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

Rules and Regulations

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2023–0841; Special Conditions No. 25–837–SC]

Special Conditions: Airbus SAS Model A320 and A321 Series Airplanes; Rechargeable Lithium Batteries and Battery System Installations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus SAS (Airbus) Model A320–251N, –252N, –253N, –271N, –272N, and –273N; and Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes. These airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is a mini emergency power supply unit containing rechargeable lithium-ion batteries. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Airbus on June 8, 2023. Send comments on or before July 24, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2023–0841 using any of the following methods:

- *Federal eRegulations Portal:* Go to *https://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.
- *Privacy:* Except for Confidential Business Information as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to *https://www.regulations.gov/,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.
- *Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Docket: Background documents or comments received may be read at *https://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, Aircraft Systems, AIR–623, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone (206) 231–3160; email *Nazih.khaouly@faa.gov.*

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to 14 CFR 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Background

On August 17, 2022, Airbus SAS applied for a change to Type Certificate No. A28NM to install a mini emergency power supply unit containing rechargeable, lithium-ion batteries and battery system on Airbus A320–251N, –252N, –253N, –271N, –272N, and –273N and Airbus Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes.

These airplanes, approved under Type Certificate No. A28NM, are twin-engine transport category airplanes with a maximum seating of capacity between 179 to 244 passengers and a maximum takeoff weight between 154,322 to 213,848 pounds, depending on model.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101,

Airbus must show that changes to the Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N and Airbus Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes, as changed, continues to meet the applicable provisions of the regulations listed in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (*e.g.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N, and Airbus Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N, and Airbus Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N; and Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes will incorporate the following novel or unusual design feature Mini Emergency Power Supply Unit containing rechargeable lithium-ion batteries.

Discussion

Rechargeable lithium batteries and battery systems are considered to be a novel or unusual design feature in transport category airplanes, with respect to the requirements in § 25.1353. This type of battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on transport category airplanes. These batteries and battery systems introduce higher energy levels into airplane systems through new chemical compositions in various battery-cell sizes and construction. Interconnection of these cells in battery packs introduces failure modes that require unique design considerations, such as provisions for thermal management.

Special Condition 1 requires that each individual cell within a battery and battery system be designed to maintain safe temperatures and pressures. Special Condition 2 addresses these same issues but for the entire battery system.

Special Condition 2 requires that the batteries and battery system be designed to prevent propagation of a thermal event, such as self-sustained, uncontrolled increases in temperature or pressure from one cell to adjacent cells.

Special Conditions 1 and 2 are intended to ensure that the cells and battery system are designed to eliminate the potential for uncontrollable failures. However, a certain number of failures will occur due to various factors beyond the control of the designer. Therefore, other special conditions are intended to protect the airplane and its occupants if failure occurs.

Special Conditions 3, 7, and 8 are self-explanatory.

Special Condition 4 clarifies that the flammable-fluid fire-protection requirements of § 25.863 apply to rechargeable lithium battery installations. Section 25.863 is applicable to areas of the airplane that could be exposed to flammable fluid leakage from airplane systems. Rechargeable lithium batteries contain electrolyte that is a flammable fluid.

Special Condition 5 requires each rechargeable lithium battery and battery system installation to not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape in such a way as to cause a major or more severe failure condition.

Special Condition 6 requires each rechargeable lithium battery and battery system installation to have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells. The means of meeting special conditions 5 and 6 may be the same, but they are independent requirements addressing different hazards. Special Condition 5 addresses corrosive fluids and gases, whereas special condition 6 addresses heat.

Special Condition 9 requires rechargeable lithium batteries and battery systems to have ''automatic'' means, for charge rate and disconnect, due to the fast acting nature of lithium battery chemical reactions. Manual intervention would not be timely or effective in mitigating the hazards associated with these batteries.

These special conditions apply to all rechargeable lithium batteries and battery system installations in lieu of § 25.1353(b)(1) through (4) at amendment 25–123, or § 25.1353(c)(1) through (4) at earlier amendments. Those regulations will remain in effect for other battery installations on these airplanes.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N; and Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes. Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on Airbus Model A320–251N, –252N, –253N, –271N, –272N, and –273N; and Model A321–251NX, –252NX, –253NX, –271NX, and –272NX airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type

certification basis for Airbus Model A320–251N, –252N, –253N, –271N, –272N and –273N; and Model A321–251NX, –252NX, –253NX, –271NX and –272NX airplanes.

Rechargeable Lithium Battery and Battery System Installations

In lieu of § 25.1353(b)(1) through (4) at amendment 25–123, or § 25.1353(c)(1) through (4) at earlier amendments, each rechargeable lithium battery installation must:

1. Be designed to maintain safe cell temperatures and pressures under all foreseeable operating conditions to prevent fire and explosion.

2. Be designed to prevent the occurrence of self-sustaining, uncontrollable increases in temperature or pressure, and automatically control the charge rate of each cell to protect against adverse operating conditions, such as cell imbalance, back charging, overcharging, and overheating.

3. Not emit explosive or toxic gases, either in normal operation or as a result of its failure that may accumulate in hazardous quantities within the airplane.

4. Meet the requirements of § 25.863.

5. Not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape in such a way as to cause a major or more- severe failure condition.

6. Have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells.

7. Have a failure sensing and warning system to alert the flightcrew if its failure affects safe operation of the airplane.

8. Have a monitoring and warning feature that alerts the flightcrew when its charge state falls below acceptable levels if its function is required for safe operation of the airplane.

9. Have a means to automatically disconnect from its charging source in the event of an over-temperature condition, cell failure or battery failure.

Note: A battery system consists of the battery, battery charger and any protective, monitoring and alerting circuitry or hardware inside or outside of the battery. It also includes vents (where necessary) and packaging. For the purpose of these special conditions, a battery and the battery system is referred to as a battery.

Issued in Des Moines, Washington, on June 4, 2023.

Suzanne A. Masterson,

Acting Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2023–12278 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1254; Airspace Docket No. 23–ASO–23]

RIN 2120–AA66

Amendment of Class E Airspace; West Palm Beach, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the West Palm Beach, FL Class E airspace legal description by removing ''West Palm Beach'' from the Palm Beach International Airport name in the West Palm Beach Class E airspace legal description sub-header as it is excessive and unnecessary. This action does not change the boundaries, altitudes, or operating requirements of the Class E airspace area.

DATES: Effective 0901 UTC, August 10, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: 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 a day, 365 days a year.

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) 305–5649.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it amends the Class E5 airspace description in West Palm Beach, FL, by removing ''West Palm Beach'' from the legal description sub-header because it is excessive and unnecessary.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. These updates would subsequently be published in the next update to FAA Order JO 7400.11. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

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

The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 Feet or more above the surface of the earth for Palm Beach International Airport, West Palm Beach, FL, by removing ''West Palm Beach'' from the legal description sub-header because it is excessive and unnecessary. This action does not affect the boundaries, altitudes, or operating requirements of the airspace. Therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a

''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ASO FL E5 West Palm Beach, FL

Palm Beach International Airport, FL
(Lat 26°40′59″ N, long 80°5′44″ W)
Palm Beach County Park Airport
(Lat 26°35′35″ N, long 80°5′6″ W)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of Palm Beach International Airport and a 6.7-mile radius of Palm Beach County Park Airport.

* * * * *

Issued in College Park, Georgia, on June 1, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–12054 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2022–0222]

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations; request for comments.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Florida East Coast (FEC) Railroad Bridge, mile 7.41, and the NW Dixie Highway Bridge, mile 7.5, across the Okeechobee Waterway (OWW), at Stuart, Florida. In anticipation of a significant increase in railway activity across the FEC Railroad Bridge, the Coast Guard is considering changing the operating regulation for the FEC Railroad Bridge to allow the drawbridge to operate on a more predictable schedule. The operating regulation for the adjacent NW Dixie Highway Bridge will be modified to allow for the drawbridges to operate in concert. This deviation will test a change to the drawbridge operation schedule to determine whether a permanent change to the schedule is needed. The Coast Guard is seeking comments from the public regarding this deviation.

DATES: This deviation is effective from 12:01 a.m. on June 21, 2023, through 11:59 p.m. on December 17, 2023.

Comments and related material must reach the Coast Guard on or before August 4, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0222 using Federal Decision Making Portal at *https://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this test deviation, call or email Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email *Jennifer.N.Zercher@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Background, Purpose and Legal Basis

The FEC Railroad Bridge across the Okeechobee Waterway (OWW), mile 7.4, at Stuart, Florida is a single-leaf bascule bridge with a six-foot vertical clearance at mean high water in the closed position. The normal operating schedule for the bridge is found in 33 CFR 117.317(c).

The NW Dixie Highway Bridge across the OWW, mile 7.5, at Stuart, Florida, is a double-leaf bascule bridge with a 14-foot vertical clearance at mean high water in the closed position. The normal operating schedule for the bridge is found in 33 CFR 117.317(d). Navigation on the waterway is commercial and recreational.

In anticipation of a significant increase in railway activity across the FEC Railroad Bridge, the Coast Guard is considering changing the operating regulation for the FEC Railroad Bridge to allow the drawbridge to operate on a more predictable schedule and allow for reasonable usage of competing modes of transportation. The operating regulation for the adjacent NW Dixie Highway Bridge will be modified to allow for the drawbridges to operate in concert.

On May 3, 2022, the Coast Guard published a Notification of Inquiry entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (87 FR 26145). On June 10, 2022, a Supplemental Notification of Inquiry entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' was published in the **Federal Register** (87 FR 35472). We received a total 2358 comments on those publications. Those comments were taken into consideration when developing this test deviation.

Under this temporary deviation, the FEC Railroad Bridge shall open on signal at the quarter and three-quarter hour and remain open until all vessels requiring or requesting an opening have cleared, except any open period shall not exceed 15 minutes.

If a train is in the track circuit at the designated opening time, the opening may be delayed up to but not exceed five minutes. Once the train has cleared the track circuit, the bridge must open immediately, if requested, and remain open until all vessels requiring an

opening have cleared, except any open period shall not exceed 15 minutes.

The drawbridge shall have a drawbridge tender onsite at all times, who is capable of physically tending and operating the drawbridge by local control, if necessary, or when ordered by the Coast Guard. Upon request, the drawbridge tender shall provide operational information 24 hours a day on VHF–FM channel 9. Electronic signs shall be posted visible to marine traffic and display VHF radio contact information, mobile application information, and the telephone number for the bridge tender.

In the event of a drawbridge operational failure, or other emergency circumstances impacting normal drawbridge operations, the drawbridge owner shall immediately notify the Coast Guard Captain of the Port Miami and provide an estimated time of repair and return to normal operations.

A drawbridge logbook shall be maintained including the date and each time it closes and opens to navigation, the number and direction of vessels passing through during each opening, the types of vessels passing through during each opening, and an estimated or known size (height, length, and beam) of the largest and smallest vessel passing through during each opening. The drawbridge logbook shall also include all maintenance openings, closings, malfunctions, or reasons for drawbridge closings that interfere with scheduled openings.

The drawbridge owner shall maintain a mobile application. The drawbridge owner shall publish drawbridge opening times, and the drawbridge owner shall provide timely updates to schedules, including but not limited to, impacts due to emergency circumstances, repairs, and inspections.

The NW Dixie Hwy Bridge shall open on signal; except when the adjacent FEC Railroad Bridge is in the closed position, the draw need not open. The draw must open immediately upon opening of the railroad bridge to pass all accumulated vessels which require an opening.

Vessels able to pass through the bridges in the closed position may do so at any time. There is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridges.

In accordance with 33 CFR 117.35(e), the drawbridges must return to their regular operating schedules immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

II. Public Participation and Request for Comments

We view public participation as essential to determining the needs of the public and will consider all comments and material received during the comment period. Your comment can help shape the outcome of future actions. If you submit a comment, please include the docket number for this test deviation, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2022–0222, in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

View material in the docket. To view documents mentioned in this deviation as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of this deviation. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments, future actions or updates are posted to the docket.

We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Dated: June 2, 2023.

Brendan C. McPherson,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 2023–12270 Filed 6–7–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0361]

Safety Zones; Fireworks Displays in the Fifth Coast Guard District—Philadelphia, PA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Delaware River, Philadelphia, PA Safety Zone for fireworks displays on two separate periods. The safety zone will first be enforced on June 21, 2023, and again, on July 1, 2023. This is to provide for the safety of life on navigable waterways during each of two separate barge-based fireworks displays. Our regulation for marine events within the Fifth Coast Guard District identifies the regulated area for this event in Philadelphia, PA. During the enforcement period, no person or vessel may enter, remain in, or transit through the regulated area, and anyone in the vicinity must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: The regulation at 33 CFR 165.506, for Philadelphia, PA, will be enforced for the location identified in entry 10 of table 1 to paragraph (h)(1) from 8:35 p.m. through 9:20 p.m. on June 21, 2023, or on a rain date of June 22, 2023, and from 9:15 p.m. to 10:15 p.m. on July 1, 2023, or on a rain date of July 2, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, you may call or email Petty Officer Dylan Caikowski, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division, telephone 215–271–4814, email *SecDelBayWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in table 1 to paragraph (h)(1) to 33 CFR 165.506, entry No. 10 for two periods, for two separate barge-based fireworks displays. The first enforcement period will be from 8:35 p.m. through 9:20 p.m. on June 21, 2023, or on a rain date of June 22, 2023. The second enforcement period will be from 9:15 p.m. to 10:15 p.m. on July 1, 2023, or on a rain date of July 2, 2023. This action is necessary to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after

fireworks displays. Our regulation for safety zones of fireworks displays within the Fifth Coast Guard District, table 1 to paragraph (h)(1) to 33 CFR 165.506, entry 10 specifies the location of the regulated area as all waters of the Delaware River adjacent to Penn's Landing, Philadelphia, PA, within a 500-yard radius of the fireworks barge position. The approximate position for the displays is latitude 39°56′52″ N, longitude 075°08′09″ W. During the enforcement period, as reflected in § 165.506(d), vessels may not enter, remain in, or transit through the safety zone unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on-scene.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via Local Notice to Mariners and Broadcast Notice to Mariners.

Dated: June 2, 2023.

Jonathan D. Theel,

Captain, U.S. Coast Guard Captain of the Port, Sector Delaware Bay.

[FR Doc. 2023–12266 Filed 6–7–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0421]

RIN 1625–AA00

Safety Zone; Fireworks Display, Delaware River, Philadelphia, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for waters of Delaware River near Pleasant Hill Park in Philadelphia, PA, for a barge-based fireworks display. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a fireworks display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Delaware Bay (COTP).

DATES: This rule is effective from 9 p.m. on July 4, 2023, through 10 p.m. July 5, 2023. It will only be enforced from 9 to 10 p.m. on July 4, 2023 or those same hours on the rain date of July 5, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0421 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 Petty Officer Dylan Caikowski, Sector Delaware Bay, Waterways Management Division, U.S. Coast Guard; telephone (215) 271–4814, email *SecDelBayWWM@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

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 to do so. There is insufficient time to allow for a reasonable comment period prior to the event. The rule must be in force by July 4, 2023. We are taking immediate action to ensure the safety of spectators and the general public from hazards associated with a barge-based fireworks display. Hazards include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. For the same reasons, the Coast Guard finds good cause under 5 U.S.C. 553(d) to make this rule effective less than 30 days after publication.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that the potential hazards associated with a barge-based fireworks display will be a safety concern for anyone within 300 yards of the barge. The purpose of this rule is to ensure the safety of vessels and people in the navigable waters in the safety zone before, during, and after a barge-based fireworks display.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 9 p.m. through 10 p.m. on July 4, 2023, or on a rain date of July 5, 2023. The safety zone will cover all navigable waters within 300 yards of a barge on the Delaware River located at approximate position latitude 40°2′22.54″ N longitude 074°59′22.03″ W. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 9:15 p.m. to 9:40 p.m. fireworks display. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. 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 following factors: (1) although persons and vessels may not enter, transit through, anchor in, or remain within the safety zone without authorization from the COTP or a designated representative, they may operate in the surrounding area during the enforcement period; (2) persons and vessels will still be able to enter, transit through, anchor in, or remain within the regulated area if authorized by the COTP; and (3) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

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 temporary safety zone lasting 1 hour that would prohibit entry within 300 yards of a fireworks barge. It is categorically excluded from further review under paragraph L60(a) f 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.T05–0421 to read as follows:

§ 165.T05–0421 Safety Zone; Fireworks Display, Delaware River, Philadelphia, PA.

(a) *Location.* All navigable waters within 300 yards of a barge in the Delaware River located at approximate position latitude 40°2′22.54″ N longitude 074°59′22.03″ W.

(b) *Definitions.* As used in this section, designated representative means a Coast Guard Patrol Commander, including a Coast Guard petty officer, warrant or commissioned officer on board a Coast Guard vessel or on board a federal, state, or local law enforcement vessel assisting the Captain of the Port (COTP), Sector Delaware Bay in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter or remain in the zone, contact the COTP or the COTP's representative via VHF–FM channel 16 or 215–271–4807. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) No vessel may take on bunkers or conduct lightering operations within the safety zone during its enforcement period.

(4) This section applies to all vessels except those engaged in law enforcement, aids to navigation servicing, and emergency response operations.

(d) *Enforcement.* 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 zone will be enforced from approximately 9 p.m. through 10 p.m. on July 4, 2023, or on a rain date of July 5, 2023.

Dated: June 2, 2023.

Jonathan D. Theel,

Captain, U.S. Coast Guard, Captain of the Port, Sector Delaware Bay.

[FR Doc. 2023–12263 Filed 6–7–23; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3011

[Docket No. RM2019–13]

RIN 3211–AA23

Reorganization of Postal Regulatory Commission Rules; Correction

AGENCY: Postal Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: On April 20, 2020, the Postal Regulatory Commission revised Commission rules. The publication of that document contained an incorrect cross-reference. This document corrects the final regulation.

DATES: This rule is effective June 8, 2023.

ADDRESSES: For additional information, this document can be accessed electronically through the Commission's website at *https://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6800.

SUPPLEMENTARY INFORMATION: In a rule published on February 19, 2020 (85 FR 9614), effective April 20, 2020, final rule § 3011.401(c) contained a cross-reference to § 3007.201 of this chapter, instead of the correct cross-reference to § 3011.201. This document corrects that error.

List of Subjects in 39 CFR Part 3011

Administrative practice and procedure, Confidential business information.

For the reasons set out in the preamble, 39 CFR part 3011 is corrected as follows:

PART 3011—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION

■ 1. The authority for part 3011 continues to read as follows:

Authority: 39 U.S.C. 503, 504.

■ 2. Revise § 3011.401(c) to read as follows:

§ 3011.401 Materials for which non-public treatment has expired.

* * * * *

(c) *Response.* A response to the request is due within seven calendar days of the filing of the request, unless the Commission otherwise provides. Any response opposing the request shall seek an extension of non-public status by including an application for non-public treatment compliant with § 3011.201. This extension application shall also include specific facts in support of any assertion that commercial injury is likely to occur if the information contained in the materials is publicly disclosed despite the passage of ten years or the timeframe established by Commission order.

* * * * *

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–12229 Filed 6–7–23; 8:45 am]

BILLING CODE 7710–FW–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 23–464; MB Docket No. 23–45; RM–11945; FR ID 146177]

Radio Broadcasting Services; Peach Springs, Arizona

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the FM Table of Allotments, of the Federal Communications Commission's (Commission) rules, by substituting Channel 287A for vacant Channel 280A at Peach Springs, Arizona to accommodate the hybrid modification application for Station KIDD(FM), Fort Mohave, Arizona to specify operation on Channel 280C2 in lieu of Channel 280A. A staff engineering analysis indicates that Channel 287A can be allotted to Peach Springs, Arizona, consistent with the minimum distance separation requirements of the Commission's rules, with a site restriction of 12.6 km (7.8 miles) northeast of the community. The reference coordinates are 35–33–18 NL and 113–18–02 WL.

DATES: Effective July 17, 2023.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2054.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, adopted May 31, 2023 and released May 31, 2023. The full text of this Commission decision is available online at *https://apps.fcc.gov/ecfs/*. The full text of this document can also be downloaded in Word or Portable Document Format (PDF) at *https://www.fcc.gov/edocs.* This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

The Commission will send a copy of the Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.202, in paragraph (b), amend the Table of FM Allotments under Arizona, by revising the entry for ''Peach Springs'' to read as follows:

§ 73.202 Table of Allotments.

* * * * *

(b) *Table of FM Allotments.*

TABLE 1 TO PARAGRAPH (b)

U.S. States	Channel No.
Arizona	
* * * * *	
Peach Springs	287A
* * * * *	

[FR Doc. 2023–12235 Filed 6–7–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 23–476; MB Docket No. 23–86; RM–11948; FR ID 146598]

Radio Broadcasting Services; Tecopa, California

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document amends the FM Table of Allotments, of the Federal Communications Commission's (Commission) rules, by substituting Channel 256A for vacant Channel 288A at Tecopa, California to accommodate the hybrid modification application for Station KRZQ(FM), Amargosa Valley, Nevada to specify operation on Channel 291C in lieu of Channel 290C1. A staff engineering analysis indicates that Channel 256A can be allotted to Tecopa, California, consistent with the minimum distance separation requirements of the Commission's rules, with a site restriction of 2.3 km (1.4 miles) northwest of the community. The reference coordinates are 35–50–48 NL and 116–13–27 WL.

DATES: Effective July 17, 2023.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2054.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, adopted June 2, 2023 and released June 2, 2023. The full text of this Commission decision is available online at *https://apps.fcc.gov/ecfs/.* The full text of this document can also be downloaded in Word or Portable Document Format (PDF) at *https://www.fcc.gov/edocs.* This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13.

The Commission will send a copy of the Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.202(b), amend the Table of FM Allotments under California, by revising the entry for ''Tecopa'' to read as follows:

§ 73.202 Table of Allotments.

* * * * *

(b) *Table of FM Allotments.*

TABLE 1 TO PARAGRAPH (b)

U.S. States	Channel No.
California	
* * * * *	
Tecopa	256A
* * * * *	

[FR Doc. 2023–12269 Filed 6–7–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 230602–0141]

RIN 0648–BL84

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Harvest Levels

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement management measures described in a framework action under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). This final rule revises the commercial and recreational annual catch limits (ACLs) and annual catch targets (ACTs) for red snapper in the Gulf exclusive economic zone (EEZ). The purpose of this final rule is to increase the Gulf red snapper ACLs and ACTs consistent with best scientific information available, and to continue to achieve optimum yield (OY) for the stock.

DATES: This final rule is effective July 10, 2023.

ADDRESSES: Electronic copies of the framework action, which includes an environmental assessment, regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/modification-catch-limits-gulf-mexico-red-snapper.*

FOR FURTHER INFORMATION CONTACT: Dan Luers, Southeast Regional Office, NMFS, telephone: 727–824–5305, email: *daniel.luers@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Gulf reef fish fishery, which includes red snapper, is managed under the FMP. The FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Steven Act).

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and to achieve, on a continuing basis, the OY from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the Nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

On February 28, 2023, NMFS published a proposed rule for the framework action and requested public comment (88 FR 12642). The proposed rule and the framework action outline the rationale for the actions contained in this final rule. A summary of the management measures described in the framework action and implemented by this final rule is described below.

Unless otherwise noted, all weights in this final rule are in round weight.

Red snapper in the Gulf EEZ is harvested by both the commercial and recreational sectors. The stock ACL for red snapper is equal to the acceptable biological catch (ABC) recommended by the Council's Scientific and Statistical Committee (SSC), and each sector has its own ACL and associated management measures. The stock ACL is allocated 51 percent to the commercial sector and 49 percent to the recreational sector. In 2015, Amendment 40 to the FMP (80 FR 22422, April 22, 2015) divided the recreational ACL (quota) between the Federal charter vessel/headboat (for-hire) component (42.3 percent) and the private angling component (57.7 percent).

In 2020, NMFS implemented state management of red snapper for the private angling component as specified in Amendments 50 A–F to the FMP (85 FR 6819, February 6, 2020). Through these amendments, each Gulf state was allocated a portion of the red snapper

private angling component ACL and was delegated the authority to set the private angling fishing season, bag limit, and size limit. However, each Gulf state was managing the harvest by its private anglers using estimates from its own state data collection program, which, except for Texas, was not directly comparable to the state's ACL. To address this issue, the Council, Gulf States, and NMFS worked to develop and implement calibration ratios that adjusted each state's private angling component ACL so that it could be directly compared to the landings estimates produced by that state's data collection program (87 FR 74014, December 2, 2022).

In 2016, Congress awarded funding to researchers in an effort to independently estimate the population size of red snapper in the Gulf. Commonly known as the ''Great Red Snapper Count'' (GRSC), this project's primary goal was to provide a snapshot estimate of abundance and distribution of age 2 and older red snapper on artificial, natural, and uncharacterized bottom habitat across the northern Gulf through 2019.

The results of the GRSC and catch projections produced by the NMFS Southeast Fisheries Science Center (SEFSC) using the GRSC estimates of red snapper abundance were made available to the SSC in 2021. The SSC expressed some concerns about using the GRSC findings to recommend catch levels. Specifically, the SSC noted the uncertainty associated with the GRSC biomass estimate, questions about the productivity of the red snapper stock that are raised by the GRSC findings (that the productivity of the stock appears to be lower than previously assumed), and the declining trend observed in the longstanding NMFS Bottom Longline (BLL) survey. Based on these concerns, and until additional information could be presented related to the SSC's questions about some aspects of the GRSC, the SSC determined that it was not appropriate to use the GRSC-based projections to recommend a new ABC, which constrains the total allowable catch that may be specified by the Council. Instead, the SSC used the GRSC-based projections to recommend a new overfishing limit (OFL) of 25,600,000 lb (11,611,965 kg) but used projections generated using information from the NMFS BLL survey to recommend a new ABC of 14,400,000 lb (6,531,730 kg). The Council adopted these recommendations and specified new commercial and recreational catch limits using the established allocations. These new catch limits were effective on January 1, 2023 (87 FR 74014, December 2, 2022).

At its March 2022 meeting, the SSC reviewed new catch level projections based on an SEFSC analysis that used updated GRSC abundance data for Florida and included an independent study that provided an estimate of red snapper abundance for Louisiana. In summary, as described in the framework action, the SSC determined that the SEFSC projections informed by the GRSC abundance data for Texas, Alabama, Mississippi, the updated abundance data for Florida, and new abundance data for Louisiana are based on the best scientific information available and should be used for new OFL and ABC recommendations. Therefore, the SSC recommended a new OFL of 18,910,000 lb (8,577,432 kg) and a new ABC of 16,310,000 lb (7,398,092 kg), which is reduced from the OFL based on 30 percent probability of overfishing. The SSC recommended a decrease in the OFL because the total estimate of red snapper (over the age of 2) abundance was reduced from 118 million fish to 85.6 million fish. The SSC recommended an increase in the ABC because the decrease in the scientific uncertainty in the new abundance estimates allowed for a smaller buffer between the OFL and ABC.

Consistent with the Council's practice of setting the red snapper stock ACL equal to the ABC, the SSC's recommendation would result in the red snapper stock ACL increasing from 15,400,000 lb (7,000,000 kg) to 16,310,000 lb (7,400,000 kg). The Council approved the framework action to revise the red snapper harvest limits at its August 2022 meeting.

Management Measures Contained in This Final Rule

The framework action and this final rule revise the red snapper OFL and ABC as recommended by the SSC and increase the red snapper commercial and recreational ACLs and ACTs.

The commercial ACL (commercial quota) increases from 7,854,000 lb (3,562,514 kg) to 8,318,100 lb (3,773,026 kg), and the recreational ACL (recreational quota) increases from 7,546,000 lb (3,422,808 kg) to 7,991,900 lb (3,625,065 kg). This final rule also increases the Federal for-hire component ACL from 3,191,958 lb (1,447,848 kg) to 3,380,574 lb (1,533,403 kg) and increases the Federal for-hire component ACT from 2,904,682 lb (1,317,542 kg) to 3,076,322 lb (1,395,396 kg). In addition, this final rule increases the private angling component ACL from 4,354,042 lb (1,974,960 kg) to 4,611,326 lb (2,091,662 kg) and increases the private angling component ACT from 3,483,234 lb (1,579,968 kg) to 3,689,061 lb (1,673,330 kg).

This final rule increases the state specific private angling component ACLs for each of the Gulf States. Each state's ACL listed below is consistent with the allocation established in Amendment 50A and the state specific calibration ratio implemented in January 2023. Alabama's private angling component ACL increases from 558,200 lb (253,195 kg) to 591,185 lb (268,157 kg). Florida's private angling component ACL increases from 2,069,053 lb (938,507 kg) to 2,191,315 lb (993,964 kg). Louisiana's private angling component ACL increases from 882,443 lb (400,269 kg) to 934,587 lb (423,922 kg). Mississippi's private angling component ACL increases from 59,354 lb (26,923 kg) to 62,862 lb (28,514 kg). Finally, Texas's private angling component ACL increases from 270,386 lb (122,645 kg) to 286,363 lb (129,892 kg).

Measure Contained in This Final Rule Not in the Framework Action

In addition to modifying the Gulf red snapper harvest level as specified in the framework action, this final rule revises language related to the red snapper Federal for-hire component quota (50 CFR 622.39(a)(2)(i)(B)) and the red snapper Federal for-hire component ACT (50 CFR 622.41(q)(2)(iii)(B)). Since 2015, when the recreational ACL (quota) was allocated between the Federal for-hire and private angling components, these provisions have specified that the Federal for-hire quota and ACT apply ''to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year.'' (84 FR 24832 May 1, 2015). This language was intended to prohibit persons with vessels issued Federal for-hire permits from transferring those permits off the vessels and then fishing for red snapper under the private-angling component catch limits during the same fishing year. To clarify this prohibition, NMFS added the following language in the final rule implementing Amendments 50A–F (85 FR 6819, February 6, 2020): ''A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf EEZ when the Federal charter vessel/headboat component is closed.'' However, in that final rule, NMFS mistakenly referred to ''the Gulf EEZ,'' which is inconsistent with the 2015 language because it improperly suggests that persons aboard

these vessels could harvest red snapper from state waters when the for-hire component is closed and, thus, allow the type of activity that the prior sentence was intended to prohibit. This final rule removes ''EEZ'' from that sentence in both 50 CFR 622.39(a)(2)(i)(B) and 50 CFR 622.41(q)(2)(iii)(B) to reflect that the harvest limitation applies to the entire Gulf (Federal and state waters).

Comments and Responses

NMFS received comments from 11 individuals or fishing organizations on the proposed rule for the framework action. Four comments were in support of the proposed rule and two comments were opposed to the proposed rule. Four other comments were not specific in their opinion on the proposed rule, but advocated for careful consideration and deep study when making changes to catch limits. One commenter made a suggestion related to how increases in the commercial quota should be distributed, but this suggestion is outside the scope of this action.

Specific comments related to the proposed rule and the framework action are grouped as appropriate and responded to below.

Comment 1: NMFS should determine whether the framework action would have a significant economic impact on smaller businesses, and on how it would affect local communities. The final rule may need to be modified based on these considerations.

Response: NMFS and the Council conducted thorough economic analyses for this framework action consistent with the requirements of the National Environmental Policy Act, the Magnuson-Stevens Act, Executive Order 12866, and the Regulatory Flexibility Act. These analyses, which are contained in the framework action and are described in the proposed rule, showed that the increases in the total, sector, and recreational component ACLs for red snapper would have positive economic effects in terms of increased producer surplus for fishing businesses (commercial and potentially for-hire), increased allocation value for red snapper IFQ shareholders, and increased consumer surplus for recreational anglers and seafood consumers. The estimates included in the framework action showed that economic value would increase by at least $1.58 million for the commercial sector and $7.95 million for the recreational sector, for a combined increase in net economic benefits of $9.52 million per year. These estimates pertain to the red snapper component of the FMP as a whole, and community-level estimates are not available. However, NMFS did identify and discuss which communities are most likely to be affected by the action in the framework action and the proposed rule.

Comment 2: NMFS should not increase the red snapper catch limits at this time. Red snapper are not as abundant as they were in the past. NMFS should study the population for a few more years to better understand population growth before making these changes. No regulations should be changed without deep study and careful consideration of future consequences.

Response: NMFS disagrees that the catch levels should not be changed at this time. Maintaining the current red snapper catch levels is not consistent with the best scientific information available, which indicates that the red snapper stock can support higher catch limits. The current red snapper catch limits were implemented through the final rule for a framework action that was effective January 1, 2023 (87 FR 74014, December 2, 2022). In that framework action, NMFS set the OFL for red snapper based on results of the GRSC and recommendations from the Council's SSC, which estimated the stock biomass of Gulf red snapper was approximately three times greater than the previous biomass estimate. The SSC reviewed the GRSC projections at its March 2021 meeting, and determined that it was appropriate to use the GRSC results to recommend an OFL for of 25,600,000 lb (11,611,965 kg). However, some limitations and caveats of the study were identified by the SSC that warranted further investigation, and thus, the SSC made an ABC recommendation based on NMFS BLL survey, which had been used in the past to set catch limits, rather than the GRSC. This resulted in an ABC recommendation of 15,400,000 lb (7,000,000 kg).

After the SSC's ABC recommendation, some of the limitations and caveats associated with the GRSC were addressed through several research studies, and this new information was provided to the SSC at its March 2022 meeting. The updated information included: (1) a revised estimate of red snapper abundance in waters adjacent to Louisiana that was considered by the SSC to be more indicative of red snapper abundance than the GRSC, and (2) a post-stratified re-analysis of GRSC data for Florida using different depth bins than what were originally used in the GRSC. Based on this new estimate, the SSC determined the interim analysis suitable for providing catch advice and recommended decreasing the OFL from 25,600,000 lb (11,611,965 kg) to 18,910,000 lb (8,577,432 kg) and increasing the ABC from 15,400,000 lb (7,000,000 kg) to 16,310,000 lb (7,398,092 kg). These recommendations reflect a decrease in scientific uncertainty in the new estimates, which allows for an increase in the ABC despite the decrease in the OFL.

Comment 3: The framework action and the proposed rule do not adequately account for discards, especially in the recreational sector. The framework action and the proposed rule do not quantify the expected discards, which makes it difficult for the public to assess impacts from this action.

Response: NMFS disagrees that this rule does not adequately account for discards. NMFS recognizes that the proposed rule did not quantify expected discards, because discards are estimated based on fishing effort for each sector, and are difficult to quantify with precision. However, the revised catch limits do account for discards because they are based on the most recent stock assessment, completed in 2018, which included information about discards, and updated information about red snapper abundance that indicated that the stock can support additional harvest with the associated discards. As explained in the framework action, the increase in the catch limits is not expected to change how the reef fish fishery is prosecuted overall, or the manner in which red snapper fishing takes place. Thus, the rates at which red snapper are discarded by the commercial and recreational sectors are not expected to change, but the increased catch limits are expected to result in a change in the numbers of discarded fish proportional to the fishing effort necessary to harvest the increased catch limits.

Comment 4: The Council is unbalanced and biased toward the recreational sector, and this unbalance has resulted in the increased catch limits in this rule at a time when there is evidence that the health of the red snapper stock is in decline.

Response: The sector balance on the Council is outside the scope of the rule, and statements about decisions a council with a different balance would make are speculative. However, NMFS notes that Council members are trustees of the Nation's fishery resources and each Council member must take an oath of office in which they ''promise to conserve and manage the living marine resources of the United States of America by carrying out the business of the Council for the greatest overall benefit of the Nation'' (50 CFR 600.220). Council members must also adhere to

high standards of ethical conduct (50 CFR 600.225). Therefore, NMFS expects Council members to make decisions that are best for the fishery resources as a whole. Further, regardless of who sits on the Council, NMFS must determine whether the framework action is consistent with the Magnuson-Stevens Act and other applicable law, and NMFS has determined that the increased catch limits for all sectors will prevent overfishing while achieving optimum yield and are supported by the best scientific information available.

Comment 5: The proposed rule fails to account for the fact that there have been *de facto* reallocations of red snapper harvest at several levels since 2018: from the commercial to the recreational sector, from the for-hire component to the private angling component, and from certain Gulf states to other Gulf states.

Response: NMFS disagrees that ''*de facto* allocations have occurred.'' However, NMFS acknowledges that since 2018, when the Gulf States began managing private angling harvest of red snapper, there have been overages of the private angling component ACL resulting from the differences between data from the state surveys used to monitor harvest and the Federal survey data used to establish the catch limits. However, on January 1, 2023, NMFS implemented a final rule that modified the state-specific red snapper private angling component ACLs using calibration ratios adopted by the Council (87 FR 74014, December 2, 2022). These calibration ratios allow each state's landings estimates to be compared directly to that state's ACL and are expected to prevent the noted overages. Furthermore, the proposed rule did account for all red snapper harvest (commercial, for-hire, and private angling) regardless of the specified allocations. Thus, this increase in the total allowable harvest is based on the best scientific information available on the health and abundance of the red snapper stock taking into account past harvest, including since 2018.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the framework action, the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

The Magnuson-Stevens Act provides the legal basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this final rule. This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995. A description of this final rule, why it is being considered, and the purposes of this final rule are contained in the preamble and in the **SUMMARY** section of this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. Public comments relating to socio-economic implications and potential impacts on small businesses are addressed in the response to *Comment 1* in the Comments and Responses section of this final rule. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Annual catch limits, Fisheries, Fishing, Gulf, Red snapper, Reef fish, Quota.

Dated: June 5, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.23, revise paragraph (a)(1)(ii) to read as follows:

§ 622.23 State management of the red snapper recreational sector private angling component in the Gulf EEZ.

(a) * * *

(1) * * *

(ii) *State private angling component ACLs.* All ACLs specified below are in round weight and are consistent with monitoring under the respective state's reporting system. Equivalent ACLs, consistent with monitoring under the Federal reporting system, are provided, as applicable. If a state's delegation is suspended, as described in this paragraph (a)(1), the Federal equivalent ACL, or for the Texas regional management area the ACL in paragraph (a)(1)(ii)(E) of this section, applies in the EEZ off that state.

(A) *Alabama regional management area*—591,185 lb (268,157 kg); Federal equivalent—1,212,687 lb (550,066 kg).

(B) *Florida regional management area*—2,191,315 lb (993,964 kg); Federal equivalent—2,066,889 lb (937,525 kg).

(C) *Louisiana regional management area*—934,587 lb (423,922 kg); Federal equivalent—881,686 lb (399,926 kg).

(D) *Mississippi regional management area*—62,862 lb (28,514 kg); Federal equivalent—163,702 lb (74,254 kg).

(E) *Texas regional management area*—286,363 lb (129,892 kg).

* * * * *

■ 3. In § 622.39, revise paragraphs (a)(1)(i) and (a)(2)(i) to read as follows:

§ 622.39 Quotas.

* * * * *

(a) * * *

(1) * * *

(i) Commercial quota for red snapper—8,318,100 lb (3,773,027 kg), round weight.

* * * * *

(2) * * *

(i) *Recreational quota for red snapper*–(A) *Total recreational.* The total recreational quota is 7,991,900 lb (3,625,065 kg), round weight.

(B) *Federal charter vessel/headboat component quota.* The Federal charter vessel/headboat component quota applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf when the Federal charter vessel/headboat component is closed. The Federal charter vessel/headboat component quota is 3,380,574 lb (1,533,403 kg), round weight.

(C) *Private angling component quota.* The private angling component quota applies to vessels that fish under the bag limit and have not been issued a Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. The private angling component quota is 4,611,326 lb (2,091,662 kg), round weight.

* * * * *

■ 4. In § 622.41, revise the paragraph (q)(2)(iii)(B) and the last sentence in (q)(2)(iii)(C) to read as follows:

§ 622.41 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(q) * * *

(2) * * *

(iii) * * *

(B) *Federal charter vessel/headboat component ACT.* The Federal charter vessel/headboat component ACT applies to vessels that have been issued a valid Federal charter vessel/headboat permit for Gulf reef fish any time during the fishing year. A person aboard a vessel that has been issued a charter vessel/headboat permit for Gulf reef fish any time during the fishing year may not harvest or possess red snapper in or from the Gulf when the Federal charter vessel/headboat component is closed. The component ACT is 3,076,322 lb (1,395,396 kg), round weight.

(C) * * * The component ACT is 3,689,061 lb (1,673,330 kg), round weight.

* * * * *

[FR Doc. 2023–12243 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 220510–0113; RTID 0648–XC983]

Fisheries Off West Coast States; Modification of the West Coast Salmon Fisheries; Inseason Actions #51–#52

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

ACTION: Inseason modification of 2022–2023 management measures.

SUMMARY: NMFS announces two inseason actions for the 2023 portion of the 2022 ocean salmon fishing season (May 16, 2022–May 15, 2023). These inseason actions modify the commercial salmon troll fisheries in the area from the U.S./Canada border to Cape Falcon, OR.

DATES: The effective date for these inseason actions are set out in this document under the heading Inseason Actions and the actions remain in effect until superseded or modified.

FOR FURTHER INFORMATION CONTACT: Shannon Penna at 562–980–4239, Email: *Shannon.Penna@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The annual management measures for the 2022 ocean salmon fisheries (87 FR 29690, May 16, 2022) govern the commercial and recreational fisheries in the area from the U.S./Canada border to the U.S./Mexico border, effective from 0001 hours Pacific Daylight Time (PDT), May 16, 2022, until the effective date of the 2023 management measures, as published in the **Federal Register**. NMFS is authorized to implement inseason management actions to modify fishing seasons and quotas as necessary to provide fishing opportunity while meeting management objectives for the affected species (50 CFR 660.409). Inseason actions in the salmon fishery may be taken directly by NMFS (50 CFR 660.409(a)—Fixed inseason management provisions) or upon consultation with the Chairman of the Pacific Fishery Management Council (Council), and the appropriate State Directors (50 CFR 660.409(b)—Flexible inseason management provisions).

Management of the salmon fisheries is divided into two geographic areas: north of Cape Falcon (NOF) (U.S./Canada border to Cape Falcon, OR), and south of Cape Falcon (Cape Falcon, OR, to the U.S./Mexico border). The action described in this document affects the NOF commercial salmon troll fisheries, as set out under the heading Inseason Actions below.

Consultation with the Council Chairperson on this inseason action occurred on April 18, 2023 and May 9, 2023. Representatives from NMFS, Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, California Department of Fish and Wildlife participated in these consultations. Representatives from the Salmon Advisory Subpanel and Salmon Technical Team were also present.

These inseason actions were announced on NMFS' telephone hotline and U.S. Coast Guard radio broadcast on the date of the consultations (50 CFR 660.411(a)(2)).

Inseason Actions

Inseason Action #51

Description of the action: Inseason action #51 modifies the ocean salmon troll commercial fishery from the U.S./Canada border to Cape Falcon, OR.

Effective dates: Inseason action #51 takes effect for the following areas and dates, and remains in effect until superseded.

- Effective May 1, 2023, at 12:01 a.m. the quota for the May–June fishery is modified to 26,000 Chinook salmon, no more than 6,890 of which may be caught in the area between the U.S./Canada border and the Queets River and no more than 6,040 of which may be caught in the area between Leadbetter Point and Cape Falcon.
- Effective May 1, 2023, at 12:01 a.m. the landing and possession limit for the entire area between the U.S./Canada border and Cape Falcon is 200 Chinook salmon per vessel for the period May 1, 2023, through May 10, 2023, and 150 Chinook salmon per vessel per landing week (Thursday–Wednesday) beginning May 11, 2023, at 12:01 a.m.
- Effective May 1, 2023, at 12:01 a.m. the landing and possession limit in the area between the U.S./Canada border and the Queets River is 105 Chinook per vessel for the period May 1, 2023, through May 10, 2023, and 70 Chinook salmon per vessel per landing week (Thursday–Wednesday) beginning May 11, 2023, at 12:01 a.m.
- Effective May 1, 2023, at 12:01 a.m. the landing and possession limit in the area between the Queets River and Leadbetter Point is 200 Chinook salmon per vessel for the period May 1, 2023, through May 10, 2023, and 150 Chinook salmon per vessel per landing week (Thursday–Wednesday) beginning May 11, 2023, at 12:01 a.m.
- Effective May 1, 2023, at 12:01 a.m. the landing and possession limit in the area between Leadbetter Point and Cape Falcon is 90 Chinook per vessel for the period May 1, 2023, through May 10, 2023, and 60 Chinook salmon per vessel per landing week (Thursday–Wednesday) beginning May 11, 2023, at 12:01 a.m.
- Effective May 1, 2023, at 12:01 a.m. vessels may not land salmon east of the Sekiu River or east of Tongue Point, Oregon.

Reason and authorization for the action: The 2022 annual management measures for ocean salmon fisheries (87 FR 29690, May 16, 2022) established a May–June commercial salmon fishery that included NOF subarea quotas that were based on information available at the time the 2022 management measures were adopted. The 2022 management measures allow for inseason action to adjust fisheries scheduled to occur from March 15, 2023, through May 15, 2023, in response to new information on 2023 salmon stock abundance forecasts and northern salmon fisheries impacts, to keep fisheries impacts within management objectives and consistent with conservation needs. In addition, the Council adopted a weekly landing and possession limit based on the calendar week (Thursday–Wednesday). Under the 2022 regulations, the fishery will open on May 1, 2023, with the week reduced to 3 days. Inseason action adjusts the landing and possession

period to 10 days with a slightly higher landing limit that corresponds to the longer period (*i.e.,* from May 1, 2023–May 3 to May 1, 2023–May 10 to match the full Thursday–Wednesday landing week).

The NMFS West Coast Regional Administrator (RA) considered the abundance forecasts for Chinook salmon stocks, the timing of the action relative to the length of the season, and determined that the inseason action described above is necessary to meet management and conservations goals set preseason. This inseason action modifies quotas and/or fishing seasons, and landing boundaries under 50 CFR 660.409(b)(1)(i) and (v).

Inseason Action #52

Description of the action: Inseason action #52 modifies the ocean salmon troll commercial fishery. The area between the U.S./Canada border and the Queets River (La Push and Neah Bay subareas) is closed.

Effective dates: Inseason action #52 took effect on May 11, 2023, at 12:01 a.m., and remains in effect until superseded.

Reason and authorization for the action: Inseason action #52 was necessary to not exceed the Chinook salmon guideline due to high Chinook salmon catch relative to the subarea quota for the U.S. area north of the Queets River and to preserve the length of the season. The RA considered the 2023 abundance forecasts for Chinook salmon stocks, the timing of the action relative to the length of the season, and determined that the inseason action described above is necessary to meet management and conservation goals set preseason. This inseason action modifies quotas and/or fishing seasons under 50 CFR 660.409(b)(1)(i).

All other restrictions and regulations remain in effect as announced for the 2022 ocean salmon fisheries (87 FR 29690, May 16, 2022), as modified by previous inseason actions (87 FR 41260, July 12, 2022; 87 FR 49534, August 11, 2022; 87 FR 52353, August 25, 2022; 87 FR 54171, September 2, 2022; 87 FR 60105, October 4, 2022; 87 FR 66609, November 4, 2022; 88 FR 21113, April 10, 2023).

The RA determined that these inseason actions were warranted based on the best available information on Pacific salmon abundance forecasts, landings to date, anticipated fishery effort and projected catch, and the other factors and considerations set forth in 50 CFR 660.409. The states and tribes manage the fisheries in state waters adjacent to the areas of the U.S. exclusive economic zone (3–200 nautical miles; 5.6–370.4 kilometers) off the coasts of the states of Washington, Oregon, and California consistent with these Federal actions. As provided by the inseason notice procedures at 50 CFR 660.411, actual notice of the described regulatory actions was given, prior to the time the actions became effective, by telephone hotline numbers 206–526–6667 and 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF–FM and 2182 kHz.

Classification

NMFS issues these actions pursuant to section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). These actions are authorized by 50 CFR 660.409, which was issued pursuant to section 304(b) of the MSA, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(3)(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. Prior notice and opportunity for public comment on this action was impracticable because NMFS had insufficient time to provide for prior notice and the opportunity for public comment between the time Chinook and coho salmon abundance, catch, and effort information were developed and fisheries impacts were calculated, and the time the fishery modifications had to be implemented in order to ensure that fisheries are managed based on the best scientific information available. As previously noted, actual notice of the regulatory action was provided to fishers through telephone hotlines and radio notifications. These actions comply with the requirements of the annual management measures for ocean salmon fisheries (87 FR 29690, May 16, 2022), the Pacific Salmon Fishery Management Plan (FMP), and regulations implementing the FMP under 50 CFR 660.409 and 660.411.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date, as a delay in effectiveness of this action would allow fishing at levels inconsistent with the goals of the FMP and the current management measures.

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

Dated: June 5, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–12237 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 110
Thursday, June 8, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1206; Project Identifier MCAI–2023–00068–T]

RIN 2120–AA64

Airworthiness Directives; ATR–GIE Avions de Transport Régional Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all ATR–GIE Avions de Transport Régional Model ATR42 and ATR72 airplanes. This proposed AD was prompted by a determination that some batches of nose landing gear (NLG) drag brace panels (DBP) having certain part numbers were affected by a quality deficiency that was not detected in production. This proposed AD would require a measurement of the affected part and, depending on findings, accomplishment of applicable corrective actions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). This proposed AD would also prohibit the installation of affected parts. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by July 24, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1206; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu*. You may find this material on the EASA website at *ad.easa.europa.eu*. It is also available at *regulations.gov* under Docket No. FAA–2023–1206.
- For Safran Landing Systems SAS service information identified in this NPRM, contact Safran Landing Systems SAS, Inovel Parc Sud—7, rue Général Valérie André, 78140 VELIZY-VILLACOUBLAY—FRANCE; telephone +33 (0) 1 46 29 81 00, website *safran-landing-systems.com*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1206; Project Identifier MCAI–2023–00068–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *shahram.daneshmandi@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0010, dated January 17, 2023 (EASA AD 2023–0010) (also referred to as the MCAI), to correct an unsafe condition for all ATR–GIE Avions de Transport Régional Model ATR 42–200, ATR 42–300, ATR 42–320, ATR 42–400, ATR 42–500, ATR 72–101, ATR 72–102, ATR 72–201, ATR 72–202, ATR 72–211, ATR

72–212, and ATR 72–212A airplanes. Model ATR 42–400 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability.

The MCAI states that it has been determined that some batches of NLG DBP having part number (P/N) D63757 and P/N D69085 were affected by a quality deficiency that was not detected in production. Consequently, this issue could lead to NLG DBP dissymmetry at the lower area, which might affect the structural strength of the NLG DBP. This condition, if not addressed, could lead to NLG DBP structural fatigue failure and subsequent collapse of the NLG, possibly resulting in damage to the airplane and injury to occupants.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1206.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0010 specifies procedures for measuring the affected part and, depending on findings, accomplishing applicable corrective actions. Corrective actions could include obtaining and carrying out repair instructions, or replacing the affected part with a serviceable part. EASA AD 2033–0010 also specifies procedures for reporting measurement findings to ATR–GIE and prohibits the installation of affected parts.

Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022, provides the list of affected parts and specifies measurement procedures.

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

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2023–0010 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0010 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0010 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0010 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0010. Service information required by EASA AD 2023–0010 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1206 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 73 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$12,410

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

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour 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. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

ATR–GIE Avions de Transport Régional: Docket No. FAA–2023–1206; Project Identifier MCAI–2023–00068–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by July 24, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all ATR–GIE Avions de Transport Régional Model ATR42–200, –300, –320, and –500; and ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Unsafe Condition

This AD was prompted by a determination that some batches of nose landing gear (NLG) drag brace panels (DBP) having part number (P/N) D63757 and P/N D69085 were affected by a quality deficiency that was not detected in production. The FAA is issuing this AD to address the possibility of a resulting NLG DBP dissymmetry at the lower area, which might affect the structural strength of the NLG DBP. This condition, if not addressed, could lead to NLG DBP structural fatigue failure and subsequent collapse of the NLG, possibly resulting in damage to the airplane and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0010, dated January 17, 2023 (EASA AD 2023–0010).

(h) Exceptions to EASA AD 2023–0010

(1) Where EASA AD 2023–0010 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0010.

(3) Where EASA AD 2023–0010 defines ''the SB,'' for this AD, operators must use Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022.

(4) Paragraph (2) of EASA AD 2023–0010 specifies to report measurement results to Safran Landing Systems SAS within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(4)(i) or (ii) of this AD, but do not exceed the compliance time specified in Table 1 of EASA AD 2023–0010.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3220; email *shahram.daneshmandi@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0010, dated January 17, 2023.

(ii) Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022.

(3) For EASA AD 2023–0010, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) For service information identified in this AD, contact Safran Landing Systems SAS, Inovel Parc Sud–7, rue Général Valérie André, 78140 VELIZY-VILLACOUBLAY–FRANCE; telephone +33 (0) 1 46 29 81 00, website *safran-landing-systems.com.*

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

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

Issued on June 2, 2023.

Michael Linegang,

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

[FR Doc. 2023–12156 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1119; Airspace Docket No. 22–AAL–76]

RIN 2120–AA66

Establishment of Class E Airspace; Tununak Airport, Tununak, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet above the surface at Tununak Airport, Tununak, AK, in support of the airport's transition from visual flight rules (VFR) to instrument flight rules (IFR) operations.

DATES: Comments must be received on or before July 24, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1119 and Airspace Docket No. 22–AAL–76 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* 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: Jeffrey Drasin, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2248.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal after considering the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Incorporation by Reference

The Class E5 Airspace designation is published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to establish Class E airspace at Tununak Airport, Tununak, AK, in support of the airport's transition from VFR to IFR operations.

Class E airspace extending upward from 700 feet above the surface should be established to contain arriving IFR operations below 1,500 feet above the surface and departing IFR operations until they reach 1,200 feet above the surface. The proposed airspace design—which extends 7.4 miles from the airport reference point to both the north and south and includes a 3.4-mile extension to the west—would contain these operations.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

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

* * * * *

AAL AK E5 Tununak, AK [New]

Tununak Airport, AK
(Lat. 60°34′10″ N, long. 165°14′47″ W)

That airspace extending upward from 700 feet above the surface within a 3.4-mile radius of the airport between the 258° bearing clockwise to the 306° bearing, and within 2.5 miles east and 2.8 miles west of the 168° bearing extending from the airport to 7.4 miles south, and within 1.9 miles east and 2.3 miles west of the 348° bearing extending from the airport to 7.4 miles north.

* * * * *

Issued in Des Moines, Washington, on June 1, 2023.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2023–12111 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 200

RIN 0596–AD59

Organization, Functions, and Procedures; Functions and Procedures; Forest Service Functions

AGENCY: Forest Service, USDA.

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: The Forest Service (Agency), United States Department of Agriculture (USDA), published an advance notice of proposed rulemaking in the **Federal Register** on April 21, 2023 initiating a 60-day comment period. The advance notice invited public comment on the following topic and additional questions: Given that climate change and related stressors are resulting in increasing impacts with rapid and variable rates of change on national forests and grasslands, how should the Forest Service adapt current policies to protect, conserve, and manage the national forests and grasslands for climate resilience, so that the Agency can provide for ecological integrity and support social and economic sustainability over time? In response to feedback from prospective commenters stating that they would benefit from additional time to adequately consider and respond to the advance notice, USDA's Forest Service has determined that an extension of the comment period by an additional 30 days, from June 20, 2023 to July 20, 2023, is appropriate.

DATES: The end of the comment period for the advance notice of proposed rulemaking published on April 21, 2023 (88 FR 24497) is extended from June 20, 2023, until July 20, 2023.

ADDRESSES: You may send comments by any of the following methods:

Preferred: Federal eRulemaking Portal *www.regulations.gov*. Mail: Director, Policy Office, 201 14th Street SW, Mailstop 1108, Washington, DC 20250–1124.

All comments received will be posted to *www.regulations.gov,* including any personal information provided. The public may inspect comments received at *www.regulations.gov*. Do not submit any information you consider to be private, confidential business information, or other information, of which the disclosure is restricted by statute.

The Forest Service is planning public engagement sessions. For additional information related to the advanced notice of proposed rulemaking and the public engagements visit: *https://www.fs.usda.gov/managing-land/sc/policy-initiatives*.

FOR FURTHER INFORMATION CONTACT: Christopher Swanston, Director, Office of Sustainability and Climate, (202) 205–0833. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Climate change and related stressors, such as wildfire, drought, insects and diseases, extreme weather events, and chronic stress on ecosystems are resulting in increasing impacts with rapid and variable rates of change on national forests and grasslands. These impacts can be compounded by fire suppression, development in the wildland-urban interface, and timber harvest and reforestation practices that are not designed and implemented considering current and projected climate change.

Multiple Forest Service plans, policies, and regulations already include direction on climate adaptation. However, given (1) increasing rates of change, and (2) new information and ways of assessing and visualizing risk, USDA and the Forest Service published an advance notice of proposed rulemaking on April 21, 2023 (88 FR 24497) to invite public feedback and to request Tribal consultation on a range of potential options to adapt current policies or develop new policies and actions to better anticipate, identify, and respond to rapidly changing conditions associated with climate-amplified impacts.

An extension of the comment period will provide additional opportunity for the public to consider the advance notice and prepare comments to address

the questions posed therein. Therefore, the USDA Forest Service is extending the comment period from June 20, 2023 to July 20, 2023.

Christopher French,

Deputy Chief, National Forest System, Forest Service.

[FR Doc. 2023–12267 Filed 6–7–23; 8:45 am]

BILLING CODE 3411–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2023–5]

Exemptions To Permit Circumvention of Access Controls on Copyrighted Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notification of inquiry and request for petitions.

SUMMARY: The United States Copyright Office is initiating the ninth triennial rulemaking proceeding under the Digital Millennium Copyright Act (''DMCA'') to consider possible temporary exemptions to the DMCA's prohibition against circumvention of technological measures that control access to copyrighted works. In this proceeding, the Copyright Office is again providing a streamlined procedure for the renewal of exemptions that were granted during the eighth triennial rulemaking. If renewed, those current exemptions would remain in force for an additional three-year period (October 2024–October 2027). Members of the public seeking the renewal of current exemptions should submit petitions as described below; parties opposing such renewal will then have the opportunity to file comments in response. The Office is also accepting petitions for new exemptions to engage in activities not currently permitted by existing exemptions, which may include proposals that expand on a current exemption. Those petitions, and any renewal petitions that are opposed, will be considered pursuant to a rulemaking process that includes three rounds of written comment, followed by public hearings, which the Office intends to conduct virtually.

DATES: Written petitions for renewal of current exemptions must be received no later than 11:59 p.m. Eastern Time on July 7, 2023. Written comments in response to any petitions for renewal must be received no later than 11:59 p.m. Eastern Time on August 11, 2023. Written petitions for new exemptions must be received no later than 11:59 p.m. Eastern Time on August 11, 2023.

ADDRESSES: Written petitions for renewal of current exemptions must be completed using the form provided on the Office's website at *https://www.copyright.gov/1201/2024/renewal-petition.pdf.* Written petitions proposing new exemptions must be completed using the form provided on the Office's website at *https://www.copyright.gov/1201/2024/new-petition.pdf.* The Copyright Office is using the *regulations.gov* system for the submission and posting of public petitions and comments in this proceeding. All petitions and comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting petitions and comments are available on the Copyright Office website at *https://www.copyright.gov/1201/2024.* If electronic submission is not feasible, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. The Digital Millennium Copyright Act and Section 1201

The Digital Millennium Copyright Act (''DMCA'') [1] has played a pivotal role in the development of the modern digital economy. Enacted by Congress in 1998 to implement the United States' obligations under two international treaties,[2] the DMCA was intended to foster the growth and development of a thriving, innovative, and flexible digital marketplace by making digital networks safe places to disseminate and use copyrighted materials.[3] It did this by, among other things, providing new legal protections for copyrighted content made available in digital formats.[4]

These protections, codified in section 1201 of title 17, United States Code, seek to balance the interests of copyright owners and users, including the personal interests of consumers, in the digital environment.[5] Section 1201 protects technological measures (also called technological protection measures or ''TPMs'') used by copyright owners to prevent unauthorized access to or use of their works.[6] Section 1201 contains three separate protections for TPMs. First, it prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as access controls). Access controls include, for example, a password requirement limiting access to an online service to paying customers or an authentication code in a video game console to prevent the playing of pirated copies. Second, the statute prohibits trafficking in devices or services primarily designed to circumvent access controls. Finally, it prohibits trafficking in devices or services primarily designed to circumvent TPMs used to protect the exclusive rights of the copyright owner of a work (also known as copy controls). Copy controls protect against unauthorized uses of a copyrighted work once access has been lawfully obtained. They include, for example, technology preventing the copying of an e-book after it has been downloaded to a user's device. Though trafficking in circumvention devices and services is prohibited, the statute does not ban the act of circumventing a copy control.[7] All of these prohibitions supplement the preexisting rights of copyright owners under the Copyright Act of 1976 by establishing separate and distinct causes of action independent of any infringement of copyright.[8]

Section 1201 contains a number of specific exemptions to these prohibitions to avoid curtailing legitimate activities such as security testing, law enforcement activities, or the protection of personally identifying information.[9] In addition, to accommodate changing marketplace conditions and ensure that access to copyrighted works for other lawful purposes is not unjustifiably diminished,[10] the statute provides for a rulemaking proceeding where temporary exemptions to the

[1] Public Law 105–304, 112 Stat. 2860 (1998).

[2] WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).

[3] *See* Staff of H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4th, 1998, at 2, 6 (Comm. Print 1998) (''House Manager's Report''); H.R. Rep. No. 105–551, pt. 2, at 21, 23 (1998); H.R. Rep. No. 105–551, pt. 1, at 10 (1998); S. Rep. No. 105–190, at 1–2, 8–9 (1998).

[4] *See* House Manager's Report at 6 (noting Congress's intention to ''support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals'').

[5] *See* H.R. Rep. No. 105–551, pt. 2, at 26.

[6] 17 U.S.C. 1201(a)–(b).

[7] S. Rep. No. 105–190, at 12.

[8] *See* U.S. Copyright Office, Section 1201 of Title 17, at i, iii, 43–45 (June 2017) (''Section 1201 Study''), *https://www.copyright.gov/policy/1201/section-1201-full-report.pdf.*

[9] 17 U.S.C. 1201(d)–(j).

[10] H.R. Rep. No. 105–551, pt. 2, at 35–36.

prohibition on circumventing access controls may be adopted by the Librarian of Congress, on the recommendation of the Register of Copyrights after consultation with the Assistant Secretary for Communications and Information of the Department of Commerce.[11] In contrast to the permanent exemptions set out by statute, exemptions adopted pursuant to the rulemaking must be reconsidered every three years.[12] By statute, the triennial rulemaking process only addresses the prohibition on circumvention of access controls; the statute does not grant the authority to adopt exemptions to the anti-trafficking provisions.[13]

For an exemption to be granted through the triennial rulemaking, it must be established that ''persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under [title 17] of a particular class of copyrighted works.'' [14] In evaluating the evidence, several statutory factors must be weighed: ''(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.'' [15]

II. Overview of the Rulemaking Process

To assess whether the implementation of access controls impairs the ability of individuals to make noninfringing uses of copyrighted works, the Copyright Office solicits exemption proposals from the public and develops a comprehensive administrative record using information submitted by interested parties.[16] Based on that record, the Register provides a written recommendation to the Librarian concerning which exemptions are warranted. The recommendation includes proposed regulatory text for adoption and publication in the **Federal Register**.

The rulemaking process for the ninth triennial proceeding will be generally the same as the process followed in the eighth proceeding. This includes the streamlined procedure introduced in the seventh proceeding through which members of the public may petition for temporary exemptions that were granted during the previous rulemaking to remain in force for an additional three-year period (October 2024–October 2027).

With this notification of inquiry, the Copyright Office is initiating the petition phase of the rulemaking, asking the public to submit petitions both to renew current exemptions, as well as any comments in support of or opposition to such petitions, and to propose new exemptions. After the close of the petition phase, the Office will publish a notice of proposed rulemaking (''NPRM'') to initiate the next phase of the rulemaking process, also described below.

Video tutorials explaining section 1201 and the rulemaking process can be found on the Office's section 1201 rulemaking web page at *https://www.copyright.gov/1201.*

III. Process for Seeking Renewal of Current Exemptions

For the last two rulemakings, the Copyright Office has used a streamlined process to facilitate the renewal of previously adopted exemptions for which there was no substantive opposition.[17] This process remains in effect, and parties seeking readoption of a current exemption may petition for its renewal by submitting a required form, available on the Office's website at *https://www.copyright.gov/1201/2024/renewal-petition.pdf.* This form is for renewal petitions only. Petitions for new exemptions must use a different form, as discussed below.

Scope of Renewal. The Office will only permit renewal of current exemptions as they are currently written in the *Code of Federal Regulations,* without modification. If a proponent seeks to engage in any activities not currently permitted by an existing exemption, they must submit a petition for a *new* exemption. Petitioners seeking to expand an existing exemption are encouraged to submit both a petition to renew the existing exemption and a separate petition for a new exemption. In such cases, the petition for a new exemption may focus on legal and factual issues relevant to the proposed expansion. If the Office recommends renewal of the current exemption, then it will consider only the discrete aspects relevant to its expansion as a new petition.

Automatic Reconsideration. If the Office declines to recommend renewal of a current exemption (as discussed below), proponents of renewal do not need to submit additional material. The petition to renew will automatically convert into a petition for a new exemption. If a proponent petitions for both renewal and expansion, and the Office declines to recommend renewal of the existing exemption, the expanded exemption as a whole will be treated as a new petition.

Petition Form and Contents. The petition to renew is a short form designed to let proponents identify themselves, identify the relevant exemption, and make sworn statements to the Copyright Office concerning the existence of a continuing need and justification for the exemption. Proponents are required to use the Office's prepared form and must follow the instructions contained in this notice and on the form. Proponents seeking renewal of multiple exemptions must submit separate forms for each exemption. This requirement ensures a clear record of the basis for each renewal request.

The petition form has four components:

1. Petitioner identity and contact information. Each petitioner (*i.e.,* the individual or entity seeking renewal) must provide its name and the name of its representative, if any, along with contact information. Any member of the public capable of making the sworn declaration discussed below may submit

[11] 17 U.S.C. 1201(a)(1)(C); *see also id.* at 1201(a)(1)(B)–(D).

[12] *Id.* at 1201(a)(1)(C).

[13] *Id.* at 1201(a)(1)(C), (a)(1)(E).

[14] *Id.* at 1201(a)(1)(C).

[15] *Id.*

[16] *See* H.R. Rep. No. 105–796, at 64 (1998) (Conf. Rep.) (''It is the intention of the conferees that . . . the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.''); *see also* H.R. Rep. No. 106–464, at 149 (1999) (Conf. Rep.) (''[T]he Copyright Office shall conduct the rulemaking under section 1201(a)(1)(C) . . . .'').

[17] *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Inquiry,* 85 FR 37399 (June 22, 2020) (''2020 NOI''). The streamlined process was first introduced during the seventh proceeding shortly after the Office concluded a comprehensive public policy study of section 1201. *See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Inquiry,* 82 FR 29804 (June 30, 2017); *see generally* Section 1201 Study. In that study, the Office concluded that ''the statute itself requires that exemptions cannot be renewed automatically, presumptively, or otherwise, without a fresh determination concerning the next three-year period. . . . [A] determination must be made specifically for each triennial period.'' Section 1201 Study at 142. The Office further determined, however, that ''the statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.'' *Id.* at 143.

a petition for renewal, regardless of whether they were involved with past rulemakings. Petitioners and/or their representatives should be reachable through the provided contact information for the duration of the rulemaking proceeding. Multiple petitioning parties may jointly file a single petition.

2. Identification of the current exemption that is the subject of the petition. The form lists all exemptions currently in effect and codified at 37 CFR 201.40. Petitioners must mark the appropriate checkbox for the exemption they seek to renew.

3. Explanation of need for renewal. The petitioner must provide a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption. The required showing is meant to be minimal. The Office anticipates that petitioners will provide a paragraph or two detailing this information, but there is no page limit. While it is permissible to attach supporting documentary evidence as exhibits to the petition, it is not necessary. The Office's petition form includes an example of what it regards as a sufficient explanation.

4. Declaration and signature. One of the named petitioners must sign a declaration attesting to the continued need for the exemption and the truth of the explanation provided in support. Where the petitioner is an entity, the declaration must be signed by an individual at the organization having appropriate personal knowledge to make the declaration and authority to sign on behalf of the entity. The declaration may be signed electronically.

For the attestation to be trustworthy and reliable, it is important that the petitioner make it based on his or her own personal knowledge and experience. This requirement should not be burdensome, as a broad range of individuals have a sufficient level of knowledge and experience. For example, a blind individual having difficulty finding and purchasing e-books with appropriate assistive technologies would have personal knowledge and experience to make the declaration with regard to the assistive technology exemption. The same would hold true for an organization like the American Foundation for the Blind, which advocates for the blind, visually impaired, and print disabled, is familiar with the needs of the community, and has particular knowledge of e-book accessibility. It would be improper, however, for a general member of the public to petition for renewal if he or she knows nothing more about matters concerning e-book accessibility other than what he or she might have read in a brief newspaper article, or simply opposes the use of TPM tools as a matter of general principle.

The declaration also requires an affirmation that, to the best of the petitioner's knowledge, there has not been any material change in the facts, law, or other circumstances in the rulemaking record that resulted in the exemption being issued initially.[18] By ''material change,'' the Office means a significant change in the underlying conditions that justified the exemption when it was first granted, such as legal precedent that led the Office to conclude a use was likely noninfringing, or factual circumstances that demonstrated individuals could not engage in a noninfringing use due to the statutory prohibition on circumvention. The attestation serves as evidence that the Office can continue to rely on the prior rulemaking record and that, absent renewal of the exemption, users of copyrighted works would be adversely affected in their ability to engage in noninfringing uses.

C. Comments in Response to a Petition to Renew an Exemption

Any interested party may submit comments in response to a renewal petition. While the primary purpose of these comments is to allow for opposition to renewal requests, parties may also submit comments in support of renewal. The Office will not provide a form for such comments, and the first page of any responsive comments must clearly identify which exemption's renewal is being supported or opposed. Each submission must address only a single exemption, but participants may submit multiple comments to address multiple exemptions. For example, a party who opposes (or supports) the renewal of both the wireless device unlocking exemption and the jailbreaking exemption for routers and other networking devices must file separate comments for each.[19] The Office recognizes that this format may require some parties to repeat some general information (*e.g.,* about their organization) across multiple submissions, but it has determined that the administrative benefits of creating self-contained, separate records for each exemption will be worth the modest amount of added effort involved.

Opposition to a renewal petition should provide evidence that the prior rulemaking record is no longer a valid basis to support recommending renewal of an exemption.[20] Specifically, evidence should consist of new legal or factual developments that implicate ''the reliability of the previously-analyzed administrative record.'' [21] For example, a change in case law might affect whether a particular use is noninfringing, new technological developments might affect the availability for use of copyrighted works, or new business models might affect the market for or value of copyrighted works. The Office may also consider whether opposition evidence casts doubt only as to renewal of part of a current exemption.

Unsupported conclusory opinion and speculation will not be enough for the Office to refuse to recommend renewing an exemption it would have otherwise recommended in the absence of any opposition, or to convert a renewal petition into a petition for a new exemption. Nor should opposition comments opine on unrelated issues, such as whether proponents have in fact engaged in ''every possible use covered by an exemption'' or ''whether any user's activities may or may not be consistent with the exemption'' as codified.[22] The sole purpose of the streamlined renewal proceeding is to determine whether petitioners have made a minimal showing that the regulatory record that supported a previously issued exemption remains representative of the current environment.[23] It is not a forum to litigate other concerns.

[18] Depending on when the exemption was originally recommended by the Office, the relevant rulemaking record may be discussed in the 2015, 2018, or 2021 Register's Recommendation.

[19] If a single exemption receives multiple petitions for its renewal, commenters may respond to all of those petitions in a single submission. For instance, if the Office receives six petitions in favor of readopting the current unlocking exemption, a commenter may file a single comment that addresses points made in the six petitions. That comment, however, may not address petitions to readopt the jailbreaking exemption for routers and other networking devices.

[20] In the past two rulemaking cycles, the Office referred to such oppositions as ''meaningful.'' *See* 2020 NOI at 37402. The Office is adopting different terminology here to avoid potential confusion about when an opposition can be considered ''meaningful.''

[21] *See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking,* 85 FR 65293, 65295 (Oct. 15, 2020) (''2020 NPRM'') (finding renewal oppositions were not meaningful where they questioned the sufficiency of the renewal petition's justifications ''rather than themselves disputing the reliability of the previously-analyzed administrative record''). Opponents may also explain if a petitioner has failed to comply with the renewal process outlined above (such as because the petitioner lacks personal knowledge or experience relevant to the exemption sought to be renewed).

[22] *Id.* at 65296–97.

[23] *Id.* at 65297–98 (finding proponents had made ''minimal showing'' required for renewal and concluding that, given a lack of opposition, ''the

IV. Process for Seeking New Exemptions

Those seeking to engage in activities not currently permitted by an existing exemption, including activities that expand on a current exemption, may propose a new exemption by filing a petition using the fillable form, available on the Office's website at *https://www.copyright.gov/1201/2024/new-petition.pdf.* Use of the Office's prepared form is mandatory, and petitioners must follow the instructions contained in this notice and on the petition form. As in previous rulemakings, a separate petition must be filed for *each* proposed exemption. By requiring separate submissions for each proposed exemption, the Office will ensure a clear administrative record for each proposed exemption. Although a single petition may not encompass more than one proposed exemption, the same party may submit multiple petitions.

The petition form has two components:

1. Petitioner identity and contact information. The form asks each petitioner (*i.e.,* the individual or entity proposing the exemption) to provide its name and the name of its representative, if any, along with contact information. Petitioners and/or their representatives must be reachable through the provided contact information for the duration of the rulemaking proceeding. Multiple petitioning parties may jointly file a single petition.

2. Description of the proposed exemption. At this stage, the Office is only asking petitioners to briefly explain the nature of the proposed new or expanded exemption. The information that would be most helpful to the Office includes the following, to the extent relevant: (1) the types of copyrighted works sought to be accessed; (2) the physical media or devices on which the works are stored or the services through which the works are accessed; (3) the purposes for which the works are sought to be accessed; (4) the types of users who want access; and (5) the barriers that currently exist or which are likely to exist in the near future preventing these users from obtaining access to the relevant copyrighted works.

The description of the new exemption may be minimal. Petitioners do not need to propose regulatory language or fully define the contours of an exemption class. A short statement describing the nature of the activities in which petitioners seek to engage is sufficient. The Office anticipates that petitioners will be able to adequately describe in plain terms the relevant information in a few sentences. The form includes examples of what the Office regards as a sufficient description. At this point, petitioners need not, and should not, provide a complete legal and evidentiary basis for their proposals.

The sole purpose of the petition is to provide the Office with basic information about what uses of copyrighted works petitioners believe are adversely affected by the statutory prohibition on circumvention. The Office will then use that information to organize and formulate categories of potential exemptions, grouping similar proposals together. This organization will be used in the substantive phase of the rulemaking that begins with the publication of the NPRM in the fall.

As in previous rulemakings, the NPRM will not ''put forward precise regulatory language for the proposed classes.'' [24] The Office's grouping of proposed exemption classes in the NPRM is ''only a starting point for further consideration in the rulemaking proceeding,'' and will be subject to ''further refinement based on the record.'' [25] Proponents will have the opportunity to further refine or expound on their initial petitions as the rulemaking progresses.

V. Notice of Proposed Rulemaking

After reviewing the petitions for new exemptions, petitions for renewal of existing exemptions, and comments on petitions for renewal, the Office will issue an NPRM addressing all of the potential exemptions to be considered in the rulemaking.

With respect to renewal petitions, the NPRM will set forth which exemptions the Register intends to recommend for renewal, along with proposed regulatory language. The NPRM will also identify any exemptions the Register declines to recommend for renewal due to an insufficient showing or evidence presented in comments opposing renewal. Those exemptions will instead be treated as a new petition and require a new administrative record. At the NPRM stage, the Register will not reject any petitioned exemption, unless it fails to meets the threshold requirements of section 1201(a).[26]

For newly requested exemptions, including proposals to expand current exemptions, the NPRM will group such exemptions appropriately, describe them, and initiate at least three rounds of public comment. The Office plans to consolidate or group related and/or overlapping proposed exemptions where possible to simplify the rulemaking process and encourage joint participation among parties with common interests (though such collaboration is not required). As in previous rulemakings, the exemptions described in the NPRM will serve as a starting point for further consideration in the rulemaking proceeding and are subject to further refinement. Additionally, the NPRM will highlight specific legal and factual issues in proposed exemptions that the Office finds particularly important and should be addressed in public comments. The NPRM will also contain additional instructions and requirements for submitting comments and will detail the later phases of the rulemaking proceeding—*i.e.,* public hearings, post-hearing questions, recommendation, and final rule. The Office intends to hold virtual public hearings as in the previous rulemaking, as this format supports an efficient process and provides greater accessibility for the public and rulemaking participants.

The Office expects to follow a similar timeframe for issuance of the NPRM and submission of comments as in the eighth rulemaking.[27] If appropriate, the Office may issue post-hearing questions to hearing participants or hold *ex parte* meetings to discuss discrete issues in the proposed classes, including suggestions regarding regulatory language, as well as to provide opportunities for sufficient stakeholder participation.[28]

Dated: June 5, 2023.

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

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conditions that led to adoption of this exemption are likely to continue during the next triennial period'').

[24] 2020 NOI at 37402 (quoting 82 FR 29804, 29807 (June 30, 2017)).

[25] *Id.*

[26] *See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Proposed Rulemaking,* 79 FR 73856, 73859 (Dec. 12, 2014) (noting that three petitions sought an exemption which could not be granted as a matter of law and declining to put them forward for comment).

[27] In the previous rulemaking, the NPRM was published on October 15, 2020, initial comments supporting new exemptions due on December 14, 2020, opposition comments due on February 9, 2021, and reply comments due on March 10, 2021. 2020 NPRM at 65293.

[28] *See* 2020 NOI at 37403; U.S. Copyright Office, *Ex Parte* Communications, *https://www.copyright.gov/1201/2021/ex-parte-communications.html;* U.S. Copyright Office, Letters Between the U.S. Copyright Office and Other Agencies, *https://www.copyright.gov/1201/2021/USCO-letters/;* Section 1201 Study at 150–51.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2022–0173; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BF79

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Swale Paintbrush

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the swale paintbrush (*Castilleja ornata*), a flowering plant species from New Mexico within the United States and the states of Chihuahua and Durango in Mexico, as an endangered species under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the swale paintbrush. After a review of the best available scientific and commercial information, we find that listing the species is warranted. If we finalize this rule as proposed, it would add this species to the List of Endangered and Threatened Plants and extend the Act's protections to the species. We find that designating critical habitat for the swale paintbrush is not prudent at this time.

DATES: We will accept comments received or postmarked on or before August 7, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by July 24, 2023.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2022–0173, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2022–0173, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, NM 87113; telephone 505–346–2525. 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:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the swale paintbrush meets the definition of an endangered species; therefore, we are proposing to list it as such. Listing a species as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to list the swale paintbrush as an endangered species under the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that habitat loss and fragmentation, hydrological alteration, altered fire regimes, effects from intensive grazing pressure, exotic plant invasion, climate change impacts (*i.e.,* drought and increased cool season temperatures), and cumulative effects of multiple stressors are threats to the swale paintbrush to the degree that listing it as an endangered species under the Act is warranted. Additionally, future collection risk may have compounding impacts on the species' viability.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, to designate critical habitat concurrent with listing. We have determined that designating critical habitat for swale paintbrush is not prudent due to the threat of collection and that increased collection risk outweighs the benefits that would be afforded to the species from the designation of critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for pollination, reproduction, and dispersal;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;

(d) Historical and current population levels, and current and projected trends;

(e) Past and ongoing conservation measures for the species, its habitat, or both; and

(f) Information on the species' biology, habitat, or status of populations at historical locations or within suitable habitats in Mexico.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any

threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status of this species.

(5) Information regarding our determination that designating critical habitat for the swale paintbrush is not prudent.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, 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. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Our final determination may differ from this proposal because we will consider all comments and information we receive during the comment period as well as any information that may become available after this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, we may consider proposing areas of critical habitat if, after considering new information and public comments, we determine that designating critical habitat is prudent and determinable. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On June 18, 2007, Forest Guardians (now WildEarth Guardians) petitioned the Service to list 475 species in the southwestern United States, including the swale paintbrush, as an endangered or a threatened species under the Act. On December 16, 2009, the Service published in the **Federal Register** (74 FR 66866) a partial 90-day petition finding that the petition provided substantial information indicating that the swale paintbrush may warrant listing under the Act based on loss and degradation of suitable habitat (Factor A). This document constitutes the 12-month finding on the petition to list the swale paintbrush under the Act.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the swale paintbrush (Service 2023, entire). The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained within the swale paintbrush SSA report. The Service sent the SSA report to four independent peer reviewers and received two responses. Results of this structured peer review process can be found at *https://www.regulations.gov.* In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Review Comments

As discussed in Peer Review above, we received comments from two peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained within the SSA report. The peer reviewers generally concurred with our methods and conclusions presented within the draft SSA report. They provided some additional information, clarifications in terminology, further discussions and interpretations of herbarium records, and feedback on stressors. We incorporated the majority of the substantive comments into the swale paintbrush SSA report, and thus this proposed rule. We outline the substantive comments that we did not incorporate, or fully incorporate, into the SSA report below.

(1) Comment: Both reviewers suggested alternative locations for the georeferenced location of some herbarium records based upon their knowledge and interpretation of the collection notes for the specimen in question, other specimens collected by the same collector, and specimens collected by other collectors that were known to be collecting on the same trip.

Response: We incorporated the new information for the records in question into the SSA report, where appropriate. Where alternate collection site locations were proposed, we considered both our originally georeferenced location and the alternate site as potential collection locations for the record. Most of the alternate locations were located within our 10-kilometer (6.2-mile) buffer zone, with the exception of the Palmer 320 site, which was located 20.1 kilometers (12.5 miles) south-southwest of the originally georeferenced locality. Since the buffer zone analyses were designed to approximate the disturbance patterns for a larger geographic area and consider the positional uncertainty in our georeferenced locations, we did not re-

run the disturbance analyses on the alternate collection sites. We assumed that the percent, intensity, and trends in disturbance would be roughly equivalent for all sites within the larger buffered area. However, we added additional discussion to our disturbance analysis narrative and overall summaries, where appropriate, to include information about disturbance in the near vicinity of the alternate collection locations.

We also received information about one previously unknown herbarium record within the Animas Valley of New Mexico, the Cowan Ranch site. Both peer reviewers alerted us to the omission of this site, and we added the Cowan Ranch record to our assessments throughout the SSA report. The Cowan Ranch site is also considered within this proposed rule.

(2) Comment: One reviewer questioned the inclusion versus exclusion of some of the herbarium specimens as swale paintbrush records. Specifically, they questioned our treatment of *Castilleja palmeri* and *C. pediaca* as synonyms of *C. ornata* (swale paintbrush). They noted that two primary online reference databases for plants (*i.e.,* the Missouri Botanical Garden's *Tropicos* database and the Royal Botanic Gardens, Kew's *Plants of the World* database) do not recognize *C. palmeri* and *C. pediaca* as synonyms of *C. ornata;* however, they acknowledged that the researchers who annotated the type specimens considered these species synonyms. Thus, they requested that we include additional records that were labeled as *C. palmeri* and *C. pediaca* in herbarium records as swale paintbrush within our analyses and add some clarifying language in our consideration of taxonomy.

Response: We consulted with an expert in *Castilleja* systematics to verify the accuracy of all of the swale paintbrush records that we considered in our analyses as well as the additional records mentioned by the reviewer. After our discussions and consideration of the information provided through peer review, we added two of the suggested records as swale paintbrush and kept one record, Palmer 376, as ''likely not swale paintbrush'' within our SSA report. We did not include the Palmer 376 record because the species identity of the *C. palmeri* type collection remains an open question. This specimen is likely not swale paintbrush (*C. ornata*) given that the specimen and typical swale paintbrush specimens have differences in morphology and the collection is much farther south than known swale paintbrush collections. Further, this *C. palmeri* record was described in the same paper as some swale paintbrush specimens, and the author considered them to be separate species (Eastwood 1909, pp. 570–571). Thus, it was recommended to treat ambiguous *C. palmeri* specimens as likely not swale paintbrush until further specimens could be studied (Egger 2022a, pers. comm.; Egger 2022b, pers. comm.).

(3) Comment: One reviewer suggested that we consider soil formations and the geological history of the species' range within our assessments of swale paintbrush. They suggested that swale paintbrush occurrence may be associated with pluvial Pleistocene lakes, such as the Cloverdale Lake in the Animas Valley and the Bavicora Lake in Chihuahua, or alluvial filled canyon bottoms.

Response: Although there is potential for up to four of the historical collection sites being associated with some of the historical pluvial or alluvial geologic features, this observation does not appear to be diagnostic for the species across its range. Given the large uncertainty in the georeferenced locations for the historical sites, especially those within Mexico, any associations based on those locations may be spurious. Thus, we did not include these pluvial and alluvial features as a potentially diagnostic character for swale paintbrush occupancy. However, we updated and clarified our soil type associations discussion to include the soil types observed at alternate sites.

(4) Comment: One reviewer questioned whether we could speak strongly to aspects of the swale paintbrush's ecology given a lack of research on the topic. Specifically, they questioned whether we could state if the species relies on seasonal inundation, fire, and grazing as well as the timing of those impacts.

Response: We acknowledge that there is inherent uncertainty within our SSA report with regard to the swale paintbrush ecology given the scarcity of information on this species. The bulk of published studies pertain to the species' taxonomy rather than the species' ecology. Most observations for the species occurred from limited observations of swale paintbrush at a single site over the last 30 years. Thus, we used information from other species within the genus *Castilleja,* information from other herbaceous plants within Madrean desert ecosystems, and observations of swale paintbrush habitat over the last decade to inform our assessments. For species that have limited data, such as swale paintbrush, data from a surrogate species are informative for assessing that status of the species and/or threats to the species' habitat; however, we acknowledge our uncertainties related to our assessment and use of surrogate information throughout the SSA report, particularly in chapter 6 (Service 2023, entire).

The full list of peer reviewer comments and the SSA report (Service 2023, entire), which incorporates the feedback from peer and partner reviews, are available for public review at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2022–0173.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the swale paintbrush (*Castilleja ornata*) is presented in the SSA report (Service 2023, entire). The swale paintbrush (also known as the glowing Indian paintbrush and the ornate paintbrush) is an annual species of flowering plant in the family Orobanchaceae. There is no taxonomic uncertainty surrounding the validity of swale paintbrush as a species (Egger 2002 pp. 193, 195; Integrated Taxonomic Information System (ITIS) 2022, unpaginated); thus, we recognize swale paintbrush as a valid species and, therefore, a listable entity under the Act.

The swale paintbrush is native to the grassland ecosystems of Hidalgo County, New Mexico, in the United States and to the eastern Sierra Madre Occidental in Chihuahua and Durango in Mexico (McIntosh 1994, pp. 329–330). The species has been historically documented from 13 sites: 2 sites within Hidalgo County, New Mexico; 10 sites in Chihuahua, Mexico; and 1 site in Durango, Mexico. Swale paintbrush was first observed from a site in Chihuahua, Mexico, in 1887, but not discovered in New Mexico until 1993 (Service 2023, pp. 6–11). The swale paintbrush was last observed in Mexico in 1985 and New Mexico in 2021. Currently, the species is only known to occur at a single site in the Animas Valley of Hidalgo County, New Mexico: the Gray Ranch site. Additional surveys within suitable habitat in the vicinity of known sites have not yielded additional locations for the species (Roth 2017, p. 3; Roth 2020, pp. 5, 7; Service 2023, unpublished data). The current status of swale paintbrush at the other historical sites is unknown.

Given the species' overall rarity, little is known about the habitat requirements for swale paintbrush. Across the species' historical range, swale paintbrush has been observed in relatively level, seasonally wet grassland habitats at elevations ranging

from approximately 1,500–2,300 meters (m) (4,920–7,550 feet (ft)) (Service 2023, pp. 6–20). Species within the genus *Castilleja* are root hemiparasites, meaning that plant vigor depends on exploitation of host plants for carbon, nitrogen, and other nutrients (Heckard 1962, p. 29). *Castilleja* plants begin to establish connections with host plant roots (via structures called haustoria) as seedlings (Heckard 1962, p. 28). For swale paintbrush, alkali sacaton (*Sporobolus airoides*) and blue grama (*Bouteloua gracilis*) are thought to be the primary host plants within the Animas Valley populations.

Swale paintbrush individuals have one or a few erect stems that stand 20–50 centimeters (cm) (7.9–19.7 inches (in)) in height. Plants have oblong leaves with strongly wavy leaf margins and floral bracts are typically off-white to very pale yellow (New Mexico Rare Plant Technical Council (NMRPTC) 1999, unpaginated), although reddish phases of the plant have been observed within herbarium records. Across the range, aspects of the swale paintbrush's life cycle seem timed to monsoon season precipitation patterns. Plants germinate between April and June, flower between late-May and late-August (coincident with monsoonal rainfall), and set seed in late August through October (NMRPTC 1999, unpaginated). The longevity of swale paintbrush in the seedbank is unknown; however, the longevity of surrogate *Castilleja* species is up to 5 years in storage and 2 years in the wild (Service 2023, pp. 22–24).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess swale paintbrush viability, we used the three conservation biology principles of resiliency, redundancy,

and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (*e.g.,* wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (*e.g.,* droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (*e.g.,* climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the swale paintbrush SSA report; the full SSA report can be found at Docket FWS–R2–ES–2022–0173 on *https://www.regulations.gov.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis. For a full description of our analyses, see the swale paintbrush SSA report (Service 2023, entire).

Species Needs

The individual, population-level, and species-level needs of the swale paintbrush are summarized in tables 1 through 3, below. For additional information, please see the SSA report (Service 2023, chapter 2).

TABLE 1—THE ECOLOGICAL REQUISITES FOR SURVIVAL AND REPRODUCTIVE SUCCESS OF SWALE PAINTBRUSH INDIVIDUALS

Life stage	Requirements	Description
Seeds—germination	Suitable abiotic conditions	• Winter temperatures below 2 degrees Celsius (36 degrees Fahrenheit) for cold stratification. • Suitable warmth, light, and soil moisture for germination of seeds; cool season precipitation supports germination soil moisture.
Seedlings and Vegetative Plants—establishment and growth.	Suitable biotic and abiotic conditions.	• Adequate monsoonal rainfall June through August, the critical rainfall period for swale paintbrush, for growth and establishment. • Proximity of surrounding plants, likely alkali sacaton (*Sporobolus airoides*) and/or blue grama (*Bouteloua gracilis*), for increased water and nutrient uptake via parasitic haustoria. • Lack of herbivory throughout germination, establishment, and growth periods.
Flowering Plants—reproduction	Pollination	• Presence of suitable pollinators during the flowering season (June to September). • Lack of herbivory through flower production (June to September) and seed set (July to October).

TABLE 2—POPULATION-LEVEL REQUISITES NECESSARY FOR A HEALTHY POPULATION OF SWALE PAINTBRUSH

Resiliency type	Requirements	Detail
Demographic	Population growth rate (λ)	• The long-term λ needs to be high enough to rebound from periodic population crashes, *i.e.,* on average $\lambda > 1.0$.
	Population size (N)	• Sufficiently large N to withstand periodic stochastic events and population crashes. • The N required may vary geographically across populations.
Habitat	Precipitation	• Adequate quantity and timing of cool season rainfall to allow for germination and establishment. • Adequate quantity and timing of monsoonal rainfall during the critical rainfall period of swale paintbrush (June through August) to allow for germination, establishment, growth, survival, and reproduction.
	Habitat	• Presence of host species, likely alkali sacaton, for hemiparasitic relationships and increased uptake of water and nutrients.

TABLE 2—POPULATION-LEVEL REQUISITES NECESSARY FOR A HEALTHY POPULATION OF SWALE PAINTBRUSH—Continued

Resiliency type	Requirements	Detail
	Pollination	• Minimal to no nonnative vegetation that outcompete swale paintbrush, its host species, or pollinator forage and host plants for soil nutrients, light, and water resources. • Absence of persistent chemical contaminants that interfere with swale paintbrush's, host species', or pollinator species' physiological functionality. • Limited levels of herbivory across all life stages. • Natural processes, such as hydrological cycles and periodic disturbances, that maintain grassland integrity (*e.g.,* natural fire return intervals of low intensity, seasonally appropriate fires that maintain canopy gaps, enhance grass and forb growth, and prevent colonization by woody species). • Presence of suitable pollinator(s). • Sufficient soil moisture and nutrients for production of flowers and nectar resources. • An abundance and diversity of native flowering plants within the habitat to attract pollinators and maintain genetic connectivity between swale paintbrush patches.

TABLE 3—SPECIES-LEVEL ECOLOGY OF SWALE PAINTBRUSH: REQUIREMENTS FOR LONG-TERM VIABILITY

[Ability to maintain self-sustaining populations over a biologically meaningful timeframe]

3 Rs	Species-level requisites	Description
Resiliency	Self-sustaining populations across the species' range.	Self-sustaining populations are demographically, genetically, and physiologically robust; have sufficient quantity of high-quality habitat; and are free of, or have manageable, threats.
Redundancy	Sufficient distribution of populations to spread risk.	Sufficient distribution to guard against catastrophic events wiping out portions of the species' adaptive diversity and the species as a whole (*i.e.,* to reduce covariance among populations); spread out geographically but also ecologically (different ecological settings).
Representation	Maintain adaptive diversity of the species.	Populations maintained across spatial and environmental gradients to maintain ecological and genetic diversity.
	Maintain evolutionary processes	Maintain evolutionary drivers (gene flow, natural selection, genetic drift) to mimic historical patterns.

Risk Factors for the Swale Paintbrush

The primary factors influencing swale paintbrush viability are habitat loss and fragmentation, hydrological alteration, altered fire regimes, effects from intensive grazing pressure, exotic plant invasion, climate change impacts (*i.e.,* drought and increased cool season temperatures), and cumulative effects of multiple stressors. Additionally, future collection risk may have compounding impacts on the species' viability. The majority of information pertaining to these threats are based on the New Mexico portion of the species' range; however, based on visual inspections of aerial imagery and the limited information we have on the historical sites, we believe these are threats to this species rangewide. These stressors and their effects to swale paintbrush are summarized below.

Habitat Loss and Fragmentation

Habitat loss (Factor A) results in mortality of active plants, within-site seedbank loss, reduction in available habitat, overall decline in occupied area and abundance, increased edge effects, and decreased genetic exchange (Oostermeijer 2003, p. 3 and references therein). Edge effects include reduced wildlife use and travel (and the associated decrease in genetic exchange), reduced infiltration of precipitation, altered surface and subsurface hydrology, increased human activities, and exotic plant invasion (Forman and Alexander 1998, pp. 210, 223; Bhattacharya et al. 2003, p. 37; Raiter et al. 2018, pp. 445–446; Sawyer et al. 2020, p. 934). The combined effects of habitat loss and edge effects can lead to fragmented and small populations that have reduced genetic exchange and hence reduced reproductive potential and adaptive capacity (Oostermeijer 2003, p. 1 and reference therein). Major sources of habitat loss and fragmentation within swale paintbrush's range include conversion to agriculture and development associated with human habitation and transportation.

Hydrological Alteration

Swale paintbrush relies on cool season precipitation, monsoon precipitation, and a suitable surface/subsurface hydrology to complete its life cycle and maintain its seedbank. Thus, this species is sensitive to hydrological alterations (Factor A), such as artificial drought and emergence season inundation. Artificial drought occurs when upslope obstacles to, or diversions of, surface flows starve downslope areas that would have otherwise received those flows (Raiter et al. 2018, pp. 445–446; Roth 2020, p. 5; Nichols and Degginger 2021, entire). One report suggests that disturbance altered local hydrology in the Gray Ranch area, starving previously occupied patches of habitat, and rendering them unsuitable for the species (Roth 2020, p. 5). Alternately, downslope obstacles to surface flows may permanently or seasonally flood upslope areas that would have otherwise shed flows to downslope areas. Prolonged inundation causes forb mortality, reducing forb cover and increasing graminoid (grass-like) cover and height (Insausti et al. 1999, pp. 267, 269–271). If inundation interrupts the species' annual lifecycle, existing seedbanks may become

depleted and/or seedbank replenishment may be thwarted, depending on the timing, intensity, and/or duration of flooding (Insausti et al. 1999, p. 272).

Altered Fire Regime

Fire intensity, frequency, and seasonality (Factor A) have direct and indirect influences on swale paintbrush. Swale paintbrush relies heavily on canopy gaps and mineralized soil nutrient inputs for establishment and growth. Fire fosters these conditions and also reduces the cover of woody vegetation. It stimulates the growth of other grasses, including blue grama (which is one of swale paintbrush's host plants), and forbs (which support pollinators and, hence, swale paintbrush pollination) (Johnson 2000, unpaginated; Anderson 2003, unpaginated; Lybbert et al. 2017, p. 1030; Sam 2020, p. 69; Bestelmeyer et al. 2021, p. 181).

Prehistoric fire return intervals in Madrean ecosystems range from 2.5–10 years. Grasslands, a key ecosystem for swale paintbrush, are more likely to convert to shrublands or woodlands when fire return intervals exceed 10 years. Fire management regimes and grazing intensity (described below) affect fire frequency, and these habitats are sensitive to fire suppression and herbivore removal of fine fuels, which decrease fire frequency and may lead to increased intensity of fires when they do occur (Kaib et al. 1996, pp. 253, 260; Swetnam and Baisan 1996, pp. 23, 25; Brown and Archer 1999, pp. 2393–2394; Poulos et al. 2013, pp. 3–4, 8; NatureServe 2021, unpaginated). Excessive fire frequency, though less likely to occur, may also have detrimental impacts on swale paintbrush populations. For example, alkali sacaton's post-fire recovery time is 2–4 years, and high fire frequency can lower pollinator abundance and diversity (Johnson 2000, unpaginated; Carbone et al. 2019, p. 7). In turn, decreased pollinator abundance and diversity results in decreased pollination rates of swale paintbrush, which then leads to decreased reproduction and seedbank replenishment.

Uncharacteristic fire seasonality is likely to adversely affect swale paintbrush. While a spring fire season is characteristic of the Sierra Madre Occidental and adjacent Madrean ecosystems, a summer fire season is characteristic of the rest of the desert southwest (Swetnam et al. 2001, pp. 5, 8; Poulos et al. 2013, p. 8). Current natural ignitions for the historical Gray Ranch area are reported to rarely start before the middle of April or after the middle of July (Brown 1998, p. 250). However, fire prescriptions for the Animas Valley area are timed to avoid the breeding seasons of several wildlife species, potentially pushing prescription burns into mid-August, swale paintbrush's reproductive season (Malpai Borderlands Group (MBG) 2008, pp. 63–116). If fire interrupts the species' annual lifecycle, existing seedbanks may become depleted and/or seedbank replenishment may be thwarted.

