimal impacts to marine mammal habitat/prey are expected;
- There is one pinniped haulout in the vicinity of the project area (Hicks Rocks), but it is on the opposite side of Seavey Island and not within the ensonified area; and
- There are no known biologically important areas in the vicinity of the project.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the Navy's activities will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The maximum annual amount of take NMFS has authorized is below one-third of the estimated stock abundance for all five species (see Table 16). The number of animals authorized to be taken from these stocks is considered small relative to the relevant stock's abundances even if each estimated take occurred to a new individual, which is an unlikely scenario.

Based on the analysis contained herein of the Navy's activities (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

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 will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy construction activities will contain an adaptive management component. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications will have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or

number not authorized by these regulations or subsequent LOAs.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review the proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of LOAs) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the action qualifies to be categorically excluded from further review under NEPA.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of LOAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this 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 certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be subject to the requirements in these regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency.

Waiver of Delay in Effective Date

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C 553(d)(3)) to waive the 30-day delay in the effective date of the measures contained in the final rule. The Navy is the only entity subject to these regulations, and it has informed NMFS that it requests that this final rule take effect by April 1, 2023, when the IHA previously issued by NMFS to govern the taking of marine mammals incidental to U.S. Navy construction of the multifunctional expansion of Dry Dock 1 at Portsmouth Naval Shipyard, Kittery, Maine (87 FR 19886, April 6, 2022) expires. Any delay in promulgating the final rule could result in a delay to the project schedule that would extend the completion of the project and cause further risks to the Navy Fleet boat schedule. In addition, in-water work at Dry Dock 1 is critical to timely completion of the overall project. Delaying the completion of ongoing work will have increased risk on other mission critical work, as some of the construction components cannot begin until others are started or in some cases completed. Moreover, the contractor is onsite and currently working under an existing IHA (87 FR 19886, April 6, 2022), therefore, the Navy is ready to operate under the LOA immediately. For these reasons, the Assistant Administrator finds good cause to waive the 30-day delay in the effective date. In addition, the rule allows authorization of incidental take of marine mammals that would otherwise be prohibited under the statute. Therefore, by granting an exception to the Navy, the rule will relieve restrictions under the MMPA, which provides a separate basis for waiving the 30-day effective date for the rule.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Samuel D. Rauch, III,

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

For reasons set forth in the preamble, NMFS amends 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 N to part 217 to read as follows:

Subpart N—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Portsmouth Naval Shipyard, Kittery, Maine.

Sec.

§ 217.130 Specified activity and geographical region.

(a) Regulations in this subpart apply only to taking of marine mammals by the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities that occur incidental to construction activities related to the multifunctional expansion and modification of Dry Dock 1 in the areas outlined in paragraph (b) of this section.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs at Portsmouth Naval Shipyard, Kittery, Maine.

§ 217.131 Effective dates.

Regulations in this subpart are effective for a period of 5 years from the date of issuance.

§ 217.132 Permissible methods of taking.

Under an LOA issued pursuant to § 216.106 of this chapter and § 217.136, the Holder of the LOA (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in

§ 217.130(b) by harassment associated with construction activities related to the multifunctional expansion and modification of Dry Dock 1, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 217.133 Prohibitions.

(a) Except for the takings contemplated in § 217.132 and authorized by a LOA issued under § 216.106 of this chapter and § 217.136, it is unlawful for any person to do any of the following in connection with the activities described in § 217.130:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 217.136;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA after NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

§ 217.134 Mitigation requirements.

(a) When conducting the activities identified in § 217.130(a), the mitigation measures contained in this subpart and any LOA issued under § 216.106 of this chapter and § 217.136 must be implemented. These mitigation measures include:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA at all times that activities subject to this LOA are being conducted.

(2) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain, night), the Navy shall delay pile driving and drilling until observers are confident marine mammals within the shutdown zone could be detected.

(3) The Navy must ensure that construction supervisors and crews, the monitoring team, and relevant Navy staff are trained prior to the start of construction activity subject to this rule, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project will be trained prior to commencing work.