Effects of Intensive Grazing

Swale paintbrush occurs in grasslands that are used for grazing. While spring grazing helps to create the canopy gaps that this species needs for establishment, excessive grazing pressure that results in significant canopy loss increases the potential for evaporation, erosion, and nutrient loss (Factor A) (Li et al. 2007, pp. 318, 329–331). These effects can reduce swale paintbrush productivity both directly and indirectly through impacts on the productivity of symbiotic and host species (Pimentel and Kounang 1998, pp. 419–421). Palatability of species in the genus *Castilleja* is considered poor for horses, poor to fair for cattle, and fair to good for sheep (New Mexico State University n.d., unpaginated). However, the swale paintbrush's slender stem morphology and erect growth habitat make them vulnerable to trampling by livestock when habitats are grazed during the plant's growing season. If grazing or trampling interrupt the species' annual lifecycle, existing seedbanks may become depleted and/or seedbank replenishment may be thwarted, depending on the timing, intensity, and/or duration of the grazing. Winter–spring grazing is least likely to affect swale paintbrush survival and reproduction directly. Excessive herbivory during winter–spring could result in shifting the fire season further into the growing season, which could have negative impacts on seedbank replenishment and viability.

Exotic Plant Invasion

Exotic plants (Factor A) can become introduced to, and dispersed within, grassland habitats by the travel of both humans and animals. Invasive exotic plants could reduce the availability of canopy gaps and/or outcompete swale paintbrush for available gaps, soil moisture, and soil nutrients, potentially both depleting the existing seedbank and reducing seedbank replenishment. Co-occurring noxious plant species also increase the risks of herbicide exposure. For a list of documented introduced species within the Gray Ranch area, see the SSA report (Service 2023, pp. 29–30). Introduced species in the vicinity of the sites in Mexico are unknown.

Climate Change Impacts

Climate change (Factor E) has the potential to affect all of the following factors: drought (and associated increases in grazing pressure), flood, fire, and vulnerability to exotic plant invasion. The New Mexico sites are classified as an Apacherian-Chihuahuan Semi-Desert Grassland and Steppe ecological system within the EPA level 3 Madrean Archipelago ecoregion and the EPA level 4 Madrean Basin Grasslands ecoregion. This system is highly vulnerable to future climate changes. The remaining historical collection sites in Mexico are in Chihuahuan Semi-Desert Grassland and Steppe ecological systems within Sierra Madre Occidental ecoregions, which are moderately vulnerable to future climate changes. Projections for the Cloverdale HUC 08 watershed predict increasing temperatures and less available soil moisture, which would be akin to prolonged drought. The elevated temperatures and increased aridity projected across swale paintbrush's historical range render these systems vulnerable to conversion to shrub-steppe (Caracciolo et al. 2016, pp. 2–3; NatureServe 2021, unpaginated). These changes are likely to impact swale paintbrush populations at the northern- and southern-most extents of this species' range, including the verified extant population in New Mexico. Increased growing season aridity may stress the germination, establishment, growth, and reproduction of swale paintbrush plants, and increased winter temperatures may reduce swale paintbrush's capacity to overcome seed dormancy before seeds in the soil seedbank become unviable. The combined effects of increased soil seedbank loss and reduced seedbank replenishment leads to smaller population sizes, and, thus, the species would be more susceptible to environmental and demographic stochasticity.

Collection Risk

A future threat to the species is the emerging risk of collection (Factor B). Although no illegal collection events of swale paintbrush have been documented, other species within the genus *Castilleja* are horticulturally desirable. Many *Castilleja* species are readily available via online companies, and yellow-bracted species, aesthetically similar to swale paintbrush, are marketed as rare.

Currently, due to the species' rarity and limited distribution and risks of illegal collection to rare species, swale paintbrush locality data below the county level are not publicly available through online databases (*e.g.,* SEINet, Natural Heritage New Mexico, New Mexico Rare Plants website). If the location of known occupied habitat became publicly available, risk of illegal collection could increase. There is a history of illegal collection occurring for other species at or within the near vicinity of the Gray Ranch site. These collection efforts targeted the Sonoran Desert toad (*Bufo alvarius;* New Mexico Department of Game and Fish 2020, pp. 78–79), New Mexico ridge-nosed rattlesnake (*Crotalus willardi obscurus;* Harris Jr. and Simmons 1975, p. 6; Malpai Borderlands Group 2008, p. 60), and Mexican hog-nosed snake (*Heterodon kennerlyi;* Medina 2021, pers. comm.). For the New Mexico ridge-nosed rattlesnake specifically, collection over the period of 1961–1974 may have resulted in the loss of 130 individuals from the population (Service 2008, p. 37) and researchers encountered 15 illegal collectors from six states during a single season (Harris Jr. and Simmons 1975, p. 6). Swale paintbrush is easier to detect and collect than these mobile, camouflaged species. Thus, given the desirability of paintbrush species for horticultural use, the increased desirability of rare species, the inability of this species to evade detection and collection, and the history of illegal collection in the vicinity of the Gray Ranch, illegal collection is a potential future emerging threat for this species, especially if the location of known occupied habitat becomes publicly available. Further, given the small known extant range and population size of this species, its annual duration and reliance on frequent seedbank replenishment, and risks to its seedbank from stochastic events and other ongoing threats to the species, effects from collection (removal of plants and damage to habitat), illegal collection would be deleterious to swale paintbrush.

Cumulative Effects

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report (Service 2023, entire), we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

In summary, swale paintbrush is likely adapted to withstand stochastic stressor events individually and intermittently. However, increased intensity, frequency, co-occurrence of, or consecutive occurrence of, and synergistic effects between, stochastic stressor events increases this species risk. Given swale paintbrush's annual duration, reliance on frequent seedbank replenishment, and its low seed longevity, as few as two consecutive years of adverse environmental conditions or human-caused or natural adverse stochastic events could have catastrophic consequences for this species.

Current Condition

The swale paintbrush was historically documented from 13 sites in the United States and Mexico: 2 sites in the Animas Valley of Hidalgo County, New Mexico, and 11 sites in the eastern Sierra Madre Occidental of Chihuahua and northern Durango in Mexico. Currently, only one site—the Gray Ranch site—is known to exist within the Animas Valley of Hidalgo County, New Mexico, and the species was last observed at this site in 2021. The last observations of historical sites were 1993 in New Mexico and 1985 in Mexico.

We assessed the swale paintbrush's current condition using a two-pronged approach. First, for all known occupied and historically collected swale paintbrush sites, we derived the amount and intensity of disturbed area and currently protected areas within the vicinity of each site using aerial imagery from the period of 2000 to 2020. Then, we used these data to estimate the possibility of swale paintbrush occupancy within the vicinity of the historical location and assigned each site into one of four categories: (1) known extant, (2) possibly extant, (3) possibly extirpated, and (4) presumed extirpated. Known extant means that the population has been observed within the last decade. Possibly extant means that the site is only known from herbarium records but has a reasonable potential for rediscovery; evidence of habitat loss or degradation is not substantial enough to presume complete loss of swale paintbrush habitat since the time of collection. Possibly extirpated means that the population is known only from herbarium records and has a low potential for rediscovery; evidence of habitat loss or degradation is substantial enough that loss of the species at the site is possible. Presumed extirpated means that the population is only known from herbarium records and has a very low potential for rediscovery; evidence of habitat loss or alteration is significant enough to presume complete loss of suitable habitat since the time of collection.

Second, we conducted a more detailed assessment of the resiliency for the known occupied site at the Gray Ranch in the Animas Valley. Briefly, we considered the demographic factors (population abundance, occupied area, and count of patches within the last 2 years) and habitat factors (surface disturbance, herbicide exposure, fire regime, grazing regime, inundation seasonality, growing season canopy cover, and precipitation history). We assigned each factor into three condition categories; (1) high (factor values that are compatible with stable to increasing populations); (2) moderate (factor values that contribute to minimal rates of decline), or (3) low (factor values that contribute to high rates of decline). Our methodology and evaluations of viability are described in more detail in the swale paintbrush SSA report (Service 2023, chapter 4).

Based on our assessment of swale paintbrush's current conditions across all sites, one site, the Gray Ranch site, is known extant, four sites ranked as possibly extant, six sites ranked as possibly extirpated, and two sites ranked as presumed extirpated. Of the four possibly extant sites, swale paintbrush plants were last observed at the sites in 1899, 1903, 1979, and 1993. Although potentially suitable habitat may remain at some of the historical sites, particularly the four possibly extant sites, the size and abundance (*i.e.,* resiliency) of the historical sites are unknown and we cannot reasonably assume anything about the status of the species at these sites. Thus, the swale paintbrush has no verifiable redundancy and very limited representation throughout its known range.

Based on our detailed assessment of current condition, swale paintbrush has moderate to high resiliency at the Gray Ranch site. The most recent survey in September 2021 documented a minimum abundance of 6,000 plants—higher than our range of provisional minimum viable population sizes (1,500–5,000 plants)—distributed across 2 patches and 28 acres of habitat in the Animas Valley. Generally, the site has moderate amounts of surface disturbance that would have limited influence on pollinator visitation rates. There has been no recent herbicide

exposure within 300 meters of swale paintbrush patches within the last 15 years. Grazing during the species' active season within recent years has been avoided, and the disturbance regime (fire return intervals, inundation seasonality, grazing regime) combined with the recent precipitation history, have maintained favorable canopy cover that allows for swale paintbrush growth, establishment, and recent seedbank replenishment within the core of the population area.

Although the Gray Ranch site is considered to have moderate to high resiliency currently, the small area that the species is known to occupy increases its risk of extirpation due to catastrophic events. The swale paintbrush is at risk of impacts from cumulative impacts of multiple stressors because it is an annual species with a provisional seedbank viability of 2 years in the wild and frequent replenishment of the seedbank is essential to population persistence. Replenishment of the seedbank with viable seeds requires flower production, successful pollination, and ovule maturation, all of which are impacted by stochastic and catastrophic events such as: habitat loss and fragmentation (Factor A), hydrological alteration (Factor A), altered fire regimes (Factor A), effects from intensive grazing pressure (Factor A), exotic plant invasion (Factor A), climate change impacts (*i.e.,* drought and increased cool season temperatures; Factor E), and cumulative effects of multiple stressors. Additionally, future collection risk (Factor B) may have compounding impacts on the species' viability.

Drought is the primary threat to the species, as increased frequency, intensity, and/or duration of drought can lead to decreased swale paintbrush survival through direct (*e.g.,* drought stress, trampling, or herbivory) and indirect (*e.g.,* increased grazing pressure within the habitat, increased fire risk, delayed post-fire recovery) mortality. Although grazing and fires help maintain canopy gaps, grazing and/or fires during the growing season can result in decreased swale paintbrush survival. Currently, grazing during the growing season is generally avoided at the Gray Ranch site; however, this site is used as a grass-banking pasture and may experience increased grazing pressure during times of drought. Grazing during the active season can result in trampling and mortality of the species. Growing season fires result in swale paintbrush mortality and, depending on the duration and intensity of the fire, prolonged recovery times for native vegetation. Decreased recovery times leave soils vulnerable to evaporation, erosion, nutrient loss, and invasive species establishment, all of which lead to decreased swale paintbrush survival.

Taken altogether, the swale paintbrush has moderate to high resiliency within 1 population and unknown resiliency across the other 12 historical sites. Although our analyses reflect our best assessment of the current conditions of disturbance at or in the vicinity of our estimates of historical site locations, the status of historically collected sites at Cowan Ranch of the Animas Valley and in the eastern Sierra Madre Occidental of Mexico is unknown. Rangewide, specimens were collected from 1887–2021, with the most recent record from Mexico being collected in 1985. Additionally, outside of the known extant New Mexico site, there have been no reported estimates of abundance with the exception of qualitative reports of ''occasional'' for the distribution at the Keil 13388 site and ''few plants'' for Palmer 320 (Palmer 1906, unpaginated; Keil 1978, unpaginated; Service 2023, p. 19). Thus, we cannot reasonably conclude anything about the health or resiliency of any site except for the Gray Ranch site. Accordingly, swale paintbrush has limited to no redundancy, depending on the status of the species at the historical sites. Even if swale paintbrush remains extant at sites outside of Gray Ranch, the majority of sites are isolated and there is limited potential for interpopulation rescue in the event of local extirpations. Finally, the swale paintbrush has limited representation. The Gray Ranch site exists at the northern periphery of the species' range and contains only a small portion of the historical genetic and ecological diversity of the species.

Future Condition

As part of the SSA, we also developed future condition scenarios to capture the range of uncertainties regarding future threats and the projected responses by the swale paintbrush. Our future condition assessments considered the projected impacts of increased habitat disturbance and climate changes across the swale paintbrush's historical range. Specifically, we considered the upper and lower bounds of plausible impacts of environmental variables related to aridity during the growing and reproductive seasons and seed chilling and cold stratification during the cool season. Because we determined that the current condition of the swale paintbrush is consistent with an endangered species (see Determination of Swale Paintbrush's Status, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2023, chapter 5) for the full analysis of future scenarios.

Conservation Efforts and Regulatory Mechanisms

Below is a brief description of conservation measures and regulatory mechanisms currently in place. Please see the SSA report for a more detailed description (Service 2023, chapter 3).

Swale paintbrush is listed as an endangered species by the state of New Mexico. In New Mexico, swale paintbrush exists on lands managed for livestock production in an ecologically responsible manner by the Animas Foundation (Brown 1998, p. 248). The Nature Conservancy (TNC), the former landowners of the Gray Ranch site, retains a conservation easement prohibiting development on the lands formerly known as the Gray Ranch (TNC 2022, unpaginated). While the easement does not ensure that range improvements will avoid adverse effects to swale paintbrush, it ensures that the covered areas will remain open space.

The Animas Foundation is a member of the Malpai Borderlands Group, a private, nonprofit organization that is dedicated to maintaining or increasing rangeland health and the viability of traditional livelihoods that maintain rangelands as open space (Malpai Borderlands Group 1994, p. 2; Brown 1998, p. 249; Malpai Borderlands Group 2008, pp. 1–2). Malpai Borderlands Group activities related to use, maintenance, and enhancement of rangelands fall within the scope of a habitat conservation plan (HCP) for all privately owned and State-trust rangelands in the Malpai Borderlands of Southern Arizona and New Mexico. Although the swale paintbrush is not a covered species under this plan, the species may benefit from the plan's covered activities and associated conservation measures (Service 2023, pp. 35–36, table 3–1). These covered activities and associated conservation measures have the potential to maintain and enhance swale paintbrush habitat by restoring fire, minimizing erosion, and controlling invasive and exotic plant species. The Animas Foundation's participation in the HCP, beyond the grassbanking program, is unknown.

Finally, we have partnered with the Animas Foundation, the State of New Mexico, and Albuquerque Bio Park to conduct and maintain ex situ seed collections of swale paintbrush from the Gray Ranch site. Currently, 77 maternal lines have been collected and retained in offsite storage institutions for

germination studies, grow out, seed increase, and potential reintroduction efforts.

Determination of Swale Paintbrush's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we found that the swale paintbrush's distribution has declined from historical conditions. The swale paintbrush was documented from 13 sites historically: 2 sites in the Animas Valley of Hidalgo County, New Mexico, and 11 sites in the eastern Sierra Madre Occidental of Chihuahua and northern Durango in Mexico. Of the 13 historical sites, only 1 site—the Gray Ranch site within the Animas Valley of Hidalgo County, New Mexico—is currently known to be extant. Swale paintbrush plants were last observed at the Gray Ranch site in September of 2021 with a minimum abundance of 6,000 plants distributed across 28 acres of habitat. Of the 12 other historical sites, our analyses found that four sites ranked as ''possibly extant,'' six sites ranked as ''possibly extirpated,'' and two sites ranked as ''presumed extirpated.'' Although potentially suitable habitat may remain at some of the historical sites, the size and abundance (*i.e.,* resiliency) of the historical sites is unknown, and we do not have information that these sites are resilient, stable, or able to contribute to the viability of the species.

Although the Gray Ranch site is considered to have moderate to high resiliency currently—based on the most recent abundance exceeding the minimum viable population size and habitat conditions of the Animas Valley being generally favorable—the small area that the species is known to occupy increases its risk of extirpation due to catastrophic events. The swale paintbrush is at risk from cumulative impacts of multiple stressors because it is an annual species with a provisional seedbank viability of 2 years and frequent replenishment of the seedbank is essential to population persistence. Replenishing the seedbank with viable seeds requires flower production, successful pollination, and ovule maturation, all of which are impacted by these stochastic and catastrophic events such as habitat loss and fragmentation (Factor A), hydrological alteration (Factor A), altered fire regimes (Factor A), effects from intensive grazing pressure (Factor B), exotic plant invasion (Factor A), climate change impacts (*i.e.,* drought and increased cool season temperatures; Factor E), and cumulative effects of multiple stressors. Additionally, future collection risk (Factor B) may have compounding impacts on the species' viability.

Drought is the primary threat to the species, as increased frequency, intensity, and/or duration of drought can lead to decreased swale paintbrush survival through direct and indirect mortality. Although grazing and fires can help maintain canopy gaps, grazing and/or fires during the growing season can result in decreased swale paintbrush survival. Currently, grazing during the growing season is avoided at the Gray Ranch site; however, this site is used as a grass-banking pasture and may experience increased grazing pressure during times of drought. Grazing during the active season can result in trampling and mortality of the species. Growing season fires result in swale paintbrush mortality and, depending on the duration and intensity of the fire, prolonged recovery times for native vegetation. Decreased recovery times leave soils vulnerable to evaporation, erosion, nutrient loss, and invasive species establishment, all of which lead to decreased swale paintbrush survival. Thus, decreased swale paintbrush survival results in decreased seedbank replenishment and, by extension, decreased seedbank viability, which increases the species' risk of extinction.

Overall, swale paintbrush has limited viability due to its limited resiliency, lack of redundancy, and limited representation at the species level. The species currently occurs at a single site at the northern periphery of its known historical range, and is vulnerable to the impacts of catastrophic events. Given its limited distribution, the species likely contains only a small portion of its historical genetic and ecological diversity, and thus swale paintbrush has limited capacity to adapt to long-term environmental changes (representation). Even if swale paintbrush is extant at sites outside of the Gray Ranch, the majority of these potentially extant historical sites are isolated, and thus there is limited potential for interpopulation rescue in the event of local extirpations.

Accordingly, we find that the swale paintbrush is presently in danger of extinction throughout all of its range based on small population size and the species' risk from a number of contemporary threats. The risk of extinction is high due to a small population with no known potential for recolonization from nearby sources (no redundancy) and the species having limited viability within the seedbank. We do not find that a threatened status is warranted for the swale paintbrush because the species occupies a small geographic range that is currently vulnerable to stressors with the potential for catastrophic synergistic consequences. Thus, the species' limited resiliency, lack of redundancy, and limited representation currently place the species in danger of extinction, and these contemporary threats are only projected to increase in frequency, severity, extent, and/or duration into the future.

Thus, after assessing the best available information, we determine that swale paintbrush is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the swale paintbrush is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the swale paintbrush warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered

Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the swale paintbrush meets the Act's definition of an endangered species. Therefore, we propose to list the swale paintbrush as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of New Mexico would be eligible for Federal funds to implement management actions that promote the protection or recovery of the swale paintbrush. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Although the swale paintbrush is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled Interagency Cooperation and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

In contrast, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action which *is likely* to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Although the conference procedures are required only when an action is likely to result in jeopardy or adverse modification, action agencies may voluntarily confer with the Service on actions that may affect species proposed for listing or critical habitat proposed to be designated. In the event that the subject species is listed or the relevant critical habitat is designated, a conference opinion may be adopted as a biological opinion and serve as compliance with section 7(a)(2).

Examples of actions for the swale paintbrush that may be subject to conference and consultation procedures under section 7 are land management or other landscape-altering activities on Federal lands administered by the Bureau of Land Management and the U.S. Forest Service as well as actions on

State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Examples of Federal agency actions that may require consultation for the swale paintbrush could include direct participation in Federal permits or funding for habitat maintenance or restoration treatments, emergency response activities (such as for fire), range improvement projects, and public infrastructure maintenance or development (such as transportation infrastructure and border barricades). Given the difference in triggers for conferencing and consultation, Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.61, make it illegal for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed any of the following with an endangered plant: (1) import to or export from, the United States; (2) remove and reduce to possession from areas under Federal jurisdiction; maliciously damage or destroy on any such area; remove, cut, dig up, or damage or destroy on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; (3) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity; (4) or sell or offer for sale in interstate or foreign commerce. Certain exceptions to these prohibitions apply to employees or agents of the Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits for endangered plants are codified at 50 CFR 17.62. With regard to endangered plants, a permit may be issued for scientific purposes or for enhancing the propagation or survival of the species. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, specific activities that will not result in violation of section 9 of the Act. To the extent possible, activities will be considered likely to result in violation will also be identified in as specific a manner as possible. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing.

As discussed above, certain activities that are prohibited under section 9 may be permitted under section 10 of the Act. In addition, to the extent currently known, the following activities will not be considered likely to result in violation of section 9 of the Act:

(1) Normal residential landscaping activities on non-Federal lands that do not occur within known swale paintbrush habitat;

(2) Cool season livestock grazing (November to April) that is conducted in a manner that does not result in degradation of swale paintbrush habitat; and

(3) Collection occurring under a Federal permit for scientific or recovery purposes.

This list is intended to be illustrative and not exhaustive; additional activities that will not be considered likely to result in violation of section 9 of the Act may be identified during coordination with the local field office, and in some instances (*e.g.,* with new information), the Service may conclude that one or more of the activities identified here will be considered likely to result in violation of section 9.

To the extent currently known, the following is a list of examples of activities that will be considered likely to result in violation of section 9 of the Act in addition to what is already clear from the descriptions of prohibitions found at 50 CFR 17.61:

(1) Removing, cutting, digging up, or damaging or destroying swale paintbrush in knowing violation of any law or regulation of the State of New Mexico or in the course of any violation of a State criminal trespass law; and

(2) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of swale paintbrush in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity.

This list is intended to be illustrative and not exhaustive; additional activities that will be considered likely to result in violation of section 9 of the Act may be identified during coordination with the local field office, and in some instances (*e.g.,* with new or site-specific information), the Service may conclude that one of more activities identified here will not be considered likely to result in violation of section 9. Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as

research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

We find that designating critical habitat for the swale paintbrush is not prudent under the criterion set forth at 50 CFR 424.12(a)(1)(i). Although no known illegal collection events of swale

paintbrush have been documented, other species within the genus *Castilleja* are horticulturally desirable. Many *Castilleja* species are readily available via online companies, and yellow-bracted species, aesthetically similar to swale paintbrush, are marketed as rare. There is a history of illegal collection occurring for other species at or within the near vicinity of the Gray Ranch site. These collection efforts involved the Sonoran Desert toad (New Mexico Department of Game and Fish 2020, pp. 78–79), New Mexico ridge-nosed rattlesnake (Harris Jr. and Simmons 1975, p. 6; Malpai Borderlands Group 2008, p. 60), and Mexican hog-nosed snake (Medina 2021, pers. comm.). Swale paintbrush is easier to detect and collect than these mobile, camouflaged species. Additionally, swale paintbrush locality data are not published within online databases due to the species' rarity and limited distribution. Designation of critical habitat requires the publication of maps and a narrative description of specific critical habitat areas in the **Federal Register**. The degree of detail necessary to properly designate critical habitat is considerably greater than the general descriptions of location provided in this proposal to list the swale paintbrush as an endangered species. We find that the publication of maps and descriptions outlining the locations would further facilitate unauthorized collection by providing currently unavailable precise location information. Overall, given the small known extant range and population size of this species, its annual duration and reliance on frequent seedbank replenishment, and risks to its seedbank from stochastic events and other ongoing threats to the species, effects from collection (removal of plants and damage to habitat), illegal collection would be deleterious to swale paintbrush. As such, we have determined that the increased collection risk to the swale paintbrush outweighs the benefits that would be afforded to the species from the designation of critical habitat. Therefore, in accordance with 50 CFR 424.12(a)(1), we determine that designation of critical habitat is not prudent for the swale paintbrush.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We contacted all Tribal entities with documented cultural interests in Hidalgo County, New Mexico—the Hopi Tribe, the White Mountain Apache Tribe, the Mescalero Apache Tribe, and the Fort Sill Apache Tribe—to provide notice of our status review, solicit information, and invite participation in the SSA process. We will continue to work with Tribal entities during the development of a final listing determination for the swale paintbrush.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2022–0173 and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.12, in paragraph (h), amend the List of Endangered and Threatened Plants by adding an entry for ''*Castilleja ornata*'' in alphabetical order under FLOWERING PLANTS to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
		FLOWERING PLANTS		
*	*	*	*	*
Castilleja ornata	swale paintbrush	Wherever found	E	[**Federal Register** citation when published as a final rule].
*	*	*	*	*

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–12132 Filed 6–7–23; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register
Vol. 88, No. 110
Thursday, June 8, 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–NOP–23–0026]

Meeting of the National Organic Standards Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), is announcing a meeting of the National Organic Standards Board (NOSB). The NOSB assists the USDA in the development of standards for substances to be used in organic production and advises the Secretary of Agriculture on any other aspects of the implementation of the Organic Foods Production Act (OFPA).

DATES: An in-person meeting will be held October 24–26, 2023, from 10:00 a.m. to approximately 6:00 p.m. Eastern Time (ET) each day and we plan to include a broadcast meeting virtually. The NOSB will hear oral public comments via webinars on Tuesday, October 17, 2023, and Thursday, October 19, 2023, from 12:00 p.m. to approximately 5:00 p.m. ET. The deadline to submit written comments and/or sign up for oral comment at either the webinar or in-person is 11:59 p.m. ET, September 28, 2023.

Public Comments: Comments should address specific topics noted on the meeting agenda.

Written Comments: Written public comments will be accepted on or before 11:59 p.m. ET on September 28, 2023, via *http://www.regulations.gov* (Doc. No. AMS–NOP–23–0026). Comments submitted after this date will be added to the public comment docket, but Board members may not have adequate time to consider those comments prior to making recommendations. NOP strongly prefers comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed under **FOR FURTHER INFORMATION CONTACT** by or before the deadline.

Oral Comments: The NOSB will hear oral public comments via webinars on Tuesday, October 17, 2023, and Thursday, October 19, 2023, from 12:00 p.m. to approximately 5:00 p.m. ET. Each commenter wishing to address the Board must pre-register by 11:59 p.m. ET on September 28, 2023, and can register for only one speaking slot. Instructions for registering and participating in the webinars can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-providence-ri.*

ADDRESSES: The in-person meeting will take place at Marriott Providence Downtown, One Orms Street, Providence, Rhode Island 02904, United States and will be broadcast virtually. Virtual webinars may be accessed via the internet and/or phone. Detailed information pertaining to the webinar and in-person meeting, including virtual viewing options, can be found at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-providence-ri.*

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Arsenault, Advisory Committee Specialist, National Organic Standards Board, USDA–AMS–NOP, 1400 Independence Avenue SW, Room 2642–S, STOP 0268, Washington, DC 20250–0268; Phone: (202) 997–0115; Email: *nosb@usda.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 10 and 7 U.S.C. 6518(e), as amended, AMS is announcing a meeting of the NOSB. The NOSB makes recommendations to USDA about whether substances should be allowed or prohibited in organic production and/or handling, assists in the development of standards for organic production, and advises the Secretary on other aspects of the implementation of the Organic Foods Production Act, 7 U.S.C. 6501 *et seq.* NOSB is holding a public meeting to discuss and vote on proposed recommendations to USDA, to obtain updates from the USDA National Organic Program (NOP) on issues pertaining to organic agriculture, and to receive comments from the organic community. The meeting is open to the public. Registration is only required to sign up for oral comments. All meeting documents and instructions for participating will be available on the AMS website at *https://www.ams.usda.gov/event/national-organic-standards-board-nosb-meeting-providence-ri.*

Please check the website periodically for updates. Meeting topics will encompass a wide range of issues, including substances petitioned for addition to, or removal from, the National List of Allowed and Prohibited Substances (National List), substances on the National List that are under sunset review, and guidance on organic policies.

Meeting Accommodations: The meeting hotel is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under **FOR FURTHER INFORMATION CONTACT**. Determinations for reasonable accommodation will be made on a case-by-case basis.

Dated: June 2, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–12232 Filed 6–7–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are required regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the

quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by July 10, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Farm Loan Program—Inventory Property Management.

OMB Control Number: 0560–0234.

Summary of Collection: The Farm Loan Program (FLP) provides supervised credit in the form of loans to family farmers to purchase inventory property (real estate and equipment) and finance the lease or purchase amount.

Need and Use of the Information: Information collections are submitted by applicants to the local agency office where their business is headquartered. The information is necessary to thoroughly evaluate an applicant's request to purchase inventory property and is used by FLP to determine an applicant's eligibility to lease or purchase inventory property and to ensure payment of the lease or purchase amount. Failure to collect the information would result not complying with congressional mandates.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 160.

Frequency of Responses: Reporting: On occasion; Annually.

Total Burden Hours: 90.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–12268 Filed 6–7–23; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by July 10, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: EmpowHR/Person Model Non-Employee Data Sheet—FNS Form-775.

OMB Control Number: 0584–NEW.

Summary of Collection: The U.S. Department of Agriculture, Food and Nutrition Service, Human Resources Division FNS 775 EmpowHR/Person Model collects the required biographic data personal identifiable information (PII) such as full legal name, address, phone, social security number, birthdate, place of birth, country of citizenship is required to input into the USDA system of record, Empower Human Resources (EmpowHR), so that upon submission, it conforms to the data requirements set forth by USAccess.

Legal authority for gathering of data fields mentioned above comes from the Homeland Security Presidential Directive 12.

Need and Use of the Information: The data collected on the FNS 775 EmpowHR/Person Model sheet is used to input data for individuals who are employees' contractors, interns, or volunteers. The data collected (full legal name, address, phone, social security number, birthdate, place of birth, country of citizenship) is than input to the System of Record, EmpowHR. The personal identifiable information (PII) data collected is for the specific purpose of sponsorship for the agency's PIV (Personal Identity Verification) credential and will be used during background investigation as required for access to agency facilities, systems, and information.

Description of Respondents: Individuals or households and Business (Contractors, Interns, Volunteers, recently hired employees).

Number of Respondents: 750.

Frequency of Responses: Reporting: Other (as desired).

Total Burden Hours: 375.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–12264 Filed 6–7–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0015]

Notice of Decision To Authorize the Importation of Phalaenopsis spp. Orchid Plants for Planting in Approved Growing Media From the Republic of Costa Rica Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to authorize the importation into the United States,

including territories, of *Phalaenopsis* spp. orchid plants for planting in approved growing media from the Republic of Costa Rica. As a condition of entry, *Phalaenopsis* spp. orchid plants in approved growing media from the Republic of Costa Rica will have to meet all relevant requirements included in the U.S. Department of Agriculture Plants for Planting Manual and detailed in a bilateral workplan. This action will allow for the importation of *Phalaenopsis* spp. orchid plants for planting from the Republic of Costa Rica in approved growing media while providing protection against the introduction of plant pests.

DATES: The plants for planting covered by this notice may be authorized for importation after June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Indira Singh, Agriculturist, Pest Exclusion and Import Programs, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 851–2020; *indira.singh@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart H—Plants for Planting'' (7 CFR 319.37–1 through 319.37–23, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) prohibits or restricts the importation of plants for planting (including living plants, plant parts, seeds, and plant cuttings) to prevent the introduction of quarantine pests into the United States. *Quarantine pest* is defined in § 319.37–2 as a plant pest or noxious weed that is of potential economic importance to the United States and not yet present in the United States, or present but not widely distributed and being officially controlled. In accordance with § 319.37–20, APHIS may impose quarantines and other restrictions on the importation of specific types of plants for planting. These restrictions are listed in the USDA Plants for Planting Manual.[1]

Section 319.37–10 restricts the importation of plants for planting in approved growing media, with exceptions. Paragraph (d) of § 319.37–10 states that certain types of plants for planting, as listed in the USDA Plants for Planting Manual, may be imported when they are established in a growing medium approved by the Administrator and produced in accordance with additional requirements specified in the manual.

On March 3, 2020, we published in the **Federal Register** (85 FR 12441–12442, Docket No. APHIS–2019–0015) a notice[2] proposing to authorize the importation of *Phalaenopsis* spp. orchid plants from the Republic of Costa Rica in approved growing media into the United States, including territories, subject to all relevant requirements included in the USDA Plants for Planting Manual and in a bilateral workplan agreed to between APHIS and the national plant protection organization (NPPO) of the Republic of Costa Rica.

We solicited comments concerning our proposal for 60 days ending May 4, 2020. We did not receive any comments.

Therefore, in accordance with the regulations in § 319.37–10(d), we are announcing our decision to authorize the importation into the United States, including territories, of *Phalaenopsis* spp. orchid plants for planting in approved growing media from the Republic of Costa Rica subject to the phytosanitary measures listed in the risk management document that accompanied the initial notice. We are adding these phytosanitary measures to the USDA Plants for Planting Manual.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the burden requirements included in this notice are covered under the Office of Management and Budget control number 0579–0049.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this notice, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Specialist, at (301) 851–2483.

Congressional Review Act

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

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 5th day of June 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–12295 Filed 6–7–23; 8:45 am]

BILLING CODE 3410–34–P

[1] *https://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/plants_for_planting.pdf.*

[2] To view the notice and supporting documents, go to *https://www.regulations.gov/docket/APHIS-2019-0015.*

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Notice of Intent To Renew Agricultural Policy Advisory Committee (APAC) and the Related Agricultural Technical Advisory Committees (ATACs) for Trade and Continuation of Requests for Nominations for the Agricultural Trade Advisory Committees

AGENCY: Foreign Agricultural Service, United States Department of Agriculture.

ACTION: Notice of rechartering and continuation of requests for nominations.

SUMMARY: Pursuant to section 135 of the Trade Act of 1974 and the Federal Advisory Committee Act, as amended, notice is hereby given that the Secretary of Agriculture (Secretary), in coordination with the United States Trade Representative (Trade Representative or USTR), intends to renew the Agricultural Policy Advisory Committee (APAC) and the related Agricultural Technical Advisory Committees (ATACs) for Trade to provide detailed policy and technical advice, information, and recommendations regarding trade barriers, negotiation of trade agreements, and implementation of existing trade agreements affecting food and agricultural products, including the performance of other advisory functions relevant to U.S. agricultural trade policy matters. The establishment and renewal of such committees is in the public interest in connection with the duties of United States Department of Agriculture (USDA) imposed by the Trade Act of 1974, as amended. In addition, the Foreign Agricultural Service (FAS) continues to welcome nominations for persons to serve on APAC and ATACs.

DATES: We will accept nominations for membership on the APAC and six ATACs throughout the four-year charter term of the committees (June 2023 through June 2027). New applicants are considered approximately every 12–18 months.

ADDRESSES: Electronic copies of the nomination materials should be sent to *ATACs@usda.gov.*

All nomination materials may also be mailed in a single, complete package to: Office of the Secretary, U.S. Department of Agriculture, 1400 Independence Ave. SW, Room 200A, Jamie L. Whitten Building, Washington, DC 20250–1001, Attn: APAC/ATACs.

FOR FURTHER INFORMATION CONTACT: Darlene Maginnis, Group Federal Officer, Foreign Agricultural Service, U.S. Department of Agriculture at 202–868–7059; or by email at *ATACs@usda.gov.* You can find additional information about the APAC and ATACs on the Foreign Agricultural Service website at *www.fas.usda.gov/atacs.*

SUPPLEMENTARY INFORMATION:

Rechartering of Existing Committees: Pursuant to the Federal Advisory Committee Act (5 U.S.C. 10), FAS gives notice that the Secretary and Trade Representative intends to renew the APAC and the following six ATACs:

- Animals and Animal Products;
- Fruits and Vegetables;
- Grains, Feed, Oilseeds, and Planting Seeds;
- Processed Foods;
- Sweeteners and Sweetener Products; and,
- Tobacco, Cotton, Peanuts and Hemp (newly revised title).

In 1974, Congress established a private sector advisory committee system to ensure that U.S. trade policy and negotiation objectives adequately reflect U.S. commercial and economic interests. The private sector advisory committee system currently consists of three tiers:

- The President's Advisory Committee for Trade Policy and Negotiations;
- Five general policy advisory committees, including the APAC; and,
- Several technical advisory committees, including the ATACs.

Background

In 1974, Congress established a private-sector advisory committee system to ensure that U.S. trade policy and negotiation objectives adequately reflect U.S. commercial and economic interests.

As provided for in the law and their charters, the APAC has the following responsibilities:

(A) The Committee will advise, consult with, and make recommendations to the Secretary and Trade Representative concerning the trade policy of the United States and the matters arising in the administration of such policy; (B) The Committee will provide information and advice regarding the following: negotiating objectives and bargaining positions of the United States before the United States enters into trade agreements, the operation of any trade agreement once entered into, and matters arising in connection with the administration of the trade policy of the United States; and (C) The Committee will furnish such other advisory opinions and reports as the Secretary and Trade Representative deem necessary; and the ATACs have similar responsibilities:

General Committee Information

Each committee has a chairperson, who is elected from the membership of that committee. Committees meet as needed, and all committee meetings are typically held in Washington, DC, or by telephone conference. Committee meetings may be closed if USTR determines that a committee will be discussing issues that justify closing a meeting or portions of a meeting, in accordance with 19 U.S.C. 2155(f).

Throughout the year, members are requested to review sensitive trade policy information and provide comments regarding trade negotiations. In addition to their other advisory responsibilities, at the conclusion of negotiations of any trade agreement, all committees are required to provide a report on each agreement to the President, Congress, USTR, and USDA.

Committee Membership Information

All committee members are appointed by and serve at the discretion of the Secretary and Trade Representative. Committee appointments are typically for a period of four years but may be renewed for an additional term. Each committee member must be a U.S. citizen and must represent a U.S. entity with an interest in agricultural trade and must not be registered with the Department of Justice under the Foreign Agents Registration Act. To attend most meetings, committee members must have a current security clearance. New members will be guided in how to apply for a security clearance and their appointment will be contingent on successful completion of the investigation. Committee members serve without compensation and are not reimbursed for their travel expenses. No person may serve on more than one USDA advisory committee at the same time unless a specific exception is granted by the USDA Committee Management Officer. No entity may have more than one representative on any single trade advisory committee.

Nominations and Appointments of Members

Eligibility: Nominations for APAC and ATAC membership are open to individuals representing U.S. entities with an interest in agricultural trade without regard to race, color, religion, sex, national origin, age, mental or physical handicap, marital status, or sexual orientation. Equal opportunity practices in accordance with U.S. Government policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee take into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. Members should have expertise and knowledge of agricultural trade as it relates to policy and commodity specific issues. Members will normally come from an entity with an interest in agriculture, and will serve as a Representative, presenting the views and interests of a particular U.S. entity that has an interest in the subject matter of the committee.

However, should a member be appointed primarily for his or her expertise, and not as a representative of an interest group, he or she shall be designated as a Special Government Employee (SGE). SGEs are subject to specific provisions of the ethics laws, including disclosure of financial interests, if they are appointed because of their personal knowledge, background, or expertise. USDA will assist SGEs in disclosing their financial interest and will provide ethics training on an annual basis.

Appointments are made of individuals only and are not transferrable. No person, company, producer, farm organization, trade association, or other entity has a right to membership on a committee. In making appointments, every effort will be made to maintain balanced representation on the committees with representation from producers, farm and commodity organizations, processors, traders, and consumers. Geographical diversity on each committee will also be sought.

Nominations: Nominating a person to serve on any of the committees requires submission of a current resume for the nominee and the USDA AD–755 (Advisory Committee Membership Background Information, OMB Number 0505–0001), available on the internet at: *https://www.fas.usda.gov/trade-advisorycommittees-applying-membership.* A cover letter should also be submitted indicating the specific committee for which the individual is

being nominated, why the nominee wants to be a committee member, and his or her qualifications for membership, and how the submitter learned about this call for nominations. The cover letter should also include the statements required below related to Federally Registered Lobbyists and Foreign Firms. If applicable, the application should include a sponsor letter on the non-Federal governmental entity letterhead containing a brief description of the manner in which international trade affects the entity and why the applicant should be considered for membership. Forms may also be requested by sending an email to *ATACs@usda.gov,* or by phone at (202) 868–7059.

Federally Registered Lobbyists: All nominees must provide a statement confirming their lobbyist status.

Pursuant to the Revised Guidance on the Appointment of Lobbyists to Federal Advisory Committees, Boards and Commissions, published by the Office of Management and Budget (OMB) on August 13, 2014, federally-registered lobbyists are no longer prohibited from serving on the advisory committees in a representative capacity. OMB's revised guidance clarifies that the eligibility restriction does not apply to advisory committee members who are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments. The lobbyist prohibition continues to apply to persons serving on advisory committees in their individual capacity (*e.g.,* SGEs).

Foreign Firms: If the nominee is to represent an entity or corporation with ten percent or greater non-U.S. ownership, the nominee must state the extent to which the organization or interest to be represented by the nominee is owned by non-U.S. citizens, organizations, or interests and demonstrate at the time of nomination that this ownership interest does not constitute control and will not adversely affect his or her ability to serve as an advisor on the U.S. agriculture advisory committee for trade.

Dated: June 5, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–12313 Filed 6–6–23; 11:15 am]

BILLING CODE 3410–10–P

DEPARTMENT OF COMMERCE

International Trade Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Self-Certifications Under the Data Privacy Framework Program

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on March 30, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: International Trade Administration, Department of Commerce.

Title: Self-Certifications under the Data Privacy Framework Program.

OMB Control Number: New Collection. Not yet assigned.

Form Number(s): None.

Type of Request: Regular submission, new information collection.

Number of Respondents: 4,000.

Average Hours per Response: 40 minutes.

Burden Hours: 3,062 hours.

Needs and Uses: The United States, the European Union (EU), the United Kingdom (UK), and Switzerland share a commitment to enhancing privacy protection, the rule of law, and a recognition of the importance of transatlantic data flows to our respective citizens, economies, and societies, but take different approaches to doing so. Given those differences, the Department of Commerce (DOC) developed the EU–U.S. Data Privacy Framework (EU–U.S. DPF), the UK Extension to the EU–U.S. Data Privacy Framework (UK Extension to the EU–U.S. DPF), and the Swiss-U.S. Data Privacy Framework (Swiss-U.S. DPF) in consultation with the European Commission, the UK Government, the Swiss Federal Administration, industry, and other stakeholders. These arrangements were respectively developed to provide U.S. organizations reliable mechanisms for personal data transfers to the United States from the European Union, the United Kingdom (and, as applicable, Gibraltar), and Switzerland while ensuring data protection that is consistent with EU, UK, and Swiss law.

The DOC is issuing the EU–U.S. DPF Principles and the Swiss-U.S. DPF Principles, including the respective sets of Supplemental Principles (collectively the Principles) and Annex I of the Principles, as well as the UK Extension to the EU–U.S. DPF under its statutory authority to foster, promote, and develop international commerce (15 U.S.C. 1512). The International Trade Administration (ITA) will administer and supervise the Data Privacy Framework program, including maintaining and making publicly available the Data Privacy Framework List, an authoritative list of U.S. organizations that have self-certified to the DOC and declared their commitment to adhere to the Principles pursuant to the EU–U.S. DPF and, as applicable, the UK Extension to the EU–U.S. DPF, and/or the Swiss-U.S. DPF. On the basis of the Principles, Executive Order 14086, 28 CFR part 201, and accompanying letters and materials, including ITA's commitments regarding the administration and supervision of the Data Privacy Framework program, it is the DOC's expectation that the European Commission, the UK Government, and the Swiss Federal Administration will respectively recognize the adequacy of the protection provided by the EU–U.S. DPF, the UK Extension to the EU–U.S. DPF, and the Swiss-U.S. DPF thereby enabling personal data transfers from each respective jurisdiction to U.S. organizations participating in the relevant part of the Data Privacy Framework program. It is the DOC's present expectation that the effective date of the EU–U.S. DPF Principles would coincide with the entry into force of the European Commission's anticipated recognition of adequacy, whereas the respective effective dates of the UK Extension to the EU–U.S. DPF and the Swiss-U.S. DPF Principles would occur before the entry into force of the anticipated, respective recognitions of adequacy (*i.e.,* to enable U.S. organizations from the earliest possible date to self-certify their compliance with multiple parts of the Data Privacy Framework program). Personal data cannot be received in reliance on the EU–U.S. DPF, the UK Extension to the EU–U.S. DPF, and the Swiss-U.S. DPF until they have respectively received such recognition (*i.e.,* until such formal recognition enters into force).

In order to participate in the EU–U.S. DPF and, as applicable, the UK Extension to the EU–U.S. DPF, and/or

the Swiss-U.S. DPF an organization must (a) be subject to the investigatory and enforcement powers of the Federal Trade Commission (FTC), the Department of Transportation (DOT), or another statutory body that will effectively ensure compliance with the Principles; (b) publicly declare its commitment to comply with the Principles; (c) publicly disclose its privacy policies in line with the Principles; and (d) fully implement them.

To rely on the EU–U.S. DPF and, as applicable, the UK Extension to the EU–U.S. DPF, and/or the Swiss-U.S. DPF an organization must self-certify its adherence to the Principles to the DOC, and both be placed and remain on the Data Privacy Framework List. Such organizations' commitment to comply with the Principles must be reflected in their self-certification submissions to the DOC and in their privacy policies. Organizations that only wish to self-certify their compliance pursuant to the EU–U.S. DPF and/or the Swiss-U.S. DPF may do so; however, organizations that wish to participate in the UK Extension to the EU–U.S. DPF must participate in the EU–U.S. DPF. The DOC will update the Data Privacy Framework List on the basis of annual re-certification submissions made by participating organizations and by removing organizations when they voluntarily withdraw, fail to complete the annual re-certification in accordance with the DOC's procedures, or are found to persistently fail to comply. The DOC will also maintain and make available to the public an authoritative record of U.S. organizations that have been removed from the Data Privacy Framework List and will identify the reason each organization was removed. The aforementioned authoritative list and record will remain available to the public on the DOC's Data Privacy Framework program website. An organization's failure to comply with the Principles after its self-certification is enforceable by the FTC under Section 5 of the Federal Trade Commission (FTC) Act prohibiting unfair or deceptive acts in or affecting commerce (15 U.S.C. 45); by the DOT under 49 U.S.C. 41712 prohibiting a carrier or ticket agent from engaging in an unfair or deceptive practice in air transportation or the sale of air transportation; or under other laws or regulations prohibiting such acts.

To initially self-certify or subsequently re-certify for the EU–U.S. DPF and, as applicable, UK Extension to the EU–U.S. DPF, and/or the Swiss-U.S. DPF, an organization must on each occasion provide to the DOC a submission that contains the relevant information specified in the Principles. The submission must be made via the DOC's Data Privacy Framework program website by an individual within the organization who is authorized to make representations on behalf of the organization and any of its covered U.S. entities regarding its adherence to the Principles. Such an organization must respond promptly to inquiries and other requests for information from the DOC relating to the organization's adherence to the Principles.

ITA has committed to follow up with organizations that have been or wish to be removed from the Data Privacy Framework List. ITA will direct organizations that allow their self-certifications to lapse to verify whether they intend to re-certify or instead intend to withdraw. An organization that intends to re-certify will be required to further verify to the DOC that during the lapse of its certification status it applied the Principles to relevant personal data received in reliance on its participation in the Data Privacy Framework program and clarify what steps it will take to address the outstanding issues that have delayed its re-certification. An organization that intends to withdraw will be required to further verify to the DOC what it will do and/or has done (as applicable) with the relevant personal data that it received in reliance on its participation in the Data Privacy Framework program and who within the organization will serve as an ongoing point of contact for Principles-related questions. Organizations will be required to provide such verification to the DOC by completing and submitting appropriate questionnaires to the DOC.

ITA has also committed to conduct compliance reviews on an ongoing basis, including, as appropriate, through sending detailed questionnaires to participating organizations. The DOC will require that a participating organization complete and submit to the DOC such a questionnaire when: (a) the DOC has received any specific, non-frivolous complaints about the organization's compliance with the Principles; (b) the organization does not respond satisfactorily to inquiries by the DOC for information relating to the organization's adherence to the Principles; or (c) there is credible evidence that the organization does not comply with its commitments under the EU–U.S. DPF and, as applicable, the UK Extension to the EU–U.S. DPF, and/or the Swiss-U.S. DPF.

Affected Public: Primarily businesses or other for-profit organizations.

Frequency: Annual and periodic.

Respondent's Obligation: Voluntary.

Legal Authority: The DOC's statutory authority to foster, promote, and develop the foreign and domestic commerce of the United States (15 U.S.C. 1512).

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

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

Sheleen Dumas,

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

[FR Doc. 2023–12199 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Initiation of Circumvention Inquiry on the Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from the Fresh Garlic Producers Association and its individual members (collectively, the petitioners), the Department of Commerce (Commerce) is initiating a country-wide circumvention inquiry to determine whether imports of small and large garlic chunks from the People's Republic of China (China) are circumventing the antidumping duty (AD) order on fresh garlic from China.

DATES: Applicable June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Charles DeFilippo or Jacob Saude; AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3979 or 202–482–0981, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 16, 2023, pursuant to section 781(c) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.226(c), the petitioners filed a circumvention inquiry request alleging that small and large garlic chunks are circumventing the *Order*[1] and, accordingly, should be included within the scope of the *Order.*[2] On March 17, 2023, we deferred the decision to initiate this circumvention inquiry until the ongoing scope inquiry regarding large and small garlic chunks from Green Garden Produce LLC was complete.[3] On April 13, 2023, Commerce officials held a videoconference and in-person meeting with counsel to the petitioners regarding their February 16, 2023, request that Commerce conduct a minor alterations circumvention inquiry.[4] On March 3, 2023, Commerce issued a supplemental questionnaire to the petitioners regarding their circumvention request.[5] On May 10, 2023, the petitioners submitted their supplemental questionnaire response.[6]

Scope of the Order

The products covered by this *Order* are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing and level of decay. A full description of the scope of the *Order* is provided in the Initiation Checklist.[7]

Merchandise Subject to the Circumvention Inquiry

The circumvention inquiry covers small and large garlic chunks produced in China and exported to the United States.

Initiation of Circumvention Inquiry

Section 351.226(d) of Commerce's regulations states that if Commerce determines that a request for a circumvention inquiry satisfies the requirements of 19 CFR 351.226(c), then Commerce ''will accept the request and initiate a circumvention inquiry.'' Section 351.226(c)(1) of Commerce's regulations, in turn, requires that each request for a circumvention inquiry allege ''that the elements necessary for a circumvention determination under section 781 of the Act exist'' and be ''accompanied by information reasonably available to the interested party supporting these allegations.'' The petitioners alleged circumvention pursuant to section 781(c) of the Act (minor alterations of merchandise).

Section 781(c) of the Act provides that Commerce may find circumvention of an AD order when products which are of the class or kind of merchandise subject to an AD order have been ''altered in form or appearance in minor respects . . . whether or not included in the same tariff classification.'' Section 781(c)(2) of the Act provides an exception that ''{p}aragraph 1 shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the AD order.''

While the statute is silent as to what factors to consider in determining whether alterations are properly considered ''minor,'' the legislative history of this provision indicates that there are certain factors which should be considered before reaching a circumvention determination. In conducting a circumvention inquiry under section 781(c) of the Act, Commerce has generally relied upon ''such criteria as the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products.''[8]

Analysis

Based on our analysis of the petitioners' circumvention inquiry request, we determined that the petitioners satisfied the criteria under 19 CFR 351.226(c), and thus, pursuant to 19 CFR 351.226(d)(1)(ii), we have accepted the request and are initiating the requested circumvention inquiry of the *Order.* For a full discussion of the basis for our decision to initiate the requested circumvention inquiry, *see* Initiation Checklist.

Furthermore, pursuant to 19 CFR 351.226(c)(2)(iii), the petitioners noted that Green Garden is the entity that imports small and large garlic chunks into the United States. While the petitioners stated that they are not aware of other exporters and/or producers exporting small and large garlic chunks to the United States, beyond those that supply Green Garden, they are concerned that there are numerous Chinese entities that could begin production of significant volumes of IQF garlic chunks for exportation to the United States. Therefore, given the ease with which other Chinese exporters and/or producers could engage in the same activities as those supplying Green Garden, Commerce is initiating this circumvention inquiry on a country-wide basis.

Respondent Selection

Commerce intends to base respondent selection on U.S. Customs and Border Protection (CBP) data. Commerce intends to place the CBP data on the record within five days of the publication of the initiation notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after placement of the CBP data on the record of the relevant inquiry.

Commerce intends to establish a schedule for questionnaire responses after respondent selection. A company's failure to completely respond to Commerce's requests for information may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.

Suspension of Liquidation

Pursuant to 19 CFR 351.226(l)(1), Commerce intends to notify CBP of this

[1] *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China,* 59 FR 59209 (November 16, 1994) (*Order*).

[2] *See* Petitioners' Letter, ''Petitioners' Request for Circumvention Ruling Pursuant to Section 781(c) of the Tariff Act of 1930, As Amended,'' dated February 16, 2023.

[3] *See* Memorandum, ''Extension of Time to Determine Whether to Initiate Circumvention Inquiry,'' dated March 17, 2023.

[4] *See* Memorandum, ''Meeting with Petitioners' Counsel,'' dated April 13, 2023.

[5] *See* Commerce's Letter, ''Circumvention Inquiry Request Supplemental Questionnaire,'' dated May 3, 2023.

[6] *See* Petitioners' Letter, ''Response to Supplemental Questionnaire in Circumvention Inquiry Request,'' dated May 10, 2023.

[7] *See* Initiation Checklist, ''Initiation of the Circumvention Inquiry on the Antidumping Duty Order,'' dated concurrently with, and hereby adopted by, this notice (Initiation Checklist) at 7.

[8] *See* S. Rep. No.71, 100th Cong., 1st Sess. 100 (1987) (''In applying this provision, the Commerce Department should apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively, even where such alterations to an article technically transform it into a differently designated article.''). *See also Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Steel Plate from the People's Republic of China,* 74 FR 33991, 33992 (July 14, 2009), unchanged in *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China,* 74 FR 40565 (August 12, 2009).

initiation and direct CBP to continue the suspension of liquidation of entries of products subject to this circumvention inquiry that were already subject to the suspension of liquidation under the *Order* and to apply the cash deposit rates that would be applicable if the products were determined to be covered by the scope of the *Order.* Should Commerce issue affirmative preliminary or final circumvention determinations, Commerce will follow the suspension of liquidation rules under 19 CFR 351.226(l)(2)–(4).

Notification to Interested Parties

In accordance with 19 CFR 351.226(d) and section 781(c) of the Act, Commerce determines that the petitioners' request for a circumvention inquiry satisfies the requirements of 19 CFR 351.226(c). Accordingly, Commerce is notifying all interested parties of the initiation of this circumvention inquiry to determine whether small and large garlic chunks produced in and exported from China are circumventing the *Order* and the opportunity to comment on any additional entities that import small and large garlic chunks to the United States. In addition, we have included a description of the products that are the subject to this inquiry and an explanation of Commerce's decision to initiate this inquiry as provided in the accompanying Initiation Checklist.[9] In accordance with 19 CFR 351.226(e)(1), Commerce intends to issue its preliminary circumvention determination no later than 150 days from the date of publication of the notice of initiation of this circumvention inquiry in the **Federal Register**.

This notice is published in accordance with section 781(c) of the Act, and 19 CFR 351.226(d)(1)(ii).

Dated: June 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–12242 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–DS–P

[9] *See* Initiation Checklist at 4 and 6.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–060, A–533–875, A–580–893, A–583–860]

Fine Denier Polyester Staple Fiber From the People's Republic of China, India, the Republic of South Korea, and Taiwan: Final Results of Expedited First Sunset Reviews of the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of these expedited sunset reviews, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) orders on fine denier polyester staple fiber (fine denier PSF) from the People's Republic of China (China), India, the Republic of Korea (South Korea), and Taiwan would likely lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Sunset Reviews'' section of this notice.

DATES: Applicable June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Luke Caruso, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2081.

SUPPLEMENTARY INFORMATION:

Background

After Commerce initiated these sunset reviews [1] of the *Orders,*[2] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), domestic interested parties [3] timely submitted complete notices of intent to participate in,[4] and adequate substantive responses regarding, the reviews.[5] The domestic interested parties claimed domestic interested party status under section 771(9)(C) of the Act as producers of the domestic like product in the United States.[6] Commerce did not receive a substantive response from any respondent interested party, nor was a hearing requested. On March 23, 2023, Commerce notified the International Trade Commission that it did not receive adequate substantive responses from respondent interested parties.[7] As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited (120-day) sunset reviews of the *Orders.*

Scope of the Orders [8]

The merchandise covered by the *Orders* is fine denier PSF, not carded or combed, measuring less than 3.3 decitex (3 denier) in diameter. The scope covers all fine denier PSF, whether coated or uncoated. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[9]

Analysis of Comments Received

A complete discussion of all issues raised in these sunset reviews, including the likelihood of continuation or recurrence of dumping and the magnitude of the dumping margins likely to prevail if the *Orders* were revoked, is provided in the Issues and Decision Memorandum. A list of the sections in the Issues and Decision Memorandum is in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed

[1] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 6700 (February 1, 2023).

[2] *See Fine Denier Polyester Staple Fiber from the People's Republic of China, India, the Republic of Korea, and Taiwan: Antidumping Duty Orders,* 83 FR 34545 (July 20, 2018) (*Orders*).

[3] The domestic interested parties are Auriga Polymers Inc.; Fiber Industries LLC; Nan Ya Plastics Corporation, America; and Sun Fiber LLC.

[4] *See* Domestic Interested Parties' Letters, ''Fine Denier Polyester Staple Fiber from India—Domestic Interested Parties' Notice of Intent to Participate,'' dated February 15, 2023; ''Fine Denier Polyester Staple Fiber from the People's Republic of China—Domestic Interested Parties' Notice of Intent to Participate,'' dated February 15, 2023; ''Fine Denier Polyester Staple Fiber from the Republic of Korea—Domestic Interested Parties' Notice of Intent to Participate,'' dated February 15, 2023; and ''Fine Denier Polyester Staple Fiber from Taiwan—Domestic Interested Parties' Notice of Intent to Participate,'' dated February 15, 2023.

[5] *See* Domestic Interested Parties' Letters, ''Fine Denier Polyester Staple Fiber from India—Domestic Interested Parties' Substantive Response,'' dated March 3, 2023; ''Fine Denier Polyester Staple Fiber from the People's Republic of China—Domestic Interested Parties' Substantive Response,'' dated March 2, 2023; ''Fine Denier Polyester Staple Fiber from Korea—Domestic Interested Parties' Substantive Response,'' dated March 3, 2023; and ''Fine Denier Polyester Staple Fiber from Taiwan—Domestic Interested Parties' Substantive Response,'' dated March 2, 2023.

[6] *Id.*

[7] See Commerce's Letter ''Sunset Reviews Initiated on February 1, 2023,'' dated March 23, 2023.

[8] *See Orders.*

[9] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the First Expedited Sunset Reviews of the Antidumping Duty Orders on Fine Denier Polyester Staple Fiber from India, the People's Republic of China, the Republic of Korea, and Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Orders* would likely lead to continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail are weighted-average margins up to 103.06 percent for China, 21.43 percent for India, 45.23 percent for South Korea, and 48.86 percent for Taiwan.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely notification of the return or destruction of APO materials or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of sunset reviews in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218(e)(1)(ii)(C)(2) and 19 CFR 351.221(c)(5)(ii).

Dated: May 30, 2023.

Lisa Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Sections in the Issues and Decision Memorandum

[FR Doc. 2023–12260 Filed 6–7–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–876]

Fine Denier Polyester Staple Fiber From India: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on fine denier polyester staple fiber (fine denier PSF) from India would be likely to lead to continuation or recurrence of countervailing subsidies at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Luke Caruso, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2081.

SUPPLEMENTARY INFORMATION:

Background

On March 16, 2018, Commerce published in the **Federal Register** the CVD order on fine denier PSF from India.[1] On February 1, 2023, Commerce initiated the first sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On February 15, 2023, Commerce received a timely notice of intent to participate from Auriga Polymers Inc., Fiber Industries LLC, Nan Ya Plastics Corporation, America, and Sun Fiber LLC (collectively, the domestic interested parties) within the 15-day deadline specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested parties claimed interested party status under section 771(9)(C) of the Act and 19 CFR 351.102(b)(29)(v) as producers of the domestic like product.

On March 3, 2023, Commerce received an adequate substantive response to the *Initiation Notice* from the domestic interested parties within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] We received no substantive responses from any other interested parties, including the Government of India, and no interested party requested a hearing. On March 23, 2023, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties, and that Commerce would conduct an expedited (120-day) sunset review of the *Order,*[5] pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B)–(C).

Scope of the Order

The product covered by the *Order* is fine denier PSF. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[6]

Analysis of Comments Received

All issues raised in this sunset review are addressed in the accompanying Issues and Decision Memorandum. A list of the issues discussed in the Issues and Decision Memorandum is attached as the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNotices/ListLayout.aspx.*

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the *Order* would likely lead to continuation or recurrence of countervailable subsidies at the following net countervailable subsidy rates:

[1] *See Fine Denier Polyester Staple Fiber from the People's Republic of China and India: Amended Final Affirmative Countervailing Duty Determination for the People's Republic of China and Countervailing Duty Orders for the People's Republic of China and India,* 83 FR 11681 (March 16, 2018) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 6700 (February 1, 2023) (*Initiation Notice*).

[3] *See* Domestic Interested Parties' Letter, ''Fine Denier Polyester Staple Fiber from India—Domestic Interested Parties' Notice of Intent to Participate,'' dated February 15, 2023.

[4] *See* Domestic Interested Parties' Letter, ''Fine Denier Polyester Staple Fiber from India—Domestic Interested Parties' Substantive Response,'' dated March 3, 2023.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on February 1, 2023,'' dated March 23, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Fine Denier Polyester Staple Fiber from India,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Company	Subsidy rate (percent *ad valorem*)
Bombay Dyeing & Manufacturing Company Limited	14.35
Reliance Industries Limited	28.33
All Others	25.77

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

Commerce is issuing and publishing these final results and notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: June 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–12261 Filed 6–7–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC990]

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 79 Data webinar for Gulf of Mexico and South Atlantic Mutton Snapper.

SUMMARY: The SEDAR 79 assessment process of Gulf of Mexico and South Atlantic mutton snapper will consist of a Data Workshop, and a series of assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 79 Data webinar will be held June 29, 2023, from 10 a.m. to 12 p.m., Eastern Time. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) A Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGOs; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the webinar are as follows:

Panelists will review the data sets being considered for the assessment.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: June 5, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–12274 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD076]

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Atlantic Coastal Fisheries Cooperative Management Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS, has made a preliminary determination that an Exempted Fishing Permit application contains all of the required information and warrants further consideration. The Exempted Fishing Permit would allow commercial fishing vessels to fish outside fishery regulations in support of research conducted by the applicant. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Coastal Fisheries Cooperative Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed Exempted Fishing Permits.

DATES: Comments must be received on or before June 23, 2023.

ADDRESSES: You may submit written comments by the following method:

- *Email: nmfs.gar.efp@noaa.gov.* Include in the subject line ''MDMR 2023 Alternative Gear Retrieval EFP.''

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, *Laura.Deighan@noaa.gov,* (978) 281–9184.

SUPPLEMENTARY INFORMATION: The Maine Department of Marine Resources submitted a complete application for an Exempted Fishing Permit (EFP) to conduct commercial fishing activities that the regulations would otherwise restrict to test alternative gear retrieval systems that only uses one traditional surface buoy. This EFP would exempt the participating vessels from the gear marking requirements at 50 CFR 697.21(b)(2) to allow the use of trawls of more than three traps with one surface marking and § 648.84(b) to allow the use of gillnet gear with one surface marking. The EFP would be valid from June 1, 2023, or the date it is issued, whichever is later, through September 30, 2024.

Alternative Gear Retrieval Trials

This EFP would allow 15 federally permitted vessels to test alternative gears to reduce entanglement risk to protected species, mainly the North Atlantic right whale, in trap/pot and sink gillnet fisheries. Participating vessels would replace one traditional surface marking with either a spring-tag or a timed-release retrieval system. A spring-tag retrieval system uses a low breaking strength (<1700 lb (771.11 kg)) buoy line that releases a stowed retrieval line of greater breaking strength when subjected to tension (>75 lb (34.02 kg)). A timed-release retrieval system releases a stowed line after a programmed pre-set soak time. Vessels would be required to use one traditional surface-marking on the other end of trap trawls of more than three traps and on the other end of all gillnet gear.

Each vessel would modify two existing pieces of gear total, one using a spring-tag on one end and a traditional endline on the other and one using a timed-release on one end and a traditional endline on the other, resulting in no additional vertical lines in the water. Other than gear markings, all trap trawls and gillnet strings would be consistent with the regulations of the management area where the vessel is fishing and would be fished in accordance with the participating vessels' standard operations (number and length of trips, soak times, trap limits, etc.). The researchers anticipate 52 hauls of 26 modified trap trawls (1,352 total hauls) in Lobster Management Areas 1 and 3 and Maine state waters. Trap trawls would be consistent with Atlantic Large Whale Take Reduction Plan (ALWTRP) regulations. Trawls would not exceed 50 traps per trawl and would soak for approximately 3 days (and not more than 30 days). The researchers anticipate 52 hauls of 4 modified gillnet strings (208 total hauls) in Statistical Areas 513, 514, 515, and Maine state waters. Gillnets would be consistent with ALWTRP and Harbor Porpoise Take Reduction Plan regulations. Gillnets would use 15–30.5 cm (5.9–12 in) mesh, would not exceed 3,200 m (10,498.7 ft), and would soak for a period of approximately 24 hours (and not more than 30 days).

The Department and the gear manufacturer will distribute gear and train all participants on its use. Scientific observers may accompany the participants on up to two trips per vessel, within budget and safety limitations. The Department would provide standardized data collection sheets to all participants, but individually-identifiable data will only be made public with the express permission of the vessel owner.

This project would test novel and emerging technologies, including low-cost gear retrieval and sub-sea gear-marking systems, in fixed-gear fisheries to evaluate their impacts on fishing activity and entanglement risk to protected species, mainly the North Atlantic right whale. The project objectives are to: (1) Assess changes to fishing operations from the use of alternative retrieval systems under a variety of oceanographic conditions over a full year; (2) compare the time timed-release retrieval lines remain in the water column to that of traditional persistent buoy lines; (3) identify fishing areas that may be best suited for these alternative retrieval systems; (4) assess changes to fishing operations from the use of alternative gear-marking systems; and, (5) compare data on multiple sub-sea gear-location systems with other methods of ranging gear locations (*e.g.* surface buoy or digital chart marker).

The Department has proposed the following best management and risk reduction practices:

- Experimental buoy lines will be marked with unique white and blue markings above the experimental timed and spring-tagline retrieval systems, in addition to and above the required regional markings;
- All vessels would provide mandatory, weekly gear loss reports;
- All vessels would report all right whale sightings to NMFS via *ne.rw.survey@noaa.gov* or NOAA (866–755–6622) or the U.S. Coast Guard (Channel 16);
- All vessels would adhere to a 10-knot speed limit when transiting dynamic management areas, transiting areas closed to vertical lines, and/or when whales are observed;
- All vessels would adhere to current approach regulations that create a 500-yard (457.2-meter or 1,500-foot) buffer zone in the presence of a surfacing right whale and would depart immediately at a safe and slow speed. Hauling any gear would immediately cease (by removal) to accommodate the regulation and be reinitiated only after it was reasonable to assume the whale left the area;
- Law enforcement would be able to inspect gear at any time because one traditional surface-marking will be present at all times. The PI would notify law enforcement agencies of project participants and activities in advance of the project start date, including:
  - Materials related to the redeployment of alternative retrieval gear systems, most relevant to the spring-tagline retrieval system, as the timed-release system can be redeployed without intervention;
  - Information necessary to continue relevant enforcement operations with participant gear.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate the completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any

fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

All comments received are a part of the public record and will generally be posted for public viewing at *https://www.noaa.gov/organization/information-technology/foia-reading-room* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''anonymous'' as the signature if you wish to remain anonymous).

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

Dated: June 5, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–12289 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Extension of Request for Public Comment on a Draft Standard Ocean Mapping Protocol

AGENCY: Office of Coast Survey, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Extension of deadline for public comments.

SUMMARY: On February 24, 2023, the National Ocean Mapping, Exploration, and Characterization (NOMEC) Council and the Interagency Working Group on Ocean and Coastal Mapping (IWG–OCM) submitted a request for public comment on the IWG–OCM's draft Standard Ocean Mapping Protocol (SOMP) in the **Federal Register**. This notice extends the deadline for comment from June 2, 2023, to July 28, 2023. All information in the original **Federal Register** notice remains accurate but for the deadline extension to July 28, 2023.

DATES: Comments must be received via email by 5 p.m. ET on July 28, 2023 at the email address listed in the **ADDRESSES** section below.

ADDRESSES:

A copy of the draft SOMP may be downloaded or viewed at: *https://iocm.noaa.gov/standards/Standard_Ocean_Mapping_Protocol_draft_Feb2023.pdf.*

A copy of the National Strategy may be downloaded or viewed at: *https://iocm.noaa.gov/about/documents/strategic-plans/20200611-FINAL-STRATEGY-NOMEC-Sec.-2.pdf.*

A copy of the National Strategy Implementation Plan may be downloaded or viewed at: *https://iocm.noaa.gov/about/documents/strategic-plans/210107-FINALNOMECImplementationPlan-Clean.pdf.*

Comments can be submitted by email to *iwgocm.staff@noaa.gov* by 5 p.m. ET on July 28, 2023.

Instructions: Response to this **Federal Register** notice is voluntary. Please include ''Public Comment on Draft SOMP'' in the subject line of the message. If applicable, clearly indicate the section and page number of the draft SOMP to which submitted comments pertain. All submissions must be in English. Email attachments will be accepted in plain text, Microsoft Word, or Adobe PDF formats only. Each individual or institution is requested to submit only one response. Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Paul Turner, NOAA Integrated Ocean and Coastal Mapping, at *iwgocm.staff@noaa.gov,* (240) 429–0293.

SUPPLEMENTARY INFORMATION: Pursuant to Objective 2.1 of the National Strategy for Ocean Mapping, Exploring, and Characterizing the United States Exclusive Economic Zone, this SOMP was drafted to encourage consistency in data acquisition, stewardship and data management for seafloor mapping. The draft SOMP is organized into the following seven chapters:

Data Management, Bathymetry, Seabed and Lakebed Backscatter, Water Column Sonar, Side Scan Sonar, Sub-bottom, and Magnetometer. Public comments to improve the draft SOMP are welcome on one, a few, or all sections. Questions that might be considered while reviewing the draft SOMP include:

- Are the SOMP chapters comprehensive and explanatory?
- Is the SOMP understandable?
- As a protocol, will it be helpful to your organization, sector, or interest group?
- How do you anticipate your organization or sector will participate in SOMP implementation?
- What specific improvements to the SOMP would be of value to your organization/sector?
- What is missing in the SOMP that would facilitate use if added?
- Are there authoritative sources for the SOMP chapters that are missing or should be considered?

Authority: 33 U.S.C. 883e.

RDML Benjamin K. Evans,

Director, Office of Coast Survey, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–12230 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD037]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold meetings of its Habitat Blueprint Working Group to review the draft Habitat Blueprint.

DATES: The meetings will be held from 10 a.m. until 12 p.m. on Wednesday, June 28, 2023 and Wednesday, August 16, 2023.

ADDRESSES: The meetings will be held via webinar. Webinar registration is required. Details are included in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8440 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Meeting information, including the webinar registration link, online public comment form, agenda, and briefing book materials will be posted on the Council's website at: *https://safmc.net/workgroups/.* Comments become part of the Administrative Record of the meeting and will automatically be posted to the website and available for Council consideration.

The Council is developing the Habitat Blueprint to provide direction for its habitat program. The Habitat Blueprint will address program goals and objectives, document actions to address habitat requirements of the Magnuson-Stevens Act, and provide guidance on the role and use of the Council's Habitat Advisory Panel.

At the June 28 meeting, the Working Group will review the draft Blueprint and the Council's web-based habitat and ecosystem mapping tools. At the August 16 meeting the Working Group will review the draft Habitat Blueprint and develop recommendations for consideration by the Council's Habitat Committee.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: June 5, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–12275 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD077]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a 3-day in-person meeting with an option for remote participation to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). The Council continues to follow all public safety measures related to COVID–19 and intends to do so for this meeting.

DATES: The meeting will be held on Tuesday, June 27, 2023 through Thursday, June 29, 2023, beginning at 9 a.m. each day.

ADDRESSES: The meeting will be held at the Hilton Garden Inn, 5 Park Street, Freeport, ME 04032; telephone: (207) 865–1433; online at *https://www.hilton.com/en/hotels/pwmfdgi-hilton-garden-inn-freeport-downtown/.* Join the webinar at *https://attendee.gotowebinar.com/register/2165734872346457438.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, June 27, 2023

The Council will begin this meeting with brief announcements, followed by reports on recent activities from the Council's Chair and Executive Director, the Greater Atlantic Regional Fisheries Office (GARFO) Regional Administrator, the Northeast Fisheries Science Center (NEFSC) Director, the NOAA Office of General Counsel, the Mid-Atlantic Fishery Management Council liaison, staff from the Atlantic States Marine Fisheries Commission (ASMFC), and representatives from the U.S. Coast Guard and NOAA's Office of Law Enforcement. Next, the Council will receive a presentation on the final report of the Council Coordination Committee's Subcommittee on Area-Based Management. The Skate Committee report will follow with two items: (1) a progress report on the development of 2024–2025 skate specifications and potential initiation of a framework adjustment to include measures to expand possession of smooth and barndoor skates; and (2) a presentation on and Council discussion of a final white paper containing potential approaches to support thorny skate rebuilding. Then, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. These comments will be received both in person and through the webinar. A guide for how to publicly comment through the webinar is available on the Council website at *https://s3.amazonaws.com/nefmc.org/NEFMC-meeting-remote-participation_generic.pdf.*

After the lunch break, the Council will take up the Atlantic Herring Committee report and approve a problem statement for action to revisit the inshore midwater trawl exclusion zone contained in Herring Amendment 8. The Council also will consider a potential change in priorities to identify time/area closure options to reduce bycatch of river herring and shad in midwater trawl and small-mesh bottom trawl fisheries. Next on the agenda is a presentation on a NOAA Fisheries comment opportunity under an advance notice of proposed rulemaking (ANPR) for updating National Standard Guidelines 4, 8, and 9. The Council will receive input on the draft guidelines from its Scientific and Statistical Committee (SSC) and staff before formulating its own comments. The Council then will receive a brief overview of NOAA's Technical Guidance for National Standard 1 Reference Points and Status Determinations. The Council will discuss which process it prefers to use to develop comments on the technical guidance. The Council then will adjourn for the day.

Wednesday, June 28, 2023

The Council will begin the second day of its meeting with a presentation on the Greater Atlantic Regional Fisheries Office and Northeast Fisheries Science Center draft strategic plan. The Groundfish Committee report will come next. The Council will initiate Framework Adjustment 66, which may include: (1) 2024–26 specifications for redfish, northern windowpane flounder, and southern windowpane flounder, (2) 2024–25 specifications for white hake and U.S./Canada resources of Eastern Georges Bank cod, Eastern Georges Bank haddock, and Georges Bank yellowtail flounder, (3) a revised white hake rebuilding plan, and (4) Atlantic halibut management measures. The Council also will consider a potential change in priorities to revise Gulf of Maine haddock specifications for 2024 and 2025 in Framework 66. The Council will initiate a separate framework adjustment to revise acceptable biological catch (ABC) control rules for groundfish and receive Scientific and Statistical Committee feedback on control rule options. Finally, the Council will receive an update on its Atlantic Cod Management Transition Plan. Next up will be the Monkfish Research Set-Aside (RSA) Program Working Group, which will provide a progress report on a Council work

priority to review and improve the Monkfish RSA program.

After the lunch break, the Council will receive an update on a joint New England and Mid-Atlantic Fishery Management Council action to reduce Atlantic sturgeon bycatch in large-mesh monkfish and dogfish gillnet fisheries. As part of this discussion, the Council will approve the range of alternatives for Monkfish Framework Adjustment 15, which will contain the proposed sturgeon measures. Next, the Council will receive a presentation from the National Fish and Wildlife Foundation (NFWF) on its competitive grant funding programs, including the Electronic Monitoring and Reporting Program and the New England Gear Innovation Fund, which is a new program that seeks to address issues related to right whale fishing gear entanglements. The Council will close out the day with a discussion on the East Coast Climate Change Scenario Planning initiative. The Council will: (1) review findings from the February 2023 East Coast Climate Change Scenario Planning Summit; (2) receive Northeast Region Coordinating Council (NRCC) feedback on the summit findings; and (3) discuss the findings and next steps.

Thursday, June 29, 2023

The Council will begin the third day of its meeting by hearing from the Ecosystem-Based Fishery Management (EBFM) Committee. The Council will receive: (1) the final report on the prototype management strategy evaluation (pMSE) for EBFM and the Georges Bank example Fishery Ecosystem Plan (eFEP); and (2) suggestions from a subpanel of the SSC intended to help improve the results of the pMSE's model scenarios. The Council also will receive an update on planning for upcoming deep-dive public information workshops on EBFM. The Scallop Committee then will present three items related to the Atlantic Sea Scallop Research Set-Aside (RSA) Program for Council consideration: (1) approval of longer-term RSA survey awards; (2) adoption of survey guiding principles; and (3) approval of 2024–2025 RSA priorities. The Council also will initiate action for fishing year 2024 specifications, 2025 defaults, and other measures. Another important scallop-related item will be covered under the next agenda item, the Habitat Committee report.

After the lunch break, the first item under the Habitat Committee report will focus on the Northern Edge of Georges Bank. The discussion will include an update and proposed timeline for action to potentially authorize scallop fishery access to the habitat management area at the top of Closed Area II on Georges Bank. The habitat report also will include a work plan update on the Essential Fish Habitat Review, followed by a Bureau of Ocean Energy Management (BOEM) update on the Gulf of Maine offshore wind call area and other wind developments. The Risk Policy Working Group will report next with an update on its efforts to address the terms of reference for revising the Council's Risk Policy. The Council then will receive a series of reports related to Atlantic Highly Migratory Species, which will cover: (1) the NOAA Fisheries HMS Management Division's presentation on (a) the proposed rule for Amendment 15 to the 2006 Consolidated HMS Fishery Management Plan; (b) the advance notice of proposed rulemaking on electronic reporting; and (c) scoping for Amendment 16 shark issues; (2) the HMS Advisory Panel report on the May 2023 meeting; and (3) the Advisory Committee to the U.S. Section to the International Commission on the Conservation of Atlantic Tunas (ICCAT) report on its April meeting. Finally, the Council will close out the meeting with other business.

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: June 5, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–12276 Filed 6–7–23; 8:45 am]

BILLING CODE 3510–22–P

COUNCIL ON ENVIRONMENTAL QUALITY

[CEQ–2023–0004]

Ocean Justice Strategy

AGENCY: Council on Environmental Quality (CEQ).

ACTION: Request for information.

SUMMARY: The Council on Environmental Quality (CEQ) and Office of Science and Technology Policy (OSTP), on behalf of the Ocean Policy Committee (OPC), request input from all interested parties to inform the development of an Ocean Justice Strategy. The Ocean Justice Strategy will describe the vision, goals, and high-level objectives for coordinating and guiding ocean justice activities across the Federal Government. It may also serve as a reference for Tribal, Territorial, State, and local governments, regional management bodies, and non-governmental groups. The Ocean Justice Strategy will propose equitable and just practices to advance safety, health, and prosperity for communities residing near the ocean, the coasts, and the Great Lakes and for the whole country, now and for future generations. It builds on current Biden-Harris Administration activities and commitments aimed to advance environmental justice. Through this Request for Information (RFI), the Ocean Policy Committee seeks public input on what the vision and goals of the Ocean Justice Strategy should be and how the Federal Government can advance just and equitable access to, and management and use of, the ocean, the coasts, and the Great Lakes.

DATES: Responses are due by 11:59 p.m. Eastern Time on July 24, 2023. Submissions received after the deadline will not be taken into consideration.

ADDRESSES: You may submit comments, identified by docket number CEQ–2023–0004, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: Responding to this RFI is voluntary. You may respond to some or all of the questions in this RFI. We request that you submit only one response, and that your submission not exceed 2,500 words. For any submissions that are over 2,500 words, please consider including an executive summary of 2,500 words or fewer. Your submission should clearly indicate which question(s) you are addressing. Your response should include the name of the person(s) or organization(s) submitting it. If your response refers to

studies, research, or other empirical data that are not widely published, include copies of or electronic links to the referenced materials.

Comments received will be posted without change to *https://www.regulations.gov,* including any personal information you provide. Do not submit any information you consider to be private information, privileged or confidential commercial or financial information, or other information the disclosure of which is restricted by statute.

FOR FURTHER INFORMATION CONTACT: De'Marcus Robinson, Ocean Policy Fellow, 202–395–5750 or *De'Marcus.R.Robinson@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION:

Background

From the air we breathe to the food we eat, the ocean touches every aspect of our lives.[1] Coastlines are home to approximately 40 percent of the U.S. population,[2] and as it sustains and connects us, the ocean is woven into our cultures and communities. All people—regardless of race, background, income, ability, Tribal affiliation, or ZIP Code—should have equitable access to the benefits provided by the ocean, such as well-paying jobs, healthy and plentiful food, wetlands that protect from damaging storms, space for cultural and religious practices, multiple sources of energy, recreation, transportation, and trade. But even as many communities in the United States have thrived in recent decades, many other communities have been left behind. Communities do not share equitably in the benefits provided by the ocean or equitably bear the burden of the negative impacts of human activities associated with the ocean: climate change, sea level rise and coastal flooding, increased storm intensity, pollution, overfishing, loss of habitat biodiversity, and other threats.

Communities with environmental justice concerns face entrenched disparities that are often the legacy of racial discrimination and marginalization, redlining, exclusionary zoning, and other discriminatory decisions or patterns. Examples of such decisions and patterns include the inequitable placement of polluting infrastructure, such as ports and landfills, and inadequate responses to natural hazards, such as storms and typhoons. Communities with a significant proportion of people who are Black, Latino, Indigenous and Native American, Asian American, Native Hawaiian, or Pacific Islander may be disproportionately impacted by these issues, as well as communities with a significant proportion of people who experience persistent poverty or other forms of social inequality. Communities experiencing environmental injustices also include geographically dispersed and mobile populations, such as migrant fishers or those who have been displaced by environmental hazards or inequitable development practices. Environmental injustices may also be cumulative and convergent as people face multiple climate and social challenges over time.

The Federal Government is dedicated to building upon and strengthening its commitment to deliver environmental justice to all communities across America. Restoring and protecting a healthy environment wherever people live, play, work, learn, grow, and worship is of the utmost importance to the Biden-Harris Administration. All communities deserve a healthy and resilient ocean, and opportunities to pursue traditional and cultural practices and participate in a sustainable blue economy where good jobs, skills training, and economic benefits are shared.

The Ocean Policy Committee, a Congressionally mandated, Cabinet-level interagency committee charged with coordinating Federal ocean policy,[3] will develop an Ocean Justice Strategy in consultation with Federally recognized Tribes and input from Territorial, State, and local governments, Indigenous communities, the private sector, and the public. The Ocean Justice Strategy will aim to identify barriers and opportunities to fully integrate environmental justice principles into ocean-related activities of the Federal Government.

The Ocean Justice Strategy will: (1) assess how the Federal Government should define ocean justice; (2) describe barriers to and opportunities for ocean justice; (3) describe how ocean justice should apply to the scientific enterprise of knowledge building, including the appropriate consideration, inclusion, and application of Indigenous Knowledge; [4] (4) describe how ocean justice should apply to access to and management of the ocean, coasts, and Great Lakes; and (5) describe how ocean justice will be implemented by the Federal Government to build on and expand the work of Tribal, Territorial, State, and local governments, Indigenous communities, the private sector, and the public.

At the Federal level, the Ocean Justice Strategy will take into account all relevant Biden-Harris Administration actions and reports, including: Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government),[5] Executive Order 14008 of January 27, 2021 (Tackling the Climate Crisis at Home and Abroad),[6] Executive Order 14091 of February 16, 2023 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government),[7] Executive Order 14096 of April 21, 2023 (Revitalizing Our Nation's Commitment to Environmental Justice for All),[8] the Ocean Climate Action Plan,[9] the National Nature Assessment,[10] Opportunities to Accelerate Nature-Based Solutions,[11] the America the Beautiful initiative,[12] and Guidance for Federal Departments and Agencies on Indigenous Knowledge.[13]

Questions To Inform Development of the Strategy

You may provide information on as many topics below as you choose. Clearly indicate in your submission which questions you are addressing. The OPC is seeking input from the public on the following:

- *Definitions.* What is ocean justice? How do you define ocean justice in the context of your community and your work?
- *Barriers to Ocean Justice.* What are the barriers to realizing ocean justice? What key challenges do you face in achieving ocean justice? What ocean

[1] ''Ocean'' includes the open ocean, coasts, estuaries, the U.S. Arctic, the Great Lakes, and oceans and coasts surrounding the U.S. Territories.

[2] Office for Coastal Management, Economics and Demographics (2023), *https://coast.noaa.gov/states/fast-facts/economics-and-demographics.html.*

[3] National Oceanic and Atmospheric Administration, Ocean Policy Committee (2023), *https://www.noaa.gov/interagency-ocean-policy.*

[4] OSTP & CEQ, Guidance for Federal Departments and Agencies on Indigenous Knowledge (2022), *https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf* [hereinafter IK Guidance].

[5] 86 FR 7009 (Jan. 25, 2021).

[6] 86 FR 7619 (Jan. 27, 2021).

[7] 88 FR 10825 (Feb. 22, 2023).

[8] 88 FR 25251 (Apr. 26, 2023).

[9] OPC, Ocean Climate Action Plan (2023), *https://www.whitehouse.gov/wp-content/uploads/2023/03/Ocean-Climate-Action-Plan_Final.pdf.*

[10] U.S. Global Change Research Program, National Nature Assessment, *https://www.globalchange.gov/nna.*

[11] CEQ, OSTP & the White House Office of Domestic Climate Policy, Opportunities for Accelerating Nature-Based Solutions: A Roadmap for Climate Progress (2022), *https://www.whitehouse.gov/wp-content/uploads/2022/11/Nature-Based-Solutions-Roadmap.pdf.*

[12] U.S. Department of the Interior, America the Beautiful, *https://www.doi.gov/priorities/america-the-beautiful.*

[13] IK Guidance, *supra* note 5.

justice challenges do you see as central to Federal Government action?

• *Opportunities for Ocean Justice.* What elements, activities, and components should the Ocean Justice Strategy include? What injustices related to the ocean should the Federal Government better address? What successful regional or local efforts to remedy past harms or advance ocean justice should be applied nationwide? What examples do you have of instances when the Federal Government made a just decision related to the ocean, and how might that be scaled up or broadened? What does ocean justice in Federal actions and decision-making look like in practice?

• *Research and Knowledge Gaps.* What are the research and knowledge gaps that we need to address for the Federal Government to create and advance an effective Ocean Justice Strategy and take equitable and ambitious action?

• *Tools and Practices.* How can the Federal Government harness existing environmental justice tools and practices, such as the Climate and Economic Justice Screening Tool (CEJST),[14] EJ Screen,[15] and EnviroAtlas,[16] to answer questions about justice in ocean policy? What new tools and practices are necessary to advance ocean justice?

• *Partnerships and Collaboration.* What ocean justice solutions can or should be led by non-Federal entities? Where and how can the Federal Government partner with Tribal, Territorial, State, and local governments, as well as external stakeholders across regions and sectors, to effectively remedy past harms and advance ocean justice?

• *Additional Considerations.* What else would you like considered in the development of the Ocean Justice Strategy?

Please note that this **Federal Register** notice is designed to complement existing Federal activities in this space. The OPC will consider comments submitted in response to its previous request for information on the Ocean Climate Action Plan [17] to inform the development of the Ocean Justice Strategy.

Matthew Lee-Ashley,

Chief of Staff.

[FR Doc. 2023–12271 Filed 6–7–23; 8:45 am]

BILLING CODE 3325–F3–P

[14] CEQ, Climate and Economic Justice Screening Tool, *https://screeningtool.geoplatform.gov/.*

[15] U.S. Environmental Protection Agency (EPA), EJScreen: Environmental Justice Screening and Mapping Tool (2023), *https://www.epa.gov/ejscreen.*

[16] EPA, EnviroAtlas (2023), *https://www.epa.gov/enviroatlas.*

[17] 87 FR 60228 (Oct 4, 2022).

DEPARTMENT OF DEFENSE

Department of the Air Force

[ARV–221004B–PL]

Notice of Intent To Grant an Exclusive Patent License

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of intent.

SUMMARY: Pursuant to the Bayh-Dole Act and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant an exclusive patent license to Advanced Cooling Technologies, Inc., having a place of business at 1046 New Holland Avenue, Lancaster, PA 17601.

DATES: Written objections must be filed no later than fifteen (15) calendar days after the date of publication of this notice.

ADDRESSES: Submit written objections to Sara Telano, AFRL/RDOX, 3550 Aberdeen Ave SE, Kirtland AFB, NM 87117; Phone: (505) 853–3305; or Email: *sara.telano@us.af.mil.* Include Docket No. ARV–221004B–PL in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Sara Telano, AFRL/RDOX, 3550 Aberdeen Ave. SE, Kirtland AFB, NM 87117; Phone: (505) 853–3305; or Email: *sara.telano@us.af.mil.*

Abstract of Patent Application(s)

A thermomodulating heat pipe is provided including a heat pipe envelope having a capillary wick extending substantially continuously the full length of the heat pipe and a void space interior of the capillary wick. The heat pipe envelope has a nominal evaporator section, a nominal condenser section where the nominal condenser section includes an active condenser portion and an inactive condenser portion, and a reservoir section extending from the inactive condenser portion. At a nominal condition, a heat pipe fluid is provided with a liquid phase filling the capillary wick and a vapor phase filling the void space of the nominal evaporator section and the active condenser portion, a non-condensable gas filling the void space of at least the reservoir section and the inactive condenser portion. Depending on thermal conditions, both prograde and retrograde heat transfer are enabled.

Intellectual Property

U.S. Application No. 18/204,114, filed on May 31, 2023, and entitled, ''Thermomodulating Heat Pipe.''

The Department of the Air Force may grant the prospective license unless a timely objection is received that sufficiently shows the grant of the license would be inconsistent with the Bayh-Dole Act or implementing regulations. A competing application for a patent license agreement, completed in compliance with 37 CFR 404.8 and received by the Air Force within the period for timely objections, will be treated as an objection and may be considered as an alternative to the proposed license.

Authority: 35 U.S.C. 209; 37 CFR 404.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–12210 Filed 6–7–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Record of Decision for the Environmental Impact Statement Sentinel (Ground Based Strategic Deterrent) Program Deployment and Minuteman III Decommissioning and Disposal

ACTION: Notice of availability of record of decision.

SUMMARY: On May 19, 2023, the Department of the Air Force (DAF) signed the Record of Decision (ROD) for the Environmental Impact Statement Sentinel (Ground Based Strategic Deterrent [GBSD]) Program Deployment and Minuteman III Decommissioning and Disposal.

ADDRESSES: Lt Col Rodney Ellison, Air Force Global Strike Command, Air Forces Strategic-Air Public Affairs, 245 Davis Ave. E, Suite 198, Barksdale AFB, LA 71110, (318.456.1305), *rodney.ellison.4@us.af.mil.*

SUPPLEMENTARY INFORMATION: The Department of Air Force (DAF) approved the three GBSD locations and their subsequent sequencing (June 2020). Based on this decision, the DAF will sequentially replace all land-based Minuteman III intercontinental ballistic missile in the United States with the Sentinel system, including the motors, interstages, propulsion system rocket engine, and missile guidance set. All

missile alert facilities, launch facilities, communication systems, infrastructure, and technologies, including interconnecting utility corridors, will be modernized, replaced, or reused as necessary to support the Sentinel system.

The DAF decision documented in the ROD was based on matters discussed in the Final Environmental Impact Statement, inputs from the public and regulatory agencies, and other relevant factors. The Final Environmental Impact Statement was made available to the public on March 31, 2023, through a Notice of Availability in the **Federal Register** (Volume 88, Number 62, Page 19302) with a waiting period that ended on May 1, 2023.

Authority: This Notice of Availability is published pursuant to the regulations (40 CFR part 1506.6) implementing the provisions of the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) and the Air Force's Environmental Impact Analysis Process (32 CFR parts 989.21(b) and 989.24(b)(7)).

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–12273 Filed 6–7–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0050]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the OUSD(P&R) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by August 7, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *https://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Office of the Under Secretary of Defense (Personnel and Readiness) (Military Personnel Policy), ATTN: Mr. Kent Bauer, 1500 Defense Pentagon, Washington, DC 20301–1500 or call (703) 693–4204.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; And OMB Number: Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States; DD Form 2168; OMB Control Number 0704–0100.

Needs and Uses: This information collection requirement is necessary to implement section 401 of Public Law 95–202 (codified at 38 U.S.C. 106 Note), which directs the Secretary of Defense: (1) To determine if civilian employment or contractual service rendered to the Armed Forces of the United States by certain groups shall be considered Active Duty service, and (2) to award members of approved groups an appropriate certificate where the nature and duration of service so merits. This information is collected on DD Form 2168, ''Application for Discharge of Member of Group Certified to have Performed Active Duty with the Armed Forces of the United States,'' which provides the necessary data to assist each of the Military Departments in determining if an applicant was a member of a group which has performed active military service. Those individuals who have been recognized as members of an approved group shall be eligible for benefits administered by the Veterans' Administration.

Affected Public: Individuals or households.

Annual Burden Hours: 250.

Number of Respondents: 500.

Responses per Respondent: 1.

Total Annual Responses: 500.

Average Burden per Response: 30 minutes.

Frequency: On occasion.

Information provided by the applicant will include: The name of the group served with; dates and place of service; highest grade/rank/rating held during service; highest pay grade; military installation where ordered to report; specialty/job title(s). If the information requested on a DD Form 2168 is compatible with that of a corresponding approved group, and the applicant can provide supporting evidence, he or she will receive veteran's status in accordance with the provisions of DoD Directive 1000.20. Information from the DD form 2168 will be extracted and used to complete the DD Form 214, ''Certificate for Release of Discharge from Active Duty.''

Dated: June 2, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–12217 Filed 6–7–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0097]

Agency Information Collection Activities; Comment Request; Efficacy Evaluation of the Mathematics Intervention Toolkit for the Elementary Grades

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before August 7, 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–0097. 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 Janelle Sands, 202–245–6786.

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: Efficacy Evaluation of the Mathematics Intervention Toolkit for the Elementary Grades.

OMB Control Number: 1850–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 9,630.

Total Estimated Number of Annual Burden Hours: 3,106.

Abstract: The U.S. Department of Education (ED) requests OMB clearance for data collection related to the Regional Educational Laboratory (REL) program. ED, in consultation with REL Northeast and the Islands (REL–NEI) under contract 91990022C0013 has planned a study of the efficacy of a professional development (PD) course for fourth and fifth grade math intervention teachers in the state of Massachusetts. Researchers at WestEd will carry out a school-level randomized controlled trial (RCT) to evaluate the efficacy of the PD course and investigate how and whether the PD course is helping teachers improve their practices and boost student learning. OMB approval is being requested for REL–NEI's data collection for this project, including pre and post measures of student skills and attitudes, and teacher knowledge, beliefs, and feedback regarding instructional practice and implementation of the PD course.

Elementary math achievement is a topic of national concern. Students who leave elementary school with a strong foundation in mathematics, particularly fractions, are better prepared to succeed in middle school mathematics and algebra. Algebra is a well-documented gatekeeper to advanced high school math coursework, which is consistently linked to increased post-secondary opportunities and earnings. On the 2019 NAEP report card, only 41% of grade 4 students scored Proficient or above in math, and these numbers are lower for students from marginalized backgrounds. These opportunity gaps persist at the secondary level, so need to be addressed as soon as they appear.

Given this need, district leaders in Massachusetts are seeking ways to bolster learning for students who struggle with mathematics. Some of these approaches adopted by districts target core instruction, but districts are also interested in strengthening their approaches to intervention. Together with the Massachusetts Partnership to Support Student Learning Through Math Intervention, REL–NEI is designing a toolkit PD course to build educators' knowledge of and ability to implement the recommendations of a new What Works Clearinghouse (WWC) Practice Guide, Assisting Students Struggling with Mathematics: Intervention in the Elementary Grades. By using the PD course's extensive resources, districts will be able to provide teachers with in-depth PD on the recommendations and how to implement them by using specific instructional practices. Teachers will learn to use these practices effectively, helping them to optimize intervention time to improve student learning. Their students will be actively engaged in doing math, communicating their ideas, and progressing toward clear learning goals with feedback and support.

Dated: June 5, 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. 2023–12265 Filed 6–7–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0096]

Agency Information Collection Activities; Comment Request; Full-Service Community Schools Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before August 7, 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–0096. 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 Jane Hodgdon, 202–245–6057.

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: Full-Service Community Schools Annual Performance Report.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 42.

Total Estimated Number of Annual Burden Hours: 378.

Abstract: The collection of this information is part of the government-wide effort to improve the performance and accountability of all federal programs, under the Government Performance and Results Act (GPRA) passed in 1993, the Uniform Guidance, and the Education Department General Administrative Regulations (EDGAR). Under GPRA, a process for using performance indicators to set program performance goals and to measure and report program results was established. To implement GPRA, the U.S. Department of Education (ED) developed GPRA measures at every program level to quantify and report program progress required by the Elementary and Secondary Education Act of 1965 (ESEA), as amended. Under the Uniform Guidance and EDGAR, recipients of federal awards are required to submit performance and financial expenditure information. The GPRA program-level measure (established under section 4625(4)(C) of the Elementary and Secondary Education Act of 1965, as amended), the 13 additional program indicators (established through a Notice of Final Priorities, Requirements, Definitions, and Selection Criteria (NFP) published in the **Federal Register** on July 13, 2022, 87 FR 41675)), and budget information for the Full-Service Community Schools (FSCS) Program are reported in the Annual Performance Report (APR). The APR is required under 2 CFR 200.328 and 34 CFR 75.118 and 75.590. It provides data on the status of funded projects that correspond to the scope and objectives established in the approved applications and any amendments. To ensure that accurate and reliable data are reported to Congress on program implementation and performance outcomes, the FSCS APR collects data from grantees in a consistent format to calculate these data in the aggregate.

Dated: June 5, 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. 2023–12262 Filed 6–7–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[DOE Docket No. 202–22–1]

Emergency Order Issued to the California Independent System Operator Corporation To Operate Power Generating Facilities Under Limited Circumstances in California as a Result of Extreme Weather

AGENCY: Office of Cybersecurity, Energy Security, and Emergency Response, Department of Energy.

ACTION: Notice of emergency action.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is issuing this Notice to document emergency actions that it has taken pursuant to the Federal Power Act. California experienced several periods of extreme heat, drought conditions, and threat of wildfires. California Governor Gavin Newsom issued a proclamation declaring a state of emergency regarding increased electrical demand and generation. Because the additional generation may result in a conflict with environmental standards and requirements, the DOE authorized only the necessary additional generation, allowing CAISO to sufficiently supply the necessary amount of energy needed to prevent electrical disruption.

FOR FURTHER INFORMATION CONTACT: For further information on this Notice, or for information on the emergency activities described herein, contact Kenneth Buell, (202) 586–3362, *Kenneth.Buell@hq.doe.gov,* or by mail to the attention of Kenneth Buell, CR–30, 1000 Independence Ave. SW, Washington, DC 20585.