(4) The Navy, construction supervisors and crews, protected species observers (PSOs), and relevant Navy staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations will cease and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary, to avoid direct physical interaction.

(5) The Navy must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions as described in this rule and the NMFS-approved Marine Mammal Monitoring Plan.

(6) Monitoring must take place from 30 minutes prior to initiation of pile driving or drilling activity (*i.e.,* pre-start clearance monitoring) through 30 minutes post-completion of pile driving or drilling activity.

(7) For all pile driving and drilling activities, the Navy must implement shutdown zones with radial distances as identified in a LOA issued under § 216.106 of this chapter and § 217.136. If a marine mammal comes within or approaches the shutdown zone, such operations must cease.

(8) In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals must be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior must be monitored and documented. If a marine mammal is observed within the shutdown zone, pile driving or drilling activities may not commence or resume until at least one of the following conditions has been met:

(i) The animal has been observed exiting the shutdown zone;

(ii) The animal is thought to have exited the shutdown zone based on a determination of its course, speed, and movement relative to the pile driving location; or

(iii) The shutdown zone has been clear from any additional sightings for fifteen minutes.

(9) If pile driving or drilling construction activities cease for more than 30 minutes, the pre-activity monitoring of the shutdown zone must commence.

(10) The Navy must conduct monitoring to include the entire region of influence, which includes the area within the Level A and Level B harassment zones with radial distances as identified in a LOA issued under § 216.106 of this chapter and § 217.136.

(11) The Navy must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes from the hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

(12) The Navy must install a bubble curtain across the entrance openings during DTH cluster drill and hydraulic rock hammering activities. The bubble curtain must adhere to the following restrictions:

(i) The bubble curtain must distribute air bubbles across 100 percent of the entrance openings for the full depth of the water column;

(ii) The lowest bubble ring must be in contact with the substrate for the full extent of the curtain, and the weights attached to the bottom of the curtain must ensure 100 percent substrate contact. No parts of the curtain or other objects shall prevent full substrate contact; and

(iii) Air flow to the bubblers must be balanced across the entrance openings to the super flood basin.

(iv) The Navy shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers and corrections to the attenuation device to meet the performance standards. This shall occur prior to the initiation of in-water construction activities.

(13) The bubble curtain may be discontinued for certain activities should the results of hydroacoustic recordings inside the bubble curtain show that the source levels from those activities do not result in the Level A harassment thresholds being achieved across the entire region of influence, upon review of the data by NMFS.

(14) Pile driving and drilling activity must be halted upon observation of either a species entering or within the harassment zone for which incidental take is not authorized, or a species for which incidental take has been authorized but the authorized number of takes has been met.

(b) [Reserved]

§ 217.135 Requirements for monitoring and reporting.

(a) Marine Mammal monitoring must be conducted in accordance with the conditions in this section and the Marine Mammal Monitoring Plan. The Navy must submit a Marine Mammal

Monitoring Plan to NMFS for approval in advance of construction.

(b) Monitoring must be conducted by qualified PSOs in accordance with the following conditions:

(1) PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods.

(2) At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(3) Other PSOs may substitute relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(4) Where a team of three PSOs are required, a lead observer or monitoring coordinator shall be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and

(5) One PSO must be designated as lead PSO or monitoring coordinator. The lead PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(6) PSOs must work in shifts to reduce fatigue and ensure their ability to monitor for marine mammals.

(7) PSOs must be approved by NMFS prior to beginning any activity subject to this LOA.

(c) For all pile driving activities, a minimum of three PSOs must be stationed on boats, docks, or piers sufficient to monitor the harassment and shutdown zones, and as described in the Marine Mammal Monitoring Plan.

(d) PSOs must record all observations of marine mammals, regardless of distance from the pile/hole being driven/drilled or the construction activity taking place (*i.e.,* DTH, rotary drilling, rock hammering), as well as additional data indicated in the reporting requirements.

(e) The Navy must conduct hydroacoustic data collection (sound source verification and propagation loss) as described in a LOA and in accordance with a hydroacoustic monitoring plan that must be approved by NMFS in advance of construction. This plan shall include acoustic monitoring inside the bubble curtain to measure construction generated noise levels.

(f) The harassment and/or shutdown zones may be modified with NMFS' approval following NMFS' acceptance of an acoustic monitoring report.

(g) The Navy must submit a draft monitoring report to NMFS within 90 work days of the completion of required monitoring for each portion of the project as well as a comprehensive summary report at the end of the project. The reports will detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports (each portion of the project and comprehensive) must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

(h) All draft and final monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.tyson.moore@noaa.gov.*

(i) The reports must at minimum contain the informational elements described as follows (as well as any additional information described in the Marine Mammal Monitoring Plan), including:

(1) Dates and times (begin and end) of all marine mammal monitoring.

(2) Construction activities occurring during each daily observation period, including:

(i) The number and type of piles that were driven or removed and by what method (*i.e.,* impact, vibratory, DTH, rotary drilling, rock hammering.

(ii) The total duration of driving time for each pile/hole (vibratory driving, rotary drilling) and number of strikes for each pile/hole (impact driving, hydraulic rock hammering).

(iii) For DTH, the duration of operation for both impulsive and non-pulse components as well as the strike rate.

(3) PSO locations during marine mammal monitoring.

(4) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance);

(5) Upon observation of a marine mammal, the following information:

(i) Name of PSO who sighted the animal(s) and PSO location, as well as the activity at the time of the sighting;

(ii) Time of sighting;

(iii) Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;

(iv) Distances and bearings of each marine mammal observed in relation to the pile being driven or drilled for each sighting (if pile driving or drilling was occurring at time of sighting).

(v) Estimated number of animals (min/max/best estimate);

(vi) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*);

(vii) Animal's closest point of approach and estimated time spent within the harassment zone;

(viii) Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses to the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

(6) Number of marine mammals detected within the harassment zones, by species;

(7) Detailed information about any implementation of any mitigation (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in the behavior of the animal, if any; and

(j) The Holder will submit all PSO datasheets and/or raw sightings data with the draft reports.

(k) The Navy must report the hydroacoustic data collected as required by a LOA issued under § 216.106 of this chapter and § 217.136 and as described in the Acoustic Monitoring Plan, which at a minimum, must include:

(1) Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);

(2) Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.,* hammer model and energy), and total pile driving duration;

(3) Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;

(4) For impact pile driving and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile/hole): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 μPa): root mean square sound pressure level (SPLrms); cumulative sound exposure level (SELcum), peak sound pressure level

(SPLpeak), and single-strike sound exposure level (SELss);

(5) For vibratory driving/removal, rotary drilling, and/or DTH excavation (DTH mono-hammer and cluster drill) (per pile/hole): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 µPa): root mean square sound pressure level (SPLrms), cumulative sound exposure level (SELcum) (and timeframe over which the sound is averaged);

(6) One-third octave band spectrum and power spectral density plot; and

(7) General Daily Site Conditions, including the date and time of activities, and environmental data such as wind speed and direction, air temperature, humidity, surface water temperature, tidal state, water depth, wave height, weather conditions, and other factors that could contribute to influencing the airborne and underwater sound levels (*e.g.,* aircraft, boats, etc.).

(l) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy must report incident to the Office of Protected Resources (OPR), NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *ITP.tyson.moore@noaa.gov*) and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator (978–282–8478 or 978–281–9291) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this rule and the LOA issued under § 216.106 of this chapter and § 217.136. The Navy will not resume their activities until notified by NMFS. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

§ 217.136 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 217.137.

(e) The LOA will set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA will be published in the **Federal Register** within 30 days of a determination.

§ 217.137 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.136 for the activity identified in § 217.130(a) may be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under § 216.106 of this chapter and § 217.136 for the activity identified in § 217.130(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment;

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to § 216.106 of this chapter and § 217.136, a LOA may be modified without prior public notice or opportunity for public comment. Notification would be published in the **Federal Register** within 30 days of the action.