The Order and all related information are available here: *https://www.energy.gov/ceser/federal-power-act-section-202c-caiso-september-2022.*

SUPPLEMENTARY INFORMATION:

Background

Section 202(c) of the Federal Power Act

The U.S. Department of Energy is issuing this Notice pursuant to 10 CFR 1021.343(a) to document emergency actions taken in accordance with section 202(c) of the Federal Power Act (FPA) (16 U.S.C. 824a(c)). FPA section 202(c) provides that ''[d]uring the continuance of any war in which the United States is engaged, or whenever the [Secretary of Energy] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the [Secretary of Energy]

shall have authority, either upon [her] own motion or upon complaint, with or without notice, hearing ore report, to require by order such temporary connections of facilities and generation, delivery, interchange, or transmission of electric energy as in [her] judgment will best meet the emergency and serve the public interest.

1. Request for Emergency Order From the California Independent System Operator Corporation

On September 1, 2022, the California Independent System Operator Corporation (CAISO) submitted to the Department a Request for Emergency Order Under Section 202(c) of the Federal Power Act (Application) with the Department ''to preserve the reliability of bulk electric power system in California.'' In its Application, CAISO cited extreme heat and forecasted a supply deficiency to meet demand during peak demand hours. CAISO requested the authority to direct the operation of three natural gas-fired generating resources capable of providing 28 megawatts of additional generation supply (the Covered Resources). CAISO stated that the emergency order it was requesting could result in exceedances of National Ambient Air Quality Standards under the Clean Air Act. Given the permit limits of the Covered Resources, CAISO anticipated that the additional capacity could not be made available absent an order under FPA section 202(c).

2. CAISO Order

On September 2, 2022, the Acting Under Secretary for Infrastructure, acting pursuant to delegated authority, issued Order No. 2022–22–1 (the CAISO Order). As set forth in the CAISO Order, the Acting Under Secretary for Infrastructure found that an emergency exists in California due to a shortage of electric energy, a shortage of facilities for the generation of electric energy, and other causes, and that the issuance of the CAISO Order would meet the emergency and serve the public interest.

The CAISO Order authorized the CAISO to dispatch the Covered Resources from September 2, 2022 to September 8, 2022, solely under the following conditions: (i) the issuance and continuation of an Energy Emergency Alert Level 2 (EEA2) condition or greater between the hours of 14:00 Pacific Daylight Time and 22:00 Pacific Daylight Time; and (ii) a transmission emergency that requires operation of a Covered Resource to prevent or mitigate load curtailment during any operating hour. Under the CAISO Order, the CAISO was required to exhaust all reasonably and practically available resources prior to dispatching the Covered Resources.

The CAISO Order requires that CAISO provide a report by October 10, 2022, to include all source-specific data for dates between September 2, 2022 and September 8, 2022, during which the Covered Resources operated. The report must include, ''for each unit: (1) the hours of operation, as well as the hours in which any permit limit was exceeded, and (2) a preliminary description of each permit term that was exceeded and the manner in which such exceedance occurred.'' The CAISO Order also requires the CAISO to ''submit a final report by November 14, 2022, with any revisions to the information reported on December 12, 2022.'' However, because no facilities operated above permitted levels during the emergency as authorized by the DOE order, no environmental impacts resulted from DOE issuing the order. Consequently, DOE has decided not to prepare a special environmental analysis.

3. Amendment Number 1 to CAISO Order

On September 7, 2022, the CAISO submitted to the Department a Request for Modification of Emergency Order Pursuant to Section 202(c) of the Federal Power Act (Request for Modification) in which it requested that the CAISO Order be amended to add two units at Calpine's Greenleaf Unit 1 site in Yuba City, California (the Greenleaf Units) as additional Covered Resources and that the Greenleaf Units be permitted to operate through September 9, 2022, and otherwise in accordance with the terms of CAISO Order. In its Request for Modification, the CAISO reported that the water injection pump failed at the Greenleaf Units on September 6, 2022. Operation of the Greenleaf Units could cause exceedance of permitted emissions limits, and thus could result in suspension of their operation absent the issuance of an emergency order permitting operation of the Greenleaf Units during specified conditions.

On September 7, 2022, the Acting Under Secretary for Infrastructure issued Amendment Number 1 to Order No. 202–22–1 (Amendment Number 1), finding that the circumstances which led to her previous determination that California was experiencing a shortage of electric energy was continuing and that Amendment Number 1 would help meet the emergency conditions in the CAISO control area and serve the public interest. Amendment Number 1 added the Greenleaf Units as Covered Resources subject to all of the terms of the CAISO Order, except that the Greenleaf Units could be operated through September 9, 2022. All other terms of CAISO Order remained in effect and applied to all of the Covered Resources, including the Greenleaf Units. The CAISO Order as amended by Amendment Number 1 is referred to herein as the Amended CAISO Order.

4. Amendment Number 2 to the Amended CAISO Order

On September 7, 2022, the CAISO submitted to the Department a Request for Extension of Emergency Order Pursuant to Section 202(c) of the Federal Power Act (Extension Application) to the Department. In its Extension Application, the CAISO requested an extension of the expiration date of the Amended CAISO Order through September 12, 2022. The CAISO stated that California was experiencing extreme heat, which the CAISO forecasted to continue through at least September 9, 2022, and the extended and excessive heat as well as wildfire risk could ''exacerbate electric grid reliability issues at any time.'' Consequently, the CAISO believed it prudent to ask that the expiration date of the Amended CAISO Order be extended through September 12, 2022.

On September 8, 2022, the Acting Under Secretary for Infrastructure issued Amendment Number 2 to Order No. 202–22–1 (Amendment Number 2), finding that an emergency continued to exist in California due to a shortage of electric energy and that issuance of the extension would help to meet the emergency conditions and serve the public interest. Amendment Number 2 extended the expiration date of the Amended CAISO Order through September 12, 2022. All other terms of the Amended CAISO Order remained in effect, including the obligation of the CAISO to exhaust all reasonably and practically available resources prior to dispatching the Covered Resource and the obligation to report information regarding the environmental impacts of the operation of the Covered Resources permitted by the CAISO Order. As required by FPA section 202(c), the Department consulted with the Environmental Protection Agency (EPA) in considering the CAISO's request for an extension of the Amended CAISO Order. The EPA did not request any additional conditions be included in the Amended CAISO Order. Because no facilities operated above permitted levels during the emergency as authorized by the DOE order, no environmental impacts resulted from DOE issuing the order. Consequently,

DOE has decided not to prepare a special environmental analysis.

5. Further Information

The CAISO Order, Amendment Number 1, Amendment Number 2, and other documents referenced herein can be found on the Department's website at Federal Power Act Section 202(c): CAISO September 2022 | Department of Energy. The reports required by the Amended CAISO Order will be posted to the Department's website when they become available.

Signing Authority

This document of the Department of Energy was signed on May 15, 2023, by Puesh M. Kumar, Director for the Office of Cybersecurity, Energy Security, and Emergency Response, 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 June 2, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–12214 Filed 6–7–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD23–3–000]

Commission Information Collection Activities (FERC–725B(5))

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC–725B(5), (Mandatory Reliability Standards, Critical Infrastructure Protection (CIP–003–9)- Temporary Placeholder for FERC–725B that is pending approval at OMB.

No Comments were received on the 60-day notice published on March 30, 2023.

DATES: Comments on the collection of information are due July 10, 2023.

ADDRESSES: Send written comments on FERC–725B(5), Mandatory Reliability Standards, Critical Infrastructure Protection (CIP–003–9) to OMB through *www.reginfo.gov/public/do/PRAMain.* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control No: 1902–NEW(FERC–725B(5)) in the subject line of your comments. Comments should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Please submit copies of your comments to the Commission. You may submit copies of your comments (identified by Docket No. RD23–3–000) by one of the following methods:

Electronic filing through *https://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: OMB submissions must be formatted and filed in accordance with submission guidelines at *www.reginfo.gov/public/do/PRAMain.* Using the search function under the ''Currently Under Review'' field, select Federal Energy Regulatory Commission; click ''submit,'' and select ''comment'' to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov/ferc-online/overview.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION:

Title: FERC–725B(5) (Mandatory Reliability Standards, Critical Infrastructure Protection (CIP–003–9))—Temporary Placeholder for FERC–725B that is pending approval at OMB

OMB Control No.: 1902–NEW.

Type of Request: New collection request for FERC–725B(5)—temporary placeholder for FERC–725B information collection requirements with changes to the reporting requirements.

Abstract: On August 8, 2005, Congress enacted the Energy Policy Act of 2005.[1] The Energy Policy Act of 2005 added a new section 215 to the Federal Power Act (FPA),[2] which requires a Commission-certified Electric Reliability Organization to develop mandatory and enforceable Reliability Standards,[3] including requirements for cybersecurity protection, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the Electric Reliability Organization subject to Commission oversight, or the Commission can independently enforce Reliability Standards.

On February 3, 2006, the Commission issued Order No. 672,[4] implementing FPA section 215. The Commission subsequently certified the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization. The Reliability Standards developed by NERC become mandatory and enforceable after Commission approval and apply to users, owners, and operators of the Bulk-Power System, as set forth in each Reliability Standard.[5] The CIP

[1] Energy Policy Act of 2005, Public Law 109–58, sec. 1261 *et seq.,* 119 Stat. 594 (2005).

[2] 16 U.S.C. 824o.

[3] Section 215 of the FPA defines Reliability Standard as a requirement, approved by the Commission, to provide for reliable operation of existing bulk-power system facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the Bulk-Power System. However, the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity. *Id.* at 824o(a)(3).

[4] *Rules Concerning Certification of the Elec. Reliability Org.; and Procedures for the Establishment, Approval, and Enf't of Elec. Reliability Standards,* Order No. 672, 71 FR 8661 (Feb. 17, 2006), 114 FERC ¶ 61,104, *order on reh'g,* Order No. 672–A, 71 FR 19814 (Apr. 28, 2006), 114 FERC ¶ 61,328 (2006).

[5] NERC uses the term ''registered entity'' to identify users, owners, and operators of the Bulk-Power System responsible for performing specified reliability functions with respect to NERC

Continued

Reliability Standards require entities to comply with specific requirements to safeguard bulk electric system (BES) Cyber Systems [6] and their associated BES Cyber Assets. These standards are results-based and do not specify a technology or method to achieve compliance, instead leaving it up to the entity to decide how best to comply.

The Commission has approved multiple versions of the CIP Reliability Standards submitted by NERC, partly to address the evolving nature of cyber-related threats to the Bulk-Power System. High impact systems include large control centers. Medium impact systems include smaller control centers, ultra-high voltage transmission, and large substations and generating facilities. The remainder of the BES Cyber Systems are categorized as low impact systems. Most requirements in the CIP Reliability Standards apply to high and medium impact systems; however, a technical controls requirement in Reliability standard CIP–003, described below, applies only to low impact systems.

The Commission is currently revising CIP–003 on this submission of Docket No. RD23–3–000 to update CIP–003–8 to CIP–003–9.

The FERC–725B information collection requirements are subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.[7] OMB's regulations require approval of certain information collection requirements imposed by agency rules.[8] Upon approval of a collection of information, OMB will assign an OMB control number and expiration date. Respondents subject to the filing requirements will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

Reliability Standard CIP–003–9 Security Management Controls: requires entities to specify consistent and sustainable security management controls that establish responsibility and accountability to protect BES Cyber Systems against compromise that could lead to mis-operation or instability on the Bulk-Power System. Specifically, the Reliability Standard CIP–003–9 is being revised to add requirements for entities to adopt mandatory security controls for vendor electronic remote access used at low impact BES Cyber Systems. It is part of the implementation of the Congressional mandate of the Energy Policy Act of 2005 to develop mandatory and enforceable Reliability Standards to better ensure the reliability of the nation's Bulk-Power System.

Type of Respondents: Business or other for profit, and not for profit institutions.

Estimate of Annual Burden: [9]

The Commission bases its paperwork burden estimates on the changes in paperwork burden presented by the proposed revision to CIP Reliability Standard CIP–003–9 as compared to the current Commission-approved Reliability Standard CIP–003–8. As discussed above, the immediate order addresses the area of modification to the CIP Reliability Standards: adopting mandatory security controls for vendor electronic remote access used at low impact BES Cyber Systems.

The CIP Reliability Standards, viewed as a whole, implement a defense-in-depth approach to protecting the security of BES Cyber Systems at all impact levels.[10] The CIP Reliability Standards are objective-based and allow entities to choose compliance approaches best tailored to their systems.[11] The NERC Compliance Registry, as of January 4, 2023, identifies approximately 1,592 U.S. entities that are subject to mandatory compliance with Reliability Standards. Of this total, we estimate that 1,579 entities will face an increased paperwork burden under Reliability Standard CIP 003–9, estimating that a majority of these entities will have one or more low impact BES Cyber Systems. Based on these assumptions, the Commission estimates the total annual burden and cost as follows:

RD23–3–000 COMMISSION ORDER

[Mandatory reliability standards for critical infrastructure protection reliability standards CIP–003–9]

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost per response [12]	Total annual burden hours & total annual cost	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Create vendor remote access policy (one-time) [13].	1,579	1	1,579	60 hrs. $5,340	94,740 hrs. $8,431,860	5,340
Updates and reviews of vendor remote access policy (ongoing).	1,579	1	1,579	3.5 hrs. $311.50.	5,527 hrs. (rounded) $491,903	311.50
Total burden for FERC–725B(5) under CIP–003–9.			3,158		100,267 hrs. $8,923,763	

Reliability Standards. *See, e.g., Version 4 Critical Infrastructure Protection Reliability Standards,* Order No. 761, 77 FR 24594 (Apr. 25, 2012), 139 FERC ¶ 61,058, at P 46, *order denying clarification and reh'g,* 140 FERC ¶ 61,109 (2012). Within the NERC Reliability Standards are various subsets of entities responsible for performing various specified reliability functions. We collectively refer to these as ''entities.''

[6] NERC defines BES Cyber System as ''[o]ne or more BES Cyber Assets logically grouped by a responsible entity to perform one or more reliability tasks for a functional entity.'' NERC, Glossary of Terms Used in NERC Reliability Standards, at 5 (2020), *https://www.nerc.com/files/glossary_of_terms.pdf* (NERC Glossary of Terms). NERC defines BES Cyber Asset as ''A Cyber Asset that if rendered unavailable, degraded, or misused would, within 15 minutes of its required operation, mis-operation, or non-operation, adversely impact one or more Facilities, systems, or equipment, which, if destroyed, degraded, or otherwise rendered unavailable when needed, would affect the reliable operation of the Bulk Electric System. Redundancy of affected Facilities, systems, and equipment shall not be considered when determining adverse impact. Each BES Cyber Asset is included in one or more BES Cyber Systems.''

Id. at 4.

[7] 44 U.S.C. 3507(d) (2012).

[8] 5 CFR 1320.11 (2017).

[9] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to Title 5 Code of Federal Regulations 1320.3.

[10] Order No. 822, 154 FERC ¶ 61,037 at 32.

[11] *Mandatory Reliability Standards for Critical Infrastructure Protection,* Order No. 706, 73 FR 7368 (Feb. 7, 2008), 122 FERC ¶ 61,040, at P 72 (2008); *order on reh'g,* Order No. 706–A, 123 FERC ¶ 61,174 (2008); *order on clarification,* Order No. 706–B, 126 FERC ¶ 61,229 (2009).

The one-time burden of 94,740 hours that only applies for Year 1 will be averaged over three years (94,740 hours ÷ 3 = 31,580 hours/year over three years). The number of responses is also averaged over three years (1,579 responses ÷ 3 = 526.33 responses/year).

The responses and burden hours for Years 1–3 will total respectively as follows for Year 1's one-time burden:

Year 1: 526.33 responses; 31,580 hours
Year 2: 526.33 responses; 31,580 hours
Year 3: 526.33 responses; 31,580 hours

The responses and burden hours for Years 1–3 will total respectively as follows for Ongoing and beyond: 1,579 responses and 5,527 hours.

The following shows the annual cost burden for each group, based on the burden hours in the table above:

- *Year 1:* $8,431,860 (One-time)
- *Years 2 and 3:* $491,903 (Ongoing)

The paperwork burden estimate includes costs associated with the initial development of a policy to address requirements relating to: (1) clarifying the obligations pertaining to electronic access control for low impact BES Cyber Systems; (2) adopting mandatory security controls for transient electronic devices (*e.g.,* thumb drives, laptop computers, and other portable devices frequently connected to and disconnected from systems) used at low impact BES Cyber Systems; and (3) requiring responsible entities to have a policy for declaring and responding to CIP Exceptional Circumstances related to low impact BES Cyber Systems. Further, the estimate reflects the assumption that costs incurred in year 1 will pertain to policy development, while costs in years 2 and 3 will reflect the burden associated with maintaining logs and other records to demonstrate ongoing compliance.

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: June 2, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–12241 Filed 6–7–23; 8:45 am]

BILLING CODE 6717–01–P

[12] The loaded hourly wage figure (includes benefits) is based on the average of three occupational categories for 2022 found on the Bureau of Labor Statistics website (*http://www.bls.gov/oes/current/naics2_22.htm*):

[13] This one-time burden applies in Year One only.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–174–000.
Applicants: Red Tailed Hawk Solar LLC.
Description: Red Tailed Hawk Solar LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 6/1/23.
Accession Number: 20230601–5307.
Comment Date: 5 p.m. ET 6/22/23.

Docket Numbers: EG23–175–000.
Applicants: AEUG Union Solar LLC.
Description: AEUG Union Solar LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 6/1/23.
Accession Number: 20230601–5308.
Comment Date: 5 p.m. ET 6/22/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–74–000.
Applicants: East Kentucky Power Cooperative, Inc. v. *PJM Interconnection, L.L.C.*
Description: Complaint of *East Kentucky Power Cooperative, Inc.* v. *PJM Interconnection, L.L.C.*
Filed Date: 5/31/23.
Accession Number: 20230531–5426.
Comment Date: 5 p.m. ET 6/30/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–502–006.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: NYISO Compliance Demand Curve reset re: FERC's May 2023 Order to be effective 6/9/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5118.
Comment Date: 5 p.m. ET 6/16/23.

Docket Numbers: ER23–1591–001.
Applicants: Westlands Transmission, LLC.
Description: Tariff Amendment: Revised 2nd Amended TSA Castanea Project (ER23–1591–) to be effective 4/8/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5177.
Comment Date: 5 p.m. ET 6/12/23.

Docket Numbers: ER23–1623–001.
Applicants: Mesquite Solar 4, LLC.
Description: Tariff Amendment: MS4 and MS5 Inter-Company SFA and Inter-Phase SFA Concurrence Amendments to be effective 4/13/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5124.
Comment Date: 5 p.m. ET 6/12/23.

Docket Numbers: ER23–1624–001.
Applicants: Mesquite Solar 5, LLC.
Description: Tariff Amendment: MS4 and MS5 Inter-Company SFA and Inter-Phase SFA Concurrence Amendments to be effective 4/13/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5126.
Comment Date: 5 p.m. ET 6/12/23.

Docket Numbers: ER23–1626–001.
Applicants: Mesquite Solar 5, LLC.
Description: Tariff Amendment: MS4 and MS5 Inter-Company SFA and Inter-Phase SFA Concurrence Amendments to be effective 4/13/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5127.
Comment Date: 5 p.m. ET 6/12/23.

Docket Numbers: ER23–1627–001.
Applicants: Mesquite Solar 4, LLC.
Description: Tariff Amendment: MS4 and MS5 Inter-Company SFA and Inter-Phase SFA Concurrence Amendments to be effective 4/13/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5125.
Comment Date: 5 p.m. ET 6/12/23.

Docket Numbers: ER23–2040–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: NYISO 205: DER and Aggregation market rule changes to be effective 12/31/9998.
Filed Date: 6/1/23.
Accession Number: 20230601–5217.
Comment Date: 5 p.m. ET 6/22/23.

Docket Numbers: ER23–2041–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Seven Flags BESS Generation Interconnection Agreement to be effective 5/19/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5033.
Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2042–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Monte Cristo Windpower System Upgrade Agreement to be effective 5/18/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5037.
Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2043–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original IISA, SA No. 6919 and ICSA, SA No. 6920; Queue No. AG1–135 to be effective 5/3/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5038.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2044–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6232; Queue No. AE1–071 to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5065.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2045–000.
Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: Niagara Mohawk Power Corporation submits tariff filing per 35.13(a)(2)(iii: Niagara Mohawk 205: CRA between Niagara Mohawk and Westfield, SA No. 2781 to be effective 5/3/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5094.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2046–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: Lancaster Solar Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5095.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2047–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: Odom Solar Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5096.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2048–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Arlington II Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5097.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2049–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Baxley Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5098.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2050–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Clay Affected System Construction Agreement (GPAS 014) Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5099.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2051–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR DeSoto Affected System Construction Agreement (GPAS 016) Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5103.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2052–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Lumpkin Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5105.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2053–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Perry Affected System Construction Agreement (GPAS 013) Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5106.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2054–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–06–02_SA 3114 Entergy Arkansas-Walnut Bend Solar 1st Rev GIA (J552) to be effective 5/23/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5107.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2055–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Snipesville Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5111.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2056–000.
Applicants: Georgia Power Company.
Description: Tariff Amendment: SR Terrell Affected System Construction Agreement Termination Filing to be effective 8/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5112.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2057–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: 4th Amend LGIA, Marvel + Removal from eTariff (TOT789/Q1295–SA219) to be effective 6/3/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5133.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2058–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2023–06–02 Interconnection Process Enhancements 2023 Track 1 to be effective 12/31/9998.
Filed Date: 6/2/23.
Accession Number: 20230602–5152.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2059–000.
Applicants: Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: RS 2—Joint Use Agreement with Northeast Missouri to be effective 8/2/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5170.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2060–000.
Applicants: Entergy Louisiana, LLC.
Description: § 205(d) Rate Filing: SRA LBA Agreement to be effective 6/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5174.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2061–000.
Applicants: Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: Joint Use Agreement ATXI and UEC to be effective 8/2/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5175.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2062–000.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2023–06–02 Petition for Limited Waiver Filing—Greenhouse Gas Price-Washington to be effective N/A.
Filed Date: 6/2/23.
Accession Number: 20230602–5178.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2063–000.
Applicants: Ameren Transmission Company of Illinois.
Description: § 205(d) Rate Filing: RS 4 Fiber License Agreement with Northeast Missouri Electric to be effective 8/2/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5185.
Comment Date: 5 p.m. ET 6/23/23.
Docket Numbers: ER23–2064–000.
Applicants: Ameren Transmission Company of Illinois.

Description: § 205(d) Rate Filing: Fiber License Agreement with City of Rolla, RS 5 to be effective 8/2/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5190.

Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2065–000.

Applicants: New England Power Company.

Description: § 205(d) Rate Filing: 2023–06–02 Filing of LGIA with Millennium Power and Request for CEII Treatment to be effective 5/3/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5202.

Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2066–000.

Applicants: Antelope Valley BESS, LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Application and Request for Expedited Action to be effective 7/17/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5208.

Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2067–000.

Applicants: Union Electric Company.

Description: § 205(d) Rate Filing: RS 504 Joint Use Agreement with Northeast Missouri Electric to be effective 8/2/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5213.

Comment Date: 5 p.m. ET 6/23/23.

Docket Numbers: ER23–2068–000.

Applicants: Ameren Transmission Company of Illinois.

Description: § 205(d) Rate Filing: ATXI Certificate of Concurrence with ITC Midwest to be effective 8/2/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5216.

Comment Date: 5 p.m. ET 6/23/23.

*Docket Numbers:*ER23–2069–000.

Applicants: Union Electric Company.

Description: § 205(d) Rate Filing: Certificate of Concurrence with ITC to be effective 8/2/2023.

Filed Date: 6/2/23.

Accession Number: 20230602–5226.

Comment Date: 5 p.m. ET 6/23/23.

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: June 2, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–12240 Filed 6–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–194–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Alabama Georgia Connector Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document, that will discuss the environmental impacts of the Alabama Georgia Connector Project involving construction and operation of facilities by Transcontinental Gas Pipe Line Company, LLC (Transco) in Marengo and Randolph Counties, Alabama; and Coweta, Henry, and Walton Counties, Georgia. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00pm Eastern Time on July 3, 2023. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on April 19, 2023, you will need to file those comments in Docket No. CP23–194–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

Transco provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?''

which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (*www.ferc.gov*) under the Natural Gas, Landowner Topics link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature, which is also located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You will be asked to select the type of filing you are making; a comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–194–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Summary of the Proposed Project

Transco proposes to construct and operate various modifications at five existing compressor stations in Alabama and Georgia. The Alabama Georgia Connector Project would provide about 63,800 dekatherms per day of year-round firm transportation capacity on Transco's system for the Oglethorpe Power Corporation, the Municipal Gas Authority of Georgia (MGAG), and the City of Buford Georgia.

The Alabama Georgia Connector Project would consist of the following facilities:

- Existing Compressor Station 90 (Marengo County, Alabama)
  - Re-wheel two existing compressors.
- Existing Compressor Station 110 (Randolph County, Alabama)
  - Increase the total certificated horsepower (HP) of two gas-fired turbines from 35,500 HP at International Organization for Standardization conditions to 39,365 HP at International Organization for Standardization conditions.
- Existing Compressor Station 115 (Coweta County, Georgia)
  - Re-wheel three existing compressors.
- Existing Compressor Station 120 (Henry County, Georgia)
  - Replacement of an existing certificated 12,000 HP electric motor driven compressor unit with a 22,500 HP electric motor driven compressor unit
- Existing Compressor Station 125 (Walton County, Georgia).
  - Increase the total certificated HP of the station from 49,800 HP to 55,800 HP (by increasing the currently certificated HP of an existing compressor unit from 9.000 to 15,000 HP and re-wheel of one existing compressor.

Transco would also modify station piping within the compressor stations listed above. The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 122.4 acres of land within existing compressor station facilities and temporary use of existing permanent facility roads. No new permanent areas would be required for the project; however, the existing permanent facility areas and roads would continue to be maintained after the construction of the project.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- socioeconomics;
- environmental justice;
- air quality and noise;
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/ Notice of Schedule* will be issued, which will open an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary''. For instructions on connecting to eLibrary, refer to the last page of this notice. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

public record through eLibrary [2] and the Commission's natural gas environmental documents web page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Offices, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] The environmental document for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to *GasProjectAddressChange@ferc.gov* stating your request. You must include the docket number CP23–194–000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address as it appeared on this notice. This email address is unable to accept comments.

OR

(2) Return the attached ''Mailing List Update Form'' (appendix 2).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate the Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Public sessions or site visits will be posted on the Commission's calendar located at *https://www.ferc.gov/news-events/events* along with other related information.

Dated: June 2, 2023.

Kimberly D. Bose,

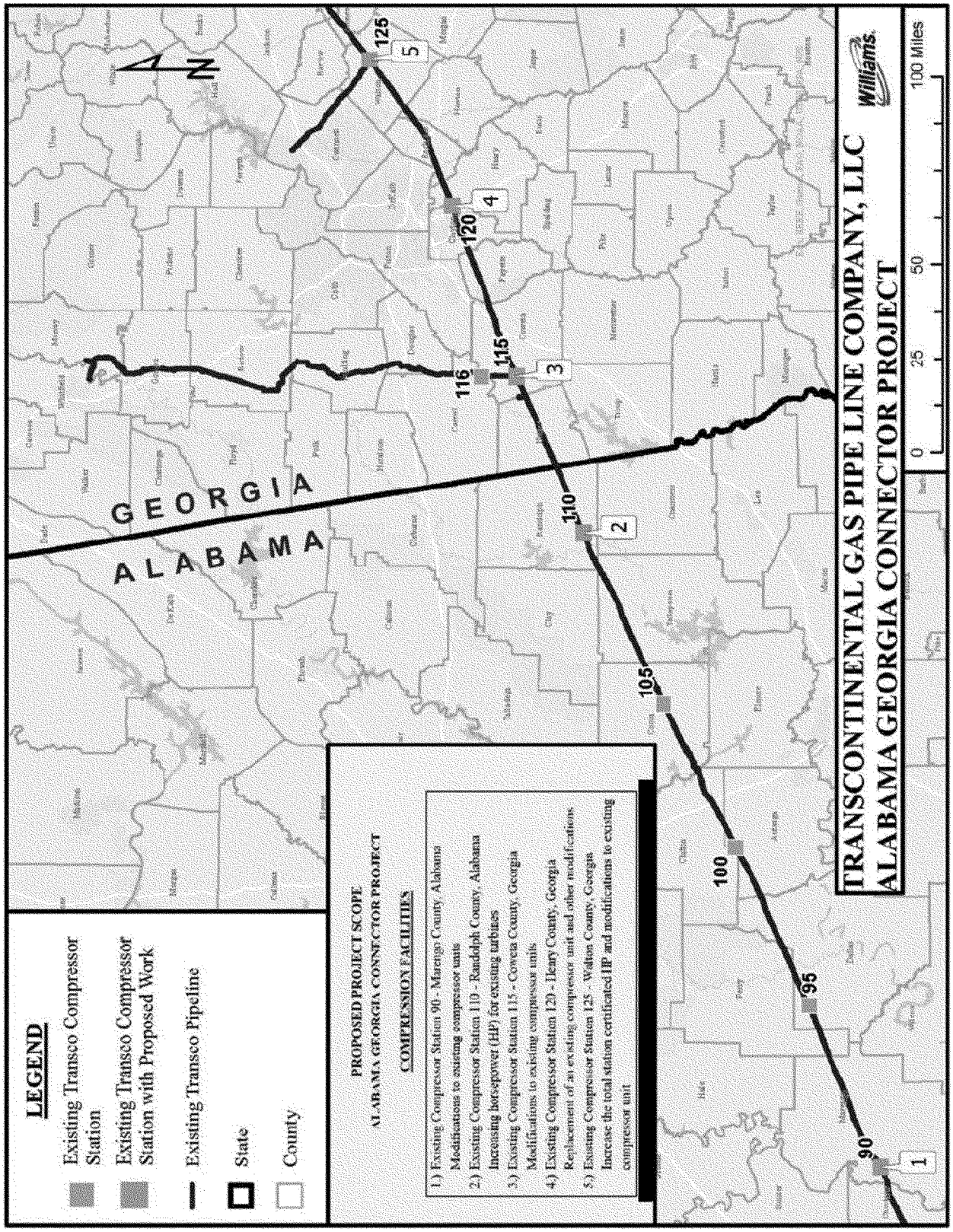
Secretary.

Appendix 1

[2] For instructions on connecting to eLibrary, refer to the last page of this notice.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Section 1501.8.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.



Appendix 2

MAILING LIST UPDATE FORM

ALABAMA GEORGIA CONNECTOR PROJECT

Name _____

Agency _____

Address _____

City _____

State _____

Zip Code _____

☐ Please update the mailing list

☐ Please remove my name from the mailing list

FROM _____

ATTN: OEP—Gas 1, PJ–11.1
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
CP23–194–000, Alabama Georgia Connector Project
Staple or Tape Here
[FR Doc. 2023–12244 Filed 6–7–23; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2589–095]

Marquette Board of Light and Power; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Request for a Temporary Variance of Flow and Reservoir Elevation Requirements.

b. *Project No.:* 2589–095.

c. *Dates Filed:* May 26, 2023.

d. *Applicant:* Marquette Board of Light and Power (licensee).

e. *Name of Project:* Marquette Hydroelectric Project.

f. *Location:* The project is located on the Dead River, near the City of Marquette, in Marquette County, Michigan. The project does not occupy federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Thomas J. Skewis, Environmental Compliance, Marquette Board of Light and Power, 2200 Wright Street, Marquette, MI 49855, (906) 225–8670, *tskewis@mblp.*

i. *FERC Contact:* Aneela Mousam, (202) 502–8357, *aneela.mousam@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests is 30 days from the issuance of this notice by the Commission. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/doc-sfiling/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. The first page of any filing should include docket number P–2589–095.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee requests Commission approval for a temporary variance of the minimum powerhouse flow and reservoir elevation requirements outlined in license articles 403 and 404. The purpose of the variance request is to accommodate controls upgrade and minor maintenance at the Forestville powerhouse (No. 2 Development), scheduled to take place for a duration of 6–10 weeks in June–July 2023. To facilitate the controls upgrade, the licensee plans to take both hydro units offline. Prior to taking the hydro units offline, the licensee would gradually reduce the powerhouse flows [1] to allow the reservoir elevation to exceed the maximum allowable limit (771.0 feet), and overflow the spillway [2] to prevent areas within the river channel from drying up before suspending the powerhouse flows.

For the duration of the planned upgrades, the licensee would provide flows [3] from the spillway to the river by allowing the reservoir elevation to exceed the spillway crest elevation of 771.4 feet. Once the project upgrades are complete, the licensee would place the hydro units online and lower the reservoir level to meet the license requirements. The licensee would work closely with the relevant resource agencies to prevent any adverse environmental effects from occurring prior to, during, and after the temporary variance.

[1] 40 cubic feet per second.

[2] The overflow spillway has a crest elevation of 771.4 feet.

[3] The flows would be run of the river.

l. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Motions to Intervene, or Protests:* Anyone may submit comments, a motion to intervene, or a protest in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, motions to intervene, or protests must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''MOTION TO INTERVENE'', or ''PROTEST'' as applicable; (2) set forth in the heading the name of the applicant and the project number(s) of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person intervening or protesting; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

p. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available

information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 2, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–12239 Filed 6–7–23; 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: RP23–822–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: § 4(d) Rate Filing: Quarterly Fuel Adjustment Filing to be effective 7/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5136.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–823–000.
Applicants: Millennium Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Amendment No. 142019–3—Mitsui to be effective 6/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5143.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–824–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Periodic TCRA Filing—Texas Eastern Refund to be effective 7/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5144.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–825–000.
Applicants: North Baja Pipeline, LLC.
Description: § 4(d) Rate Filing: NBX Project—Amended Negotiated Rate and Non-Conforming Agmt No. 125154–1 to be effective 6/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5146.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–826–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: Negotiated Rates—Various June 1 2023 Releases to be effective 6/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5166.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–827–000.
Applicants: Dauphin Island Gathering Partners.
Description: § 4(d) Rate Filing: Negotiated Rate Filing—6/1/2023 Chevron to be effective 6/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5174.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–828–000.
Applicants: Rover Pipeline LLC.
Description: § 4(d) Rate Filing: Summary of Negotiated Rate Capacity Release Agreements 6–1–23 to be effective 6/1/2023.
Filed Date: 6/1/23.
Accession Number: 20230601–5187.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–829–000.
Applicants: Equitrans, L.P.
Description: Compliance filing: Notice Regarding Non-Certificated Gathering Facilities—6/1/2023 to be effective N/A.
Filed Date: 6/1/23.
Accession Number: 20230601–5188.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: RP23–830–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Neg Rate & Non-Conforming Agreement—Antero 149760 to be effective 7/1/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5000.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: RP23–831–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Hartree June 5, 2023) to be effective 6/5/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5063.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: RP23–832–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: § 4(d) Rate Filing: Small Customer Rate Schedule Conversion to be effective 7/3/2023.
Filed Date: 6/2/23.
Accession Number: 20230602–5078.
Comment Date: 5 p.m. ET 6/14/23.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP23–769–001.
Applicants: North Baja Pipeline, LLC.
Description: Compliance filing: NBX Project—Notice of Commencement of Service CP20–27 to be effective N/A.
Filed Date: 6/2/23.
Accession Number: 20230602–5057.
Comment Date: 5 p.m. ET 6/14/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 2, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–12238 Filed 6–7–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0358; FRL–10925–01–OAR]

Proposed Agency Information Collection Request; Comment Request; Responsible Appliance Disposal Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''EPA's Responsible Appliance Disposal Program (RAD) Program (Renewal)'' (EPA ICR Number 2254.04, OMB Control Number 2060–0703) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through January 31, 2024. 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 August 7, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2007–0358, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Sally Hamlin, Stratospheric Protection Division, Office of Atmospheric Programs (mail code 6205T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 343–9711; email address: *Hamlin.Sally@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 *https://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The Responsible Appliance Disposal Program (RAD) is a voluntary partnership program sponsored by the Environmental Protection Agency (EPA) that reduces emissions of ozone-depleting substances (ODS) and their substitutes, including hydrofluorocarbons (HFCs), that can be attributed to improper disposal of appliances. Appliances can contain ODS or HFC refrigerants and foams as well as universal wastes such as mercury, used oil, and polychlorinated biphenyls (PCB). Federal law requires refrigerant recovery and proper management of universal waste but does not require the recovery of appliance foam. Foam blowing agents and refrigerants in appliances may also have high ozone-depletion and/or global warming potentials. The RAD program works with utilities, retailers, manufacturers, federal agencies/states/municipalities, waste removal service providers, affiliates, and others to dispose of appliances using best environmental practices.

Form numbers: 5900–481; 5900–482.

Respondents/affected entities: The following is a list of North American Industry Classification System (NAICS) codes for organizations potentially affected by the information requirements covered under this ICR are Utilities (2211), Manufacturers (3352), Retailers (449210), federal agencies/states/municipalities (9924110), and Waste Removal Service Providers (56211).

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 52 (over three years).

Frequency of response: Annual, and when desired.

Total estimated burden: 292 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $43,702 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in estimates: There is no change to the total estimated respondent burden compared with the 292 hours for the ICR currently approved by OMB. While the total number of respondents increased, the number of expected new Partners decreased. Therefore, the increase in burden associated with existing Partner activities is offset by the decrease in burden associated with new Partner activities.

Cynthia A. Newberg,

Director, Stratospheric Protection Division.

[FR Doc. 2023–12224 Filed 6–7–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–11007–01–OCSPP]

Access to Confidential Business Information by Agile Decision Sciences, LLC and Subcontractor Abaco-Blackfish JV, LLC

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor Agile Decisions Sciences LLC of Huntsville, AL and subcontractor Abaco-Blackfish JV, LLC of Leesburg, VA to access information which has been submitted to EPA under all Sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than June 15, 2023.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Colby Lintner or Adam Schwoerer, Program Management and Operations Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number and email address: (202) 564–8182; *lintner.colby@epa.gov* or (202) 564–4767; *schwoerer.adam@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Because other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2003–0004, is available at *https://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. 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 OPPT Docket is (202) 566–0280. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

II. What action is the Agency taking?

Under contract number 68HERD23D0002 Task Order number 68HERD23F0105, contractor Agile Decision Sciences, LLC located at 350 Voyager Way, Suite 100B, Huntsville, AL 35806–3200 and subcontractor Abaco-Blackfish JV, LLC located at 107 Harrison Street, NE Leesburg, VA 20176–2309 will support the operations of the TSCA Confidential Business Information Center (CBIC), providing records services to EPA personnel and contractors, as well as those companies who submit information in compliance with TSCA. The efficient and ongoing operation of services in the CBIC are vital to Agency personnel to make informed decisions on environmental issues and other information that maybe claimed as TSCA CBI in accordance with the TSCA Security Manual.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68HERD23D0002 Task Order number 68HERD23F0105, Agile Decision Sciences, LLC and Abaco-Blackfish JV, LLC will require access to CBI submitted under all Sections of TSCA to perform successfully the duties specified under the contract. Agile Decision Sciences, LLC and Abaco-Blackfish JV, LLC personnel will be given access to information claimed or determined to be CBI information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA will provide Agile Decision Sciences, LLC and Abaco-Blackfish JV, LLC access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and in accordance with EPA's *TSCA CBI Protection Manual* and the Rules of Behavior for Virtual Desktop Access to OPPT Materials, including TSCA CBI.

Access to TSCA data, including CBI, will continue until April 02, 2028. If the contract is extended, this access will also continue for the duration of the extended contract without further notice. Agile Decision Sciences, LLC and Abaco-Blackfish JV, LLC personnel will be required to sign nondisclosure agreements and will be briefed on specific security procedures for TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: June 5, 2023.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023–12259 Filed 6–7–23; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of information collection—extension without change: Demographic Information on Applicants for Federal Employment.

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) announces that it intends to submit to the Office of Management and Budget (OMB) a request for a three-year extension of a Commission form (Demographic Information on Applicants OMB No. 3046–0046).

DATES: Written comments on this notice must be submitted on or before July 10, 2023.

ADDRESSES: You may submit comments by any of the following methods—please use only one method:

Federal eRulemaking Portal: Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.

Fax: (202) 663–4114. Only comments of six or fewer pages will be accepted via FAX transmittal to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 921–2815 (voice), 1–800–669–6820 (TTY), or 1–844–234–5122 (ASL video phone).

Mail: Comments may be submitted by mail to Raymond Windmiller, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Hand Delivery/Courier: Raymond Windmiller, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE, Washington, DC 20507.

Instructions: All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. However, the Commission reserves the right to refrain from posting libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; that contain hate speech based upon race, color, sex, national origin, age, religion, disability, or genetic information; or that promote or endorse services or products.

Docket: Copies of comments received are also available for review at the Commission's library. Copies of comments received in response to this notice will be made available for viewing by appointment only at 131 M Street NE, Suite 4NW08R, Washington, DC 20507. Members of the public may schedule an appointment by sending an email to *OEDA@eeoc.gov.*

FOR FURTHER INFORMATION CONTACT: Wendy Doernberg, Federal Sector Programs, Office of Federal Operations, at (202) 921–2948 (voice) or *wendy.doernberg@eeoc.gov.* Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 921–3191 (voice), (800) 669–6820 (TTY), or (844) 234–5122 (ASL Video Phone).

SUPPLEMENTARY INFORMATION: The EEOC's Demographic Information on Applicants (OMB No. 3046–0046) is intended for use by federal agencies in gathering data on the race, ethnicity, sex, and disability status of job applicants. This form is used by the EEOC and other agencies to gauge progress and trends over time with respect to equal employment opportunity goals.

On March 8, 2023, the Commission published a 60-Day Notice informing the public of its intent to request from OMB an extension without change of the information collection requirements associated with a Commission form (Demographic Information on Applicants OMB No. 3046–0046). 88 FR 14363 (March 8, 2023). Pursuant to the

Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and OMB regulation 5 CFR 1320.8(d)(1), the Commission solicited public comment to enable it to:

(1) Evaluate whether the proposed data collection tool will have practical utility by enabling a federal agency to determine whether recruitment activities are effectively reaching all segments of the relevant labor pool in compliance with the laws enforced by the Commission and whether the agency's selection procedures allow all applicants to compete on a level playing field regardless of race, national origin, sex, or disability status;

(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; and

(4) Minimize the burden of the collection of information on applicants for federal employees who choose 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 Commission received three comments unrelated to these topics.

Overview of This Information Collection

Collection Title: Demographic Information on Applicants.

OMB Control No.: 3046–0046.

Description of Affected Public: Individuals submitting applications for federal employment.[1]

Number of Annual Responses: 9,092.

Estimated Time per Response: 3 minutes.

Total Annual Burden Hours (EEOC only): 455.[2]

Annual Federal Cost: None.

Abstract: Under section 717 of title VII and 501 of the Rehabilitation Act, the Commission is charged with reviewing and approving federal agencies' plans to affirmatively address potential discrimination before it occurs. Pursuant to such oversight responsibilities, the Commission has established systems to monitor compliance with title VII and the Rehabilitation Act by requiring federal agencies to evaluate their employment practices through the collection and analysis of data on the race, national origin, sex, and disability status of applicants for both permanent and temporary employment.

While several federal agencies (or components of such agencies) have obtained OMB approval for the use of forms collecting data on the race, national origin, sex, and disability status of applicants, it is not an efficient use of government resources for each federal agency to separately seek OMB approval. Accordingly, to avoid unnecessary duplication of effort and a proliferation of forms, the EEOC seeks approval of a form to be used by federal agencies.

Response by applicants is completely optional. The information obtained will be provided in the form of aggregate data and used by federal agencies only for evaluating whether an agency's recruitment activities are effectively reaching all segments of the relevant labor pool and whether the agency's selection procedures allow all applicants to compete on a level playing field regardless of race, national origin, sex, or disability status. The voluntary responses provided by applicants are treated in a highly confidential manner and play no part in the selection of the individual for employment. The information is not provided to any panel rating the applications, to selecting officials, to anyone who can affect the application or to the public. Rather, the information is used in summary form to determine trends over many selections within a given occupational or organization area. No information from the form is entered into an official personnel file.

The present Notice is for a three-year extension without change to the Commission's existing form for collecting voluntary demographic information from federal applicants. The Commission remains engaged in interagency discussions about equitable data collection, including (a) the Federal Interagency Technical Working Group on Race and Ethnicity Standards convened by OMB; and (b) the Subcommittee on Sexual Orientation, Gender Identity, and Variations in Sex Characteristics convened by the National Science and Technology Council's Subcommittee on Equitable Data. As the work of those groups continues, the Commission may seek authorization from OMB, pursuant to the Paperwork Reduction Act, to amend the race, ethnicity, and/or sex questions on the Demographic Information on Applicants form.

Burden Statement: Because of the predominant use of online application systems, which require only pointing and clicking on the selected responses, and because the form requests only seven questions regarding basic information, the EEOC estimates that an applicant can complete the form in approximately 3 minutes or less. Based on past experience, we expect that 9,092 applicants will choose to complete the form for vacancies at the EEOC annually.

Upon approval of this common form by OMB, federal agencies may request OMB approval to use this common form without having to publish notices and request public comments for 60 and 30 days. Each agency must account for the burden associated with their use of the common form.[3]

For the Commission.

Dated: June 5, 2023.

Charlotte A. Burrows,

Chair, Equal Employment Opportunity Commission.

BILLING CODE 6570–01–P

[1] Each agency is responsible for its own burden estimates.

[2] This total is calculated as follows: 9,092 annual responses from EEOC applicants × 3 minutes per response = 27,276 minutes. 27,276/60 = 455 hours each year and approximately 1,364 hours for the three-year period.

[3] ''Frequently Asked Questions about ROCIS's New Common Forms Module'' provides further information about common forms and can be found by searching *www.whitehouse.gov.*

DEMOGRAPHIC INFORMATION ON APPLICANTS

OMB No.:
Expiration Date:

Vacancy Announcement No.:
Position Title:

YOUR PRIVACY IS PROTECTED

This information is used to determine if our equal employment opportunity efforts are reaching all segments of the population, consistent with Federal equal employment opportunity laws. Responses to these questions are voluntary. Your responses will not be shown to the panel rating the applications, to the official selecting an applicant for a position, or to anyone else who can affect your application. This form will not be placed in your Personnel file nor will it be provided to your supervisors in your employing office should you be hired. The aggregate information collected through this form will be kept private to the extent permitted by law. See the Privacy Act Statement below for more information.

Completion of this form is voluntary. No individual personnel selections are made based on this information. There will be no impact on your application if you choose not to answer any of these questions.

Thank you for helping us to provide better service.

1. How did you learn about this position? (Check One):

- ☐ Agency Internet Site recruitment
- ☐ Private Employment Web Site
- ☐ Other Internet Site
- ☐ Job Fair
- ☐ Newspaper or magazine
- ☐ Agency or other Federal government on campus
- ☐ School or college counselor or other official
- ☐ Friend or relative working for this agency
- ☐ Private Employment Office
- ☐ Agency Human Resources Department (bulletin board or other announcement)
- ☐ Federal, State, or Local Job Information Center
- ☐ Other

2. Sex (Check One):

- ☐ **Male**
- ☐ **Female**

3. Ethnicity (Check One):

- ☐ **Hispanic or Latino** - a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.
- ☐ **Not Hispanic or Latino**

4. Race (Check all that apply):

- ☐ **American Indian or Alaska Native** - a person having origins in any of the original peoples of North or South America (including Central America), and who maintains tribal affiliation or community attachment.
- ☐ **Asian** - a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, or Vietnam.
- ☐ **Black or African American** - a person having origins in any of the black racial groups of Africa.
- ☐ **Native Hawaiian or Other Pacific Islander** - a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific islands.
- ☐ **White** - a person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

5. Disability/Serious Health Condition

The next questions address disability and serious health conditions. Your responses will ensure that our outreach and recruitment policies are reaching a wide range of individuals with physical or mental conditions. Consider your answers without the use of medication and aids (except eyeglasses) or the help of another person.

A. Do you have any of the following? Check all boxes that apply to you:

- ☐ **Deaf or serious difficulty hearing**
- ☐ **Blind or serious difficulty seeing even when wearing glasses**
- ☐ **Missing an arm, leg, hand, or foot**
- ☐ **Paralysis: Partial or complete paralysis (any cause)**
- ☐ **Significant Disfigurement: for example, severe disfigurements caused by burns, wounds, accidents, or congenital disorders**
- ☐ **Significant Mobility Impairment: for example, uses a wheelchair, scooter, walker or uses a leg brace to walk**
- ☐ **Significant Psychiatric Disorder: for example, bipolar disorder, schizophrenia, PTSD, or major depression**
- ☐ **Intellectual Disability (formerly described as mental retardation)**
- ☐ **Developmental Disability: for example, cerebral palsy or autism spectrum disorder**
- ☐ **Traumatic Brain Injury**
- ☐ **Dwarfism**
- ☐ **Epilepsy or other seizure disorder**
- ☐ **Other disability or serious health condition: for example, diabetes, cancer, cardiovascular disease, anxiety disorder, or HIV infection; a learning disability, a speech impairment, or a hearing impairment**

If you did not select one of the options above, please indicate whether.

- ☐ **None of the conditions listed above apply to me.**
- ☐ **I do not wish to answer questions regarding disability/health conditions.**

If you have indicated that you have one of the above conditions, you may be eligible to apply under Schedule A Hiring Authority. For more information, please see http://www.opm.gov/policy-data-oversight/disability-employment/hiring/#url=Schedule-A-Hiring-Authority .

If an applicant checks the box for "other disability or serious health condition," the applicant will be taken to Section A.1.

A.1. Other Disability or Serious Health Condition (Optional)

You indicated that you have a disability or a serious health condition. If you are willing, please select any of the conditions listed below that apply to you. As explained above, your responses will not be shown to the panel rating the applications, to the selecting official, or to anyone else who can affect your application. All responses will remain private to the extent permitted by law. See the Privacy Act Statement below for more information.

Please check all that apply:

- □ **I do not wish to specify any condition.**
- □ **Alcoholism**
- □ **Cancer**
- □ **Cardiovascular or heart disease**
- □ **Crohn's disease, irritable bowel syndrome, or other gastrointestinal impairment**
- □ **Depression, anxiety disorder, or other psychological disorder**
- □ **Diabetes or other metabolic disease**
- □ **Difficulty seeing even when wearing glasses**
- □ **Hearing impairment**
- □ **History of drug addiction (but not currently using illegal drugs)**
- □ **HIV Infection/AIDS or other immune disorder**
- □ **Kidney dysfunction: for example, requires dialysis**
- □ **Learning disabilities or ADHD**
- □ **Liver disease: for example, hepatitis or cirrhosis**
- □ **Lupus, fibromyalgia, rheumatoid arthritis, or other autoimmune disorder**
- □ **Morbid obesity**
- □ **Nervous system disorder: for example, migraine headaches, Parkinson's disease, or multiple sclerosis**
- □ **Non-paralytic orthopedic impairments: for example, chronic pain, stiffness, weakness in bones or joints, or some loss of ability to use parts of the body**
- □ **Orthopedic impairments or osteo-arthritis**
- □ **Pulmonary or respiratory impairment: for example, asthma, chronic bronchitis, or TB**
- □ **Sickle cell anemia, hemophilia, or other blood disease**
- □ **Speech impairment**
- □ **Spinal abnormalities: for example, spina bifida or scoliosis**
- □ **Thyroid dysfunction or other endocrine disorder**
- □ **Other. Please identify the disability/health condition, if willing: _____**

PRIVACY ACT AND PAPERWORK REDUCTION ACT STATEMENTS

Privacy Act Statement: This Privacy Act Statement is provided pursuant to 5 U.S.C. 552a (commonly known as the Privacy Act of 1974). The authority for this form is 5 U.S.C. 7201, which provides that the Office of Personnel Management shall implement a minority recruitment program, by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607.4, which requires collection of demographic data to determine if a selection procedure has an unlawful disparate impact, and by Section 501 of the Rehabilitation Act of 1973, which requires federal agencies to prepare affirmative action plans for the hiring and advancement of people with disabilities. Data relating to an individual applicant are not provided to selecting officials. This form will be seen by Human Resource personnel in the Office of Personnel Management (who are not involved in considering an applicant for a particular job) and by Equal Employment Opportunity Commission officials who will receive aggregate, non-identifiable data from the Office of Personnel Management derived from this form. **Purpose and Routine Uses:** The aggregate, non-identifiable information summarizing all applicants for a position will be used by the Office of Personnel Management and by the Equal Employment Opportunity Commission to determine if the executive branch of the Federal Government is effectively recruiting and selecting individuals from all segments of the population. **Effects of Nondisclosure:** Providing this information is voluntary. No individual personnel selections are made based on this information. There will be no impact on your application if you choose not to answer any of these questions.

Paperwork Reduction Act Statement: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq,) requires us to inform you that this information is being collected for planning and assessing affirmative employment program initiatives. Response to this request is voluntary. 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 estimated burden of completing this form is five (5) minutes per response, including the time for reviewing instructions. Direct comments regarding the burden estimate or any other aspect of this form to [INSERT: Agency name and address] and to the Office of Management Budget, Office of Information and Regulatory Affairs, Washington, DC 20503.

[FR Doc. 2023–12252 Filed 6–7–23; 8:45 am]

BILLING CODE 6570–01–C

EXPORT-IMPORT BANK

Sunshine Act Meetings; Notice of Open Meeting of the Sub-Saharan Africa Advisory Committee of the Export-Import Bank of the United States (EXIM)

TIME AND DATE: Wednesday, June 21st, 2023 from 10:00 a.m.–12:00 p.m. EDT.

PLACE: Hybrid meeting—EXIM Bank Headquarters (811 Vermont Ave. NW, Washington, DC) and Virtual. The meeting will be held in person for committee members, EXIM's Board of Directors and support staff, and virtually for all other participants.

REGISTRATION AND PUBLIC COMMENT: Virtual Public Participation: The meeting will be open to public participation virtually and time will be allotted for questions or comments submitted online. Members of the public may also file written statements before or after the meeting to *advisory@exim.gov.*

Interested parties may register for the meeting at: *https://events.teams.microsoft.com/event/a106dc52-203d-495d-9547-4da38bfa9941@b953013c-c791-4d32-996f-518390854527.*

MATTERS TO BE CONSIDERED: Discussion of EXIM policies and programs designed to support the expansion of financing support for U.S. manufactured goods and services in Sub-Saharan Africa.

CONTACT PERSON FOR MORE INFORMATION: For further information, contact India Walker, External Engagement Specialist, at 202–480–0062 or *india.walker@exim.gov.*

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2023–12322 Filed 6–6–23; 11:15 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

Sunshine Act Meetings; Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (EXIM)

TIME AND DATE: Wednesday, June 21st, 2023, from 2:00 p.m.–4:00 p.m. EDT.

PLACE: Hybrid meeting—EXIM Bank Headquarters (811 Vermont Ave. NW, Washington, DC) and Virtual. The meeting will be held in person for committee members, EXIM's Board of Directors and support staff, and virtually for all other participants.

STATUS: *Public Participation:* The meeting will be open to public participation and time will be allotted for questions or comments submitted online. Members of the public may also file written statements before or after the meeting to *external@exim.gov.* Interested parties may register below for the meeting: *https://events.teams.microsoft.com/event/aa7bded9-0f8a-473e-8345-e17839b5290a@b953013c-c791-4d32-996f-518390854527.*

MATTERS TO BE CONSIDERED: Discussion of EXIM policies and programs to provide competitive financing to expand United States exports and comments for inclusion in EXIM's Report to the U.S. Congress on Global Export Credit Competition.

CONTACT PERSON FOR MORE INFORMATION: For further information, contact India Walker, External Enagagement Specialist, at 202–480–0062 or at *india.walker@exim.gov.*

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2023–12323 Filed 6–6–23; 11:15 am]

BILLING CODE 6690–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 23–04]

Ports America Chesapeake, LLC and Marine Terminals Corporation-East, Complainants v. APS East Coast, Inc., Respondent; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission (Commission) by Ports America Chesapeake, LLC and Marine Terminals Corporation-East (hereinafter ''Complainants'') against APS East Coast, Inc. (hereinafter ''Respondent''). Complainant states that it is a limited liability company organized under the laws of Delaware with a principal place of business in Maryland. Complainant Marine Terminals Corporation-East is a corporation organized under the laws of California with a principal place of business in Maryland. Complainants identify APS East Coast, Inc. as an auto processing business and Marine Terminal Operator organized under the laws of Delaware, with a principal place of business in Florida and generally doing business as AMPORTS.

Complainants alleges that Respondent violated 46 U.S.C. 41102(c) and 41106(2)–(3), as well as 46 CFR 545.5, regarding its practices and procedures and the billing and payment of costs, including assessing access fees on allegedly ''non-preferred'' stevedores, as well as preferences for certain stevedoring providers, an additional 14-day notice requirement and advance approval process for non-preferred stevedores, and unreasonably refusing to deal. An answer to the complaint is due to be filed with the Commission within twenty-five (25) days after the date of service.

The full text of the complaint can be found in the Commission's Electronic Reading Room at *https://www2.fmc.gov/readingroom/proceeding/23-04/.* This proceeding has been assigned to Office of Administrative Law Judges. The initial decision of the presiding officer in this proceeding shall be issued by June 3, 2024, and the final decision of the Commission shall be issued by December 17, 2024.

Served: June 2, 2023.

William Cody,

Secretary.

[FR Doc. 2023–12209 Filed 6–7–23; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than June 22, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198–0001. Comments can also be sent electronically to *KCApplicationComments@kc.frb.org:*

1. *Stephen F. Sturm, as co-trustee of the 2019 Emily Sarah Sturm Trust I dated March 28, 2019, and the Number Two-A Irrevocable Trust dated December 19, 2012; and Emily S. Sturm, as co-trustee of the 2019 Stephen Forrest Sturm Trust I dated March 28, 2019, and the Number One-A Irrevocable Trust dated December 19, 2012, all of Denver, Colorado;* to become members of the Sturm Family Control Group, a group acting in concert, to acquire voting shares of Sturm Financial Group, Inc., and thereby indirectly acquire ANB Bank, both of Denver, Colorado.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–12205 Filed 6–7–23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

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 July 7, 2023.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414. Comments can also be sent electronically to *Comments.applications@chi.frb.org:*

1. *Petefish, Skiles Bancshares, Inc., Virginia, Illinois;* to acquire First National Bank of Beardstown, Beardstown, Illinois.

B. Federal Reserve Bank of Dallas (Karen Smith, Director, Mergers & Acquisitions) 2200 N Pearl St., Dallas, Texas 75201. Comments can also be sent electronically to *Comments.applications@dal.frb.org:*

1. *HomeTown Bancshares, Inc., Galveston, Texas;* to acquire HomeTown Bank, National Association, also of Galveston, Texas.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–12207 Filed 6–7–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX; Docket No. 2023–0001; Sequence No. 1]

Submission for OMB Review; Overseas Employment Agreement; GSA Form 5040

AGENCY: Office of Human Resources Management, General Services Administration (GSA).

ACTION: Notice of the results of public comments regarding a request for a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement.

DATES: Submit comments on or before July 10, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colin C. Bennett, Senior Policy Specialist, Office of Human Resources Management, at telephone (717)-359–7735, or *Colin.Bennett@gsa.gov.*

SUPPLEMENTARY INFORMATION: The General Services Administration routinely hires, reassigns, promotes, or transfers Federal employees to duty stations in foreign areas (*i.e.,* outside of the United States and its territories and possessions). Under the Administrative Expenses Act of 1946 (60 stat. 808), as amended, agencies are permitted to use appropriated funds to pay for the various costs incurred for permanent change of station (PCS) to the foreign area (see further 5 U.S.C. 5722 *et seq.*). Such costs include: (1) travel and relocation expenses of the new appointee (or employee) and his or her immediate family from the place of actual residence in the U.S. to the place of employment outside the U.S.; (2) return travel and relocation expenses for an employee and his family from his

post outside the U.S. to his or her actual place of residence in the U.S.; and (3) the additional expenses of transporting a privately owned motor vehicle, as authorized under 5 U.S.C. 5723 and 5727(c). Under these relocation authorities, in return for these benefits, the job candidate (or employee) must agree to remain in the agency's service for at least 12 months (*i.e.,* 1 year). Additional information concerning this authority is found within the GSA Government Travel Regulations at 41 CFR part 302–3, subpart F.

To more effectively memorialize the agency costs incurred, and the appointee's (or employee's) resulting service obligation, GSA has redeveloped its existing form GSA 5040, *Overseas Employment Services Agreement.* This form serves as: (1) an information collection device to determine eligibility for, and then memorialize, the compensation, foreign allowances, and travel and transportation benefits provided, and (2) an enforceable service agreement for PCS travel and transportation costs, pursuant to the Federal Claims Collection Act of 1966 and the Debt Collection Act Amendments of 1996 (see further 31 U.S.C. 3711 *et seq.*).

C. Annual Burden

Respondents: 25.
Responses per Respondent: 1.
Total Annual Responses: 25.
Hours per Response: 1.
Total Burden Hours: 25.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 88 FR 9521, on February 14, 2023.

A total of nine (9) comments were received; however, they involved proposed wording changes for the form and did not address, or change, the original estimate of the administrative burden. A summary of the comments, and our responses, are as follows.

Comment 1: A commenter suggested that the nomenclature of military bases in Box 6 be revised to reflect military ''installations.''

Response: This response is accepted, and the names will be changed to reflect military installations.

Comment 2: A commenter suggested that a general response, such as ''Nationwide,'' be permissible for writing into Box 8b, which describes the anticipated U.S. duty station upon conclusion of overseas duty.

Response: This response is accepted and the Instruction for Box 8b will be revised to suggest that users can use descriptive, but generic, responses when appropriate.

Comment 3: A commenter noted that there was an erroneous reference to direct-deposit forms in the Privacy Act Statement.

Response: This response is accepted. We will have the form corrected to have this reference removed.

Comment 4: A commenter questioned the authority for Box 11 as well as the information provided in the Instruction for that question at the back of the form. Box 11 discusses the employee benefits known as ''home leave'' and the 45-day (*i.e.,* 360 hour) annual leave accrual ceiling. These two authorities are related because to be eligible for home leave, the job candidate must first be eligible for the 45-day leave accrual ceiling under 5 U.S.C. 6304(b). Both the 45-day leave ceiling and home leave are reserved for employees that are originally hired, reassigned, or transferred from the United States and then placed into a foreign area. Generally, job candidates already in a foreign area are not eligible for either benefit unless they can demonstrate that they were originally hired from the United States, have been in continuous employment with the U.S. government or a U.S. entity, and have return relocation benefits memorialized by written transportation agreements during all periods of foreign service.

Response: The eligibility requirements discussed in Box 11 and the Instruction are an explication of the governing statute (5 U.S.C. 6304(b)) and Civil Service regulation (5 CFR 630.602). We have decided to keep the narrative language within Box 11 the same, however, we have decided to shorten the language within the Instruction statement related to Box 11 to reduce possible confusion.

Comment 5: A commenter suggested that Box 12 be removed from the form and that the form be signed not by a human resources specialist but instead by the hiring manager. Box 12 concerns documentation of which overseas allowances and differentials are authorized for the job candidate.

Response: We partially accept the comment and will change the form's signature to that of the hiring manager, as the commenter suggested. We note that under GSA administrative order 5450.39D ADM CHGE 1 that generally the hiring manager's organization decides which overseas allowances are appropriate to provide, based upon the lexicon of those that are available based on eligibility. Generally, the hiring manager's organization is responsible for paying for the allowances offered, since the allowances are used as optional tools for recruitment and retention. We will not remove Box 12, however, because it is important to document on this form which allowances and differentials are approved and then offered to the job candidate.

Comment 6: A commenter from GSA's human resources function recommended that Box 11 be removed from the form. Box 11, as discussed above, concerns home leave and the 45-day annual leave accrual ceiling. The commenter believed that human resources specialists are unfamiliar with paid leave authorities and do not have sufficient background to understand how to assist with, or administer, these leave authorities.

Response: We have chosen not to accept this comment. It is important to have Box 11 to both review the eligibility, and then to document that eligibility, for home leave as well as for the 45-day annual leave ceiling. We also believe that current skills gaps can be addressed and ameliorated through a proper future training regimen.

Comment 7: A commenter suggested that in Box 9 a reference be removed to obsolete Form 5042, *Overseas Employment Transportation Agreement.*

Response: We agree that the reference to the obsolete form should be removed. The historical business purpose of Form 5042 (that of a transportation agreement) has been fully merged into the new Form 5040, the subject of this **Federal Register** notice.

Comments 8 and 9: One commenter submitted two substantially similar comments essentially suggesting that the main certifying signature on the form be applied by the hiring manager rather than by a human resources specialist.

Response: As discussed earlier, we accept this comment and will change the certifying signature to be that of the hiring manager. As the primarily first-line representative of the agency, the hiring manager is in the best position to know the specific circumstances of the job offer, and the conditions of employment offered to the job candidate.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–XXXX, Overseas Employment Agreement; GSA Form 5040.

Lesley Briante,

Acting Deputy Chief Information Officer.

[FR Doc. 2023–12256 Filed 6–7–23; 8:45 am]

BILLING CODE 6820–FM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Availability of Program Application Instructions for Adult Protective Services Funding

Title: Elder Justice Act—Adult Protective Services.

Announcement Type: Initial.

Statutory Authority: The statutory authority for grants under this program announcement is contained in the Elder Justice Act, section 2042(b) of title XX of the Social Security Act [Pub. L. 74–271] [As Amended Through Pub. L. 115–123, Enacted February 9, 2018] as referenced in the Consolidated Appropriations Act, 2023, Public Law 117–328.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.698.

DATES: The deadline date for the submission of the Elder Justice Act—Adult Protective Services Letter of Assurance is 11:59 p.m. EST (30 days after date of publication).

I. Funding Opportunity Description

The Administration for Community Living (ACL) is establishing the ''Elder Justice Act—Adult Protective Services funding opportunity in accordance with section 2042(b) of subtitle B of title XX of the Social Security Act, otherwise known as the Elder Justice Act (EJA) as authorized and funded through the Consolidated Appropriations Act, 2023, Public Law 117–328. In accordance with these statutes, the purpose of this opportunity is to enhance and improve adult protective services provided by States, the District of Columbia, and the Territories. Funds awarded to States and Territories under this opportunity will provide Adult Protective Services (APS) programs in the States, District of Columbia, and Territories with resources to enhance, improve, and expand the ability of APS to investigate allegations of abuse, neglect, and exploitation. Examples of activities consistent with the purposes of the statute include:

- Costs and salaries for hiring permanent or temporary staff members, extended hours/over-time for current staff, and associated personnel costs;
- Costs associated with providing goods and services to APS clients;
- Costs associated with community outreach, including public awareness campaigns and other resources designed to increase the public's awareness and understanding of APS' role in the community;
- Training costs, including state-wide training conferences for APS staff;
- Acquiring personal protection equipment and supplies;
- Improving and enhancing technology systems, including supporting remote work, such as the purchase of communications and technology hardware, software, or infrastructure in order to provide adult protective services;
- Improving data collection and reporting at the case worker, local-, and state-levels in a manner that is consistent with the National Adult Maltreatment Reporting System (NAMRS);
- Improving or enhancing existing APS processes for receiving reports, conducting intakes and investigations, planning/providing for services, making case determinations, documenting and closing cases, and continuous quality improvement;
- Working with tribal adult protective services efforts, such as conducting demonstrations on state-Tribal APS partnerships to better serve tribal elders who experience abuse, neglect, and exploitation, partnering with Tribes within the state to include tribal elder abuse data in the state's National Adult Maltreatment Reporting System (NAMRS) reporting, and undertaking demonstrations to better understand elder abuse experienced by tribal individuals living in non-tribal communities and served by state APS programs;
- Establishing or enhancing the availability for elder shelters and other emergency, short-term housing and accompanying ''wrap-around'' services for APS clients;
- Establishing, expanding, or enhancing state-wide and local-level elder justice networks for the purpose of removing bureaucratic obstacles and improving coordination across the many state and local agencies interacting with APS clients who have experienced abuse, neglect, or exploitation;
- Costs associated with establishing new, or improving existing processes for responding to alleged scams and frauds;
- Costs associated with assisting APS clients secure the least restrictive option for emergency or alternative housing, and with obtaining, providing, or coordinating with care transitions as appropriate;
- Costs associated with transporting APS clients to necessary appointments, such as medical visits; and
- Costs associated with establishing grants or contracts to address gaps in the APS program identified in the environmental scan previously completed.

Awards authorized under the EJA section 2042(b) shall be provided to the agency or unit of state government having the legal responsibility for providing adult protective services within the state, District of Columbia, or territory. Funding under this opportunity may be used to serve any APS client who meets their state's statutory or regulatory criteria for client eligibility for APS services. This funding must supplement and not supplant existing funding for APS provided by states and local units of government. Additionally, award recipients will be required to submit federal financial reports and annual program reports related to the activities performed.

II. Award Information

A. Eligible Entity

The eligible entity for these awards is the agency or unit of state government legally responsible for providing adult protective services in each State, the District of Columbia, or Territory (EJA section 2042(b)(3)(B)).

B. Funding Instrument Type

These awards will be made in the form of formula grants to the agencies and units of state government with the legal responsibility to provide adult protective services.

C. Anticipated Total Funding per Budget Period

Under this program announcement, ACL intends to make grant awards to each State, Territory, and the District of Columbia. Funding will be distributed through the formula identified in section 2042(b) of the Elder Justice Act. The amounts allocated are based upon the proportion of elders living in each State and Territory, as defined in statute, and will be distributed based on the formula. There are no cost-sharing nor match requirements. Awards made under this announcement have an estimated start date of April 1, 2023 and an estimated end date of March 30, 2025. The total available funding for this opportunity is $13,829,521.

Below are the projected award amounts:

State/territory	Projected amount
Alabama	$203,957
Alaska	103,721
Arizona	295,963
Arkansas	119,940
California	1,379,183
Colorado	205,382
Connecticut	150,599
Delaware	103,721
Dist. of Columbia	19,614
Florida	1,012,648
Georgia	371,014

State/territory	Projected amount
Hawaii	103,721
Idaho	103,721
Illinois	486,778
Indiana	258,460
Iowa	129,256
Kansas	112,609
Kentucky	177,794
Louisiana	176,669
Maine	103,721
Maryland	234,634
Massachusetts	281,036
Michigan	420,917
Minnesota	222,640
Mississippi	114,034
Missouri	250,009
Montana	103,721
Nebraska	103,721
Nevada	118,424
New Hampshire	103,721
New Jersey	364,704
New Mexico	103,721
New York	799,276
North Carolina	411,452
North Dakota	103,721
Ohio	484,094
Oklahoma	148,286
Oregon	176,477
Pennsylvania	563,289
Rhode Island	103,721
South Carolina	219,175
South Dakota	103,721
Tennessee	272,556
Texas	913,978
Utah	103,721
Vermont	103,721
Virginia	325,594
Washington	288,858
West Virginia	103,721
Wisconsin	245,790
Wyoming	103,721
American Samoa	13,830
Guam	13,830
Northern Marianas	13,830
Puerto Rico	159,576
Virgin Islands	13,830

III. Submission Requirements

A. Letter of Assurance

A *Letter of Assurance* is required to be submitted by the eligible entity in order to receive an award. The Letter of Assurance must include the following:

1. Assurance that the award recipient is the agency or unit of state government legally responsible for providing adult protective services in each state and territory.

2. Assurance that funds will supplement and not supplant existing APS funding.

3. Select one of the following:

a. Assurance that the award recipient's previously submitted and approved 3–5 year operational plan for improving and enhancing their APS system at the state and local level remains accurate, and that they intend to follow that plan in expending their FY 2023 grant funds; OR

b. Assurance that the award recipient has included an initial spend plan for the FY 2023 funds and will provide an updated 3–5 operational plan within 90 days of award.

4. Assurance that funds will be spent in ways consistent with the Elder Justice Act section 2042(b) and guidance provided by ACL, including the examples of activities consistent with the purposes of the authorizing legislation contained in the **Federal Register** Notice:

- Personnel costs;
- Providing goods and services to APS clients;
- Community outreach;
- Training;
- Acquiring personal protection equipment and supplies;
- Improving and enhancing technology systems;
- Improving data collection and reporting at the case worker, local-, and state-levels in a manner that is consistent with the National Adult Maltreatment Reporting System;
- Improving or enhancing existing APS processes;
- Working with tribal adult protective services efforts;
- Establishing or enhancing the availability for elder shelters and other emergency, short-term housing and accompanying ''wrap-around'' services;
- Establishing, expanding, or enhancing state-wide and local-level elder justice networks;
- Improving and supporting remote work;
- Establishing new, or improving existing processes for responding to alleged scams and frauds;
- Transportation costs;
- Assisting APS clients secure the least restrictive option for emergency or alternative housing, and with obtaining, providing, or coordinating with care transitions as appropriate; and
- Establishing grants and contracts as needed.

5. Assurance to provide federal financial reports and annual program reports related to the activities performed.

B. Initial Spend Plan

An *Initial Spend Plan* is required only if the previously submitted and approved 3–5 year operational plan needs to be updated. The Initial Spend Plan should outline how the state/territory intends to spend their FY 2023 allotment in response to the needs and challenges to their APS program. The plan should be consistent with the purpose of the authorizing legislation and the description and examples outlined above. The Initial Spend Plan submitted in response to this opportunity is considered a preliminary framework for how the state/territory will plan to spend these funds. The Initial Spend Plan should have the following format: 3–5 pages in length, double-spaced, with 12pt font and 1″ margins, with a layout of 8.5″ x 11″ paper.

C. Unique Entity ID Number

All grant applicants must obtain and keep current a Unique Entity ID (UEI). On April 4, 2022, the unique entity identifier used across the federal government changed from the DUNS Number to the Unique Entity ID (generated by *SAM.gov*). The Unique Entity ID is a 12-character alphanumeric ID assigned to an entity by *SAM.gov*. The UEI is viewable in your *SAM.gov* entity registration record.

D. Intergovernmental Review

Executive Order 12372, Intergovernmental Review of Federal Programs, is not applicable to these grant applications.

IV. Submission Information

A. Submission Process

To receive funding, eligible entities must provide a *Letter of Assurance* and an *Initial Spend Plan* (if applicable) containing all the information outlined in Section IIIA. & B. above.

Materials should be addressed to: Alison Barkoff, Acting Administrator and Assistant Secretary for Aging, Administration for Community Living, 330 C Street SW, Washington, DC 20201.

Letters of Assurance and the Initial Spend Plan should be submitted electronically via email to *aps@acl.hhs.gov.*

B. Submission Dates and Times

To receive consideration, Letters of Assurance and the Initial Spend Plan must be submitted by 11:59 p.m. Eastern Time on EST (30 days after date of FRN publication), Letters of Assurance and the Initial Spend Plan should be submitted electronically via email to *aps@acl.hhs.gov* and have an electronic time stamp indicating the date/time submitted.

VII. Agency Contacts

A. Programmatic Issues/Questions

Direct programmatic inquiries to: Erin Kee, Email: *erin.kee@acl.hhs.gov*, Phone: 202–795–7312.

B. Submission Issues/Questions

Direct inquiries regarding submission of applications to *aps@acl.hhs.gov.* ACL

will provide a response within 2 business days.

Dated: June 5, 2023.

Alison Barkoff,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2023–12248 Filed 6–7–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2688]

Analay Rico: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Analay Rico from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Ms. Rico was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product under the FD&C Act. Analay Rico was given notice of the proposed permanent debarment and was given an opportunity to request a hearing to show why she should not be debarred. As of March 3, 2023 (30 days after receipt of the notice), Ms. Rico had not responded. Ms. Rico's failure to respond and request a hearing within the prescribed timeframe constitutes a waiver of her right to a hearing concerning this action.

DATES: This order is applicable June 8, 2023.

ADDRESSES: Any application by Analay Rico for special termination of debarment under section 306(d)(4) of the FD&C Act (21 U.S.C. 335a(d)(4)) may be submitted as follows:

Electronic Submissions

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. An application submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application 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 application, that information will be posted on *https://www.regulations.gov.*
- If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

- *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 a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All applications must include the Docket No. FDA–2022–N–2688. Received applications 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 an application with confidential information that you do not wish to be made publicly available, submit your application 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 your application. 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 application 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, 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 between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240–402–8743 or *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(A) of the FD&C Act (21 U.S.C. 335a(a)(2)(A)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act. On October 18, 2022, Ms. Rico was convicted as defined in section 306(l)(1) of the FD&C Act in the U.S. District Court for the Southern District of Florida, Miami Division, when the court accepted her plea of guilty and entered judgment against her for one count of conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. 1349.

The factual basis for this conviction is as follows: As contained in the Information, entered into the docket on March 16, 2021, and the Factual Proffer in support of Ms. Rico's guilty plea, entered into the docket on August 8, 2022, both from her case, Ms. Rico was a clinical research coordinator employed at Tellus Clinical Research, Inc. (Tellus). Tellus was a medical research clinic that conducted clinical trials on behalf of pharmaceutical company sponsors. Among the clinical research trials conducted by Tellus were two different studies of an investigational drug intended to treat opioid dependency sponsored by

Sponsor 1 and managed by Contract Research Organization (CRO) 1 (the opioid dependency trials); two studies of an investigational drug intended to treat irritable bowel syndrome in female patients sponsored by Sponsor 2 and by CRO 2 (the IBS trials); and one study of an investigational injectable drug intended to treat diabetic nephropathy sponsored by Sponsor 3 and managed by CRO 3 (the diabetes trial). One of Ms. Rico's co-conspirators was the clinical investigator hired by the sponsors and/or the CROs for each of these five studies (the Studies). Ms. Rico served as a study coordinator for the Studies. In that role, she was responsible for administering procedures to subjects in the Studies and preparing honest and accurate written records, including records known as ''case histories,'' describing the participation of the subjects in the Studies.

Ms. Rico and her co-conspirators caused false information to be entered in subject case histories to make it appear that subjects had, among other things, satisfied eligibility criteria to participate in the Studies, provided informed consent to participate in the Studies, received physical examinations, received or been administered the investigational drug for the Studies, and received payments for visits to Tellus for the Studies when, in truth and in fact, Ms. Rico knew that such events had not occurred.

For example, on or about March 12, 2014, Ms. Rico initialed case history documentation in the first Opioid dependency study for subject, N.F., the mother of one of Ms. Rico's co-conspirators, wherein Ms. Rico indicated falsely that N.F. was eligible to participate in the study, provided a urine sample that tested positive for opiates and buprenorphine, received study medication from one of Ms. Rico's co-conspirators, and that another co-conspirator witnessed N.F. receive the study medication. Ms. Rico knew that N.F. was not eligible to participate in the study, had not provided a urine sample that tested positive for opiates or buprenorphine, and had not received any study medication, and these representations were false. In addition, on or about June 9, 2015, Ms. Rico initialed case history documentation for subject G.C., falsely representing that G.C. was a study subject participating in the second IBS study, that G.C. had visited Tellus, that Ms. Rico had obtained G.C.'s urine and blood for analysis as required by the protocol governing IBS Study 2, that Ms. Rico had performed an electrocardiogram on G.C., and that Ms. Rico had dispensed IBS Study 2 medication to G.C. In truth, Ms. Rico knew that G.C. was not participating in the second IBS study and that these representations were false.

Furthermore, Ms. Rico knew that subjects in the IBS trials were required to make daily phone calls to an ''e-diary'' system (a toll-free number maintained by a third party) and report their personal experience with the study drug. In furtherance of the conspiracy, Ms. Rico and her co-conspirators knowingly placed telephone calls to the e-diary system, using the subjects' individual PIN numbers, for purposes of reporting fabricated data on behalf of subjects in the IBS studies. Ms. Rico and her co-conspirators placed these fraudulent telephone calls on behalf of more than 10 subjects in the IBS trials. Ms. Rico also participated in falsifying and fabricating data in connection with the diabetes trial. For example, on or about November 20, 2015, Ms. Rico initialed case history documentation for subject S.D. in the diabetes trial, falsely representing that she witnessed one of her co-conspirators dispense the study drug to subject S.D. at Tellus. In truth, Ms. Rico knew these representations were false. For her work as a clinical research coordinator at Tellus and for her participation in the conspiracy, Ms. Rico received approximately $240,000.

In 2016, FDA conducted a regulatory inspection of Tellus relating to allegations of fraudulent and fabricated data submitted in the IBS trials. For the purpose of preventing FDA investigators from learning the truth about fabricated data at Tellus, Ms. Rico contacted certain individuals enrolled as subjects in the IBS trials and instructed them to lie to FDA investigators regarding their participation in the IBS trials. Among other things, Ms. Rico instructed subjects to falsely represent to FDA investigators that they had participated in an IBS study at Tellus, received physical examinations and electrocardiograms, and met with a doctor who matched the physical description of one of Ms. Rico's co-conspirators.

As a result of this conviction, FDA sent Ms. Rico by certified mail on January 20, 2023, a notice proposing to permanently debar her from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(A) of the FD&C Act, that Ms. Rico was convicted, as set forth in section 306(l)(1) of the FD&C Act, of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act. The proposal also offered Ms. Rico an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Ms. Rico received the proposal on February 1, 2023. She did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and any contentions concerning her debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(A) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Ms. Rico has been convicted of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act.

As a result of the foregoing finding, Ms. Rico is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(A) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Ms. Rico in any capacity during her debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Ms. Rico provides services in any capacity to a person with an approved or pending drug product application during her period of debarment, she will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Ms. Rico during her period of debarment, other than in connection with an audit under section 306(c)(1)(B) of the FD&C Act. Note that, for purposes of sections 306 and 307 of the FD&C Act, a ''drug product'' is defined as a drug subject to regulation under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262) (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Dated: June 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–12249 Filed 6–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–P–0120]

Determination That BUSPAR (Buspirone Hydrochloride) Capsules, 5 Milligrams, 7.5 Milligrams, 10 Milligrams, and 15 Milligrams, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) has determined that BUSPAR (buspirone hydrochloride) capsules, 5 milligrams (mg), 7.5 mg, 10 mg, and 15 mg, were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDA) for buspirone hydrochloride capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Caitlin Callahan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 240–402–4318, *Caitlin.Callahan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, are the subject of NDA 021190, held by Bristol Myers Squibb Co., and initially approved on December 20, 2000. BUSPAR is indicated for the management of anxiety disorders or the short-term relief of the symptoms of anxiety.

In correspondence dated December 28, 2012, Bristol Myers Squibb Co. requested withdrawal of NDA 021190 for BUSPAR (buspirone hydrochloride). In the **Federal Register** of December 5, 2014 (79 FR 72186), FDA announced that it was withdrawing approval of NDA 021190, effective January 5, 2015.

Epic Pharma, LLC submitted a citizen petition dated January 10, 2023 (Docket No. FDA–2023–P–0120), under 21 CFR 10.30, requesting that the Agency determine whether BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, were withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, were not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that this drug product was not withdrawn from sale for reasons of safety or effectiveness.[1]

Accordingly, the Agency will continue to list BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to BUSPAR (buspirone hydrochloride) capsules, 5 mg, 7.5 mg, 10 mg, and 15 mg, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: June 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–12247 Filed 6–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2136]

Advisory Committee; Antimicrobial Drugs Advisory Committee; Renewal

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; renewal of Federal advisory committee.

SUMMARY: The Food and Drug Administration (FDA) is announcing the renewal of the Antimicrobial Drugs Advisory Committee by the Commissioner of Food and Drugs (the Commissioner). The Commissioner has determined that it is in the public interest to renew the Antimicrobial Drugs Advisory Committee for an additional 2 years beyond the charter expiration date. The new charter will be in effect until the October 7, 2024, expiration date.

[1] FDA previously determined that BUSPAR (buspirone hydrochloride) tablets, 5 mg, 10 mg, 15 mg, and 30 mg, approved under NDA 018731 and held by Bristol Myers Squibb Co. Pharmaceutical Research Institute, were not withdrawn from sale for reasons of safety or effectiveness. See 75 FR 64310 (October 19, 2010), 81 FR 61220 (September 6, 2016).

DATES: Authority for the Antimicrobial Drugs Advisory Committee will expire on October 7, 2024, unless the Commissioner formally determines that renewal is in the public interest.

FOR FURTHER INFORMATION CONTACT: She-Chia Chen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 240–402–5343, *AMDAC@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.65 and approval by the Department of Health and Human Services and by the General Services Administration, FDA is announcing the renewal of the Antimicrobial Drugs Advisory Committee (the Committee). The Committee is a discretionary Federal advisory committee established to provide advice to the Commissioner. The Committee advises the Commissioner or designee in discharging responsibilities as they relate to helping to ensure safe and effective drugs for human use and, as required, any other product for which FDA has regulatory responsibility.

The Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of infectious diseases and disorders and makes appropriate recommendations to the Commissioner.

The Committee shall consist of a core of 13 voting members including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities knowledgeable in the fields of infectious disease, internal medicine, microbiology, pediatrics, epidemiology or statistics, and related specialties. Members will be invited to serve for overlapping terms of up to 4 years. Non-Federal members of this committee will serve as Special Government Employees, representatives or Ex-Officio members. Federal members will serve as Regular Government Employees or Ex-Officios. The core of voting members may include one technically qualified member, selected by the Commissioner or designee, who is identified with consumer interests and is recommended by either a consortium of consumer-oriented organizations or other interested persons. In addition to the voting members, the Committee may include one non-voting representative member who is identified with industry interests. There may also be an alternate industry representative.

Further information regarding the most recent charter and other information can be found at *https://www.fda.gov/advisory-committees/antimicrobial-drugs-advisory-committee-formerly-known-anti-infective-drugs-advisory-committee/antimicrobial-drugs-advisory-committee-formerly-known-anti-infective-drugs-advisory-committee* or by contacting the Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**). In light of the fact that no change has been made to the committee name or description of duties, no amendment will be made to 21 CFR 14.100.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app.). For general information related to FDA advisory committees, please visit us at *https://www.fda.gov/AdvisoryCommittees/default.htm.*

Dated: June 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–12288 Filed 6–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–1189]

Agency Information Collection Activities; Proposed Collection; Comment Request; Importation of Prescription Drugs

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions related to FDA's regulation on importation of prescription drugs.

DATES: Either electronic or written comments on the collection of information must be submitted by August 7, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of August 7, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand Delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–1189 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Importation of Prescription Drugs.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the

Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Importation of Prescription Drugs—21 CFR Part 251

OMB Control Number 0910–0888—Extension

This information collection supports implementation of section 804 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 384), and applicable regulations in part 251 (21 CFR part 251). The purpose of section 804 of the FD&C Act is to reduce the cost of covered products to American consumers without imposing additional risk to public health and safety. The regulations in part 251 set forth procedures Section 804 Importation Program sponsors (SIP Sponsors) must follow when submitting plans to implement time-limited programs to begin importation of drugs from Canada. The regulations also establish criteria for FDA review and authorization of a SIP proposal or supplemental proposal. Additionally, the regulations set forth requirements for eligible prescription drugs and requirements for entities that engage in importation of eligible prescription drugs. Finally, the regulations provide for exempt eligible prescription drugs that meet certain requirements from section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)).

Description of Respondents: Respondents to the collection of information are SIP Sponsors (States or Indian Tribes, or in certain future circumstances, pharmacists or wholesale distributors, and any cosponsor(s)), importers (pharmacists or wholesaler distributors), and manufacturers of eligible prescription drugs.

We estimate the burden of the collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section 251; information collection activity	Number of respondents	Number of records per recordkeeper	Total annual records	Average burden per record	Total hours
Subpart B; SIP proposals and pre-import requests	40	1.5	60	72	4,320
Subpart C; Certain requirements for importation programs	40	1	40	43	1,720
Total			100		6,040

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We have established a web page at *https://www.fda.gov/about-fda/reports/importation-drugs-originally-intended-foreign-markets* to communicate news and information about FDA efforts to implement the Section 804 Importation Program. To date, however, no SIP proposals have been authorized since publication of the final rule on October 1, 2020 (85 FR 62094). We have therefore retained figures based on our original impact analysis estimating that 40 SIP sponsors will each submit a SIP proposal or pre-import request. We assume burden attributable to the

required retention and disclosure of records pertaining to these information collection activities will be distributed among respondents for an average of 100 responses and 6,040 hours annually.

Dated: June 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–12258 Filed 6–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–1275]

Demonstrating Bioequivalence for Type A Medicated Articles Containing Active Pharmaceutical Ingredient(s) Considered To Be Poorly Soluble in Aqueous Media, That Exhibit Little to No Systemic Bioavailability, and Are Locally Acting; 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) #279 entitled ''Demonstrating Bioequivalence for Type A Medicated Articles Containing Active Pharmaceutical Ingredient(s) Considered To Be Poorly Soluble in Aqueous Media, That Exhibit Little to No Systemic Bioavailability, and Are Locally Acting; Draft Guidance for Industry.'' This draft guidance describes an approach to satisfy the requirements for the completion of the Bioequivalence technical section for generic Type A medicated articles (TAMAs) containing poorly soluble, locally acting, active pharmaceutical ingredients (APIs) that have little to no systemic absorption, and for which blood level studies are not considered appropriate to demonstrate product bioequivalence. The suggested approach described in this draft guidance uses a combination of *in vitro* and *in vivo* data to support a determination of bioequivalence to address the unique challenges associated with demonstrating bioequivalence of TAMAs containing poorly soluble, locally acting APIs that have little to no systemic absorption.

DATES: Submit either electronic or written comments on the draft guidance by August 7, 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–1275 for ''Demonstrating Bioequivalence for Type A Medicated Articles Containing Active Pharmaceutical Ingredient(s) Considered To Be Poorly Soluble in Aqueous Media, That Exhibit Little to No Systemic Bioavailability, and Are Locally Acting.'' 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: Ian Hendricks, Center for Veterinary Medicine (HFV–172), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0853, *Ian.Hendricks@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry #279 entitled ''Demonstrating Bioequivalence for Type A Medicated Articles Containing Active Pharmaceutical Ingredient(s) Considered To Be Poorly Soluble in Aqueous Media, That Exhibit Little to No Systemic Bioavailability, and Are Locally Acting.'' Section 512(c)(2)(A)(vi) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360b(c)(2)(A)(vi)) requires that generic new animal drug products be shown to be bioequivalent to the reference listed new animal drug (RLNAD), and section 512(n)(1)(E) of the FD&C Act requires that the sponsor provide information to show that the proposed product is bioequivalent to the RLNAD.

FDA's Center for Veterinary Medicine (CVM) has issued guidance on demonstrating bioequivalence through *in vivo* studies, and guidance on product types that may be eligible for a waiver from the requirement to perform *in vivo* bioequivalence studies, including oral solutions and other solubilized forms, parenteral solutions, some topically applied dosage forms (see Guidance for Industry #35, ''Bioequivalence Guidance'') and TAMAs with APIs that are considered to be water soluble (see Guidance for Industry #171, ''Demonstrating Bioequivalence for Soluble Powder Oral Dosage Form Products, and Type A Medicated Articles Manufactured from Active Pharmaceutical Ingredients Considered To Be Soluble in Aqueous Media''). However, these guidance documents do not specifically address the unique challenges associated with demonstrating bioequivalence of TAMAs containing poorly soluble, locally acting APIs. Therefore, this guidance is intended to address these unique challenges. In particular, when the TAMA is not a candidate for a waiver from the requirement to conduct *in vivo* blood level bioequivalence studies, CVM recommends via this guidance that product bioequivalence be demonstrated using alternative test approaches to those relying exclusively on animal testing. This draft guidance, when finalized, is intended to address these situations.

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 ''Demonstrating Bioequivalence for Type A Medicated Articles Containing Active Pharmaceutical Ingredient(s) Considered To Be Poorly Soluble in Aqueous Media, That Exhibit Little to No Systemic Bioavailability, and Are Locally Acting.'' 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 section 512(n)(1) of the FD&C Act have been approved under OMB control number 0910–0669.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/animal-veterinary/guidance-regulations/guidance-industry, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov*.

Dated: May 31, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–12206 Filed 6–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders Meeting and Solicitation for Written and Oral Comments

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Intergovernmental and External Affairs, White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders.

ACTION: Notice of meeting and solicitation for written and oral comments.

SUMMARY: The U.S. Department of Health and Human Services (HHS) announces the next meeting of the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders (Commission) and the solicitation of written and oral comment regarding the advancement of equity, justice and opportunity for Asian American, Native Hawaiian, and Pacific Islander (AA and NHPI) communities. The meeting is open to the public and will be held in Honolulu, Hawaii. Virtual attendance will be available through livestream for July 6; in-person attendance is available for July 7, 2023. The Commission is working to accomplish its mission to provide independent advice and recommendations to the President on ways to advance equity, justice, and opportunity for AA and NHPI communities.

DATES: The Commission will meet on July 6, 2023, from 2:30 p.m. Eastern Time (ET) to 11:30 p.m. ET and July 7, 2023, from 3:00 p.m. ET to 6:00 p.m. ET. The final location and agenda will be posted on the website for the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders: *https://www.hhs.gov/about/whiaanhpi/commission/index.html* when this information becomes available.

ADDRESSES: Members of the public may attend virtually or in person, depending on the portion of the meeting. Registration is required through the following links:

July 6 (virtual attendance only): https://www.eventbrite.com/e/meeting-of-the-presidents-advisory-commission-on-aa-and-nhpis-tickets-646261494527

July 7 (in-person attendance only): https://www.eventbrite.com/e/white-house-initiative-aa-and-nhpi-economic-summit-honolulu-tickets-649191698847

FOR FURTHER INFORMATION CONTACT: Viviane Chao, Designated Federal Officer, President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders, U.S. Department of Health and Human Services, Office of the Secretary, Office of Intergovernmental and External Affairs, Hubert H. Humphrey Building, Room 620E, 200 Independence Ave. SW, Washington, DC 20201; email: *AANHPICommission@hhs.gov;* telephone: (202) 951–0235.

SUPPLEMENTARY INFORMATION: The meeting is the sixth in a series of Federal advisory committee meetings regarding the development of recommendations to advance equity, justice, and opportunity for AA and NHPI communities. The meeting is open to the public and will be live streamed. The Commission, co-chaired by HHS Secretary Xavier Becerra and the U.S. Trade Representative Ambassador

Katherine Tai, advises the President on: the development, monitoring, and coordination of executive branch efforts to advance equity, justice, and opportunity for AA and NHPI communities in the United States, including efforts to close gaps in health, socioeconomic, employment, and educational outcomes; policies to address and end anti-Asian bias, xenophobia, racism, and nativism, and opportunities for the executive branch to advance inclusion, belonging, and public awareness of the diversity and accomplishments of AA and NHPI people, cultures, and histories; policies, programs, and initiatives to prevent, report, respond to, and track anti-Asian hate crimes and hate incidents; ways in which the Federal Government can build on the capacity and contributions of AA and NHPI communities through equitable Federal funding, grantmaking, and employment opportunities; policies and practices to improve research and equitable data disaggregation regarding AA and NHPI communities; policies and practices to improve language access services to ensure AA and NHPI communities can access Federal programs and services; and strategies to increase public-and private-sector collaboration, and community involvement in improving the safety and socioeconomic, health, educational, occupational, and environmental well-being of AA and NHPI communities.

Information is available on the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders website at *https://www.hhs.gov/about/whiaanhpi/commission/index.html.* The names of the 25 members of the President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders are available at *https://www.hhs.gov/about/whiaanhpi/commission/commissioners/index.html.*

Purpose of Meeting: The President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders, authorized by Executive Order 14031, will meet to discuss full and draft recommendations by the Commission's six Subcommittees on ways to advance equity, justice, and opportunity for Asian American, Native Hawaiian, and Pacific Islander communities. The Subcommittees are: Belonging, Inclusion, Anti-Asian Hate, Anti-Discrimination; Data Disaggregation; Language Access; Economic Equity; Health Equity; and Immigration and Citizenship Status.

Background: Asian American, Native Hawaiian, and Pacific Islander communities are among the fastest growing racial and ethnic populations in the United States according to the U.S. Census Bureau. However, in recent years, AA and NHPI individuals have faced increasing hate crimes and incidents that threaten their safety, as well as harmful stereotypes that often ignore socioeconomic, health, and educational disparities impacting these diverse communities.

Tragic acts of anti-Asian violence increased during the COVID–19 pandemic, casting a shadow of fear and grief over many AA and NHPI communities, in particular East Asian communities. Long before this pandemic, AA and NHPI communities in the United States, including South Asian and Southeast Asian communities, have faced persistent xenophobia, religious discrimination, racism, and violence. At the same time, AA and NHPI communities were overrepresented in the pandemic's essential workforce in healthcare, food supply, education, and childcare, with more than four million AA and NHPIs manning the frontlines throughout the pandemic.

Many AA and NHPI communities, and in particular Native Hawaiian and Pacific Islander communities, were disproportionately burdened by the COVID–19 public health crisis. Evidence suggests that Native Hawaiians and Pacific Islanders were three times more likely to contract COVID–19 compared to white people and nearly twice as likely to die from the disease. On top of these health inequities, many AA and NHPI workers, families, and small businesses faced devastating economic losses during the crisis.

The challenges AA and NHPI communities face are often exacerbated by a lack of adequate data disaggregation and language access. The President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders works to advise the President on executive branch efforts to address these challenges and advance equity, justice, and opportunity for AA and NHPI communities.

Public Participation at Meeting: Members of the public may attend virtually or in person, depending on the portion of the meeting. Registration is required through the following links:

July 6 (virtual attendance only): https://www.eventbrite.com/e/meeting-of-the-presidents-advisory-commission-on-aa-and-nhpis-tickets-646261494527

July 7 (in-person attendance only): https://www.eventbrite.com/e/white-house-initiative-aa-and-nhpi-economic-summit-honolulu-tickets-649191698847

Written public comments: Written comments are welcomed throughout the development of the Commission's recommendations to promote equity, justice, and opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders and may be emailed to *AANHPICommission@hhs.gov* at any time. Respond concisely and in plain language. You may use any structure or layout that presents your information well. You may respond to some or all of our questions, and you can suggest other factors or relevant questions. You may also include links to online material or interactive presentations. Clearly mark any proprietary information and place it in its own section or file. Your response will become Government property, and we may publish some of its non-proprietary content.

Oral public comments: Individuals may submit a request to make an oral public comment at the July 7, 2023, meeting in response to the questions below. Advance copy of public comment must be sent via email at *AANHPICommission@hhs.gov* with the subject line ''PACAANHPI: In-person Response to <insert the issue and question>'' no later than 11:59 p.m. ET on Friday, June 23, 2023. Submissions received after the deadline will not be considered for oral public comment.

Registration for oral public comment is on a first-come, first-served basis. Comments are limited to two (2) minutes or less. 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. You will be notified via email no later than July 5, 2023, if you have been identified to provide in-person public comment.

The Commission is particularly interested in soliciting comments on the following questions:

1. Belonging, Inclusion, Anti-Asian Hate, Anti-Discrimination Subcommittee Questions:

a. Please provide feedback on the experiences of Asian Americans, Native Hawaiians, and Pacific Islanders in the Child Protection/Child Welfare system.

b. What are promising practices, services, or prevention and intervention strategies that advance the well-being of AA and NHPI children and families who encounter the child protection/child welfare systems?

2. Language Access Subcommittee Questions:

a. How can the Federal Government promote the preservation, teaching, learning of, maintenance and utilization of AA and NHPI languages?

b. Are there any programs you recommend the Commission examine that provide meaningful language access to government benefits and services to persons with limited English proficiency?

3. Economic Equity Subcommittee Questions:

a. To what extent does the Native Hawaiian community have access to or understand how to access resources for job training and housing assistance at the local, state, and federal level?

b. How familiar is the public with the federal government resources available to support small businesses, loans, or grants?

c. How can the government better provide culturally sensitive and affordable housing for AA and NHPI communities?

4. Health Equity Subcommittee Questions:

a. What are the mental health concerns impacting communities in the Pacific Islands and what are some of the ways communities are trying to address them?

b. What are the biggest concerns around health for Native Hawaiians?

c. What are some of the biggest barriers to obtaining health care in Hawaii and other Pacific Islands?

d. What could improve your communities' ability to obtain federal services such as housing assistance, SSI/SSDI, SNAP/WIC, FEMA assistance, etc.?

5. Immigration and Citizenship Status Subcommittee Questions:

a. What are the main policy implications for Pacific Islanders who have either immigrated or moved away from their island homelands to other locations in the United States?

b. Pacific Islanders have a unique history with the United States that differs from most immigrants or migrants to this country. What should the responsibility of the federal government be to Pacific Islanders in light of this historical relationship?

c. As immigration-related agencies within the U.S. Department of Homeland Security (DHS) like the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP), work to expand language services, how should they decide which languages and which processes should be prioritized for implementation? Are there specific forms or processes that DHS agencies should prioritize providing language services for immediately? If so, which forms and language translations should be prioritized?

d. What can be done to address negative stereotypes and improve group relations between Pacific Islanders and other communities both in the Pacific Islands and throughout the United States?

Authority: Executive Order 14031. The President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders is governed by provisions of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. app.), which sets forth standards for the formation and use of Federal advisory committees.

Krystal Ka'ai,

Executive Director, White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders President's Advisory Commission on Asian Americans, Native Hawaiians, and Pacific Islanders.

[FR Doc. 2023–12272 Filed 6–7–23; 8:45 am]

BILLING CODE 4153–01–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 July 11, 2023, 11:00 a.m.–1:15 p.m. Eastern Daylight Time (EDT). Ending times are approximate; meeting may end earlier or run later.

Written Public Comment Submissions: Deadline is July 5, 2023; 5:00 p.m. EDT.

Registration for Oral Comments: Deadline is July 5, 2023; 5:00 p.m. EDT.

ADDRESSES:

Meeting Web Page: The preliminary agenda, registration, and other meeting materials will be available at *https://ntp.niehs.nih.gov/go/165* by June 12, 2023.

Virtual Meeting: A link to the URL for viewing the virtual meeting will be provided on the meeting web page by noon 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, Durham, NC 27713.

SUPPLEMENTARY INFORMATION: The BSC will provide input to the NTP on programmatic activities and issues. The preliminary agenda topics include a presentation on needed research capabilities to support predictive toxicology and evidence evaluation, including the development and implementation of computational, alternative, literature-based, and quality assessment tools and methodologies. The NIEHS proposes to obtain support for these activities via contract mechanism due to the scope of the required capabilities and availability of personnel with relevant experience to perform these activities exceeding the internal resources available. The preliminary agenda, 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*) or may be requested in hardcopy from the Designated Federal Officer for the BSC. Following the meeting, summary minutes will be prepared and made 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*) by noon 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 July 5, 2023, by 5:00 p.m. EDT. 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 public comment periods on the agenda topics (up to five commenters per topic, up to five minutes per speaker per topic). Oral comments will be received only during the formal comment periods indicated on the preliminary agenda. Persons wishing to make an oral comment are required to register online at *https://ntp.niehs.nih.gov/go/165* by July 5, 2023, by 5:00 p.m. EDT. Registration is on a first-come, first-served basis. Each organization is allowed one time slot per topic. 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 Ms. Robbin Guy by email: *robbin.guy@nih.gov* by July 5, 2023; 5:00 p.m. EDT.

Meeting Materials: The preliminary meeting agenda will be available on the meeting web page (*https://ntp.niehs.nih.gov/go/165*) by 5:00 p.m. on June 12, 2023, and updated one week before the meeting. 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.

Richard P. Woychik,

Director, National Institute of Environmental Health Sciences and National Toxicology Program, National Institutes of Health.

[FR Doc. 2023–12223 Filed 6–7–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Secret Service

[Docket Number DHS–2023–0017]

Agency Information Collection Activities: Generic Information Collection: USSS Customer Satisfaction Surveys

AGENCY: Department of Homeland Security (DHS).

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted until August 7, 2023. This process is conducted in accordance with 5 CFR 1320.1

ADDRESSES: You may submit comments, identified by docket number Docket # DHS–2023- 0017, at:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # DHS–2023–0017. 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.*

SUPPLEMENTARY INFORMATION: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, the Department of Homeland Security (hereafter ''the Agency'') seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management. Improving agency programs requires ongoing assessment of service delivery, by which we mean systematic review of the operation of a program compared to a set of explicit or implicit standards, as a means of contributing to the continuous improvement of the program.

The Agency will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of current services and make improvements in service delivery based on feedback. The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable. The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

• Information gathered will be used only internally for general service

improvement and program management purposes and is not intended for release outside of the agency (if released, procedures outlined in Question 16 will be followed);

• Information gathered will not be used for the purpose of substantially informing influential policy decisions 1;

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study;

• The collections are voluntary;

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;

• The collections are non-controversial and do not raise issues of concern to other Federal agencies;

• Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future; and

• With the exception of information needed to provide renumeration for participants of focus groups and cognitive laboratory studies, personally identifiable information (PII) is collected only to the extent necessary and is not retained.

If these conditions are not met, the Agency will submit an information collection request to OMB for approval through the normal PRA process. To obtain approval for a collection that meets the conditions of this generic clearance, a standardized form will be submitted to OMB along with supporting documentation (*e.g.,* a copy of the comment card). The submission will have automatic approval, unless OMB identifies issues within 5 business days. The types of collections that this generic clearance covers include, but are not limited to:

- Customer comment cards/complaint forms
- Small discussion groups
- Focus Groups of customers, potential customers, delivery partners, or other stakeholders
- Cognitive laboratory studies, such as those used to refine questions or assess usability of a website;
- Qualitative customer satisfaction surveys (*e.g.,* post-transaction surveys; opt-out web surveys)
- In-person observation testing (*e.g.,* website or software usability tests)

The Agency has established a manager/managing entity to serve for this generic clearance and will conduct an independent review of each information collection to ensure compliance with the terms of this clearance prior to submitting each collection to OMB. If appropriate, agencies will collect information electronically and/or use online collaboration tools to reduce burden.

Small business or other small entities may be involved in these efforts but the Agency will minimize the burden on them of information collections approved under this clearance by sampling, asking for readily available information, and using short, easy-to-complete information collection instruments. Without these types of feedback, the Agency will not have timely information to adjust its services to meet customer needs. If a confidentiality pledge is deemed useful and feasible, the Agency will only include a pledge of confidentiality that is supported by authority established in statute or regulation, that is supported by disclosure and data security policies that are consistent with the pledge, and that does not unnecessarily impede sharing of data with other agencies for compatible confidential use. If the agency includes a pledge of confidentiality, it will include a citation for the statute or regulation supporting the pledge. This is a new collection.

The Office of Management and Budget is particularly interested in comments which:

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; and

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.

Analysis

Agency: Department of Homeland Security (DHS)/United States Secret Service (USSS).

Title: Generic Information Collection: USSS Customer Satisfaction Surveys.

OMB Number: 1620–NEW.

Frequency: On Occasion.

Affected Public: Stakeholders/participants who engage with USSS programs, investigations, and inspections; including, individuals/households and Federal, State, and Local governments.

Number of Respondents: 160,000.

Estimated Time per Respondent: 2 Minutes.

Total Burden Hours: 5,333 Hours.

Frances Humphrey,

Information Technology Program Manager, Office of the Chief information Officer.

[FR Doc. 2023–12204 Filed 6–7–23; 8:45 am]

BILLING CODE 9110–18–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R7–ES–2023–0030; FXES111607MRG01–234–FF07CAMM00]

Marine Mammals; Incidental Take During Specified Activities; Proposed Incidental Harassment Authorization for Southcentral Alaska Stock of Northern Sea Otters in Whittier, Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application; proposed incidental harassment authorization; draft environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, in response to a request under the Marine Mammal Protection Act of 1972, as amended, from Turnagain Marine Construction, propose to authorize nonlethal, incidental take by harassment of small numbers of the Southcentral Alaska stock of northern sea otters (*Enhydra lutris kenyoni*) for 1 year from the date of issuance of the incidental harassment authorization. The applicant has requested this authorization for take by harassment that may result from activities associated with pile driving and marine construction activities on the western shore of Passage Canal in Whittier, Alaska. We estimate that this project may result in the nonlethal incidental take by harassment of up to 44 northern sea otters from the Southcentral stock. This proposed authorization, if finalized, will be for up to 70 takes of 7 northern sea otters by Level A harassment and 544 takes of 37 northern sea otters by Level B harassment. No lethal take is requested, or expected, and no such take will be authorized.

DATES: Comments on this proposed incidental harassment authorization and

the accompanying draft environmental assessment must be received by July 10, 2023.

ADDRESSES:

Document availability: You may view this proposed incidental harassment authorization, the application package, supporting information, draft environmental assessment, and the list of references cited herein at *https://www.regulations.gov* under Docket No. FWS–R7–ES–2023–0030 or these documents may be requested from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Comment submission: You may submit comments on the proposed authorization by one of the following methods:

- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R7–ES–2023–0030, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.
- *Electronic submission:* Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R7–ES–2023–0030.

We will post all comments at *https://www.regulations.gov.* You may request that we withhold personal identifying information from public review; however, we cannot guarantee that we will be able to do so. See Request for Public Comments for more information.

FOR FURTHER INFORMATION CONTACT: Sierra Franks, U.S. Fish and Wildlife Service, MS 341, 1011 East Tudor Road, Anchorage, Alaska 99503, by email at *R7mmmregulatory@fws.gov* or by telephone at 1–800–362–5148. 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:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972 (MMPA; 16 U.S.C. 1361, *et seq.*) authorizes the Secretary of the Interior (Secretary) to allow, upon request, the incidental, but not intentional, taking by harassment of small numbers of marine mammals in response to requests by U.S. citizens (as defined in title 50 of the Code of Federal Regulations (CFR) in part 18, at 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region during a period of not more than 1 year. The Secretary has delegated authority for implementation of the MMPA to the U.S. Fish and Wildlife Service (''Service'' or ''we''). According to the MMPA, the Service shall allow this incidental taking if we make findings that the total of such taking for the 1-year period:

(1) is of small numbers of marine mammals of a species or stock;

(2) will have a negligible impact on such species or stocks; and

(3) will not have an unmitigable adverse impact on the availability of these species or stocks for taking for subsistence use by Alaska Natives.

If the requisite findings are made, we issue an authorization that sets forth the following, where applicable:

(a) permissible methods of taking;

(b) means of effecting the least practicable adverse impact on the species or stock and its habitat and the availability of the species or stock for subsistence uses; and

(c) requirements for monitoring and reporting of such taking by harassment, including, in certain circumstances, requirements for the independent peer review of proposed monitoring plans or other research proposals.

The term ''take'' means to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal. ''Harassment'' means any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (the MMPA defines this as ''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 (the MMPA defines this as ''Level B harassment'').

The terms ''negligible impact'' and ''unmitigable adverse impact'' are defined in 50 CFR 18.27 (*i.e.,* regulations governing small takes of marine mammals incidental to specified activities) as follows: ''Negligible impact'' is 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. ''Unmitigable adverse impact'' means an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The term ''small numbers'' is also defined in 50 CFR 18.27. However, we do not rely on that definition here as it conflates ''small numbers'' with ''negligible impacts.'' We recognize ''small numbers'' and ''negligible impacts'' as two separate and distinct considerations when reviewing requests for incidental harassment authorizations (IHA) under the MMPA (see *Natural Res. Def. Council, Inc.* v. *Evans,* 232 F. Supp. 2d 1003, 1025 (N.D. Cal. 2003)). Instead, for our small numbers determination, we estimate the likely number of takes of marine mammals and evaluate if that take is small relative to the size of the species or stock.

The term ''least practicable adverse impact'' is not defined in the MMPA or its enacting regulations. For this IHA, we ensure the least practicable adverse impact by requiring mitigation measures that are effective in reducing the impact of project activities, but they are not so restrictive as to make project activities unduly burdensome or impossible to undertake and complete.

If the requisite findings are made, we shall issue an IHA, which may set forth the following, where applicable: (i) permissible methods of taking; (ii) 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 subsistence uses by coastal-dwelling Alaska Natives (if applicable); and (iii) requirements for monitoring and reporting take by harassment.

Summary of Request

On September 16, 2022, Turnagain Marine Construction (hereafter ''TMC'' or ''the applicant'') submitted a request to the Service for authorization to take by Level A and Level B harassment a small number of northern sea otters (*Enhydra lutris kenyoni*) (hereafter ''sea otters'' or ''otters'' unless another species is specified) from the Southcentral Alaska stock. The Service sent requests for additional information on November 1, November 30, and December 14, 2022. We received updated versions of the request on November 11, November 23, December 1, and December 22, 2022. The Service determined the December 22, 2022, application to be adequate and complete. TMC expects take by

harassment may occur during the construction of their cruise ship berth and associated facilities on the western shore of Passage Canal in Whittier, Alaska.

Description of Specified Activities and Specified Geographic Region

The specified activity (hereafter ''project'') will include installation and removal of piles for the construction of a 152-by-21 meter (m) (500-by-70-foot (ft)) floating cruise ship dock in Whittier, Alaska (figure 1) between April 2023 and April 2024. TMC will install and remove 72 91-centimeter (cm) (36-inch (in)) diameter steel piles and will permanently install the following types of piles: 36 91-cm (36-in) diameter steel piles, 16 107-cm (42-in) diameter steel piles, and 20 122-cm (48-in) diameter steel piles. Dock components that will be installed out of water include bull rail, fenders, mooring cleat, pre-cast concrete dock surface, and mast lights. Pile-driving activities will occur over 129 non-consecutive days for approximately 321 hours during the course of 1 year from date of issuance of the IHA. If the IHA is issued after TMC's intended start date in April 2023, its schedule for conducting the specified activities may be adjusted accordingly. Pile installation will be done with a combination of impact, vibratory, and down-the-hole (DTH) drilling. Temporary piles will be removed with the vibratory hammer. Materials and equipment will be transported via barges, and workers will be transported to and from the barge work platform via skiff.

Additional project details may be reviewed in the application materials available as described under **ADDRESSES** or may also be requested as described under **FOR FURTHER INFORMATION CONTACT**.

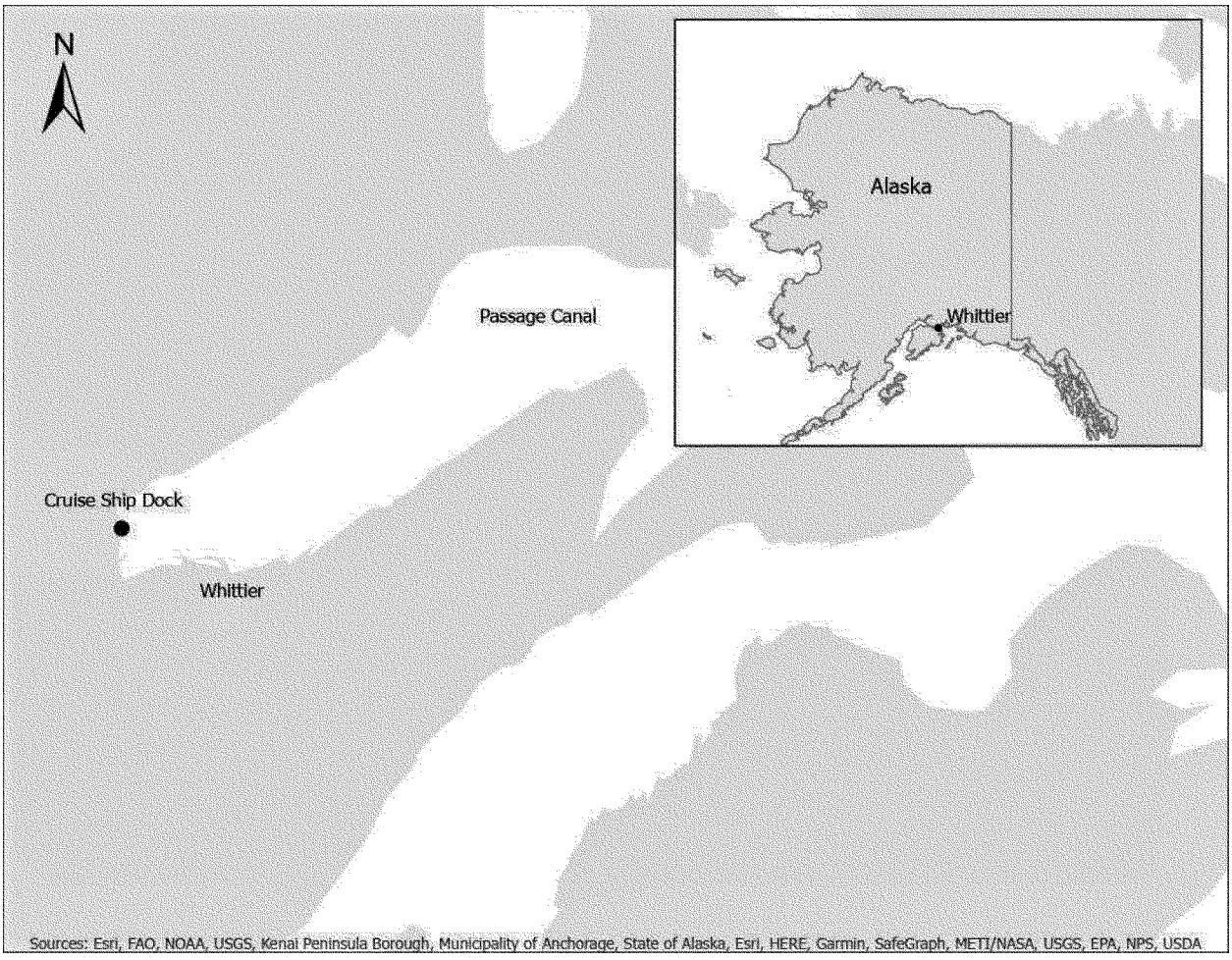


Figure 1. Specified geographic region of the project.

Description of Marine Mammals in the Specified Geographic Region

Sea Otter Biology

There are three sea otter stocks in Alaska: Southeast Alaska stock, Southcentral Alaska stock, and the Southwest Alaska stock. Only the Southcentral Alaska stock is represented in the project area. Detailed information about the biology of this stock can be found in the most recent Southcentral Alaska draft stock assessment report (USFWS 2023), which can be found at *https://www.regulations.gov/document/FWS-R7-ES-2022-0155-0004* and was announced in the **Federal Register** at 88 FR 7992, February 7, 2023.

Sea otters may be distributed anywhere within the specified project area other than upland areas; however, they generally occur in shallow water near the shoreline. They are most commonly observed within the 40-m (131-ft) depth contour (USFWS 2023), although they can be found in areas with deeper water. Ocean depth is generally correlated with distance to shore, and sea otters typically remain

within 1 to 2 kilometers (km) (0.62 to 1.24 miles (mi)) of shore (Riedman and Estes 1990). They tend to be found closer to shore during storms, but venture farther out during good weather and calm seas (Lensink 1962; Kenyon 1969).

Sea otters are nonmigratory and generally do not disperse over long distances (Garshelis and Garshelis 1984), usually remaining within a few kilometers of their established feeding grounds (Kenyon 1981). Breeding males stay for all or part of the year in a breeding territory covering up to 1 km (0.62 mi) of coastline, while adult females maintain home ranges of approximately 8 to 16 km (5 to 10 mi), which may include one or more male territories. Juveniles move greater distances between resting and foraging areas (Lensink 1962; Kenyon 1969; Riedman and Estes 1990; Tinker and Estes 1996). Although sea otters generally remain local to an area, they are capable of long-distance travel. Sea otters in Alaska have shown daily movement distances greater than 3 km (1.9 mi) at speeds up to 5.5 km per hour (hr) (km/hr; 3.4 mi/hr) (Garshelis and Garshelis 1984).

Southcentral Alaska Sea Otter Stock

The Southcentral Alaska sea otter stock occurs in the center of the sea otter range in Alaska and extends from Cape Yakataga in the east to Cook Inlet in the west, including Prince William Sound, the eastern Kenai Peninsula coast, and Kachemak Bay (USFWS 2023). Between 2014 and 2019, aerial surveys were conducted in three regions of the Southcentral Alaska sea otter stock: (1) Eastern Cook Inlet, (2) Outer Kenai Peninsula, and (3) Prince William Sound by aerial transects flown at 91 m (298.56 ft) of altitude. The combined estimates of the three regions resulted in approximately 21,617 (SE = 2,190) sea otters and an average density of 1.96 sea otters per square kilometer (km^2) for the Southcentral Alaska stock (Esslinger et al. 2021). We applied the average density of sea otters in Prince William Sound, 2.03 sea otters/km^2 (Esslinger et al. 2021).

Potential Impacts of the Specified Activities on Marine Mammals

Effects of Noise on Sea Otters

We characterized ''noise'' as sound released into the environment from human activities that exceeds ambient levels or interferes with normal sound production or reception by sea otters. The terms ''acoustic disturbance'' or ''acoustic harassment'' are disturbances or harassment events resulting from noise exposure. Potential effects of noise exposure are likely to depend on the distance of the sea otter from the sound source, the level and intensity of sound the sea otter receives, background noise levels, noise frequency, noise duration, and whether the noise is pulsed or continuous. The actual noise level perceived by individual sea otters will also depend on whether the sea otter is above or below water and atmospheric and environmental conditions. Temporary disturbance of sea otters or localized displacement reactions are the most likely effects to occur from noise exposure.

Sea Otter Hearing

Pile driving and marine construction activities will fall within the hearing range of sea otters. Controlled sound exposure trials on southern sea otters (*Enhydra lutris nereis*) indicate that sea otters can hear frequencies between 125 hertz (Hz) and 38 kilohertz (kHz) with best sensitivity between 1.2 and 27 kHz (Ghoul and Reichmuth 2014). Aerial and underwater audiograms for a captive adult male southern sea otter in the presence of ambient noise suggest the sea otter's hearing was less sensitive to high-frequency (greater than 22 kHz) and low-frequency (less than 2 kHz) sound than terrestrial mustelids but was similar to that of a California sea lion (*Zalophus californianus*). However, the sea otter was still able to hear low-frequency sounds, and the detection thresholds for sounds between 0.125–1 kHz were between 116–101 decibels (dB), respectively. Dominant frequencies of southern sea otter vocalizations are between 3 and 8 kHz, with some energy extending above 60 kHz (McShane et al. 1995, Ghoul and Reichmuth 2012).

Exposure to high levels of sound may cause changes in behavior, masking of communications, temporary or permanent changes in hearing sensitivity, discomfort, and injury to marine mammals. Unlike other marine mammals, sea otters do not rely on sound to orient themselves, locate prey, or communicate under water; therefore, masking of communications by anthropogenic sound is less of a concern than for other marine mammals. However, sea otters, especially mothers and pups, do use sound for communication in air (McShane et al. 1995), and sea otters may monitor underwater sound to avoid predators (Davis et al. 1987).

Exposure Thresholds

Noise exposure criteria for identifying underwater noise levels capable of causing Level A harassment to marine mammal species, including sea otters, have been established using the same methods as those used by the National Marine Fisheries Service (NMFS) (Southall et al. 2019). These criteria are based on estimated levels of sound exposure capable of causing a permanent shift in sensitivity of hearing (*i.e.,* a permanent threshold shift (PTS) (NMFS 2018)). PTS occurs when noise exposure causes hairs within the inner ear system to die (Ketten 2012). Although the effects of PTS are, by definition, permanent, PTS does not equate to total hearing loss.

Sound exposure thresholds incorporate two metrics of exposure: the peak level of instantaneous exposure likely to cause PTS and the cumulative sound exposure level (SEL_{CUM}) during a 24-hour period. They also include weighting adjustments for the sensitivity of different species to varying frequencies. PTS-based injury criteria were developed from theoretical extrapolation of observations of temporary threshold shifts (TTS) detected in lab settings during sound exposure trials (Finneran 2015). Southall and colleagues (2019) predict PTS for sea otters, which are included in the ''other marine carnivores'' category, will occur at 232 dB peak or 203 dB SEL_{CUM} for impulsive underwater sound and 219 dB SEL_{CUM} for nonimpulsive (continuous) underwater sound.

Thresholds based on TTS have been used as a proxy for Level B harassment (*i.e.,* 70 FR 1871, January 11, 2005; 71 FR 3260, January 20, 2006; 73 FR 41318, July 18, 2008). Southall et al. (2007) derived TTS thresholds for pinnipeds based on 212 dB peak and 171 dB SEL_{CUM}. Exposures resulting in TTS in pinnipeds were found to range from 152 to 174 dB (183 to 206 dB SEL) (Kastak et al. 2005), with a persistent TTS, if not a PTS, after 60 seconds of 184 dB SEL (Kastak et al. 2008). Kastelein et al. (2012) found small but statistically significant TTSs at approximately 170 dB SEL (136 dB, 60 minutes (min)) and 178 dB SEL (148 dB, 15 min). Based on these findings, Southall et al. (2019) developed TTS thresholds for sea otters, which are included in the ''other marine carnivores'' category, of 188 dB SEL_{CUM} for impulsive sounds and 199 dB SEL_{CUM} for nonimpulsive sounds.

The NMFS (2018) criteria do not identify thresholds for avoidance of Level B harassment. For pinnipeds (seals and sea lions), NMFS has adopted a 160-dB threshold for Level B harassment from exposure to impulsive noise and a 120-dB threshold for continuous noise (NMFS 1998, HESS 1999, NMFS 2018). These thresholds

were developed from observations of mysticete (baleen) whales responding to airgun operations (*e.g.,* Malme et al. 1983; Malme and Miles 1983; Richardson et al. 1986, 1995) and from equating Level B harassment with noise levels capable of causing TTS in lab settings. Southall et al. (2007, 2019) assessed behavioral response studies and found considerable variability among pinnipeds. The authors determined that exposures between approximately 90 to 140 dB generally do not appear to induce strong behavioral responses from pinnipeds in water. However, they found behavioral effects, including avoidance, become more likely in the range between 120 to 160 dB, and most marine mammals showed some, albeit variable, responses to sound between 140 to 180 dB. Wood et al. (2012) adapted the approach identified in Southall et al. (2007) to develop a probabilistic scale for marine mammal taxa at which 10 percent, 50 percent, and 90 percent of individuals exposed are assumed to produce a behavioral response. For many marine mammals, including pinnipeds, these response rates were set at sound pressure levels of 140, 160, and 180 dB, respectively.

We have evaluated these thresholds and determined that the Level B threshold of 120 dB for nonimpulsive noise is not applicable to sea otters. The 120-dB threshold is based on studies in which gray whales (*Eschrichtius robustus*) were exposed to experimental playbacks of industrial noise (Malme et al. 1983; Malme and Miles 1983). During these playback studies, southern sea otter responses to industrial noise were also monitored (Riedman 1983, 1984). Gray whales exhibited avoidance to industrial noise at the 120-dB threshold; however, there was no evidence of disturbance reactions or avoidance in southern sea otters. Thus, given the different range of frequencies to which sea otters and gray whales are sensitive, the NMFS 120-dB threshold based on gray whale behavior is not appropriate for predicting sea otter behavioral responses, particularly for low-frequency sound.

Based on the lack of sea otter disturbance response or any other reaction to the playback studies from the 1980s, as well as the absence of a clear pattern of disturbance or avoidance behaviors attributable to underwater sound levels up to about 160 dB resulting from low-frequency broadband noise, we assume 120 dB is not an appropriate behavioral response threshold for sea otters exposed to continuous underwater noise.

Based on the best available scientific information about sea otters, and closely related marine mammals when sea otter data are limited, the Service has set 160 dB of received underwater sound as a threshold for Level B harassment by disturbance for sea otters for this proposed IHA. Exposure to unmitigated in-water noise levels between 125 Hz and 38 kHz that are greater than 160 dB—for both impulsive and nonimpulsive sound sources—will be considered by the Service as Level B harassment. Thresholds for Level A harassment (which entails the potential for injury) will be 232 dB peak or 203 dB SEL for impulsive sounds and 219 dB SEL for continuous sounds (table 1).

Airborne Sounds

The NMFS (2018) guidance neither addresses thresholds for preventing injury or disturbance from airborne noise, nor provides thresholds for avoidance of Level B harassment. Southall et al. (2007) suggested thresholds for PTS and TTS for sea lions exposed to nonpulsed airborne noise of 172.5 and 159 dB re (20 μPa)^2-s SEL. Conveyance of underwater noise into the air is of little concern since the effects of pressure release and interference at the water's surface reduce underwater noise transmission into the air. For activities that create both in-air and underwater sounds, we will estimate take based on parameters for underwater noise transmission. Considering sound energy travels more efficiently through water than through air, this estimation will also account for exposures to sea otters at the surface.

TABLE 1—TEMPORARY THRESHOLD SHIFT (TTS) AND PERMANENT THRESHOLD SHIFT (PTS) THRESHOLDS ESTABLISHED BY SOUTHALL ET AL. (2019) THROUGH MODELING AND EXTRAPOLATION FOR ''OTHER MARINE CARNIVORES,'' WHICH INCLUDES SEA OTTERS

[Values are weighted for other marine carnivores' hearing thresholds and given in cumulative sound exposure level (SEL_{CUM} dB re (20 micropascal (μPa) in air and SEL_{CUM} dB re 1 μPa in water) for impulsive and nonimpulsive sounds and unweighted peak sound pressure level (SPL) in air (dB re 20 μPa) and water (dB 1 μPa) (impulsive sounds only).]

	TTS			PTS		
	Nonimpulsive	Impulsive		Nonimpulsive	Impulsive	
	SEL_{CUM}	SEL_{CUM}	Peak SPL	SEL_{CUM}	SEL_{CUM}	Peak SPL
Air	157	146	170	177	161	176
Water	199	188	226	219	203	232

Evidence From Sea Otter Studies

Sea otters may be more resistant to the effects of sound disturbance and human activities than other marine mammals. For example, observers have noted no changes from southern sea otters in regard to their presence, density, or behavior in response to underwater sounds from industrial noise recordings at 110 dB and a frequency range of 50 Hz to 20 kHz and airguns, even at the closest distance of 0.5 nautical miles (<1 km or 0.6 mi) (Riedman 1983). Southern sea otters did not respond noticeably to noise from a single 1,638 cubic centimeters (cm^3) (100 cubic inches [in^3]) airgun, and no sea otter disturbance reactions were evident when a 67,006 cm^3 (4,089 in^3) airgun array was as close as 0.9 km (0.6 mi) to sea otters (Riedman 1983, 1984). However, southern sea otters displayed slight reactions to airborne engine noise (Riedman 1983). Northern sea otters were observed to exhibit a limited response to a variety of airborne and underwater sounds, including a warble tone, sea otter pup calls, calls from killer whales (*Orcinus orca*) (which are predators to sea otters), air horns, and an underwater noise harassment system designed to drive marine mammals away from crude oil spills (Davis et al. 1988). These sounds elicited reactions from northern sea otters, including startle responses and movement away from noise sources. However, these reactions were observed only when northern sea otters were within 100 to 200 m (328 to 656 ft) of noise sources. Further, northern sea otters appeared to become habituated to the noises within

2 hours or, at most, 3–4 days (Davis et al. 1988).

Noise exposure may be influenced by the amount of time sea otters spend at the water's surface. Noise at the water's surface can be attenuated by turbulence from wind and waves more quickly compared to deeper water, reducing potential noise exposure (Greene and Richardson 1988, Richardson et al. 1995). Additionally, turbulence at the water's surface limits the transference of sound from water to air. A sea otter with its head above water will be exposed to only a small fraction of the sound energy traveling through the water beneath it. The average amount of time that sea otters spend above the water each day while resting and grooming varies between males and females and across seasons (Esslinger et al. 2014, Zellmer et al. 2021). For example, female sea otters foraged for an average of 8.78 hours per day compared to male sea otters, which foraged for an average of 7.85 hours per day during the summer months (Esslinger et al. 2014). Male and female sea otters spend an average of 63 to 67 percent of their day at the surface resting and grooming during the summer months (Esslinger et al. 2014). Few studies have evaluated foraging times during the winter months. Garshelis et al. (1986) found that foraging times increased from 5.1 hours per day to 16.6 hours per day in the winter; however, Gelatt et al. (2002) did not find a significant difference in seasonal foraging times. It is likely that seasonal variation is determined by seasonal differences in energetic demand and the quality and availability of prey sources (Esslinger et al. 2014). These findings suggest that the large portion of the day sea otters spend at the surface may help limit sea otters' exposure during noise-generating operations.

Sea otter sensitivity to industrial activities may be influenced by the overall level of human activity within the sea otter population's range. In locations that lack frequent human activity, sea otters appear to have a lower threshold for disturbance. Sea otters in Alaska exhibited escape behaviors in response to the presence and approach of vessels (Udevitz et al. 1995). Behaviors included diving or actively swimming away from a vessel, entering the water from haulouts, and disbanding groups with sea otters swimming in multiple different directions (Udevitz et al. 1995). Sea otters in Alaska were also observed to avoid areas with heavy boat traffic in the summer and return to these areas during seasons with less vessel traffic (Garshelis and Garshelis 1984). In Cook Inlet, sea otters drifting on a tide trajectory that would have taken them within 500 m (0.3 mi) of an active offshore drilling rig were observed to swim in order to avoid a close approach of the drilling rig despite near-ambient noise levels (BlueCrest 2013).

Individual sea otters in Passage Canal will likely show a range of responses to noise from pile-driving activities. Some sea otters will likely dive, show startle responses, change direction of travel, or prematurely surface. Sea otters reacting to pile-driving activities may divert time and attention from biologically important behaviors, such as feeding and nursing pups. Sea otter responses to disturbance can result in energetic costs, which increases the amount of prey required by sea otters (Barrett 2019). This increased prey consumption may impact sea otter prey availability and cause sea otters to spend more time foraging and less time resting (Barrett 2019). Some sea otters may abandon the project area and return when the disturbance has ceased. Based on the observed movement patterns of sea otters (*i.e.,* Lensink 1962; Kenyon 1969, 1981; Garshelis and Garshelis 1984; Riedman and Estes 1990; Tinker and Estes 1996), we expect some individuals will respond to pile-driving activities by dispersing to nearby areas of suitable habitat; however, other sea otters, especially territorial adult males, are less likely to be displaced.

Consequences of Disturbance

The reactions of wildlife to disturbance can range from short-term behavioral changes to long-term impacts that affect survival and reproduction. When disturbed by noise, animals may respond behaviorally (*e.g.,* escape response) or physiologically (*e.g.,* increased heart rate, hormonal response) (Harms et al. 1997; Tempel and Gutiérrez 2003). Theoretically, the energy expense and associated physiological effects from repeated disturbance could ultimately lead to reduced survival and reproduction (Gill and Sutherland 2000; Frid and Dill 2002). For example, South American sea lions (*Otaria byronia*) visited by tourists exhibited an increase in the state of alertness and a decrease in maternal attendance and resting time on land, thereby potentially reducing population size (Pavez et al. 2015). In another example, killer whales that lost feeding opportunities due to boat traffic faced a substantial (18 percent) estimated decrease in energy intake (Williams et al. 2006). In severe cases, such disturbance effects could have population-level consequences. For example, increased disturbance by tourism vessels has been associated with a decline in abundance of bottlenose dolphins (*Tursiops* spp.) (Bejder et al. 2006; Lusseau et al. 2006). However, these examples evaluated sources of disturbance that were longer term and more consistent than the temporary and intermittent nature of the specified project activities.

These examples illustrate direct effects on survival and reproductive success, but disturbances can also have indirect effects. Response to noise disturbance is considered a nonlethal stimulus that is similar to an antipredator response (Frid and Dill 2002). Sea otters are susceptible to predation, particularly from killer whales and eagles, and have a well-developed antipredator response to perceived threats. For example, the presence of a harbor seal (*Phoca vitulina*) did not appear to disturb southern sea otters, but they demonstrated a fear response in the presence of a California sea lion by actively looking above and beneath the water (Limbaugh 1961).

Although an increase in vigilance or a flight response is nonlethal, a tradeoff occurs between risk avoidance and energy conservation. An animal's reactions to noise disturbance may cause stress and direct an animal's energy away from fitness-enhancing activities such as feeding and mating (Frid and Dill 2002; Goudie and Jones 2004). For example, southern sea otters in areas with heavy recreational boat traffic demonstrated changes in behavioral time budgeting, showing decreased time resting and changes in haulout patterns and distribution (Benham 2006; Maldini et al. 2012). Chronic stress can also lead to weakened reflexes, lowered learning responses (Welch and Welch 1970; van Polanen Petel et al. 2006), compromised immune function, decreased body weight, and abnormal thyroid function (Selye 1979).

Changes in behavior resulting from anthropogenic disturbance can include increased agonistic interactions between individuals or temporary or permanent abandonment of an area (Barton et al. 1998). Additionally, the extent of previous exposure to humans (Holcomb et al. 2009), the type of disturbance (Andersen et al. 2012), and the age or sex of the individuals (Shaughnessy et al. 2008; Holcomb et al. 2009) may influence the type and extent of response in individual sea otters.

Vessel Activities

Vessel collisions with marine mammals can result in death or serious injury. Wounds resulting from vessel

strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus 2001). An animal may be harmed by a vessel when the vessel runs over the animal at the surface, the animal hits the bottom of a vessel while the animal is surfacing, or the animal is cut by a vessel's propeller.

Vessel strike has been documented as a cause of death across all three stocks of northern sea otters in Alaska. Since 2002, the Service has conducted 1,433 sea otter necropsies to determine cause of death, disease incidence, and the general health status of sea otters in Alaska. Vessel strike or blunt trauma was identified as a definitive or presumptive cause of death in 65 cases (4 percent) (USFWS 2020). In most of these cases, trauma was determined to be the ultimate cause of death; however, there was a contributing factor, such as disease or biotoxin exposure, which incapacitated the sea otter and made it more vulnerable to vessel strike (USFWS 2023).

Vessel speed influences the likelihood of vessel strikes involving sea otters. The probability of death or serious injury to a marine mammal increases as vessel speed increases (Laist et al. 2001, Vanderlaan and Taggart 2007). Sea otters spend a considerable portion of their time at the water's surface (Esslinger et al. 2014). They are typically visually aware of approaching vessels and can move away if a vessel is not traveling too quickly. Mitigation measures to be applied to vessel operations to prevent collisions or interactions are included below in the proposed authorization portion of this document under *Avoidance and Minimization.*

Sea otters exhibit behavioral flexibility in response to vessels, and their responses may be influenced by the intensity and duration of the vessel's activity. As noted above, sea otter populations in Alaska were observed to avoid areas with heavy vessel traffic but return to those same areas during seasons with less vessel traffic (Garshelis and Garshelis 1984). Sea otters have also shown signs of disturbance or escape behaviors in response to the presence and approach of survey vessels including sea otters diving and/or actively swimming away from a vessel, sea otters on haulouts entering the water, and groups of sea otters disbanding and swimming in multiple different directions (Udevitz et al. 1995).

Additionally, sea otter responses to vessels may be influenced by the sea otter's previous experience with vessels. Groups of southern sea otters in two locations in California showed markedly different responses to kayakers approaching to within specific distances, suggesting a different level of tolerance between the groups (Gunvalson 2011). Benham (2006) found evidence that the sea otters exposed to high levels of recreational activity may have become more tolerant than individuals in less-disturbed areas. Sea otters off the California coast showed only mild interest in vessels passing within hundreds of meters and appeared to have habituated to vessel traffic (Riedman 1983, Curland 1997). These findings indicate that sea otters may adjust their responses to vessel activities depending on the level of activity. Vessel activity during the project includes the transit of three barges for materials and construction, all of which will remain onsite, mostly stationary, to support the work; additionally, two skiffs will be used during the project: one for transporting workers short distances to the crane barge and the other for marine mammal monitoring during pile driving. Vessels will not be used extensively or over a long duration during the planned work; therefore, we do not anticipate that sea otters will experience changes in behavior indicative of tolerance or habituation.

Effects on Sea Otter Habitat and Prey

Physical and biological features of habitat essential to the conservation of sea otters include the benthic invertebrates that sea otters eat and the shallow rocky areas and kelp beds that provide cover from predators. Sea otter habitat in the project area includes coastal areas within the 40-m (131-ft) depth contour where high densities of sea otters have been detected.

Industrial activities, such as pile driving, may generate in-water noise at levels that can temporarily displace sea otters from important habitat and impact sea otter prey species. The primary prey species for sea otters are sea urchins (*Strongylocentrotus* spp. and *Mesocentrotus* spp.), abalone (*Haliotis* spp.), clams (*e.g., Clinocardium nuttallii, Leukoma staminea,* and *Saxidomus gigantea*), mussels (*Mytilus* spp.), crabs (*e.g., Metacarcinus magister, Pugettia* spp., *Telemessus cheiragonus,* and *Cancer* spp.), and squid (*Loligo* spp.) (Tinker and Estes 1996, LaRoche et al. 2021). When preferential prey are scarce, sea otters will also eat kelp, slow-moving benthic fishes, sea cucumbers (*e.g., Apostichopus californicus*), egg cases of rays, turban snails (*Tegula* spp.), octopuses (*e.g., Octopus* spp.), barnacles (*Balanus* spp.), sea stars (*e.g., Pycnopodia helianthoides),* scallops (*e.g., Patinopecten caurinus),* rock oysters (*Saccostrea* spp.), worms (*e.g., Eudistylia* spp.), and chitons (*e.g., Mopalia* spp.) (Riedman and Estes 1990, Davis and Bodkin 2021).

Several studies have addressed the effects of noise on invertebrates (Tidau and Briffa 2016, Carroll et al. 2017). Behavioral changes, such as an increase in lobster (*Homarus americanus*) feeding levels (Payne et al. 2007), an increase in avoidance behavior by wild-caught captive reef squid (*Sepioteuthis australis*) (Fewtrell and McCauley 2012), and deeper digging by razor clams (*Sinonovacula constricta*) (Peng et al. 2016) have been observed following experimental exposures to sound. Physical changes have also been observed in response to increased sound levels, including changes in serum biochemistry and hepatopancreatic cells in lobsters (Payne et al. 2007) and long-term damage to the statocysts required for hearing in several cephalopod species (André et al. 2011, Solé et al. 2013). De Soto et al. (2013) found impaired embryonic development in scallop (*Pecten novaezelandiae*) larvae when exposed to 160 dB. Christian et al. (2003) noted a reduction in the speed of egg development of bottom-dwelling crabs following exposure to noise; however, the sound level (221 dB at 2 m or 6.6 ft) was far higher than the planned project activities will produce. Industrial noise can also impact larval settlement by masking the natural acoustic settlement cues for crustaceans and fish (Pine et al. 2012, Simpson et al. 2016, Tidau and Briffa 2016).

While these studies provide evidence of deleterious effects to invertebrates as a result of increased sound levels, Carroll et al. (2017) caution that there is a wide disparity between results obtained in field and laboratory settings. In experimental settings, changes were observed only when animals were housed in enclosed tanks, and many were exposed to prolonged bouts of continuous, pure tones. We would not expect similar results in open marine conditions. It is unlikely that noises generated by project activities will have any lasting effect on sea otter prey given the short-term duration of sounds produced by each component of the planned work.

Noise-generating activities that interact with the seabed can produce vibrations, resulting in the disturbance of sediment and increased turbidity in the water. Although turbidity is likely to have little impact on sea otters and prey species (Todd et al. 2015), there may be some impacts from vibrations and increased sedimentation. For example,

mussels (*Mytilus edulis*) exhibited changes in valve gape and oxygen demand, and hermit crabs (*Pagurus bernhardus*) exhibited limited behavioral changes in response to vibrations caused by pile driving (Roberts et al. 2016). Increased sedimentation is likely to reduce sea otter visibility, which may result in reduced foraging efficiency and a potential shift to less-preferred prey species. These outcomes may cause sea otters to spend more energy on foraging or processing the prey items; however, the impacts of a change in energy expenditure are not likely seen at the population level (Newsome et al. 2015). Additionally, the benthic invertebrates may be impacted by increased sedimentation, resulting in higher abundances of opportunistic species that recover quickly from industrial activities that increase sedimentation (Kotta et al. 2009). Although sea otter foraging could be impacted by industrial activities that cause vibrations and increased sedimentation, it is more likely that sea otters would be temporarily displaced from the project area due to impacts from noise rather than vibrations and sedimentation.

Potential Impacts of the Specified Activities on Subsistence Uses

The planned specified activities will occur near marine subsistence harvest areas used by Alaska Natives from Whittier and the surrounding areas. The majority of sea otter harvest in this area occurs more than 3.2 km (2 mi) outside of Whittier. Since 2012, there have been 75 sea otters harvested in the Whittier area, and most of those were taken prior to 2017. From 2018 through 2021, only eight sea otters were harvested from the Whittier area.

The planned project would occur within the Whittier city limits, where firearm use is prohibited. The area potentially affected by the planned project does not significantly overlap with current subsistence harvest areas. Construction activities will not preclude access to hunting areas or interfere in any way with individuals wishing to hunt. Despite no conflict with subsistence use being anticipated, the Service will conduct outreach with potentially affected communities to see whether there are any questions, concerns, or potential conflicts regarding subsistence use in those areas. If any conflicts are identified in the future, TMC will develop a plan of cooperation specifying the steps necessary to minimize any effects the project may have on subsistence harvest.

Estimated Take

Definitions of Incidental Take Under the Marine Mammal Protection Act

Below we provide definitions of three potential types of take of sea otters. The Service does not anticipate and is not authorizing lethal take as a part of this proposed IHA; however, the definitions of these take types are provided for context and background:

Lethal Take—Human activity may result in biologically significant impacts to sea otters. In the most serious interactions, human actions can result in mortality of sea otters.

Level A Harassment—Human activity may result in the injury of sea otters. Level A harassment, for nonmilitary readiness activities, is defined as any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild.

Level B Harassment—Level B Harassment for nonmilitary readiness activities means any act of pursuit, torment, or annoyance that 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, feeding, or sheltering. Changes in behavior that disrupt biologically significant behaviors or activities for the affected animal are indicative of take by Level B harassment under the MMPA.

The Service has identified the following sea otter behaviors as indicative of possible Level B harassment:

- Swimming away at a fast pace on belly (*i.e.,* porpoising);
- Repeatedly raising the head vertically above the water to get a better view (spyhopping) while apparently agitated or while swimming away;
- In the case of a pup, repeatedly spyhopping while hiding behind and holding onto its mother's head;
- Abandoning prey or feeding area;
- Ceasing to nurse and/or rest (applies to dependent pups);
- Ceasing to rest (applies to independent animals);
- Ceasing to use movement corridors;
- Ceasing mating behaviors;
- Shifting/jostling/agitation in a raft so that the raft disperses;
- Sudden diving of an entire raft; or
- Flushing animals off a haulout.

This list is not meant to encompass all possible behaviors; other behavioral responses may equate to take by Level B harassment. Relatively minor changes in behavior such as increased vigilance or a short-term change in direction of travel are not likely to disrupt biologically important behavioral patterns, and the Service does not view such minor changes in behavior as indicative of a take by Level B harassment.

Calculating Take

We assumed all animals exposed to underwater sound levels that meet the acoustic exposure criteria defined above in Exposure Thresholds will experience take by Level A or Level B harassment due to exposure to underwater noise. Spatially explicit zones of ensonification were established around the planned construction location to estimate the number of otters that may be exposed to these sound levels. We determined the number of otters present in the ensonification zones using density information generated by Esslinger et al. (2021).

The project can be divided into four major components: DTH drilling, vibratory drilling, pile driving using an impact driver, and skiff use to support construction. Each of these components will generate a different type of in-water noise. Vibratory drilling and the use of skiffs will produce nonimpulsive or continuous noise; impact driving will produce impulsive noise; and DTH drilling is considered to produce both impulsive and continuous noise (NMFS 2020).

The level of sound anticipated from each project component was established using recorded data from several sources listed in tables 2 through 5. We used the NMFS Technical Guidance and User Spreadsheet (NMFS 2018, 2020) to determine the distance at which sound levels would attenuate to Level A harassment thresholds, and empirical data from the proxy projects were used to determine the distance at which sound levels would attenuate to Level B harassment thresholds (table 1). The weighting factor adjustment included in the NMFS user spreadsheet accounts for sounds created in portions of an organism's hearing range where they have less sensitivity. We used the weighting factor adjustment for otariid pinnipeds as they are the closest available physiological and anatomical proxy for sea otters. The spreadsheet also incorporates a transmission loss coefficient, which accounts for the reduction in sound level outward from a sound source. We used the NMFS-recommended transmission loss coefficient of 15 for coastal pile-driving activities to indicate practical spread (NMFS 2020).

We calculated the harassment zones for DTH drilling with input from NMFS. The sound pressure levels produced by DTH drilling were provided by NMFS in

2022 via correspondence with Solstice Alaska Consulting, who created the application for this IHA on behalf of TMC. We then used the NMFS Technical Guidance and User Spreadsheet (NMFS 2018, 2020) to determine the distance at which these sounds would attenuate to Level A harassment thresholds. To estimate the distances at which sounds would attenuate to Level B harassment thresholds, we used the NMFS-recommended transmission loss coefficient of 15 for coastal pile-driving activities in a practical spreading loss model (NMFS 2020) to determine the distance at which sound levels attenuate to 160 dB re 1 µPa. However, due to the differences in how PTS and TTS thresholds are calculated, as well as limited data of underwater sound pressure levels from DTH drilling, the resultant Level A isopleths are larger than the Level B isopleths.

TABLE 2—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY VIBRATORY DRILLING

Pile size	91-cm (36-in) (temporary)-installation	91-cm (36-in) (temporary)-removal	91-cm (36-in) (permanent)	107-cm (42-in)	122-cm (48-in)
Total number of piles	72	72	36	16	20.
Sound level	166 dB re 1µPa at 10 m (RMS)			168.2 dB re 1µPa at 10 m (RMS)	
Source	NAVFAC[a] 2015			Austin et al. 2016	
Timing per pile	10 minutes/pile	10 minutes/pile	15 minutes/pile	15 minutes/pile	15 minutes/pile.
Maximum number of piles per day	4	4	4	4	2.
Maximum number of days of activity	18	18	9	4	10.
Sea otter density	2.03 sea otters/km^2				
Distance to below Level A harassment threshold.	0.5 meters	0.5 meters	0.6 meters	0.9 meters	0.6 meters.
Level A area (km^2)	0.000001	0.000001	0.000001	0.000003	0.000001.
Potential sea otters affected by Level A sound per day.	0.000002	0.000002	0.000002	0.00001	0.000002.
Potential sea otters affected by Level A sound per day (rounded).	0	0	0	0	0.
Total potential Level A harassment events.	0	0	0	0	0.
Distance to below Level B harassment threshold.	25 meters	25 meters	25 meters	35 meters	35 meters.
Level B area (km^2)	0.0020	0.0020	0.0020	0.0038	0.0038.
Potential sea otters affected by Level B sound per day.	0.0041	0.0041	0.0041	0.0077	0.0077.
Potential sea otters affected by Level B sound per day (rounded).	0	0	0	0	0.
Total potential Level B harassment events.	0	0	0	0	0.

[a] Naval Facilities Engineering Command.

TABLE 3—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY IMPACT PILE DRIVING

Pile size	91-cm (36-in) (permanent)	107-cm (42-in)	122-cm (48-in)
Total number of piles	36	16	20.
Sound level	184 dB (SEL)/192 dB (RMS)/211 dB (peak) re 1µPa at 10 m.	186.7 dB (SEL)/198.6 dB (RMS) re 1µPa at 10 m.	186.7 dB (SEL)/198.6 dB (RMS)/212 dB (peak) re 1µPa at 10 m.
Source	NAVFAC 2015	Austin et al. 2016	
Timing per pile	45 minutes/pile; 1,800 strikes/pile.	60 minutes/pile; 2,400 strikes/pile.	60 minutes/pile; 2,400 strikes/pile.
Maximum number piles per day	4	3	2.
Maximum number of days of activity	9	5.3	10.
Sea otter density	2.03 sea otters/km^2		
Distance to below Level A harassment threshold	169.2 meters	256.0 meters	195.4 meters.
Level A area (km^2)	0.0718	0.1786	0.1199.

TABLE 3—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY IMPACT PILE DRIVING—Continued

Pile size	91-cm (36-in) (permanent)	107-cm (42-in)	122-cm (48-in)
Potential sea otters affected by Level A sound per day	0.1458	0.3626	0.2434.
Potential sea otters affected by Level A sound per day (rounded).	1	1	1.
Total potential Level A harassment events	9	6	10.
Distance to below Level B harassment threshold	1,359 meters	3,744 meters	3,744 meters.
Level B area (km^2)	1.9161	7.3224	7.8846.
Potential sea otters affected by Level B sound per day	3.8897	14.8645	16.0057.
Potential sea otters affected by Level B sound per day (rounded).	4	15	16.
Total potential Level B harassment events	36	80	160.

TABLE 4—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY DOWN-THE-HOLE DRILLING

Pile size	91-cm (36-in) (temporary)	91-cm (36-in) (permanent)	107-cm (42-in)	122-cm (48-in)
Total number of piles	36 (installation only)	36	16	20.
Sound level	164 dB (SEL)/167 dB (RMS) re 1μPa at 10 m			171 dB (SEL)/167 (RMS) dB re 1μPa at 10 m.
Source	Reyff and Heyvaert 2019; Reyff 2020; Denes et al. 2019; Heyvaert and Reyff 2021			SolsticeAK 2022; Heyvaert and Reyff 2021.
Timing per pile	60 minutes/pile	150 minutes/pile	150 minutes/pile	150 minutes/pile.
Maximum number piles per day	4	2	2	2.
Maximum number of days of activity	9	18	8	10.
Sea otter density	2.03 sea otters/km^2			
Distance to below Level A harassment threshold [a].	57.9 meters	67.1 meters	67.1 meters	196.6 meters.
Level A area (km^2)	0.0105	0.0141	0.0141	0.1214.
Potential sea otters affected by Level A sound per day.	0.0213	0.0286	0.0286	0.2464.
Potential sea otters affected by Level A sound per day (rounded).	1	1	1	1.
Total potential Level A harassment events	9	18	8	10.
Distance to below Level B harassment threshold [a].	29 meters	29 meters	29 meters	29 meters.
Level B area (km^2)	0.0026	0.0026	0.0026	0.0026.
Potential sea otters affected by Level B sound per day.	0.0053	0.0053	0.0053	0.0053.
Potential sea otters affected by Level B sound per day (rounded).	0	0	0	0.
Total potential Level B harassment events	0	0	0	0.

[a] Due to differences in how PTS and TTS thresholds are calculated, the Level A isopleths are larger than the Level B isopleths.

TABLE 5—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY USE OF SKIFFS

Sound source	Monitoring skiff	Worker transit skiff
Sound level	175 dB (RMS) re 1μPa at 1 m	175 dB (RMS) re 1μPa at 1 m.
Source	Richardson et al. 1995; Kipple and Gabriele 2007	

TABLE 5—SUMMARY OF SOUND LEVEL, TIMING OF SOUND PRODUCTION, DISTANCE FROM SOUND SOURCE TO BELOW LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS, DAYS OF IMPACT, SEA OTTERS IN LEVEL A AND LEVEL B HARASSMENT ENSONIFICATION AREA, AND TOTAL OTTERS EXPECTED TO BE HARASSED THROUGH BEHAVIORAL DISTURBANCE BY USE OF SKIFFS—Continued

Sound source	Monitoring skiff	Worker transit skiff
Number of days of vessel use	129	129.
Sea otter density	2.03 sea otters/km^2	
Distance to below Level A harassment threshold	0 meters	0 meters.
Level A area (km^2)	0	0.
Potential sea otters affected by Level A sound per day	0	0.
Potential sea otters affected by Level A sound per day (rounded)	0	0.
Total potential Level A harassment events	0	0.
Distance to below Level B harassment threshold	10 meters	10 meters.
Level B area (km^2)	0.2832	0.0095.
Potential sea otters affected by Level B sound per day	0.5748	0.0192.
Potential sea otters affected by Level B sound per day (rounded)	1	1.
Total potential Level B harassment events	129	129.

Sound levels for all sources are unweighted and given in dB re 1µPa. Nonimpulsive sounds are in the form of mean maximum root mean square (RMS) sound pressure level (SPL) as it is more conservative than cumulative sound exposure level (SEL) or peak SPL for these activities. Impulsive sound sources are in the form of SEL for a single strike.

To determine the number of sea otters that may experience in-water sounds >160 dB re 1µPa due to pile driving, we multiplied the area ensonified to >160 dB re 1µPa by the density of animals (2.03 sea otters/km^2) derived from surveys conducted off Prince William Sound (Esslinger 2021). We applied the same methodology to determine the number of sea otters that may experience sounds capable of causing PTS. The number of sea otters expected to be exposed to such sound levels can be found in tables 2 through 5. To calculate the area ensonified for each type of pile-driving activity, the coordinates of the piles were mapped in ArcGIS Pro. We used a representative pile of each size around which to map the Level A and Level B harassment zones. We chose representative piles that were farthest from shore so that the zones that are intercepted by land have the largest in-water areas possible. The majority of these radii are small enough that their defined circles will fall entirely in the water, and in these instances, the area was calculated as πr^2. The exceptions are the Level A and Level B zones generated by impact pile driving the 36-in permanent and 42-in piles, as well as the Level B zone generated by impact pile driving the 48-in piles; for these, we used ArcGIS Pro to map and calculate the area of the water ensonified by those activities.

The area ensonified by the worker transit skiff was estimated by multiplying the vessel's anticipated daily track length by twice the 160 dB radius plus πr^2 to account for the rounded ends of the track line. It was estimated that the distance of each trip would be no more than 457.2 m (1,500 ft).

The monitoring skiff will travel in a triangle of perimeter approximately 7 km (4.3 mi) between Emerald Island, the north shore of Passage Canal, and Gradual Point. To estimate the area ensonified by the monitoring skiff, we used ArcGIS Pro to plot the points of the triangle, map the track line between those points, and apply a buffer of 10 m (33 ft; the 160-dB radius) on either side of the track line.

We assumed that the different types of activities would occur sequentially and that the total number of days of work would equal the sum of the number of days required to complete each type of activity. While it is possible that on some days more than one type of activity will take place, which would reduce the number of days of exposure within a year, we cannot know this information in advance. As such, the estimated number of days and, therefore, exposures per year is the maximum possible for the planned work. Where the number of exposures expected per day was zero to three or more decimal places (*i.e.,* <0.00X), the number of exposures per day was assumed to be zero.

In order to minimize exposure of sea otters to sounds above Level A harassment thresholds, TMC will implement shutdown zones ranging from 10 to 260 m (33 to 853 ft), based on the pile size and type of pile driving or marine construction activity, where operations will cease should a sea otter enter or approach the specified zone. Soft-start and zone clearance prior to startup will also limit the exposure of sea otters to sound levels that could cause PTS. However, TMC has requested, and the Service proposes to authorize, small numbers of take by Level A harassment during impact pile driving and DTH drilling.

Critical Assumptions

We estimate that 544 takes of 37 sea otters by Level B harassment and 70 takes of 7 sea otters by Level A harassment may occur due to TMC's planned cruise ship dock construction activities. In order to conduct this analysis and estimate the potential amount of take by harassment, several critical assumptions were made.

Level B harassment is equated herein with behavioral responses that indicate harassment or disturbance. There is likely a portion of animals that respond in ways that indicate some level of disturbance but do not experience significant biological consequences.

We used the sea otter density for the Whittier area from surveys and analyses conducted by Esslinger (2021). Methods and assumptions for these surveys can be found in the original publication.

We used sound source verification from recent pile-driving activities in a number of locations within and beyond Alaska to generate sound level estimates for construction activities. Environmental conditions in these locations, including water depth, substrate, and ambient sound levels are similar to those in the project location, but not identical. Further, estimation of ensonification zones were based on sound attenuation models using a practical spreading loss model. These factors may lead to actual sound values

differing slightly from those estimated here.

We assumed that all piles will be installed and removed while submerged in water. Some of the 36-in permanent piles supporting the approach trestle, and the associated temporary 36-in piles used for the templates to install the permanent piles, will be located in the intertidal zone. Work performed at lower tidal heights would likely result in decreased transmission of sounds to the water column. However, as the timing of pile installation and removal was not known in advance, we accounted for the possibility that all work may occur at a tidal height that allows for full sound transmission.

Finally, the pile-driving activities described here will also create in-air noise. Because sea otters spend over half of their day with their heads above water (Esslinger et al. 2014), they will be exposed to an increase in-air noise from construction equipment. However, we have calculated Level B harassment with the assumption that an individual may be harassed only one time per 24-hour period, and underwater sound levels will be more disturbing and extend farther than in-air noise. Thus, while sea otters may be disturbed by noise both in-air and underwater, we have relied on the more conservative underwater estimates.

Sum of Harassment From All Sources

The applicant plans to conduct pile driving and marine construction activities in Whittier, Alaska, over the course of a year from the date of issuance of the IHA. A summary of total estimated take during the project by source is provided in table 6.

TABLE 6—TOTAL ESTIMATED TAKES BY SOURCE OF LEVEL A AND LEVEL B HARASSMENT OF SEA OTTERS

Source	Number of days of activity	Sea otters exposed per day to Level A harassment	Total takes of sea otters by Level A harassment	Sea otters exposed per day to Level B harassment	Total takes of sea otters by Level B harassment
Vibratory drilling:					
36-inch piles (temporary)—installation	18	0	0	0	0
36-inch piles (temporary)—removal	18	0	0	0	0
36-inch piles (permanent)	9	0	0	0	0
42-inch piles	4	0	0	0	0
48-inch piles	10	0	0	0	0
Impact drilling:					
36-inch piles (permanent)	9	1	9	4	36
42-inch piles	6	1	6	15	90
48-inch piles	10	1	10	16	160
Down-the-hole drilling:					
36-inch piles (temporary)—installation	9	1	9	0	0
36-inch piles (permanent)	18	1	18	0	0
42-inch piles	8	1	8	0	0
48-inch piles	10	1	10	0	0
Skiff use:					
Monitoring skiff	129	0	0	1	129
Worker transit skiff	129	0	0	1	129
Totals	387	7	70	37	544

Over the course of the project, we estimate 544 instances of take by Level B harassment of 37 northern sea otters from the Southcentral Alaska stock due to behavioral responses of TTS associated with noise exposure. Although multiple instances of Level B harassment of individual sea otters are possible, these events are unlikely to have significant consequences for the health, reproduction, or survival of affected animals and therefore would not rise to the level of an injury or Level A harassment.

The use of soft-start procedures, zone clearance prior to startup, and shutdown zones is likely to decrease both the number of sea otters exposed to sounds above Level A harassment thresholds and the exposure time of any sea otters venturing into a Level A harassment zone. This reduces the likelihood of losses of hearing sensitivity that might impact the health, reproduction, or survival of affected animals. Despite the implementation of mitigation measures, it is anticipated that some sea otters will experience Level A harassment via exposure to underwater sounds above threshold criteria during impact and DTH pile-driving activities. Due to sea otters' small body size and low profile in the water, as well as the relatively large size of the Level A harassment zone associated with these activities, we anticipate that sea otters will at times avoid detection before entering Level A harassment zones for those activities. We anticipate that PSOs will be able to reliably detect and prevent take by Level A harassment of sea otters up to 20 m away; conversely, we anticipate that at distances greater than 20 m, sea otters will at times avoid detection. Throughout the project, we estimate 70 instances of take by Level A harassment of 7 sea otters.

Determinations and Findings

Sea otters exposed to sound from the specified activities are likely to respond with temporary behavioral modification or displacement. The specified activities could temporarily interrupt the feeding, resting, and movement of sea otters. Because activities will occur during a limited amount of time and in a localized region, the impacts associated with the project are likewise temporary and localized. The anticipated effects are short-term behavioral reactions and displacement of sea otters near active operations.

Sea otters that encounter the specified activity may exert more energy than they would otherwise due to temporary cessation of feeding, increased vigilance, and retreating from the project area. We expect that affected sea otters will tolerate this exertion without measurable effects on health or reproduction. Most of the anticipated takes will be due to short-term Level B

harassment in the form of TTS, startling reactions, or temporary displacement. While mitigation measures incorporated into TMC's request will reduce occurrences of Level A harassment to the extent practicable, a small number of takes by Level A harassment would be authorized for impact and DTH pile-driving activities, which have Level A harassment zone radii ranging in size from 57.9 to 256 m (190 to 840 ft).

With the adoption of the mitigation measures incorporated in TMC's request and required by this proposed IHA, anticipated take was reduced. Those mitigation measures are further described below.

Small Numbers

To assess whether the authorized incidental taking would be limited to ''small numbers'' of marine mammals, the Service uses a proportional approach that considers whether the estimated number of marine mammals to be subjected to incidental take is small relative to the population size of the species or stock. Here, predicted levels of take were determined based on the estimated density of sea otters in the project area and ensonification zones developed using empirical evidence from similar geographic areas.

We estimate TMC's specified activities in the specified geographic region will take no more than 544 takes of 37 sea otters by Level B harassment and 70 takes of 7 sea otters by Level A harassment during the 1-year period of this proposed IHA (see *Sum of Take from All Sources*). Take of 44 animals is 0.2 percent of the best available estimate of the current Southcentral Alaska stock size of 21,617 animals (Esslinger et al. 2021) ($(44 \div 21{,}617) \times 100 \approx 0.2$) and represents a ''small number'' of sea otters of that stock.

Negligible Impact

We propose a finding that any incidental take by harassment resulting from the specified activities cannot be reasonably expected to, and is not reasonably likely to, adversely affect the sea otter through effects on annual rates of recruitment or survival and will, therefore, have no more than a negligible impact on the Southcentral Alaska stock of northern sea otters. In making this finding, we considered the best available scientific information, including the biological and behavioral characteristics of the species, the most recent information on species distribution and abundance within the area of the specified activities, the current and expected future status of the stock (including existing and foreseeable human and natural stressors), the potential sources of disturbance caused by the project, and the potential responses of marine mammals to this disturbance. In addition, we reviewed applicant-provided materials, information in our files and datasets, published reference materials, and species experts.

Sea otters are likely to respond to planned activities with temporary behavioral modification or temporary displacement. These reactions are not anticipated to have consequences for the long-term health, reproduction, or survival of affected animals. Most animals will respond to disturbance by moving away from the source, which may cause temporary interruption of foraging, resting, or other natural behaviors. Affected animals are expected to resume normal behaviors soon after exposure with no lasting consequences. Each sea otter is estimated to be exposed to construction noise for between 4 and 129 days per year, resulting in repeated exposures. However, injuries (*i.e.,* Level A harassment or PTS) due to chronic sound exposure is estimated to occur at a longer time scale (Southall et al. 2019). The area that will experience noise greater than Level B thresholds due to pile driving is small (less than 0.18 km^2), and an animal that may be disturbed could escape the noise by moving to nearby quiet areas. Further, sea otters spend over half of their time above the surface during the summer months (Esslinger et al. 2014), and likely no more than 70 percent of their time foraging during winter months (Gelatt et al. 2002), thus their ears will not be exposed to continuous noise, and the amount of time it may take for permanent injury is considerably longer than that of mammals primarily under water. Some animals may exhibit some of the stronger responses typical of Level B harassment, such as fleeing, interruption of feeding, or flushing from a haulout. These responses could have temporary biological impacts for affected individuals but are not anticipated to result in measurable changes in survival or reproduction.

The total number of animals affected and severity of impact is not sufficient to change the current population dynamics at the stock scale. Although the specified activities may result in approximately 614 incidental takes of 44 sea otters from the Southcentral Alaska stock, we do not expect this level of harassment to affect annual rates of recruitment or survival or result in adverse effects on the stock.

Our proposed finding of negligible impact applies to incidental take associated with the specified activities as mitigated by the avoidance and minimization measures identified in TMC's mitigation and monitoring plan. These mitigation measures are designed to minimize interactions with and impacts to sea otters. These measures and the monitoring and reporting procedures are required for the validity of our finding and are a necessary component of the proposed IHA. For these reasons, we propose a finding that the specified project will have a negligible impact on the Southcentral Alaska stock of northern sea otters.

Least Practicable Adverse Impacts

We find that the mitigation measures required by this proposed IHA will effect the least practicable adverse impacts on the stocks from any incidental take likely to occur in association with the specified activities. In making this finding, we considered the biological characteristics of sea otters, the nature of the specified activities, the potential effects of the activities on sea otters, the documented impacts of similar activities on sea otters, and alternative mitigation measures.

In evaluating what mitigation measures are appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses, we considered the manner and degree to which the successful implementation of the measures are expected to achieve this goal. We considered the nature of the potential adverse impact being mitigated (likelihood, scope, range), the likelihood that the measures will be effective if implemented, and the likelihood of effective implementation. We also considered the practicability of the measures for applicant implementation (*e.g.,* cost, impact on operations). We assessed whether any additional, practicable requirements could be implemented to further reduce effects, but did not identify any.

To reduce the potential for disturbance from acoustic stimuli associated with the activities, TMC will implement mitigation measures, including the following:

- Using the smallest diameter piles practicable while minimizing the overall number of piles;
- Using a project design that does not include dredging or blasting;
- Using pile caps made of high-density polyethylene or ultra-high-molecular-weight polyethylene softening materials during impact pile driving;
- Minimizing the use of the impact hammer to the extent possible by using

a vibratory hammer to advance piles as deeply as possible;

- Employing an 18-m (60-ft) deep bubble curtain during all impact pile driving as well as during all pile-driving activities in less than 18 m (60 ft) of water to reduce noise impacts;
- Not reducing sound source levels due to the planned use of pile caps and a bubble curtain to calculate the most conservative harassment and shutdown zones;
- Development of a marine mammal monitoring and mitigation plan;
- Establishment of shutdown and monitoring zones;
- Visual mitigation monitoring by designated protected species observers (PSO);
- Site clearance before startup;
- Soft-start procedures; and
- Shutdown procedures.

The Service has not identified any additional (*i.e.,* not already incorporated into TMC's request) mitigation or monitoring measures that are practicable and would further reduce potential impacts to sea otters and their habitat.

Impact on Subsistence Use

The project will not preclude access to harvest areas or interfere with the availability of sea otters for harvest. Additionally, the planned cruise ship berth and associated facilities are located within the City of Whittier, where firearm use is prohibited. We therefore propose a finding that TMC's anticipated harassment will not have an unmitigable adverse impact on the availability of any stock of northern sea otters for taking for subsistence uses. In making this finding, we considered the timing and location of the planned activities and the timing and location of subsistence harvest activities in the project area.

Monitoring and Reporting

The purposes of the monitoring requirements are to document and provide data for assessing the effects of specified activities on sea otters; to ensure that take is consistent with that anticipated in the small numbers, negligible impact, and subsistence use analyses; and to detect any unanticipated effects on the species. Monitoring plans include steps to document when and how sea otters are encountered and their numbers and behaviors during these encounters. This information allows the Service to measure encounter rates and trends and to estimate numbers of animals potentially affected. To the extent possible, monitors will record group size, age, sex, reaction, duration of interaction, and closest approach to the project activity.

As proposed, monitoring activities will be summarized and reported in formal reports. TMC must submit monthly reports for all months during which noise-generating work takes place as well as a final monitoring report that must submitted no later than 90 days after the expiration of the IHA. We will require an approved plan for monitoring and reporting the effects of pile driving and marine construction activities on sea otters prior to issuance of an IHA. We will require approval of the monitoring results for continued operation under the IHA.

We find that these proposed monitoring and reporting requirements to evaluate the potential impacts of planned activities will ensure that the effects of the activities remain consistent with the rest of the findings.

Required Determinations

National Environmental Policy Act (NEPA)

We have prepared a draft environmental assessment in accordance with the NEPA (42 U.S.C. 4321 et seq.). We have preliminarily concluded that authorizing the nonlethal, incidental, unintentional take by Level B harassment of up to 544 takes of 37 sea otters and by Level A harassment of up to 70 takes of 7 sea otters from the Southcentral Alaska stock in the specified geographic region during the specified activities during the regulatory period would not significantly affect the quality of the human environment and, thus, preparation of an environmental impact statement for this proposed IHA is not required by section 102(2) of NEPA or its implementing regulations. We are accepting comments on the draft environmental assessment as specified above in **DATES** and **ADDRESSES**.

Endangered Species Act (ESA)

Under the ESA (16 U.S.C. 1536(a)(2)), all Federal agencies are required to ensure the actions they authorize are not likely to jeopardize the continued existence of any threatened or endangered species or result in destruction or adverse modification of critical habitat. The specified activities would occur entirely within the range of the Southcentral Alaska stock of northern sea otters, which is not listed as threatened or endangered under the ESA. The authorization of incidental take of sea otters and the measures included in the proposed IHA would not affect other listed species or designated critical habitat.

Government-to-Government Consultation

It is our responsibility to communicate and work directly on a Government-to-Government basis with federally recognized Alaska Native Tribes in developing programs for healthy ecosystems. We seek their full and meaningful participation in evaluating and addressing conservation concerns for protected species. It is our goal to remain sensitive to Alaska Native culture, and to make information available to Alaska Natives. Our efforts are guided by the following policies and directives:

(1) *The Native American Policy of the Service* (January 20, 2016);

(2) *The Alaska Native Relations Policy* (currently in draft form);

(3) *Executive Order 13175* (January 9, 2000);

(4) *Department of the Interior Secretary's Orders 3206* (June 5, 1997), *3225* (January 19, 2001), *3317* (December 1, 2011), and *3342* (October 21, 2016);

(5) *The Alaska Government-to-Government Policy* (a departmental memorandum issued January 18, 2001); and

(6) The Department of the Interior's policies on consultation with Alaska Native Tribes and organizations.

We have evaluated possible effects of the specified activities on federally recognized Alaska Native Tribes and organizations. The Service has determined that, due to this project's locations and activities, the Tribal organizations and communities near Whittier, Alaska, as well as relevant Alaska Native Claims Settlement Act corporations, will not be impacted by this project. Regardless, we will be reaching out to them to inform them of the availability of this proposed IHA and offer them the opportunity to consult.

We invite continued discussion, either about the project and its impacts or about our coordination and information exchange throughout the IHA process.

Proposed Authorization

We propose to authorize the nonlethal, incidental take by Level A and Level B harassment of 614 takes of 44 sea otters from the Southcentral Alaska stock. Authorized take may be caused by pile driving and marine construction activities conducted by Turnagain Marine Construction (TMC) in Whittier, Alaska, over the course of a year from the date of issuance of the IHA. We do not anticipate or authorize any lethal take to sea otters resulting from these activities.

A. General Conditions for the Incidental Harassment Authorization (IHA)

(1) Activities must be conducted in the manner described in the December 22, 2022, revised request from TMC for an IHA and in accordance with all applicable conditions and mitigation measures. The taking of sea otters whenever the required conditions, mitigation, monitoring, and reporting measures are not fully implemented as required by the IHA is prohibited. Failure to follow the measures specified both in the revised request and within this proposed authorization may result in the modification, suspension, or revocation of the IHA.

(2) If project activities cause unauthorized take (*i.e.,* greater than 614 takes of 44 of the Southcentral Alaska stock of northern sea otters, a form of take other than Level A or Level B harassment, or take of one or more sea otters through methods not described in the IHA), TMC must take the following actions:

(i) cease its activities immediately (or reduce activities to the minimum level necessary to maintain safety);

(ii) report the details of the incident to the Service within 48 hours; and

(iii) suspend further activities until the Service has reviewed the circumstances and determined whether additional mitigation measures are necessary to avoid further unauthorized taking.

(3) All operations managers, vehicle operators, and machine operators must receive a copy of this IHA and maintain access to it for reference at all times during project work. These personnel must understand, be fully aware of, and be capable of implementing the conditions of the IHA at all times during project work.

(4) This IHA will apply to activities associated with the specified project as described in this document and in TMC's revised request. Changes to the specified project without prior authorization may invalidate the IHA.

(5) TMC's revised request is approved and fully incorporated into this IHA unless exceptions are specifically noted herein. The request includes:

(i) TMC's original request for an IHA, dated September 16, 2022;

(ii) Revised applications, dated November 11, November 23, December 1, and December 22, 2022;

(iii) Marine Mammal Mitigation and Monitoring Plan;

(iv) Google Earth package;

(v) Bubble curtain schematics; and

(vi) Pile coordinates.

(6) Operators will allow Service personnel or the Service's designated representative to visit project worksites to monitor for impacts to sea otters and subsistence uses of sea otters at any time throughout project activities so long as it is safe to do so. ''Operators'' are all personnel operating under TMC's authority, including all contractors and subcontractors.

B. Avoidance and Minimization

(7) Construction activities must be conducted using equipment that generates the lowest practicable levels of underwater sound within the range of frequencies audible to sea otters.

(8) During all pile-installation activities, regardless of predicted sound levels, a physical interaction shutdown zone of 20 m (66 ft) must be enforced. If a sea otter enters the shutdown zone, in-water activities must be delayed until either the animal has been visually observed outside the shutdown zone, or 15 minutes have elapsed since the last observation time without redetection of the animal.

(9) If the impact driver has been idled for more than 30 minutes, an initial set of three strikes from the impact driver must be delivered at reduced energy, followed by a 1-minute waiting period, before full-powered proofing strikes.

(10) In-water activity must be conducted in daylight. If environmental conditions prevent visual detection of sea otters within the shutdown zone, in-water activities must be stopped until visibility is regained.

(11) All in-water work along the shoreline must be conducted during low tide when the site is dewatered to the maximum extent practicable.

C. Mitigation Measures for Vessel Operations

Vessel operators must take every precaution to avoid harassment of sea otters when a vessel is operating near these animals. The applicant must carry out the following measures:

(12) Vessels must remain at least 500 m (0.3 mi) from rafts of sea otters unless safety is a factor. Vessels must reduce speed and maintain a distance of 100 m (328 ft) from all sea otters unless safety is a factor.

(13) Vessels must not be operated in such a way as to separate members of a group of sea otters from other members of the group and must avoid alongshore travel in shallow water (<20 m) whenever practicable.

(14) When weather conditions require, such as when visibility drops, vessels must adjust speed accordingly to avoid the likelihood of injury to sea otters.

(15) Vessel operators must be provided written guidance for avoiding collisions and minimizing disturbances to sea otters. Guidance will include measures identified in paragraphs (C)(12) through (15) of this section.

D. Monitoring

(16) Operators shall work with protected species observers (PSOs) to apply mitigation measures and shall recognize the authority of PSOs up to and including stopping work, except where doing so poses a significant safety risk to personnel.

(17) Duties of the PSOs include watching for and identifying sea otters, recording observation details, documenting presence in any applicable monitoring zone, identifying and documenting potential harassment, and working with operators to implement all appropriate mitigation measures.

(18) A sufficient number of PSOs will be available to meet the following criteria: 100 percent monitoring of exclusion zones during all daytime periods of underwater noise-generating work; a maximum of 4 consecutive hours on watch per PSO; a maximum of approximately 12 hours on watch per day per PSO.

(19) All PSOs will complete a training course designed to familiarize individuals with monitoring and data collection procedures. A field crew leader with prior experience as a sea otter observer will supervise the PSO team. Initially, new or inexperienced PSOs will be paired with experienced PSOs so that the quality of marine mammal observations and data recording is kept consistent. Resumes for candidate PSOs will be made available for the Service to review.

(20) Observers will be provided with reticule binoculars (7×50 or better), big-eye binoculars or spotting scopes (30×), inclinometers, and range finders. Field guides, instructional handbooks, maps, and a contact list will also be made available.

(21) Observers will collect data using the following procedures:

(i) All data will be recorded onto a field form or database.

(ii) Global positioning system data, sea state, wind force, and weather will be collected at the beginning and end of a monitoring period, every hour in between, at the change of an observer, and upon sightings of sea otters.

(iii) Observation records of sea otters will include date; time; the observer's locations, heading, and speed (if moving); weather; visibility; number of animals; group size and composition (adults/juveniles); and the location of the animals (or distance and direction from the observer).

(iv) Observation records will also include initial behaviors of the sea otters, descriptions of project activities and underwater sound levels being generated, the position of sea otters relative to applicable monitoring and mitigation zones, any mitigation measures applied, and any apparent reactions to the project activities before and after mitigation.

(v) For all sea otters in or near a mitigation zone, observers will record the distance from the sound source to the sea otter upon initial observation, the duration of the encounter, and the distance at last observation in order to monitor cumulative sound exposures.

(vi) Observers will note any instances of animals lingering close to or traveling with vessels for prolonged periods of time.

(22) Monitoring of the shutdown zone must continue for 30 minutes following completion of pile installation.

E. Measures To Reduce Impacts to Subsistence Users

(23) Prior to conducting the work, TMC will take the following steps to reduce potential effects on subsistence harvest of sea otters:

(i) Avoid work in areas of known sea otter subsistence harvest;

(ii) Discuss the planned activities with subsistence stakeholders including Southcentral Alaska villages and traditional councils;

(iii) Identify and work to resolve concerns of stakeholders regarding the project's effects on subsistence hunting of sea otters; and

(iv) If any concerns remain, develop a POC in consultation with the Service and subsistence stakeholders to address these concerns.

F. Reporting Requirements

(24) TMC must notify the Service at least 48 hours prior to commencement of activities.

(25) Monthly reports will be submitted to the Service's Marine Mammal Management office (MMM) for all months during which noise-generating work takes place. The monthly report will contain and summarize the following information: dates, times, weather, and sea conditions (including the Beaufort Scale sea state and wind force conditions) when sea otters were sighted; the number, location, distance from the sound source, and behavior of the sea otters; the associated project activities; and a description of the implementation and effectiveness of mitigation measures with a discussion of any specific behaviors the sea otters exhibited in response to mitigation.

(26) A final report will be submitted to the Service's MMM within 90 days after completion of work or expiration of the IHA. The report will include:

(i) A summary of monitoring efforts (hours of monitoring, activities monitored, number of PSOs, and, if requested by the Service, the daily monitoring logs).

(ii) A description of all project activities, along with any additional work yet to be done. Factors influencing visibility and detectability of marine mammals (*e.g.,* sea state, number of observers, and fog and glare) will be discussed.

(iii) A description of the factors affecting the presence and distribution of sea otters (*e.g.,* weather, sea state, and project activities). An estimate will be included of the number of sea otters exposed to noise at received levels greater than or equal to 160 dB (based on visual observation).

(iv) A description of changes in sea otter behavior resulting from project activities and any specific behaviors of interest.

(v) A discussion of the mitigation measures implemented during project activities and their observed effectiveness for minimizing impacts to sea otters. Sea otter observation records will be provided to the Service in the form of electronic database or spreadsheet files.

(27) Injured, dead, or distressed sea otters that are not associated with project activities (*e.g.,* animals known to be from outside the project area, previously wounded animals, or carcasses with moderate to advanced decomposition or scavenger damage) must be reported to the Service within 24 hours of the discovery to either the Service's MMM (1–800–362–5148, business hours); or the Alaska SeaLife Center in Seward (1–888–774–7325, 24 hours a day); or both. Photographs, video, location information, or any other available documentation must be provided to the Service.

(28) All reports shall be submitted by email to *fw7_mmm_reports@fws.gov.*

(29) TMC must notify the Service upon project completion or end of the work season.

Request for Public Comments

If you wish to comment on this proposed authorization, the associated draft environmental assessment, or both documents, you may submit your comments by either of the methods described in **ADDRESSES**. Please identify if you are commenting on the proposed authorization, draft environmental assessment, or both, make your comments as specific as possible, confine them to issues pertinent to the proposed authorization, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph that you are addressing. The Service will consider all comments that are received before the close of the comment period (see **DATES**). The Service does not anticipate extending the public comment period beyond the 30 days required under section 101(a)(5)(D)(iii) of the MMPA.

Comments, including names and street addresses of respondents, will become part of the administrative record for this proposal. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Peter Fasbender,

Assistant Regional Director for Fisheries and Ecological Services, Alaska Region.

[FR Doc. 2023–12233 Filed 6–7–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AK_FRN_MO4500170694; AA–26417]

Public Land Order No. 7925; Extension of a Withdrawal Created by Executive Order, Modified by Public Land Order No. 6458; Sitka Magnetic Observatory Site; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This Public Land Order (PLO) extends the duration of the withdrawal created by Executive Order, as modified by PLO No. 6458 and extended by PLO No. 7581, for an additional 20-year term. The Executive Order as modified and extended withdrew 117.13 acres of public land from all forms of appropriation under the public land laws, including the mining laws, but not from the mineral leasing laws, for the Sitka Magnetic Observatory site, and reserved the site for use by the United States Geological Survey as a magnetic and seismological observatory in Sitka, Alaska.

DATES: This PLO takes effect on September 6, 2023.

FOR FURTHER INFORMATION CONTACT: Chelsea Kreiner, BLM Alaska State Office, 222 West Seventh Avenue, Mailstop 13, Anchorage, AK 99513–7504, 907–271–4205, or *ckreiner@blm.gov*. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The purpose for which the withdrawal was first made requires this extension for continued use of the lands as a magnetic and seismological observatory.

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, E.O. No. 8854 (6 FR 4181 (1941)), as modified by PLO No. 6458 (48 FR 40232 (1983)) and extended by PLO No. 7581 (68 FR 52613 (2003)), which withdrew 117.13 acres of public land from all forms of appropriation under the public land laws, including the mining laws, but not from the mineral leasing laws, for the Sitka Magnetic Observatory site, and reserved it for use by the United States Geological Survey as a magnetic and seismological observatory in Sitka, Alaska, is hereby extended for an additional 20-year period.

2. The withdrawal extended by this Order will expire on September 5, 2043, unless, as a result of a review conducted prior to the expiration date, pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

(Authority: 43 U.S.C. 1714)

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–12212 Filed 6–7–23; 8:45 am]

BILLING CODE 4331–10–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035974; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Detroit Institute of Arts, Detroit, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Detroit Institute of Arts has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were most likely removed from the upper peninsula of Michigan.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after July 10, 2023.

ADDRESSES: Denene De Quintal, Detroit Institute of Arts, 5200 Woodward Avenue, Detroit, MI 48202, telephone (313) 578–1067, email *NAGPRA@dia.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Detroit Institute of Arts. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Detroit Institute of Arts.

Description

Human remains representing, at minimum, two individuals were removed from a location most likely in the upper peninsula of Michigan. On May 19, 2021, Detroit Institute of Arts staff encountered these human remains (X1989.3768) during a comprehensive review of the Indigenous America collection. No known individuals were identified. The two associated funerary objects (X1989.3768) are one rim sherd and one rodent rib fragment.

Aboriginal Land

The human remains and associated funerary objects in this notice were removed from a known geographic location. This location is the aboriginal land of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission, the United States Court of Claims, a treaty, an Act of Congress, and an Executive Order.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the Detroit Institute of Arts has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- The two objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana; Citizen Potawatomi Nation, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band;

Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan; Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians; Seneca-Cayuga Nation; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Tonawanda Band of Seneca; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.

Requests for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after July 10, 2023. If competing requests for disposition are received, the Detroit Institute of Arts must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The Detroit Institute of Arts is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12279 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035978; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Denver Museum of Nature & Science. Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Denver Museum of Nature & Science intends to repatriate certain cultural items that meet both the definition of sacred objects and the definition of objects of cultural patrimony, and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from the State of New York and Canada.

DATES: Repatriation of the cultural items in this notice may occur on or after July 10, 2023.

ADDRESSES: Chris Patrello, Curator of Anthropology, Denver Museum of Nature & Science, 2001 Colorado Blvd., Denver CO 80205, telephone (303) 370–6378, email *chris.patrello@dmns.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Denver Museum of Nature & Science. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Denver Museum of Nature & Science.

Description

The 83 cultural items listed in this notice were removed from several locations in the State of New York and Ontario, Canada, beginning in 1965. Of this number, 79 cultural items were purchased by collectors Mary and Francis Crane, who donated their collection to the Denver Museum of Nature & Science (then the Denver Museum of Natural History) between 1968 and 1983. In 1965, the Cranes purchased from Gerald Fenstermaker eight Medicine Faces (AC.8544, AC.9717, AC.9722, AC.9724, AC.9727, AC.9728, AC.9729, AC.9742); two Corn Husk Faces (AC.9709, AC.9711); two Husk Face Figurines comprising a set (AC.9825A–B); three Medicine Face Figurines comprising a set (AC.9826A–C); nine Medicine Face Figurines comprising a set (AC.8554A–I); and 10 Medicine Face Figurines comprising a set (AC.11957A–J). These cultural items had been removed from various locations in the State of New York and Ontario, Canada. Between 1965 and 1967, the Cranes purchased from Howard B. Roloff three Corn Husk Faces (AC.8341, AC.8381 AC.9714); 25 Medicine Faces (AC.8375, AC.8379, AC.8390, AC.8391, AC.8444, AC.10284, AC.10285, AC.10319, AC.10330, AC.10333A–K, AC.8406A–E); 12 Medicine Face Figurines comprising a set (AC.8285A–L); and four Medicine Face Figurines comprising a set (AC.10328). These cultural items had been acquired from the Six Nations of the Grand River Reserve in Ontario, Canada. In 1969, the Cranes purchased a figurine wearing a Medicine Face from the Las Novedades Gallery in Taos, NM (AC.7684). The figurine is identified as Haudenosaunee.

In 1990, one Medicine Face (A1648.1) was transferred from the Museum's Education Collection to its Anthropology Collection. In 1999, during a NAGPRA consultation, representatives of the Haudenosaunee Confederacy suggested that this cultural item is a copy of an older mask made by Elon Webster, an Onondaga carver from the Tonawanda Reservation in New York.

In 1989, the Museum purchased three cultural items from William H. Hensler of Aurora, CO. Hensler had acquired these items from Iroqrafts, an arts and crafts store located on the Six Nations of the Grand River Reserve in Canada. The items are three Medicine Faces (A1633.1, A1633.2, and A1633.3). Museum records indicate that A1633.1 and A1633.2 were made by ''He Keeps Ice'' and are affiliated with the Cayuga Wolf clan, and that A1633.3 was made by ''Across the River'' and is affiliated with the Mohawk Turtle Clan.

The Denver Museum of Nature & Science acknowledges that the Haudenosaunee Confederacy predates the establishment of the geopolitical borders that separate its territories. Haudenosaunee communities maintain unbroken political, cultural, spiritual, and economic ties to their lands. The cultural items listed in this notice belong to the Confederacy, and as Keepers of the Central Fire of the Haudenosaunee, the Onondaga Nation is responsible for their care and protection. In a letter dated Feb. 21, 2022, Christine G. Abrams, Acting Chair of the Haudenosaunee Standing Committee on Burial Rules and

Regulations, informed the Museum that the Standing Committee had approved the Onondaga Nation's request to repatriate Medicine Faces, Corn Husk Faces, and figurines wearing Medicine Faces or Corn Husk Faces designated as ''Haudenosaunee,'' ''Iroquois,'' and ''Grand River,'' as well as those with multiple affiliations.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, folkloric, geographical, historical, oral traditional, other relevant information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Denver Museum of Nature & Science has determined that:

- The 83 cultural items described above have ongoing historical traditional or cultural importance central to the Native American Group or culture itself, rather than property owned by an individual.
- The 83 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Onondaga Nation.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES.** Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, the Denver Museum of Nature & Science must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Denver Museum of Nature & Science is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12283 Filed 6–7–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035977; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Rochester Museum & Science Center, Rochester, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Rochester Museum & Science Center (RMSC) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Broome County, NY.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after July 10, 2023.

ADDRESSES: Kathryn Murano Santos, Rochester Museum & Science Center, 657 East Avenue, Rochester, NY 14607, telephone (585) 697–1929, email *kmurano@rmsc.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Rochester Museum & Science Center. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Rochester Museum & Science Center.

Description

Human remains representing, at minimum, seven individuals were removed from the Palmer (F.A. Rider) Site (Ap1 001) in Broome County, NY. The individuals were excavated during RMSC expeditions in 1931, 1933, and 1948. No known individuals were identified. Of the eight associated funerary objects listed in this notice, two objects are present and accounted for in the RMSC collections and six objects are currently missing. (Rochester Museum & Science Center continues to look for these missing objects.) The two present associated funerary objects are one lot of sherds and one lot of bear skeletons. The six currently missing associated funerary objects are one deer skull; two stone net sinkers; one miniature pot; and two body sherds.

Human remains representing, at minimum, 27 individuals were removed from the Roger P. Clark Site (Bgh 002) in Broome County, NY. The individuals were excavated by the Rochester Museum in 1929 and 1930. No known individuals were identified. The one associated funerary object is a lot of mixed soil and bone fragments.

Human remains representing, at minimum, one individual were removed from the Roger P. Clark Site (Bgh 002) in Broome County, NY. The individual was removed by Mr. Clark in 1930. No known individual was identified. The one associated funerary object is one lot of brass thimbles with thongs.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following type of information was used to reasonably trace the relationship: geographical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Rochester Museum & Science Center has determined that:

- The human remains described in this notice represent the physical remains of 35 individuals of Native American ancestry.

• The 10 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

• There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Delaware Nation, Oklahoma; Delaware Tribe of Indians; Oneida Indian Nation; Oneida Nation; Onondaga Nation; and the Tuscarora Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, the Rochester Museum & Science Center must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Rochester Museum & Science Center is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12282 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035980; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent to Repatriate Cultural Items: Fine Arts Museums of San Francisco, San Francisco, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Fine Arts Museums of San Francisco intends to repatriate a cultural item that meets the definitions of both a sacred object and an object of cultural patrimony and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural item was removed from Acoma, NM.

DATES: Repatriation of the cultural item in this notice may occur on or after July 10, 2023.

ADDRESSES: Christina Hellmich, Fine Arts Museums of San Francisco, 50 Hagiwara Tea Garden Drive, San Francisco, CA 94118, telephone (415) 750–2621, email *chellmich@famsf.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Fine Arts Museums of San Francisco. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Fine Arts Museums of San Francisco.

Description

On an unknown date the one cultural item was removed from Acoma, NM. The cultural item is a shield. The provenance of the shield is documented by two art exhibitions and accompanying catalogues at the Art Institute of Chicago and the Aspen Center for the Visual arts in 1977 and 1979, respectively. In 1977, Robert & Sharon Ashton of Santa Fe, NM, were listed as the owners of the shield. From 1979 to 1985, the shield was in the private collection of Jonathan and Philip M. Holstein of The Thundercloud Corporation, Aspen, CO. In 1985, the shield was sold to Thomas W. Weisel. It was in the Thomas W. Weisel Family Collection, Ross, CA, from 1985 until 2013, when it was gifted to the Fine Arts Museums of San Francisco. The shield is both a sacred object and an object of culturally patrimony.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: art historical, oral traditional, other relevant information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Fine Arts Museums of San Francisco has determined that:

• The one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

• The one cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.

• There is a relationship of shared group identity that can be reasonably traced between the cultural item and the Pueblo of Acoma, New Mexico.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, the Fine Arts Museums of San Francisco must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The Fine Arts Museums of San Francisco is

responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12285 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035975; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Kansas City Museum, Kansas City, MO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Kansas City Museum has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Amchitka Island, AK.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after July 10, 2023.

ADDRESSES: Lisa Shockley, Kansas City Museum, 3218 Gladstone Blvd., Kansas City, MO 64133, telephone (816) 702–7700, email *lshockley@kansascitymuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Kansas City Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Kansas City Museum.

Description

In 1943, human remains representing, at minimum, one individual were removed from Amchitka Island, AK, (catalogue number: 1961.56.8). The collector removed these human remains while stationed at a now-abandoned nuclear test site on Amchitka Island, in the Aleutian Islands, and subsequently donated them to the Kansas City Museum. The human remains—a jawbone fragment without teeth and a jawbone fragment with a single tooth—belong to an individual of unknown age and sex. The one associated funerary object is a faunal tooth, possibly from a bear.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Kansas City Museum has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- The one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary object described in this notice and the Native Village of Atka.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, the Kansas City Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Kansas City Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12280 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035976; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Kansas City Museum, Kansas City, MO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Kansas City Museum (KCM) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from Platte County, MO.

DATES: Repatriation of the human remains in this notice may occur on or after July 10, 2023.

ADDRESSES: Lisa Shockley, Kansas City Museum, 3218 Gladstone Blvd., Kansas City, MO 64133, telephone (816) 702–7700, email *lshockley@kansascitymuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Kansas City Museum. The National Park Service is not responsible for the determinations

in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Kansas City Museum.

Description

In 1954, human remains representing, at minimum, one individual were removed from site 23PL1, commonly referred to as the Renner Site, in Platte County, MO. These human remains (catalogue number: I.1995.268 (part of 2000.7)) were excavated with the private landowner's permission during an archeological project conducted jointly by the Kansas City Museum, the University of Missouri, and the Kansas City Archaeological Society. The human remains—skull fragments—belong to a subadult of unknown sex. No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical, historical, and expert opinion.

Determination

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Kansas City Museum has determined that:

- The human remains described in this notice represent the physical remains of at least one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Pawnee Nation of Oklahoma.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, the Kansas City Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The Kansas City Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12281 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0035979; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: University of California, Davis, Davis, CA, and University of California, Berkeley, Berkeley, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of California, Davis (UC Davis) and University of California, Berkeley (UC Berkeley) intend to repatriate certain cultural items that meet the definition of unassociated funerary objects and certain cultural items that meet the definition of objects of cultural patrimony, and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Sacramento County, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after July 10, 2023.

ADDRESSES: Megon Noble, NAGPRA Project Manager, University of California, Davis, 412 Mrak Hall, One Shields Avenue, Davis, CA 95616, telephone (530) 752–8501, email *mnoble@ucdavis.edu,* and Alex Lucas, Repatriation Coordinator, University of California, Berkeley, Office of Government and Community Relations, 120 California Hall, Berkeley, CA 94720, telephone (510) 570–0964, email *nagpra-ucb@berkeley.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of UC Davis and UC Berkeley. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by UC Davis and UC Berkeley.

Description

The four cultural items listed in this notice were removed from a site along the American River (CA–SAC–157) in Sacramento County, CA.

In 1981, as a part of an archeology course, Richard Burrill, Cordova Senior High School, removed archeological items from CA–SAC–157. Subsequently, these items were donated to the Folsom Historical Society, and in 2016, they were transferred to the UC Davis Shields Library. The items include two lots of unassociated funerary objects, only one of which is present and accounted for in the UC Davis collections. The unassociated funerary objects are one lot consisting of abalone shells and one lot consisting of projectile points, flakes, a scraper, a net weight, and a clamshell disc bead.

On February 16, 1942, Jeremiah B. Lillard, Harry Wanzer, and the Sacramento County Board of Education gifted archeological items from CA–SAC–157 to the Phoebe A. Hearst Museum at the University of California, Berkeley. These items include one lot of unassociated funerary objects consisting of sinkers, mortars, and pestles.

On June 3, 1938, the Phoebe A. Hearst Museum of Anthropology at the University of California, Berkeley, acquired archeological items from CA–SAC–157 that were excavated by Robert Fleming Heizer and the University of California Field Party. These items include one lot of objects of cultural patrimony consisting of awls, ulnas, points, pestles, mortars, shells, and flakes.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more

Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, folkloric, geographical, historical, kinship, linguistic, oral traditional, and other relevant information or expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, UC Davis and UC Berkeley have determined that:

- The three lots of cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- The one lot of cultural items described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Wilton Rancheria, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after July 10, 2023. If competing requests for repatriation are received, UC Davis and UC Berkeley must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. UC Davis and UC Berkeley are responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: May 31, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–12284 Filed 6–7–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[DOI–2023–0007; RR83570000, 23XR0680A4, RX.19520003.9WONTEL]

Privacy Act of 1974; System of Records

AGENCY: Bureau of Reclamation, Interior.