§ 217.138–217.139 [Reserved]

[FR Doc. 2023–06300 Filed 3–30–23; 8:45 am]

BILLING CODE 3510–22–P

FEDERAL REGISTER

Vol. 88 Friday,

No. 62 March 31, 2023

Part V

The President

Presidential Determination No. 2023–06 of March 27, 2023—Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Printed Circuit Boards and Advanced Packaging Production Capability

Federal Register
Vol. 88, No. 62
Friday, March 31, 2023

Presidential Documents

Title 3—

The President

Presidential Determination No. 2023–06 of March 27, 2023

Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Printed Circuit Boards and Advanced Packaging Production Capability

Memorandum for the Secretary of Defense

Ensuring a robust, resilient, and sustainable domestic industrial base is essential for the national defense. Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 303 of the Defense Production Act of 1950, as amended (the ''Act'') (50 U.S.C. 4533), I hereby determine, pursuant to section 303(a)(5) of the Act, that:

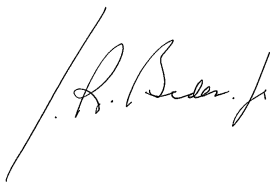
(1) printed circuit boards and advanced packaging, their components, and the manufacturing systems that produce such systems and components are industrial resources, materials, or critical technology items essential to national defense;

(2) without Presidential action under section 303 of the Act, United States industry cannot reasonably be expected to provide the capability for the needed industrial resource, material, or critical technology item in a timely manner; and

(3) purchases, purchase commitments, or other action pursuant to section 303 of the Act are the most cost-effective, expedient, and practical alternative method for meeting the need.

Pursuant to section 303(a)(7)(B) of the Act, I find that action to expand the domestic production capability for printed circuit boards and advanced packaging is necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability. Therefore, I waive the requirements of section 303(a)(1)–(a)(6) of the Act for the purpose of expanding the domestic production capability for these supply chains.

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



THE WHITE HOUSE,
Washington, March 27, 2023

[FR Doc. 2023–06921
Filed 3–30–23; 11:15 am]
Billing code 5001–06–P

Reader Aids

Federal Register

Vol. 88, No. 62

Friday, March 31, 2023

CUSTOMER SERVICE AND INFORMATION

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**
Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.
To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.
PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.
To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.
FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.
Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**
The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, MARCH

CFR PARTS AFFECTED DURING MARCH

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.

72 .....13017, 15864, 18379
73.....15864, 18379
74.....15864, 18379
76.....15864, 18379
429 .....14014, 15510, 16052, 17934
430 .....14014, 15510, 16052, 16869
431.....17934, 18965

Proposed Rules:
Ch. I.....14091
50 .....13717, 13735, 14957, 15620
51.....13329, 14958
52.....13735, 14957
72.....17164
73.....17165
170.....13357
171.....13357
429.....17419
430 .....13520, 16112, 17419, 18086, 19382
460.....17745

11 CFR

Proposed Rules:
113.....13384

12 CFR

201.....18379
204.....18380
702.....18006
748.....12811
Ch. X 16531, 17366
1026.....19214
1081.....18382
1238.....14871

Proposed Rules:
652.....18098
1026.....16198, 18905
1240.....15306

14 CFR

25.....13299, 18389
39 .....12817, 12820, 13301, 13303, 13306, 13309, 13311, 13313, 13659, 13662, 13665, 13668, 13671, 14871, 14874, 14877, 14880, 14883, 14885, 15269, 15600, 15604, 15607, 15609, 15901, 16174, 17679, 17682, 17685, 18011, 18016, 18019
43.....15905
65.....15905
71 .....14047, 14048, 14486, 17369, 17688, 18023, 18026, 18028, 18029, 18031, 18241, 18392, 19220
91.....16871
93.....18032
95.....17689
97.....14487, 14488
147.....15905

Proposed Rules:
21.....13071, 14092
25.....13071, 14092
29.....13071, 14092
39 .....13385, 14298, 14301, 14303, 14306, 15333, 17426, 17429, 17748, 17751, 17753, 18099, 18263, 19019, 19021
71 .....12870, 12872, 13737, 13739, 13740, 13742, 13744, 14514, 14516, 17434, 17436, 17437, 18101, 18264
73.....18444
259.....13387, 15620
260.....13387, 15620
399 .....13387, 13389, 15620, 15622