ACTION: Rescindment of a system of records notice.

SUMMARY: The Department of the Interior (DOI) is issuing a public notice of its intent to rescind the Bureau of Reclamation (Reclamation) Privacy Act system of records notice (SORN), INTERIOR/WBR–37, Trespass Cases, from its existing inventory. Reclamation has decommissioned records previously maintained within this system and migrated those records into the INTERIOR/DOI–10, Incident Management, Analysis and Reporting System. This rescindment will eliminate an unnecessary duplicate notice and promote the overall streamlining and management of DOI Privacy Act systems of records.

DATES: These changes take effect on June 8, 2023.

ADDRESSES: You may submit comments identified by docket number [DOI–2023–0007] by any of the following methods:

- *Federal e-Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: DOI_Privacy@ios.doi.gov.* Include docket number [DOI–2023–0007] in the subject line of the message.
- *U.S. Mail or Hand-Delivery:* Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C Street NW, Room 7112, Washington, DC 20240.

Instructions: All submissions received must include the agency name and docket number [DOI–2023–0007]. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

You should be aware your entire comment including your personally identifiable information, such as your address, phone number, email address, or any other personal information in your comment, may be made publicly available at any time. While you may request to withhold your personally identifiable information from public review, we cannot guarantee we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Regina Magno, Associate Privacy Officer, Bureau of Reclamation, P.O. Box 25007, Denver, CO 80225, *privacy@usbr.gov* or (303) 445–3326.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, Reclamation is rescinding the INTERIOR/WBR–37, Trespass Cases, SORN from its inventory. This system was used to manage Reclamation's trespass cases and investigations records. During a review of systems of records, Reclamation determined that trespass case records are covered by DOI's Department-wide SORN for incident reporting and law enforcement investigations, INTERIOR/DOI–10, Incident Management, Analysis and Reporting System, 79 FR 31974 (June 3, 2014); modification published at 86 FR 50156 (September 7, 2021). Reclamation has migrated trespass case records into the Department-wide system and is rescinding the INTERIOR/WBR–37, Trespass Cases, SORN to eliminate an unnecessary duplicate notice in accordance with OMB Circular A–108, *Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act.*

Rescinding the INTERIOR/WBR–37, Trespass Cases, SORN will have no adverse impacts on individuals as the records are covered under INTERIOR/DOI–10, Incident Management, Analysis and Reporting System, and individuals may continue to seek access or correction to their records under this notice. This rescindment will also promote the overall streamlining and management of DOI Privacy Act systems of records. This notice hereby rescinds the INTERIOR/WBR–37, Trespass Cases, SORN as identified below.

SYSTEM NAME AND NUMBER:

INTERIOR/WBR–37, Trespass Cases.

HISTORY:

64 FR 29876 (June 3, 1999); modification published at 73 FR 20949 (April 17, 2008).

Teri Barnett,

Departmental Privacy Officer, Department of the Interior.

[FR Doc. 2023–12257 Filed 6–7–23; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–571–572 and 731–TA–1347–1348 (Review)]

Biodiesel From Argentina and Indonesia

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping and countervailing duty orders on biodiesel from Argentina and Indonesia would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on December 1, 2022 (87 FR 73781) and determined on March 6, 2023 that it would conduct expedited reviews (88 FR 19668, April 3, 2023).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on June 2, 2023. The views of the Commission are contained in USITC Publication 5428 (June 2023), entitled *Biodiesel from Argentina and Indonesia: Investigation Nos. 701–TA–571–572 and 731–TA–1347–1348 (Review).*

By order of the Commission.

Issued: June 2, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–12222 Filed 6–7–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–683 and 731–TA–1594–1596 (Final)]

Paper File Folders From China, India, and Vietnam; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–683 and 731–TA–1594–1596 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of paper file folders from China, India, and Vietnam, provided for in subheading 4820.30.00 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: May 17, 2023.

FOR FURTHER INFORMATION CONTACT: Calvin Chang ((202) 205–3062), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as file folders consisting primarily of paper, paperboard, pressboard, or other cellulose material, whether coated or uncoated, that has been folded (or creased in preparation to be folded), glued, taped, bound, or otherwise assembled to be suitable for holding documents. The scope includes all such folders, regardless of color, whether or not expanding, whether or not laminated, and with or without tabs, fasteners, closures, hooks, rods, hangers, pockets, gussets, or internal dividers. The term ''primarily'' as used in the first sentence of this scope means 50 percent or more of the total product weight, exclusive of the weight of fasteners, closures, hooks, rods, hangers, removable tabs, and similar accessories, and exclusive of the weight of packaging.

Subject folders have the following dimensions in their folded and closed position: lengths and widths of at least 8 inches and no greater than 17 inches, regardless of depth.

The scope covers all varieties of folders, including but not limited to manila folders, hanging folders, fastener folders, classification folders, expanding folders, pockets, jackets, and wallets.

Excluded from the scope are:

- mailing envelopes with a flap bearing one or more adhesive strips that can be used permanently to seal the entire length of a side such that, when sealed, the folder is closed on all four sides;
- binders, with two or more rings to hold documents in place, made from paperboard or pressboard encased entirely in plastic;
- binders consisting of a front cover, back cover, and spine, with or without a flap; to be excluded, a mechanism with two or more metal rings must be included on or adjacent to the interior spine;
- non-expanding folders with a depth exceeding 2.5 inches and that are closed or closeable on the top, bottom, and all four sides (*e.g.,* boxes or cartons);
- expanding folders that have (1) 13 or more pockets, (2) a flap covering the top, (3) a latching mechanism made of plastic and/or metal to close the flap, and (4) an affixed plastic or metal carry handle;
- folders that have an outer surface (other than the gusset, handles, and/or closing mechanisms, if any) that is covered entirely with fabric, leather, and/or faux leather;
- fashion folders, which are defined as folders with all of the following characteristics: (1) plastic lamination covering the entire exterior of the folder, (2) printing, foil stamping, embossing (*i.e.,* raised relief patterns that are recessed on the opposite side), and/or debossing (*i.e.,* recessed relief patterns that are raised on the opposite side), covering the entire exterior surface area of the folder, (3) at least two visible and printed or foil stamped colors other than the color of the base paper, and other than the printing of numbers, letters, words, or logos, each of which separately covers no less than 10 percent of the entire exterior surface area, and (4) patterns, pictures, designs, or artwork covering no less than thirty percent of the exterior surface area of the folder;
- portfolios, which are folders having (1) a width of at least 16 inches when open flat, (2) no tabs or dividers, and (3) one or more pockets that are suitable for holding letter size documents and that cover at least 15 percent of the surface area of the relevant interior side or sides; and

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

• report covers, which are folders having (1) no tabs, dividers, or pockets, and (2) one or more fasteners or clips, each of which is permanently affixed to the center fold, to hold papers securely in place.

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that certain benefits which constitute subsidies within the meaning of § 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in India of paper file folders, and that such products from China, India, and Vietnam are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b). The investigations were requested in petitions filed on October 12, 2023, by the Coalition of Domestic Folder Manufacturers, Hastings, Minnesota and Naperville, Illinois.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on September 19, 2023, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, October 3, 2023. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before September 27, 2023. Any requests to appear as a witness via videoconference must be included with your request to appear. Requests to appear via videoconference must include a statement explaining why the witness cannot appear in person; the Chairman, or other person designated to conduct the investigation, may in their discretion for good cause shown, grant such a request. Requests to appear as remote witness due to illness or a positive COVID–19 test result may be submitted by 3pm the business day prior to the hearing. Further information about participation in the hearing will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.*

A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference, if deemed necessary, to be held at 9:30 a.m. on September 29, 2023. Parties shall file and serve written testimony and presentation slides in connection with their presentation at the hearing by no later than 4:00 p.m. on October 2, 2023. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is September 26, 2023. Parties shall also file written testimony in connection with their presentation at the hearing, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is October 11, 2023. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before October 11, 2023. On October 24, 2023, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before October 26, 2023, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: June 5, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–12251 Filed 6–7–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0042]

Occupational Safety and Health Administration Conflict of Interest (COI) and Disclosure Form; 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 its request to extend the Office of Management and Budget's (OMB) approval of information collection. Regarding the Occupational Safety and Health Administration Conflict of Interest (COI) and Disclosure Form.

DATES: Comments must be submitted (postmarked, sent, or received) by August 7, 2023.

ADDRESSES:

Electronically: You may submit comments, including attachments, electronically at *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

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

Instructions: All submissions must include the agency name and the OSHA Docket Number for this **Federal Register** notice (OSHA–2009–0042). OSHA will place 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 the 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, the 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).

OSHA conducts peer reviews of a draft product for quality by specialists in the field who were not involved in producing the draft. The selection of participants in a peer review is based on expertise, considering their independence and any actual or potential conflicts of interest. The Office of Management and Budget published the Final Information Quality Bulletin for Peer Review on December 15, 2004. The Bulletin states ''. . . the agency must address reviewers' potential conflicts of interest (including those stemming from ties to regulated businesses and other stakeholders) and independence from the agency.'' The Bulletin requires agencies to adopt or adapt the committee selection policies employed by the National Academy of Sciences (NAS) when selecting peer reviewers who are not government employees. To fulfill this requirement, OSHA has developed a Conflict of Interest (COI) and Disclosure Form, based on NAS' Conflict of Interest Disclosure form. This form will be used to determine whether a conflict exists for a potential peer review panel member.

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, 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

There are no changes in burden hours from the previous Information Collection Request for obtaining the necessary background information and disclosure of conflict-of-interest information to ensure that invited experts are not compromised.

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: Occupational Safety and Health Administration Conflict of Interest (COI) and Disclosure Form.

OMB Control Number: 1218–0255.

Affected Public: Individuals and Households.

Number of Respondents: 36.

Frequency: On occasion.

Average Time per Response: OSHA estimates it will take thirty minutes (30/60 hour) to complete the short version of the COI form, and one (1) hour to complete the long version of the COI form.

Estimated Total Number of Responses: 36.

Estimated Total Burden Hours: 27.

Estimated Cost (Operation and Maintenance): $0.

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); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA Docket Number for this ICR (Docket No. OSHA–2009–0042). 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 their social security number and date 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 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. 1–2012 (77 FR 3912).

Signed at Washington, DC, on May 25, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–12208 Filed 6–7–23; 8:45 am]

BILLING CODE 4510–26–P

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Reinstatement and Revision of a Previously Approved Information Collection; Comment Request

AGENCY: Merit Systems Protection Board.

ACTION: 30-Day notice and request for comments.

SUMMARY: The U.S. Merit Systems Protection Board (MSPB) is seeking to reinstate and revise a previously approved information collection in accordance with the Paperwork Reduction Act (PRA) of 1995. The Information Collection Request (ICR) will be submitted to the Office of Management and Budget (OMB) pursuant to the PRA for review and clearance. This information collection, entitled, ''Generic Clearance Request for Voluntary Customer Surveys,'' OMB Control No. 3124–0012, is part of MSPB's efforts to improve customer service delivery. The information collection instruments consist of short customer-focused surveys distributed through Qualtrics, MSPB's survey platform. MSPB is requesting public comments. The purpose of this notice is to allow 30 days for public comment after submission of the collection to OMB.

DATES: Consideration will be given to all comments received by July 10, 2023.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to the Desk Officer for the Merit Systems Protection Board and sent via electronic mail to *oira.submission@omb.eop.gov.*

All comments must reference OMB Control No. 3124–0012. All submissions will be posted, without change, to MSPB's website (*www.mspb.gov*) and will include any personal information you provide. Therefore, submitting this information makes it public.

FOR FURTHER INFORMATION CONTACT: D. Fon Muttamara, Chief Privacy Officer, at *privacy@mspb.gov* or (202) 653–7200. You may submit written questions to the Office of the Clerk of the Board by any of the following methods: by email to *privacy@mspb.gov* or by mail to Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419. Please reference OMB Control No. 3124–0012 with your questions.

SUPPLEMENTARY INFORMATION: MSPB intends to request approval for a reinstatement and revision of a previously approved information collection and seeks a three-year renewal of its MSPB's ''Generic Clearance Request for Voluntary Customer Surveys,'' OMB Control No. 3124–0012, which was previously published in the **Federal Register** on March 28, 2023, at 88 FR 18349 with a 60-day public comment period. No comments were received. The purpose of this 30-day notice is to notify the public that MSPB will submit the information collection abstracted below to OMB for review and clearance.

Title: Agency Information Collection Activities; Reinstatement and Revision of a Previously Approved Information Collection.

OMB Number: 3124–0012.

Type of Information Collection: This is a request for reinstatement and revision of a previously approved information collection.

ICR Status: MSPB intends to request approval for reinstatement and revision of a previously approved information collection from OMB under the PRA of 1995. 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.

Abstract of Proposed Collection: This collection is part of MSPB's compliance efforts pursuant to Executive Order 12862, ''Setting Customer Service Standards,'' which mandates that agencies identify their customers and survey them to determine the kind and quality of services they want and their level of satisfaction with existing services. Responses to any collection of information under this ICR are voluntary.

Affected Public: Individuals and Households; Businesses and Organizations.

Estimated Total Number of Respondents: 600.

Estimated Frequency of Responses: Once per year.

Estimated Total Average Number of Responses for Each Respondent: Once per year.

Estimated Total Annual Burden Hours: 300.

Estimated Total Cost: $11,370.

Comments: Comments should be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to: (a) evaluate whether the collection of information is necessary for the proper performance of the functions of MSPB, including whether the information shall have practical utility; (b) evaluate the accuracy of MSPB's estimate of the burden of the collection of information; (c) enhance the quality, utility, and

clarity of the information to be collected; (d) minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) evaluate the estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Jennifer Everling,

Acting Clerk of the Board.

[FR Doc. 2023–12213 Filed 6–7–23; 8:45 am]

BILLING CODE 7400–01–P

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Reinstatement of a Previously Approved Information Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Merit Systems Protection Board.

ACTION: 30-Day notice and request for comments.

SUMMARY: The U.S. Merit Systems Protection Board (MSPB) is seeking to reinstate a previously approved information collection in accordance with the Paperwork Reduction Act (PRA) of 1995. MSPB will submit the information collection abstracted below, OMB No. 3124–0015, to the Office of Management and Budget (OMB) pursuant to the PRA for review and clearance. MSPB's Information Collection Request (ICR) expired on May 31, 2023. The ICR describes the nature of the information collection and its expected burden. This information collection was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery. MSPB is requesting public comments. The purpose of this notice is to allow 30 days for public comment after submission of the collection to OMB.

DATES: Consideration will be given to all comments received by July 10, 2023.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to the Desk Officer for the Merit Systems Protection Board and sent via electronic mail to *oira.submission@omb.eop.gov.*

All comments must reference OMB Control No. 3124–0015. All submissions will be posted, without change, to MSPB's website (*www.mspb.gov*) and will include any personal information you provide. Therefore, submitting this information makes it public.

FOR FURTHER INFORMATION CONTACT: D. Fon Muttamara, Chief Privacy Officer, at *privacy@mspb.gov* or (202) 653–7200. You may submit written questions to the Office of the Clerk of the Board by any of the following methods: by email to *privacy@mspb.gov* or by mail to Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419. Please include OMB Control No. 3124–0015 with your questions.

SUPPLEMENTARY INFORMATION: MSPB intends to request approval for a reinstatement of a previously approved information collection and seeks a three-year renewal of the collection entitled ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery,'' OMB Control No. 3124–0015. MSPB previously sought a renewal of this information collection and published a notice in the **Federal Register** on March 28, 2023, at 88 FR 18348 with a 60-day public comment period. No comments were received. At that time, the information collection had not expired, and MSPB is now seeking a reinstatement and renewal of this information collection. The purpose of this 30-day notice is to notify the public that MSPB will submit the information collection abstracted below to OMB for review and clearance.

Information Collection Requirement

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 3124–0015.

Type of Information Collection: This is a request for reinstatement of a previously approved information collection.

ICR Status: This ICR expired on May 31, 2023. MSPB intends to request approval for reinstatement of a previously approved information collection from OMB under the PRA of 1995. 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.

Abstract of Proposed Collection: This collection is part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery and provides a means to obtain qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with MSPB's commitment to improving service delivery. Responses to any collection of information under this ICR are voluntary.

Affected Public: Individuals and Households; Businesses and Organizations.

Estimated Total Number of Respondents: 600.

Estimated Frequency of Responses: Once per year.

Estimated Total Average Number of Responses for Each Respondent: Once per year.

Estimated Total Annual Burden Hours: 49.8.

Estimated Total Cost: $1,887.42.

Comments: Comments should be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to: (a) evaluate whether the collection of information is necessary for the proper performance of the functions of MSPB, including whether the information shall have practical utility; (b) evaluate the accuracy of MSPB's estimate of the burden of the collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; (d) minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) evaluate the estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review

the collection of information; and to transmit or otherwise disclose the information.

Jennifer Everling,

Acting Clerk of the Board.

[FR Doc. 2023–12215 Filed 6–7–23; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–033]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA has submitted to OMB for approval the information collection described in this notice. We invite you to comment on the proposed information collection.

DATES: OMB must receive written comments on or before July 10, 2023.

ADDRESSES: Send any comments and recommendations on the proposed information collection in writing to *www.reginfo.gov/public/do/PRAMain.* You can find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with any requests for additional information.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection for this information collection on March 31, 2023 (88 FR 19330) and we received no comments. We are therefore submitting the described information collection to OMB for approval.

If you have comments or suggestions, they should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses.

In this notice, we solicit comments concerning the following information collection:

Title: 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. 2023–12236 Filed 6–7–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIME AND DATE: The Members of the National Council on Disability (NCD) will hold a closed meeting on Thursday, June 15, 2023, 11 a.m.–12 p.m., Eastern Daylight Time (EDT).

PLACE: This meeting will occur via Zoom videoconference.

MATTERS TO BE CONSIDERED: The meeting, closed to the public, will be conducted to discuss internal personnel rules and practices, pursuant to paragraph (c)(2) of the Sunshine Act, and in accordance with a determination made by the NCD Chairman.

CONTACT PERSON FOR MORE INFORMATION: Nicholas Sabula, Public Affairs Specialist, NCD, 1331 F Street NW, Suite 850, Washington, DC 20004; 202–272–2004 (V), or *nsabula@ncd.gov.*

Dated: June 5, 2023.

Anne C. Sommers McIntosh,

Executive Director.

[FR Doc. 2023–12306 Filed 6–6–23; 11:15 am]

BILLING CODE 8421–02–P

NATIONAL CREDIT UNION ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, the National Credit Union Administration (NCUA) gives notice of a new proposed Privacy Act system of records. The new system is NCUA–28, Anti-Harassment Case Tracking and Records. This system will maintain information collected for the purpose of conducting internal investigations into allegations of harassment brought by NCUA employees and NCUA contractors and taking appropriate action(s). Information is collected directly from the individual with their consent.

DATES: Submit comments on or before July 10, 2023. This system will be effective immediately, and routine uses will be effective on July 10, 2023.

ADDRESSES: You may submit comments by any of the following methods, but please send comments by one method only:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Comments on New System of Records, NCUA–28'' in the transmittal.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Elizabeth Fischmann, Chief Ethics Counsel, Donald Names, Anti-Harassment Coordinator, Office of Ethics Counsel, or Linda Dent, Senior Agency Official for Privacy, the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia, 22314.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act, 5 U.S.C. 552a, the NCUA is establishing a new system of records, NCUA–28, Anti-Harassment

Case Tracking and Records. This new system will support the prevention of and investigations into alleged harassment in the NCUA workspace. The NCUA is committed to equal employment opportunity and a workplace free of unlawful discriminatory harassment or any other category of harassment.

The format of NCUA–28 aligns with the guidance set forth in Office of Management and Budget (OMB) Circular A–108.

By the National Credit Union Administration Board.

Melane Conyers-Ausbrooks,

Secretary of the Board.

SYSTEM NAME AND NUMBER:

Anti-Harassment Case Tracking and Records, NCUA–28.

SECURITY CLASSIFICATION

Unclassified.

SYSTEM LOCATION:

National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

SYSTEM MANAGER:

Anti-Harassment Coordinator, Office of Ethics Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 1751, *et seq.;* Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.;* Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.;* Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.,* including ADA Amendments Act of 2008; Rehabilitation Act of 1973 (Section 501), 29 U.S.C. 791; Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Public Law 107–174; Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law 110–233; Executive Order 13087; Executive Order 13152; and further amendments to Executive Order 11478, Executive Order 11246, and EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, V.C.1 (June 18, 1999).

PURPOSE(S) OF THE SYSTEM:

The information in the system is collected to assist the NCUA with conducting internal investigations into allegations of harassment brought by NCUA employees and NCUA contractors and taking appropriate action(s) to address such allegations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

NCUA employees and NCUA contractors who have submitted complaints or reports of harassment or who have provided information related to an investigation of workplace harassment and NCUA employees and contractors who have been accused of harassment.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system include complaints of harassment, statements of witnesses, reports of investigation, investigator's and Chief Ethics Officer's findings and recommendations, final decisions and corrective action taken, and related correspondence and exhibits. These records include names of the alleged victim, harasser and witnesses, their contact information, and the specific circumstances relevant to the harassment.

RECORD SOURCE CATEGORIES:

The information in this system is collected directly from individuals.

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 the NCUA as a routine use as follows:

1. To disclose information as necessary to any source from which additional information is requested in the course of processing a complaint or report of harassment.

2. To provide to the alleged harasser information in the event of a disciplinary hearing.

3. A record from a system of records may be disclosed as a routine use to an authorized appeal grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee. Further, a record from any system of records may be disclosed as a routine use to the Office of Personnel Management in accordance with the agency's responsibility for evaluation and oversight of federal personnel management.

4. If a record in a system of records indicates a violation or potential violation of civil or criminal law or a regulation, and whether arising by general statute or particular program statute, or by regulation, rule, or order, the relevant records in the system or records may be disclosed as a routine use to the appropriate agency, whether federal, state, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

5. A record from a system of records may be disclosed as a routine use to a member of Congress or to a congressional staff member in response to an inquiry from the congressional office made at the request of the individual about whom the record is maintained;

6. Records in a system of records may be disclosed as a routine use to the Department of Justice, when: (a) NCUA, or any of its components or employees acting in their official capacities, is a party to litigation; or (b) Any employee of NCUA in his or her individual capacity is a party to litigation and where the Department of Justice has agreed to represent the employee; or (c) The United States is a party in litigation, where NCUA determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and NCUA determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, NCUA determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

7. Records in a system of records may be disclosed as a routine use in a proceeding before a court or adjudicative body before which NCUA is authorized to appear: (a) when NCUA or any of its components or employees are acting in their official capacities; (b) where NCUA or any employee of NCUA in his or her individual capacity has agreed to represent the employee; or (c) where NCUA determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and NCUA determines that use of such records is relevant and necessary to the litigation;

8. A record from a system of records may be disclosed as a routine use to contractors, experts, consultants, and the agents thereof, and others performing or working on a contract, service, cooperative agreement, or other assignment for NCUA when necessary to accomplish an agency function or administer an employee benefit program. Individuals provided information under this routine use are

subject to the same Privacy Act requirements and limitations on disclosure as are applicable to NCUA employees;

9. A record from a system of records may be disclosed to appropriate agencies, entities, and persons when: (1) NCUA suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) NCUA has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by NCUA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NCUA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm; and

10. To another Federal agency or Federal entity, when the NCUA 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.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records and backups are stored on secure servers, approved by the NCUA's Office of the Chief Information Officer (OCIO), and accessed only by authorized personnel.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by any of the following: name of the individual who files a complaint or report of harassment, name of the alleged victim of harassment, if any, and name of the alleged harasser.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained and disposed of in accordance with the General Records Retention Schedules issued by the National Archives and Records Administration (NARA) or an NCUA records disposition schedule approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

NCUA has implemented the appropriate administrative, technical, and physical controls in accordance with the Federal Information Security Modernization Act of 2014, Public Law 113–283, S. 2521, and the NCUA's information security policies to protect the confidentiality, integrity, and availability of the information system and the information contained therein. Access is limited only to individuals authorized through NIST-compliant Identity, Credential, and Access Management policies and procedures. The records are maintained behind a layered defensive posture consistent with all applicable Federal laws and regulations, including Office of Management and Budget (OMB) Circular A–130 and NIST Special Publication 800–37.

RECORD ACCESS PROCEDURES:

After an individual receives verification that they have a record in the system, per the notification procedure above, if they wish to access to their records, they should submit a written request to the Senior Agency Official for Privacy, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

1. Full name.
2. Any available information regarding the type of record involved.
3. The address to which the record information should be sent.
4. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf. Individuals requesting access must also comply with the NCUA's Privacy Act regulations regarding verification of identity and access to records (12 CFR 792.55).

CONTESTING RECORD PROCEDURES:

Individuals wishing to request an amendment to their records should submit a written request to the Senior Agency Official for Privacy, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

1. Full name.
2. Any available information regarding the type of record involved.
3. A statement specifying the changes to be made in the records and the justification therefore.
4. The address to which the response should be sent.
5. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf.

NOTIFICATION PROCEDURES:

Individuals wishing to learn whether this system of records contains information about them should submit a written request to the Senior Agency Official for Privacy, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

1. Full name.
2. Any available information regarding the type of record involved.
3. The address to which the record information should be sent.
4. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf. Individuals requesting access must also comply with the NCUA's Privacy Act regulations regarding verification of identity and access to records (12 CFR 792.55).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system is exempt under 5 U.S.C. 552a(k)(2) from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) of the Act.

HISTORY:

This is a new system.

[FR Doc. 2023–12246 Filed 6–7–23; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Annual and Final Report Template

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to establish this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing an opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting Office of Management and Budget (OMB) clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by August 7, 2023 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to the address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance

Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18200, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: Grantee Reporting Requirements for the NSF Accelerating Research through International Network-to-Network Collaboration (AccelNet) Program.

OMB Control No.: 3145-New.

Expiration Date of Approval: Not applicable.

Abstract: We are proposing a modified annual/final report template specific to the Accelerating Research through International Network-to-Network Collaborations program (AccelNet, NSF 21–511). Briefly, the program funds planning and implementation awards to investigators forming international networks of networks that will work collaboratively to create a research agenda that will advance science in a way not possible with a concerted international cooperative effort. More information on the current solicitation can be found on the program website: *https://new.nsf.gov/funding/opportunities/accelerating-research-through-international*. While NSF requires awardees to submit annual reports each year of the award and a final report at the end of the award period, the template is focused on research outcomes at the national scale whereas our program is focused on networking activities and workforce development at the international scale. The NSF standard report template does not include prompts that are meaningful to the scope of work awarded and does not provide program directors useful information about achievements and international activities.

Respondents: Awardees.

Estimated Number of Annual Respondents: 70.

Burden on the Public: 24 hours or 3 workdays per award.

Dated: June 2, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–12225 Filed 6–7–23; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2022–74 and CP2022–77; Order No. 6532]

Competitive Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is extending the comment deadline in Docket Nos. CP2022–74 and CP2022–77. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 12, 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: On May 26, 2023, the Postal Service filed notice that the terms of the existing Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contracts, have been amended.[1] The Postal Service states that the proposed amendments will not materially affect cost coverage and therefore did not include revised supporting financial documentation or financial certification. Notices at 1.

The Commission has reviewed the proposed amendments' terms and has determined that the amendments revise material sections of the contracts that may affect cost coverage. The Commission issued a notice initiating the instant dockets on May 30, 2023, with the deadline for filing comments on June 6, 2023.[2] The Commission has requested the Postal Service file supporting financial documentation reflecting the amendments' revisions.[3]

To give all interested parties sufficient time to review the responses to the information requests and formulate their comments, the Commission hereby extends the deadline for filing comments to June 12, 2023.

It is ordered:

1. Comments by interested persons are due by June 12, 2023.

2. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–12226 Filed 6–7–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail, First-Class Package Service & Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on June 2, 2023, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail, First-Class Package Service & Parcel Select Contract 26 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–167, CP2023–171.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–12218 Filed 6–7–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

[1] Docket No. CP2022–74, USPS Notice of Amendment to Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 11, Filed Under Seal, May 26, 2023; Docket No. CP2022–77, USPS Notice of Amendment to Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 14, Filed Under Seal, May 26, 2023 (Notices).

[2] *See* Docket Nos. CP2022–74 and CP2022–77, Notice Initiating Docket(s) for Recent Postal Service Negotiated Service Agreement Filings, May 30, 2023.

[3] *See* Docket No. CP2022–74, Chairman's Information Request No. 2 and Notice of Filing Under Seal, June 1, 2023 (CHIR No. 2); Docket No. CP2022–77, Chairman's Information Request No. 2 and Notice of Filing Under Seal, June 1, 2023 (CHIR No. 2).

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on May 31, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 1 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–165, CP2023–169.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–12220 Filed 6–7–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail, First-Class Package Service & Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* June 8, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on June 2, 2023, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail, First-Class Package Service & Parcel Select Contract 25 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–166, CP2023–170.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–12221 Filed 6–7–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97645; File No. SR–NYSEARCA–2023–38]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Shares of the Natixis Loomis Sayles Focused Growth ETF Under NYSE Arca Rule 8.601–E (Active Proxy Portfolio Shares)

June 2, 2023.

Pursuant to section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on May 24, 2023, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 list and trade shares of the Natixis Loomis Sayles Focused Growth ETF under NYSE Arca Rule 8.601–E. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has adopted NYSE Arca Rule 8.601–E for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges (''UTP''), of Active Proxy Portfolio Shares, which are securities issued by an actively managed open-end investment management company.[4] Commentary .01 to Rule 8.601–E requires the Exchange to file separate proposals under section 19(b) of the Act before listing and trading any series of Active Proxy Portfolio Shares on the Exchange. Therefore, the Exchange is submitting this proposal in order to list and trade shares (''Shares'') of the Natixis Loomis Sayles Focused Growth ETF (the ''Fund'') under Rule 8.601–E.

Key Features of Active Proxy Portfolio Shares

While funds issuing Active Proxy Portfolio Shares will be actively-managed and, to that extent, will be similar to Managed Fund Shares, Active Proxy Portfolio Shares differ from

[4] *See* Securities Exchange Act Release No. 89185 (June 29, 2020), 85 FR 40328 (July 6, 2020) (SR–NYSEArca–2019–95). Rule 8.601–E(c)(1) provides that ''[t]he term ''Active Proxy Portfolio Share'' means a security that (a) is issued by an investment company registered under the Investment Company Act of 1940 (''Investment Company'') organized as an open-end management investment company that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a specified minimum number of shares, or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio or Custom Basket, as applicable, and/or cash with a value equal to the next determined net asset value (''NAV''); (c) when aggregated in the same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder's request in return for the Proxy Portfolio or Custom Basket, as applicable, and/or cash to the holder by the issuer with a value equal to the next determined NAV; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.'' Rule 8.601–E(c)(2) provides that ''[t]he term ''Actual Portfolio'' means the identities and quantities of the securities and other assets held by the Investment Company that shall form the basis for the Investment Company's calculation of NAV at the end of the business day.'' Rule 8.601–E(c)(3) provides that ''[t]he term ''Proxy Portfolio'' means a specified portfolio of securities, other financial instruments and/or cash designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares as provided in the exemptive relief pursuant to the Investment Company Act of 1940 applicable to such series.'' Rule 8.601–E(c)(4) provides that the term ''Custom Basket'' means a portfolio of securities that is different from the Proxy Portfolio and is otherwise consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 applicable to a series of Active Proxy Portfolio Shares.

Managed Fund Shares in the following important respects. First, in contrast to Managed Fund Shares, which are actively-managed funds listed and traded under NYSE Arca Rule 8.600–E [5] and for which a ''Disclosed Portfolio'' is required to be disseminated at least once daily,[6] the portfolio for an issue of Active Proxy Portfolio Shares will be publicly disclosed within at least 60 days following the end of every fiscal quarter in accordance with normal disclosure requirements otherwise applicable to open-end management investment companies registered under the Investment Company Act of 1940 (the ''1940 Act'').[7] The composition of the portfolio of an issue of Active Proxy Portfolio Shares would not be available at commencement of Exchange listing and trading. Second, in connection with the creation and redemption of Active Proxy Portfolio Shares, such creation or redemption may be exchanged for a Proxy Portfolio or Custom Basket, as applicable, and/or cash with a value equal to the next-determined NAV. A series of Active Proxy Portfolio Shares will disclose the Proxy Portfolio on a daily basis, which, as described above, is designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares, instead of the actual holdings of the Investment Company, as provided by a series of Managed Fund Shares. As set forth in NYSE Arca Rule 8.601–E(d)(2)(B)(ii), for Active Proxy Portfolio Shares using a Custom Basket, each Business Day,[8] before the opening of trading in the Core Trading Session (as defined in NYSE Arca Rule 7.34–E (a)), the Investment Company shall make publicly available on its website the composition of any Custom Basket transacted on the previous Business Day, except a Custom Basket that differs from the applicable Proxy Portfolio only with respect to cash.

The Commission has previously approved [9] and noticed for immediate effectiveness [10] the listing and trading on the Exchange of series of Active Proxy Portfolio Shares under NYSE Arca Rule 8.601–E.

The Shares of the Fund will be series of Natixis ETF Trust II (the ''Company''), a Massachusetts business trust registered with the Commission as an open-end management investment company.[11] Natixis Advisors, LLC will be the investment adviser to the Fund (the ''Adviser''). Loomis, Sayles & Company, L.P. (''Sub-Adviser'') will be the Sub-Adviser to the Fund. State Street Bank and Trust Company will serve as the Fund's custodian. ALPS Distributors, Inc. will act as the distributor (the ''Distributor'') for the Fund.

Commentary .04 to NYSE Arca Rule 8.601–E provides that, if the investment

[5] The Commission has previously approved listing and trading on the Exchange of a number of issues of Managed Fund Shares under NYSE Arca Rule 8.600–E. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR–NYSEArca–2009–55) (order approving listing of Dent Tactical ETF); 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR–NYSEArca–2010–118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF). The Commission also has approved a proposed rule change relating to generic listing standards for Managed Fund Shares. *See* Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016) (SR–NYSEArca–2015–110) (amending NYSE Arca Equities Rule 8.600 to adopt generic listing standards for Managed Fund Shares).

[6] NYSE Arca Rule 8.600–E(c)(2) defines the term ''Disclosed Portfolio'' as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. NYSE Arca Rule 8.600–E(d)(2)(B)(i) requires that the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

[7] A mutual fund is required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N–CSR under the 1940 Act. Information reported on Form N–PORT for the third month of a fund's fiscal quarter will be made publicly available 60 days after the end of a fund's fiscal quarter. Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a series of Active Proxy Portfolio Shares' Statement of Additional Information (''SAI''), its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A series of Active Proxy Portfolio Shares' SAI and Shareholder Reports will be available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

[8] ''Business Day'' is defined to mean any day that the Exchange is open, including any day when the Fund satisfies redemption requests as required by section 22(e) of the 1940 Act.

[9] *See* Securities Exchange Act Release Nos. 89185 (June 29, 2020), 85 FR 40328 (July 6, 2020) (SR–NYSEArca–2019–95) (Notice of Filing of Amendment No. 6 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 6, to Adopt NYSE Arca Rule 8.601–E to Permit the Listing and Trading of Active Proxy Portfolio Shares and To List and Trade Shares of the Natixis U.S. Equity Opportunities ETF Under Proposed NYSE Arca Rule 8.601–E); 89192 (June 30, 2020), 85 FR 40699 (July 7, 2020) (SR–NYSEArca–2019–96) (Notice of Filing of Amendment No. 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 5, to List and Trade Two Series of Active Proxy Portfolio Shares Issued by the American Century ETF Trust under NYSE Arca Rule 8.601–E); 89191 (June 30, 2020), 85 FR 40358 (July 6, 2020) (SR–NYSEArca–2019–92) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to List and Trade Four Series of Active Proxy Portfolio Shares Issued by T. Rowe Price Exchange-Traded Funds, Inc. under NYSE Arca Rule 8.601–E); 89438 (July 31, 2020), 85 FR 47821 (August 6, 2020) (SR–NYSEArca–2020–51) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of Natixis Vaughan Nelson Select ETF and Natixis Vaughan Nelson MidCap ETF under NYSE Arca Rule 8.601–E); 91266 (March 5, 2021), 86 FR 13930 (March 11, 2021) (SR–NYSEArca–2020–104) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Stance Equity ESG Large Cap Core ETF Under NYSE Arca Rule 8.601–E).

[10] *See, e.g.,* Securities Exchange Act Release Nos. 92104 (June 3, 2021), 86 FR 30635 (June 9, 2021) (NYSEArca–2021–46) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to List and Trade Shares of the Nuveen Santa Barbara Dividend Growth ETF, Nuveen Small Cap Select ETF, and Nuveen Winslow Large-Cap Growth ESG ETF Under NYSE Arca Rule 8.601–E (Active Proxy Portfolio Shares); 92958 (September 13, 2021), 86 FR 51933 (September 17, 2021) (NYSEArca–2021–77) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Shares of the Nuveen Growth Opportunities ETF Under NYSE Arca Rule 8.601–E (Active Proxy Portfolio Shares); 93264 (October 6, 2021), 86 FR 56989 (October 13, 2021) (SR–NYSEArca–2021–84) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Shares of the Schwab Ariel ESG ETF Under NYSE Arca Rule 8.601–E (Active Proxy Portfolio Shares); 94486 (March 22, 2022), 87 FR 17351 (March 28, 2022) (SR–NYSEArca–2022–14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to List and Trade Shares of the Columbia Seligman Semiconductor and Technology ETF Under NYSE Arca Rule 8.601 (Active Proxy Portfolio Shares); 94908 (May 13, 2022), 87 FR 30524 (May 19, 2022) (SR–NYSEArca–2022–28) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to List and Trade Shares of the Principal Real Estate Active Opportunities ETF Under NYSE Arca Rule 8.601 (Active Proxy Portfolio Shares)); 94902 (May 12, 2022), 87 FR 30286 (May 18, 2022) (SR–NYSEArca–2022–29) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to List and Trade Shares of the IQ Winslow Large Cap Growth ETF and IQ Winslow Focused Large Cap Growth ETF Under NYSE Arca Rule 8.601–E (Active Proxy Portfolio Shares)).

[11] The Company is registered under the 1940 Act. On March 24, 2023, the Company filed a registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–235466 and 811–23500) (the ''Registration Statement''). The Company filed a seventh amended and restated application for an order under section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder on October 21, 2019 (File No. 812–14870). *See* Investment Company Act Release No. 33684 (File No. 812–14870) (the ''Application''). On December 10, 2019, the Commission issued an order under the 1940 Act granting the exemptions requested in the Application (Investment Company Act Release No. 33711 (December 10, 2019)) (the ''Exemptive Order''). Investments made by the Fund will comply with the conditions set forth in the Application and the Exemptive Order. The description of the operation of the Fund herein is based, in part, on the Registration Statement, Application, and Exemptive Order. The Exchange will not commence trading in Shares of the Fund until the Registration Statement is effective.

adviser to the Investment Company issuing Active Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or has access to non-public information regarding the Investment Company's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto. Commentary .04 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Rule 5.2–E(j)(3); however, Commentary .04, in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer, reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds.[12] Commentary .04 is also similar to Commentary .06 to Rule 8.600–E related to Managed Fund Shares, except that Commentary .04 relates to establishment and maintenance of a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, applicable to an Investment Company's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto, and not just to the underlying portfolio, as is the case with Managed Fund Shares.

In addition, Commentary .05 to Rule 8.601–E provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company's Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable, or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable.

Neither the Adviser nor the Sub-Adviser is registered as a broker-dealer but each is affiliated with a broker-dealer. The Adviser and Sub-Adviser have implemented and will maintain a ''fire wall'' with respect to such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable.

In the event (a) the Adviser or Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer, or becomes affiliated with a broker-dealer, it will implement and maintain a ''fire wall'' with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto. Any person related to the Adviser, Sub-Adviser or the Fund who makes decisions pertaining to the Fund's Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable, or has access to non-public information regarding the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto are subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable or changes thereto.

In addition, any person or entity, including any service provider for the Fund, who has access to non-public information regarding the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto, will be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity has erected and will maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to the Fund's Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable.

Description of the Fund

According to the Registration Statement, the Adviser will identify a Proxy Portfolio for the Fund that is designed to replicates the daily performance of the Fund's Actual Portfolio and will only include securities and investments in which the Fund may invest. While the Fund's Proxy Portfolio and Actual Portfolio will hold some of the same securities, the Proxy Portfolio and Actual Portfolio may not include identical securities.

The composition of the Proxy Portfolio will be published on the Fund's website (*im.natixis.com*) each Business Day before the commencement of trading of the Fund's Shares. The Fund's website will include the following information for each portfolio holding in the Proxy Portfolio: (1) ticker symbol; (2) CUSIP or other identifier; (3) description of holding; (4) quantity of each security or other asset held; and (5) percentage weight of the holding in the Proxy Portfolio. The Proxy Portfolio will be reconstituted daily, and the Adviser or Sub-Adviser will not make intra-day changes to the Proxy Portfolio except to correct errors in the published Proxy Portfolio.

[12] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser, Sub-Adviser and their related personnel will be subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

The Fund will, at the end of each trading day, calculate the percentage weight overlap between the holdings of its Proxy Portfolio and the Actual Portfolio (the ''Proxy Overlap'') that formed the basis for the Fund's calculation of NAV at the end of the prior Business Day by taking the lesser weight of each asset held in common between the Actual Portfolio and the Proxy Portfolio and adding the totals.

The Fund's holdings will conform to the permissible investments as set forth in the Application and Exemptive Order, and the holdings will be consistent with all requirements in the Application and Exemptive Order.[13] Any foreign common stocks held by the Fund will be traded on an exchange that is a member of the Intermarket Surveillance Group (''ISG'') or with which the Exchange has in place a comprehensive surveillance sharing agreement.

According to the Registration Statement, the Fund's investment objective is long-term growth of capital. The Fund will, under normal circumstances, invest primarily in exchange-traded U.S.-listed common stocks and other exchange-traded equity securities across a wide range of sectors and industries that the Adviser believes have sustainable long-term competitive advantages and trade at a significant discount to estimates of intrinsic value. The Fund focuses on stocks of large capitalization companies, but the Fund may invest in companies of any size. The Fund is non-diversified, which means that it may invest a greater percentage of its assets in a particular issuer and may invest in fewer issuers than a diversified fund. Typically, the Fund's portfolio will hold 20 to 30 securities.

Investment Restrictions

The Shares of the Fund will conform to the initial and continued listing criteria under Rule 8.601–E. The Fund's holdings will be limited to and consistent with permissible holdings as described in the Application and Exemptive Order and all requirements in the Application and Exemptive Order.[14]

The Fund's investments, including derivatives, will be consistent with its investment objectives and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[15]

Purchases and Redemptions

According to the Registration Statement, the Company will issue and sell Shares of the Fund only in specified minimum size ''Creation Units'' on a continuous basis through the Distributor at their NAV next determined after receipt of an order, on any Business Day, in proper form. The NAV of the Fund's Shares will be calculated each Business Day as of the close of regular trading on the Exchange, ordinarily 4:00 p.m. Eastern Time (''E.T.''). A Creation Unit will generally consist of at least 10,000 Shares.

According to the Registration Statement, Shares of the Fund will be purchased and redeemed in Creation Units. Creation Units will generally be purchased in-kind through the deposit of a designated portfolio of securities (the ''Deposit Securities''), which will typically replicate the Proxy Portfolio, plus the ''Cash Component,'' which is an amount equal to the difference between the NAV of the Fund's shares (per Creation Unit) and the market value of the Deposit Securities or ''Cash Deposit'' (as defined below), as applicable. The Cash Component serves the function of compensating for any differences between the NAV per Creation Unit and the market value of the Deposit Securities or Cash Deposit, as applicable. The Cash Deposit is a ''cash in lieu'' amount that the Company may permit or require to be added to the Cash Component to replace any Deposit Security. The names and quantities of the instruments that constitute the Deposit Securities will be the same as the Proxy Portfolio, except to the extent that the Fund requires purchases and redemptions to be made entirely or in part on a cash basis. Together, the Deposit Securities or Cash Deposit, as applicable, and the Cash Component constitute the ''Fund Deposit,'' which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

Creation Units of the Fund may be purchased and/or redeemed entirely or partially for cash in the Company's discretion. When full or partial cash purchases or redemptions of Creation Units are available or specified for the Fund, they will be effected in essentially the same manner as in-kind purchases or redemptions thereof.[16]

The identity and number of shares comprising a Creation Unit may change from time to time. The Fund, through the National Securities Clearing Corporation (the ''NSCC''), will make available on each Business Day, immediately prior to the opening of business on the Exchange, the list of the names and the required number of shares of each Deposit Security or the required amount of Cash Deposit, as applicable, to be included in the Fund Deposit. The published Fund Deposit will apply until such time as the next-announced composition of the Deposit Securities is made available, and there will be no intra-day changes except to correct errors in the published Fund Deposit. The Fund Deposit will be published each Business Day regardless of whether the Fund decides to issue or redeem Creation Units entirely or in part on a cash basis. The identity of the Fund Securities that will be applicable to redemption requests received in proper form on a Business Day will also be made available prior to the opening of business on the Exchange on each Business Day.

All orders to purchase or redeem Creation Units must be placed with the Distributor by or through an Authorized Participant, who may engage in creation or redemption transactions directly with the Fund.[17] Orders to purchase or redeem Creation Units must be submitted at the close of regular trading on the Exchange, generally 4:00 p.m. E.T., on each Business Day in order to receive the NAV of Shares of the Fund on that Business Day. The date on which an order to purchase or redeem Creation Units is placed is referred to as the ''Transmittal Date.'' When the

[13] Pursuant to the Application and Exemptive Order, the permissible investments for the Fund include only the following instruments: exchange-traded funds, exchange-traded notes, exchange-traded common stocks, exchange-traded preferred stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metal trusts, exchange-traded currency trusts and exchange-traded futures that trade contemporaneously with the Fund's shares. In addition, the Fund may hold cash and cash equivalents (short-term U.S. Treasury securities, government money market funds, and repurchase agreements). Pursuant to the Application and Exemptive Order, the Fund will not hold short positions or invest in derivatives other than U.S. exchange-traded futures, will not borrow for investment purposes, and will not purchase any securities that are illiquid investments at the time of purchase.

[14] *See id.*

[15] The Fund's broad-based securities benchmark index will be identified in a future amendment to its Registration Statement following the Fund's first full calendar year of performance.

[16] The Adviser represents that, to the extent the Company effects the creation or redemption of Shares in cash on any given day, such transactions will be effected in the same manner for all Authorized Participants (as defined below) placing trades with the Fund on that day.

[17] According to the Registration Statement, an ''Authorized Participant'' is (i) a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC or (ii) a DTC Participant.

Exchange closes earlier than normal, the Fund may require orders for Creation Units to be placed earlier in the Business Day.

Availability of Information

The Fund's website (*www.im.natixis.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's website will include on a daily basis, per Share for the Fund: (1) the prior Business Day's NAV; (2) the prior Business Day's ''Closing Price'' or ''Mid-Point of the Bid/Ask Price at Close''; [18] and (3) a calculation of the premium/discount of such Closing Price or Mid-Point of the Bid/Ask Price at Close against such NAV.[19] The Adviser has represented that the Fund's website will also provide: (1) any other information regarding premiums/discounts as may be required for other ETFs under Rule 6c–11 under the 1940 Act, as amended, and (2) any information regarding the bid/ask spread for the Fund as may be required for other ETFs under Rule 6c–11 under the 1940 Act, as amended. The Fund's website also will disclose the information required under Rule 8.601–E(c)(3).[20] The website and information will be publicly available at no charge.

The identity and quantity of investments in the Proxy Portfolio for the Fund will be publicly available on the Fund's website before the commencement of trading in Shares on each Business Day. The website will also include information relating to the Proxy Overlap and Tracking Error, as discussed above. With respect to each Custom Basket utilized by the Fund, each Business Day, before the opening of trading in the Core Trading Session (as defined in NYSE Arca Rule 7.34–E (a)), the Fund's website will also include the composition of any Custom Basket transacted on the previous Business Day, except a Custom Basket that differs from the Proxy Portfolio only with respect to cash.

Typical mutual fund-style annual, semi-annual and quarterly disclosures contained in the Fund's Commission filings will be provided on the Fund's website on a current basis.[21] Thus, the Fund will publish the portfolio contents of its Actual Portfolio on a periodic basis, and no less than 60 days after the end of every fiscal quarter.

Investors can also obtain the Fund's SAI, Shareholder Reports, Form N–CSR, N–PORT, and Form N–CEN. The prospectus, SAI, and Shareholder Reports are available free upon request, and those documents and the Form N–CSR, N–PORT, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website. The Exchange also notes that pursuant to the Application, the Fund must comply with Regulation Fair Disclosure, which prohibits selective disclosure of any material non-public information.

Information regarding the market price of Shares and trading volume in Shares, will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Quotation and last sale information for the Shares and U.S. exchange-traded instruments (excluding futures contracts) will be available via the Consolidated Tape Association (''CTA'') high-speed line, from the exchanges on which such securities trade, or through major market data vendors or subscription services. Quotation and last sale information for futures contracts will be available from the exchanges on which they trade. Intraday price information for all exchange-traded instruments, which include all eligible instruments except cash and cash equivalents, will be available from the exchanges on which they trade, or through major market data vendors or subscription services. Intraday price information for cash equivalents is available through major market data vendors, subscription services and/or pricing services.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[22] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Rule 8.601–E(d)(2)(D), which sets forth circumstances under which Shares of the Fund will be halted.

Specifically, Rule 8.601–E(d)(2)(D) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Active Proxy Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Active Proxy Portfolio Shares inadvisable. These may include: (a) the extent to which trading is not occurring in the securities and/or the financial instruments composing the Proxy Portfolio and/or Actual Portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. If the Exchange becomes aware that the NAV, Proxy Portfolio, or Actual Portfolio with respect to a series of Active Proxy Portfolio Shares is not disseminated to all market participants at the same time, the Exchange shall halt trading in such series until such time as the NAV, Proxy Portfolio, or Actual Portfolio is available to all market participants at the same time.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace in all trading sessions in accordance with NYSE Arca Rule 7.34–E(a). As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.601–E. The Exchange has appropriate rules to facilitate trading in the Shares during all trading sessions.

A minimum of 100,000 Shares for the Fund will be outstanding at the commencement of trading on the

[18] The records relating to Bid/Ask Prices will be retained by the Fund or its service providers. The ''Bid/Ask Price'' is the midpoint of the highest bid and lowest offer based upon the National Best Bid and Offer as of the time of calculation of the Fund's NAV. The ''National Best Bid and Offer'' is the current national best bid and national best offer as disseminated by the Consolidated Quotation System or UTP Plan Securities Information Processor. The ''Closing Price'' of Shares is the official closing price of the Shares on the Exchange.

[19] The ''premium/discount'' refers to the premium or discount to the NAV at the end of a trading day and will be calculated based on the last Bid/Ask Price on a given trading day.

[20] *See* note 4, *supra.* Rule 8.601–E (c)(3) provides that the website for each series of Active Proxy Portfolio Shares shall disclose the information regarding the Proxy Portfolio as provided in the exemptive relief pursuant to the 1940 Act applicable to such series, including the following, to the extent applicable: (i) Ticker symbol; (ii) CUSIP or other identifier; (iii) Description of holding; (iv) Quantity of each security or other asset held; and (v) Percentage weighting of the holding in the portfolio.

[21] *See* note 7, *supra.*

[22] *See* NYSE Arca Rule 7.12–E.

Exchange. In addition, pursuant to Rule 8.601–E(d)(1)(B), the Exchange, prior to commencement of trading in the Shares, will obtain a representation from the Company that (i) the NAV per Share of the Fund will be calculated daily, (ii) the NAV, Proxy Portfolio, and the Actual Portfolio for the Fund will be made publicly available to all market participants at the same time, and (iii) the Company and any person acting on behalf of the Company will comply with Regulation Fair Disclosure under the Act, including with respect to any Custom Basket.

With respect to Active Proxy Portfolio Shares, all of the Exchange member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange and the Financial Industry Regulatory Authority, Inc. (''FINRA'') will continue to monitor Exchange members for compliance with such requirements.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[23] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading such securities and underlying exchange-traded instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in such securities and underlying exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[24]

The Adviser will make available daily to FINRA and the Exchange the Actual Portfolio of the Fund, upon request, as necessary to assist with the performance of the surveillances and investigations referred to above.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Commentary .03 to NYSE Arca Rule 8.601–E provides that the Exchange will implement and maintain written surveillance procedures applicable to Active Proxy Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will, upon request by the Exchange or FINRA, on behalf of the Exchange, make available to the Exchange or FINRA the daily Actual Portfolio holdings of each series of Active Proxy Portfolio Shares. The Exchange believes that the ability to access the information on an as needed basis will provide it with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Active Proxy Portfolio Shares on the Exchange, including the ability to monitor compliance with the initial and continued listing requirements as well as the ability to surveil for manipulation of Active Proxy Portfolio Shares.

The Exchange will utilize its existing procedures to monitor issuer compliance with the requirements of Rule 8.601–E. For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require from the issuer of a series of Active Proxy Portfolio Shares, upon initial listing and periodically thereafter, a representation that it is in compliance with Rule 8.601–E. The Exchange notes that Commentary .01 to Rule 8.601–E requires an issuer of Active Proxy Portfolio Shares to notify the Exchange of any failure to comply with the continued listing requirements of Rule 8.601–E. In addition, the Exchange will require issuers to represent that they will notify the Exchange of any failure to comply with the terms of applicable exemptive and no-action relief. As part of its surveillance procedures, the Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 8.601–E.

With respect to the Fund, all statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange. The Exchange will obtain a representation from the Company, prior to commencement of trading in the Shares of the Fund, that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[25] in general, and furthers the objectives of section 6(b)(5) of the Act,[26] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[27]

With respect to the proposed listing and trading of Shares of the Fund, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.601–E.

[23] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[24] For a list of the current members of ISG, *see www.isgportal.org.*

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] The Exchange represents that, for initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act, as provided by NYSE Arca Rule 5.3–E.

The Fund's holdings will conform to the permissible investments as set forth in the Application and Exemptive Order, and the holdings will be consistent with all requirements in the Application and Exemptive Order.[28]

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and underlying exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Any foreign common stocks held by the Fund will be traded on an exchange that is a member of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The daily dissemination of the identity and quantity of Proxy Portfolio component investments, together with the right of Authorized Participants to create and redeem each day at the NAV, will be sufficient for market participants to value and trade Shares in a manner that will not lead to significant deviations between the Shares' Closing Price or Bid/Ask Price and NAV.

The Fund's investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the Company that the NAV per Share of the Fund will be calculated daily and that the NAV, Proxy Portfolio, Actual Portfolio and/or Custom Basket, as applicable, for the Fund will be made available to all market participants at the same time. Investors can obtain the Fund's SAI, shareholder reports, and its Form N–CSR, Form N–PORT, and Form N–CEN. The Fund's SAI and shareholder reports will be available free upon request from the Fund, and those documents and the Form N–CSR, Form N–PORT, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website.

Commentary .03 to NYSE Arca Rule 8.601–E provides that the Exchange will implement and maintain written surveillance procedures applicable to Active Proxy Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will, upon request by the Exchange or FINRA, on behalf of the Exchange, make available to the Exchange or FINRA the daily portfolio holdings of each series of Active Proxy Portfolio Shares. The Exchange believes that the ability to access the information on an as needed basis will provide it with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Active Proxy Portfolio Shares on the Exchange, including the ability to monitor compliance with the initial and continued listing requirements as well as the ability to surveil for manipulation of Active Proxy Portfolio Shares. With respect to the Fund, the Adviser will make available daily to FINRA and the Exchange the portfolio holdings of the Fund upon request as necessary to facilitate the performance of the surveillances and investigations referred to above.

The Exchange will utilize its existing procedures to monitor compliance with the requirements of Rule 8.601–E. For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require from the Company, upon initial listing and periodically thereafter, a representation that it is in compliance with Rule 8.601–E. The Exchange notes that Commentary .01 to Rule 8.601–E requires the issuer of Shares to notify the Exchange of any failure to comply with the continued listing requirements of Rule 8.601–E. In addition, the Exchange will require the issuer to represent that it will notify the Exchange of any failure to comply with the terms of applicable exemptive and no-action relief. The Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 8.601–E.

In addition, with respect to the Fund, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares and U.S. exchange-traded instruments (excluding futures contracts) will be available via the CTA high-speed line, from the exchanges on which such securities trade, or through major market data vendors or subscription services. Quotation and last sale information for futures contracts will be available from the exchanges on which they trade. Intraday price information for all exchange-traded instruments, which include all eligible instruments except cash and cash equivalents, will be available from the exchanges on which they trade, or through major market data vendors or subscription services. Intraday price information for cash equivalents is available through major market data vendors, subscription services and/or pricing services.

The website for the Fund will include a form of the prospectus that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Rule 8.601–E(d)(2)(D), which sets forth circumstances under which Shares of the Fund will be halted. In addition, as noted above, investors will have ready access to the Proxy Portfolio and quotation and last sale information for the Shares. The identity and quantity of investments in the Proxy Portfolio will be publicly available on the Fund's website before the commencement of trading in Shares on each Business Day. The Shares will conform to the initial and continued listing criteria under Rule 8.601–E.[29]

The Fund's holdings will conform to the permissible investments as set forth in the Application and Exemptive Order, and the holdings will be consistent with all requirements in the Application and Exemptive Order.[30] Any foreign common stocks held by the Fund will be traded on an exchange that is a member of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that

[28] *See* note 13, *supra.*

[29] *See* note 4, *supra.*

[30] *See* note 13, *supra.*

it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange will obtain a representation from the Adviser, prior to commencement of trading in the Shares of the Fund, that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change would permit listing and trading of an additional actively-managed ETF that has characteristics different from existing actively-managed and index ETFs and would introduce additional competition among various ETF products to the benefit of investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[31] and Rule 19b–4(f)(6) thereunder.[32]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[33] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange notes that the Commission has approved and noticed for immediate effectiveness proposed rule changes to permit listing and trading on the Exchange of Active Proxy Portfolio Shares similar to the Fund.[34] The proposed listing rule for the Fund raises no novel legal or regulatory issues. Thus, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[35]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSEARCA–2023–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2023–38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–NYSEARCA–2023–38, and should be submitted on or before June 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–12216 Filed 6–7–23; 8:45 am]

BILLING CODE 8011–01–P

[31] 15 U.S.C. 78s(b)(3)(A).

[32] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[33] 17 CFR 240.19b–4(f)(6)(iii).

[34] *See supra* notes 9 and 10.

[35] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[36] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 88 FR 36624, June 5, 2023.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, June 7, 2023 at 10:00 a.m.

CHANGES IN THE MEETING: The following item will not be considered during the Open Meeting on Wednesday, June 7, 2023:

1. The Commission will consider whether to approve a proposed amendment to the CAT NMS Plan to implement a revised funding model (''Executed Share Model'') for the consolidated audit trail (''CAT'') and to establish a fee schedule for Participant CAT fees in accordance with the Executed Share Model.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: June 6, 2023.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2023–12339 Filed 6–6–23; 11:15 am]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–1340]

Agency Information Collection Activities: Requests for Comments; Clearance of [Renewed] Approval of Information Collection: Pilots Convicted of Alcohol or Drug-Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedure

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval [to renew an] information collection. The collection involves receiving and maintaining correspondence required to be sent to the FAA from pilots who have been involved in a drug- or alcohol-related motor vehicle action. The information to be collected will be used to and/or is necessary because the FAA must identify airmen with multiple drug- or alcohol-related motor vehicle actions, and verify traffic conviction information in order to support the FAA's Aviation Safety, Office of Aerospace Medicine, Aerospace Medical Certification Division, for their requirements to evaluate the qualifications of that airman to hold a medical certificate.

DATES: Written comments should be submitted by August 7, 2023.

ADDRESSES: Please send written comments:

By Electronic Docket: https://www.regulations.gov (Enter docket number into search field).

By mail: Christopher Marks, P.O. Box 25810, Oklahoma City, OK 73125.

By fax: 405–954–4989.

FOR FURTHER INFORMATION CONTACT: Christopher Marks by email at: *Christopher.Marks@faa.gov;* phone: 405–954–2789.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0543.

Title: Pilots Convicted of Alcohol or Drug-Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedure.

Form Numbers: No official form numbers used.

Type of Review: Renewal of an information collection.

Background: After a study and audit conducted from the late 1970's through the 1980's by the Department of Transportation, Office of the Inspector General, (DOT/OIG), the DOT/OIG recommended the FAA find a way to track alcohol abusers and those dependent on the substance that may pose a threat to the National Airspace (NAS). Through a Congressional act issued in November of 1990, the FAA established a Driving Under the Influence (DUI) and Driving While Intoxicated (DWI) Investigations Branch. The final rule for this program is found in title 14 Code of Federal Regulations (CFR)—part 61 61.15.

This regulation calls for pilots certificated by the FAA to send information regarding Driving Under the Influence (or similar charges) of alcohol and/or drugs to the FAA within 60 days from either an administrative action against their driver's license and/or criminal conviction. Part of the regulation also calls for the FAA to seek certificate action should an airman be involved in multiple, separate drug/alcohol related motor vehicle incidents within a three-year period. Information sent by the airmen is used to confirm or refute any violations of these regulations, as well as by the Civil Aerospace Medical Institute (CAMI) for medical qualification purposes. Collection by CAMI is covered under a separate OMB control number 2120–0034.

An airman is required to provide a written report, with the following information: name, address, date of birth, airman certificate number, the type of violation which resulted in the conviction or administrative action, the state which holds the records or action, and a statement of whether the motor vehicle action resulted from the same incident or arose out of the same factual circumstances related to a previously reported motor vehicle action.

Respondents: 480 FAA airmen with drug and alcohol related motor vehicle actions provide approximately 599 reports per year over the last three years.

Frequency: On occasion.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 30 minutes per report and 299.5 hours for all reports annually.

Issued in Oklahoma City, OK, on June 2, 2023.

Christopher Marks,

Security Specialist, Security & Hazardous Materials Safety/Enforcement Standards & Policy Division, AXE–900.

[FR Doc. 2023–12201 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2022–0236]

Agency Information Collection Activities; Renewal of Currently Approved Information Collection: Hazardous Materials Safety Permits

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval and invites the public to comment. FMCSA is seeking to renew an existing ICR titled, ''Hazardous Materials Safety Permits.'' This ICR requires companies holding safety permits to develop communication plans that allow for the periodic tracking of hazardous materials shipments. A record of the communications that includes the time of the call and location of the shipment may be kept by either the driver (*e.g.,* recorded in the logbook) or the company. These records must be kept, either physically or electronically, for at least 6 months at the company's principal place of business or readily available to the employees at the principal place of business. This ICR has been updated only to the extent that the number of motor carriers with an active Hazardous Materials (HM) Safety Permit has increased from 987 to 1065.

DATES: Comments on this notice must be received on or before July 10, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Melissa Williams, Office of Safety, Hazardous Materials Division, DOT, FMCSA, 6th Floor, West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; 202–366–4163; *melissa.williams@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Hazardous Materials Safety Permits.

OMB Control Number: 2126–0030.

Type of Request: Renewal of a currently approved information collection.

Respondents: Motor Carriers subject to the Hazardous Materials Safety Permit requirements in 49 CFR part 385, subpart E.

Estimated Number of Respondents: 1065.

Estimated Time per Response: 5 minutes. The communication between motor carriers and their drivers must take place at least two times per day. It is estimated that it will take 5 minutes to maintain a daily communication record for each driver.

Expiration Date: September 30, 2023.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 750,000 hours [9 million trips × 5 minutes per record ÷ 60 minutes per hour = 750,000, rounded to the nearest thousand].

Background: The Secretary of Transportation is responsible for implementing regulations to issue safety permits for transporting certain HM in accordance with 49 U.S.C. 5101 *et seq.* The HM Safety Permit regulations (49 CFR part 385, subpart E) require initial or first time HM Safety Permit carriers to file the Unified Registration System Form MCSA–1. Update and renewal applications must be filed with FMCSA using the ''Combined Motor Carrier Identification Report and HM Permit Application'' (Form MCS–150B). The HM Safety Permit regulations also require carriers to have a security program. As part of the HM Safety Permit regulations, carriers are required to develop and maintain route plans so that law enforcement officials can verify the correct location of the HM shipment. FMCSA requires companies holding permits to develop a communications plan that allows for the periodic tracking of the shipment. This information covers the record of communications that includes the time of the call and location of the shipment. The records may be kept by either the driver (*e.g.,* recorded in the logbook) or the company. These records must be kept, either physically or electronically, for at least 6 months at the company's principal place of business or be readily available to employees at the company's principal place of business.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–12255 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0098]

Agency Information Collection Activities; New Information Collection: Safety Impacts of Human-Automated Driving System (ADS) Team Driving Applications

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. This notice invites comments on a proposed information collection titled ''Safety Impacts of Human-Automated Driving System (ADS) Team Driving Applications.'' It is a driving simulator study with a series of questionnaires that will quantify the safety implications of team driving applications between humans and ADS-equipped commercial motor vehicles (CMVs). Specifically, this study will focus on team driving applications with an SAE Level 4 (L4) CMV. In L4 automation, as specified by SAE (2021), CMVs are capable of all functions and controls necessary for driving without human monitoring in limited conditions, and the human driver will not be asked to take over control of the vehicle. The L4 CMV will not operate outside of the conditions it was designed for without human control. Approximately 80 CMV drivers will participate in the study. The study will assess the safety benefits and disbenefits of human-ADS team driving applications and support the analysis of potential requests for relief from FMCSA's hours-of-service (HOS) regulations.

DATES: Comments on this notice must be received on or before August 7, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2023–0098 using any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200

New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Brian Routhier, Office of Research and Registration, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; 202–366–1225; *brian.routhier@dot.gov.*

SUPPLEMENTARY INFORMATION:

Public Participation

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov*, and follow the online instructions for accessing the docket, or go to the street address listed above.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''FAQ'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

Background

Over the past 15 years, ADS technology has advanced rapidly through innovation. As more manufacturers and technology companies move toward higher levels of automation (*i.e.,* SAE ''L4''), it is not fully clear how human drivers will team with ADS-equipped trucks. L4 ADS-equipped CMVs are capable of all functions and controls necessary for driving without human monitoring in limited conditions, and the human driver will not be asked to take over control of the vehicle. L4 ADS will not operate outside of the conditions for which it was designed. Currently, there are at least four use cases where a human may team with an ADS-equipped CMV:

1. In-vehicle driver teams with an ADS CMV;
2. In-vehicle driver teams with a following ADS-equipped CMV;
3. In-vehicle driver teams with a remote human to monitor and control an ADS CMV; and
4. Remote monitor/operator teaming with ADS CMV.

Each of the teaming use cases above offers different potential human factors benefits and challenges. However, it is unclear how each human-ADS teaming use case will affect safety, productivity, and efficiency. Each teaming combination may positively or negatively affect a driver's cognitive workload and level of fatigue, alertness, or distraction compared to the case of a traditional driver in a truck without ADS. For example, the in-vehicle drivers and remote monitors/operators in the above teaming use cases may experience varying workloads and differences in the development of fatigue.

Previous research conducted by FMCSA found a paucity of extant research related to ADS-equipped CMVs. To date, most commercial ADSs on U.S. roadways are in passenger vehicles, and CMV ADSs are only recently being implemented in real-world operations. Therefore, FMCSA needs more data on ADS-equipped CMVs to understand the human factors surrounding team driving applications between humans and ADS-equipped CMVs.

The purpose for obtaining data in this study is to quantify safety implications of the four human-ADS teaming use cases described above. Specifically, this project will provide data to assess the safety benefits and disbenefits on human-ADS teaming scenarios: (i) driver use, workload, fatigue, alertness, and distraction when teaming with an ADS; (ii) remote operator use, workload, fatigue, alertness, and distraction while actively monitoring and/or controlling an ADS-equipped truck; (iii) driver re-engagement to the driving task after ADS or remote operator control; and (iv) fleet acceptance and future integration possibilities. Additionally, data from this study will support the analysis of potential requests for relief from FMCSA's HOS regulations under 49 U.S.C. 31315 and 49 CFR part 381. Answers to these research questions will provide insight into the potential safety implications and human factors associated with human-ADS team driving applications.

The study includes data collection from a series of questionnaires and a driving-simulator focused experiment. The collected survey data will support the simulator experiment data. The survey data will be used in two ways: in the assessment of driving performance data as covariates in the model (to control for certain demographic variables, such as age, gender, and experience) and to answer research questions on the human factors and the relationship the safety benefits of each of the four human-ADS team driving applications. Data on workload, fatigue, alertness, inattention, and performance will be collected from the simulator experiment. Eligible drivers will hold a valid commercial driver's license, currently drive a CMV, be 21 years of age or older, and pass the motion sickness history screening questionnaire.

We anticipate 80 participants in total for the driving simulator study. Data will be collected over one study session lasting up to 17 hours. Questionnaire data will be collected prior to the simulator study, during the simulator study, and after the simulator study. All questionnaires will be preloaded in an app format for drivers to complete on a tablet.

The analysis methodology uses a multifaceted approach to address research questions on driver workload, fatigue, alertness, distraction, and rate of safety-critical events. The principal statistical method for analyzing the data will include mixed models to account for multiple, correlated data points from a single participant. Eye-tracking data will be used to assess driver workload, fatigue, alertness, distraction, and reaction time. These data will be described using summary statistics and advanced plotting techniques to visually compare drivers and remote operators during in-vehicle driving, in-vehicle monitoring, and remote operation. A generalized linear mixed model (GLMM) will be used to assess differences in average fatigue, workload, alertness, distraction, and reaction times between in-vehicle driving and remote operator driving operation types. In the transportation safety field, GLMMs are

often used to analyze driver behavior and assess relationships between driving scenarios and behaviors. Finally, rates of safety-critical events, including unintentional lane deviations (which are surrogates for fatigue and alertness) will be analyzed using a Poisson or negative binomial mixed-effect regression model. Poisson or negative binomial regression models are standard practice for the assessment of events over a unit of exposure in the field of transportation safety.

Title: Safety Impacts of Human-Automated Driving System (ADS) Team Driving Applications.

OMB Control Number: 2126–00XX.

Type of Request: New ICR.

Respondents: CMV drivers.

Estimated Number of Respondents: 80.

Estimated Time per Response: 17 hours.

Expiration Date: This is a new ICR.

Frequency of Response: One response.

Estimated Total Annual Burden: 508.5 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this ICR.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–12254 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0134]

Request for Comments on the Approval of a New Information Collection: Building American Production Capacity for Electric Port Equipment and Other Port Infrastructure Items

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Maritime Administration (MARAD) invites public comments on our intention to request the Office of Management and Budget (OMB) approval of a new information collection. The proposed collection OMB 2133–NEW (Building American Production Capacity for Electric Port Equipment and Other Port Infrastructure Items) will be used to identify the demand for electric-powered port equipment and other port infrastructure items supported by a pooled procurement. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995. A 60-day **Federal Register** Notice soliciting comments on this information collection was published on March 2, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collections 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: Kirk Claussen, (202) 366–5660, Office of Ports & Waterways, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, Email at *Kirk.Claussen@dot.gov*.

SUPPLEMENTARY INFORMATION:

Title: Building American Production Capacity for Electric Port Equipment and Other Port Infrastructure Items.

OMB Control Number: 2133–NEW.

Type of Request: New Information Collection.

Abstract: The Building American Production Capacity for Electric Port Equipment and Other Port Infrastructure Items collection is essential to identify the demand for electrically powered port equipment and infrastructure items supported by pooled procurement. This initiative, which is comprised of an online survey and interview with diverse American port stakeholders, will also support Buy American/Buy America objectives and American manufacturers of electrically powered port equipment. Survey responses will also help to identify a suitable port through which the procurement of electrically powered port equipment and infrastructure can be initiated. This survey is being conducted through a cooperative agreement between the Maritime Administration (MARAD) and the American Association of Port Authorities (AAPA).

Currently, many U.S. port authorities and marine terminal operators purchase diesel-powered dockside equipment, necessary for loading, unloading, and organizing shipping containers. Much of this equipment is foreign made, in short supply, and increases exposure to dangerous emissions that contribute to climate change. The recent passage of the Infrastructure Investment and Jobs Act (IIJA), commonly referred to as the Bipartisan Infrastructure Bill, which was signed into law on November 15, 2021, provides a federal grant stream that will modernize U.S. ports infrastructure over the next five years. Specifically, this Bill assures resources for the development of a domestic capacity of clean electric-powered American alternatives to replace and reduce emissions by predominantly foreign-made diesel port equipment.

Respondents: U.S. port authorities, marine terminal operators, and port equipment manufacturers.

Affected Public: Local and state governments and businesses.

Estimated Number of Respondents: 200.

Estimated Number of Responses: 200.

Estimated Hours per Response: 2.25 hours.

Annual Estimated Total Annual Burden Hours: 138.

Frequency of Response: Once.

(Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.49.)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–12219 Filed 6–7–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–OCC–2023–0009]

Mutual Savings Association Advisory Committee

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The OCC announces a meeting of the Mutual Savings Association Advisory Committee (MSAAC).

DATES: A public meeting of the MSAAC will be held on Tuesday, June 27, 2023, beginning at 1:00 p.m. Eastern Daylight Time (EDT). The meeting will be in person and virtual.

ADDRESSES: The OCC will host the June 27, 2023 meeting of the MSAAC at the OCC's offices at 400 7th Street SW, Washington, DC 20219 and virtually.

FOR FURTHER INFORMATION CONTACT: Michael R. Brickman, Deputy Comptroller for Specialty Supervision, (202) 649–5420, Office of the Comptroller of the Currency, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services. You also may access prior MSAAC meeting materials on the MSAAC page of the OCC's website.[1]

SUPPLEMENTARY INFORMATION: Under the authority of the Federal Advisory Committee Act (the Act), 5 U.S.C. 1001 *et seq.* and the regulations implementing the Act at 41 CFR part 102–3, the OCC is announcing that the MSAAC will convene a meeting on Tuesday, June 27, 2023. The meeting is open to the public and will begin at 1:00 p.m. EDT. The purpose of the meeting is for the MSAAC to advise the OCC on regulatory or other changes the OCC may make to ensure the health and viability of mutual savings associations. The agenda includes a discussion of current topics of interest to the industry.

Members of the public may submit written statements to the MSAAC. The OCC must receive written statements no later than 5:00 p.m. EDT on Thursday, June 22, 2023. Members of the public may submit written statements to *MSAAC@occ.treas.gov.*

[1] *https://occ.gov/topics/supervision-and-examination/bank-management/mutual-savings-associations/mutual-savings-association-advisory-committee.html.*

Members of the public who plan to attend the meeting should contact the OCC by 5:00 p.m. EDT on Thursday, June 22, 2023, to inform the OCC of their desire to attend the meeting and whether they will attend in person or virtually, and to obtain information about participating in the meeting. Members of the public may contact the OCC via email at *MSAAC@OCC.treas.gov* or by telephone at (202) 649–5420. Attendees should provide their full name, email address, and organization, if any. For persons who are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to arrange telecommunications relay services for this meeting.

Michael J. Hsu,

Acting Comptroller of the Currency.

[FR Doc. 2023–12234 Filed 6–7–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for 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 June 5, 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. SAPOZHNIKOV, Konstantin Prokopyevich (Cyrillic: САПОЖНИКОВ, Константин Прокопьевич), 63 1 Planernaya Street, Apt 449, St. Petersburg, Russia; DOB 02 Dec 1982; POB Kaluzhskaya Area, Russia; nationality Russia; citizen Russia; Gender Male; Passport 719869507 (Russia); National ID No. 2912519114 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

2. MAKOLOV, Yury Yuryevich (Cyrillic: МАКОЛОВ, Юрий Юрьевич), Beringa, St. Petersburg, St. Petersburg 199406, Russia; DOB 27 Mar 1995; POB Togliatti, Russia; nationality Russia; citizen Russia; Gender Male; Passport 711393126 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

3. KHLOPONIN, Gleb Maksimovich (Cyrillic: ХЛОПОНИН, Глеб Максимович), 3 Pionerskaya Street, Apt 144, Zheleznodorozhny, Moscow Oblast 143987, Russia; DOB 16 Feb 1985; nationality Russia; citizen Russia; Gender Male; Tax ID No. 601302569578 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

4. GROMOVIKOV, Vasiliy Viktorovich (Cyrillic: ГРОМОВИКОВ, Василий Викторович) (a.k.a. "Zevsgod2000"), St. Petersburg, Russia; DOB 31 Mar 1993; POB St. Petersburg, Russia; nationality Russia; citizen Russia; Gender Male; Tax ID No. 5528037522335 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

5. LOSEV, Aleksey Vyacheslavovich (Cyrillic: ЛОСЕВ, Алексей Вячеславович) (a.k.a. LOSEV, Alexey Vyacheslavovich; a.k.a. PERKO, Alexey; a.k.a. "KALUGA, Perko"), Kalugskaya Street, DOM 48, KV. 9, Kaluga, Kalugskaya Oblast 248009, Russia; DOB 10 Apr 1986; POB Kaluga, Russia; nationality Russia; citizen Russia; Gender Male; Passport 750643398 (Russia); National ID No. 2907229130 (Russia); Tax ID No. 402903661126 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

6. BOYKO, Svetlana Andreyevna (Cyrillic: БОЙКО, Светлана Андреевна) (a.k.a. "BOYKO, Sveta"), St. Petersburg, Russia; DOB 14 Apr 1990; POB Leningrad, Russia; nationality Russia; citizen Russia; Gender Female; Tax ID No. 781102544700 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

7. TRAVNIKOVA, Anna (Cyrillic: ТРАВНИКОВА, Анна) (a.k.a. "TAUSENT, Anna"; a.k.a. "TOWSENT, Anna"), Kaluga, Russia; DOB 09 Jan 1990; POB Moscow, Russia; nationality Russia; citizen Russia; Gender Female (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(ii)(F) of E.O. 14024 for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

Entities

1. PERKO JULLEUCHTER (a.k.a. JULLEUCHTER BY PERKO; a.k.a. JULLEUCHTER BY PERKO FAMILY WORKSHOP; a.k.a. PERKO WORKSHOP FAMILY; a.k.a. "PERKO_JULLEUCHTER"; a.k.a. "PERKOWORKSHOP"), Kaluga, Russia; Organization Type: Manufacture of other porcelain and ceramic products [RUSSIA-EO14024] (Linked To: LOSEV, Aleksey Vyacheslavovich).

   Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Aleksey Vyacheslavovich Losev, a person whose property and interests in property are blocked pursuant to E.O. 14024.

Dated: June 5, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–12253 Filed 6–7–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Relating to Election To Treat a Qualified Revocable Trust as Party of an Estate

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, 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 continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Election To Treat a Qualified Revocable Trust as Party of an Estate.

DATES: Written comments should be received on or before August 7, 2023 to be assured of consideration

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Include OMB control number 1545–1881 or Election To Treat a Qualified Revocable Trust as Party of an Estate in the subject line of email.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Election To Treat a Qualified Revocable Trust as Party of an Estate.

OMB Number: 1545–1881.

Form Number: 8855.

Abstract: Form 8855 is used to make a section 645 election that allows a qualified revocable trust to be treated and taxed (for income tax purposes) as part of its related estate during the election period.

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Time per Response: 5 hours, 38 minutes.

Estimated Total Annual Burden Hours: 28,200 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 2, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023–12211 Filed 6–7–23; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the New England Wind Project Offshore Massachusetts; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 230530–0140]

RIN 0648–BL96

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the New England Wind Project Offshore Massachusetts

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

ACTION: Proposed rule; proposed letter of authorization; request for comments.

SUMMARY: NMFS has received a request from Park City Wind, LLC (Park City Wind) for Incidental Take Regulations (ITR) and an associated Letter of Authorization (LOA) pursuant to the Marine Mammal Protection Act (MMPA). The requested regulations would govern the authorization of take, by Level A harassment and/or Level B harassment, of small numbers of marine mammals over the course of 5 years (2025–2030) incidental to construction of the New England Wind Project. Park City Wind proposes to develop the New England Wind Project in two phases, known as Park City Wind (Phase 1) and Commonwealth Wind (Phase 2). Project activities that may result in incidental take include pile driving (impact and vibratory), drilling, unexploded ordnance or munitions and explosives of concern (UXO/MEC) detonation, and vessel-based site assessment surveys using high-resolution geophysical (HRG) equipment. NMFS requests comments on this proposed rule. NMFS will consider public comments prior to making any final decision on the promulgation of the requested ITR and issuance of the LOA; agency responses to public comments will be summarized in the final rule, if issued. If adopted, the proposed regulations would be effective March 27, 2025, through March 26, 2030.

DATES: Comments and information must be received no later than July 10, 2023.

ADDRESSES: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2023–0080 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of Park City Wind's Incidental Take Authorization (ITA) application and supporting documents, as well as a list of the references cited in this document, may be obtained online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This proposed rule would provide a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to construction of the New England Wind Project within the Bureau of Ocean Energy Management (BOEM) Renewable Energy Lease Area OCS–A 0534, the southwest (SW) portion of Lease Area OCS–A 0501, and along an export cable corridor to a landfall location in Massachusetts. NMFS received a request from Park City Wind for 5-year regulations and an LOA that would authorize take, by Level A harassment and/or Level B harassment, of 39 species of marine mammals incidental to Park City Wind's construction activities. After reviewing the request, NMFS is proposing to authorize the take, by harassment only, of 38 species, representing 38 stocks. No mortality or serious injury is anticipated or proposed for authorization. Please see the Estimated Take of Marine Mammals section below for definitions of relevant terms.

Legal Authority for the Proposed Action

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are promulgated, and public notice and an opportunity for public comment are provided.

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

As noted above, no serious injury or mortality is anticipated or proposed for authorization in this proposed rule. Relevant definitions of MMPA statutory and regulatory terms are included below:

- *Citizen*—individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) (*see* 50 CFR 216.103);
- *Take*—to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362);
- *Incidental taking*—an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental (see 50 CFR 216.103);
- *Serious Injury*—any injury that will likely result in mortality (50 CFR 216.3);
- *Level A harassment*—any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362; 50 CFR 216.3); and
- *Level B harassment*—any act of pursuit, torment, or annoyance which

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 (16 U.S.C. 1362).

Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for proposing and, if appropriate, issuing 5-year regulations and an associated LOA. This proposed rule also establishes required mitigation, monitoring, and reporting requirements for Park City Wind's activities.

Summary of Major Provisions Within the Proposed Action

The major provisions within this proposed rule are as follows:

- Authorize take of marine mammals by Level A harassment and/or Level B harassment.
- No mortality or serious injury of any marine mammal is proposed to be authorized;
- Establish a seasonal moratorium on foundation installation and UXO/MEC detonations during the months of highest North Atlantic right whale (*Eubalaena glacialis*) presence in the project area (no foundation installation or UXO/MEC detonation from January 1–April 30; no vibratory pile driving in May and December; impact pile driving and drilling activities would not be planned or occur in December unless due to unforeseen circumstances and only with NMFS' approval; UXO/MEC detonations would not be planned or occur in December or May unless due to unforeseen circumstances and only with NMFS' approval);
- Enhanced North Atlantic right whale clearance, shutdown and restart procedures May 1 through May 14 and November 1 through December 31 (if a seasonally-restricted activity is approved in December due to unforeseen circumstances);
- Require both visual and passive acoustic monitoring by trained, NOAA Fisheries-approved Protected Species Observers (PSOs) and Passive Acoustic Monitoring (PAM; where required) operators before, during, and after select activities;
- Require the use of sound attenuation device(s) during all foundation installation activities and UXO/MEC detonations to reduce noise levels;
- Delay the start of foundation installation and UXO/MEC detonations if a North Atlantic right whale is observed at any distance by PSOs or acoustically detected within certain distances;
- Delay the start of foundation installation and UXO/MEC detonations if other marine mammals are observed entering or within their respective clearance zones;
- Shut down pile driving (if feasible) if a North Atlantic right whale is observed or if other marine mammals enter their respective shut down zones;
- Implement sound field verification requirements during impact pile driving and UXO/MEC detonations to measure in situ noise levels for comparison against the model results;
- Implement soft-starts for impact pile driving and use the least hammer energy possible;
- Require PSOs to continue to monitor for the presence of marine mammals for 30 minutes after any impact pile driving occurs;
- Implement ramp-up for HRG site characterization survey equipment;
- Increase awareness of North Atlantic right whale presence through monitoring of the appropriate networks and Channel 16, as well as reporting any sightings to the sighting network;
- Implement various vessel strike avoidance measures;
- Implement Best Management Practices (BMPs) during fisheries monitoring surveys, such as removing gear from the water if marine mammals are considered at-risk or are interacting with gear; and
- Require frequent scheduled and situational reporting including, but not limited to, information regarding activities occurring, marine mammal observations and acoustic detections, and sound field verification monitoring results.

Under Section 105(a)(1) of the MMPA, failure to comply with these requirements or any other requirements in a regulation or permit implementing the MMPA may result in civil monetary penalties. Pursuant to 50 CFR 216.106, violations may also result in suspension or withdrawal of the Letter of Authorization (LOA) for the project. Knowing violations may result in criminal penalties under Section 105(b) of the MMPA.

National Environmental Policy Act (NEPA)

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate the proposed action (*i.e.,* promulgation of regulations and subsequent issuance of a 5-year LOA) and alternatives with respect to potential impacts on the human environment.

Accordingly, NMFS proposes to adopt the BOEM's Environmental Impact Statement (EIS), provided our independent evaluation of the document finds that it includes adequate information analyzing the effects of promulgating the proposed regulations and LOA issuance on the human environment. NMFS is a cooperating agency on BOEM's EIS. BOEM's draft EIS, ''New England Wind Draft Environmental Impact Statement (DEIS) for Commercial Wind Lease OCS–A0534'', was made available for public comment on December 23, 2022 (87 FR 78993), beginning the 60-day comment period ending on February 21, 2023. Additionally, BOEM held three virtual public hearings on January 27, February 1, and February 6, 2023.

Information contained within Park City Wind's incidental take authorization (ITA) application and this **Federal Register** document provide the environmental information related to these proposed regulations and associated 5-year LOA for public review and comment. NMFS will review all comments submitted in response to this notice of proposed rulemaking prior to concluding the NEPA process or making a final decision on the requested 5-year ITR and LOA.

Fixing America's Surface Transportation Act (FAST–41)

This project is covered under Title 41 of the Fixing America's Surface Transportation Act, or ''FAST–41''. FAST–41 includes a suite of provisions designed to expedite the environmental review for covered infrastructure projects, including enhanced interagency coordination as well as milestone tracking on the public-facing Permitting Dashboard. FAST–41 also places a 2-year limitations period on any judicial claim that challenges the validity of a Federal agency decision to issue or deny an authorization for a FAST–41 covered project. 42 U.S.C. 4370m–6(a)(1)(A).

Park City Wind's proposed project is listed on the Permitting Dashboard, where milestones and schedules related to the environmental review and permitting for the project can be found at *https://www.permits.performance.gov/permitting-project/new-england-wind.*

Summary of Request

On December 1, 2021, Park City Wind, a limited liability company registered in the State of Delaware and wholly owned subsidiary of Avangrid Renewables, LLC, submitted a request for the promulgation of regulations and issuance of an associated 5-year LOA to

take marine mammals incidental to construction activities associated with implementation of the New England Wind Project (hereafter ''Project'') offshore of Massachusetts in the BOEM Lease Area OCS–A 0534 and the possible use of their southwest (SW) portion of Lease Area OCS–A 0501. The request was for the incidental, but not intentional, taking of a small number of 39 marine mammal species (comprising 38 stocks). Neither Park City Wind nor NMFS expects serious injury or mortality to result from the specified activities nor is any proposed for authorization.

Park City Wind is proposing to develop the Project in two phases with a maximum of 132 wind turbine generators (WTGs) and electrical service platforms (ESP) positions. Two positions may potentially have co-located ESPs (*i.e.,* two foundations installed at one grid position); hence, the 132 foundations would be installed at 130 positions in the lease area. Phase 1 would include 41 to 62 WTGs and 1 or 2 ESPs while Phase 2 would include 64 to 88 WTG/ESP positions (up to 3 of those positions will be occupied by ESPs). Four or five offshore export cables will transmit electricity generated by the WTGs to onshore transmission systems in the Town of Barnstable, Massachusetts.

In response to our questions and comments and following extensive information exchange between Park City Wind and NMFS, Park City Wind submitted a final revised application on July 13, 2022. NMFS deemed it adequate and complete on July 20, 2022. This final application is available on NMFS' website at *https://www.fisheries.noaa.gov/protected-resource-regulations.*

On August 22, 2022, NMFS published a notice of receipt (NOR) of Park City Wind's adequate and complete application in the **Federal Register** (87 FR 51345), requesting public comments and information on Park City Wind's request during a 30-day public comment period. During the NOR public comment period, NMFS received comment letters from one private citizen and one non-governmental organization (ALLCO Renewable Energy Limited). NMFS has reviewed all submitted material and has taken the material into consideration during the drafting of this proposed rule. In January 2023 and again in March 2023, Park City Wind submitted memos to NMFS detailing updates and changes to their ITA application (''Application Update Report''). These are available on the NMFS website at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-park-city-wind-llc-construction-new-england-wind-offshore-wind.*

NMFS previously issued one Incidental Harassment Authorization (IHA) to Park City Wind for the taking of marine mammals incidental to marine site characterization surveys, using high-resolution geophysical (HRG) of the Project Phase 1 in the BOEM Lease Area OCS–A 0534 (87 FR 44087, July 07, 2022). NMFS has also previously issued another IHA to Avangrid Renewables, LLC (Avangrid), owner of Park City Wind, LLC, to take small numbers of marine mammals incidental to an HRG survey for a BOEM Lease Area (OCS–A 0508) off the coasts of North Carolina and Virginia (84 FR 31032, June 28, 2019). To date, Park City Wind and Avangrid have complied with all IHA requirements (*e.g.,* mitigation, monitoring, and reporting). Applicable monitoring results may be found in the Estimated Take of Marine Mammals section. If available, the full monitoring reports can be found on NMFS' website at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.*

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations (87 FR 46921, August 1, 2022) to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event. Should a final vessel speed rule be issued and become effective during the effective period of this ITR (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule would become effective immediately upon the effective date of any final vessel speed rule and, when notice is published on the effective date, NMFS would also notify Park City Wind if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer required.

Description of the Specified Activities

Overview

Park City Wind has proposed to construct and operate a wind energy facility in State and Federal waters in the Atlantic Ocean in lease area OCS–A 0534. This lease area is located within the Massachusetts Wind Energy Area (MA WEA) and adjacent to the Rhode Island/Massachusetts Wind Energy Area (RI/MA WEA). The Project will occupy all of Lease Area OCS–A 0534 and potentially a portion of Lease Area OCS–A 0501 in the event that Vineyard Wind 1 does not develop spare or extra positions included in Lease Area OCS–A 0501. If Vineyard Wind 1 does not develop spare or extra positions in Lease Area OCS–A 0501, those positions would be assigned to Lease Area OCS–A 0534. Accordingly, for the purposes of the LOA, Park City Wind has defined the Southern Wind Development Area (SWDA) as all of Lease Area OCS–A 0534 and the southwest portion of Lease Area OCS–A 0501.

The Project would consist of several different types of permanent offshore infrastructure, including wind turbine generators (WTGs) and associated foundations, ESPs, and offshore cabling. Onshore cabling, substations, and operations and maintenance (O&M) facilities are also planned. The Project is divided into two phases: Park City Wind (Phase 1) and Commonwealth Wind (Phase 2). Phase 1 would occupy 150–231 km^2 (37,066–57,081 acres) which would include 41–62 WTGs and 1–2 ESPs. Phase 1 includes two WTG foundation types: monopiles and piled jackets. The ESP(s) will also be supported by a monopile or jacket foundation. Strings of WTGs will connect with the ESP(s) via a submarine inter-array cable transmission system. Two high-voltage alternating current (HVAC) offshore export cables, up to 101 km (62.8 mi) in length per cable, would be installed within the SWDA. An Offshore Export Cable Corridor (OECC) would transmit electricity from the ESP(s) to a landfall site.

Phase 2 depends upon the final footprint of Phase 1. Phase 2 is expected to contain 64 to 88 WTGs and 1–3 ESP positions within an area ranging from 222–303 km^2 (54,857–74,873 acres). Phase 2 includes three general WTG foundation types: monopiles, jackets (with piles or suction buckets), or bottom-frame foundations (with piles or suction buckets). Inter-array cables will transmit electricity from the WTGs to

the ESP(s). The ESP(s) will also be supported by a monopile or jacket foundation (with piles or suction buckets). Two or three HVAC offshore export cables, each with a maximum length of 116–124 km (63–67 NM) per cable, will transmit power from the ESP(s) to shore. All Phase 2 offshore export cables are planned to use the same OECC as the Phase 1. Cables for Phase 1 and Phase 2 will diverge 2–3 km (1–2 mi) from shore to unique landfall locations.

The installation of WTGs and ESPs, would require impact and vibratory pile driving and drilling. Work would also include HRG vessel-based site characterization surveys using active acoustic sources with frequencies of less than 180 kHz and the potential detonations of 10 unexploded ordnances or Munitions and Explosives of Concern (UXO/MEC) of different charge weights. Additionally, project plans include trenching, laying, and burial activities associated with the installation of the export cable route from the ESP to the shore-based landing locations and the inter-array cables between turbines; site preparation work (*e.g.,* boulder removal); placement of scour protection around foundations; and several types of fishery and ecological monitoring surveys. Vessels would transit within the project area and between ports and the wind farm to transport crew, supplies, and materials to support pile installation. All offshore cables will connect to onshore export cables, substations, and grid connections, which would be located in Barnstable County, Massachusetts. Marine mammals exposed to elevated noise levels during impact and vibratory pile driving, drilling, detonations of UXOs, or site characterization surveys may be taken by Level A harassment and/or Level B harassment depending on the specified activity. No serious injury or mortality is anticipated or proposed for authorization.

Dates and Duration

Park City Wind anticipates that the Project activities with the potential to result in harassment of marine mammals would occur throughout all 5 years of the proposed regulations which, if promulgated, would be effective from March 27, 2025 through March 26, 2030. The estimated schedule, including dates and duration, for various activities is provided in Table 1 (also see Tables 1–3 in Application Update Report). However, this proposed rule considers the potential for activity schedules to shift. Detailed information about the activities themselves may be found in the *Detailed Description of the Specific Activities* subsection.

TABLE 1—ESTIMATED ACTIVITY SCHEDULE TO CONSTRUCT AND OPERATE THE PROJECT

Project activity	Estimated schedule	Estimated duration
HRG Surveys	Q1 2025–Q4 2029	Any time of the year, up to 25 days per year.
Scour Protection Pre- or Post-Installation	Q1 2025–Q4 2029	Any time of the year.
WTG and ESP Foundation Installation, Schedule A.	Q2–Q4 2026 and 2027 [1]	Up to 8 months per year.
WTG and ESP Foundation Installation, Schedule B.	Q2–Q4 2026, 2027, and 2028 [1]	Up to 8 months per year.
Horizontal Directional Drilling at Cable Landfall Sites.	Q4 2025–Q2 2026	Up to 150 days.
UXO/MEC Detonations	Q2–Q4 2025 and 2026 [3]	Up to 6 days in 2025 and 4 days in 2026. No more than 10 days total.
Inter-array Cable Installation	Q3–Q4 2026 and Q2 2027–Q2 2028	Phase 1: 5 months; [2] Phase 2: 10 months.[2]
Export Cable Installation and Termination	Q2 2026–Q2 2028	Phase 1: 8–9 months; [1] Phase 2: 13–17 months.[1]
Fishery Monitoring Surveys	Q1 2025–Q4 2029	Any time of year.
Turbine Operation	Initial turbines operational 2027, all turbines operational by 2028.	

[1] Foundation installation pile driving would be limited to May 1–December 31, annually; however, pile driving in December will not be planned but may occur due to unforeseen circumstances (*e.g.,* unanticipated extended weather delays, unexpected technical difficulties) and with NMFS approval.
[2] The Project is divided into 2 phases: Park City Wind (Phase 1) and Commonwealth Wind (Phase 2).
[3] Park City Wind requested UXO/MEC detonations be allowed Q1 2025–Q4 2026. We propose to only allow it May–December 2025 and 2026.

Specific Geographic Region

Park City Wind would construct the Project in Federal waters offshore of Massachusetts (Figure 1). The project area is part of the Rhode Island/Massachusetts Wind Energy Area (RI-MA WEA). The project area covers approximately 101,590 acres (411 km^2) in Lease Area OCS–A 0534. The project area is located about 20 miles (32 km) southwest of Martha's Vineyard, about 24 miles (39 km) south of Nantucket, and adjacent to the southwest boundary of the BOEM-approved Vineyard Wind 1 energy project (Lease Area OCS–A 0501; 65,296 acres (262 km^2) assigned for potential Project development). Water depths in the project area range from 43 to 62 m (141–203 ft) and in the OECC range from less than 2 m to 46 m (<7–151 ft). The onshore components of the Project will include up to three export cable landfalls in Barnstable County, Massachusetts (one for Phase 1 and up to two for Phase 2).

Park City Wind's specified activities would occur in the Northeast U.S. Continental Shelf Large Marine Ecosystem (NES LME), an area of approximately 260,000 km^2 from Cape Hatteras in the south to the Gulf of Maine in the north. Specifically, the lease area and cable corridor are located within the Mid-Atlantic Bight subarea of the NES LME, which extends between Cape Hatteras, North Carolina, and Martha's Vineyard, Massachusetts, extending westward into the Atlantic to the 100-m isobath. In the Mid-Atlantic Bight, which extends from Massachusetts to North Carolina, the pattern of sediment distribution is relatively simple. The continental shelf south of New England is broad and flat, dominated by fine grained sediments. Most of the surficial sediments on the continental shelf are sands and gravels. Silts and clays predominate at and beyond the shelf edge, with most of the slope being 70–100 percent mud. Fine sediments are also common in the shelf valleys leading to the submarine canyons, as well as in areas such as the ''Mud Patch'' south of Rhode Island. There are some larger materials, including boulders and rocks, left on the seabed by retreating glaciers, along the

coast of Long Island and to the north and east.

In support of the Rhode Island Ocean Special Area Management Plan development process, Codiga and Ullman (2011) reviewed and summarized the physical oceanography of coastal waters off Rhode Island. Conditions off the coast of Rhode Island are shaped by a complex interplay among wind-driven variability, tidal processes, and density gradients that arise from combined effects of interaction with adjacent estuaries, solar heating, and heat flux through the air-sea interface. In winter and fall, the stratification is minimal and circulation is a weak upwelling pattern directed offshore at shallow depths and onshore near the seafloor. In spring and summer, strong stratification develops due to an important temperature contribution, and a system of more distinct currents occurs, including a narrow flow that proceeds counterclockwise around the perimeter of Rhode Island Sound (RIS) likely in association with a tidal mixing front.

The waters in the vicinity of the Project are transitional waters positioned between the continental slope and the coastal environments of Rhode Island Sound and Nantucket Sound. The region is generally characterized by predominantly mobile sandy substrate, and the associated benthic communities are adopted to survive in a dynamic environment. The WEAs are composed of a mix of soft and hard bottom environments as defined by the dominant sediment grain size and composition (Continental Margin Mapping Program [Department of the Interior, 2020]; usSEABED (USGS, 2020)).

The benthic environment of the RI-MA WEA is dominated by sandy sediments that ranged from very fine to medium sand; very fine sands tend to be more prevalent in deeper, lower energy areas (*i.e.,* the southern portion of the MA WEA), whereas coarser sediments, including gravels (*e.g.,* patchy cobbles and boulders) were found in shallower areas (Bay State Wind, 2019; Deepwater Wind South Fork, LLC, 2019; DWW Rev I, LLC, 2020; Stokesbury, 2014; LaFrance *et al.,* 2010; McMaster, 1960; Popper *et al.,* 2014). The species that inhabit the benthic habitats of the OCS are typically described as infaunal species, those living in the sediments (*e.g.,* polychaetes, amphipods, mollusks), and epifaunal species, those living on the seafloor surface (mobile, *e.g.,* sea starts, sand dollars, sand shrimp) or attached to substrates (sessile, *e.g.,* barnacles, anemones, tunicates). Further detail on the benthic habitats found in the project area, including the results of site-specific benthic habitat assessments, can be found within Construction and Operations Plan (COP) Volume II–A, Section 5—Results Of Biological Surveys and COP Volume II–A Appendices—Appendix II–H 2016–2020 Benthic Reports.

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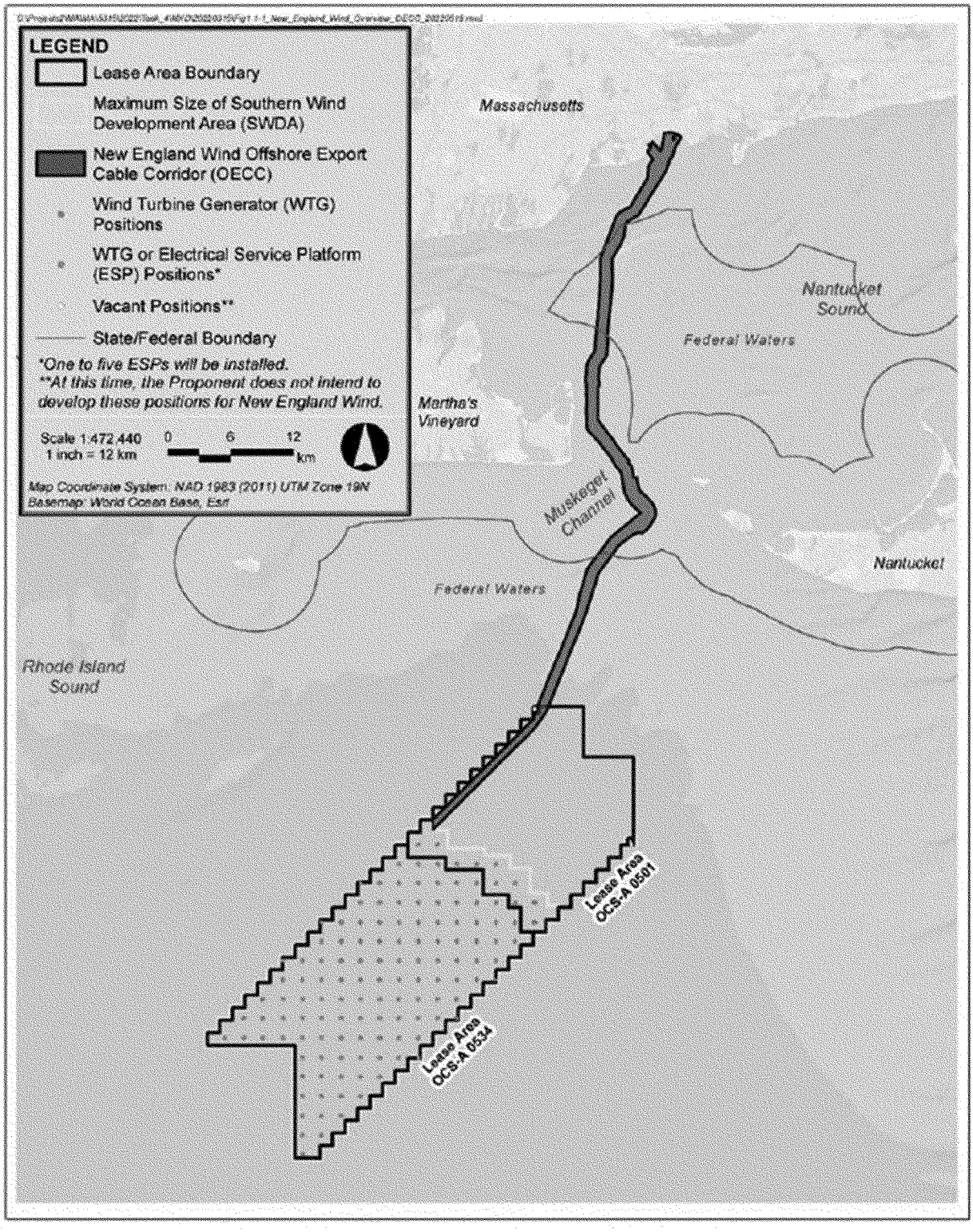

Figure 1– Project Location

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Detailed Description of Specific Activities

Below, we provide detailed descriptions of Park City Wind's activities, explicitly noting those that are anticipated to result in the take of marine mammals and for which incidental take authorization is requested. Additionally, a brief explanation is provided for those activities that are not expected to result in the take of marine mammals.

WTG and ESP Foundation Installation

Park City Wind proposes to install a maximum of 130 wind turbine generator (WTG) and electrical service platform (ESP) positions. Two positions may potentially have co-located ESPs (*i.e.,* 1

WTG and 1 ESP foundation installed at 1 grid position), resulting in 132 foundations. The WTGs would have a maximum tip height of 357 m (1,171 ft) and a maximum penetration depth of 85 m (279 ft). Each turbine would be spaced 1 nautical mile (nmi) apart in fixed east-to-west rows and north-to-south columns to create the 1 nmi by 1 nmi grid arrangement. Park City Wind anticipates that the initial WTGs (41–62 WTGs) would become operational in 2027 after installation is completed and all necessary components, such as array cables, ESPs, export cable routes, and onshore substations. Park City Wind expects that all remaining turbines will be operational by 2028. No more than one foundation will be installed at a time (*i.e.,* concurrent/simultaneous pile driving of foundations would not occur).

Phase 1 will include 41 to 62 WTGs and 1 or 2 ESPs for a total of 42 to 64 foundations. The total number of foundations in Phase 2 depends upon the final footprint of Phase 1. Phase 2 is expected to contain 64 to 88 WTG/ESP foundations (up to 3 of those positions will be occupied by ESPs). While only 132 foundations would be permanently installed, Park City Wind has accounted for up to 133 pile driving events in its take request to account for the instance wherein foundation installation began but is unable to be completed due to environmental or engineering constraints and the pile is re-driven at another position.

Phase 1 foundation types would be monopiles or jackets while Phase 2 foundation types include monopiles, jackets, or bottom-frame foundations. Jacket foundations require the installation of three to four jacket securing piles, known as pin piles. The bottom-frame foundation is similar to a conventional jacket foundation, but generally has fewer, larger structural tubular members, has a triangular space frame, no small-diameter lattice cross-bracing, and a single central vertical tubular column. At each foot, the structure would be secured to the seafloor using driven piles similar to those used by piled jacket foundations or suction buckets. For purposes of this analysis, the use of suction buckets to secure bottom-frame foundations is not being considered further in this analysis as installation of bottom-frame foundations using suction buckets is not anticipated to result in noise levels that would cause harassment to marine mammals.

The applicant proposed two construction schedules, A and B. Construction schedule A assumes a single 2-year construction scenario. Overall, 89 monopile foundations and 2 jacket foundations (8 pin piles) would be installed in 2026 over 52 days and 18 monopile foundations and 24 jacket foundations (96 pin piles) would be installed in 2027 over 35 days for a total of 87 days of pile driving to install all 133 foundations. All days would include impact pile driving and a subset may include vibratory pile driving and drilling. No more than one foundation would be installed at a time (*i.e.,* concurrent/simultaneous installation of more than one foundation would not occur). Park City Wind anticipates that a maximum of two monopiles or one jacket (up to four pin piles) is expected to be installed per day.

Construction schedule B assumes that all construction would occur over a 3-year period (2026–2028). Overall, 55 monopile foundations and 3 jacket foundations (12 pin piles) would be installed in 2026 over 38 days, 53 jackets (212 piles) would be installed in 2027 over 53 days, and 22 jackets (88 pin piles) would be installed over 22 days in 2028. In total, 133 foundations would be installed over 113 days. Similar to Schedule A, all days would include impact pile driving and a subset may include vibratory pile driving and drilling. Please see Table 2 and 3 in Park City Wind's March 2023 Application Update Report. Table 2 provides a summary of Construction Schedule A and B.

TABLE 2—FOUNDATION INSTALLATION CONSTRUCTION SCHEDULES

[Days]

Foundation type	Schedule A			Schedule B			
	2026	2027	Total	2026	2027	2028	Total
Monopiles	89	18	107	55	0	0	55
Jackets	2	24	26	3	53	22	78
No. of Days	52	35	87	38	53	22	113

Monopiles would be up to 12 m (39.37 ft) or 13 m (42.7 ft) in diameter and could be installed in both Phases 1 and 2. Jacket foundations require up to four pin piles and each would have a maximum diameter of 4 m (13.1 ft) diameter (see Figures 3–6 in the ITA application). When accounting for pre-piling preparatory work and post-piling activities, installation of a single monopile or jacket pile will take approximately 6–13 hours. Park City Wind anticipates at least 1 hour between monopile installations and 30 minutes between jacket pin pile installations. Park City Wind anticipates that a maximum of two monopiles or one jacket (up to four pin piles) is expected to be installed per day. Pile driving activities could occur within the 8-month period of May through December.

A WTG monopile foundation typically consists of a single steel tubular section with several sections of rolled steel plate welded together and secured to the seabed. Secondary structures on each WTG monopile foundation will include a boat landing or alternative means of safe access, ladders, a crane, and other ancillary components. A typical monopile installation sequence begins with the monopiles transported directly to the project area for installation or to the construction staging port by an installation vessel or a feeding barge. At the foundation location, the main installation vessel upends the monopile in a vertical position in the pile gripper mounted on the side of the vessel. The hammer is then lifted on top of the pile and pile driving commences with a soft-start and proceeds to completion. Piles are driven until the target embedment depth is met (up to 50 m), then the pile hammer is removed and the monopile is released from the pile gripper. Once installation of the monopile is complete, the vessel moves to the next installation location.

Monopiles would be installed using a 5,000 kJ to 6,000 kJ hammer to a maximum penetration depth of 40 m (131 ft). Park City Wind estimates that a monopile could require up to 6,970 strikes at up to 30.0 blows per minute (bpm) to reach full penetration depth. It is expected that each monopile installation will last less than 6 hours,

with most installations anticipated to last between 3–4 hours. Figures 3–6 in Park City Wind's ITA application provide a conceptual example of the WTG support structures (*i.e.,* towers and foundations). WTGs would be designed to withstand severe weather conditions anticipated at the SWDA (COP Appendix I–E). While major storms, winter nor'easters, and, to a lesser extent, hurricanes pass through the SWDA regularly, the Project's offshore facilities are designed to withstand such severe weather events (COP Volume I).

Jacket foundations may be used. Once delivered to the SWDA, the jacket will be lifted off the transport or installation vessel and lowered to the seabed with the correct orientation. The piles will be driven to the engineered depth, following the same process described above for monopiles. The WTG jacket piles are expected to be pre-piled (*i.e.,* the jacket structure will be set on pre-installed piles). Up to three ESP jackets are expected to be post-piled (*i.e.,* the jacket is placed on the seafloor and piles are subsequently driven through guides at the base of each leg). For the ESP post-piled jackets, piling would be initiated during daylight hours (no later than 1.5 hours prior to civil sunset) and need to continue until all piles are installed due to health and safety concerns.

Jacket foundations would be installed using a 3,500 kJ hammer energy pile driving for a 4-m pin pile to reach their maximum penetration depth of 50 m (164 ft). There are four pins per jacket foundation, Park City Wind estimates that each pin will take up to 9,805 hammer strikes at up 30.0 bpm to reach full penetration depth (Table 1 in the ITA application). Foundation installation would use a 20-minute soft-start to ensure that the monopile or jacket foundation pile remains vertical and to allow any motile marine life to leave the area before the pile driving intensity is increased. Jacket foundation installation times will vary, but will likely take up to 6 hours per pin pile, depending on whether the jacket is pre- or post-piled (Table 4 ITA application). The bottom-frame foundation (for Phase 2 only) is similar to the jacket foundation, with shorter piles and shallower penetration. The potential acoustic impact of the bottom-frame foundation installation is equivalent to or less than that predicted for the jacket foundation. As the design and installation methods for bottom-frame foundations would be equivalent to or less than jacket foundations, bottom-frame foundations are not carried forward in this document.

During construction of the Project, it may be necessary to start pile installation using a vibratory hammer rather than using an impact hammer, a technique known as vibratory setting of piles. The vibratory method is particularly useful when soft seabed sediments are not sufficiently stiff to support the weight of the pile during the initial installation, increasing the risk of 'pile run' where a pile sinks rapidly through seabed sediments. Piles which experience pile run can be difficult to recover and pose significant safety risks to the personnel and equipment on the construction vessel. The vibratory hammer mitigates this risk by forming a hard connection to the pile using hydraulic clamps, thereby acting as a lifting/handling tool as well as a vibratory hammer. The tool is inserted into the pile on the construction vessel deck, and the connection made. The pile is then lifted, upended and lowered into position on the seabed using the vessel crane. After the pile is lowered into position, vibratory pile installation will commence. Vibratory pile installation is a technique where piles are driven into soil using a longitudinal vibration motion. The vibratory hammer installation method can continue until the pile is inserted to a depth that is sufficient to fully support the structure, and then the impact hammer can be positioned and operated to complete the pile installation. Of the 132 WTG/ESPs, Park City Wind estimates approximately 70 total foundations (53 percent) may require vibratory hammering before impact hammering. Table 7 and 8 in Park City Wind's application provides a breakdown of the number of potential days of pile installation, by activity, per month under the maximum design scenario for Schedules A and B, respectively.

Construction schedule A anticipates 20 days of vibratory hammering in 2026 and 25 days in 2027 (total 45 days) (Table 2). Construction schedule B anticipates 20 days of vibratory hammering in 2026, 25 days in 2027, and 9 days in 2028 (total 54 days) (Table 2). Comparisons of vibratory pile installation versus impulsive hammer pile installation indicate that vibratory pile installation typically produces lower amplitude sounds in the marine environment than impact hammer installation (Rausche and Beim 2012). The average expected duration of vibratory setting is approximately 30 minutes per pile for the Project. Due to the small size of the permanent threshold shift (PTS) ranges and the mitigation that will be applied during construction, no Level A harassment is expected. More information on vibratory pile setting is in Section 1.2.2 of the ITA application.

Drilling is a contingency measure that may be required to remove soil and/or boulders from inside the pile in cases of pile refusal during installation. A pile refusal can occur if the total frictional resistance of the soil becomes too much for the structural integrity of the pile and the capability of the impact hammer. Continuing to drive in a refused condition can lead to overstress in the pile and potential to buckle (tear) the pile material. The use of an offshore drill can reduce the frictional resistance by removing the material from inside the pile and allowing the continuation of safe pile driving. An offshore drill is an equipment piece consisting of a motor and bottom hole assembly (BHA). The drill is placed on top of the refused pile using the construction vessel crane, and the BHA is lowered down to the soil inside the pile. On the bottom face of the BHA is a traditional ''drill bit,'' which slowly rotates (at 4 or 5 revolutions per minute or approximately 0.4 m per hour) and begins to disturb the material inside the pile. As the disturbed material mixes with seawater which is pumped into the pile, it begins to liquefy. The liquefied material is pumped out to a pre-designated location, leaving only muddy seawater inside the pile instead of a solid ''soil plug,'' and largely reducing the frictional resistance generated by the material inside the pile. When enough material has been removed from inside the pile and the resistance has reduced sufficiently, the drill is then lifted off the pile and recovered to the vessel. The impact hammer is then docked onto the pile and impact pile driving commences. It may be necessary to remove and replace the drill several times in the driving process to achieve sufficiently low frictional resistance to achieve the design penetration through impact pile driving. Of the 132 WTG/ESPs, Park City Wind estimates 48 foundations (36 percent) may require drilling to remove soil and/or boulders from inside the pile that would otherwise affect the capability of the impact hammer. Construction schedule A anticipates 33 days of drilling in 2026 and 15 days in 2027 (total 48 days) (Table 2). Construction schedule B anticipates 20 days of drilling in 2026, 19 days in 2027, and 9 days in 2028 (total 48 days) (Tables 2).

While pre-piling preparatory work and post-piling activities could be ongoing at one foundation position as pile driving is occurring at another position, there is no concurrent/

simultaneous pile driving of foundations planned (see *Dates and Duration* section). Impact pile driving associated with foundation installation would be limited to the months of May through December and is currently scheduled to be conducted during 2026–2028 (depending which construction schedule is done, A or B). Installation of foundations is anticipated to result in the take of marine mammals due to noise generated during pile driving.

Park City Wind has proposed to conduct pile driving 24 hours per day. Once construction begins, Park City Wind would proceed as rapidly as possible, while meeting all required mitigation and monitoring measures, to reduce the total duration of construction. NMFS acknowledges the benefits of completing construction quickly during times when North Atlantic right whales are unlikely to be in the area but also recognizes challenges associated with monitoring during reduced visibility conditions such as night. Should Park City Wind submit a NMFS-approved Alternative Monitoring Plan, pile driving may be initiated at night. NMFS intends to condition the final rule, if issued, identifying if initiating pile driving at night may occur.

Installation of the WTG and ESP foundations is anticipated to result in the take of marine mammals due to noise generated during pile driving and drilling.

HRG Surveys

High-resolution geophysical site characterization surveys would occur annually throughout the 5 years the rule and LOA would be effective with duration dependent on the activities occurring in that year (*i.e.,* construction versus non-construction year). HRG surveys would utilize up to a maximum of three vessels working concurrently in different sections of the Lease Area and OECC corridor. Park City Wind estimates that no more than 3 years will have HRG surveys and each year would have at least 6,000 km surveyed. In total, no more than 18,000 km may be surveyed across the 5-years with a total of no more than 225 vessel days within the Lease Area and along the OECC corridor in water depths ranging from 1 m (3.6 ft) to 61.9 m (203 ft). Each day that a survey vessel covers 80 km (50 miles) of survey trackline is considered vessel day. For example, three vessels operating concurrently on the same calendar day, covering 80 km each, would be 3 vessel days.

HRG surveys would be conducted to identify any seabed debris and to support micrositing of the WTG and ESP foundations and cable routes. Geophysical survey instruments may include side scan sonar, synthetic aperture sonar, single and multibeam echosounders, sub-bottom profilers (SBP), and magnetometers/gradiometers, some of which are expected to result in the take of marine mammals (LOA Section 1.2.5.). Equipment may be mounted to the survey vessel or the Project may use autonomous surface vehicles (SFV) to carry out this work. Surveys would occur annually, with durations dependent on the activities occurring in that year (*i.e.,* construction years versus operational years).

As summarized previously, HRG surveys will be conducted using up to three vessels concurrently. Up to 80 km of survey lines will be surveyed per vessel each survey day at approximately 7.4 km/hour (4 knots) on a 24-hour basis. HRG surveys are anticipated to operate at any time of year for 25 days per year, a maximum of 125 days for the maximum of the 3 planned years covered under the 5-years of the LOA. Of the HRG equipment types proposed for use, the following sources have the potential to result in take of marine mammals:

- Medium penetration SBPs (boomers) to map deeper subsurface stratigraphy as needed. A boomer is a broad-band sound source operating in the 0.2 kHz to 15 kHz frequency range. This system is typically mounted on a sled and towed behind the vessel.
- Medium penetration SBPs (sparkers) to map deeper subsurface stratigraphy as needed. A sparker creates acoustic pulses from 0.05 kHz to 3 kHz omni-directionally from the source that can penetrate several hundred meters into the seafloor. These are typically towed behind the vessel with adjacent hydrophone arrays to receive the return signals.

Table 3 identifies all the representative survey equipment that operate below 180 kilohertz (kHz) (*i.e.,* at frequencies that are audible and have the potential to disturb marine mammals) that may be used in support of planned geophysical survey activities and are likely to be detected by marine mammals given the source level, frequency, and beamwidth of the equipment. Equipment with operating frequencies above 180 kHz and equipment that does not have an acoustic output (*e.g.,* magnetometers) may also be used but are not discussed further because they are outside the general hearing range of marine mammals likely to occur in the project area. In addition, due to the characteristics of non-impulsive sources (*i.e.,* Ultra-Short BaseLine (USBL), Innomar, and other parametric sub-bottom profilers), take is not anticipated due to operating characteristics like very narrow beam width which limit acoustic propagation. Therefore, no Level A harassment or B harassment can be reasonably expected from the operation of these sources. The sources that have the potential to result in harassment to marine mammals include boomers and sparkers (Table 3).

TABLE 3—SUMMARY OF REPRESENTATIVE HRG SURVEY EQUIPMENT

Equipment type	Name	Representative model	Operating frequency (kHz)	Source level (dB re 1 µPa m)	Peak source level 0-pk (dB re 1 µPa m)	Pulse duration (ms)	Repetition rate (Hz)	Beamwidth (degrees)	Information source
Boomer	Applied Acoustics AA251.	Applied Acoustics AA251 [a].	0.2–15	205	212	0.8	[e] 2	180	CF
Sparker	GeoMarine Geo Spark 2000 (400 tip).	SIG ELC 820 Sparker [b].	[c] 0.05–3	203	213	3.4	[e] 1	[d] 180	CF

[a] Frequency estimated from Figures 14 and 16 in Crocker and Fratantonio (2016). Source levels, beam width, and pulse duration from Table 5 in Crocker and Fratantonio (2016) at 300 J.

[b] SIG ELC 820 has similar operation settings as Geo Spark 2000 (Sect. I.5.1). See Table 9 in Crocker and Fratantonio (2016) source for levels at 5 m source depth, 750 J setting.

[c] Frequency source specifications provided by Vineyard Wind.

[d] Assumes omnidirectional source.

[e] Vineyard Wind indicates they will use this repetition rate.

UXO/MEC Detonations

Park City Wind anticipates encountering UXO/MECs during Project construction. UXO/MECs include explosive munitions (such as bombs, shells, mines, torpedoes, *etc.*) that did not explode when they were originally deployed or were intentionally discarded in offshore munitions dump sites to avoid land-based detonations. The risk of incidental detonation associated with conducting seabed-altering activities, such as cable laying and foundation installation, in proximity to UXO/MECs jeopardizes the health and safety of project participants.

For UXO/MECs that are positively identified in proximity to planned activities on the seabed, several alternative strategies will be considered prior to in-situ UXO/MEC disposal. These may include: (1) relocating the activity away from the UXO/MEC (avoidance), (2) physical UXO/MEC removal (lift and shift), (3) alternative combustive removal technique (low order disposal), (4) cutting the UXO/MEC open to apportion large ammunition or deactivate fused munitions (cut and capture), or (5) using shaped charges to ignite the explosive materials and allow them to burn at a slow rate rather than detonate instantaneously (deflagration). Only after these alternatives are considered and found infeasible would *in-situ* high-order UXO/MEC detonation be pursued. If detonation is necessary, detonation noise could result in the take of marine mammals by Level A harassment and Level B harassment.

Park City wind anticipates that up to 10 UXO/MECs may require disposal through high-order detonation and that these detonations would occur in 2025 and 2026. To better assess the likelihood of encountering UXO/MECs during project construction, Park City Wind is conducting HRG surveys to identify potential UXO/MECs that have not been previously mapped. As these surveys and analysis of data from them are still underway, the exact number and type of UXO/MECs in the project area are not yet known. However, Park City Wind assumes that up to 10 UXO/MECs charges, of up to 454-kg (1,000 pounds; lbs), which is the largest charge that is reasonably expected to be encountered (See Estimated Take of Marine Mammals for detailed description of UXO/MEC charge weights), may require *in-situ* detonation. Although it is highly unlikely that all charges would weigh 454 kg, this approach was determined to be the most conservative for the purposes of impact analysis. If necessary, these detonations would occur on up to 10 different days (*i.e.,* only one detonation would occur per day). Park City Wind anticipates up to six detonations could occur in 2025 and four in 2026. All detonations would occur during daylight hours only and would not occur from December 1 through May 31, annually; however, NMFS may approve detonating UXO/MECs on a case-by-case basis in December and May.

NMFS concurs with Park City Wind that Levels A and Level B harassment are possible for UXO/MEC detonation activities. Auditory injury or behavioral harassment may result from exposure to the sounds produced by UXO/MEC detonation; no non-auditory injury is anticipated.

Cable Laying and Installation

Up to five offshore export cables will transmit electricity generated by the WTGs to onshore transmission systems in the Town of Barnstable, Massachusetts. Underground onshore export cables, located primarily within existing roadway layouts, will connect the landfall site(s) to one or two new onshore substations in the Town of Barnstable, Massachusetts. Grid interconnection cables will then connect the Phase 1 onshore substation to the ISO New England (ISO–NE) electric grid at Eversource's existing 345 kilovolt substation in West Barnstable. Park City Wind intends to install all Phase 2 offshore export cables within the same OECC as the Phase 1 cables but will use separate landfall sites than Phase 1 in Barnstable. The offshore export cables will likely be transported directly to the Offshore Development Area in a cable laying vessel, on an ocean-going barge, or on a heavy transport vessel (which may also transport the cable laying vessel overseas) and installed by the cable laying vessel upon arrival. Vessel types under consideration for cable installation activities are presented in the COP Volume 1 Table 4.3–1.

Cable burial operations will occur both in the SWDA for the inter-array cables connecting the WTGs to the ESPs and in the Offshore Export Cable Corridor (OECC) for the cables carrying power from the ESPs to the landfall sites. Construction of the OECC and the inter-array cable installation would take place in 2026 through 2028 (Table 2). The target depth for cable burial is 1.5 m to 2.5 m (5–8 ft). Therefore, the seafloor in the direct path of the inter-array, inter-link, and offshore export cables within the SWDA will be disturbed from the surface to a depth of 1.5 to 2.5 m (5–8 ft). Where sufficient cable burial depths cannot be achieved, cable protection would be used. Cable laying, cable installation, and cable burial activities planned to occur during the construction of the project may include the following: jetting (*e.g.,* jet plow or jet trenching); vertical injection; leveling; mechanical cutting; plowing (with or without jet-assistance); pre-trenching; boulder removal; and controlled flow excavation. During construction related activities, including cable laying and construction material delivery, dynamic positioning (DP) thrusters may be used to maneuver and maintain station. No blasting is proposed for cable installation.

Bottom habitat may also be permanently altered to hard bottom substrate through the installation of cable protection (as described in Sections 3.2.1.5.4 and 4.2.1.5.4 of BOEM COP Volume I). Potential cable protection methods include: rock placement on top of the cables (6.4 cm in diameter or larger); Gabion rock bags on top of the cables; concrete mattresses; or half-shell pipes or similar (only for cable crossings or where the cable is laid on the seafloor). Cable protection will be up to 9 m (30 ft) wide. The offshore export cables will likely be transported directly to the Offshore Development Area in a cable laying vessel, on an ocean-going barge, or on a heavy transport vessel (which may also transport the cable laying vessel overseas) and installed by the cable laying vessel upon arrival. Phase 1 will consist of two offshore export cables with a maximum total length of ~202 km (~109 nmi). Phase 2 will consist of two or three offshore export cables with a maximum total length (assuming three cables) of 356 km (~192 nmi). The ends of the offshore export cables will likely be protected using protection conduits put in place at the approach to the ESP foundation(s). Installation of an offshore export cable is anticipated to last approximately 9 months for Phase 1 and approximately 13.5 months for Phase 2. Cable installation for each Phase may be continuous and take up to 2 years. The estimated installation time frame for the inter-array cables is over a period of approximately 4–5 months for Phase 1 and 9 months for Phase 2.

The ends of the offshore export cables will likely be protected using protection conduits put in place at the approach to the ESP foundation(s) (see COP Volume I Figure 3.2–8). This cable entry protection system consists of different components of composite material and/or cast-iron half-shells with suitable corrosion protection, which protect the cables from fatigue and mechanical loads as they transition above the seabed and enter the foundation.

Although a large majority of the cable entry protection system will likely lie on top of the monopile scour protection (if used), it will likely extend a short distance beyond the edge of the scour protection. Additional cable protection may be placed on top of the cable entry protection system (within the footprint of the scour protection) to secure the cable entry protection system in place and limit movement of the cable, which can damage the cable (for specific details see COP Volume I section 3.2.1.5.4).

For Phases 1 and 2, 66 to 132 kilovolt (kV) inter-array cables will connect ''strings'' of WTGs to an ESP. The maximum anticipated total length of the Phase 1 inter-array cables is approximately 225 km (121 nmi) and the maximum anticipated total length of the inter-link cable is approximately 20 km (11 nmi). The maximum anticipated total length of the Phase 2 inter-array cables is approximately 325 km (175 nmi) and the maximum anticipated total length of the inter-link cable is approximately ~60 km (~32 nmi). The target burial depth of the offshore export cables will be at least 1.5–2.5 m (5–8 ft) along their entire length. Like the offshore export cables, all inter-array cables and inter-link cables will likely be protected with cable entry protection systems at the approach to the WTG and ESP foundations.

Some dredging of the upper portions of sand waves may be required prior to cable laying to achieve sufficient burial depth below the stable sea bottom; large boulders may also need to be relocated. Dredging may be used to remove the upper portions of sand waves within the OECC and will be limited only to the extent required to achieve adequate cable burial depth during cable installation. Dredging could be accomplished by a trailing suction hopper dredge (TSHD) or controlled flow excavation.

The amount of habitat disturbance from the use of jack-up and/or anchored vessels, cable installation, and metocean buoy anchors would be approximately 4.08 km^2 (1.58 $miles^2$). The total area of alteration within the SWDA due to foundation and scour protection installation, jack-up and/or anchored vessel use, inter-array and inter-link cable installation, potential cable protection (if required), and metocean buoy anchors is 5.19 km^2, (2.00 $miles^2$) which is 1.1 percent of the maximum size of the SWDA. Metocean buoys are small buoys that collect various ocean data. As the noise levels generated from cable laying and installation work are low, the potential for take of marine mammals to result is discountable. Park City Wind is not requesting, and NMFS is not proposing to authorize, take associated with cable laying activities. Therefore, cable laying activities are not analyzed further in this document.

Site Preparation

Seabed preparation may be required prior to foundation installation, scour protection installation, or cable-laying (see Section 3.3.1.2 and 4.3.1.2 of the COP Volume I). This could include the removal of large obstructions and/or leveling of the seabed. Large boulders along the route may need to be relocated prior to cable installation. Some dredging of the upper portions of sand waves may also be required prior to cable laying to achieve sufficient burial depth below the stable sea bottom. However, depending on bottom conditions, water depth, and contractor preferences, other specialty techniques may be used in certain areas to ensure sufficient burial depth. For monopile and jacket pile installation, seafloor preparation will include required boulder clearance and removal of any obstructions within the seafloor preparation area at each foundation location. Scour protection installation will occur pre- or post-installation and will involve a rock dumping vessel placing scour using fall-pipes, side dumping, and/or placement using a crane/bucket at each foundation location (more details can be found in Park City Wind's COP Volume 1 Section 3.3.1.2).

For Phases 1 and 2, a pre-lay grapnel run and pre-lay survey are expected to be performed to clear obstructions, such as abandoned fishing gear and other marine debris, and inspect the route prior to cable laying. A specialized vessel will tow a grapnel rig that hooks and recovers obstructions, such as fishing gear, ropes, and wires from the seafloor. Boulder clearance may be required in targeted locations to clear boulders along the OECC, inter-array cable (IAC) routes, and/or foundations prior to installation.

Boulder removal would occur prior to installation and would be completed by a support vessel based. It is currently anticipated that boulders larger than approximately 0.2–0.3 m (0.7–1 ft) will be avoided or relocated outside of the final installation corridor to create an installation corridor wide enough to allow the installation tool to proceed unobstructed along the seafloor. If there are boulders along the final route that cannot be moved, a reasonable buffer of up to 5 m (16 ft) could be utilized. Further details on boulder relocation can be found in COP Volume 1 Section 3.3.1.3.2.

Dredging would also occur and be limited to the extent required to achieve adequate cable burial depth during cable installation. Where dredging is necessary, Park City Wind conservatively assumed that the dredge corridor would typically be 15 m (50 ft) wide at the bottom (to allow for equipment maneuverability) with approximately 1:3 sideslopes for each cable. However, the depth of dredging will vary with the height of sand waves and the dimensions of the sideslopes will likewise vary with the depth of dredging and sediment conditions. This dredge corridor includes up to 1 m (3.3 ft) wide cable installation trench and up to 3 m (10 ft) wide temporary disturbance zone from the tracks or skids of the cable installation equipment. The average dredge depth is approximately 0.5 m (1.6 ft) and may range up to 5.25 m (17 ft) in localized areas. The total vertical disturbance within sand waves is up to 8 m (26 ft), which includes dredging and cable installation.

Two installation methods may be used to complete sand leveling including Trailing Suction Hopper Dredging (TSHD) and controlled flow excavation (CFE). A TSHD can be used in sand waves of most sizes, whereas the controlled flow excavation technique is most likely to be used in areas where sand waves are less than 2 m (6.6 ft) high. A TSHD vessel contains one or more drag arms that extend from the vessel, rest on the seafloor, and suction up sediments. Any sediment removed would be deposited in the dredged material within the OECC. Bottom dumping of dredged material would only occur within sand waves. CFE is a contactless dredging tool, providing a method of clearing loose sediment below submarine cables, enabling burial. The CFE tool draws in seawater from the sides and then jets this water out from a vertical down pipe at a specified pressure and volume, which is then positioned over the cable alignment, enabling the stream of water to fluidize the sands around the cable. This allows the cable to settle into the trench under its own weight. Further details on dredging and sand level can be found in COP Volume I 3.3.1.3.5.

NMFS does not expect site preparation work, including boulder removal and sand leveling (*i.e.,* dredging), to generate noise levels that would cause take of marine mammals. Underwater noise associated with these activities is expected to be similar in nature to the sound produced by the dynamic positioning (DP) cable lay vessels used during cable installation activities within the project. Sound

produced by DP vessels is considered non-impulsive and is typically more dominant than mechanical or hydraulic noises produced from the cable trenching or boulder removal vessels and equipment. Therefore, noise produced by those vessels would be comparable to or less than the noise produced by DP vessels, so impacts are also expected to be similar. Additionally, boulder clearance is a discreet action occurring over a short duration resulting in short term direct effects and sound produced by boulder clearance equipment would be preceded by, and associated with, sound from ongoing vessel noise and would be similar in nature.

NMFS expects that marine mammals would not be exposed to sounds levels or durations from seafloor preparation work that would disrupt behavioral patterns. Therefore, the potential for take of marine mammals to result from these activities is discountable and Park Wind did not request, and NMFS does not propose to authorize, any Level A harassment or Level B harassment takes associated with seafloor preparation work and these activities are not analyzed further in this document.

Vessel Operation

Park City Wind will utilize various types of vessels over the course of the 5-year proposed regulations. Park City Wind has identified several existing port facilities located in Massachusetts, Rhode Island, Connecticut, New York, and/or New Jersey to support offshore construction, assembly and fabrication, crew transfer and logistics, and other operational activities. In addition, some components, materials, and vessels could come from Canadian and European ports. A variety of vessels would be used throughout the construction activities. These range from crew transportation vessels, tugboats, jack-up vessels, cargo ships, and various support vessels (Table 4). Details on the vessels, related work, operational speeds, and general trip behavior can be found in Table 2 of the ITA application and Table 3.3–1 in the COP Volume 1. In addition to vessels, helicopters may be used for crew transfer and fast response visual inspections and repair activities during both construction and operations. It is not possible at this stage of the project to quantify the expected use of helicopters and any potential reduction in the number of vessel trips.

As part of various vessel-based construction activities, including cable laying and construction material delivery, dynamic positioning thrusters may be utilized to hold vessels in position or move slowly. Sound produced through use of dynamic positioning thrusters is similar to that produced by transiting vessels, and dynamic positioning thrusters are typically operated either in a similarly predictable manner or used for short durations around stationary activities. Sound produced by dynamic positioning thrusters would be preceded by, and associated with, sound from ongoing vessel noise and would be similar in nature; thus, any marine mammals in the vicinity of the activity would be aware of the vessel's presence. Construction-related vessel activity, including the use of dynamic positioning thrusters, is not expected to result in take of marine mammals. Park City Wind did not request, and NMFS does not propose to authorize, any take associated with vessel activity.

During construction and operation, crew transfer vessels (CTVs) and a service operation vessel (SOV) will be used to conduct maintenance activities. Although less likely, if an SOV is not used, several CTVs and helicopters would be used to frequently transport crew to and from the offshore facilities. Park City Wind has also included potential for helicopters to be used when rough weather limits or precludes the use of CTVs and during fast response visual inspections and repair activities during both construction and operations (COP Volume 1 Sections 3.3.1.12.1 and 4.3.1.12.1). The total vessels expected for use during the Project are in Table 4; more details can be found in Table 2 of the ITA application.

Assuming the maximum design scenario for each Phase individually, ~3,200 total vessel round trips (an average of approximately six round trips per day) are expected to occur during offshore construction of Phase 1 and ~3,800 total vessel round trips (an average of approximately seven round trips per day) are expected to occur during offshore construction of Phase 2 (For the purposes of estimating vessel trips, tugboats and barges are considered one vessel). Due to the range of buildout scenarios for Phases 1 and 2, Park City Wind expects the total number of vessel trips from both Phases of New England Wind combined to be less than the sum of vessel trips estimated for each Phase independently (section 1.1.2 ITA application). Park City Wind estimates that, between the 5 major port areas they intend to use, they expect an average of 15 round trips per day and 443 round trips per month during peak construction (Table 1 ITA application). Throughout the entire construction period, they expect an average of 8 round trips per day and 215 round trips per month (Table 1 ITA application).

TABLE 4—TYPE AND NUMBER OF VESSELS ANTICIPATED DURING CONSTRUCTION AND OPERATIONS

Project period	Vessel types	Max number of vessels
All Foundation Installation	Transport, Installation, and Support	20
All Foundation Installation	Crew Transfer	3
All Foundation Installation	Environmental Monitoring and Mitigation	8
WTG Installation	Transport, Installation, and Support	21
WTG Installation	Crew Transfer Vessel	3
Inter-array Cable Installation	Transport, Installation, and Support	7
Inter-array Cable Installation	Crew Transfer Vessel	2
ESP Installation	Transport, Installation, and Support	9
ESP Installation	Crew Transfer Vessel	1
Offshore Export Cable Installation	Transport, Installation, and Support	13
Offshore Export Cable Installation	Crew Transfer Vessel	1
All Other Construction Activities	Crew Transfer Vessel	4
All Other Construction Activities	Transport, Survey, and Support	4

NMFS is proposing to require extensive vessel strike avoidance measures that would avoid vessel strikes from occurring (see Proposed Mitigation section). Park City Wind has not requested, and NMFS is not

proposing to authorize, take from vessel strikes.

Fisheries and Benthic Monitoring

Fisheries and benthic monitoring surveys are being designed for the project in accordance with recommendations set forth in ''Guidelines for Providing Information on Fisheries for Renewable Energy Development on the Atlantic Outer Continental Shelf'' (BOEM, 2019). Park City Wind would conduct trawl net sampling, video surveillance (drop camera), plankton (Neuston) net, ventless trap, and tagging surveys. Specifically, Park City Wind would conduct seasonal trawl surveys following the Northeast Area Monitoring and Assessment Program (NEAMAP) survey protocol to sample fish and invertebrates in the SWDA and control area. The surveys would be comprised of 200 tows per year conducted for 20 minutes at vessel speed of 3.0 knots. The ventless trap surveys would follow Massachusetts and Rhode Island Division of Marine Fisheries protocol to sample lobster, black sea bass, and Jonah crab. Surveys would be conducted twice per month from May to December in 30 stations across the SWDA and control areas with 6 lobster traps and 1 fish pot at each station. Because the drop camera, tagging efforts, and Neuston nets do not have components with which marine mammals are likely to interact (*i.e.,* become entangled in or hooked by), these activities are not anticipated to result in take of marine mammals and will not be discussed further. Only trap and trawl surveys have the potential to result in harassment to marine mammals. However, Park City Wind would implement mitigation and monitoring measures to avoid taking marine mammals, including, but not limited to, monitoring for marine mammals before and during trawling activities, not deploying or pulling trawl gear in certain circumstances, limiting tow times, and fully repairing nets. A full description of mitigation measures can be found in the Proposed Mitigation section.

With the implementation of these measures, Park City Wind does not anticipate, and NMFS is not proposing to authorize, take of marine mammals incidental to research trap and trawl surveys. Given no take is anticipated from these surveys, impacts from fishery surveys will not be discussed further in this document (with the exception of the description of measures in the Proposed Mitigation section).

Description of Marine Mammals in the Area of Specified Activities

Thirty-eight marine mammal species under NMFS' jurisdiction have geographic ranges within the western North Atlantic OCS (Hayes *et al.,* 2022). Park City Wind requested take of all 38 species (comprising 38 stocks) of marine mammals. The majority of takes are requested for only 17 species; the remaining 22 stocks are considered rare in the project area and Park City Wind is requested a limited amount of take for those species (*e.g.,* one group size). Sections 3 and 4 of Park City Wind's ITA 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 in the application instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs), *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*), and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 5 lists all species and stocks for which take is expected and proposed to be authorized for this action and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR) level, where known. The MMPA defines PBR as ''the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population'' (16 U.S.C. 1362(20)). PBR values are identified in NMFS's SARs. While no mortality is anticipated or proposed to be authorized, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some stocks, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 5 are the most recent available at the time of publication and, unless noted otherwise, use NMFS' 2022 SARs (Hayes *et al.,* 2023) available online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports.*

TABLE 5—MARINE MAMMAL SPECIES THAT MAY OCCUR IN THE PROJECT AREA AND BE TAKEN, BY HARASSMENT

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual mortalities or serious injuries (M/SI) [3]
Order Artiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E,D,Y	338 (0; 332; 2020)	0.7	8.1
Family Balaenopteridae (rorquals):						
Blue whale	*Balaenoptera musculus*	Western North Atlantic	E,D,Y	UNK (UNK, 402, 2019)	0.8	0
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E,D,Y	6,802 (0.24; 5,573; 2016)	11	1.8
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-,-,Y	1,396 (0; 1,380; 2016)	22	12.15
Minke whale	*Balaenoptera acutorostrata.*	Canadian Eastern Coastal	-,-,N	21,968 (0.31; 17,002; 2016).	170	10.6
Sei whale	*Balaenoptera borealis*	Nova Scotia	E,D,Y	6,292 (1.02; 3,098; 2016)	6.2	0.8

TABLE 5—MARINE MAMMAL SPECIES THAT MAY OCCUR IN THE PROJECT AREA AND BE TAKEN, BY HARASSMENT—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual mortalities or serious injuries (M/SI) [3]
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	North Atlantic	E,D,Y	4,349 (0.28; 3,451; 2016)	3.9	0
Family Kogiidae:						
Dwarf sperm whale [4]	*Kogia sima*	Western North Atlantic	-,-,N	7,750 (0.38; 5,689; 2016)	46	0
Pygmy sperm whale [4]	*Kogia breviceps*	Western North Atlantic	-,-,N	7,750 (0.38; 5,689; 2016)	46	0
Family Ziphiidae:						
Cuvier's beaked whale	*Ziphius cavirostris*	Western North Atlantic	-,-,N	5,744 (0.36, 4,282, 2016)	43	0.2
Blainville's beaked whale	*Mesoplodon densirostris*	Western North Atlantic	-,-,N	10,107 (0.27, 8,085, 2016).	81	[5] 0.2
Gervais' beaked whale	*Mesoplodon europaeus*	Western North Atlantic	-,-,N	5,744 (0.36, 4,282, 2016)	81	[5] 0
Sowerby's beaked whale	*Mesoplodon bidens*	Western North Atlantic	-,-,N	10,107 (0.27, 8,085, 2016).	81	[5] 0
True's beaked whale	*Mesoplodon mirus*	Western North Atlantic	-,-,N	10,107 (0.27, 8,085, 2016).	81	[5] 0
Northern bottlenose whale	*Hyperoodon ampullatus*	Western North Atlantic	-,-,N	UNK (UNK, UNK, 2016)	UNK	0
Family Delphinidae:						
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic	-,-,N	39,921 (0.27; 32,032; 2016).	320	0
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	-,-,N	93,233 (0.71; 54,433; 2016).	544	27
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic—Offshore.	-,-,N	62,851 (0.23; 51,914; 2016).	519	28
Clymene dolphin	*Stenella clymene*	Western North Atlantic	-,-,N	4,237 (1.03; 2,071; 2016)	21	0
Common dolphin	*Delphinus delphis*	Western North Atlantic	-,-,N	172,897 (0.21; 145,216; 2016).	1,452	390
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	-,-,N	39,215 (0.3; 30,627; 2016).	306	29
Short-finned pilot whale	*Globicephala macrorhynchus.*	Western North Atlantic	-,-,Y	28,924 (0.24, 23,637, See SAR).	236	136
Risso's dolphin	*Grampus griseus*	Western North Atlantic	-,-,N	35,215 (0.19; 30,051; 2016).	301	34
False killer whale	*Pseudorca crassidens*	Western North Atlantic	-,-,N	1,791 (0.56, 1,154, 2016)	12	0
Fraser's dolphin	*Lagenodelphis hosei*	Western North Atlantic	-,-,N	UNK (UNK, UNK, 2016)	UNK	0
Killer whale	*Orcinus orca*	Western North Atlantic	-,-,N	UNK (UNK, UNK, 2016)	UNK	0
Melon-headed whale	*Peponocephala electra*	Western North Atlantic	-,-,N	UNK (UNK, UNK, 2016)	UNK	0
Pantropical spotted dolphin	*Stenella attenuata*	Western North Atlantic	-,D,N	6,593 (0.52, 4,367, 2016)	44	0
Pygmy killer whale	*Feresa attenuata*	Gulf of Maine/Bay of Fundy	-,-,N	UNK (UNK, UNK, 2016)	UNK	0
Rough-toothed dolphin	*Steno bredanensis*	Western North Atlantic	-,-,N	136 (1.0, 67, 2016)	0.7	0
Spinner dolphin	*Stenella longirostris*	Western North Atlantic	-,D,N	4,102 (0.99, 2,045, 2016)	20	0
Striped dolphin	*Halichoerus grypus*	Western North Atlantic	-,-,N	67,036 (0.29; 52,939; 2016).	529	0
White-beaked dolphin	*Phoca vitulina*	Western North Atlantic	-,-,N	536,016 (0.31; 415,344; 2016).	4,153	0
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-,-,N	95,543 (0.31; 74,034; 2016).	851	16
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Gray seal [6]	*Halichoerus grypus*	Western North Atlantic	-,-,N	27,300 (0.22; 22,785; 2016).	1,389	4,453
Harbor seal	*Phoca vitulina*	Western North Atlantic	-,-,N	61,336 (0.08; 57,637; 2018).	1,729	339
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic	-,-,N	7.6M (UNK; 7.1M; 2019)	426,000	178,573
Hooded seal	*Cystophora cristata*	Western North Atlantic	-,-,N	UNK (UNK, UNK, N/A)	UNK	1,680

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

[2] NMFS' marine mammal stock assessment reports can be found online at *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is the coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/*; Committee on Taxonomy (2022)).

[4] Accounts for both *Kogia* species.

[5] Accounts for all *Mesoplodon* species.

[6] NMFS' stock abundance estimate (and associated PBR value) applies to the U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

In addition to the species listed in Table 5, the Florida manatees (*Trichechus manatus;* a sub-species of the West Indian manatee) has been previously documented as an occasional visitor to the Northeast region during summer months (U.S. Fish and Wildlife Service (USFWS), 2019). However, manatees are managed by the USFWS

and are not considered further in this document.

Park City Wind also requested take for beluga whales (*Delphinapterus leucas*), however, beluga whales are so rare in the project area that there is no beluga whale stock designated along the U.S. Eastern Seaboard as it is a more northerly species. In 2014, a beluga whale was observed in Taunton River, Massachusetts, however, experts opined that this whale was far from its natural habitat (which include arctic and subarctic waters) (Swaintek, 2014). It is not anticipated that beluga whales would occur in the project area; therefore, beluga whales are not considered further in this document.

Between October 2011 and June 2015, a total of 76 aerial surveys were conducted throughout the MA and RI/MA WEAs (the Project is contained within the MA WEA and adjacent to the RI/MA WEA along with several other offshore renewable energy Lease Areas). Between November 2011 and March 2015, Marine Autonomous Recording Units (MARU; a type of static passive acoustic monitoring (PAM) recorder) were deployed at nine sites in the MA and RI/MA WEAs. The goal of the study was to collect visual and acoustic baseline data on distribution, abundance, and temporal occurrence patterns of marine mammals (Kraus *et al.,* 2016). The New England Aquarium conducted additional aerial surveys throughout the MA and RI/MA WEAs from February 2017 through July 2018 (38 surveys), October 2018 through August 2019 (40 surveys), and March 2020 through July 2021 (12 surveys) (Quintana and Kraus, 2019; O'Brien *et al.,* 2021a; O'Brien *et al.,* 2021b). As indicated above, 17 species and stocks in Table 5 are known to temporally and spatially co-occur with the activity. Additionally, 22 stocks are rare in the project area. However, Park City Wind has conservatively requested a limited amount of take to ensure MMPA compliance in the unlikely event that one or more of these rare species are encountered during project activities that may result in take (Table 32). Five of the marine mammal species for which take is requested are listed as threatened or endangered under the ESA: North Atlantic right, blue, fin, sei, and sperm whales.

In addition to what is included in Sections 3 and 4 of Park City Wind's ITA application (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-park-city-wind-llc-construction-new-england-wind-offshore-wind*), the SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*), and NMFS' website (*https://www.fisheries.noaa.gov/species-directory/marine-mammals*), we provide further detail below informing the baseline for select species (*e.g.,* information regarding current Unusual Mortality Events (UME) and known important habitat areas, such as Biologically Important Areas (BIAs) (Van Parijs, 2015)). There are no ESA-designated critical habitats for any species within the project area (*https://www.fisheries.noaa.gov/resource/map/national-esa-critical-habitat-mapper*).

Under the MMPA, a UME is defined as ''a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response'' (16 U.S.C. 1421h(6)). As of May 2023, five UMEs are active. Four of these UMEs are occurring along the U.S. Atlantic coast for various marine mammal species. Of these, the most relevant to the project area are the North Atlantic right whale, humpback whale, and harbor and gray seal UMEs given the prevalence of these species in the project area. More information on UMEs, including all active, closed, or pending, can be found on NMFS' website at *https://www.fisheries.noaa.gov/national/marine-life-distress/active-and-closed-unusual-mortality-events.*

Below, we include information for a subset of the species that presently have an active or recently closed UME occurring along the Atlantic coast or for which there is information available related to areas of biological significance. Blue whales have been included due to their ESA-listing and not due to any UME or area of biological significance. For the majority of species potentially present in the specific geographic region, NMFS has designated only a single generic stock (*e.g.,* ''western North Atlantic'') for management purposes. This includes the ''Canadian east coast'' stock of minke whales, which includes all minke whales found in U.S. waters and is also a generic stock for management purposes. For humpback and sei whales, NMFS defines stocks on the basis of feeding locations (*i.e.,* Gulf of Maine and Nova Scotia, respectively). However, references to humpback whales and sei whales in this document refer to any individuals of the species that are found in the project area. Any areas of known biological importance (including the BIAs identified in LaBrecque *et al.,* 2015) that overlap spatially (or are adjacent) with the project area are addressed in the species sections below.

North Atlantic Right Whales

The North Atlantic right whale has been listed as Endangered since the ESA's enactment in 1973. The species was recently uplisted from Endangered to Critically Endangered on the International Union for Conservation of Nature (IUCN) Red List of Threatened Species (Cooke, 2020). The uplisting was due to a decrease in population size (Pace *et al.,* 2017), an increase in vessel strikes and entanglements in fixed fishing gear (Daoust *et al.,* 2017; Davis & Brillant, 2019; Knowlton *et al.,* 2012; Knowlton *et al.,* 2022; Moore *et al.,* 2021; Sharp *et al.,* 2019), and a decrease in birth rate (Pettis *et al.,* 2022; Reed *et al.,* 2022). The Western Atlantic stock is considered depleted under the MMPA (Hayes *et al.,* 2022). There is a recovery plan (NMFS, 2005) for the North Atlantic right whale, and NMFS completed 5-year reviews of the species in 2012, 2017, and 2022 which concluded no change to the listing status is warranted.

Designated by NMFS as a Species in the Spotlight, the North Atlantic right whale is considered among the species with the greatest risk of extinction in the near future (*https://www.fisheries.noaa.gov/topic/endangered-species-conservation/species-in-the-spotlight*).

The North Atlantic right whale population had only a 2.8 percent recovery rate between 1990 and 2011 and an overall abundance decline of 23.5 percent from 2011–2019 (Hayes *et al.,* 2022). Since 2010, the North Atlantic right whale population has been in decline (Pace *et al.,* 2017; Pace *et al.,* 2021), with a 40 percent decrease in calving rate (Kraus *et al.,* 2016; Moore *et al.,* 2021). North Atlantic right whale calving rates dropped from 2017 to 2020 with zero births recorded during the 2017–2018 season. The 2020–2021 calving season had the first substantial calving increase in 5 years with 20 calves born followed by 15 calves during the 2021–2022 calving season. However, mortalities continue to outpace births, and best estimates indicate fewer than 70 reproductively active females remain in the population.

Critical habitat for North Atlantic right whales is not present in the project area. However, the project area both spatially and temporally overlaps a portion of the migratory corridor BIA within which North Atlantic right whales migrate south to calving grounds generally in November and December, followed by a northward migration into feeding areas east and north of the project area in March and April (LaBrecque *et al.,* 2015; Van Parijs *et al.,*

2015). While the project does not overlap any North Atlantic right whale feeding BIAs, it does spatially overlap a more recently described important feeding area. North Atlantic right whales have recently been observed feeding year-round in the region south of Martha's Vineyard and Nantucket with larger numbers in this area in the winter making it the only known winter foraging habitat for the species (Leiter *et al.,* 2017; Quintana-Rizzo *et al.,* 2021).

NMFS' regulations at 50 CFR 224.105 designated Seasonal Management Areas (SMAs) for North Atlantic right whales in 2008 (73 FR 60173, October 10, 2008). SMAs were developed to reduce the threat of collisions between ships and North Atlantic right whales around their migratory route and calving grounds. The Block Island SMA is near the proposed project area; this SMA is currently active from November 1 through April 30 of each year and may be used by North Atlantic right whales for feeding (although to a lesser extent than the area to the east near Nantucket Shoals) and/or migrating. As noted above, NMFS is proposing changes to the North Atlantic right whale speed rule (87 FR 46921, August 1, 2022). Due to the current status of North Atlantic right whales and the spatial proximity overlap of the proposed project with areas of biological significance, (*i.e.,* a migratory corridor, SMA), the potential impacts of the proposed project on North Atlantic right whales warrant particular attention.

North Atlantic right whale presence in the project area is predominately seasonal; however, year-round occurrence is documented. Abundance is highest in winter with irregular occurrence during summer months and similar occurrence rates in spring and fall (O'Brien *et al.,* 2022; Quintana-Rizzo *et al.,* 2021; Estabrook *et al.,* 2022). Model outputs suggest that 23 percent of the North Atlantic right whale population is present from December through May, and the mean residence time has tripled to an average of 13 days during these months (Quintana-Rizzo *et al.,* 2021).

North Atlantic right whale distribution can also be derived from acoustic data. A review of passive acoustic monitoring data from 2004 to 2014 collected throughout the western North Atlantic demonstrated nearly continuous year-round North Atlantic right whale presence across their entire habitat range with a decrease in summer months, including in locations previously thought of as migratory corridors suggesting that not all of the population undergoes a consistent annual migration (Davis *et al.,* 2017). To describe seasonal trends in North Atlantic right whale presence, Estabrook *et al.* (2022) analyzed North Atlantic right whale acoustic detections collected between 2011–2015 during winter (January–March), spring (April–June), summer (July–September), and autumn (October–December). Winter had the highest presence (75 percent array-days, n = 193), and summer had the lowest presence (10 percent array-days, n = 27). Spring and autumn were similar, where 45 percent (n = 117) and 51 percent (n = 121) of the array-days had detections, respectively. Across all years, detections were consistently lowest in August and September. In Massachusetts Bay and Cape Cod Bay, located outside of the project area, acoustic detections of North Atlantic right whales increased in more recent years in both the peak season of late winter through early spring and in summer and fall, likely reflecting broad-scale regional habitat changes (Charif *et al.,* 2020). NMFS' Passive Acoustic Cetacean Map (PACM) contains up-to-date acoustic data that contributes to our understanding of when and where specific whales (including North Atlantic right whales), dolphin, and other cetacean species are acoustically detected in the North Atlantic. These data support the findings of the aforementioned literature.

In late fall (*i.e.,* November), a portion of the right whale population (including pregnant females) typically departs the feeding grounds in the North Atlantic, moves south along the migratory corridor BIA, including through the project area, to right whale calving grounds off Georgia and Florida. However, recent research indicates understanding of their movement patterns remains incomplete and not all of the population undergoes a consistent annual migration (Davis *et al.,* 2017; Gowan *et al.,* 2019; Krzystan *et al.,* 2018). The results of multistate temporary emigration capture-recapture modeling, based on sighting data collected over the past 22 years, indicate that non-calving females may remain in the feeding grounds, during the winter in the years preceding and following the birth of a calf to increase their energy stores (Gowan *et al.,* 2019).

Southern New England waters are a migratory corridor in the spring and early winter and a primary feeding habitat for North Atlantic right whales during late winter through spring. Right whales feed primarily on the copepod *Calanus finmarchicus,* a species whose availability and distribution has changed both spatially and temporally over the last decade due to an oceanographic regime shift that has been ultimately linked to climate change (Meyer-Gutbrod *et al.,* 2021; Record *et al.,* 2019; Sorochan *et al.,* 2019). This distribution change in prey availability has led to shifts in North Atlantic right whale habitat-use patterns within the region over the same time period (Davis *et al.,* 2020; Meyer-Gutbrod *et al.,* 2022; Quintana-Rizzo *et al.,* 2021; O'Brien *et al.,* 2022). Since 2010, North Atlantic right whales have reduced their use of foraging habitats in the Great South Channel and Bay of Fundy while increasing their use of habitat within Cape Cod Bay as well as a region south of Martha's Vineyard and Nantucket Islands (Stone *et al.,* 2017; Mayo *et al.,* 2018; Ganley *et al.,* 2019; Record *et al.,* 2019; Meyer-Gutbrod *et al.,* 2021). The SWDA and OECC are south and east of Martha's Vineyard and south and west of Nantucket Islands.

Since 2017, 98 dead, seriously injured, or sublethally injured or ill North Atlantic right whales along the U.S. and Canadian coasts have been documented, necessitating a UME declaration and investigation. The leading category for the cause of death for this ongoing UME is ''human interaction,'' specifically from entanglements or vessel strikes. As of May 17, 2023, there have been 36 confirmed mortalities (dead stranded or floaters) and 33 seriously injured free-swimming whales for a total of 69 whales. Beginning on October 14, 2022, the UME also considers animals with sublethal injury or illness bringing the total number of whales in the UME to 98. Approximately 42 percent of the population is known to be in reduced health (Hamilton *et al.,* 2021) likely contributing to smaller body sizes at maturation, making them more susceptible to threats and reducing fecundity (Moore *et al.,* 2021; Reed *et al.,* 2022; Stewart *et al.,* 2022). More information about the North Atlantic right whale UME is available online at *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event.*

Humpback Whales

Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. On September 8, 2016, NMFS divided the once single species into 14 distinct population segments (DPS), removed the species-level listing, and, in its place, listed four DPSs as endangered and one DPS as threatened (81 FR 62259, September 8, 2016). The remaining nine DPSs were

not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whales that is expected to occur in the project area. Bettridge *et al.* (2015) estimated the size of the West Indies DPS population at 12,312 (95 percent confidence interval (CI) 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.,* 2003; Smith *et al.,* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.,* 2015).

In New England waters, feeding is the principal activity of humpback whales, and their distribution in this region has been largely correlated to abundance of prey species (Payne *et al.,* 1986, 1990). Humpback whales are frequently piscivorous when in New England waters, feeding on herring (*Clupea harengus*), sand lance (*Ammodytes spp.*), and other small fishes, as well as euphausiids in the northern Gulf of Maine (Paquet *et al.,* 1997). Kraus *et al.* (2016) observed humpbacks in the RI/MA & MA WEAs and surrounding areas during all seasons but most often during spring and summer months with a peak from April to June. Acoustic data indicate that this species may be present within the RI/MA WEA year-round with the highest rates of acoustic detections in the winter and spring (Kraus *et al.,* 2016).

The project area does not overlap any ESA-designated critical habitat, BIAs, or other important areas for the humpback whales. A humpback whale feeding BIA extends throughout the Gulf of Maine, Stellwagen Bank, and Great South Channel from May through December, annually (LaBrecque *et al.,* 2015). However, this BIA is located further east and north of, and thus, does not overlap, the project area.

Since January 2016, elevated humpback whale mortalities along the Atlantic coast from Maine to Florida led to the declaration of a UME. As of May 17, 2023, 191 humpback whales have stranded as part of this UME. Partial or full necropsy examinations have been conducted on approximately 90 of the known cases. Of the whales examined, about 40 percent had evidence of human interaction, either ship strike or entanglement. While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. More information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/active-and-closed-unusual-mortality-events.*

Fin Whales

Fin whales typically feed in the Gulf of Maine and the waters surrounding New England, but their mating and calving (and general wintering) areas are largely unknown (Hain *et al.,* 1992; Hayes *et al.,* 2022). Acoustic detections of fin whale singers augment and confirm these visual sighting conclusions for males. Recordings from Massachusetts Bay, New York Bight, and deep-ocean areas have detected some level of fin whale singing from September through June (Watkins *et al.,* 1987; Clark and Gagnon, 2002; Morano *et al.,* 2012). These acoustic observations from both coastal and deep-ocean regions support the conclusion that male fin whales are broadly distributed throughout the western North Atlantic for most of the year (Hayes *et al.,* 2022).

Kraus *et al.* (2016) suggest that, compared to other baleen whale species, fin whales have a high multi-seasonal relative abundance in the RI/MA & MA WEAs and surrounding areas. Fin whales were observed in the MA WEA in spring and summer. This species was observed primarily in the offshore (southern) regions of the RI/MA & MA WEAs during spring and was found closer to shore (northern areas) during the summer months (Kraus *et al.,* 2016). Calves were observed three times and feeding was observed nine times during the Kraus *et al.* (2016) study. Although fin whales were largely absent from visual surveys in the RI/MA & MA WEAs in the fall and winter months (Kraus *et al.,* 2016), acoustic data indicate that this species is present in the RI/MA & MA WEAs during all months of the year, although less so in summer months (Morano *et al.,* 2012; Muirhead *et al.,* 2018; Davis *et al.,* 2020).

New England waters represent a major feeding ground for fin whales. The project area partially overlaps the fin whale feeding BIA (2,933 km^2) offshore of Montauk Point, New York from March to October (Hain *et al.,* 1992; LaBrecque *et al.,* 2015). A separate larger year-round feeding BIA (18,015 km^2) located far to the northeast in the southern Gulf of Maine does not overlap with the project area and would thus not be impacted by project activities.

Minke Whales

Minke whales are common and widely distributed throughout the U.S. Atlantic EEZ (Cetacean and Turtle Assessment Program (CETAP), 1982; Hayes *et al.,* 2022), although their distribution has a strong seasonal component. Minke whale occurrence is common and widespread in New England from spring to fall, although the species is largely absent in the winter (Hayes *et al.,* 2022; Risch *et al.,* 2013). Surveys conducted in the RI/MA WEAs from October 2011 through June 2015 reported 103 minke whale sightings within the area, predominantly in the spring followed by summer and fall (Kraus *et al.,* 2016). Recent surveys conducted in the RI/MA WEAs from February 2017 through July 2018, October 2018 through August 2019, and March 2020 through July 2021 documented minke whales as the most common rorqual (baleen whales with pleated throat grooves) sighted in the WEAs. Surveys also reported a shift in the greatest seasonal abundance of minke whales from spring (2017–2018) (Quintana and Kraus, 2018) to summer (2018–2019 and 2020–2021) (O'Brien *et al.,* 2021a, b).

There are two minke whale feeding BIAs identified in the southern and southwestern section of the Gulf of Maine, including Georges Bank, the Great South Channel, Cape Cod Bay and Massachusetts Bay, Stellwagen Bank, Cape Anne, and Jeffreys Ledge from March through November, annually (LaBrecque *et al.,* 2015). However, these BIAs do not overlap the project area as they are located further east and north. A migratory route for minke whales transiting between northern feeding grounds and southern breeding areas may exist to the east of the proposed project area as minke whales may track warmer waters along the continental shelf while migrating (Risch *et al.,* 2014).

From 2017 through 2022, elevated minke whale mortalities detected along the Atlantic coast from Maine through South Carolina resulted in the declaration of a UME. As of April 14, 2023, a total of 142 minke whale mortalities have occurred during this UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease, but these findings are not consistent across all of the minke whales examined, so more research is needed. More information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-minke-whale-unusual-mortality-event-along-atlantic-coast.*

Sei Whale

The Nova Scotia stock of sei whales can be found in deeper waters of the continental shelf edge of the eastern United States and northeastward to

south of Newfoundland (Mitchell, 1975; Hain *et al.,* 1985; Hayes *et al.,* 2022). During spring and summer, the stock is mainly concentrated in northern feeding areas, including the Scotian Shelf (Mitchell and Chapman, 1977), the Gulf of Maine, Georges Bank, the Northeast Channel, and south of Nantucket (CETAP, 1982; Kraus *et al.,* 2016; Roberts *et al.,* 2016; Palka *et al.,* 2017; Cholewiak *et al.,* 2018; Hayes *et al.,* 2022). Sei whales have been detected acoustically along the Atlantic Continental Shelf and Slope from south of Cape Hatteras, North Carolina to the Davis Strait, with acoustic occurrence increasing in the mid-Atlantic region since 2010 (Davis *et al.,* 2020).

Although their migratory movements are not well understood, sei whales are believed to migrate north in June and July to feeding areas and south in September and October to breeding areas (Mitchell, 1975; CETAP, 1982; Davis *et al.,* 2020). Although sei whales generally occur offshore, individuals may also move into shallower, more inshore waters (Payne *et al.,* 1990; Halpin *et al.,* 2009; Hayes *et al.,* 2022). A sei whale feeding BIA occurs in New England waters from May through November (LaBrecque *et al.,* 2015). This BIA is located nearby but not within the project area and is not expected to be impacted by the Project activities.

Blue Whales

Blue whales are included within this section due to their ESA-listing status and not to any active BIA or UME in the project area. Blue whales are widely distributed throughout the world's oceans and are an ESA-listed species throughout their range. Their Western North Atlantic Stock occurs in the western North Atlantic and generally ranges from the Arctic to at least mid-latitude waters. Blue whales are most frequently sighted in more northerly waters off eastern Canada, with the majority of records from the Gulf of St. Lawrence by Newfoundland, Canada (Hayes *et al.,* 2019). They often are found near the continental shelf edge where upwelling produces concentrations of krill, their main prey species (Yochem and Leatherwood, 1985; Fiedler *et al.,* 1998; Gill *et al.,* 2011). The blue whale is not common in the project area. A 2008 study detected blue whale calls in offshore areas of the New York Bight on 28 out of 258 days of recordings (11 percent of the days), mostly during winter (Muirhead *et al.,* 2018). Kraus *et al.* (2016) conducted aerial and acoustic surveys between 2011–2015 in the MA and RI/MA WEAs and surrounding areas. Blue whales were not visually observed and were only sparsely acoustically detected in the MA and RI/MA WEAs during winter; the acoustic detection could have been due to very distant vocalizations. These data suggest that blue whales are rarely, if at all, present in the MA and RI/MA WEAs (Kraus *et al.,* 2016). Surveys conducted in 2018–2020, did not result in any sightings of blue whales in MA and RI/MA WEAs (O'Brien *et al.,* 2021a; O'Brien *et al.,* 2021b). However, Park City Wind has requested a small amount of take for blue whales on the minimal chance of encounter.

Much is not known about the blue whale populations, the last minimum population abundance was estimated at 402 (Hayes *et al.,* 2023). There are insufficient data to determine population trends for blue whales. The total level of human caused mortality and serious injury is unknown, but it is believed to be insignificant and approaching a zero mortality and serious injury rate (Hayes *et al.,* 2019). There are no blue whale BIAs or ESA-protected critical habitat identified in the project area or along the U.S. Eastern Seaboard. There is no UME for blue whales. More information is available at *https://www.fisheries.noaa.gov/species/blue-whale.*

Pinnipeds

Since June 2022, elevated numbers of harbor seal and gray seal mortalities have occurred across the southern and central coast of Maine. This event has been declared a UME. Preliminary testing of samples has found some harbor and gray seals positive for highly pathogenic avian influenza. While the UME is not occurring in the project area, the populations affected by the UME are the same as those potentially affected by the project. Information on this UME is available online at *https://www.fisheries.noaa.gov/2022-2023-pinniped-unusual-mortality-event-along-maine-coast.*

The above event was preceded by a different UME, occurring from 2018–2020 (closure of the 2018–2020 UME is pending). Beginning in July 2018, elevated numbers of harbor seal and gray seal mortalities occurred across Maine, New Hampshire, and Massachusetts. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation encompassed all seal strandings from Maine to Virginia. A total of 3,152 reported strandings (of all species) occurred from July 1, 2018, through March 13, 2020. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME, which is pending closure. Information on this UME is available online at *https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 6.

TABLE 6—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.

* 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.

NMFS notes that in 2019a, Southall *et al.* recommended new names for hearing groups that are widely recognized. However, this new hearing group classification does not change the weighting functions or acoustic thresholds (*i.e.,* the weighting functions and thresholds in Southall *et al.* (2019a) are identical to NMFS 2018 Revised Technical Guidance). When NMFS updates our Technical Guidance, we will be adopting the updated Southall *et al.* (2019a) hearing group classification.

Potential Effects of the Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take of Marine Mammals section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. General background information on marine mammal hearing was provided previously (see the Description of Marine Mammals in the Area of the Specified Activities section). Here, the potential effects of sound on marine mammals are discussed.

Park City Wind has requested, and NMFS proposes to authorize, the take of marine mammals incidental to the construction activities associated with the project area. In their application and Application Update Report, Park City Wind presented their analyses of potential impacts to marine mammals from the acoustic and explosive sources. NMFS both carefully reviewed the information provided by Park City Wind, as well as independently reviewed applicable scientific research and literature and other information to evaluate the potential effects of the Project's activities on marine mammals.

The proposed activities would result in the construction and placement of up to 132 permanent foundations to support WTGs and ESPs and seafloor mapping using HRG surveys. Additionally, up to 10 UXO/MEC detonations may occur during construction if they cannot be safely removed by other means. There are a variety of types and degrees of effects to marine mammals, prey species, and habitat that could occur as a result of the Project. Below we provide a brief description of the types of sound sources that would be generated by the project, the general impacts from these types of activities, and an analysis of the anticipated impacts on marine mammals from the project, with consideration of the proposed mitigation measures.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see Au and Hastings (2008); Richardson *et al.* (1995); Urick (1983) as well as the Discovery of Sound in the Sea (DOSITS) website at *https://dosits.org/.* Sound is a vibration that travels as an acoustic wave through a medium such as a gas, liquid or solid. Sound waves alternately compress and decompress the medium as the wave travels. These compressions and decompressions are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones (underwater microphones). In water, sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam (narrow beam or directional sources) or sound beams may radiate in all directions (omnidirectional sources).

Sound travels in water more efficiently than almost any other form of energy, making the use of acoustics ideal for the aquatic environment and its inhabitants. In seawater, sound travels at roughly 1,500 meters per second (m/s). In-air, sound waves travel much more slowly, at about 340 m/s. However, the speed of sound can vary by a small amount based on characteristics of the transmission medium, such as water temperature and salinity. Sound travels in water more efficiently than almost any other form of energy, making the use of acoustics ideal for the aquatic environment and its inhabitants. In seawater, sound travels at roughly 1,500 m/s. In-air, sound waves travel much more slowly, at about 340 m/s. However, the speed of sound can vary by a small amount based on characteristics of the transmission medium, such as water temperature and salinity.

The basic components of a sound wave are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in Hz or cycles per second. Wavelength is the distance between two peaks or corresponding points of a

sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water.

The intensity (or amplitude) of sounds are measured in decibels (dB), which are a relative unit of measurement that is used to express the ratio of one value of a power or field to another. Decibels are measured on a logarithmic scale, so a small change in dB corresponds to large changes in sound pressure. For example, a 10-dB increase is a ten-fold increase in acoustic power. A 20-dB increase is then a 100-fold increase in power and a 30-dB increase is a 1000-fold increase in power. However, a ten-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder. Decibels are a relative unit comparing two pressures, therefore, a reference pressure must always be indicated. For underwater sound, this is 1 microPascal (µPa). For in-air sound, the reference pressure is 20 microPascal (µPa). The amplitude of a sound can be presented in various ways; however, NMFS typically considers three metrics. In this proposed rule, all decibel levels referenced to 1µPa.

Sound exposure level (SEL) represents the total energy in a stated frequency band over a stated time interval or event, and considers both amplitude and duration of exposure (represented as dB re 1 μPa^2-s). SEL is a cumulative metric; it can be accumulated over a single pulse (for pile driving this is often referred to as single-strike SEL; SEL_{ss}), or calculated over periods containing multiple pulses (SEL_{cum}). Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. The SEL metric is useful because it allows sound exposures of different durations to be related to one another in terms of total acoustic energy. The duration of a sound event and the number of pulses, however, should be specified as there is no accepted standard duration over which the summation of energy is measured.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, and is represented in the same units as the rms sound pressure. Along with SEL, this metric is used in evaluating the potential for PTS (permanent threshold shift) and TTS (temporary threshold shift). Peak sound pressure is also used to evaluate the potential for gastro-intestinal tract injury (Level A harassment) from explosives.

For explosives, an impulse metric (Pa-s), which is the integral of a transient sound pressure over the duration of the pulse, is used to evaluate the potential for mortality (*i.e.,* severe lung injury) and slight lung injury. These impulse metric thresholds account for animal mass and depth.

Sounds can be either impulsive or non-impulsive. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see NMFS *et al.* (2018) and Southall *et al.* (2007, 2019a) for an in-depth discussion of these concepts. Impulsive sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (American National Standards Institute (ANSI), 1986, 2005; Harris, 1998; National Institute for Occupational Safety and Health (NIOSH), 1998; International Organization for Standardization (ISO), 2003) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. Impulsive sounds are typically intermittent in nature.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. Sounds are also characterized by their temporal component. Continuous sounds are those whose sound pressure level remains above that of the ambient sound with negligibly small fluctuations in level (NIOSH, 1998; ANSI, 2005) while intermittent sounds are defined as sounds with interrupted levels of low or no sound (NIOSH, 1998). NMFS identifies Level B harassment thresholds based on if a sound is continuous or intermittent.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (International Council for the Exploration of the Sea (ICES), 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz, and if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of

biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Human-generated sound is a significant contributor to the acoustic environment in the project location.

Potential Effects of Underwater Sound on Marine Mammals

Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life from none or minor to potentially severe responses depending on received levels, duration of exposure, behavioral context, and various other factors. Broadly, underwater sound from active acoustic sources, such as those in the Project, can potentially result in one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2003; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Götz *et al.,* 2009). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack, 2007; Tal *et al.,* 2015).

In general, the degree of effect of an acoustic exposure is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure, in addition to the contextual factors of the receiver (*e.g.,* behavioral state at time of exposure, age class, *etc.*). In general, sudden, high level sounds can cause hearing loss as can longer exposures to lower level sounds. Moreover, any temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We describe below the specific manifestations of acoustic effects that may occur based on the activities proposed by Park City Wind.

Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur in relation to distance from a source and assuming that the signal is within an animal's hearing range. First (at the greatest distance) is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone (closer to the receiving animal) corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. The third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

Below, we provide additional detail regarding potential impacts on marine mammals and their habitat from noise in general, starting with hearing impairment, as well as from the specific activities Park City Wind plans to conduct, to the degree it is available (noting that there is limited information regarding the impacts of offshore wind construction on marine mammals).

Hearing Threshold Shift

Marine mammals exposed to high-intensity sound or to lower-intensity sound for prolonged periods can experience hearing threshold shift (TS), which NMFS defines as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level expressed in decibels (NMFS, 2018). Threshold shifts can be permanent, in which case there is an irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range or temporary, in which there is reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range and the animal's hearing threshold would fully recover over time (Southall *et al.,* 2019a). Repeated sound exposure that leads to TTS could cause PTS.

When PTS occurs, there can be physical damage to the sound receptors in the ear (*i.e.,* tissue damage) whereas TTS represents primarily tissue fatigue and is reversible (Henderson *et al.,* 2008). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997; Southall *et al.,* 2019a). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans. However, such relationships are assumed to be similar to those in humans and other terrestrial mammals. Noise exposure can result in either a permanent shift in hearing thresholds from baseline (PTS; a 40 dB threshold shift approximates a PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974; Henderson *et al.,* 2008) or a temporary, recoverable shift in hearing that returns to baseline (a 6 dB threshold shift approximates a TTS onset; *e.g.,* Southall *et al.,* 2019a). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds, expressed in the unweighted peak sound pressure level metric (PK), for impulsive sounds (such as impact pile driving pulses) are at least 6 dB higher than the TTS thresholds and the weighted PTS cumulative sound exposure level thresholds are 15 (impulsive sound) to 20 (non-impulsive sounds) dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2019a). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, PTS is less likely to occur as a result of these activities, but it is possible and a small amount has been proposed for authorization for several species.

TTS is the mildest form of hearing impairment that can occur during exposure to sound, with a TTS of 6 dB considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000; Finneran *et al.,* 2002). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. There is data on sound levels and durations

necessary to elicit mild TTS for marine mammals, but recovery is complicated to predict and dependent on multiple factors.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious depending on the degree of interference of marine mammals hearing. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical (*e.g.,* for successful mother/calf interactions, consistent detection of prey) could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocaena asiaeorientalis*)) and six species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, ring seal, spotted seal, bearded seal, and California sea lion (*Zalophus californianus*)) that were exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise with limited number of exposure to impulsive sources such as seismic airguns or impact pile driving) in laboratory settings (Southall *et al.,* 2019a). There is currently no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS or PTS in marine mammals or for further discussion of TTS or PTS onset thresholds, please see Southall *et al.* (2019a) and NMFS (2018).

Recent studies with captive odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale) have observed increases in hearing threshold levels when individuals received a warning sound prior to exposure to a relatively loud sound (Nachtigall and Supin, 2013, 2015; Nachtigall *et al.,* 2016a, 2016b, 2016c; Finneran, 2018; Nachtigall *et al.,* 2018). These studies suggest that captive animals have a mechanism to reduce hearing sensitivity prior to impending loud sounds. Hearing change was observed to be frequency dependent and Finneran (2018) suggests hearing attenuation occurs within the cochlea or auditory nerve. Based on these observations on captive odontocetes, the authors suggest that wild animals may have a mechanism to self-mitigate the impacts of noise exposure by dampening their hearing during prolonged exposures of loud sound or if conditioned to anticipate intense sounds (Finneran, 2018; Nachtigall *et al.,* 2018).

Behavioral Effects

Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007). A review of marine mammal responses to anthropogenic sound was first conducted by Richardson (1995). More recent reviews address studies conducted since 1995 and focused on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated (Nowacek *et al.,* 2007; DeRuiter *et al.,* 2012 and 2013; Ellison *et al.,* 2012; Gomez *et al.,* 2016). Gomez *et al.* (2016) conducted a review of the literature considering the contextual information of exposure in addition to received level and found that higher received levels were not always associated with more severe behavioral responses and vice versa. Southall *et al.* (2021) states that results demonstrate that some individuals of different species display clear yet varied responses, some of which have negative implications while others appear to tolerate high levels and that responses may not be fully predictable with simple acoustic exposure metrics (*e.g.,* received sound level). Rather, the authors state that differences among species and individuals along with contextual aspects of exposure (*e.g.,* behavioral state) appear to affect response probability.

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately predisposed to respond to certain sounds in certain ways) (Southall *et al.,* 2019a). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), the similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007, DeRuiter *et al.,* 2013). Individuals (of different age, gender, reproductive status, *etc.*) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors, such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Overall, the variability of responses to acoustic stimuli depends on the species receiving the sound, the sound source, and the social, behavioral, or environmental contexts of exposure (*e.g.,* DeRuiter *et al.,* 2012). For example, Goldbogen *et al.* (2013a) demonstrated that individual behavioral state was critically important in determining response of blue whales to sonar, noting that some individuals engaged in deep (greater than 50 m) feeding behavior had greater dive responses than those in shallow feeding or non-feeding conditions. Some blue whales in the Goldbogen *et al.* (2013a) study that were engaged in shallow feeding behavior demonstrated no clear changes in diving or movement even when received levels were high (~160 dB re 1µPa) for exposures to 3–4 kHz sonar signals, while deep feeding and non-feeding whales showed a clear response at exposures at lower received levels of sonar and pseudorandom noise. Southall *et al.* (2011) found that blue whales had a different response to sonar exposure depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

With respect to distance influencing disturbance, DeRuiter *et al.* (2013) examined behavioral responses of Cuvier's beaked whales to mid-frequency sonar and found that whales responded strongly at low received levels (89–127 dB re 1µPa) by ceasing normal fluking and echolocation,

swimming rapidly away, and extending both dive duration and subsequent non-foraging intervals when the sound source was 3.4–9.5 km away. Importantly, this study also showed that whales exposed to a similar range of received levels (78–106 dB re 1µPa) from distant sonar exercises (118 km away) did not elicit such responses, suggesting that context may moderate reactions. Thus, distance from the source is an important variable in influencing the type and degree of behavioral response and this variable is independent of the effect of received levels (*e.g.,* DeRuiter *et al.,* 2013; Dunlop *et al.,* 2017a, 2017b; Falcone *et al.,* 2017; Dunlop *et al.,* 2018; Southall *et al.,* 2019a).

Ellison *et al.* (2012) outlined an approach to assessing the effects of sound on marine mammals that incorporates contextual-based factors. The authors recommend considering not just the received level of sound but also the activity the animal is engaged in at the time the sound is received, the nature and novelty of the sound (*i.e.,* is this a new sound from the animal's perspective), and the distance between the sound source and the animal. They submit that this ''exposure context,'' as described, greatly influences the type of behavioral response exhibited by the animal. Forney *et al.* (2017) also point out that an apparent lack of response (*e.g.,* no displacement or avoidance of a sound source) may not necessarily mean there is no cost to the individual or population, as some resources or habitats may be of such high value that animals may choose to stay, even when experiencing stress or hearing loss. Forney *et al.* (2017) recommend considering both the costs of remaining in an area of noise exposure such as TTS, PTS, or masking, which could lead to an increased risk of predation or other threats or a decreased capability to forage, and the costs of displacement, including potential increased risk of vessel strike, increased risks of predation or competition for resources, or decreased habitat suitable for foraging, resting, or socializing. This sort of contextual information is challenging to predict with accuracy for ongoing activities that occur over large spatial and temporal expanses. However, distance is one contextual factor for which data exist to quantitatively inform a take estimate, and the method for predicting Level B harassment in this rule does consider distance to the source. Other factors are often considered qualitatively in the analysis of the likely consequences of sound exposure where supporting information is available.

Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. However, individuals may be able to compensate for some types and degrees of shifts in behavior, preserving their health and thus their vital rates and population dynamics. For example, New *et al.* (2013) developed a model simulating the complex social, spatial, behavioral and motivational interactions of coastal bottlenose dolphins in the Moray Firth, Scotland, to assess the biological significance of increased rate of behavioral disruptions caused by vessel traffic. Despite a modeled scenario in which vessel traffic increased from 70 to 470 vessels a year (a six-fold increase in vessel traffic) in response to the construction of a proposed offshore renewables' facility, the dolphins' behavioral time budget, spatial distribution, motivations and social structure remained unchanged. Similarly, two bottlenose dolphin populations in Australia were also modeled over 5 years against a number of disturbances (Reed *et al.,* 2020) and results indicate that habitat/noise disturbance had little overall impact on population abundances in either location, even in the most extreme impact scenarios modeled.

Friedlaender *et al.* (2016) provided the first integration of direct measures of prey distribution and density variables incorporated into across-individual analyses of behavior responses of blue whales to sonar and demonstrated a fivefold increase in the ability to quantify variability in blue whale diving behavior. These results illustrate that responses evaluated without such measurements for foraging animals may be misleading, which again illustrates the context-dependent nature of the probability of response.

The following subsections provide examples of behavioral responses that give an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound, contextual factors, and the wide range of potential acoustic sources to which a marine mammal may be exposed. Behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists, along with contextual factors.

Avoidance and Displacement

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales (*Eschrichtius robustus*) and humpback whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from airgun surveys (Malme *et al.,* 1984; Dunlop *et al.,* 2018). Avoidance is qualitatively different from the flight response but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, *etc.*). Avoidance may be short-term with animals returning to the area once the noise has ceased (*e.g.,* Malme *et al.,* 1984; Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007; Dähne *et al.,* 2013; Russel *et al.,* 2016). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006; Forney *et al.,* 2017). Avoidance of marine mammals during the construction of offshore wind facilities (specifically, impact pile driving) has been documented in the literature with some significant variation in the temporal and spatial degree of avoidance and with most studies focused on harbor porpoises as one of the most common marine mammals in European waters (*e.g.,* Tougaard *et al.,* 2009; Dähne *et al.,* 2013; Thompson *et al.,* 2013; Russell *et al.,* 2016; Brandt *et al.,* 2018).

Available information on impacts to marine mammals from pile driving associated with offshore wind is limited to information on harbor porpoises and seals, as the vast majority of this research has occurred at European offshore wind projects where large whales and other odontocete species are uncommon. Harbor porpoises and harbor seals are considered to be behaviorally sensitive species (*e.g.,* Southall *et al.,* 2007) and the effects of wind farm construction in Europe on these species has been well documented. These species have received particular attention in European waters due to their abundance in the North Sea (Hammond *et al.,* 2002; Nachtsheim *et al.,* 2021). A summary of the literature on documented effects of wind farm construction on harbor

porpoise and harbor seals is described below.

Brandt *et al.* (2016) summarized the effects of the construction of eight offshore wind projects within the German North Sea (*i.e.,* Alpha Ventus, BARD Offshore I, Borkum West II, DanTysk, Global Tech I, Meerwind Süd/Ost, Nordsee Ost, and Riffgat) between 2009 and 2013 on harbor porpoises, combining PAM data from 2010–2013 and aerial surveys from 2009–2013 with data on noise levels associated with pile driving. Results of the analysis revealed significant declines in porpoise detections during pile driving when compared to 25–48 hours before pile driving began, with the magnitude of decline during pile driving clearly decreasing with increasing distances to the construction site. During the majority of projects, significant declines in detections (by at least 20 percent) were found within at least 5–10 km of the pile driving site, with declines at up to 20–30 km of the pile driving site documented in some cases. Similar results demonstrating the long-distance displacement of harbor porpoises (18–25 km) and harbor seals (up to 40 km) during impact pile driving have also been observed during the construction at multiple other European wind farms (Tougaard *et al.,* 2009; Bailey *et al.,* 2010; Dähne *et al.,* 2013; Lucke *et al.,* 2012; Haelters *et al.,* 2015).

While harbor porpoises and seals tend to move several kilometers away from wind farm construction activities, the duration of displacement has been documented to be relatively temporary. In two studies at Horns Rev II using impact pile driving, harbor porpoise returned within 1–2 days following cessation of pile driving (Tougaard *et al.,* 2009; Brandt *et al.,* 2011). Similar recovery periods have been noted for harbor seals off England during the construction of four wind farms (Brasseur *et al.,* 2012; Carroll *et al.,* 2010; Hamre *et al.,* 2011; Hastie *et al.,* 2015; Russell *et al.,* 2016). In some cases, an increase in harbor porpoise activity has been documented inside wind farm areas following construction (*e.g.,* Lindeboom *et al.,* 2011). Other studies have noted longer term impacts after impact pile driving. Near Dogger Bank in Germany, harbor porpoises continued to avoid the area for over 2 years after construction began (Gilles *et al.,* 2009). Approximately 10 years after construction of the Nysted wind farm, harbor porpoise abundance had not recovered to the original levels previously seen, although the echolocation activity was noted to have been increasing when compared to the previous monitoring period (Teilmann and Carstensen, 2012). However, overall, there are no indications for a population decline of harbor porpoises in European waters (*e.g.,* Brandt *et al.,* 2016). Notably, where significant differences in displacement and return rates have been identified for these species, the occurrence of secondary project-specific influences such as use of mitigation measures (*e.g.,* bubble curtains, acoustic deterrent devices (ADDs)) or the manner in which species use the habitat in the project area are likely the driving factors of this variation.

NMFS notes the aforementioned studies from Europe involve installing much smaller piles than Park City Wind proposes to install and, therefore, we anticipate noise levels from impact pile driving to be louder. For this reason, we anticipate that the greater distances of displacement observed in harbor porpoise and harbor seals documented in Europe are likely to occur off Massachusetts. However, we do not anticipate any greater severity of response due to harbor porpoise and harbor seal habitat use off Massachusetts or population-level consequences similar to European findings. In many cases, harbor porpoises and harbor seals are resident to the areas where European wind farms have been constructed. However, off Massachusetts, harbor porpoises are primarily transient (with higher abundances in winter when foundation installation and UXO/MEC detonations would not occur) and a very small percentage of the large harbor seal population are only seasonally present with no rookeries established. In summary, we anticipate that harbor porpoise and harbor seals will likely respond to pile driving by moving several kilometers away from the source but return to typical habitat use patterns when pile driving ceases.

Some avoidance behavior of other marine mammal species has been documented to be dependent on distance from the source. As described above, DeRuiter *et al.* (2013) noted that distance from a sound source may moderate marine mammal reactions in their study of Cuvier's beaked whales (an acoustically sensitive species), which showed the whales swimming rapidly and silently away when a sonar signal was 3.4–9.5 km away while showing no such reaction to the same signal when the signal was 118 km away even though the received levels were similar. Tyack *et al.* (1983) conducted playback studies of Surveillance Towed Array Sensor System (SURTASS) low frequency active (LFA) sonar in a gray whale migratory corridor off California. Similar to North Atlantic right whales, gray whales migrate close to shore (approximately +2 kms) and are low frequency hearing specialists. The LFA sonar source was placed within the gray whale migratory corridor (approximately 2 km offshore) and offshore of most, but not all, migrating whales (approximately 4 km offshore). These locations influenced received levels and distance to the source. For the inshore playbacks, not unexpectedly, the louder the source level of the playback (*i.e.,* the louder the received level), whale avoided the source at greater distances. Specifically, when the source level was 170 dB rms and 178 dB rms, whales avoided the inshore source at ranges of several hundred meters, similar to avoidance responses reported by Malme *et al.* (1983, 1984). Whales exposed to source levels of 185 dB rms demonstrated avoidance levels at ranges of +1 km. Responses to the offshore source broadcasting at source levels of 185 and 200 dB, avoidance responses were greatly reduced. While there was observed deflection from course, in no case did a whale abandon its migratory behavior.

The signal context of the noise exposure has been shown to play an important role in avoidance responses. In a 2007–2008 Bahamas study, playback sounds of a potential predator—a killer whale—resulted in a similar but more pronounced reaction in beaked whales (an acoustically sensitive species), which included longer inter-dive intervals and a sustained straight-line departure of more than 20 km from the area (Boyd *et al.,* 2008; Southall *et al.,* 2009; Tyack *et al.,* 2011). Park City Wind does not anticipate, and NMFS is not proposing to authorize take of beaked whales and, moreover, the sounds produced by Park City Wind do not have signal characteristics similar to predators. Therefore we would not expect such extreme reactions to occur. Southall *et al.* (2011) found that blue whales had a different response to sonar exposure depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

One potential consequence of behavioral avoidance is the altered energetic expenditure of marine mammals because energy is required to move and avoid surface vessels or the sound field associated with active sonar (Frid and Dill, 2002). Most animals can avoid that energetic cost by swimming away at slow speeds or speeds that minimize the cost of transport (Miksis-Olds, 2006), as has been demonstrated in Florida manatees (Miksis-Olds, 2006).

Those energetic costs increase, however, when animals shift from a resting state, which is designed to conserve an animal's energy, to an active state that consumes energy the animal would have conserved had it not been disturbed. Marine mammals that have been disturbed by anthropogenic noise and vessel approaches are commonly reported to shift from resting to active behavioral states, which would imply that they incur an energy cost.

Forney *et al.* (2017) detailed the potential effects of noise on marine mammal populations with high site fidelity, including displacement and auditory masking, noting that a lack of observed response does not imply absence of fitness costs and that apparent tolerance of disturbance may have population-level impacts that are less obvious and difficult to document. Avoidance of overlap between disturbing noise and areas and/or times of particular importance for sensitive species may be critical to avoiding population-level impacts because (particularly for animals with high site fidelity) there may be a strong motivation to remain in the area despite negative impacts. Forney *et al.* (2017) stated that, for these animals, remaining in a disturbed area may reflect a lack of alternatives rather than a lack of effects.

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996; Frid and Dill, 2002). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, beaked whale strandings (Cox *et al.,* 2006; D'Amico *et al.,* 2009). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response. Flight responses of marine mammals have been documented in response to mobile high intensity active sonar (*e.g.,* Tyack *et al.,* 2011; DeRuiter *et al.,* 2013; Wensveen *et al.,* 2019), and more severe responses have been documented when sources are moving towards an animal or when they are surprised by unpredictable exposures (Watkins, 1986; Falcone *et al.,* 2017). Generally speaking, however, marine mammals would be expected to be less likely to respond with a flight response to either stationery pile driving (which they can sense is stationery and predictable) or significantly lower-level HRG surveys, unless they are within the area ensonified above behavioral harassment thresholds at the moment the source is turned on (Watkins, 1986; Falcone *et al.,* 2017).

Diving and Foraging

Changes in dive behavior in response to noise exposure can vary widely. They may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a; Goldbogen *et al.,* 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. Variations in dive behavior may also expose an animal to potentially harmful conditions (*e.g.,* increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure, the type and magnitude of the response, and the context within which the response occurs (*e.g.,* the surrounding environmental and anthropogenic circumstances).

Nowacek *et al.* (2004) reported disruptions of dive behaviors in foraging North Atlantic right whales when exposed to an alerting stimulus, an action, they noted, that could lead to an increased likelihood of ship strike. The alerting stimulus was in the form of an 18 minute exposure that included three 2-minute signals played three times sequentially. This stimulus was designed with the purpose of providing signals distinct to background noise that serve as localization cues. However, the whales did not respond to playbacks of either right whale social sounds or vessel noise, highlighting the importance of the sound characteristics in producing a behavioral reaction. Although source levels for the proposed pile driving activities may exceed the received level of the alerting stimulus described by Nowacek *et al.* (2004), proposed mitigation strategies (further described in the Proposed Mitigation section) will reduce the severity of response to proposed pile driving activities. Converse to the behavior of North Atlantic right whales, Indo-Pacific humpback dolphins have been observed to dive for longer periods of time in areas where vessels were present and/or approaching (Ng and Leung, 2003). In both of these studies, the influence of the sound exposure cannot be decoupled from the physical presence of a surface vessel, thus complicating interpretations of the relative contribution of each stimulus to the response. Indeed, the presence of surface vessels, their approach, and speed of approach, seemed to be significant factors in the response of the Indo-Pacific humpback dolphins (Ng and Leung, 2003). Low frequency signals of the Acoustic Thermometry of Ocean Climate (ATOC) sound source were not found to affect dive times of humpback whales in Hawaiian waters (Frankel and Clark, 2000) or to overtly affect elephant seal dives (Costa *et al.,* 2003). They did, however, produce subtle effects that varied in direction and degree among the individual seals, illustrating the equivocal nature of behavioral effects and consequent difficulty in defining and predicting them.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the cessation of secondary indicators of foraging (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006a; Yazvenko *et al.,* 2007; Southall *et al.,* 2019b). An understanding of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal can facilitate the assessment of whether foraging disruptions are likely to incur fitness consequences (Goldbogen *et al.,* 2013b; Farmer *et al.,* 2018; Pirotta *et al.,* 2018; Southall *et al.,* 2019a; Pirotta *et al.,* 2021).

Impacts on marine mammal foraging rates from noise exposure have been documented, though there is little data regarding the impacts of offshore turbine construction specifically. Several broader examples follow, and it is reasonable to expect that exposure to noise produced during the 5-years the proposed rule would be effective could have similar impacts.

Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale

behavior prior to, during, and following exposure to airgun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array exposures at 1–13 km (Madsen *et al.,* 2006a; Miller *et al.,* 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the airguns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were 6 percent lower during exposure than control periods (Miller *et al.,* 2009). Miller *et al.* (2009) noted that more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior.

Balaenopterid whales exposed to moderate low-frequency signals similar to the ATOC sound source demonstrated no variation in foraging activity (Croll *et al.,* 2001), whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.,* 2004). Although the received SPLs were similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. The source levels of both the proposed construction and HRG activities exceed the source levels of the signals described by Nowacek *et al.* (2004) and Croll *et al.* (2001), and noise generated by Park City Wind's activities at least partially overlap in frequency with the described signals. Blue whales exposed to mid-frequency sonar in the Southern California Bight were less likely to produce low frequency calls usually associated with feeding behavior (Melcón *et al.,* 2012). However, Melcón *et al.* (2012) were unable to determine if suppression of low frequency calls reflected a change in their feeding performance or abandonment of foraging behavior and indicated that implications of the documented responses are unknown. Further, it is not known whether the lower rates of calling actually indicated a reduction in feeding behavior or social contact since the study used data from remotely deployed, passive acoustic monitoring buoys. Results from the 2010–2011 field season of a behavioral response study in Southern California waters indicated that, in some cases and at low received levels, tagged blue whales responded to mid-frequency sonar but that those responses were mild and there was a quick return to their baseline activity (Southall *et al.,* 2011; Southall *et al.,* 2012b, Southall *et al.,* 2019).

Information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal will help better inform a determination of whether foraging disruptions incur fitness consequences. Foraging strategies may impact foraging efficiency, such as by reducing foraging effort and increasing success in prey detection and capture, in turn promoting fitness and allowing individuals to better compensate for foraging disruptions. Surface feeding blue whales did not show a change in behavior in response to mid-frequency simulated and real sonar sources with received levels between 90 and 179 dB re 1 µPa, but deep feeding and non-feeding whales showed temporary reactions including cessation of feeding, reduced initiation of deep foraging dives, generalized avoidance responses, and changes to dive behavior (DeRuiter *et al.,* 2017; Goldbogen *et al.,* 2013b; Sivle *et al.,* 2015). Goldbogen *et al.* (2013b) indicate that disruption of feeding and displacement could impact individual fitness and health. However, for this to be true, we would have to assume that an individual whale could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication that individual fitness and health would be impacted, particularly since unconsumed prey would likely still be available in the environment in most cases following the cessation of acoustic exposure.