15 CFR

90.....17696
744 .....13673, 17706, 18983

Proposed Rules:
231.....17439, 18103

16 CFR

1.....18034
1220.....13686

Proposed Rules:
260.....14092
456.....18266
461.....19024

17 CFR

230.....17710
232.....13872, 17710
240.....13872, 18987
275.....13872

Proposed Rules:
230.....16921
232.....16921
239.....16921
270.....16921
274.....16921
275.....14672, 16921
279.....14672, 16921

19 CFR

206.....14887
207.....14887

20 CFR

Proposed Rules:
726.....14094

21 CFR

10.....16878
11.....13018
73.....16182
101.....17710
106.....17710
170.....17710
172.....17710
173.....17710
184.....17710
190.....17710
312.....18037
510.....14893, 16543
516.....16543
520.....14893, 16543
522.....14893, 16543
524.....14893, 16543
526.....14893, 16543
528.....14893
529.....16543
556.....16543
558.....14893, 16543
803.....16878
812.....16878
822.....16878
888.....18987, 18990
900.....15126
1100.....16551
1107.....16551
1114.....16551
1140.....16551
1143.....16551
1308.....13692

Proposed Rules:
14.....14960
74.....19026
130.....12870
1120 .....14960, 14962, 15174
1300.....12875, 12890
1304.....12875, 12890
1306.....12875, 12890

22 CFR

Ch. I.....18252
22.....18243
41.....13694
62.....18249

Proposed Rules:
42.....16384

24 CFR

51.....17725
100.....19450
203.....12822, 14252
206.....12822

Proposed Rules:
5.....18268
50.....17755
55.....17755
58.....17755
92.....18268
93.....18268
200.....17755, 18268
202.....12906
574.....18268
576.....18268
578.....18268
581.....16834
880.....18268
882.....18268
884.....18268
886.....18268
888.....18268
902.....18268
982.....18268
983.....18268
985.....18268

25 CFR

140.....13018
141.....13018
211.....13018
213.....13018
225.....13018
226.....13018
227.....13018
243.....13018
249.....13018
537.....18393

Proposed Rules:
226.....16386

26 CFR

1.....17725
31.....14490
301.....14259

Proposed Rules:
1.....17451
52.....18446

27 CFR

19.....17725

Proposed Rules:
9 .....13072, 18471, 18481

28 CFR

Proposed Rules:
0.....18487
27.....18487

29 CFR

102.....14908, 14913
1601.....17372
1635.....17145
1952.....16880
1989.....15271
4044.....5906

Proposed Rules:
2550.....17466

30 CFR

250.....17725

31 CFR

16.....16885
27.....16885
50.....16885
542.....17727
548.....18038
587 .....13316, 16887, 16889
591.....13022, 13024

32 CFR

310.....16182

33 CFR

100 .....14259, 15275, 17373, 19222
110.....16185
117.....16891
165 .....12829, 12831, 13026, 13316, 14259, 14262, 14265, 14266, 14916, 16188, 16378, 16553, 16893, 17145, 17728, 17730, 18050, 18253, 18393, 18395, 18993, 18998, 19222, 19223
334.....18051
401.....14266
402.....15275, 16556

Proposed Rules:
100 .....14309, 16386, 17467, 17470
147.....13745, 15939
165 .....15625, 16576, 16922, 17470, 18104, 18278, 19027

34 CFR

600.....18225
668.....18225
690.....18225

Proposed Rules:
Ch. II.....15336
Ch. III.....18280
Ch. VI.....17777
662.....16924
663.....16924

36 CFR

Proposed Rules:
13.....14963
251.....14517

37 CFR

1 .....13028, 17147, 18052
41.....17147
202.....16190
401.....17730
404.....17730

38 CFR

3.....15277
9.....15907

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 23, 2023

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://portalguard.gsa.gov/—layouts/PG/register.aspx*.

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.