Similarly, while the rates of foraging lunges decrease in humpback whales due to sonar exposure, there was variability in the response across individuals, with one animal ceasing to forage completely and another animal starting to forage during the exposure (Sivle *et al.,* 2016). In addition, almost half of the animals that demonstrated avoidance were foraging before the exposure but the others were not; the animals that avoided while not feeding responded at a slightly lower received level and greater distance than those that were feeding (Wensveen *et al.,* 2017). These findings indicate the behavioral state of the animal and foraging strategies play a role in the type and severity of a behavioral response. For example, when the prey field was mapped and used as a covariate in examining how behavioral state of blue whales is influenced by mid-frequency sound, the response in blue whale deep-feeding behavior was even more apparent, reinforcing the need for contextual variables to be included when assessing behavioral responses (Friedlaender *et al.,* 2016).

Vocalizations and Auditory Masking

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, production of echolocation clicks, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result directly from increased vigilance or a startle response, or from a need to compete with an increase in background noise (see Erbe *et al.,* 2016 review on communication masking), the latter of which is described more below.

For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004) and blue whales increased song production (Di Iorio and Clark, 2009), while North Atlantic right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease or reduce sound production during production of aversive signals (Bowles *et al.,* 1994; Thode *et al.,* 2020; Cerchio *et al.,* 2014; McDonald *et al.,* 1995). Blackwell *et al.* (2015) showed that whales increased calling rates as soon as airgun signals were detectable before ultimately decreasing calling rates at higher received levels.

Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, or navigation) (Richardson *et al.,* 1995; Erbe and Farmer, 2000; Tyack, 2000; Erbe *et al.,* 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar,

seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other 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 these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations. Masking can lead to behavioral changes including vocal changes (*e.g.,* Lombard effect, increasing amplitude, or changing frequency), cessation of foraging or lost foraging opportunities, and leaving an area, to both signalers and receivers, in an attempt to compensate for noise levels (Erbe *et al.,* 2016) or because sounds that would typically have triggered a behavior were not detected. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, though, the detection of frequencies above those of the masking stimulus decreases also. This principle is expected to apply to marine mammals as well because of common biomechanical cochlear properties across taxa.

Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting behavioral patterns. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which only occurs during the sound exposure. Because masking (without resulting in threshold shift) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009; Matthews *et al.,* 2017) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013; Cholewiak *et al.,* 2018).

The echolocation calls of toothed whales are subject to masking by high-frequency sound. Human data indicate low-frequency sound can mask high-frequency sounds (*i.e.,* upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, 1993) indicate that some species may use various processes to reduce masking effects (*e.g.,* adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high-frequencies these cetaceans use to echolocate, but not at the low-to-moderate frequencies they use to communicate (Zaitseva *et al.,* 1980). A study by Nachtigall and Supin (2008) showed that false killer whales adjust their hearing to compensate for ambient sounds and the intensity of returning echolocation signals.

Impacts on signal detection, measured by masked detection thresholds, are not the only important factors to address when considering the potential effects of masking. As marine mammals use sound to recognize conspecifics, prey, predators, or other biologically significant sources (Branstetter *et al.,* 2016), it is also important to understand the impacts of masked recognition thresholds (often called ''informational masking''). Branstetter *et al.* (2016) measured masked recognition thresholds for whistle-like sounds of bottlenose dolphins and observed that they are approximately 4 dB above detection thresholds (energetic masking) for the same signals. Reduced ability to recognize a conspecific call or the acoustic signature of a predator could have severe negative impacts. Branstetter *et al.* (2016) observed that if ''quality communication'' is set at 90 percent recognition the output of communication space models (which are based on 50 percent detection) would likely result in a significant decrease in communication range.

As marine mammals use sound to recognize predators (Allen *et al.,* 2014; Cummings and Thompson, 1971; Curé *et al.,* 2015; Fish and Vania, 1971), the presence of masking noise may also prevent marine mammals from responding to acoustic cues produced by their predators, particularly if it occurs in the same frequency band. For example, harbor seals that reside in the coastal waters off British Columbia are frequently targeted by mammal-eating killer whales. The seals acoustically discriminate between the calls of mammal-eating and fish-eating killer whales (Deecke *et al.,* 2002), a capability that should increase survivorship while reducing the energy required to attend to all killer whale calls. Similarly, sperm whales (Curé *et al.,* 2016; Isojunno *et al.,* 2016), long-finned pilot whales (Visser *et al.,* 2016), and humpback whales (Curé *et al.,* 2015) changed their behavior in response to killer whale vocalization playbacks; these findings indicate that some recognition of predator cues could be missed if the killer whale vocalizations were masked. The potential effects of masked predator acoustic cues depends on the duration of the masking noise and the likelihood of a marine mammal encountering a predator during the time that detection and recognition of predator cues are impeded.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these sounds by improving the effective signal-to-noise ratio.

Masking affects both senders and receivers of acoustic signals and, at higher levels and longer duration, can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009; Cholewiak *et al.,* 2018). All anthropogenic sound sources, but especially chronic and

lower-frequency signals (*e.g.,* from commercial vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

In addition to making it more difficult for animals to perceive and recognize acoustic cues in their environment, anthropogenic sound presents separate challenges for animals that are vocalizing. When they vocalize, animals are aware of environmental conditions that affect the ''active space'' (or communication space) of their vocalizations, which is the maximum area within which their vocalizations can be detected before it drops to the level of ambient noise (Brenowitz, 2004; Brumm *et al.,* 2004; Lohr *et al.,* 2003). Animals are also aware of environmental conditions that affect whether listeners can discriminate and recognize their vocalizations from other sounds, which is more important than simply detecting that a vocalization is occurring (Brenowitz, 1982; Brumm *et al.,* 2004; Dooling, 2004; Marten and Marler, 1977; Patricelli and Blickley, 2006). Most species that vocalize have evolved with an ability to make adjustments to their vocalizations to increase the signal-to-noise ratio, active space, and recognizability/distinguishability of their vocalizations in the face of temporary changes in background noise (Brumm *et al.,* 2004; Patricelli and Blickley, 2006). Vocalizing animals can make adjustments to vocalization characteristics such as the frequency structure, amplitude, temporal structure, and temporal delivery (repetition rate), or ceasing to vocalize.

Many animals will combine several of these strategies to compensate for high levels of background noise. Anthropogenic sounds that reduce the signal-to-noise ratio of animal vocalizations, increase the masked auditory thresholds of animals listening for such vocalizations, or reduce the active space of an animal's vocalizations impair communication between animals. Most animals that vocalize have evolved strategies to compensate for the effects of short-term or temporary increases in background or ambient noise on their songs or calls. Although the fitness consequences of these vocal adjustments are not directly known in all instances, like most other trade-offs animals must make, some of these strategies likely come at a cost (Patricelli and Blickley, 2006; Noren *et al.,* 2017; Noren *et al.,* 2020). Shifting songs and calls to higher frequencies may also impose energetic costs (Lambrechts, 1996).

Marine mammals are also known to make vocal changes in response to anthropogenic noise. In cetaceans, vocalization changes have been reported from exposure to anthropogenic noise sources such as sonar, vessel noise, and seismic surveying (see the following for examples: Gordon *et al.,* 2003; Di Iorio and Clark, 2009; Hatch *et al.,* 2012; Holt *et al.,* 2009; Holt *et al.,* 2011; Lesage *et al.,* 1999; McDonald *et al.,* 2009; Parks *et al.,* 2007; Risch *et al.,* 2012; Rolland *et al.,* 2012), as well as changes in the natural acoustic environment (Dunlop *et al.,* 2014). Vocal changes can be temporary, or can be persistent. For example, model simulation suggests that the increase in starting frequency for the North Atlantic right whale upcall over the last 50 years resulted in increased detection ranges between right whales. The frequency shift, coupled with an increase in call intensity by 20 dB, led to a call detectability range of less than 3 km to over 9 km (Tennessen and Parks, 2016). Holt *et al.* (2009) measured killer whale call source levels and background noise levels in the 1 to 40 kHz band and reported that the whales increased their call source levels by 1 dB SPL for every one dB SPL increase in background noise level. Similarly, another study on St. Lawrence River belugas reported a similar rate of increase in vocalization activity in response to passing vessels (Scheifele *et al.,* 2005). Di Iorio and Clark (2009) showed that blue whale calling rates vary in association with seismic sparker survey activity, with whales calling more on days with surveys than on days without surveys. They suggested that the whales called more during seismic survey periods as a way to compensate for the elevated noise conditions.

In some cases, these vocal changes may have fitness consequences, such as an increase in metabolic rates and oxygen consumption, as observed in bottlenose dolphins when increasing their call amplitude (Holt *et al.,* 2015). A switch from vocal communication to physical, surface-generated sounds such as pectoral fin slapping or breaching was observed for humpback whales in the presence of increasing natural background noise levels, indicating that adaptations to masking may also move beyond vocal modifications (Dunlop *et al.,* 2010).

While these changes all represent possible tactics by the sound-producing animal to reduce the impact of masking, the receiving animal can also reduce masking by using active listening strategies such as orienting to the sound source, moving to a quieter location, or reducing self-noise from hydrodynamic flow by remaining still. The temporal structure of noise (*e.g.,* amplitude modulation) may also provide a considerable release from masking through comodulation masking release (a reduction of masking that occurs when broadband noise, with a frequency spectrum wider than an animal's auditory filter bandwidth at the frequency of interest, is amplitude modulated) (Branstetter and Finneran, 2008; Branstetter *et al.,* 2013). Signal type (*e.g.,* whistles, burst-pulse, sonar clicks) and spectral characteristics (*e.g.,* frequency modulated with harmonics) may further influence masked detection thresholds (Branstetter *et al.,* 2016; Cunningham *et al.,* 2014).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources, such as vessels. Several studies have shown decreases in marine mammal communication space and changes in behavior as a result of the presence of vessel noise. For example, right whales were observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007) as well as increasing the amplitude (intensity) of their calls (Parks, 2009; Parks *et al.,* 2011). Clark *et al.* (2009) observed that right whales' communication space decreased by up to 84 percent in the presence of vessels. Cholewiak *et al.* (2018) also observed loss in communication space in Stellwagen National Marine Sanctuary for North Atlantic right whales, fin whales, and humpback whales with increased ambient noise and shipping noise. Although humpback whales off Australia did not change the frequency or duration of their vocalizations in the presence of ship noise, their source levels were lower than expected based on source level changes to wind noise, potentially indicating some signal masking (Dunlop, 2016). Multiple delphinid species have also been shown to increase the minimum or maximum frequencies of their whistles in the presence of anthropogenic noise and reduced communication space (for examples see: Holt *et al.,* 2009; Holt *et al.,* 2011; Gervaise *et al.,* 2012; Williams *et al.,* 2013; Hermannsen *et al.,* 2014; Papale *et al.,* 2015; Liu *et al.,* 2017). While masking impacts are not a concern from lower intensity, higher frequency HRG surveys, some degree of masking would be expected in the vicinity of turbine pile driving and concentrated support vessel operation. However, pile driving is an intermittent sound and would not be continuous throughout a day.

Habituation and Sensitization

Habituation can occur when an animal's response to a stimulus wanes

with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance having a neutral or positive outcome (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

Both habituation and sensitization require an ongoing learning process. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; National Research Council (NRC), 2003; Wartzok *et al.,* 2003; Southall *et al.,* 2019b). Controlled experiments with captive marine mammals have shown pronounced behavioral reactions, including avoidance of loud sound sources (*e.g.,* Ridgway *et al.,* 1997; Finneran *et al.,* 2003; Houser *et al.,* 2013a; Houser *et al.,* 2013b; Kastelein *et al.,* 2018). Observed responses of wild marine mammals to loud impulsive sound sources (typically airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.,* 1995; Nowacek *et al.,* 2007; Tougaard *et al.,* 2009; Brandt *et al.,* 2011; Brandt *et al.,* 2012; Dähne *et al.,* 2013; Brandt *et al.,* 2014; Russell *et al.,* 2016; Brandt *et al.,* 2018).

Stone (2015) reported data from at-sea observations during 1,196 airgun surveys from 1994 to 2010. When large arrays of airguns (considered to be 500 in 3 or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral responses observed included changes in swimming or surfacing behavior with indications that cetaceans remained near the water surface at these times. Behavioral observations of gray whales during an airgun survey monitored whale movements and respirations pre-, during-, and post-seismic survey (Gailey *et al.,* 2016). Behavioral state and water depth were the best 'natural' predictors of whale movements and respiration and after considering natural variation, none of the response variables were significantly associated with survey or vessel sounds. Many delphinids approach low-frequency airgun source vessels with no apparent discomfort or obvious behavioral change (*e.g.,* Barkaszi *et al.,* 2012), indicating the importance of frequency output in relation to the species' hearing sensitivity.

Physiological 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 sufficiently to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Lusseau and Bejder, 2007; Romano *et al.,* 2002a; Rolland *et al.,* 2012). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales.

These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003, 2017).

Respiration naturally varies with different behaviors and variations in respiration rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Mean exhalation rates of gray whales at rest and while diving were found to be unaffected by seismic surveys conducted adjacent to the whale feeding grounds (Gailey *et al.,* 2007). Studies with captive harbor porpoises show increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.,* 2001; Kastelein *et al.,* 2006a) and emissions for underwater data transmission (Kastelein *et al.,* 2005). However, exposure of the same acoustic alarm to a striped dolphin under the same conditions did not elicit a response (Kastelein *et al.,* 2006a), again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure.

Stranding

The definition for a stranding under title IV of the MMPA is that (A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the

United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance (16 U.S.C. 1421h).

Marine mammal strandings have been linked to a variety of causes, such as illness from exposure to infectious agents, biotoxins, or parasites; starvation; unusual oceanographic or weather events; or anthropogenic causes including fishery interaction, ship strike, entrainment, entrapment, sound exposure, or combinations of these stressors sustained concurrently or in series. There have been multiple events worldwide in which marine mammals (primarily beaked whales, or other deep divers) have stranded coincident with relatively nearby activities utilizing loud sound sources (primarily military training events), and five in which mid-frequency active sonar has been more definitively determined to have been a contributing factor.

There are multiple theories regarding the specific mechanisms responsible for marine mammal strandings caused by exposure to loud sounds. One primary theme is the behaviorally mediated responses of deep-diving species (odontocetes), in which their startled response to an acoustic disturbance (1) affects ascent or descent rates, the time they stay at depth or the surface, or other regular dive patterns that are used to physiologically manage gas formation and absorption within their bodies, such that the formation or growth of gas bubbles damages tissues or causes other injury, or (2) results in their flight to shallow areas, enclosed bays, or other areas considered ''out of habitat,'' in which they become disoriented and physiologically compromised. For more information on marine mammal stranding events and potential causes, please see the Mortality and Stranding section of NMFS Proposed Incidental Take Regulations for the Navy's Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area (50 CFR part 218, Volume 83, No. 123, June 26, 2018).

The construction activities proposed by Park City Wind (*i.e.,* pile driving, drilling, UXO/MEC detonation) do not inherently have the potential to result in marine mammal strandings. While vessel strikes and UXO/MEC detonation could kill or injure a marine mammals (which may eventually strand), the required mitigation measures would reduce the potential for take from these activities to *de minimus* levels (see Proposed Mitigation section for more details). As described above, no mortality or serious injury is anticipated or proposed to be authorized from any Project activities.

Of the strandings documented to date worldwide, NMFS is not aware of any being attributed to pile driving, a single UXO/MEC detonation of the charge weights proposed here, or the types of HRG equipment proposed for use during the Project. Recently, there has been heightened interest in HRG surveys and their potential role in recent marine mammals strandings along the U.S. east coast. HRG surveys involve the use of certain sources to image the ocean bottom, which are very different from seismic airguns used in oil and gas surveys or tactical military sonar, in that they produce much smaller impact zones. Marine mammals may respond to exposure to these sources by, for example, avoiding the immediate area, which is why offshore wind developers have authorization to allow for Level B (behavioral) harassment, including Park City Wind. However, because of the combination of lower source levels, higher frequency, narrower beam-width (for some sources), and other factors, the area within which a marine mammal might be expected to be behaviorally disturbed by HRG sources is much smaller (by orders of magnitude) than the impact areas for seismic airguns or the military sonar with which a small number of marine mammal have been causally associated. Specifically, estimated harassment zones for HRG surveys are typically less than 200m (such as those associated with the Project), while zones for military mid-frequency active sonar or seismic airgun surveys typically extend for several kms ranging up to 10s of km. Further, because of this much smaller ensonified area, any marine mammal exposure to HRG sources is reasonably expected to be at significantly lower levels and shorter duration (associated with less severe responses), and there is no evidence suggesting, or reason to speculate, that marine mammals exposed to HRG survey noise are likely to be injured, much less strand, as a result. Last, all but one of the small number of marine mammal stranding events that have been causally associated with exposure to loud sound sources have been deep-diving toothed whale species (not mysticetes), which are known to respond differently to loud sounds.

Potential Effects of Disturbance on Marine Mammal Fitness

The different ways that marine mammals respond to sound are sometimes indicators of the ultimate effect that exposure to a given stimulus will have on the well-being (survival, reproduction, *etc.*) of an animal. There are numerous data relating the exposure of terrestrial mammals from sound to effects on reproduction or survival, and data for marine mammals continues to grow. Several authors have reported that disturbance stimuli may cause animals to abandon nesting and foraging sites (Sutherland and Crockford, 1993); may cause animals to increase their activity levels and suffer premature deaths or reduced reproductive success when their energy expenditures exceed their energy budgets (Daan *et al.,* 1996; Feare, 1976; Mullner *et al.,* 2004); or may cause animals to experience higher predation rates when they adopt risk-prone foraging or migratory strategies (Frid and Dill, 2002). Each of these studies addressed the consequences of animals shifting from one behavioral state (*e.g.,* resting or foraging) to another behavioral state (*e.g.,* avoidance or escape behavior) because of human disturbance or disturbance stimuli.

Attention is the cognitive process of selectively concentrating on one aspect of an animal's environment while ignoring other things (Posner, 1994). Because animals (including humans) have limited cognitive resources, there is a limit to how much sensory information they can process at any time. The phenomenon called ''attentional capture'' occurs when a stimulus (usually a stimulus that an animal is not concentrating on or attending to) ''captures'' an animal's attention. This shift in attention can occur consciously or subconsciously (for example, when an animal hears sounds that it associates with the approach of a predator) and the shift in attention can be sudden (Dukas, 2002; van Rij, 2007). Once a stimulus has captured an animal's attention, the animal can respond by ignoring the stimulus, assuming a ''watch and wait'' posture, or treat the stimulus as a disturbance and respond accordingly, which includes scanning for the source of the stimulus or ''vigilance'' (Cowlishaw *et al.,* 2004).

Vigilance is an adaptive behavior that helps animals determine the presence or absence of predators, assess their distance from conspecifics, or to attend cues from prey (Bednekoff and Lima, 1998; Treves, 2000). Despite those

benefits, however, vigilance has a cost of time; when animals focus their attention on specific environmental cues, they are not attending to other activities such as foraging or resting. These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (Saino, 1994; Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). Animals will spend more time being vigilant, which may translate to less time foraging or resting, when disturbance stimuli approach them more directly, remain at closer distances, have a greater group size (*e.g.,* multiple surface vessels), or when they co-occur with times that an animal perceives increased risk (*e.g.,* when they are giving birth or accompanied by a calf).

The primary mechanism by which increased vigilance and disturbance appear to affect the fitness of individual animals is by disrupting an animal's time budget and, as a result, reducing the time they might spend foraging and resting (which increases an animal's activity rate and energy demand while decreasing their caloric intake/energy). In a study of northern resident killer whales off Vancouver Island, exposure to boat traffic was shown to reduce foraging opportunities and increase traveling time (Holt *et al.,* 2021). A simple bioenergetics model was applied to show that the reduced foraging opportunities equated to a decreased energy intake of 18 percent while the increased traveling incurred an increased energy output of 3–4 percent, which suggests that a management action based on avoiding interference with foraging might be particularly effective.

On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant for fitness if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than 1 day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). It is important to note the difference between behavioral reactions lasting or recurring over multiple days and anthropogenic activities lasting or recurring over multiple days. For example, just because certain activities last for multiple days does not necessarily mean that individual animals will be either exposed to those activity-related stressors (*i.e.,* sonar) for multiple days or further exposed in a manner that would result in sustained multi-day substantive behavioral responses. However, special attention is warranted where longer-duration activities overlay areas in which animals are known to congregate for longer durations for biologically important behaviors.

There are few studies that directly illustrate the impacts of disturbance on marine mammal populations. Lusseau and Bejder (2007) present data from three long-term studies illustrating the connections between disturbance from whale-watching boats and population-level effects in cetaceans. In Shark Bay, Australia, the abundance of bottlenose dolphins was compared within adjacent control and tourism sites over three consecutive 4.5-year periods of increasing tourism levels. Between the second and third time periods, in which tourism doubled, dolphin abundance decreased by 15 percent in the tourism area and did not change significantly in the control area. In Fiordland, New Zealand, two populations (Milford and Doubtful Sounds) of bottlenose dolphins with tourism levels that differed by a factor of seven were observed and significant increases in traveling time and decreases in resting time were documented for both. Consistent short-term avoidance strategies were observed in response to tour boats until a threshold of disturbance was reached (average 68 minutes between interactions), after which the response switched to a longer-term habitat displacement strategy. For one population, tourism only occurred in a part of the home range. However, tourism occurred throughout the home range of the Doubtful Sound population and once boat traffic increased beyond the 68-minute threshold (resulting in abandonment of their home range/preferred habitat), reproductive success drastically decreased (increased stillbirths) and abundance decreased significantly (from 67 to 56 individuals in a short period).

In order to understand how the effects of activities may or may not impact species and stocks of marine mammals, it is necessary to understand not only what the likely disturbances are going to be but how those disturbances may affect the reproductive success and survivorship of individuals and then how those impacts to individuals translate to population-level effects. Following on the earlier work of a committee of the U.S. National Research Council (NRC, 2005), New *et al.* (2014), in an effort termed the Potential Consequences of Disturbance (PCoD), outline an updated conceptual model of the relationships linking disturbance to changes in behavior and physiology, health, vital rates, and population dynamics. This framework is a four-step process progressing from changes in individual behavior and/or physiology, to changes in individual health, then vital rates, and finally to population-level effects. In this framework, behavioral and physiological changes can have direct (acute) effects on vital rates, such as when changes in habitat use or increased stress levels raise the probability of mother-calf separation or predation; indirect and long-term (chronic) effects on vital rates, such as when changes in time/energy budgets or increased disease susceptibility affect health, which then affects vital rates; or no effect to vital rates (New *et al.,* 2014).

Since the PCoD general framework was outlined and the relevant supporting literature compiled, multiple studies developing state-space energetic models for species with extensive long-term monitoring (*e.g.,* southern elephant seals, North Atlantic right whales, Ziphiidae beaked whales, and bottlenose dolphins) have been conducted and can be used to effectively forecast longer-term, population-level impacts from behavioral changes. While these are very specific models with very specific data requirements that cannot yet be applied broadly to project-specific risk assessments for the majority of species, they are a critical first step towards being able to quantify the likelihood of a population level effect. Since New *et al.* (2014), several publications have described models developed to examine the long-term effects of environmental or anthropogenic disturbance of foraging on various life stages of selected species (*e.g.,* sperm whale, Farmer *et al.* (2018); California sea lion, McHuron *et al.* (2018); blue whale, Pirotta *et al.* (2018a); humpback whale, Dunlop *et al.* (2021)). These models continue to add to refinement of the approaches to the PCoD framework. Such models also help identify what data inputs require further investigation. Pirotta *et al.* (2018b) provides a review of the PCoD framework with details on each step of the process and approaches to applying real data or simulations to achieve each step.

Despite its simplicity, there are few complete PCoD models available for any marine mammal species due to a lack of data available to parameterize many of the steps. To date, no PCoD model has been fully parameterized with empirical

data (Pirotta *et al.,* 2018a) due to the fact they are data intensive and logistically challenging to complete. Therefore, most complete PCoD models include simulations, theoretical modeling, and expert opinion to move through the steps. For example, PCoD models have been developed to evaluate the effect of wind farm construction on the North Sea harbor porpoise populations (*e.g.,* King *et al.,* 2015; Nabe-Nielsen *et al.,* 2018). These models include a mix of empirical data, expert elicitation (King *et al.,* 2015) and simulations of animals' movements, energetics, and/or survival (New *et al.,* 2014; Nabe-Nielsen *et al.,* 2018).

PCoD models may also be approached in different manners. Dunlop *et al.* (2021) modeled migrating humpback whale mother-calf pairs in response to seismic surveys using both a forwards and backwards approach. While a typical forwards approach can determine if a stressor would have population-level consequences, Dunlop *et al.* demonstrated that working backwards through a PCoD model can be used to assess the ''worst case'' scenario for an interaction of a target species and stressor. This method may be useful for future management goals when appropriate data becomes available to fully support the model. In another example, harbor porpoise PCoD model investigating the impact of seismic surveys on harbor porpoise included an investigation on underlying drivers of vulnerability. Harbor porpoise movement and foraging were modeled for baseline periods and then for periods with seismic surveys as well; the models demonstrated that temporal (*i.e.,* seasonal) variation in individual energetics and their link to costs associated with disturbances was key in predicting population impacts (Gallagher *et al.,* 2021).

Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. However, as described above, individuals may be able to compensate for some types and degrees of shifts in behavior, preserving their health and thus their vital rates and population dynamics. For example, New *et al.* (2013) developed a model simulating the complex social, spatial, behavioral and motivational interactions of coastal bottlenose dolphins in the Moray Firth, Scotland, to assess the biological significance of increased rate of behavioral disruptions caused by vessel traffic. Despite a modeled scenario in which vessel traffic increased from 70 to 470 vessels a year (a six-fold increase in vessel traffic) in response to the construction of a proposed offshore renewables' facility, the dolphins' behavioral time budget, spatial distribution, motivations, and social structure remain unchanged. Similarly, two bottlenose dolphin populations in Australia were also modeled over 5 years against a number of disturbances (Reed *et al.,* 2020), and results indicated that habitat/noise disturbance had little overall impact on population abundances in either location, even in the most extreme impact scenarios modeled.

By integrating different sources of data (*e.g.,* controlled exposure data, activity monitoring, telemetry tracking, and prey sampling) into a theoretical model to predict effects from sonar on a blue whale's daily energy intake, Pirotta *et al.* (2021) found that tagged blue whales' activity budgets, lunging rates, and ranging patterns caused variability in their predicted cost of disturbance. This method may be useful for future management goals when appropriate data becomes available to fully support the model. Harbor porpoise movement and foraging were modeled for baseline periods and then for periods with seismic surveys as well; the models demonstrated that the seasonality of the seismic activity was an important predictor of impact (Gallagher *et al.,* 2021).

In their Table 1, Keen *et al.* (2021) summarize the emerging themes in PCoD models that should be considered when assessing the likelihood and duration of exposure and the sensitivity of a population to disturbance (see Table 1 from Keen *et al.,* 2021, below). The themes are categorized by life history traits (movement ecology, life history strategy, body size, and pace of life), disturbance source characteristics (overlap with biologically important areas, duration and frequency, and nature and context), and environmental conditions (natural variability in prey availability and climate change). Keen *et al.* (2021) then summarize how each of these features influence an assessment, noting, for example, that individual animals with small home ranges have a higher likelihood of prolonged or year-round exposure, that the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present, and that continuous disruption will have a greater impact than intermittent disruption.

Nearly all PCoD studies and experts agree that infrequent exposures of a single day or less are unlikely to impact individual fitness, let alone lead to population level effects (Booth *et al.,* 2016; Booth *et al.,* 2017; Christiansen and Lusseau 2015; Farmer *et al.,* 2018; Wilson *et al.,* 2020; Harwood and Booth 2016; King *et al.,* 2015; McHuron *et al.,* 2018; National Academies of Sciences, Engineering, and Medicine (NAS), 2017; New *et al.,* 2014; Pirotta *et al.,* 2018a; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015). As described through this proposed rule, NMFS expects that any behavioral disturbance that would occur due to animals being exposed to construction activity would be of a relatively short duration, with behavior returning to a baseline state shortly after the acoustic stimuli ceases or the animal moves far enough away from the source. Given this, and NMFS' evaluation of the available PCoD studies, and the required mitigation discussed later, any such behavioral disturbance resulting from Park City Wind's activities is not expected to impact individual animals' health or have effects on individual animals' survival or reproduction, thus no detrimental impacts at the population level are anticipated. Marine mammals may temporarily avoid the immediate area but are not expected to permanently abandon the area or their migratory or foraging behavior. Impacts to breeding, feeding, sheltering, resting, or migration are not expected nor are shifts in habitat use, distribution, or foraging success.

Potential Effects From Explosive Sources

With respect to the noise from underwater explosives, the same acoustic-related impacts described above apply and are not repeated here. Noise from explosives can cause hearing impairment if an animal is close enough to the sources; however, because noise from an explosion is discrete, lasting less than approximately 1 second, no behavioral impacts below the TTS threshold are anticipated considering that Park City Wind would not detonate more than 1 UXO/MEC per day and only 10 during the life of the proposed rule. This section focuses on the pressure-related impacts of underwater explosives, including physiological injury and mortality.

Underwater explosive detonations send a shock wave and sound energy through the water and can release gaseous by-products, create an oscillating bubble, or cause a plume of water to shoot up from the water surface. The shock wave and accompanying noise are of most concern to marine animals. Depending on the intensity of the shock wave and size, location, and depth of the animal, an animal can be injured, killed, suffer non-lethal physical effects, experience

hearing related effects with or without behavioral responses, or exhibit temporary behavioral responses or tolerance from hearing the blast sound. Generally, exposures to higher levels of impulse and pressure levels would result in greater impacts to an individual animal.

Injuries resulting from a shock wave take place at boundaries between tissues of different densities. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill, 1978; Yelverton *et al.,* 1973). Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.,* 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten, 2000). Sound-related damage associated with sound energy from detonations can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If a noise is audible to an animal, it has the potential to damage the animal's hearing by causing decreased sensitivity (Ketten, 1995). Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten, 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, and damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, its sensitivity to the residual noise (Ketten, 1995).

Given the mitigation measures proposed, it is unlikely that any of the more serious injuries or mortality discussed above are likely to result from any UXO/MEC detonation that Park City Wind might need to undertake. PTS, TTS, and brief startle reactions are the most likely impacts to result from this activity, if it occurs (noting detonation is the last method to be chosen for removal).

Potential Effects From Vessel Strike

Vessel collisions with marine mammals, also referred to as vessel strikes or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus, 2001). An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. Lethal interactions are typically associated with large whales, which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). Impact forces increase with speed, as does the probability of a strike at a given distance (Silber *et al.,* 2010; Gende *et al.,* 2011).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike occurs and, if so, whether it results in injury, serious injury, or mortality (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Jensen and Silber, 2003; Pace and Silber, 2005; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 knots.

Jensen and Silber (2003) detailed 292 records of known or probable ship strikes of all large whale species from 1975 to 2002. Of these, vessel speed at the time of collision was reported for 58 cases. Of these 58 cases, 39 (or 67 percent) resulted in serious injury or death (19 of those resulted in serious injury as determined by blood in the water, propeller gashes or severed tailstock, and fractured skull, jaw, vertebrae, hemorrhaging, massive bruising or other injuries noted during necropsy and 20 resulted in death). Operating speeds of vessels that struck various species of large whales ranged from 2 to 51 knots. The majority (79 percent) of these strikes occurred at speeds of 13 knots or greater. The average speed that resulted in serious injury or death was 18.6 knots. Pace and Silber (2005) found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 knots, and exceeded 90 percent at 17 knots. Higher speeds during collisions result in greater force of impact and also appear to increase the chance of severe injuries or death. While modeling studies have suggested that hydrodynamic forces pulling whales toward the vessel hull increase with increasing speed (Clyne, 1999; Knowlton *et al.,* 1995), this is inconsistent with Silber *et al.* (2010), which demonstrated that there is no such relationship (*i.e.,* hydrodynamic forces are independent of speed).

In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 knots. The chances of a lethal injury decline from approximately 80 percent at 15 knots to approximately 20 percent at 8.6 knots. At speeds below 11.8 knots, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward 100 percent above 15 knots.

The Jensen and Silber (2003) report notes that the Large Whale Ship Strike Database represents a minimum number of collisions, because the vast majority probably goes undetected or unreported. In contrast, the Project's personnel are likely to detect any strike that does occur because of the required personnel training and lookouts, along with the inclusion of Protected Species Observers (as described in the Proposed Mitigation section), and they are

required to report all ship strikes involving marine mammals.

There are no known vessel strikes of marine mammals by any offshore wind energy vessel in the U.S. Given the extensive mitigation and monitoring measures (see the Proposed Mitigation and Proposed Monitoring and Reporting section) that would be required of Park City Wind, NMFS believes that a vessel strike is not likely to occur.

Potential Effects to Marine Mammal Habitat

Park City Wind's proposed activities could potentially affect marine mammal habitat through the introduction of impacts to the prey species of marine mammals (through noise, oceanographic processes, or reef effects), acoustic habitat (sound in the water column), water quality, and biologically important habitat for marine mammals.

Effects on Prey

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, and zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). The most likely effects on fishes exposed to loud, intermittent, low-frequency sounds are behavioral responses (*i.e.,* flight or avoidance). Short duration, sharp sounds (such as pile driving or airguns) can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to acoustic sources depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality. While it is clear that the behavioral responses of individual prey, such as displacement or other changes in distribution, can have direct impacts on the foraging success of marine mammals, the effects on marine mammals of individual prey that experience hearing damage, barotrauma, or mortality is less clear, though obviously population scale impacts that meaningfully reduce the amount of prey available could have more serious impacts.

Fishes, like other vertebrates, have a variety of different sensory systems to glean information from ocean around them (Astrup and Mohl, 1993; Astrup, 1999; Braun and Grande, 2008; Carroll *et al.,* 2017; Hawkins and Johnstone, 1978; Ladich and Popper, 2004; Ladich and Schulz-Mirbach, 2016; Mann, 2016; Nedwell *et al.,* 2004; Popper *et al.,* 2003; Popper *et al.,* 2005). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008) (terrestrial vertebrates generally only detect pressure). Most marine fishes primarily detect particle motion using the inner ear and lateral line system while some fishes possess additional morphological adaptations or specializations that can enhance their sensitivity to sound pressure, such as a gas-filled swim bladder (Braun and Grande, 2008; Popper and Fay, 2011).

Hearing capabilities vary considerably between different fish species with data only available for just over 100 species out of the 34,000 marine and freshwater fish species (Eschmeyer and Fong, 2016). In order to better understand acoustic impacts on fishes, fish hearing groups are defined by species that possess a similar continuum of anatomical features, which result in varying degrees of hearing sensitivity (Popper and Hastings, 2009a). There are four hearing groups defined for all fish species (modified from Popper *et al.,* 2014) within this analysis, and they include: fishes without a swim bladder (*e.g.,* flatfish, sharks, rays, *etc.*); fishes with a swim bladder not involved in hearing (*e.g.,* salmon, cod, pollock, *etc.*); fishes with a swim bladder involved in hearing (*e.g.,* sardines, anchovy, herring, *etc.*); and fishes with a swim bladder involved in hearing and high-frequency hearing (*e.g.,* shad and menhaden). Most marine mammal fish prey species would not be likely to perceive or hear mid- or high-frequency sonars. While hearing studies have not been done on sardines and northern anchovies, it would not be unexpected for them to have hearing similarities to Pacific herring (up to 2–5 kHz) (Mann *et al.,* 2005). Currently, less data are available to estimate the range of best sensitivity for fishes without a swim bladder.

In terms of physiology, multiple scientific studies have documented a lack of mortality or physiological effects to fish from exposure to low- and mid-frequency sonar and other sounds (Halvorsen *et al.,* 2012a; Jørgensen *et al.,* 2005; Juanes *et al.,* 2017; Kane *et al.,* 2010; Kvadsheim and Sevaldsen, 2005; Popper *et al.,* 2007; Popper *et al.,* 2016; Watwood *et al.,* 2016). Techer *et al.* (2017) exposed carp in floating cages for up to 30 days to low-power 23 and 46 kHz source without any significant physiological response. Other studies have documented either a lack of TTS in species whose hearing range cannot perceive sonar (such as Navy sonar), or for those species that could perceive sonar-like signals, any TTS experienced would be recoverable (Halvorsen *et al.,* 2012a; Ladich and Fay, 2013; Popper and Hastings, 2009a, 2009b; Popper *et al.,* 2014; Smith, 2016). Only fishes that have specializations that enable them to hear sounds above about 2,500 Hz (2.5 kHz), such as herring (Halvorsen *et al.,* 2012a; Mann *et al.,* 2005; Mann, 2016; Popper *et al.,* 2014), would have the potential to receive TTS or exhibit behavioral responses from exposure to mid-frequency sonar. In addition, any sonar induced TTS to fish whose hearing range could perceive sonar would only occur in the narrow spectrum of the source (*e.g.,* 3.5 kHz) compared to the fish's total hearing range (*e.g.,* 0.01 kHz to 5 kHz).

In terms of behavioral responses, Juanes *et al.* (2017) discuss the potential for negative impacts from anthropogenic noise on fish, but the author's focus was on broader based sounds, such as ship and boat noise sources. Watwood *et al.* (2016) also documented no behavioral responses by reef fish after exposure to mid-frequency active sonar. Doksaeter *et al.* (2009; 2012) reported no behavioral responses to mid-frequency sonar (such as naval sonar) by Atlantic herring; specifically, no escape reactions (vertically or horizontally) were observed in free swimming herring exposed to mid-frequency sonar transmissions. Based on these results (Doksaeter *et al.,* 2009; Doksaeter *et al.,* 2012; Sivle *et al.,* 2012), Sivle *et al.* (2014) created a model in order to report on the possible population-level effects on Atlantic herring from active sonar. The authors concluded that the use of sonar poses little risk to populations of herring regardless of season, even when the herring populations are aggregated and directly exposed to sonar. Finally, Bruintjes *et al.* (2016) commented that fish exposed to any short-term noise within their hearing range might initially startle, but would quickly return to normal behavior.

Pile-driving noise during construction is of particular concern as the very high sound pressure levels could potentially prevent fish from reaching breeding or spawning sites, finding food, and acoustically locating mates. A playback

study in West Scotland revealed that there was a significant movement response to the pile-driving stimulus in both species at relatively low received sound pressure levels (sole: 144–156 dB re 1μPa Peak; cod: 140–161 dB re 1 μPa Peak, particle motion between 6.51×10^3 and 8.62×10^4 m/s^2 peak) (Mueller-Blenkle *et al.,* 2010). The swimming speed of sole increased significantly during the playback of construction noise when compared to the playbacks of before and after construction. While not statistically significant, cod also displayed a similar behavioral response during before, during, and after construction playbacks. However, cod demonstrated a specific and significant freezing response at the onset and cessation of the playback recording. In both species, indications were present displaying directional movements away from the playback source. During wind farm construction in the Eastern Taiwan Strait, Type 1 soniferous fish chorusing showed a relatively lower intensity and longer duration while Type 2 chorusing exhibited higher intensity and no changes in its duration. Deviation from regular fish vocalization patterns may affect fish reproductive success, cause migration, augmented predation, or physiological alterations.

Occasional behavioral reactions to activities that produce underwater noise sources are unlikely to cause long-term consequences for individual fish or populations. The most likely impact to fish from impact and vibratory pile driving activities at the project areas would be temporary behavioral avoidance of the area. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected.

SPLs of sufficient strength have been known to cause fish auditory impairment, injury and mortality. Popper *et al.* (2014) found that fish with or without air bladders could experience TTS at 186 dB SEL_{cum}. Mortality could occur for fish without swim bladders at >216 dB SEL_{cum}. Those with swim bladders or at the egg or larvae life stage, mortality was possible at >203 dB SEL_{cum}. Other studies found that 203 dB SEL_{cum} or above caused a physiological response in other fish species (Casper *et al.,* 2012, Halvorsen *et al.,* 2012a, Halvorsen *et al.,* 2012b, Casper *et al.,* 2013a; Casper *et al.,* 2013b). However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

As described in the Proposed Mitigation section below, Park City Wind would utilize a sound attenuation device which would reduce potential for injury to marine mammal prey. Other fish that experience hearing loss as a result of exposure to impulsive sound sources may have a reduced ability to detect relevant sounds such as predators, prey, or social vocalizations. However, PTS has not been known to occur in fishes and any hearing loss in fish may be as temporary as the timeframe required to repair or replace the sensory cells that were damaged or destroyed (Popper *et al.,* 2005; Popper *et al.,* 2014; Smith *et al.,* 2006). It is not known if damage to auditory nerve fibers could occur, and if so, whether fibers would recover during this process.

It is also possible for fish to be injured or killed by an explosion from UXO/MEC detonation. Physical effects from pressure waves generated by underwater sounds (*e.g.,* underwater explosions) could potentially affect fish within proximity of training or testing activities. The shock wave from an underwater explosion is lethal to fish at close range, causing massive organ and tissue damage and internal bleeding (Keevin and Hempen, 1997). At greater distance from the detonation point, the extent of mortality or injury depends on a number of factors including fish size, body shape, orientation, and species (Keevin and Hempen, 1997; Wright, 1982). At the same distance from the source, larger fish are generally less susceptible to death or injury, elongated forms that are round in cross-section are less at risk than deep-bodied forms, and fish oriented sideways to the blast suffer the greatest impact (Edds-Walton and Finneran, 2006; O'Keeffe, 1984; O'Keeffe and Young, 1984; Wiley *et al.,* 1981; Yelverton *et al.,* 1975). Species with gas-filled organs are more susceptible to injury and mortality than those without them (Gaspin, 1975; Gaspin *et al.,* 1976; Goertner *et al.,* 1994). Barotrauma injuries have been documented during controlled exposure to impact pile driving (an impulsive noise source, as are explosives and airguns) (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013a).

Fish not killed by an explosion might change their behavior, feeding pattern, or distribution. Changes in behavior of fish have been observed as a result of sound produced by explosives, with effect intensified in areas of hard substrate (Wright, 1982). Stunning from pressure waves could also temporarily immobilize fish, making them more susceptible to predation. The abundances of various fish (and invertebrates) near the detonation point for explosives could be altered for a few hours before animals from surrounding areas repopulate the area. However, these populations would likely be replenished as waters near the detonation point are mixed with adjacent waters. Repeated exposure of individual fish to sounds from underwater explosions is not likely and are expected to be short-term and localized. Long-term consequences for fish populations would not be expected. Several studies have demonstrated that airgun sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017).

UXO/MEC detonations would be dispersed in space and time; therefore, repeated exposure of individual fishes are unlikely. Mortality and injury effects to fishes from explosives would be localized around the area of a given in-water explosion but only if individual fish and the explosive (and immediate pressure field) were co-located at the same time. Fishes deeper in the water column or on the bottom would not be affected by water surface explosions. Repeated exposure of individual fish to sound and energy from underwater explosions is not likely given fish movement patterns, especially schooling prey species. Most acoustic effects, if any, are expected to be short-term and localized. Long-term consequences for fish populations, including key prey species within the project area, would not be expected.

Required soft-starts would allow prey and marine mammals to move away from the source prior to any noise levels that may physically injure prey and the

use of the noise attenuation devices would reduce noise levels to the degree any mortality or injury of prey is also minimized. Use of bubble curtains, in addition to reducing impacts to marine mammals, for example, is a key mitigation measure in reducing injury and mortality of ESA-listed salmon on the U.S. West Coast. However, we recognize some mortality, physical injury and hearing impairment in marine mammal prey may occur, but we anticipate the amount of prey impacted in this manner is minimal compared to overall availability. Any behavioral responses to pile driving by marine mammal prey are expected to be brief. We expect that other impacts, such as stress or masking, would occur in fish that serve as marine mammals prey (Popper *et al.,* 2019); however, those impacts would be limited to the duration of impact pile driving and during any UXO/MEC detonations and, if prey were to move out the area in response to noise, these impacts would be minimized.

In addition to fish, prey sources such as marine invertebrates could potentially be impacted by noise stressors as a result of the proposed activities. However, most marine invertebrates' ability to sense sounds is limited. Invertebrates appear to be able to detect sounds (Pumphrey, 1950; Frings and Frings, 1967) and are most sensitive to low-frequency sounds (Packard *et al.,* 1990; Budelmann and Williamson, 1994; Lovell *et al.,* 2005; Mooney *et al.,* 2010). Data on response of invertebrates such as squid, another marine mammal prey species, to anthropogenic sound is more limited (de Soto, 2016; Sole *et al.,* 2017). Data suggest that cephalopods are capable of sensing the particle motion of sounds and detect low frequencies up to 1–1.5 kHz, depending on the species, and so are likely to detect airgun noise (Kaifu *et al.,* 2008; Hu *et al.,* 2009; Mooney *et al.,* 2010; Samson *et al.,* 2014). Sole *et al.* (2017) reported physiological injuries to cuttlefish in cages placed at-sea when exposed during a controlled exposure experiment to low-frequency sources (315 Hz, 139 to 142 dB *re 1* μPa^2 and 400 Hz, 139 to 141 dB *re 1* μPa^2). Fewtrell and McCauley (2012) reported squids maintained in cages displayed startle responses and behavioral changes when exposed to seismic airgun sonar (136–162 re 1 $\mu Pa^2 \cdot s$). Jones *et al.* (2020) found that when squid (*Doryteuthis pealeii*) were exposed to impulse pile driving noise, body pattern changes, inking, jetting, and startle responses were observed and nearly all squid exhibited at least one response. However, these responses occurred primarily during the first eight impulses and diminished quickly, indicating potential rapid, short-term habituation.

Cephalopods have a specialized sensory organ inside the head called a statocyst that may help an animal determine its position in space (orientation) and maintain balance (Budelmann, 1992). Packard *et al.* (1990) showed that cephalopods were sensitive to particle motion, not sound pressure, and Mooney *et al.* (2010) demonstrated that squid statocysts act as an accelerometer through which particle motion of the sound field can be detected. Auditory injuries (lesions occurring on the statocyst sensory hair cells) have been reported upon controlled exposure to low-frequency sounds, suggesting that cephalopods are particularly sensitive to low-frequency sound (Andre *et al.,* 2011; Sole *et al.,* 2013). Behavioral responses, such as inking and jetting, have also been reported upon exposure to low-frequency sound (McCauley *et al.,* 2000; Samson *et al.,* 2014). Squids, like most fish species, are likely more sensitive to low frequency sounds and may not perceive mid- and high-frequency sonars. Cumulatively for squid as a prey species, individual and population impacts from exposure to explosives, like fish, are not likely to be significant, and explosive impacts would be short-term and localized.

With regard to potential impacts on zooplankton, McCauley *et al.* (2017) found that exposure to airgun noise resulted in significant depletion for more than half the taxa present and that there were two to three times more dead zooplankton after airgun exposure compared with controls for all taxa, within 1 km of the airguns. However, the authors also stated that in order to have significant impacts on r-selected species (*i.e.,* those with high growth rates and that produce many offspring) such as plankton, the spatial or temporal scale of impact must be large in comparison with the ecosystem concerned, and it is possible that the findings reflect avoidance by zooplankton rather than mortality (McCauley *et al.,* 2017). In addition, the results of this study are inconsistent with a large body of research that generally finds limited spatial and temporal impacts to zooplankton as a result of exposure to airgun noise (*e.g.,* Dalen and Knutsen, 1987; Payne, 2004; Stanley *et al.,* 2011). Most prior research on this topic, which has focused on relatively small spatial scales, has showed minimal effects (*e.g.,* Kostyuchenko, 1973; Booman *et al.,* 1996; Sætre and Ona, 1996; Pearson *et al.,* 1994; Bolle *et al.,* 2012).

A modeling exercise was conducted as a follow-up to the McCauley *et al.* (2017) study (as recommended by McCauley *et al.*), in order to assess the potential for impacts on ocean ecosystem dynamics and zooplankton population dynamics (Richardson *et al.,* 2017). Richardson *et al.* (2017) found that a full-scale airgun survey would impact copepod abundance within the survey area, but that effects at a regional scale were minimal (2 percent decline in abundance within 150 km of the survey area and effects not discernible over the full region). The authors also found that recovery within the survey area would be relatively quick (3 days following survey completion), and suggest that the quick recovery was due to the fast growth rates of zooplankton, and the dispersal and mixing of zooplankton from both inside and outside of the impacted region. The authors also suggest that surveys in areas with more dynamic ocean circulation in comparison with the study region and/or with deeper waters (*i.e.,* typical offshore wind locations) would have less net impact on zooplankton.

Notably, a recently described study produced results inconsistent with those of McCauley *et al.* (2017). Researchers conducted a field and laboratory study to assess if exposure to airgun noise affects mortality, predator escape response, or gene expression of the copepod *Calanus finmarchicus* (Fields *et al.,* 2019). Immediate mortality of copepods was significantly higher, relative to controls, at distances of 5 m or less from the airguns. Mortality 1 week after the airgun blast was significantly higher in the copepods placed 10 m from the airgun but was not significantly different from the controls at a distance of 20 m from the airgun. The increase in mortality, relative to controls, did not exceed 30 percent at any distance from the airgun. Moreover, the authors caution that even this higher mortality in the immediate vicinity of the airguns may be more pronounced than what would be observed in free-swimming animals due to increased flow speed of fluid inside bags containing the experimental animals. There were no sub-lethal effects on the escape performance or the sensory threshold needed to initiate an escape response at any of the distances from the airgun that were tested. Whereas McCauley *et al.* (2017) reported an SEL of 156 dB at a range of 509–658 m, with zooplankton mortality observed at that range, Fields *et al.* (2019) reported an

SEL of 186 dB at a range of 25 m, with no reported mortality at that distance.

The presence of large numbers of turbines has been shown to impact meso- and sub-meso-scale water column circulation, which can affect the density, distribution, and energy content of zooplankton and thereby, their availability as marine mammal prey. Topside, atmospheric wakes result in wind speed reductions influencing upwelling and downwelling in the ocean while underwater structures such as WTG and ESP foundations may cause turbulent current wakes, which impact circulation, stratification, mixing, and sediment resuspension (Daewel *et al.,* 2022). Overall, the presence and operation of structures such as wind turbines are, in general, likely to result in local and broader oceanographic effects in the marine environment and may disrupt marine mammal prey, such as dense aggregations and distribution of zooplankton through altering the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.,* 2021; Johnson *et al.,* 2021; Christiansen *et al.,* 2022; Dorrell *et al.,* 2022). However, the scale of impacts is difficult to predict and may vary from meters to hundreds of meters for local individual turbine impacts (Schultze *et al.,* 2020) to large-scale dipoles of surface elevation changes stretching hundreds of kilometers (Christiansen *et al.,* 2022).

Park City Wind intends to install up to 130 WTG and ESP positions. Two positions may potentially have co-located ESPs (*i.e.,* 1 WTG and 1 ESP foundation installed at 1 grid position), resulting in 132 foundations with turbine operations commencing in 2027 and all turbines being operational in 2028. As described above, there is scientific uncertainty around the scale of oceanographic impacts (meters to kilometers) associated with turbine operation. The project is located in an area of southern New England that experiences coastal upwelling, a consequence of the predominant wind direction and the orientation of the coastline. Along the coast of Rhode Island and southern Massachusetts, upwelling of deeper, nutrient-rich waters frequently leads to late summer blooms of phytoplankton and subsequently increased biological productivity (Gong *et al.,* 2010; Glenn *et al.,* 2004). The lease area is located within a core winter foraging habitat for North Atlantic right whales (Leiter *et al.,* 2017; Quintano-Rizzo *et al.,* 2021); however, prime foraging habitat on and near Nantucket Shoals is unlikely to be influenced.

These potential impacts on prey could impact the distribution of marine mammals within the project area, potentially necessitating additional energy expenditure to find and capture prey, but at the temporal and spatial scales anticipated for this activity are not expected to impact the reproduction or survival of any individual marine mammals. Although studies assessing the impacts of offshore wind development on marine mammals are limited, the repopulation of wind energy areas by harbor porpoises (Brandt *et al.,* 2016; Lindeboom *et al.,* 2011) and harbor seals (Lindeboom *et al.,* 2011; Russell *et al.,* 2016) following the installation of wind turbines are promising. Overall, any impacts to marine mammal foraging capabilities due to effects on prey aggregation from the turbine presence and operation during the effective period of the proposed rule is likely to be limited. Nearby habitat that is known to support North Atlantic right whale foraging would be unaffected by the project's operation.

In general, impacts to marine mammal prey species are expected to be relatively minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected. The most likely impacts of prey fish from UXO/MEC detonations, if determined to be necessary, are injury or mortality if they are located within the vicinity when detonation occurs. However, given the likely spread of any UXOs/MECs in the project area, the low chance of detonation (as lift-and-shift and deflagration are the primary removal approaches), and that this area is not a biologically important foraging ground, overall effects should be minimal to marine mammal species. NMFS does not expect HRG acoustic sources to impact fish and most sources are likely outside the hearing range of the primary prey species in the project area.

Overall, the combined impacts of sound exposure, explosions, water quality, and oceanographic impacts on marine mammal habitat resulting from the proposed activities would not be expected to have measurable effects on populations of marine mammal prey species. Prey species exposed to sound might move away from the sound source, experience TTS, experience masking of biologically relevant sounds, or show no obvious direct effects.

Reef Effects

The presence of monopile foundations, scour protection, and cable protection will result in a conversion of the existing sandy bottom habitat to a hard bottom habitat with areas of vertical structural relief. This could potentially alter the existing habitat by creating an ''artificial reef effect'' that results in colonization by assemblages of both sessile and mobile animals within the new hard-bottom habitat (Wilhelmsson *et al.,* 2006; Reubens *et al.,* 2013; Bergström *et al.,* 2014; Coates *et al.,* 2014). This colonization by marine species, especially hard-substrate preferring species, can result in changes to the diversity, composition, and/or biomass of the area thereby impacting the trophic composition of the site (Wilhelmsson *et al.,* 2010, Krone *et al.,* 2013; Bergström *et al.,* 2014, Hooper *et al.,* 2017; Raoux *et al.,* 2017; Harrison and Rousseau, 2020; Taormina *et al.,* 2020; Buyse *et al.,* 2022a; ter Hofstede *et al.,* 2022).

Artificial structures can create increased habitat heterogeneity important for species diversity and density (Langhamer, 2012). The WTG and ESP foundations will extend through the water column, which may serve to increase settlement of meroplankton or planktonic larvae on the structures in both the pelagic and benthic zones (Boehlert and Gill, 2010). Fish and invertebrate species are also likely to aggregate around the foundations and scour protection which could provide increased prey availability and structural habitat (Boehlert and Gill, 2010; Bonar *et al.,* 2015). Further, instances of species previously unknown, rare, or nonindigenous to an area have been documented at artificial structures, changing the composition of the food web and possibly the attractability of the area to new or existing predators (Adams *et al.,* 2014; de Mesel, 2015; Bishop *et al.,* 2017; Hooper *et al.,* 2017; Raoux *et al.,* 2017; van Hal *et al.,* 2017; Degraer *et al.,* 2020; Fernandez-Betelu *et al.,* 2022). Notably, there are examples of these sites becoming dominated by marine mammal prey species, such as filter-feeding species and suspension-feeding crustaceans (Andersson and Öhman, 2010; Slavik *et al.,* 2019; Hutchison *et al.,* 2020; Pezy *et al.,* 2020; Mavraki *et al.,* 2022).

Numerous studies have documented significantly higher fish concentrations including species like cod and pouting (*Trisopterus luscus*), flounder (*Platichthys flesus*), eelpout (*Zoarces viviparus*), and eel (*Anguilla anguilla*) near in-water structures than in

surrounding soft bottom habitat (Langhamer and Wilhelmsson, 2009; Bergström *et al.,* 2013; Reubens *et al.,* 2013). In the German Bight portion of the North Sea, fish were most densely congregated near the anchorages of jacket foundations, and the structures extending through the water column were thought to make it more likely that juvenile or larval fish encounter and settle on them (Rhode Island Coastal Resources Management Council (RI–CRMC), 2010; Krone *et al.,* 2013). In addition, fish can take advantage of the shelter provided by these structures while also being exposed to stronger currents created by the structures, which generate increased feeding opportunities and decreased potential for predation (Wilhelmsson *et al.,* 2006). The presence of the foundations and resulting fish aggregations around the foundations is expected to be a long-term habitat impact, but the increase in prey availability could potentially be beneficial for some marine mammals.

The most likely impact to marine mammal habitat from the project is expected to be from pile driving and UXO/MEC detonations, which may affect marine mammal food sources such as forage fish and could also affect acoustic habitat effects on marine mammal prey (*e.g.,* fish).

Water Quality

Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during pile driving and installation of the cables, including auxiliary work such as dredging and scour placement. These activities will disturb bottom sediments and may cause a temporary increase in suspended sediment in the project area. Currents should quickly dissipate any raised total suspended sediment (TSS) levels, and levels should return to background levels once the project activities in that area cease. No direct impacts on marine mammals is anticipated due to increased TSS and turbidity; however, turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary.

Equipment used by Park City Wind within the project area, including ships and other marine vessels, potentially aircrafts, and other equipment, are also potential sources of by-products (*e.g.,* hydrocarbons, particulate matter, heavy metals). All equipment is properly maintained in accordance with applicable legal requirements. All such operating equipment meets Federal water quality standards, where applicable. Given these requirements, impacts to water quality are expected to be minimal.

Acoustic Habitat

Acoustic habitat is the soundscape, which encompasses all of the sound present in a particular location and time, as a whole when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics (communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators), and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (*e.g.,* produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of airgun arrays) or for Navy training and testing purposes (as in the use of sonar and explosives and other acoustic sources). Anthropogenic noise varies widely in its frequency, content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please also see the previous discussion on Masking), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber, 2013). For more detail on these concepts, see Barber *et al.,* 2009; Pijanowski *et al.,* 2011; Francis and Barber, 2013; Lillis *et al.,* 2014.

The term ''listening area'' refers to the region of ocean over which sources of sound can be detected by an animal at the center of the space. Loss of communication space concerns the area over which a specific animal signal, used to communicate with conspecifics in biologically important contexts (*e.g.,* foraging, mating), can be heard, in noisier relative to quieter conditions (Clark *et al.,* 2009). Lost listening area concerns the more generalized contraction of the range over which animals would be able to detect a variety of signals of biological importance, including eavesdropping on predators and prey (Barber *et al.,* 2009). Such metrics do not, in and of themselves, document fitness consequences for the marine animals that live in chronically noisy environments. Long-term population-level consequences mediated through changes in the ultimate survival and reproductive success of individuals are difficult to study, and particularly so underwater. However, it is increasingly well documented that aquatic species rely on qualities of natural acoustic habitats, with researchers quantifying reduced detection of important ecological cues (*e.g.,* Francis and Barber, 2013; Slabbekoorn *et al.,* 2010) as well as survivorship consequences in several species (*e.g.,* Simpson *et al.,* 2014; Nedelec *et al.,* 2014).

Sound produced from construction activities in the project area would be temporary and transitory. The sounds produced during construction activities may be widely dispersed or concentrated in small areas for varying periods. Any anthropogenic noise attributed to construction activities in the project area would be temporary and the affected area would be expected to immediately return to the original state when these activities cease.

Although this proposed rulemaking primarily covers the noise produced from construction activities relevant to this offshore wind facility, operational noise was a consideration in NMFS' analysis of the project, as all turbines would become operational within the effective dates of the rule (if issued). It is expected that all turbines would be operational in 2028. Once operational, offshore wind turbines are known to produce continuous, non-impulsive underwater noise, primarily below 1 kHz (Tougaard *et al.,* 2020; Stöber and Thomsen, 2021).

In both newer, quieter, direct-drive systems (such as what has been

proposed for use in the Project) and older generation, geared turbine designs, recent scientific studies indicate that operational noise from turbines is on the order of 110 to 125 dB re 1 µPa root-mean-square sound pressure level (SPL_{rms}) at an approximate distance of 50 m (Tougaard *et al.,* 2020). Recent measurements of operational sound generated from wind turbines (direct drive, 6 MW, jacket piles) at Block Island wind farm (BIWF) indicate average broadband levels of 119 dB at 50 m from the turbine, with levels varying with wind speed (HDR, Inc., 2019). Interestingly, measurements from BIWF turbines showed operational sound had less tonal components compared to European measurements of turbines with gear boxes.

Tougaard *et al.* (2020) further stated that the operational noise produced by WTGs is static in nature and lower than noise produced by passing ships. This is a noise source in this region to which marine mammals are likely already habituated. Furthermore, operational noise levels are likely lower than those ambient levels already present in active shipping lanes, such that operational noise would likely only be detected in very close proximity to the WTG (Thomsen *et al.,* 2006; Tougaard *et al.,* 2020). Similarly, recent measurements from a wind farm (3 MW turbines) in China found at above 300 Hz, turbines produced sound that was similar to background levels (Zhang *et al.,* 2021). Other studies by Jansen and de Jong (2016) and Tougaard *et al.* (2009) determined that, while marine mammals would be able to detect operational noise from offshore wind farms (again, based on older 2 MW models) for several kilometers, they expected no significant impacts on individual survival, population viability, marine mammal distribution, or the behavior of the animals considered in their study (harbor porpoises and harbor seals).

More recently, Stöber and Thomsen (2021) used monitoring data and modeling to estimate noise generated by more recently developed, larger (10 MW) direct-drive WTGs. Their findings, similar to Tougaard *et al.* (2020), demonstrate that there is a trend that operational noise increases with turbine size. Their study predicts broadband source levels could exceed 170 dB SPL_{rms} for a 10 MW WTG; however, those noise levels were generated based on geared turbines; newer turbines operate with direct drive technology. The shift from using gear boxes to direct drive technology is expected to reduce the levels by 10 dB. The findings in the Stöber and Thomsen (2021) study have not been experimentally validated, though the modeling (using largely geared turbines) performed by Tougaard *et al.* (2020) yields similar results for a hypothetical 10 MW WTG. Overall, noise from operating turbines would raise ambient noise levels in the immediate vicinity of the turbines; however, the spatial extent of increased noise levels would be limited. NMFS proposes to require Park City Wind to measure operational noise levels.

In addition, Madsen *et al.* (2006b) found the intensity of noise generated by operational wind turbines to be much less than the noises present during construction, although this observation was based on a single turbine with a maximum power of 2 MW. Other studies by Jansen and de Jong (2016) and Tougaard *et al.* (2009) determined that, while marine mammals would be able to detect operational noise from offshore wind farms (again, based on older 2 MW models) for several thousand kilometer, they expected no significant impacts on individual survival, population viability, marine mammal distribution, or the behavior of the animals considered in their study (harbor porpoises and harbor seals).

More recently, Stöber and Thomsen (2021) used monitoring data and modeling to estimate noise generated by more recently developed, larger (10 MW) direct-drive WTGs. Their findings, similar to Tougaard *et al.* (2020), demonstrate that there is a trend that operational noise increases with turbine size. Their study found noise levels could exceed 170 (to 177 dB re 1 µPa SPL_{rms} for a 10 MW WTG); however, those noise levels were generated by geared turbines, but newer turbines operate with direct drive technology. The shift from using gear boxes to direct drive technology is expected to reduce the sound level by 10 dB. The findings in the Stöber and Thomsen (2021) study have not been validated. Park City Wind did not request, and NMFS is not proposing to authorize, take incidental to operational noise from WTGs. Therefore, the topic is not discussed or analyzed further herein.

Estimated Take of Marine Mammals

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

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise from pile driving, drilling, HRG surveys, and UXO/MEC detonations could result in behavioral disturbance of marine mammals that qualifies as take. Impacts such as masking and TTS can contribute to the disruption of behavioral patterns and are accounted for within those takes proposed for authorization. There is also some potential for auditory injury (Level A harassment) of all marine mammals except North Atlantic right whales. However, the amount of Level A harassment that Park City Wind requested, and NMFS proposes to authorize, is low. While NMFS is proposing to authorize Level A harassment and Level B harassment, the proposed mitigation and monitoring measures are expected to minimize the amount and severity of such taking to the extent practicable (see Proposed Mitigation and Proposed Monitoring and Reporting).

As described previously, no serious injury or mortality is anticipated or proposed to be authorized incidental to the specified activities. Even without mitigation, both pile driving activities and HRG surveys would not have the potential to directly cause marine mammal mortality or serious injury. However, NMFS is proposing measures to more comprehensively reduce impacts to marine mammal species. While, in general, mortality and serious injury of marine mammals could occur from vessel strikes or UXO/MEC detonation if an animal is close enough to the source, the mitigation and monitoring measures contained within this proposed rule would avoid vessel strikes and the potential for marine mammals to be close enough to any UXO/MEC detonation to incur mortality or non-auditory injury (see Proposed Mitigation section). No other activities have the potential to result in mortality or serious injury.

For acoustic impacts, we estimate take by considering: (1) acoustic thresholds above which 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.

As described below, there are multiple methods available to predict density or occurrence and, for each species and activity, the largest value resulting from the three take estimation methods described below (*i.e.,* density-based, PSO-based, or mean group size) was carried forward as the amount of take proposed for authorization, by Level B harassment. The amount of take proposed for authorization, by Level A harassment, reflects the density-based exposure estimates and, for some species and activities, consideration of other data such as mean group size.

Below, we describe NMFS' acoustic thresholds, acoustic and exposure modeling methodologies, marine mammal density calculation methodology, occurrence information, and the modeling and methodologies applied to estimate take for each of the Project's proposed construction activities. NMFS has carefully considered all information and analysis presented by Park City Wind, as well as all other applicable information and, based on the best available science, concurs that the Project's estimates of the types and amounts of take for each species and stock are reasonable, and is proposing to authorize the amount requested. NMFS notes the take estimates described herein for foundation installation can be considered conservative as the estimates do not reflect the implementation of clearance and shutdown zones for any marine mammal species or stock.

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 (Level B harassment) or to incur PTS of some degree (Level A harassment). A summary of all NMFS' thresholds can be found at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

Level B Harassment

Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source, ambient noise, and the receiving animal's hearing, motivation, experience, demography, behavior at time of exposure, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021; Ellison *et al.,* 2012). Based on what the 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 the received sound pressure levels (SPL_{RMS}) of 120 dB for continuous sources (*e.g.,* vibratory pile-driving, drilling) and above the received SPL_{RMS} 160 dB for non-explosive impulsive or intermittent sources (*e.g.,* impact pile driving, scientific sonar). 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 behavioral patterns that would not otherwise occur.

The proposed Project's construction activities include the use of continuous (*e.g.,* vibratory pile driving, drilling) and impulsive or intermittent sources (*e.g.,* impact pile driving, some HRG acoustic sources); therefore, the 120 and 160 dB re 1 µPa (rms) thresholds are applicable to our analysis. Level B harassment thresholds associated with UXO/MEC detonations are addressed in the Explosives Source Thresholds section below.

Level A Harassment

NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0; Technical Guidance) (NMFS, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). As described above, Park City Wind's proposed activities include the use of both impulsive and non-impulsive sources. NMFS' thresholds identifying the onset of PTS are provided in Table 7. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 7—PERMANENT THRESHOLD SHIFT (PTS) ONSET THRESHOLDS *

[NMFS, 2018]

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 4:* $L_{E,p,\ HF,24h}$: 198 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.

* 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 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.

Explosives Source Thresholds

Based on the best scientific information available, NMFS uses the acoustic and pressure thresholds indicated in Table 8 to predict the onset of PTS and TTS during UXO/MEC detonation. For a single detonation (within a 24-hour period), NMFS relies on the TTS onset threshold to assess the potential for Level B harassment. The proposed rule is conditioned such that Park City Wind would limit detonations to one per day and would be limited to daylight hours only.

TABLE 8—PTS ONSET, TTS ONSET, FOR UNDERWATER EXPLOSIVES

[NMFS, 2018]

Hearing group	PTS impulsive thresholds	TTS impulsive thresholds
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{pk,flat}$: 213 dB $L_{E,LF,24h}$: 168 dB.
Mid-Frequency (MF) Cetaceans	*Cell 4:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 5:* $L_{pk,flat}$: 224 dB; $L_{E,MF,24h}$: 170 dB.
High-Frequency (HF) Cetaceans	*Cell 7:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 8:* $L_{pk,flat}$: 196 dB; $L_{E,HF,24h}$: 140 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 10:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 11:* $L_{pk,flat}$: 212 dB; $L_{E,PW,24h}$: 170 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS/TTS onset.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 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, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Additional thresholds for non-auditory injury to lung and gastrointestinal (GI) tracts from the blast shock wave and/or onset of high peak pressures are also relevant (at relatively close ranges) as UXO/MEC detonations, in general, have potential to result in mortality and non-auditory injury (Table 9). Marine mammal lung injury criteria have been developed by the U.S. Navy (DoN (U.S. Department of the Navy), 2017) and are based on the mass of the animal and the depth at which it is present in the water column due to blast pressure. This means that specific decibel levels for each hearing group are not provided and instead, the criteria are presented as equations that allow for incorporation of specific mass and depth values. The GI tract injury threshold is based on peak pressure. The modified Goertner equations below represent the potential onset of lung injury and GI tract injury (Table 9).

TABLE 9—LUNG AND G.I. TRACT INJURY THRESHOLDS

[DoN, 2017]

Hearing group	Mortality (severe lung injury) *	Slight lung injury *	G.I. tract injury
All Marine Mammals	*Cell 1:* Modified Goertner model; Equation 1.	*Cell 2:* Modified Goertner model; Equation 2.	*Cell 3:* $L_{pk,flat}$: 237 dB.

* Lung injury (severe and slight) thresholds are dependent on animal mass (Recommendation: Table C.9 from DoN (2017) based on adult and/or calf/pup mass by species).

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range.

Modified Goertner Equations for severe and slight lung injury (pascal-second):
Equation 1: $103M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.
Equation 2: $47.5M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s.
M animal (adult and/or calf/pup) mass (kg) (Table C.9 in DoN, 2017).
D animal depth (meters).

Below, we describe the assumptions and methodologies used to estimate take, in consideration of acoustic thresholds and appropriate marine mammals density and occurrence information, for WTG and ESP foundation installation, UXO/MEC detonation, and HRG surveys. Resulting distances to thresholds, densities used, activity-specific exposure estimates (as relevant to the analysis), and activity-specific take estimates can be found in each activity subsection below. At the end of this section, we present the amount of annual and 5-year take that Park City Wind requested, and NMFS proposes to authorize, from all activities combined.

Acoustic and Exposure Modeling

The predominant underwater noise associated with the construction of the Project results from impact and vibratory pile driving and drilling. Park City Wind employed JASCO Applied Sciences (USA) Inc. (JASCO) to conduct acoustic modeling to better understand sound fields produced during these activities (Küsel *et al.,* 2022). The basic modeling approach is to characterize the sounds produced by the source, and determine how the sounds propagate within the surrounding water column. For impact pile driving, JASCO conducted sophisticated source and propagation modeling (as described below). For vibratory pile driving and drilling activities, JASCO applied *in situ* data to estimate source levels and applied a general practical spreading loss (15logR) assumption. To assess the potential for take from impact pile driving, JASCO also conducted animal movement modeling to estimate take; JASCO estimated species-specific exposure probability by considering the range- and depth-dependent sound fields in relation to animal movement in simulated representative construction scenarios. To assess the potential for take from vibratory pile driving and drilling, exposure modeling was not conducted. More details on these acoustic source modeling, propagation modeling and exposure modeling methods are described below.

JASCO's Pile Driving Source Model (PDSM), a physical model of pile vibration and near-field sound radiation (MacGillivray, 2014), was used in conjunction with the GRL, Inc. Wave Equation Analysis of Pile Driving (GRLWEAP) 2010 wave equation model (Pile Dynamics, 2010) to predict source levels associated with impact pile driving activities (WTG and ESP foundation installation). The PDSM physical model computes the underwater vibration and sound radiation of a pile by solving the theoretical equations of motion for axial and radial vibrations of a cylindrical shell. This model is used to estimate the energy distribution per frequency (source spectrum) at a close distance from the source (10 m). Piles are modeled as a vertical installation using a finite-difference structural model of pile vibration based on thin-shell theory. To model the sound emissions from the piles, the force of the pile driving hammers also had to be modeled. The force at the top of each monopile and jacket foundation pile was computed using the GRLWEAP 2010 wave equation model (GRLWEAP; Pile Dynamics, 2010), which includes a large database of simulated hammers. The forcing functions from GRLWEAP were used as inputs to the finite difference model to compute the resulting pile vibrations (see Figures 13–15 in Appendix A of Park City Wind's ITA application for the computed forcing functions). The sound radiating from the pile itself was simulated using a vertical array of discrete point sources. These models account for several parameters that describe the operation—pile type, material, size, and length—the pile driving equipment, and approximate pile penetration depth. The model assumed direct contact between the representative hammers, helmets, and piles (*i.e.,* no cushioning material). For both jacket and monopile foundation models, the piles are assumed to be vertical and driven to a penetration depth of 50 m and 40 m, respectively.

Park City Wind would use at least two noise abatement systems (NAS) during all pile driving and drilling associated with foundation installations and UXO/MEC detonations, such as a double bubble curtain or single bubble curtain and an encapsulated bubble or foam sleeve, to reduce sound levels. NAS, such as bubble curtains, are sometimes used to decrease the sound levels radiated from a source. Hence, hypothetical broadband attenuation levels of 0 dB, 6 dB, 10 dB, and 12 dB were incorporated into the foundation source models to gauge effects on the ranges to thresholds given these levels of attenuation (Appendix G of the ITA application). Although four attenuation levels were evaluated, Park City Wind and NMFS anticipate that the noise attenuation system ultimately chosen will be capable of reliably reducing source levels by 10 dB; therefore, this assumption was carried forward in this analysis for monopile and jacket foundation pile driving installation, drilling activities, and UXO/MEC detonations. See the Proposed Mitigation section for more information regarding the justification for the 10-dB assumption.

In addition to considering noise abatement, the amount of sound generated during pile driving varies with the energy required to drive piles to a desired depth and depends on the sediment resistance encountered. Sediment types with greater resistance require hammers that deliver higher energy strikes and/or an increased number of strikes relative to installations in softer sediment. Maximum sound levels usually occur during the last stage of impact pile driving where the greatest resistance is encountered (Betke, 2008). Key modeling assumptions for the monopiles and pin piles are listed in Table 10 (additional modeling details and input parameters can be found in Küsel *et al.* (2022)). Hammer energy schedules for monopiles (12-m) and pin piles (4-m) are provided in Table 11, respectively, and the resulting broadband source level comparisons of the 12-m and 13-monopiles are presented in Table 12. Decidecade spectral source levels for each pile type, hammer energy, and modeled location for summer sound speed profiles can be found in Appendix A of Park City Wind's ITA application (Figures 16 to 18).

TABLE 10—KEY PILING ASSUMPTIONS USED IN THE SOURCE MODELING

Foundation type	Maximum impact hammer energy (kJ)	Wall thickness (mm)	Pile length (m)	Seabed penetration depth (m)	Number per day
12-m Monopile [1]	6,000	200	95	40	1–2
4-m Jacket Pin Pile [2 3]	3,500	100	100	50	4

[1] A 12-m monopile using 6,000 kJ was considered representative of the other monopile approaches as the 13-m is unlikely to occur.
[2] Jacket foundations each require the installation of three to four jacket securing piles, known as pin piles.
[3] The bottom-frame foundation is similar to the jacket foundation, with the same maximum 4-m pile diameter, but with shorter piles and shallower penetration and was therefore not modeled separately in the acoustic assessment. It is assumed that the potential acoustic impact of the bottom-frame foundation installation is equivalent to or less than that predicted for the jacket foundation.

TABLE 11—HAMMER ENERGY SCHEDULES FOR MONOPILES AND PIN PILES USED IN SOURCE MODELING

12-m monopile 5000 kJ hammer		13-m monopile 5000 kJ hammer		12-m monopile 6000 kJ hammer		4-m pin pile 3500 kJ hammer		13-m monopile 6000 kJ hammer [1]	
Energy level (kJ)	Strike count	Energy level (kJ)	Strike count	Energy level (kJ)	Strike count	Energy level (kJ)	Strike count	Energy level (kJ)	Strike count
1,000	690	1,000	745	1,000	750	525	875	1,000	850
1,000	1,930	1,000	2,095	2,000	1,250	525	1,925	2,000	1,375
2,000	1,910	2,000	2,100	3,000	1,000	1000	2,165	3,000	1,100
3,000	1,502	3,000	1,475	45,000	1000	3,500	3,445	4,500	1,100
5,000	398	5,000	555	6,000	500	3,500	1,395	6,000	550
Total	6,430	Total	6,970	Total	4,500	Total	9,805	Total	4,975
Strike Rate	30.0 bpm	Strike Rate	30.0 bpm	Strike Rate	25.0 bpm	Strike Rate	30.0 bpm	Strike Rate	27.6 bpm.

[1] Due to the unlikely event Park City Wind installs a 13-m pile with a 6,000 kJ hammer, source levels were modeled to estimate the distances to mitigation zones; however, exposure modeling was not conducted for this scenario.

TABLE 12—BROADBAND IMPACT PILE DRIVING SOURCE LEVEL COMPARISONS BETWEEN THE 12-m AND 13-m MONOPILES

Hammer energy level (kJ)	12-m monopile	13-m monopile	Source level difference (dB)
	Source level (dB SPL)	Source level (dB SPL)	
1,000	221.94	222.27	0.34
2,000	223.30	223.43	0.14
3,000	224.55	225.52	0.96
4,500	226.31	226.09	0.22
6,000	227.32	228.56	1.23

For vibratory pile driving and drilling, source level modeling to estimate sound exposure levels was conducted based on extrapolations of source level data from smaller piles. Received SEL levels at 10 m for smaller, round steel piles driven with vibratory hammers were plotted as a function of pile diameter and fitted with a power function and then extrapolated for a 13-m diameter pile. While this method was applied to estimate SEL, the power function fit method described above for the received SPL at 10 m is poor, so an alternative approach to estimate SPL was derived. Noting that animals are not expected to experience a behavioral response at distances greater than 50 km (Dunlop *et al.* 2017a, 2017b), Park City Wind calculated the source level necessary to produce a received level of 120 dB at 50 km assuming practical spreading loss (15logR) resulting in a source level of 190.5 dB SPL. The drilling source level was estimated based on drilling data collected in the Alaska Chukchi and Beaufort Sea (Austin *et al.,* 2018). Resulting source levels assuming 10-dB attenuation from use of noise abatement (*e.g.,* double bubble curtain) can be found in Table 13.

TABLE 13—ASSUMED SOURCE LEVELS FOR VIBRATORY PILE DRIVING AND DRILLING OF FOUNDATION PILES

Activity	Source level SEL (dB)	Source level SPL (dB)
Vibratory driving (13-m piles)	[1] 188	190.5
Drilling	N/A	[2] 183.3

[1] Extrapolation of data resulted in a source level (SEL) of 198 dB.
[2] Source level reported in Austin *et al.* (2018) is 193.3 dB SPL, based on a measured received level of 141.8 dB at 1 km.

After calculating source levels, Park City Wind used propagation models to estimate distances to NMFS' harassment thresholds. The propagation of sound through the environment can be modeled by predicting the acoustic propagation loss—a measure, in decibels, of the decrease in sound level between a source and a receiver some distance away. Geometric spreading of acoustic waves is the predominant way by which propagation loss occurs.

Propagation loss also happens when the sound is absorbed and scattered by the seawater, and absorbed, scattered, and reflected at the water surface and within the seabed. Propagation loss depends on the acoustic properties of the ocean and seabed and its value changes with frequency. Acoustic propagation modeling for impact pile driving applied JASCO's Marine Operations Noise Model (MONM) and Full Wave Range Dependent Acoustic Model (FWRAM) that combine the outputs of the source model with the spatial and temporal environmental context (*e.g.,* location, oceanographic conditions, and seabed type) to estimate sound fields. The lower frequency bands were modeled using MONM–RAM, which is based on the parabolic equation method of acoustic propagation modeling. For higher frequencies, additional losses resulting from absorption were added to the transmission loss model. See Appendix F in Park City Wind's application for a more detailed description of JASCO's propagation models.

Sounds produced by installation of the proposed monopiles were modeled at two sites (M1 and M2) for the 12-m diameter monopile foundations—M1 in the northwest section of the SWDA in 44 m water depth and M2 in the southeast section of the SWDA at 52 m water depth. Acoustic propagation modeling was conducted for 4-m diameter jacket foundation piles assuming a site in the central area of the SWDA at 53 m water depth. Modeling locations are shown in Figure 7 of the ITA application. These locations were chosen based on the phasing plans of the Project, which involves the installation of 12-m diameter monopiles in Phase 1 and 13-m diameter monopiles in Phase 2, with jacket foundations planned for both phases. The 13-m diameter piles were only considered for modeling of the source functions for comparison with the 12-m diameter piles, which showed minimal difference in the forcing function and source spectra output for the two sizes. As the 12-m monopile represents the maximum size monopile for Phase 1 of the Project and the average size monopile for Phase 2, propagation modeling continued with the 12 m monopile.

Due to seasonal changes in the water column, sound propagation is likely to differ at different times of the year. The speed of sound in seawater depends on the temperature *T* (degree Celsius), salinity *S* (parts per thousand (ppt)), and depth *D* (m) and can be described using sound speed profiles. Oftentimes, a homogeneous or mixed layer of constant velocity is present in the first few meters. It corresponds to the mixing of surface water through surface agitation. There can also be other features, such as a surface channel, which corresponds to sound velocity increasing from the surface down. This channel is often due to a shallow isothermal layer appearing in winter conditions, but can also be caused by water that is very cold at the surface. In a negative sound gradient, the sound speed decreases with depth, which results in sound refracting downwards, which may result in increased bottom losses with distance from the source. In a positive sound gradient, as is predominantly present in the winter season, sound speed increases with depth and the sound is, therefore, refracted upwards, which can aid in long distance sound propagation.

Acoustic propagation modeling for impact pile driving foundations was conducted using an average sound speed profile for a summer period given this would be when Park City Wind would conduct the majority, if not all of its foundation installation work. FWRAM computes pressure waveforms via Fourier synthesis of the modeled acoustic transfer function in closely spaced frequency bands. Examples of decidecade spectral levels for each foundation pile type, hammer energy, and modeled location, using average summer sound speed profile are provided in Küsel *et al.* (2022). Resulting distances to NMFS' harassment thresholds for impact driving can be found in the WTG and ESP Foundation Installation subsection below.

For vibratory pile driving and drilling during foundation installation, Park City Wind assumed a simple practical spreading loss (15logR). Resulting distances to NMFS' harassment thresholds for these activities can be found in the activity-specific subsections below.

As described previously, Park City Wind has also identified the potential need to detonate up to 10 UXOs/MECs during the first two years of construction. Park City Wind did not conduct independent acoustic and propagation modeling for this activity but instead relied on a publicly available modeling report prepared by JASCO for the Revolution Wind project (Hannay and Zykov, 2022) which is geographically adjacent to the Project area. The water depths considered in the acoustic modeling study (*i.e.,* 12 m, 20 m, 30 m, 45 m) are relevant to the Project areas that may require UXO/MEC detonation, although the export cable route for New England Wind comes to shore northeast of Cape Cod Island and not into Narragansett Bay, as was considered in the modeling study. The modeled SEL from Revolution Wind are mostly transferable to similar depth sites over the Project area, with the possible exception of the shallowest site (12 m) that is located in a constrained channel in Narragansett Bay with nearby islands blocking sound propagation in some directions. In addition, Park City Wind and NMFS acknowledge the bathymetry considered in the Revolution Wind UXO/MEC study slightly varies from the Project area; however, the effects to propagation are likely minimal. Moreover, Park City Wind would be required to conduct sound field verification during any UXO/MEC detonation and any subsequent detonations would be subject to mitigation dependent upon the results of that acoustic monitoring effort (*e.g.,* changes to mitigation zone sizes may occur). Overall, the results from Hanney and Zykov (2022) are applicable to the Park City Wind project. The resulting distances to NMFS' harassment thresholds and estimate take from UXO/MEC detonation can be found in the UXO/MEC subsection below.

To estimate the probability of exposure of animals to sound above NMFS' harassment thresholds during impact pile driving for foundation installation, JASCO's Animal Simulation Model Including Noise Exposure (JASMINE) was used to integrate the sound fields generated from the source and propagation models described above with species-typical behavioral parameters (*e.g.,* dive patterns). Sound exposure models, such as JASMINE, use simulated animals (animats) to sample the predicted 3–D sound fields with movement rules derived from animal observations. Animats that exceed NMFS' acoustic thresholds are identified and the range for the exceedances determined. The output of the simulation is the exposure history for each animat within the simulation. An individual animat's sound exposure levels are summed over a specific duration, (24 hours), to determine its total received acoustic energy (SEL) and maximum received PK and SPL. These received levels are then compared to the threshold criteria within each analysis period.

The combined history of all animats gives a probability density function of exposure during the project. The number of animals expected to exceed the regulatory thresholds is determined by scaling the number of predicted animat exposures by the species-specific density of animals in the area. By programming animats to behave like

marine species that may be present near the Project area, the sound fields are sampled in a manner similar to that expected for real animals. The parameters used for forecasting realistic behaviors (*e.g.,* diving, foraging, and surface times) were determined and interpreted from marine species studies (*e.g.,* tagging studies) where available, or reasonably extrapolated from related species (Küsel *et al.,* 2022).

For modeled animals that have received enough acoustic energy to exceed a given harassment threshold, the exposure range for each animal is defined as the closest point of approach (CPA) to the source made by that animal while it moved throughout the modeled sound field, accumulating received acoustic energy. The CPA for each of the species-specific animats during a simulation is recorded and then the CPA distance that accounts for 95 percent of the animats that exceed an acoustic impact threshold is determined. The $ER_{95\%}$ (95 percent exposure radial distance) is the horizontal distance that includes 95 percent of the CPAs of animats exceeding a given impact threshold. The $ER_{95\%}$ ranges are species-specific rather than categorized only by any functional hearing group, which allows for the incorporation of more species-specific biological parameters (*e.g.,* dive durations, swim speeds, *etc.*) for assessing the potential for PTS from impact pile driving.

Park City Wind also calculated acoustic ranges which represent the distance to a harassment threshold based on sound propagation through the environment independent of any receiver. As described above, applying animal movement and behavior within the modeled noise fields allows for a more realistic indication of the distances at which PTS acoustic thresholds are reached that considers the accumulation of sound over different durations. The use of acoustic ranges ($R_{95\%}$) to the Level A harassment SEL_{cum} metric thresholds to assess the potential for PTS is considered an overly conservative method as it does not account for animal movement and behavior and therefore assumes that animals are essentially stationary at that distance for the entire duration of the pile installation, a scenario that does not reflect realistic animal behavior. The acoustic ranges to the SEL_{cum} Level A harassment thresholds for impact pile driving can be found in Park City Wind's ITA application but will not be discussed further in this analysis. However, because NMFS Level A harassment (PTS dBpeak) and Level B harassment (SPL) thresholds refer to instantaneous exposures, acoustic ranges are more relevant to the analysis. Also, because animat modeling was not conducted for vibratory pile driving or drilling, acoustic range is used to assess Level A harassment (dB SEL). Acoustic ranges to the Level A harassment (dB peak), Level A harassment (dB SEL; vibratory pile driving and drilling only), and Level B harassment threshold for each activity are provided in the WTG and ESP Foundation Installation subsection below. The differences between exposure ranges and acoustic ranges for Level B harassment are minimal given it is an instantaneous method.

Density and Occurrence

In this section, we provide the information about marine mammal density, presence, and group dynamics that informed the take calculations for all activities. Park City Wind applied the 2022 Duke University Marine Geospatial Ecology Laboratory Habitat-based Marine Mammal Density Models for the U.S. Atlantic (Duke Model, Roberts *et al.,* 2016; Roberts and Halpin, 2022) to estimate take from foundation installation, HRG surveys, and UXO/MEC detonations (please see each activity subsection below for the resulting densities). The models estimate absolute density (individuals/100 km^2) by statistically correlating sightings reported on shipboard and aerial surveys with oceanographic conditions. For most marine mammal species, densities are provided on a monthly basis. Where monthly densities are not available (*e.g.,* pilot whales), annual densities are provided. Moreover, some species are represented as guilds (*e.g.,* seals (representing *Phocidae spp.,* primarily comprised of harbor and gray seals), pilot whales (representing short-finned and long-finned pilot whales), and beaked whales (representing *Mesoplodon spp.*)).

The Duke habitat-based density models delineate species' density into 5 x 5 km (3.1 x 3.1 mi) grid cells. Park City Wind calculated monthly densities for each species using grid cells within the lease area and a perimeter around the lease area that represented the expected ensonified area to NMFS' harassment thresholds for each sound-producing activity. All 5 x 5 km grid cells in the models that fell partially or fully within the analysis polygon were considered in the calculations.

For impact pile driving, the perimeter size from the edge of the lease area was selected as the largest 10 dB-attenuated (due to use of sound attenuation device(s)) exposure range calculated based on installation of a 12-m pile using a 6,000 kJ hammer (6.2 km). For vibratory pile driving and drilling, densities from grid cells within a 50-km and 16.6-km perimeter (representing distances to the Level B harassment isopleths for each activity), respectively, were applied to the calculations. For UXO/MEC detonations, Park City Wind used the largest SEL-based TTS-onset acoustic ranges across all hearing groups and applied it to the moderate UXO/MEC risk areas, resulting in a 14.1-km perimeter for the shallow water segment of the OECC and a 13.8-km density perimeter for the deep water segment of the OECC as well as the SWDA. For HRG surveys, Park City Wind applied all grid cells within the survey corridor. No buffer was applied given the small distance to Level B harassment (<200 m) during surveys compared to the grid cell size in the Duke density models (5 x 5 km).

Densities were computed monthly for each species where monthly densities were available. For the pilot whale guild (*i.e.,* long-finned and short-finned), monthly densities are unavailable so annual mean densities were used instead. Additionally, the models provide density for pilot whales as a guild that includes both species. To obtain density estimates for long-finned and short-finned pilot whales, the guild density was scaled by the relative stock sizes based on the best available abundance estimate from NOAA Fisheries SARs (NOAA Fisheries, 2021b). Similarly, gray and harbor seal densities were scaled by each of their relative abundances, as found in the NOAA Fisheries SARs (NOAA Fisheries, 2021b). Although harp seals are not common in the project area, Park City Wind conservatively applied the resulting gray seal densities to harp seals. These scaled and surrogate densities were carried forward to the exposure and take estimates. Please see the activity-specific subsections below for resulting densities.

The equation below, using pilot whales as an example, shows how abundance scaling is applied to compute density for pilot whales and seals.

$$D_{short\text{-}finned} = D_{both} \times (N_{short\text{-}finned} / (N_{short\text{-}finned} + N_{long\text{-}finned}))$$

Where *D* represents density and *N* represents abundance.

For some species and activities, AMAPPS data from 2010–2019 shipboard distance sampling surveys (Palka *et al.,* 2021) and observational data collected during previous site assessment surveys in the project area indicate that the density-based exposure estimates may be insufficient to account

for the number of individuals of a species that may be encountered during the planned activities. This is particularly true for uncommon or rare species with very low densities in the models. Hence, consideration of other data is required to ensure the potential for take is adequately assessed.

For uncommon species, the predicted densities from the Duke models are very low and the resulting density-based exposure estimate is less than a single animal or a typical group size for the species. In such cases, the take request is based on the species' average group size (Table 14). The mean group sizes used to correct Level B take estimates, as shown in Table 14, for modeled cetacean species were derived from AMAPPS data from 2010–2019 NE shipboard distance sampling surveys (Palka *et al.,* 2021) and informed by data from 2018–2021 HRG surveys conducted by the Proponent (Vineyard Wind, 2018, 2020a, 2020c, 2021a). Mean group size was calculated as the number of individuals divided by the number of groups from Table 6–5 of Palka *et al.* (2021), which summarizes the 2010–2019 AMAPPS NE shipboard distance surveys. Summer sightings (June 1 to August 31) were chosen for these calculations because many species were not observed during fall surveys, and surveys were not conducted during spring or winter. When site assessment survey data showed a larger mean group size than was shown by the AMAPPS data, the site assessment survey group size was applied to take calculations.

In cases where the exposure estimate was less than the mean group size, it was assumed that if one group member were to be exposed, then it is reasonable to expect that all animals in the same group could receive a similar level of sound exposure. Therefore, for species for which the annual number of predicted exposures above threshold was less than the mean group size, the annual number of expected takes was increased to the mean group size rounded up to the nearest integer. Correcting for group size for these species is used as a conservative measure to ensure all animals in a group are accounted for in the take request.

As described previously, density-based exposure calculations were not conducted for species considered rare in the project area. There are few to zero sightings of these species in the sources used above to calculate group size for the modeled species, so an alternative method had to be developed. Group size calculations for rare species used sighting data from the Ocean Biodiversity Information System database (OBIS, 2021). All records for each of the rare species were extracted from the OBIS database and then filtered to include only the area from approximately Cape Hatteras to the Gulf of Maine (35° N to 43° N) and from the coast (76° W) out to the continental shelf edge (66° W) to provide a more precise estimate of potential group size in the SWDA than would be expected using all OBIS records. The OBIS data were further filtered to remove stranding data, because the group size of stranded animals does not necessarily reflect the group size of free-ranging animals. The one exception to this was the hooded seal—all records of this species in this area from the OBIS database were of single, stranded individuals, and thus a group size of one was used. This number is likely reflective of any free-swimming hooded seal that would occur in the area because this is an Arctic species and only single vagrant animals would be expected. Finally, data from digital aerial surveys were filtered out of this larger dataset because, although useful in determining presence/absence, these data provide no information on group size. The ''individualCount'' variable in the OBIS data was used to calculate minimum, maximum, and average group sizes for these rare species (Table 16 in the ITA application).

For many of these rare species, in particular the delphinids, maximum group sizes can be in the hundreds or even up to thousands of animals. However, because these animals are rare in the WEA as it is not their preferred habitat, Park City Wind assumed that they would be unlikely to form such large aggregations in this area. Thus, the average group size (rounded up to a whole number) was used in the take calculations for these species. Group sizes relevant to the SWDA can be informed by PSO sightings during site characterization surveys (Table 15). For example, white-beaked dolphins were recorded in both 2019 and 2020 during HRG surveys in this area (Vineyard Wind, 2019, 2020) with the sighting of white-beaked dolphins in 2019 consisting of 30 animals. Other rare species encountered in the survey area during previous HRG surveys include false killer whales in 2019 (5 individuals) and 2021 (1 individual) (Vineyard Wind, 2020c, 2020b) and killer whales in 2022 (2 individuals; data not yet submitted). For these species the take estimates use the observed group size from PSO sightings.

Additional detail regarding the density and occurrence as well as the assumptions and methodology used to estimate take for specific activities is included in the activity-specific subsections below and in Section 6.1 of the ITA application. Average group sizes used in take estimates, where applicable, for all activities are provided in Tables 14 and 15.

TABLE 14—AVERAGE MARINE MAMMAL GROUP SIZES USED FOR COMMON AND UNCOMMON SPECIES IN TAKE ESTIMATE CALCULATIONS

Species	Number of groups (AMAPPS data) [a]	Number of animals (AMAPPS data) [a]	Mean group size (AMAPPS data) [a]	Mean group size (PSO data) [b]	Group size used in Level B take correction [c]
North Atlantic right whale [d]	2	4	2.0	1.5	2
Fin whale [d]	345	533	1.5	1.6	2
Humpback whale	157	370	2.4	1.5	3
Minke whale	32	32	1.0	1.1	2
Sei whale [d]	20	28	1.4	1.0	2
Sperm whale [d]	298	491	1.6	1.3	2
Atlantic spotted dolphin	60	1,760	29.3	Not observed	30
Atlantic white-sided dolphin	3	61	20.3	27.5	28
Bottlenose dolphin, offshore	345	3,865	11.2	17.9	18
Common dolphin	444	19,802	44.6	14.0	45
Long-finned pilot whale	41	666	16.2	5.6	17
Short-finned pilot whale	230	2,050	8.9	Not observed	9
Risso's dolphin	486	3,131	6.4	Not observed	7

TABLE 14—AVERAGE MARINE MAMMAL GROUP SIZES USED FOR COMMON AND UNCOMMON SPECIES IN TAKE ESTIMATE CALCULATIONS—Continued

Species	Number of groups (AMAPPS data) [a]	Number of animals (AMAPPS data) [a]	Mean group size (AMAPPS data) [a]	Mean group size (PSO data) [b]	Group size used in Level B take correction [c]
Harbor porpoise	4	6	1.5	1.3	2
Gray seal	145	202	1.4	1.2	2
Harbor seal	145	202	1.4	2.0	2
Harp seal	145	202	1.4	Not observed	2

[a] Mean group size for cetaceans from 2010–2019 AMAPPS NE shipboard distance sampling surveys (Table 6–5 of Palka *et al.* (2021)), and for seals from 2010–2013 AMAPPS NE aerial surveys for all seals because most were not identified to species (Table 19.1 of Palka *et al.* (2017)).
[b] Mean group size from 2018–2021 PSO sightings data from 2018–2021 HRG surveys conducted by the Proponent (Vineyard Wind, 2018, 2020a, 2020c, 2021a). Highlighted blue cells show values that were higher for PSO data than for AMAPPS data.
[c] Group size used for Level B take correction is higher of AMAPPS data and PSO data rounded up to an integer.
[d] Listed as Endangered under the ESA.

TABLE 15—AVERAGE MARINE MAMMAL GROUP SIZES USED FOR RARE SPECIES IN TAKE ESTIMATE CALCULATIONS

Species	Minimum group size (OBIS)	Maximum group size (OBIS)	Mean group size (OBIS)	Observed group size (PSO reports)	Group size used in take estimates
Blue whale [a]	1	2	1.0	NA	1
Dwarf sperm whale	1	5	1.7	NA	2
Pygmy sperm whale	1	3	1.3	NA	2
Cuvier's beaked whale	1	10	2.8	NA	3
Blainville's beaked whale	3	4	3.3	NA	4
Gervais' beaked whale	1	12	3.5	NA	4
Sowerby's beaked whale	1	10	3.5	NA	4
True's beaked whale	2	5	2.9	NA	3
Northern bottlenose whale	2	7	3.7	NA	4
Clymene dolphin	2	1,000	166.8	NA	167
False killer whale [b]	1	30	6.3	5	5
Fraser's dolphin	75	250	191.7	NA	192
Killer whale [b]	1	40	7.3	2	2
Melon-headed whale	20	210	108.8	NA	109
Pan-tropical spotted dolphin	3	300	59.3	NA	60
Pygmy killer whale	2	10	4.5	NA	5
Rough-toothed dolphin	3	45	13.1	NA	14
Spinner dolphin	1	170	50.4	NA	51
Striped dolphin	1	500	63.8	NA	64
White-beaked dolphin [b]	1	200	13.5	30	30
Hooded seal [c]	1	1	1.0	NA	1

[a] Listed as Endangered under the ESA.
[b] Mean group size for these species from 2018–2021 PSO sightings data from 2018–2021 HRG surveys conducted by the Proponent (Vineyard Wind, 2018, 2020a, 2020c, 2021a).
[c] All records of hooded seals in the OBIS database for this region were strandings of single animals.

WTG and ESP Foundation Installation

Here, we describe the results from the acoustic, exposure, and take estimate methodologies outlined above for WTG and ESP installation activities that have the potential to result in harassment of marine mammals: pile driving and drilling. We present exposure ranges to Level A harassment (SEL) from impact driving and acoustic ranges to Level A harassment and Level B harassment thresholds, densities, exposure estimates and take estimates following the aforementioned assumptions (*e.g.,* construction and hammer schedules).

As previously described, JASCO integrated the results from acoustic source and propagation modeling into an animal movement model to calculate exposure ranges for 17 marine mammal species considered common in the project area. The resulting ranges represent the distances at which marine mammals may incur Level A harassment (*i.e.,* PTS). The exposure ranges also influence the development of mitigation and harassment zone sizes. While the first year of Schedule A includes the potential installation of 13-m monopiles using a 6,000 kJ hammer, this specific configuration was not modeled beyond acoustic source modeling because initial source modeling showed minimal difference between the 12-m and 13-m monopiles. Therefore, Park City Wind modeled the 12-m monopile with 6,000 kJ hammer energy which was assumed to be a reasonable replacement in exposure calculations. Park City Wind assumed that all Phase 2 foundations are jackets as their modeling results found that jacket foundations are the most impactful in terms of the Level A cumulative sound exposure metric. Thus, the assumption of all jacket foundations provide an envelope for an up to 13-m monopile installed with a 5,000 or 6,000 kJ hammer. Table 16 provides exposure ranges for impact pile driving 12-m and 13-m monopiles and jacket foundations, assuming 10 dB attenuation (also see Tables 21–27 in Park City Wind's ITA application).

TABLE 16—EXPOSURE RANGES (ER95%, km) TO MARINE MAMMAL LEVEL A HARASSMENT (SEL) THRESHOLDS DURING IMPACT PILE DRIVING 12-m AND 13-m MONOPILES AND 4-m PIN PILES, ASSUMING 10 dB ATTENUATION [1]

Marine mammal species	12-m monopile				13-m monopile		4-m pin piles
	5,000 kJ hammer (km)		6,000 kJ hammer (km)		5,000 kJ hammer (km)		3,500 kJ hammer (km)
	one pile/day	two piles/day	one pile/day	two piles/day	one pile/day	two piles/day	four piles/day
North Atlantic right whale	1.84	2.34	2.93	3.16	2.26	2.53	2.54
Fin whale	2.37	2.79	3.31	3.90	2.56	3.14	4.07
Humpback whale	2.76	3.44	3.81	4.62	2.87	3.66	4.49
Minke whale	1.50	1.67	2.40	2.59	1.50	1.65	1.83
Sei whale	1.95	2.04	2.47	3.08	1.66	2.31	2.84
Sperm whale	0	0	0	0	0	0	<0.01
Atlantic spotted dolphin	0	0	0	0	0	0	0
Atlantic white sided dolphin	0	0	0	0	0	0	0.01
Bottlenose dolphin	0	0	0	0	0	0	0.01
Common dolphin	0	0	0	0	0	0	<0.01
Long-finned pilot whale	0	0	0	0	0	0	<0.01
Short-finned pilot whale	<0.01	0	<0.01	0	0	0	0
Risso's dolphin	0	<0.01	0.02	<0.01	<0.01	<0.01	0.01
Harbor porpoise	1.55	1.60	2.26	2.30	1.51	1.50	1.77
Gray seal	0.51	0.56	0.84	1.01	0.59	0.57	1.31
Harbor seal	0.21	0.21	0.43	0.63	0.16	0.19	0.32
Harp seal	0.15	0.31	0.25	0.41	0.09	0.32	0.28

[1] The exposure ranges presented here represent the assumption that the pile would be fully installed with an impact hammer. Hence, for piles that are set with a vibratory hammer, these distances can be considered an overestimate since fewer strikes would be required to install the pile. Park City Wind estimates approximately 70 of the 132 foundations installed would require use of a vibratory hammer to set the pile.

As described above, JASCO also calculated acoustic ranges which represent distances to NMFS' harassment isopleths independent of movement of a receiver. Acoustic ranges are a better representation of distances to NMFS' instantaneous harassment thresholds (*i.e.,* PTS dB peak, and Level B harassment) and can also be used for PTS dB SEL when animal movement modeling is not conducted. As described previously, the distances to the PTS dB SEL threshold are likely an overestimate as it assumes an animal remains at the distance for the entire duration of pile driving. Presented below are the distances to the PTS (dB peak) threshold for impact pile driving, PTS (dB peak and dB SEL) for vibratory pile driving and drilling, and Level B harassment (SPL) thresholds for all installation methods during WTG and ESP foundation installation. Table 17 identifies the inputs Park City Wind applied to the User Spreadsheet. Full details on the inputs into the User Spreadsheet can also be found in Appendix B and C in Park City Wind's Application Update Report.

TABLE 17—NMFS USER SPREADSHEET INPUTS

Spreadsheet tab used	Source A	Source B
	Vibratory pile driving	Drilling
Source Level (Single Strike/shot SEL/rms)	188	183.3 dB SPL.
Weighting Factor Adjustment (kHz)	2.5	2.5.
(a) Number of strikes in 1 h	n/a	n/a.
(b) Number of piles per day	2	n/a.
(c) Activity Duration (h) within 24-h period	24	24.
Propagation (xLogR)	15	15.
Distance of source level measurement (m)	10	10.

Acoustic ranges to the Level A harassment threshold and Level B harassment thresholds are in Tables 18 and 19, respectively. Mean monthly density estimates for pile driving and drilling, in consideration of the applicable perimeter for each type, are provided in Tables 20, 21, and 22 below.

TABLE 18—ACOUSTIC RANGES, IN METERS, TO LEVEL A HARASSMENT THRESHOLDS DURING PILE DRIVING AND DRILLING, ASSUMING 10 dB ATTENUATION

Pile installed	Install method	Hammer energy (kJ)	Activity duration (minutes)	Distances to Level A harassment thresholds (m)							
				Low-frequency cetacean		Mid-frequency cetacean		High-frequency cetaceans		Phocids	
				219 $L_{p,pk}$	199 $L_{E,24hr}$	230 $L_{p,pk}$	198 $L_{E,24hr}$	202 $L_{p,pk}$	173 $L_{E,24hr}$	218 $L_{p,pk}$	201 $L_{E,24hr}$
Drilling	Drilling	N/A	1,440 (24 hours)	7.4	174.3		15.4		257.7		105.9
12-m	Impact	5,000	n/a	11		3		230		14	
12-m	Impact	6,000	n/a	11		3		230		14	
13-m	Impact	5,000	n/a	14		5		290		16	
4-m	Impact	3,500	n/a	2				139		2	
13-m	Vibratory	N/A	60	18.4	430.9		38.2		637.1		261.9

TABLE 19—ACOUSTIC RANGES (R95%), IN METERS, TO LEVEL B HARASSMENT THRESHOLDS DURING PILE DRIVING AND DRILLING, ASSUMING 10 dB ATTENUATION

Pile installed	Install method	Hammer energy (kJ)	Distance to Level B harassment (km)
Drilling	Drilling	N/A	16.6
12-m	Impact	5,000	4.24
12-m	Impact	6,000	5.83
13-m	Impact	5,000	4.64
4-m	Impact	3,500	3.64
13-m	Vibratory	N/A	50

TABLE 20—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS/100 km^2) FOR IMPACT PILE DRIVING CONSIDERING A 6.2-km BUFFER AROUND THE LEASE AREA [a]

Species	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec	Annual mean	May–Dec mean
North Atlantic right whale [b]	0.356	0.427	0.431	0.459	0.289	0.048	0.021	0.018	0.027	0.05	0.062	0.174	0.197	0.086
Fin whale [b]	0.212	0.168	0.106	0.163	0.27	0.249	0.443	0.37	0.234	0.057	0.05	0.138	0.205	0.226
Humpback whale	0.03	0.022	0.042	0.15	0.298	0.314	0.175	0.12	0.167	0.243	0.191	0.028	0.148	0.192
Minke whale	0.108	0.134	0.132	0.798	1.717	1.63	0.689	0.468	0.529	0.474	0.051	0.073	0.567	0.704
Sei whale [b]	0.039	0.021	0.044	0.111	0.194	0.053	0.013	0.011	0.019	0.037	0.079	0.063	0.057	0.059
Sperm whale [b]	0.031	0.012	0.013	0.003	0.013	0.029	0.039	0.109	0.066	0.063	0.031	0.021	0.036	0.046
Atlantic spotted dolphin	0.001	0	0.001	0.003	0.017	0.024	0.031	0.055	0.281	0.425	0.185	0.019	0.087	0.13
Atlantic white-sided dolphin	2.093	1.248	0.853	1.315	3.362	3.041	1.392	0.728	1.655	2.486	1.786	2.473	1.869	2.115
Bottlenose dolphin, offshore	0.515	0.113	0.06	0.158	0.832	1.39	1.51	1.702	1.511	1.36	1.278	1.141	0.964	1.341
Common dolphin	7.365	2.509	1.896	3.288	6.357	14.269	10.568	14.668	26.713	23.434	11.174	10.937	11.098	14.765
Long-finned pilot whale [c]	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142	0.142
Short-finned pilot whale [c]	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105	0.105
Risso's dolphin	0.044	0.004	0.002	0.018	0.097	0.047	0.067	0.126	0.156	0.085	0.122	0.183	0.079	0.111
Harbor porpoise	10.065	10.857	10.353	8.936	6.826	0.895	0.804	0.776	0.919	1.225	1.373	5.683	4.893	2.313
Gray seal [d]	5.756	6.123	4.627	3.434	5.122	0.757	0.076	0.083	0.214	0.505	1.844	5.002	2.795	1.7
Harbor seal [d]	12.932	13.758	10.395	7.714	11.507	1.7	0.171	0.186	0.482	1.134	4.143	11.237	6.28	3.82
Harp seal [d]	5.756	6.123	4.627	3.434	5.122	0.757	0.076	0.083	0.214	0.505	1.844	5.002	2.795	1.7

[a] Density estimates are calculated from the 2022 Duke Habitat-Based Marine Mammal Density Models (Roberts *et al.,* 2016; Roberts and Halpin, 2022).
[b] Listed as Endangered under the ESA.
[c] Long- and short-finned pilot whale densities are the annual pilot whale guild density scaled by their relative abundances.
[d] Gray and harbor seal densities are the seals guild density scaled by their relative abundances; gray seals are used as a surrogate for harp seals.

TABLE 21—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS/100 km^2) FOR VIBRATORY PILE DRIVING CONSIDERING A 50-km PERIMETER AROUND THE LEASE AREA [a]

Species	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec	Annual mean	May–Dec mean
North Atlantic right whale [b]	0.542	0.649	0.566	0.507	0.316	0.08	0.051	0.031	0.043	0.054	0.113	0.34	0.274	0.129
Fin whale [b]	0.196	0.159	0.138	0.168	0.259	0.247	0.39	0.322	0.243	0.088	0.059	0.13	0.2	0.217
Humpback whale	0.037	0.03	0.044	0.165	0.273	0.301	0.161	0.099	0.129	0.185	0.168	0.04	0.136	0.169
Minke whale	0.106	0.121	0.137	0.666	1.343	1.213	0.524	0.319	0.357	0.393	0.051	0.079	0.442	0.535
Sei whale [b]	0.031	0.023	0.044	0.121	0.181	0.058	0.016	0.009	0.015	0.034	0.076	0.059	0.056	0.056
Sperm whale [b]	0.031	0.018	0.017	0.004	0.014	0.029	0.039	0.111	0.054	0.04	0.029	0.027	0.035	0.043
Atlantic spotted dolphin	0.002	0	0.001	0.005	0.067	0.164	0.049	0.08	0.432	0.948	0.228	0.026	0.167	0.249
Atlantic white-sided dolphin	2.383	1.677	1.143	1.607	3.174	3.324	1.463	0.533	1.311	2.197	1.74	2.434	1.916	2.022
Bottlenose dolphin, offshore	0.666	0.208	0.121	0.276	1.081	1.8	1.871	1.902	1.94	1.896	1.825	1.421	1.251	1.717
Common dolphin	9.886	4.821	3.803	5.177	8.627	17.737	12.807	14.696	22.88	29.545	17.768	14.652	13.533	17.339
Long-finned pilot whale [c]	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165	0.165

TABLE 21—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS/100 km²) FOR VIBRATORY PILE DRIVING CONSIDERING A 50-km PERIMETER AROUND THE LEASE AREA [a]—Continued

Species	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec	Annual mean	May–Dec mean
Short-finned pilot whale [c] ..	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122	0.122
Risso's dolphin	0.102	0.021	0.008	0.038	0.214	0.207	0.272	0.446	0.587	0.294	0.182	0.215	0.215	0.302
Harbor porpoise	7.134	7.874	7.54	6.884	4.851	1.409	1.315	1.002	0.851	1.137	1.376	4.459	3.819	2.05
Gray seal [d]	5.859	5.46	4.518	4.932	7.239	5.389	1.57	1.3	1.512	2.863	3.463	5.24	4.112	3.572
Harbor seal [d]	13.164	12.268	10.15	11.081	16.265	12.108	3.528	2.921	3.397	6.432	7.781	11.773	9.239	8.026
Harp seal [d]	5.859	5.46	4.518	4.932	7.239	5.389	1.57	1.3	1.512	2.863	3.463	5.24	4.112	3.572

[a] Density estimates are calculated from the 2022 Duke Habitat-Based Marine Mammal Density Models (Roberts *et al.,* 2016; Roberts and Halpin, 2022).
[b] Listed as Endangered under the ESA.
[c] Long- and short-finned pilot whale densities are the annual pilot whale guild density scaled by their relative abundances.
[d] Gray and harbor seal densities are the seals guild density scaled by their relative abundances; gray seals are used as a surrogate for harp seals.

TABLE 22—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS/100 km²) FOR DRILLING CONSIDERING A 16.6-km PERIMETER AROUND THE LEASE AREA [a]

Species	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec	Annual mean	May–Dec mean
North Atlantic right whale [b]	0.419	0.497	0.48	0.484	0.29	0.05	0.023	0.019	0.029	0.052	0.076	0.227	0.221	0.096
Fin whale [b]	0.216	0.164	0.111	0.164	0.274	0.26	0.421	0.342	0.222	0.06	0.053	0.142	0.203	0.222
Humpback whale	0.032	0.025	0.043	0.147	0.284	0.297	0.166	0.116	0.16	0.222	0.184	0.032	0.142	0.183
Minke whale	0.118	0.141	0.141	0.807	1.706	1.594	0.683	0.448	0.484	0.453	0.054	0.082	0.559	0.688
Sei whale [b]	0.038	0.022	0.045	0.114	0.191	0.052	0.013	0.01	0.018	0.036	0.08	0.067	0.057	0.059
Sperm whale [b]	0.031	0.012	0.013	0.003	0.014	0.027	0.038	0.116	0.068	0.05	0.031	0.021	0.035	0.046
Atlantic spotted dolphin	0.001	0	0.001	0.003	0.02	0.029	0.032	0.054	0.27	0.48	0.178	0.019	0.09	0.135
Atlantic white-sided dolphin	2.04	1.251	0.872	1.339	3.281	3.002	1.396	0.709	1.629	2.36	1.786	2.411	1.84	2.072
Bottlenose dolphin, offshore	0.48	0.112	0.061	0.161	0.813	1.356	1.47	1.633	1.488	1.353	1.268	1.076	0.939	1.307
Common dolphin	7.13	2.538	1.988	3.375	6.36	13.828	10.656	14.298	24.73	23.023	11.7	11.063	10.891	14.457
Long-finned pilot whale [c] ...	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139	0.139
Short-finned pilot whale [c] ..	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102	0.102
Risso's dolphin	0.045	0.004	0.002	0.019	0.101	0.054	0.075	0.141	0.177	0.097	0.123	0.177	0.085	0.118
Harbor porpoise	9.722	10.5	9.999	8.702	6.457	1.041	0.988	0.95	1.043	1.274	1.435	5.798	4.826	2.373
Gray seal [d]	6.084	6.137	4.495	3.63	5.259	1.171	0.151	0.154	0.327	0.655	2.078	4.937	2.923	1.842
Harbor seal [d]	13.67	13.788	10.099	8.157	11.816	2.63	0.34	0.346	0.736	1.472	4.67	11.091	6.568	4.138
Harp seal [d]	6.084	6.137	4.495	3.63	5.259	1.171	0.151	0.154	0.327	0.655	2.078	4.937	2.923	1.842

[a] Density estimates are calculated from the 2022 Duke Habitat-Based Marine Mammal Density Models (Roberts *et al.,* 2016; Roberts and Halpin, 2022).
[b] Listed as Endangered under the ESA.
[c] Long- and short-finned pilot whale densities are the annual pilot whale guild density scaled by their relative abundances.
[d] Gray and harbor seal densities are the seals guild density scaled by their relative abundances; gray seals are used as a surrogate for harp seals.

To estimate take from foundation installation activities, Park City Wind used two pile installation construction schedules (Table 2 above; also see Tables 2 and 3 in Application Update Report). Overall, Construction Schedule A (Schedule A) assumes 52 days of foundation installation activities would occur between May and December in 2026 (Year 2) to install 89 monopiles and 2 jacket foundations and 35 days of foundation installation activities would occur in 2027 (Year 3) to install 18 monopiles and 24 jacket foundations. As previously described, Park City accounted for 133 piles to be installed in its modeling despite a maximum of 132 foundations actually being installed. In total, based on Schedule A, 87 days of foundation installation activities would occur over 2 years to complete the Project. Construction Schedule B (Schedule B) assumes 38 days of foundation installation activities would occur between May and December in 2026 (Year 2) to install 55 monopiles and 3 jacket foundations, 53 days of foundation installation activities would occur in 2027 (Year 3) to install 53 jackets, and 22 days of foundation installation activities would occur in 2028 (Year 4) to install 22 jackets. In total, based on Schedule B, 113 days of foundation installation activities would occur over 3 years to complete the Project.

Due to the extended duration of Schedule B, the total amount of Level B harassment from foundation installation activities is greater than Schedule A over the 5-year effective period of the proposed rule. The total 5-year take by Level B harassment in this proposed rule is therefore generated based on Schedule B. However, annual take estimates assume the yearly worst case scenario exposures for each species for each year from either Construction Schedule A or B. That is, annual take by Level B harassment due to foundation installation activities may use either Schedule A or B, whichever was more. As previously described, Park City accounted for 133 piles to be installed in its modeling despite a maximum of 132 foundations actually being installed to complete the Project.

Park City Wind considered three foundation installation techniques when estimating take: impact pile driving, vibratory pile driving (to set the pile), and drilling (to break up any obstacles should the pile encounter obstructions). Of these, Level A harassment (PTS) has the potential to occur from impact pile driving only. As shown in Table 18, vibratory pile driving and drilling produce very small Level A harassment zone sizes that consider static receivers over the duration of the time period considered in the model (*e.g.,* a harbor porpoise would have to remain at 637 m from the pile for 24-hours). For vibratory pile driving, the duration considered was relatively short (60 minutes); however, this represents vibratory driving over two piles in which there are several hours in between events and the resulting distances are comparatively small (*e.g.,* 460 m for low-frequency cetaceans (*i.e.,*

baleen whales)). Moreover, the implementation of clearance and shut down zones would further reduce the potential for PTS from these activities. For these reasons, Park City Wind has concluded, and NMFS agrees, the potential for PTS to occur from vibratory pile driving or drilling is discountable. For this reason, Park City Wind carried forward the PTS exposure estimates from impact pile driving and no take by Level A harassment was considered for vibratory pile driving or drilling. The maximum take by Level A harassment proposed for authorization from the foundation activities (*i.e.,* impact pile driving) is in Table 23.

To estimate the amount of Level B (behavioral) harassment that may occur incidental to foundation installation, Park City Wind considered all three installation methods. As described above, Park City Wind conducted exposure modeling to estimate the number of exposures that may occur from impact pile driving. The results of the exposure modeling and amount of take Park City Wind requested from this activity is provided in sections 3 and 4 of the Application Update Report. Separately, Park City Wind applied a more traditional approach to estimate take from vibratory driving and drilling wherein:

Take = density × area ensonified × number of days of activity

As shown in Tables 20 and 21, densities for vibratory pile driving and drilling were calculated on a monthly basis. Park City Wind then considered the number of days either activity would occur per month and per schedule (see Tables 2 and 3 in Application Update Report). Take was estimated for each activity independent of each other. That is, Park City Wind calculated take for vibratory driving 70 foundations over 45 days for Schedule A and 54 days for Schedule B. The resulting monthly and annual take can be found in Tables 18–20 of Park City Wind's Application Update Report. Separately, Park City Wind calculated take considering drilling for 48 foundations over 48 days for both Schedule A and Schedule B. The resulting monthly and annual take can be found in Tables 21–23 of Park City Wind's Application Update Report.

To avoid overestimating take, the amount of take derived when considering impact driving, vibratory driving, and drilling independently were not summed to produce the amount of annual take Park City Wind requested. Instead, Park City Wind appropriately deducted the take from drilling when vibratory pile driving and drilling would occur on the same day. This is because the area for vibratory pile driving is much larger than drilling (50 km vs 16.6 km) and the amount of take estimated for vibratory pile driving adequately covers potential take from drilling activities. However, because take from impact pile driving was modeled based on the number of piles while vibratory/drilling takes were based on the number of days of activity, Park City Wind added the take estimates from impact pile driving all piles to the take estimates from vibratory pile driving/drilling (with the appropriate discounting) to produce their annual and total take requests. However, this is an overestimate of take as impact and vibratory and/or drilling could occur on the same day. That is, via this method, the amount of take requested represents take associated with more than 132 foundations. Hence, NMFS has reduced the amount of take, by Level B harassment, proposed for authorization.

The amount of Level B harassment take NMFS proposes to authorize represents the amount of take from impact driving on days when only impact driving could occur plus the amount of take from vibratory or drilling on the days that either of those activities could occur to avoid double counting. We were able to reduce the amount of take from impact pile driving by reducing the amount proportional to the percentage of days when only impact pile driving would occur. For example, Park City Wind identified that impact pile driving would occur over 52 days in Year 2 (2026) according to Schedule A. However, Park City Wind has predicted that only 7 of those 52 days (approximately 13 percent) would contain impact pile driving only (*i.e.,* no vibratory pile driving and/or drilling). Hence, for Year 2 (2026) Schedule A, NMFS only included 13 percent of the estimated impact pile driving exposures calculated. As an example, Park City Wind estimated 9 exposures of fin whales in Year 2 (2026), Schedule A from impact pile driving. NMFS carried forward 2 (13 percent of 9) exposures into the take estimates from foundation installation.

Table 24 provides the annual take by Level B harassment calculated using this method from impact pile driving for both Schedule A and, separately, Schedule B. Table 25 identifies the amount of take for vibratory pile driving and drilling foundation installation activities after removing drilling takes when drilling would occur on the same day as vibratory pile driving (to avoid double counting). The annual take amounts represent the highest value between both Schedule A and Schedule B while the maximum 3-year take estimates represent the sum of take calculated for each year in Schedule B. NMFS retained Park City Wind's request for Level A harassment from all impact pile driving activities as no Level A harassment from vibratory pile driving or drilling is anticipated (Table 23). Table 26 identifies the amount of take for all foundation installation activities combined (*i.e.,* the sum of Tables 23 through 26) that was carried forward in the take tables for this proposed rule.

TABLE 23—HIGHEST ANNUAL EXPOSURE ESTIMATES AND ANNUAL AMOUNT OF TAKE PROPOSED FOR AUTHORIZATION BY LEVEL A HARASSMENT FROM IMPACT PILE DRIVING ASSOCIATED WITH WTG AND ESP TOTAL INSTALLATION EVENTS FOR CONSTRUCTION SCHEDULE A AND B, ASSUMING 10 dB OF NOISE ATTENUATION

Species	Year 2 (2026)		Year 3 (2027)		Year 4 (2028)	
	Exposures	Proposed takes	Exposures	Proposed takes	Exposures	Proposed takes
North Atlantic right whale [a b]	1.94	0	3.6	0	1.68	0
Fin whale [a]	8.95	9	19.97	20	8.13	9
Humpback whale	8.11	9	15.9	16	6.85	7
Minke whale	30.92	31	84.14	85	37.2	38
Sei whale [a]	0.95	1	1.88	2	0.91	1
Sperm whale [a]	<0.01	1	<0.01	1	<0.01	1
Atlantic spotted dolphin [c]	0	0	0	0	0	0
Atlantic white sided dolphin	0.01	1	0.21	1	0.09	1
Bottlenose dolphin, offshore	0.01	1	0.2	1	0.08	1
Common dolphin	0.17	8	2.18	3	0.94	1

TABLE 23—HIGHEST ANNUAL EXPOSURE ESTIMATES AND ANNUAL AMOUNT OF TAKE PROPOSED FOR AUTHORIZATION BY LEVEL A HARASSMENT FROM IMPACT PILE DRIVING ASSOCIATED WITH WTG AND ESP TOTAL INSTALLATION EVENTS FOR CONSTRUCTION SCHEDULE A AND B, ASSUMING 10 dB OF NOISE ATTENUATION—Continued

Species	Year 2 (2026)		Year 3 (2027)		Year 4 (2028)	
	Exposures	Proposed takes	Exposures	Proposed takes	Exposures	Proposed takes
Long-finned pilot whale [d]	<0.01	1	0.03	1	0.01	1
Short-finned pilot whale	<0.01	1	<0.01	1	0	0
Risso's dolphin	0.04	1	0.04	1	0.02	1
Harbor porpoise	70.65	71	135.47	136	59.89	60
Gray seal	1.09	2	2.43	3	1.13	2
Harbor seal	2.51	3	6.82	7	3.17	4
Harp seal	1.05	2	2.13	3	0.99	1

[a] Listed as Endangered under the ESA.
[b] Level A harassment exposures were estimated for this species, but due to mitigation measures, no Level A harassment takes are expected or requested.

TABLE 24—ANNUAL AND TOTAL AMOUNT OF TAKE, BY LEVEL B HARASSMENT, PROPOSED FOR AUTHORIZATION FROM IMPACT PILE DRIVING ASSOCIATED WITH WTG AND ESP TOTAL INSTALLATION EVENTS FOR CONSTRUCTION SCHEDULE A AND B, ASSUMING 10 dB OF NOISE ATTENUATION

Species	Schedule A		Schedule B			
	Year 2 (2026)	Year 3 (2027)	Year 2 (2026)	Year 3 (2027)	Year 4 (2028)	Maximum 3-year total take, Schedule B [b]
Fin whale [a]	2.29	1.49	2.39	3.94	2.18	8.52
Minke whale	12.79	10.63	14.74	40.89	23.72	79.35
Humpback whale	1.62	1.14	1.66	2.91	1.64	6.20
North Atlantic right whale [a]	0.67	0.57	0.74	1.25	0.82	2.80
Sei whale [a]	0.40	0.34	0.37	0.62	0.55	1.54
Atlantic white sided dolphin	36.21	32.46	35.55	97.96	55.63	189.14
Atlantic spotted dolphin	4.04	3.43	5.53	6.23	8.18	19.93
Common dolphin	495.87	497.78	425.69	1,381.64	783.74	2,591.07
Bottlenose dolphin, offshore	19.52	18.29	18.42	59.98	32.45	110.85
Risso's dolphin	1.48	1.26	1.29	3.11	1.91	6.31
Long-finned pilot whale	2.56	2.29	3.13	6.85	4.64	14.62
Short-finned pilot whale	1.88	1.71	1.66	5.19	3.00	9.85
Sperm whale [a]	0.67	0.57	0.55	1.45	0.82	2.82
Harbor porpoise	28.00	25.60	25.05	61.64	35.72	122.42
Gray seal	6.86	4.80	5.53	4.36	2.73	12.61
Harbor seal	16.29	13.14	14.18	20.55	12.54	47.27
Harp seal	7.94	6.40	7.00	9.34	5.73	22.07

[a] Listed as Endangered under the ESA.
[b] As construction schedule B has the highest total take by Level B harassment for impact pile driving, this column represents the sum of the Schedule B take numbers only and not the sum of the preceding columns within this table.

TABLE 25—MAXIMUM ANNUAL AND 3-YEAR VIBRATORY PILE DRIVING AND DRILLING ESTIMATED TAKE BETWEEN CONSTRUCTION SCHEDULE A AND B, BY LEVEL B HARASSMENT, ASSUMING 10 dB OF NOISE ATTENUATION

Species	Year 2 (2026) [b]	Year 3 (2027)	Year 4 (2028) [c]	Maximum 3-year take, Schedule B [d]
North Atlantic right whale [a]	92	103	47	236
Fin whale [a]	470	567	202	1,210
Humpback whale	285	324	139	726
Minke whale	878	988	449	2,256
Sei whale [a]	47	50	27	119
Sperm whale [a]	111	137	41	277
Atlantic spotted dolphin	491	624	178	1,231
Atlantic white-sided dolphin	2,716	3,037	1,373	6,927
Bottlenose dolphin, offshore	3,269	3,931	1,404	8,419
Common dolphin	32,787	39,645	13,437	82,661
Long-finned pilot whale	291	345	126	743
Short-finned pilot whale	215	255	93	547
Risso's dolphin	622	798	235	1,612
Harbor porpoise	2,078	2,366	959	5,268
Gray seal	3,587	4,170	1,986	9,683

TABLE 25—MAXIMUM ANNUAL AND 3-YEAR VIBRATORY PILE DRIVING AND DRILLING ESTIMATED TAKE BETWEEN CONSTRUCTION SCHEDULE A AND B, BY LEVEL B HARASSMENT, ASSUMING 10 dB OF NOISE ATTENUATION—Continued

Species	Year 2 (2026) [b]	Year 3 (2027)	Year 4 (2028) [c]	Maximum 3-year take, Schedule B [d]
Harbor seal	8,058	9,366	4,462	21,755
Harp seal	3,587	4170	1,986	9,683

[a] Listed as Endangered under the ESA.
[b] Year 2 is from Construction Schedule A.
[c] Year 4 is from Construction Schedule B only, there is no third year of foundation installation under Schedule A.
[d] As construction Schedule B has the highest total take by Level B harassment for vibratory or drilling, the ''all years combined'' is the sum of the Schedule B take numbers and not the sum of the preceding columns within this table.

TABLE 26—TAKES PROPOSED FOR AUTHORIZATION FOR ALL FOUNDATION INSTALLATION ACTIVITIES COMBINED, PER YEAR, CARRIED FORWARD TO THE TOTAL TAKE ESTIMATES CONSIDERING ALL ACTIVITIES

Species	Year 2 (2026)		Year 3 (2027)		Year 4 (2028)	
	Level A harassment	Level B harassment [a c e]	Level A harassment	Level B harassment [b d f]	Level A harassment	Level B harassment [b d f]
North Atlantic right whale	[a] 0	93	[b] 0	104	[b] 0	48
Fin whale	[a] 9	472	[b] 20	571	[b] 9	204
Humpback whale	[a] 9	287	[b] 16	327	[b] 7	141
Minke whale	[a] 31	[b c e] 893	[b] 85	1029	[b] 38	473
Sei whale	[a] 1	47	[b] 2	51	[b] 1	48
Sperm whale	[a] 1	112	[b] 1	138	[b] 1	42
Atlantic spotted dolphin	[a] 0	[b c e] 497	[b] 0	630	[b] 0	186
Atlantic white sided dolphin	[a] 1	2,752	[b] 1	3,135	[b] 1	1,429
Bottlenose dolphin, offshore	[a] 1	3,289	[b] 1	3,991	[b] 1	1,436
Common dolphin	[b] 8	33,283	[b] 3	41,027	[b] 1	14,221
Long-finned pilot whale	[a] 1	[b c e] 294	[b] 1	352	[b] 1	131
Short-finned pilot whale	[a] 1	217	[a] 1	260	[b] 0	96
Risso's dolphin	[a] 1	623	[b] 1	801	[b] 1	237
Harbor porpoise	[a] 71	2,106	[b] 136	2,428	[b] 60	995
Gray seal	[a] 2	3,594	[b] 3	4,175	[b] 2	1,989
Harbor seal	[a] 3	8,074	[b] 7	9,387	[b] 4	4,475
Harp seal	[a] 2	3,595	[b] 3	4,179	[b] 1	1,992

[a] Impact pile driving, Construction Schedule A (double counting of impact and vibratory days removed for Level B harassment proposed take numbers).
[b] Impact pile driving, Construction Schedule B (double counting of impact and vibratory days removed for Level B harassment proposed take numbers).
[c] Vibratory pile setting, Construction Schedule A.
[d] Vibratory pile setting, Construction Schedule B.
[e] Drilling, Construction Schedule A (double counting of vibratory and drilling days removed).
[f] Drilling, Construction Schedule B (double counting of vibratory and drilling days removed).

UXO/MEC Detonations

Park City Wind may detonate up to 10 UXO/MECs within the proposed project area with no more than six in 2025 (Year 1) and four in 2026 (Year 2); no more than one detonation per 24-hour period would occur. Park City Wind adopted the U.S. Navy's charge weight bins (E4, E6, E8, E10, and E12—see Table 27) to determine potential impacts to marine mammals from UXO/MEC detonation. As described previously, Park City Wind applied modeling results from the Revolution Wind project to its analysis. The exact type and net explosive weight of UXO/MECs that may be detonated are not known at this time. However, based on the results of a UXO/MECs desktop study (Mills, 2021), Park City Wind does not expect that 10 of the largest charge weight (bin E12) UXO/MECs will be present, but a combination of different sizes.

Mortality and non-auditory injury to lung and gastrointestinal organs were considered in the modeling study (Hannay and Zykov, 2022). As described, peak pressure and acoustic impulse levels and effects threshold exceedance zones depend only on charge weight, water depth, animal mass, and submersion depth. The maximum distance to gastrointestinal injury (1 percent of exposed animals) due to peak pressure for detonating an E12-size UXO/MEC at all sites assuming 10 dB of attenuation is 125 m (Hannay and Zykov, 2022). The maximum distance modeled to the onset of lung injury due to detonating an E12-size UXO/MEC assuming 10 dB of attenuation is 237 m for baleen whales, 330 m for pilot and minke whales, 448 m for beaked whales, 606 m for *delphinids, Kogia,* and pinnipeds, and 648 m for harbor porpoise (Table 27). Assuming 10 dB of attenuation, the impulse-based maximum distance to the onset of mortality is 353 m (porpoises) (Table 27).

TABLE 27—UXO/MEC IMPULSE EXCEEDANCE DISTANCES (METERS) FOR MARINE MAMMALS FOR THE DETONATION OF AN E12 UXO/MEC, FOR ONSET OF LUNG INJURY AND MORTALITY AT VARIOUS DEPTHS ASSUMING 10 dB ATTENUATION

Marine mammal group	12 m water depth		20 m water depth		30 m water depth		45 m water depth	
	Calf/pup	Adult	Calf/pup	Adult	Calf/pup	Adult	Calf/pup	Adult
Onset of Lung Injury								
Baleen whales and Sperm whale	151	73	204	80	226	81	237	78
Pilot and Minke whales	192	103	272	126	310	131	330	132
Beaked whales	250	171	366	237	413	267	448	282
Dolphins, Kogia, and Pinnipeds	347	241	508	351	557	400	606	429
Porpoises	377	260	541	381	594	429	648	465
Onset of mortality								
Baleen whales and Sperm whale	90	34	105	34	109	31	108	29
Pilot and Minke whales	120	56	150	58	157	57	162	50
Beaked whales	161	105	206	127	220	132	234	135
Dolphins, Kogia, and Pinnipeds	228	154	285	198	308	211	332	224
Porpoises	248	167	307	215	330	231	353	243

Given that Park City Wind would be limited to detonating UXO/MECs during daytime and be required to employ a minimum of four PSOs to visually monitor for marine mammals, including those on an aircraft when the clearance zone is larger than 5 km, in concert with acoustic monitoring efforts, it is reasonable to assume that marine mammals would be reliably detected within the zones identified above (a maximum distance of approximately 648 m (2,126 feet) of the UXO/MEC being detonated) and that mitigation would be employed to avoid take by mortality or non-auditory injury. Therefore, the potential for mortality or non-auditory injury is *de minimis* (*i.e.,* too minimal or minor for further concern) and not discussed further.

It is not currently known how easily the size and charge weights of UXO/MECs can be identified in the field. Park City Wind must demonstrate to NMFS that it is able to accurately identify charge weights in the field prior to detonation otherwise the largest charge weight, E12, will be assumed and the appropriate associated mitigation and monitoring measures implemented. Table 28 contains the maximum (R95 percent) modeled distances by Hannay and Zykov (2022) to PTS and TTS thresholds during UXO/MEC detonation for each charge weight bin.

TABLE 28—MAXIMUM DISTANCES (R95%) IN METERS TO PTS AND TTS THRESHOLDS (SEL) DURING UXO/MEC DETONATION, ASSUMING 10 dB OF ATTENUATION [a]

Marine mammal hearing group	Charge weight bins				
	E4 (2.3 kg)	E6 (9.1 kg)	E8 (45.5 kg)	E10 (227 kg)	E12 (454 kg)
Distance to PTS-onset					
Low-frequency cetaceans	552	982	1,730	2,970	3,780
Mid-frequency cetaceans	<50	75	156	337	461
High-frequency cetaceans	1820	2,950	3,710	5,390	6,200
Phocid pinnipeds	182	357	690	1,220	1,600
Distance to TTS-onset					
Low-frequency cetaceans	2,820	4,680	7,490	10,500	11,900
Mid-frequency cetaceans	453	773	1,240	2,120	2,550
High-frequency cetaceans	6,140	7,960	10,300	12,900	14,100
Phocid pinnipeds	1,470	2,350	6,490	7.610	7,020

[a] Hannay and Zykov, 2022.

To estimate the amount of take that may occur incidental to UXO/MEC detonation, Park City Wind calculated monthly densities for each species at the shallow portion of the OECC (representing the 12 m depth location; using a 14.1-km buffer) and the combined deepwater segment of the OECC and SWDA (20 m–45 m depths; using a 13.8-km buffer). As a conservative approach, the month with the highest density among the areas of interest for each species was carried forward to the exposure calculations (*i.e.,* assumed all UXO/MECs would be detonated in the month with the greatest average monthly density). In some cases where monthly densities were unavailable, annual densities were used instead for some species (*i.e.,* blue whales, pilot whale *spp.*). Additionally, the pilot whale guild, harbor seals, gray seals, and harp seals were scaled following the same approach described above. The resulting maximum density was multiplied by the number of UXOs/MECs estimated at each of the depths to calculate total estimated exposures. Table 29 provides the maximum species-specific densities for the Project and resulting take calculations using the described approach. As described above, Park City Wind based the amount

of take proposed for authorization on the number of exposures estimated assuming 10 dB attenuation using a NAS, NAS would be required during all detonations.

TABLE 29—MAXIMUM MONTHLY MARINE MAMMAL DENSITIES (INDIVIDUALS/100 km^2) WITHIN THE PROJECT AREA WITH UXO/MEC DETONATION ASSOCIATED LEVEL A HARASSMENT (PTS) AND LEVEL B HARASSMENT (TTS SEL) EXPOSURE ASSUMING 10 dB ATTENUATION, AND ESTIMATED TAKE

Species	Shallow OECC maximum monthly density (individual/ 100 km^2)	Deep OECC maximum monthly density (individual/ 100 km^2)	2025 Estimated take		2026 Estimated take	
			Level A harassment	Level B harassment	Level A harassment	Level B harassment
North Atlantic right whale [a]	0.116	0.707	0	14	0	13
Fin whale [a]	0.007	0.425	1	7	1	7
Humpback whale	0.04	0.297	1	5	1	5
Minke whale	0.129	1.72	4	28	3	27
Sei whale [a]	0.034	0.191	1	4	1	3
Sperm whale [a]	0.002	0.112	1	1	1	1
Atlantic Spotted dolphin	0.013	0.448	1	1	1	1
Atlantic White-sided dolphin	0.051	3.278	1	3	1	3
Bottlenose dolphin, Offshore	0.158	1.631	1	2	1	2
Common dolphin	0.35	24.845	1	19	1	19
Pilot whales, Long-finned	0	0.135	1	1	1	1
Pilot whales, Short-finned	0	0.1	1	1	1	1
Risso's dolphin	0.01	0.176	1	1	1	1
Harbor porpoise	1.772	10.608	56	217	51	193
Gray seal	24.506	13.647	8	146	4	80
Harbor seal	55.059	30.662	17	328	8	179
Harp seal	24.506	13.647	8	146	4	80

[a] Denotes species listed under the Endangered Species Act.

HRG Surveys

Park City Wind's proposed HRG survey activity includes the use of impulsive sources (*i.e.,* boomers, sparkers) that have the potential to harass marine mammals. The list of equipment proposed is in Table 3 (see Detailed Description of Specific Activities).

Authorized takes would be by Level B harassment only in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated nor proposed to be authorized. Therefore, the potential for Level A harassment is not evaluated further in this document. Park City Wind did not request, and NMFS is not proposing to authorize, take by Level A harassment incidental to HRG surveys. No serious injury or mortality is anticipated to result from HRG survey activities.

Specific to HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has developed a tool, available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance,* for determining the distances at which sound pressure level (SPLrms) generated from HRG surveys reach the 160 dB threshold. The equations in the tool consider water depth, frequency-dependent absorption and some directionality to refine estimated ensonified zones. Park City Wind used NMFS' methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources operating with different beam widths, the beam width associated with operational characteristics reported in Crocker and Fratantonio (2016) were used (Li and Koessler, 2022).

The isopleth distances corresponding to the Level B harassment threshold for each type of HRG equipment with the potential to result in harassment of marine mammals were calculated per NOAA Fisheries' Interim Recommendation for Sound Source Level and Propagation Analysis for High Resolution Geophysical Sources. The distances to the 160 dB RMS re 1 µPa isopleth for Level B harassment are presented in Table 30. Please refer to Appendix I in Li and Koessler (2022) for a full description of the methodology and formulas used to calculate distances to the Level B harassment threshold.

TABLE 30—DISTANCES CORRESPONDING TO THE LEVEL B HARASSMENT THRESHOLD FOR HRG EQUIPMENT

HRG survey equipment	Equipment type	Horizontal distance (m) to Level B harassment threshold	Ensonified area (km^2)
Applied Acoustics AA251 Boomer	SBP: Boomer	178	28.58
GeoMarine Geo Spark 2000 (400 tip)	SBP: Sparker	141	22.62

The survey activities that have the potential to result in Level B harassment (160 dB SPL) include the noise produced by Applied Acoustics AA251 Boomer or GeoMarine Geo Spark 2000 (400 tip) (Table 30), of which the

Applied Acoustics AA251 Boomer results in the greatest calculated distance to the Level B harassment criteria at 178 m (584 ft). Park City Wind has applied the estimated distance of 178 m (584 ft) to the 160 dB_{RMS90} percent re 1 µPa Level B harassment criteria as the basis for determining potential take from all HRG sources. All noise-producing survey equipment is assumed to be operated concurrently. Three vessels are assumed to be operating concurrently.

The total area ensonified was estimated by considering the distance of the daily vessel track line (determined using the estimated average speed of the vessel and the 24-hour operational period within each of the corresponding survey segments) and the longest horizontal distance to the relevant acoustic threshold from an HRG sound source (full formula in section 6.6 of the ITA application). Using the larger distance of 178 m (164 ft) to the 160 $dB_{RMS90\ percent}$ re 1 µPa Level B harassment isopleth (Table 30), the estimated daily vessel track of approximately 80 km (49.7 mi) per vessel for 24-hour operations, inclusive of an additional circular area to account for radial distance at the start and end of a 24-hour cycle, estimates of the total area ensonified to the Level B harassment threshold per day of HRG surveys were calculated (Table 30).

Exposure calculations assumed that there would be 25 days of HRG surveying per year over each of the 5 years. As described in the ITA application, density data were mapped within the boundary of the Project Area using geographic information systems, these data were updated based on the revised data from the Duke Model. Because the exact dates of HRG surveys are unknown, the highest density month for each species was used and carried forward in the take calculations (Table 31).

The calculated exposure estimates based on the exposure modeling methodology described above were compared with the best available information on marine mammal group sizes. Group sizes used for HRG take estimates were the same as those used for impact pile driving take estimation (Section 6.1.2 in the ITA application). Park City Wind also used data collected by Protected Species Observers (PSOs) on survey vessels operating during HRG surveys in 2020–2021 from their nearby Vineyard Wind project area (Tables 14 and 15). It was determined that the calculated number of potential takes by Level B harassment based on the exposure modeling methodology above may be underestimates for some species and therefore warranted adjustment using group size to ensure conservatism in the take numbers proposed for authorization. Despite the relatively small modeled Level B harassment zone (178 m) for HRG survey activities, it was determined that adjustments to the requested numbers of take by Level B harassment for some dolphin species was warranted to be conservative (see below).

For certain species for which the density-based methodology described above may result in potential underestimates of take and Park City Wind's PSO sightings data were relatively low, adjustments to the exposure estimates were made based on the best available information on marine mammal group sizes to ensure conservatism. For species with densities too low in the region to provide meaningful modeled exposure estimates (*i.e.,* rare species), the take request is based on the average group size (Table 31). For species not considered rare in the Project Area, but AMAPP data or Park City Wind PSO data show a higher group size level than the Duke Model, then the take proposed for authorization by Level B harassment was adjusted to one group size per day of HRG surveys (Table 31).

For species considered rare but that still have the small potential for occurrence in the Project area, takes proposed for authorization by Level B harassment during HRG surveys were requested by Park City Wind. This occurred for white-beaked dolphin, killer whale, and false killer whale. Park City Wind based their takes proposed for authorization on these species by using one group size per year in 3 of 5 years for species. Group sizes used were based on PSO observations during previous HRG surveys.

TABLE 31—MARINE MAMMAL DENSITIES USED IN EXPOSURE ESTIMATES AND ESTIMATED TAKES BY LEVEL B HARASSMENT FROM HRG SURVEYS

Species	Maximum monthly density [a] (No./100 km^2)	Annual exposure using the boomer [f]	Annual exposure using the sparker [g]	Requested annual take	Requested 5-year total take
North Atlantic right whale [b]	0.567	4.05	3.21	5	25
Fin whale [b]	0.436	3.11	2.47	4	20
Humpback whale	0.323	2.31	1.83	3	15
Minke whale	1.704	12.17	9.64	13	65
Sei whale [b]	0.193	1.38	1.09	2	10
Sperm whale [b h]	0.111	0.79	0.62	2	10
Atlantic spotted dolphin [h]	0.404	2.88	2.28	30	150
Atlantic white-sided dolphin [h]	3.406	24.34	19.26	28	140
Bottlenose dolphin, offshore [h]	1.753	12.53	9.92	18	90
Common dolphin [c]	28.314	202.3	160.13	203	1,015
Long-finned pilot whale [d h]	0.149	1.06	0.84	17	85
Short-finned pilot whale [d h]	0.11	0.78	0.62	9	45
Risso's dolphin [h]	0.187	1.34	1.06	7	35
False Killer whale [i]	N/A	N/A	N/A	5	15
Killer whale [i]	N/A	N/A	N/A	2	6
White-beaked dolphin [i]	N/A	N/A	N/A	30	90
Harbor porpoise	10.974	78.41	62.07	79	395
Gray seal [e]	27.901	199.35	157.8	200	1,000
Harbor seal [e]	62.687	447.89	354.54	448	2,240
Harp seal [e]	27.901	199.35	157.8	200	1,000

[a] Cetacean density values from the Duke Model.
[b] Listed as Endangered under the ESA.
[c] Take rounded up to one group size.
[d] Long- and short-finned pilot whale densities are the annual pilot whale guild density scaled by their relative abundances.

[e] Gray and harbor seal densities are the seals guild density scaled by their relative abundances; gray seals are used as a surrogate for harp seals.
[f] Applied Acoustics AA251 boomer.
[g] GeoMarine Geo Spark 2000.
[h] Annual take by Level B harassment is rounded up to one group size.
[i] Rare species total take estimates are based on the assumption that a group would be seen every other year; hence, the 5-yr total is less than the sum of each year.

Total Take Across All Activities

The amount of Level A harassment and Level B harassment NMFS proposes to authorize incidental to all Project activities combined (*i.e.,* pile driving and drilling to install WTG and ESP foundations, UXO/MEC detonations, and HRG surveys are shown in Table 32. The annual amount of take that is expected to occur in each year based on Park City Wind's current schedules is provided in Table 32. The Year 1 take estimates include HRG surveys and UXO/MEC detonations. Year 2 take includes all activities occurring: WTG and ESP foundation installation, HRG surveys, and UXO/MEC detonation. Year 3 includes WTG and ESP foundation installation and HRG surveys. Year 4 take includes WTG and ESP foundation installation (assuming construction schedule B) and HRG surveys. Year 5 take includes HRG surveys only.

For common and uncommon, though not ''rare,'' species where the exposure estimate was less than the mean group size, it was assumed that if one group member was exposed, then the entire group would be. For species where the annual number of predicted exposures was less than the mean group size, the annual take was increased to the mean group size rounded up to the nearest integer. The only species this applied to are the sei whale, Atlantic spotted dolphin, Risso's dolphin, and sperm whale. Because pile driving would occur over either 2 or 3 years, the mean group size rule was carried over from each of the annual take estimates to the total take estimates for the entire construction schedule to account for the possibility that a single exposure could occur in every year of a given construction schedule.

For species considered rare but still have the slight potential for occurrence in the Project area, Park City Wind requested an amount of annual take assuming one group size of that species may be harassed in any given year. However, a group is anticipated to occur only every other year; hence the total amount of take of the 5 years is less than the sum of the annual take across all 5-years. As described above, takes for these species are based on PSO sighting group sizes or on group size from OBIS data. NMFS concurs with this assessment and is proposing to authorize takes by Level A harassment and/or Level B harassment for these rare species (Table 32).

NMFS recognizes that schedules may shift due to a number of planning and logistical constraints such that take may be redistributed throughout the 5 years. However, the total 5-year total amount of take for each species, shown in Table 33, and the maximum amount of take in any one year (Table 34) would not be exceeded.

The amount of take that Park City Wind requested, and NMFS proposes to authorize, is considered conservative. NMFS does not typically authorize take of rare species in these circumstances; however, given the amount of foundation installation activities that Park City Wind is proposing to undertake (*i.e.,* installation of up to 130 WTG and ESP positions), the large harassment zone sizes estimated from foundation installation, the duration of the foundation installation (up to 3 years), that marine mammal distribution is changing and that foundation installation is not scheduled to begin until 2026, NMFS is proposing to issue take for rare species. The one exception is the request for take of beluga whales. There is no beluga whale stock in the U.S. Atlantic and the potential for a beluga whale to occur is incredibly unlikely. Hence, NMFS is not proposing to authorize take of beluga whales.

For the species for which modeling was conducted, the take estimates are considered conservative for a number of reasons. The amount of take proposed to be authorized assumes the worst case scenario with respect to project design and schedules. As described in the Description of Specific Activities section, Park City Wind may use suction-buckets to install bottom-frame WTG and ESP foundations. Should Park City Wind use these foundations, take would not occur as noise levels would not be elevated to the degree there is a potential for take (*i.e.,* no pile driving is involved with installing suction buckets). All calculated take incorporated the highest densities for any given species in any given month. The amount of proposed Level A harassment does not fully account for the likelihood that marine mammals would avoid a stimulus when possible before the individual accumulates enough acoustic energy to potentially cause auditory injury, or the effectiveness of the proposed monitoring and mitigation measures (with exception of North Atlantic right whales given the enhanced mitigation measures proposed for this species). Finally, the amount of take proposed to be authorized for foundation installation is primarily based on vibratory pile driving and drilling zones (50 km and 16.6 km, respectively) in which Park City Wind used simplistic calculations (density × area × number of days of activity) to estimate take that are inherently conservative.

TABLE 32—PROPOSED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED ANNUALLY FOR THE PROJECT OVER 5 YEARS [a] [b]

Species	Year 1		Year 2		Year 3		Year 4		Year 5	
	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
North Atlantic right whale [c]	0	19	0	111	0	109	0	53	0	5
Blue whale [c] [d]	0	0	1	2	1	2	1	2	0	0
Fin whale [c]	1	1	10	483	20	575	9	208	0	4
Humpback whale	1	8	10	295	16	330	7	114	0	3
Minke whale	4	41	34	933	85	1,042	38	486	0	13
Sei whale [c]	1	6	2	52	2	53	1	30	0	2
Sperm whale [c]	1	3	2	115	1	140	1	44	0	2
Dwarf sperm whale [d]	0	0	2	2	2	2	2	2	0	0

TABLE 32—PROPOSED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED ANNUALLY FOR THE PROJECT OVER 5 YEARS [a] [b]—Continued

Species	Year 1		Year 2		Year 3		Year 4		Year 5	
	Level A harass-ment	Level B harass-ment	Level A harass-ment	Level B harass-ment	Level A harass-ment	Level B harass-ment	Level A harass-ment	Level B harass-ment	Level A harass-ment	Level B harass-ment
Pygmy sperm whale [d]	0	0	2	2	2	2	2	2	0	0
Cuvier's beaked whale [d]	0	0	0	3	0	3	0	3	0	0
Blainville's beaked whale [d]	0	0	0	4	0	4	0	4	0	0
Gervais' beaked whale [d]	0	0	0	4	0	4	0	4	0	0
Sowerby's beaked whale [d]	0	0	0	4	0	4	0	4	0	0
True's beaked whale [d]	0	0	0	3	0	3	0	3	0	0
Northern bottlenose whale [d]	0	0	0	4	0	4	0	4	0	0
Atlantic spotted dolphin [d]	1	31	1	528	0	660	0	216	0	30
Atlantic white-sided dolphin	1	31	2	2,783	1	3,163	1	1,457	0	28
Bottlenose dolphin, offshore	1	20	2	3,309	1	4,009	1	1,454	0	18
Clymene dolphin [d]	0	0	0	167	0	167	0	167	0	0
Common dolphin	1	222	9	33,505	3	41,230	1	14,424	0	203
Long-finned pilot whale [e]	1	18	2	312	1	369	1	148	0	17
Short-finned pilot whale	1	10	2	227	1	269	0	105	0	9
Risso's dolphin	1	8	2	631	1	808	1	244	0	7
False killer whale [d]	0	5	0	10	0	10	0	10	0	5
Fraser's dolphin [d]	0	0	0	192	0	192	0	192	0	0
Killer whale [d]	0	2	0	4	0	4	0	4	0	2
Melon-headed whale [d]	0	0	0	109	0	109	0	109	0	0
Pantropical Spotted dolphin [d]	0	0	0	60	0	60	0	60	0	0
Pygmy killer whale [d]	0	0	0	5	0	5	0	5	0	0
Rough-toothed dolphin [d]	0	0	0	14	0	14	0	14	0	0
Spinner dolphin [d]	0	0	0	51	0	51	0	51	0	0
Striped dolphin [d]	0	0	0	64	0	64	0	64	0	0
White-beaked dolphin [d]	0	30	0	60	0	60	0	60	0	30
Harbor porpoise	56	296	122	2,378	136	2,507	60	1,074	0	79
Gray seal	8	346	6	3,874	3	4,375	2	2,189	0	200
Harbor seal	17	776	11	8,701	7	9,835	4	4,923	0	448
Harp seal	8	346	6	3,875	3	4,379	1	2,192	0	200
Hooded seal [d]	0	0	0	1	0	1	0	1	0	0

[a] The final rule and LOA, if issued, would be effective from March 27, 2025–March 26, 2030

[b] For days when pile installation includes both vibratory setting and drilling, only the vibratory setting Level B takes are included (because more takes are predicted for this activity) and not the drilling Level B takes to avoid double counting. For the purpose of this take request, Year 1 is assumed to be 2025. These dates reflect the currently projected construction start year and are subject to change because exact project start dates and construction schedules are not currently available.

[c] Listed as Endangered under the ESA.

[d] Rare species in the project area. Rare species total take estimates for the project are based on the assumption that a group would be seen every other year; hence, the 5-yr total is less than the sum of all years combined.

[e] Level B take estimate increased to 1 average group size in Year 1 and Year 3 for construction Schedule B.

TABLE 33—TOTAL 5-YEAR PROPOSED TAKES OF MARINE MAMMALS (BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED DURING THE CONSTRUCTION OF THE PROJECT

Species	Total Level A harassment	Total Level B harassment [a]
North Atlantic right whale [b]	0	293
Blue whale [b c]	2	4
Fin whale [b]	37	1,256
Humpback whale	31	759
Minke whale	155	2,457
Sei whale [b]	6	140
Sperm whale [b]	3	294
Dwarf sperm whale [c]	4	4
Pygmy sperm whale [c]	4	4
Cuvier's beaked whale [c]	0	6
Blainville's beaked whale [c]	0	8
Gervais' beaked whale [c]	0	8
Sowerby's beaked whale [c]	0	8
True's beaked whale [c]	0	6
Northern bottlenose whale [c]	0	12
Atlantic spotted dolphin	2	1,406
Atlantic white-sided dolphin	3	7,263
Bottlenose dolphin, offshore	3	8,627
Clymene dolphin [c]	0	334
Common dolphin	10	86,306
Long-finned pilot whale	3	847
Short-finned pilot whale	3	607
Risso's dolphin	3	1,656
False killer whale [c]	0	25
Fraser's dolphin [c]	0	384
Killer whale [c]	0	10
Melon-headed whale [c]	0	218
Pantropical Spotted dolphin [c]	0	120

TABLE 33—TOTAL 5-YEAR PROPOSED TAKES OF MARINE MAMMALS (BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED DURING THE CONSTRUCTION OF THE PROJECT—Continued

Species	Total Level A harassment	Total Level B harassment [a]
Pygmy killer whale [c]	0	10
Rough-toothed dolphin [c]	0	28
Spinner dolphin [c]	0	102
Striped dolphin [c]	0	128
White-beaked dolphin [c]	0	150
Harbor porpoise	352	6,197
Gray seal	17	10,924
Harbor seal	37	24,551
Harp seal	17	10,933
Hooded seal [c]	0	3

[a] For days when pile installation includes both vibratory setting and drilling, only the vibratory setting Level B takes are included (because more takes are predicted for this activity) and not the drilling Level B takes to avoid double counting.
[b] Listed as Endangered under the ESA.
[c] Rare species in the project area. Rare species total take estimates are based on the assumption that a group would be seen every other year during 3 years of construction. Additionally, white-beaked dolphins, false killer whale, and killer whale had one group size per year accounted for in 3 of 5 years for HRG surveys. Hence, the 5-yr total is less than the sum of all years combined, as described in Sections 6.1.2 and 6.8.2 of the ITA application.

To inform both the negligible impact analysis and the small numbers determination, NMFS assesses the maximum number of takes of marine mammals that could occur within any given year. In this calculation, the maximum estimated number of Level A harassment takes in any one year is summed with the maximum estimated number of Level B harassment takes in any one year for each species to yield the highest number of estimated take that could occur in any year (Table 34). Table 34 also depicts the number of takes proposed relative to the abundance of each stock. The takes enumerated here represent daily instances of take, not necessarily individual marine mammals taken. One take represents a day in which an animal was exposed to noise above the associated harassment threshold at least once. Some takes represent a brief exposure above a threshold, while in some cases takes could represent a longer, or repeated, exposure of one individual animal above a threshold within a 24-hour period. Whether or not every take assigned to a species represents a different individual depends on the daily and seasonal movement patterns of the species in the area. For example, activity areas with continuous activities (all or nearly every day) overlapping known feeding areas (where animals are known to remain for days or weeks on end) or areas where species with small home ranges live (*e.g.,* some pinnipeds) are more likely to result in repeated takes to some individuals. Alternatively, activities far out in the deep ocean or takes to nomadic species where individuals move over the population's range without spatial or temporal consistency represent circumstances where repeat takes of the same individuals are less likely. In other words, for example, 100 takes could represent 100 individuals each taken on one day within the year, or it could represent 5 individuals each taken on 20 days within the year, or some other combination depending on the activity, whether there are biologically important areas in the project area, and the daily and seasonal movement patterns of the species of marine mammals exposed. Where information to better contextualize the enumerated takes for a given species is available, it is discussed in the Negligible Impact Analysis and Determination and/or Small Numbers sections, as appropriate.

TABLE 34—MAXIMUM NUMBER OF PROPOSED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) THAT COULD OCCUR IN ANY ONE YEAR OF THE PROJECT RELATIVE TO STOCK POPULATION SIZE

Species	NMFS stock abundance [b]	Maximum annual Level A harassment	Maximum annual Level B harassment	Maximum annual take	Percent stock taken based on maximum annual take [a]
North Atlantic right whale [c]	338	0	111	111	32.8
Blue whale [c d]	402	1	2	3	0.7
Fin whale [c]	6,802	20	575	595	8.7
Humpback whale	1,396	16	330	346	24.8
Minke whale	21,968	85	1,042	1,127	5.1
Sei whale [c]	6,292	2	53	55	0.9
Sperm whale [c]	4,349	2	140	142	3.3
Dwarf sperm whale [d]	7,750	2	2	4	0.1
Pygmy sperm whale [d]	7,750	2	2	4	0.1
Cuvier's beaked whale [d]	5,744	0	3	3	0.1
Blainville's beaked whale [d]	10,107	0	4	4	<0.1
Gervais' beaked whale [d]	5,744	0	4	4	0.1
Sowerby's beaked whale [d]	10,107	0	4	4	<0.1
True's beaked whale[d]	10,107	0	3	3	<0.1
Northern bottlenose whale [d e]	UNK	0	4	4	UNK
Atlantic spotted dolphin	39,921	1	660	661	1.7
Atlantic white-sided dolphin	93,233	2	3,163	3,165	3.4

TABLE 34—MAXIMUM NUMBER OF PROPOSED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) THAT COULD OCCUR IN ANY ONE YEAR OF THE PROJECT RELATIVE TO STOCK POPULATION SIZE—Continued

Species	NMFS stock abundance [b]	Maximum annual Level A harassment	Maximum annual Level B harassment	Maximum annual take	Percent stock taken based on maximum annual take [a]
Bottlenose dolphin, offshore	62,851	2	4,009	4,011	6.4
Clymene dolphin [d]	4,237	0	167	167	3.9
Common dolphin	172,897	9	41,230	41,239	23.9
Long-finned pilot whale	39,215	2	369	371	0.9
Short-finned pilot whale	28,924	2	269	271	0.9
Risso's dolphin	35,215	2	808	810	2.3
False killer whale [d e]	1,791	0	10	10	0.6
Fraser's dolphin [d]	UNK	0	192	192	UNK
Killer whale [d e]	UNK	0	4	4	UNK
Melon-headed whale [d]	UNK	0	109	109	UNK
Pantropical Spotted dolphin [d]	6,593	0	60	60	0.9
Pygmy killer whale [d]	UNK	0	5	5	UNK
Rough-toothed dolphin [d]	136	0	14	14	10.3
Spinner dolphin [d]	4,102	0	51	51	1.2
Striped dolphin [d]	67,036	0	64	64	0.1
White-beaked dolphin [d e]	536,016	0	60	60	0.0
Harbor porpoise	95,543	136	2,507	2,643	2.8
Gray seal	27,300	8	4,375	4,383	16.1
Harbor seal	61,336	17	9,835	9,852	16.1
Harp seal	7,600,000	8	4,379	4,387	<0.1
Hooded seal [d]	UNK	0	1	1	<0.1

[a] The values in this column represent the assumption that each take proposed to be authorized would occur to a unique individual. Given the scope of work proposed, this is highly unlikely for species common to the project area (*e.g.,* North Atlantic right whales, humpback whales) such that the actual percentage of the population taken is less than the percentages identified here.

[b] Using the most recent stock assessment report (SAR) at time of publication, the draft 2022 (Hayes *et al.,* 2023).

[c] Listed as Endangered under the ESA.

[d] Rare species in the project area. The number of Level A harassment and Level B harassment takes calculated for rare species is based on the mean group size assuming a 3 year construction schedule (all rare species) and encounters during HRG surveys for white-beaked dolphin, killer whale, and false killer whale.

[e] Take for these species is based on PSO sighting group sizes; for all other rare species the group size is from OBIS data.

Proposed Mitigation

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

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

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation strategies described below are consistent with those required and successfully implemented under previous incidental take authorizations issued in association with in-water construction activities (*e.g.,* soft-start, establishing shutdown zones).

Additional measures have also been incorporated to account for the fact that the proposed construction activities would occur offshore. Modeling was performed to estimate harassment zones, which were used to inform mitigation measures for the project's activities to minimize Level A harassment and Level B harassment to the extent practicable, while providing estimates of the areas within which Level B harassment might occur.

Generally speaking, the mitigation measures considered and proposed here fall into three categories: temporal (seasonal and daily) work restrictions, real-time measures (shutdown, clearance, and vessel strike avoidance), and noise attenuation/reduction measures. Seasonal work restrictions are designed to avoid or minimize operations when marine mammals are concentrated or engaged in behaviors that make them more susceptible or make impacts more likely in order to reduce both the number and severity of potential takes, and are effective in reducing both chronic (longer-term) and acute effects. Real-time measures, such as implementation of shutdown and pre-clearance zones and vessel strike avoidance measures, are intended to

reduce the probability or severity of harassment by taking steps in real time once a higher-risk scenario is identified (*e.g.,* once animals are detected within an impact zone). Noise attenuation measures, such as bubble curtains, are intended to reduce the noise at the source, which reduces both acute impacts, as well as the contribution to aggregate and cumulative noise that may result in longer term chronic impacts.

Below, we briefly describe training, coordination, and vessel strike avoidance measures that apply to all activity types, and then in the following subsections we describe the measures that apply specifically to monopile foundation and jacket foundation installation, HRG surveys, and UXO/MEC detonation. Details on specific requirements can be found in the Part 217—Regulations Governing The Taking And Importing Of Marine Mammals at the end of this proposed rulemaking.

Training and Coordination

NMFS requires the Park City Wind employees and contractors conducting activities on the water and all vessel captains and crew are trained in marine mammal detection and identification, communication protocols, and reporting to minimize impacts on marine mammals and support Park City Wind's compliance with the mitigation, monitoring, and reporting requirements. All relevant personnel and the marine mammal monitoring team(s) would be required to participate in joint, onboard briefings that would be led by Park City Wind personnel and the Lead PSO prior to the beginning of project activities. The briefing would be repeated whenever new relevant personnel (*e.g.,* new PSOs, acoustic source operators, relevant crew) join the operation before work commences. During this training, Park City Wind would be required to instruct all project personnel regarding the authority of the marine mammal monitoring team(s). For example, the HRG acoustic equipment operator, pile driving personnel, *etc.,* would be required to immediately comply with any call for a delay or shutdown by the Lead PSO. Any disagreement between the Lead PSO and the project personnel would only be discussed after delay or shutdown has occurred. More information on vessel crew training requirements can be found in the *Vessel Strike Avoidance Measures* sections below.

Protected Species Observers and PAM Operator Training

Park City Wind would employ NMFS-approved PSOs and PAM operators. The PSO field team and PAM team would have a lead member (designated as the ''Lead PSO'' or ''PAM Lead'') who would have prior experience observing or acoustically detecting, respectively, mysticetes, odontocetes, and pinnipeds in the northwestern Atlantic Ocean. Any remaining PSOs and PAM operators must have previous experience observing marine mammals and must have the ability to work with all required and relevant software and equipment. New and/or inexperienced PSOs would be paired with an experienced PSO to ensure that the quality of marine mammal observations and data recording is kept consistent. Additional information on the roles and requirements of the PAM operators (section 4.1.1.2) and PSOs (section 4.1.1.3) can be found in Park City Wind's supplemental Protected Species Mitigation and Monitoring Plan (PSMMP) on NMFS' website at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-park-city-wind-llc-construction-new-england-wind-offshore-wind.* Park City Wind would be required to request PSO and PAM operator approvals 60-day prior to those personnel commencing work.

Prior to the start of activities, a briefing would be conducted between the supervisors, the crew, the PSO/PAM team, the environmental compliance monitors, and Park City Wind personnel. This briefing would be to establish the responsibilities of each participating party, to define the chains of command, to discuss communication procedures, to provide an overview of the monitoring purposes, and to review the operational procedures. The designated PSO (*i.e.,* Lead PSO) would oversee the training, the environmental compliance monitors, the PSOs, and other tasks specifically related to monitoring. For more information on the need and use of PSO and PAM personnel, please see Proposed Monitoring and Reporting.

North Atlantic Right Whale Awareness Monitoring

Park City Wind must use available sources of information on North Atlantic right whale presence, including monitoring of the Right Whale Sightings Advisory System, WhaleAlert app, and Coast Guard VHF Channel 16 throughout each day to receive notifications of any sightings, and information associated with any regulatory management actions (*e.g.,* establishment of a zone identifying the need to reduce vessel speeds). Maintaining daily awareness and coordination affords increased protection of North Atlantic right whales by understanding North Atlantic right whale presence in the area through ongoing visual and passive acoustic monitoring efforts and opportunities (outside of Park City Wind's efforts), and allows for planning reduced vessel speeds and construction activities, when practicable, to minimize potential impacts on North Atlantic right whales.

Vessel Strike Avoidance Measures

This proposed rule contains numerous vessel strike avoidance measures that reduce the risk that a vessel and marine mammal could collide. Vessel strikes are one of the most common ways that marine mammals are seriously injured or killed by human activities; therefore, enhanced mitigation and monitoring measures are required to avoid vessel strikes. While many of these measures are proactive intending to avoid the heavy use of vessels during times when marine mammals of particular concern may be in the area, several are reactive and occur when a marine mammal is sighted by project personnel. The exact requirements we propose are described generally here and, in detail, in the regulation text at the end of this proposed rule. Park City Wind will be required to comply with these measures, except under circumstances when doing so would create an imminent and serious threat to a person or vessel, or to the extent that a vessel is unable to maneuver and, because of the inability to maneuver, the vessel cannot comply.

Prior to the start of in-water construction activities, vessel operators and crews would receive training about marine mammals and other protected species known or with the potential to occur in the project area, making observations in all weather conditions, and vessel strike avoidance measures. In addition, training would include information and resources available regarding applicable Federal laws and regulations for protected species. Park City Wind would provide documentation of training to NMFS.

While underway, Park City Wind would be required to monitor for and maintain a safe distance from marine mammals, and operate vessels in a manner that reduces the potential for vessel strike. Regardless of the vessel's size, all vessel operators, crews, and dedicated visual observers (*i.e.,* PSO or trained crew member) would maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course (as appropriate) to avoid striking any marine mammal. The dedicated visual observer, equipped with suitable monitoring technology (*e.g.,* binoculars, night vision devices), would be located at an appropriate

vantage point for ensuring vessels are maintaining required vessel separation distances from marine mammals (*e.g.,* 500 m from NARWs). All Park City Wind-related vessels would comply with existing NMFS vessel speed restrictions for NARWs (50 CFR 224.105; including in areas designated as SMAs, DMAs, or Slow Zones) and required procedures for operating vessels around NARWs and other marine mammals. If a vessel is traveling at greater than 10 kn, in addition to the required dedicated visual observer, Park City Wind would monitor the transit corridor in real-time with PAM prior to and during transits. To maintain awareness of NARW presence in the project area, vessel operators, crew members, and PSOs would monitor VHF Channel 16, WhaleAlert, the Right Whale Sighting Advisory System (RWSAS), and the PAM system. Any NARW or large whale detection would be immediately communicated to PSOs, PAM operators, and all vessel captains. All vessels would be equipped with an Automatic Identification System (AIS) and Park City Wind must report all Maritime Mobile Service Identify (MMSI) numbers to NMFS Office of Protected Resources prior to initiating in-water activities. Park City Wind would submit a NMFS-approved North Atlantic right whale vessel strike avoidance plan 180 days prior to commencement of vessel use.

Compliance with these proposed measures would reduce the likelihood of vessel strike by increasing awareness of marine mammal presence in the project area (*e.g.,* monitoring, communication), reducing vessel speed when marine mammals are detected (by PSOs, PAM, and/or through another source, *e.g.,* RWSAS), and maintaining separation distances when marine mammals are encountered. While visual monitoring is useful, reducing vessel speed is one of the most effective, feasible options available to minimize the likelihood of a vessel strike and, if a strike does occur, decrease the potential for serious injury or lethal outcomes. Numerous studies have indicated that slowing the speed of vessels reduces the risk of lethal vessel collisions, particularly in areas where right whales are abundant and vessel traffic is common and otherwise traveling at high speeds (Vanderlaan and Taggart, 2007; Conn and Silber, 2013; Van der Hoop *et al.,* 2014; Martin *et al.,* 2015; Crum *et al.,* 2019).

In 2021, NMFS released the North Atlantic Right Whale Vessel Speed Rule Assessment documenting a reduction in observed right whale serious injuries and mortalities resulting from vessel strikes since implementation of the speed rule in 2008 (50 CFR 224.105). Project vessels would be required to reduce speed in the presence of marine mammals and, because reducing speed has been shown to decrease the likelihood of vessel strike and the implementation of other measures described herein, NMFS considers the potential for vessel strike to be *de minimis.* Park City Wind has not requested, and NMFS does not propose to authorize, take from vessel strikes.

Seasonal and Daily Restrictions

As described above, an effective measure for reducing the magnitude and severity of impacts from an activity is to implement time/area restrictions in places where marine mammals are concentrated, engaged in biologically important behaviors, and/or present in sensitive life stages. The temporal restrictions proposed here are built around the protection of North Atlantic right whales. The highest densities of North Atlantic right whales in the project area are expected during the months of January through April. While lower than January through April, densities remain high in May and December. Park City Wind proposed to not conduct foundation installation during January through April 30; however, NMFS is proposing additional mitigation measures during May and December. Park City Wind did not assume any vibratory pile driving would occur in May or December when estimating take but they did not specifically propose that activity during these months would be restricted. NMFS, however, is proposing to restrict vibratory pile driving, which Park City Wind estimates to have 50-km Level B harassment zones, in May and December given that North Atlantic right whale densities remain high in the project area during this time. Foundation installation activities must not be planned in December; except for in the event of unforeseen circumstances (*e.g.,* delays resulting in a few piles needing to be installed in December to remain on schedule) and with NMFS advance approval and vibratory pile driving in May was not proposed and is restricted. As with foundation installation, NMFS is similarly proposing to restrict UXO/MEC detonations December through May; except for with NMFS' advanced approval on the condition that Park City Wind provides justification for the proposed detonation. NMFS is requiring this seasonal work restriction to minimize the North Atlantic right whales risk of exposure to noise incidental to foundation installation and UXO/MEC detonation. These seasonal work restrictions are expected to greatly reduce the number of takes of North Atlantic right whales. These seasonal restrictions also afford protection to other marine mammals that are known to use the project area with greater frequency during winter months, including other baleen whales.

On a daily basis, no more than two monopile foundations or four pin piles may be installed per day and no more than one UXO/MEC may be detonated per 24-hr period. Moreover, detonations may only occur during daylight hours. No more than one pile may be installed at a given time (*i.e.,* concurrent/simultaneous pile driving and drilling may not occur).

Park City Wind has proposed to conduct foundation installation activities that may result in the harassment of marine mammals during reduced visibility conditions and initiate pile driving during nighttime when detection of marine mammals is visually challenging. As described in the Proposed Monitoring and Reporting section, effective marine mammal detection occurs when dual monitoring methods (visual and acoustic) are employed. Park City Wind has not yet demonstrated to NMFS that the equipment (*e.g.,* night vision devices, IR/thermal camera) they propose to use during reduced visibility conditions, including nighttime, are adequate to monitor marine mammals, particularly large whales, to distances necessary to ensure mitigation measures are effective. Therefore, at this time, NMFS has not determined if initiating pile driving at night should occur. NMFS will provide Park City Wind the opportunity to submit a monitoring plan considering pile driving activities during times of reduced visibility, including nighttime (Nighttime Monitoring Plan), and NMFS will make a decision on whether to authorize Park City Wind to conduct pile driving and drilling in reduced visibility conditions, including nighttime, at the final rule stage, if issued.

Given the very small harassment zones resulting from HRG surveys and that the best available science indicates that any harassment from HRG surveys, should a marine mammal be exposed, would manifest in minor behavioral harassment only (*e.g.,* potentially some avoidance of the vessel), NMFS is not proposing any seasonal and daily restrictions for HRG surveys.

Noise Attenuation Systems

Park City Wind would employ noise abatement systems (NAS), also known as noise attenuation systems, during all

foundation installation activities (*i.e.,* pile driving and drilling) to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize any acoustic impacts resulting from foundation installation. Park City Wind would be required to employ a big double bubble curtain, other technology capable of achieving a 10-dB sound level reduction, or a combination of two or more NAS capable of achieving a 10-dB sound level reduction during these activities as well as the adjustment of operational protocols to minimize noise levels. Noise attenuation devices would also be required during any UXO/MEC detonation.

Two categories of NAS exist: primary and secondary. A primary NAS would be used to reduce the level of noise produced by foundation installation activities at the source, typically through adjustments on to the equipment (*e.g.,* hammer strike parameters). Primary NAS are still evolving and will be considered for use during mitigation efforts when the NAS has been demonstrated as effective in commercial projects. However, as primary NAS are not fully effective at eliminating noise, a secondary NAS would be employed. The secondary NAS is a device or group of devices that would reduce noise as it was transmitted through the water away from the pile, typically through a physical barrier that would reflect or absorb sound waves and therefore, reduce the distance the higher energy sound propagates through the water column. Together, these systems must reduce noise levels to the lowest level practicable with the goal of not exceeding measured ranges to Level A harassment and Level B harassment isopleths corresponding to those modeled assuming 10-dB sound attenuation, pending results of Sound Field Verification (SFV; see *Sound Field Verification* section below and Part 217—Regulations Governing The Taking And Importing Of Marine Mammals).

Noise abatement systems, such as bubble curtains, are used to decrease the sound levels radiated from a source. Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. Small bubble curtains have been measured to reduce sound levels but effective attenuation is highly dependent on depth of water, current, and configuration and operation of the curtain (Austin *et al.,* 2016; Koschinski and Lüdemann, 2013). Bubble curtains vary in terms of the sizes of the bubbles and those with larger bubbles tend to perform a bit better and more reliably, particularly when deployed with two separate rings (Bellmann, 2014; Koschinski and Lüdemann, 2013; Nehls *et al.,* 2016). Encapsulated bubble systems (*e.g.,* Hydro Sound Dampers (HSDs)), can be effective within their targeted frequency ranges (*e.g.,* 100–800 Hz), and when used in conjunction with a bubble curtain appear to create the greatest attenuation. The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices.

Secondary NAS that may be used by Park City Wind include a big bubble curtain (BBC), a hydro-sound damper, or an AdBm Helmholz resonator (Elzinga *et al.,* 2019). If a single system is used, it must be a double big bubble curtain (dBBC). Other dual systems (*e.g.,* noise mitigation screens, hydro-sound damper, AdBm Helmholz resonator) may also be used, although many of these are in their early stages of development and field tests to evaluate performance and effectiveness have not been completed. Should the research and development phase of these newer systems demonstrate effectiveness, as part of adaptive management, Park City Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during foundation installation and UXO/MEC detonation activities

The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices. Dähne *et al.* (2017) found that single bubble curtains that reduce sound levels by 7 to 10 dB reduced the overall sound level by approximately 12 dB when combined as a double bubble curtain for 6-m steel monopiles in the North Sea. During installation of monopiles (consisting of approximately 8-m in diameter) for more than 150 WTGs in comparable water depths (>25 m) and conditions in Europe indicate that attenuation of 10 dB is readily achieved (Bellmann, 2019; Bellmann *et al.,* 2020) using single BBCs for noise attenuation.

If a bubble curtain is used (single or double), Park City Wind would be required to maintain the following operational performance standards: the bubble curtain(s) must distribute air bubbles using a target air flow rate of at least 0.5 $m^3/(min*m)$ and must distribute bubbles around 100 percent of the piling perimeter for the full depth of the water column. The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact; no parts of the ring or other objects should prevent full seafloor contact. Park City Wind must require that construction contractors train personnel in the proper balancing of airflow to the bubble ring and must require that construction contractors submit an inspection/performance report for approval by Park City Wind within 72 hours following the performance test. Corrections to the attenuation device to meet the performance standards must occur prior to use during foundation installation activities and UXO/MEC detonation. If Park City Wind uses a noise mitigation device in addition to a BBC, similar quality control measures would be required.

Noise abatement devices are not required during HRG surveys as they are not practicable to implement nor would be effective. However, Park City Wind would be required to make efforts to minimize source levels by using the lowest energy settings on equipment that has the potential to result in harassment of marine mammals (*e.g.,* sparkers, boomers) and turn off equipment when not actively surveying. Overall, minimizing the amount and duration of noise in the ocean from any of Park City Wind's activities through use of all means necessary (*e.g.,* noise abatement, turning off power) will effect the least practicable adverse impact on marine mammals.

Clearance and Shutdown Zones

NMFS is proposing to require the establishment of both clearance and shutdown zones during all foundation installation activities that have the potential to result in harassment of marine mammals (*i.e.,* pile driving and drilling) and HRG surveys. The purpose of ''clearance'' of a particular zone is to prevent or minimize potential instances of auditory injury and more severe behavioral disturbances by delaying the commencement of an activity if marine mammals are near the activity. The purpose of a shutdown is to prevent a specific acute impact, such as auditory injury or severe behavioral disturbance

of sensitive species, by halting the activity.

Prior to the start of conducting activities that can harass marine mammals (foundation installation, HRG surveys, or UXO/MEC detonation), Park City Wind would ensure designated areas are clear of marine mammals prior to commencing activities to minimize the potential for and degree of harassment. Once pile driving or drilling activity begins, any marine mammal entering the shutdown zone (Tables 35 and 36) would trigger pile driving to cease (unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals). Because UXO/MEC detonations are instantaneous, no shutdown is possible; therefore, there are clearance zones but no shutdown zones for UXO/MEC detonations (Table 38).

All clearance zones during foundation installation and UXO/MEC detonations would be monitored by NMFS-approved PSOs and PAM operators. PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes prior to commencing the activity. During HRG surveys, PSO(s) must visually monitor clearance zones for 30 minutes prior to commencing survey activities when using sources that may result in the harassment of marine mammals (*e.g.,* sparker, boomers, CHIRPs). In addition to PSOs, at least one PAM operator must review data from at least 24 hours prior to foundation installation and UXO/MEC detonation and actively monitor hydrophones for 60 minutes prior to commencement of these activities. Prior to initiating soft-start procedures for impact pile driving, all clearance zones must be confirmed to be free of marine mammals for at least 30 minutes immediately prior to commencing activities. In addition, pile driving will be delayed upon a confirmed PAM detection of a North Atlantic right whale, if the PAM detection is confirmed to have been located within the North Atlantic right whale PAM Clearance zone (Tables 35 and 36). Any large whale sighted by a PSO within the North Atlantic right whale PSO Clearance Zone that cannot be identified to species must be treated as if it were a North Atlantic right whale.

In addition to the clearance and shutdown zones that would be monitored both visually and acoustically, NMFS is proposing to establish a minimum visibility zone during foundation installation activities to ensure both visual and acoustic methods are used in tandem to detect marine mammals resulting in maximum detection capability. No minimum visibility zone is proposed for UXO/MEC detonation as the entire visual clearance zone must be clear given the potential for lung and GI injury. The minimum visibility zone for foundation installation activities (pile driving and drilling) would extend from the location of the pile being driven out to 3.2 km (3,200 m). This value corresponds to just greater than the modeled maximum $ER_{95\ percent}$ distances to the Level A harassment threshold for North Atlantic right whales, assuming 10 dB of attenuation. The entire minimum visibility zone must be visible for a full 30 minutes immediately prior to commencing pile driving, drilling, and UXO/MEC detonation.

If a North Atlantic right whale is detected during the clearance period, regardless of distance from the pile being installed, pile driving and drilling must not begin until 30 minutes has passed since the last sighting (12,000 meters during UXO/MEC detonations, Table 38). The clearance zone may also only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred during the clearance monitoring period. Any large whale sighted by a PSO or acoustically detected by a PAM operator that cannot be identified as a non-North Atlantic right whale must be treated as if it were a North Atlantic right whale.

As described above, JASCO conducted source level monitoring for the installation of 13-m monopiles to inform the development of mitigation zones. JASCO conducted a scaling exercise in which the largest 10 dB attenuated, modeled SEL exposure ranges (between one pile per day or two piles per day results) for the 13 m monopile with a 5,000 kJ hammer scenario was scaled by the percentage increase between the largest 10 dB attenuated, modeled SEL exposure ranges of the 12 m monopile with a 5,000 kJ hammer scenario versus a 6,000 kJ hammer scenario for each hearing group:

$$Percentage\ increase = (a - b)/a$$

$$Alternative\ mitigation\ zone = (c \times Percentage\ increase) + c$$

where a is the 12 m monopile with a 5,000 kJ hammer exposure range, b is the 12 m monopile with a 6,000 kJ hammer exposure range, and c is the 13 m monopile with a 5,000 kJ hammer exposure range. The results informed the shutdown zones in the unlikely case a 13-m pile is installed with hammer energy between 5,000 to 6,000 kJ.

Proposed clearance and shutdown zones have been developed in consideration of modeled distances to relevant PTS thresholds with respect to minimizing the potential for take by Level A harassment. All proposed clearance and shutdown zones for large whales are larger than the largest modeled exposure range ($ER_{95\ percent}$) distances to thresholds corresponding to Level A harassment (SEL and peak). If a marine mammal is observed entering or within the respective shutdown zone (Tables 35 and 36) after foundation installation has begun, the PSO will request a temporary cessation of those activities. If feasible, Park City Wind will stop those activities immediately.

In situations when shutdown is called for but it is determined that a shutdown is not practicable due to imminent risk of injury or loss of life to an individual or pile instability, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal, and a shut-down would lead to a stuck pile. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to ''let go''. During these periods of instability, the lead engineer may determine a shutdown is not feasible because the shutdown combined with impending weather conditions may require the piling vessel to ''let go'', which then poses an imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk for individuals. In these situations, Park City Wind must reduce hammer energy to the lowest level practicable.

The lead engineer must evaluate the following to determine if a shutdown is safe and practicable:

a. Use of site-specific soil data and real-time hammer log information to judge whether a stoppage would risk causing piling refusal at re-start of piling;

b. Confirmation that pile penetration is deep enough to secure pile stability in the interim situation, taking into account weather statistics for the relevant season and the current weather forecast; and

c. Determination by the lead engineer on duty will be made for each pile as the installation progresses and not for the site as a whole.

If it is determined that shutdown is not feasible, the reason must be documented and reported (see regulatory text).

Subsequent restart of the equipment can be initiated if the animal has been observed exiting its respective shutdown zone within 30 minutes of the shutdown, or, after an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other species).

Foundation installation will not be initiated if the clearance zones cannot be adequately monitored (*i.e.,* if they are obscured by fog, inclement weather, poor lighting conditions) for a 30 minute period prior to the commencement of soft-start, as determined by the Lead PSO. If light is insufficient, the lead PSO will call for a delay until the Clearance zone is visible in all directions. If a soft-start has been initiated before the onset of inclement weather, pile driving activities may continue through these periods if deemed necessary to ensure human safety and/or the integrity of the Project. PAM operators would review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes immediately prior to pile driving. odontocetes and 30 minutes for all other marine mammal species).

During HRG surveys, Park City Wind would be required to implement a 30-minute clearance period of the clearance zones (Table 37) immediately prior to the commencing of the survey, or when there is more than a 30-minute break in survey activities and PSOs have not been actively monitoring. The clearance zones would be monitored by PSOs, using the appropriate visual technology. If a marine mammal is observed within a clearance zone during the clearance period, ramp-up (described below) may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species). In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (IR/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.,* no delay is required) despite periods of inclement weather and/or loss of daylight.

Once the survey has commenced, Park City Wind would be required to shut down SBPs if a marine mammal enters a respective shutdown zone (Table 37). In cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The use of SBPs will not be allowed to commence or resume until the animal(s) has been confirmed to have left the shutdown zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting.

The shutdown requirement would be waived for small delphinids of the following genera: *Delphinus, Stenella, Lagenorhynchus,* and *Tursiops.* Specifically, if a delphinid from the specified genera is visually detected approaching the vessel (*i.e.,* to bow-ride) or towed equipment, shutdown would not be required. Furthermore, if there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), the PSOs would use their best professional judgment in making the decision to call for a shutdown. Shutdown would be required if a delphinid that belongs to a genus other than those specified is detected in the shutdown zone.

If a SBP is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it would be allowed to be activated again without ramp-up only if PSOs maintained constant observation and no additional detections of any marine mammal occurred within the respective shutdown zones. If a SBP was shut down for a period longer than 30 minutes, then all clearance and ramp-up procedures would be required, as previously described.

TABLE 35—MONOPILE INSTALLATION CLEARANCE AND SHUTDOWN ZONES IN METERS

Species	PSO clearance zone [1]	PSO shutdown zone	PAM clearance zone	PAM shutdown zone for 12-m monopile at 5,000 kJ	PAM shutdown zone for 13-m monopile at 6,000 kJ [2]	PAM monitoring zone [4]	Vessel separation distance
Impact Pile Driving							
North Atlantic right whale	Any distance [1]	Any distance [1]	[5] 5,600	[5] 4,700	[5] 5,500	12,000	500
Other baleen whales and sperm whales	4,700	4,700	4,700	4,700	5,500	12,000	100
Small whales and dolphins [3]	200	200	200	200	200	10,000	50
Harbor porpoise	2,300	2,300	2,300	2,300	2,300	10,000	50
Seals	1,100	1,100	1,100	1,100	1,100	10,000	50
Vibratory Pile Driving and Drilling							
North Atlantic right whale	Any distance	Any distance	4,500	4,500	n/a	10,000	500
Other baleen whales and sperm whale	4,700	4,700	4,700	4,700	n/a	10,000	100
Small whales and dolphins [3]	200	200	200	200	200	10,000	50
Harbor porpoise	2,300	2,300	2,300	2,300	n/a	10,000	50
Seals	1,400	1,400	1,400	1,400	n/a	10,000	50

[1] Park City Wind has elected to set their minimum visibility for North Atlantic right whales as ''any distance'', above the minimum required by NMFS.

[2] In the unlikely event that a 13-m monopile would need to be installed at 6,000 kJ, the alternative PAM shutdown zone would be applied. This zone is set equal to the maximum, scaled up Level A zone for large whales during impact pile driving (see Table 16).

[3] Park City Wind had proposed a minimum clearance and shut down of 50 m in their application. However, this would likely be inside of the NAS and, due to the loud noise levels generated by foundation installation activities, NMFS has increased these distances to 200 m.

[4] The PAM Monitoring Zone represents the distance at which marine mammals must be able to be acoustically detected.

[5] For piles installed between May 1–May 15 and November 1–December 31, the PAM clearance and shutdown zone is 10km.

TABLE 36—JACKET FOUNDATION INSTALLATION CLEARANCE AND SHUTDOWN ZONES IN METERS

Species	PSO clearance zone [1]	PSO shutdown zone	PAM clearance zone	PAM shutdown zone	PAM monitoring zone	Vessel separation zone
Impact Pile Driving						
North Atlantic right whale	Any distance [1]	Any distance [1]	[1] 4,500	4,500	12,000	500
Other baleen whales and sperm whale	4,500	4,500	4,500	4,500	12,000	100
Small whales and dolphins	50	50	50	50	10,000	50
Harbor porpoise	1,800	1,800	1,800	1,800	10,000	50
Seals	1,400	1,400	1,400	1,400	10,000	50
Vibratory Pile Driving and Drilling [1]						
North Atlantic right whale	Any distance	Any distance	4,500	4,500	12,000	500
Other baleen whales and sperm whale	4,700	4,700	4,700	4,700	12,000	100
Small whales and dolphins	50	50	50	50	10,000	50
Harbor porpoise	2,300	2,300	2,300	2,300	10,000	50
Seals	1,400	1,400	1,400	1,400	10,000	50

[1] For piles installed between May 1–May 15 and November 1–December 31, the PAM clearance and shutdown zone is 10km.

TABLE 37—HRG SURVEY CLEARANCE AND SHUTDOWN ZONES IN METERS

Species	Clearance zone	Shutdown zone	Vessel separation zone
North Atlantic right whale	500	500	500
All other ESA-listed marine mammals (*e.g.,* fin, sei, sperm whale)	500	100	100
All other marine mammal species [1]	100	100	50

[1] With the exception of seals and delphinid(s) from the genera *Delphinus, Lagenorhynchus, Stenella* or *Tursiops,* as described below.

TABLE 38—UXO/MEC DETONATION VISUAL AND PAM CLEARANCE ZONES IN METERS

Species	Visual clearance zone [1]	PAM clearance zone	PAM monitoring zone
North Atlantic right whale	Any distance	Any distance	12,000
Low-Frequency Hearing Group	3,800	3,800	12,000
Mid-Frequency Hearing Group	1,000	1,000	2,600
High-Frequency Hearing Group (Harbor porpoise)	6,200	6,200	14,100
Seals	1,600	1,600	7,100

[1] The minimum visibility zone (*i.e.,* the area which must be visibly clear of marine mammals) for UXO/MEC detonation is set at no less than 5 kms.

NMFS also notes that for any UXOs/MECs that require removal, Park City Wind would be required to implement the As Low as Reasonably Practicable (ALARP) process. This process would require Park City Wind to undertake ''lift-and-shift'' (*i.e.,* physical removal) and then lead up to in situ disposal, which could include low-order (deflagration) to high-order (detonation) methods of removal. Another potential approach involves the cutting of the UXO/MEC to extract any explosive components. Implementing the ALARP approach would minimize potential impacts to marine mammals as UXOs/MECs would only be detonated as a last resort.

Soft-Start/Ramp-Up

The use of a soft-start or ramp-up procedure is believed to provide additional protection to marine mammals by warning them, or providing them with a chance to leave the area prior to the hammer operating at full capacity. Soft-start typically involves initiating hammer operation at a reduced energy level (relative to full operating capacity) followed by a waiting period. Park City Wind must utilize a soft-start protocol for impact pile driving of monopiles by performing 4–6 strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers. For impact hammers, the actual number of strikes at reduced energy will vary because operating the hammer at less than full power results in ''bouncing'' of the hammer as it strikes the pile, resulting in multiple ''strikes''; however, as mentioned previously, Park City Wind will target less than 20 percent of the total hammer energy for the initial hammer strikes during soft-start.

Soft-start will be required at the beginning of each day's monopile installation, and at any time following a cessation of impact pile driving of 30 minutes or longer. If a marine mammal is detected within or about to enter the applicable clearance zones prior to the beginning of soft-start procedures, impact pile driving would be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other species).

At the start or restart of the use of boomers, sparkers, and SBPs, a ramp-up procedure would be required unless the equipment operates on a binary on/off switch. A ramp-up procedure, involving a gradual increase in source level output, is required at all times as part of the activation of the acoustic source when technically feasible. Operators would ramp up sources to half power for 5 minutes and then proceed to full power. Prior to a ramp-up procedure starting, the operator would have to

notify the Lead PSO of the planned start of the ramp-up. This notification time would not be less than 60 minutes prior to the planned ramp-up activities as all relevant PSOs would need the appropriate 30 minute period to monitor prior to the initiation of ramp-up.

The ramp-up procedure will not be initiated during periods of inclement conditions if the clearance zones cannot be adequately monitored by the PSOs using the appropriate visual technology (*e.g.,* reticulated binoculars, night vision equipment) for a 30-minute period. Prior to ramp-up beginning, the operator must receive confirmation from the PSO that the clearance zone is clear of any marine mammals.

All ramp-ups would be scheduled to minimize the overall time spent with the source being activated. The ramp-up procedure must be used at the beginning of HRG survey activities or after more than a 30-minute break in survey activities using the specified HRG equipment to provide additional protection to marine mammals in or near the survey area by allowing them to vacate the area prior to operation of survey equipment at full power.

Park City Wind would not initiate ramp-up until the clearance process has been completed. Ramp-up activities would be delayed if a marine mammal(s) enters its respective clearance zone. Ramp-up would only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until additional time has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species).

Use of Protected Species Observers (PSO) and Passive Acoustic Monitoring (PAM) Operators

As described above, Park City Wind would be required to use NMFS-approved PSOs and PAM operators during all foundation installation, HRG surveys, and UXO/MEC detonation activities. NMFS requires a minimum number of PSOs to actively observe for marine mammals before, during, and after pile driving. Concurrently, NMFS requires at least one PAM operator to be actively monitoring for marine mammals before, during, and after foundation installation pile driving and drilling activities and UXO/MEC detonation. The minimum number of PSOs required is dependent upon the area to be monitored and is thus activity specific. Along with PSO qualification requirements, equipment, and placements are specified in the regulatory text. The combined use of PSOs and PAM operators during pile driving and UXO/MEC detonation maximizes the likelihood of detecting a marine mammal and thereby increasing the effectiveness of any of the prescribed mitigation measures.

During all HRG survey activities using SBPs (*e.g.,* CHIRP, boomer, sparker, *etc.*), at least one PSO would be required to monitor during daylight hours and at least two would be required to monitor during nighttime hours, per vessel. PSOs would begin visually monitoring 30 minutes prior to the initiation of the specified acoustic source (*i.e.,* ramp-up, if applicable), during the HRG activities, and through 30 minutes after the use of the specified acoustic source has ceased. PSOs would be required to monitor the appropriate clearance and shutdown zones. These zones would be based on the radial distance from the acoustic source and not from the vessel.

Fishery Monitoring Surveys

All crew undertaking the fishery monitoring survey activities would be required to receive protected species identification training prior to activities occurring and attend the aforementioned onboarding training. Marine mammal monitoring must occur prior to, during, and after haul-back and gear must not be deployed if a marine mammal is observed in the area.

Park City Wind must implement the following ''move-on'' rule. If marine mammals are sighted within 1 nm of the planned location in the 15 minutes before gear deployment, Park City Wind may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear, based on best professional judgment. If, after moving on, marine mammals are still visible from the vessel, Park City Wind may decide to move again or to skip the station. Gear would not be deployed if marine mammals are observed within the area and if a marine mammal is deemed to be at risk of interaction, all gear will be immediately removed.

Park City Wind must deploy trap and trawl gear as soon as is practicable upon arrival at the sampling station and must initiate marine mammal watches (visual observation) no less than 15 minutes prior to both deployment and retrieval of the trap and trawl gear. Marine mammal watches must be conducted by scanning these surrounding waters with the naked eye and binoculars and monitoring effort must be maintained during the entire period of the time that gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval).

If marine mammals are sighted near the vessel during the soak and are determined to be at risk of interacting with the gear, then Park City Wind must immediately retrieve the gear as quickly as possible. Park City Wind may use best professional judgment in making this decision.

To avoid entanglement with vertical lines, buoy lines will be weighted and will not float at the surface of the water and all groundlines will consist of sinking line. Buoy lines and linkages will be compliant with best practices. ''Ropeless'' gear may be tested and used. To minimize risk of entanglement in trawl nets, trawl tow times would be limited to 20-minutes with a vessel speed of no more than 3.0 knots. Trawl nets will be fully cleared and repaired if damaged before redeployment. If marine mammals are sighted before the gear is fully removed from the water, the vessel will slow its speed and maneuver the vessel away from the animals to minimize potential interactions with the observed animal. Trawl nets will be emptied immediately after retrieval within the vicinity of the deck and the fishery researchers or crew will open the codend of the trawl net close to the deck in order to avoid injury to animals that may be caught in the gear. Any marine mammal interaction would be immediately reported to NMFS.

All gear must be clearly labeled as attributed to Park City Wind's fishery surveys. All fisheries monitoring gear must be fully cleaned and repaired (if damaged) before each use. Any lost gear associated with the fishery surveys will be reported to the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear. Finally, all survey vessels will adhere to all vessel mitigation measures previously discussed in this section.

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

Proposed Monitoring and Reporting

In order to promulgate a rulemaking for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the

monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

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

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

Separately, monitoring is also regularly used to support mitigation implementation, which is referred to as mitigation monitoring, and monitoring plans typically include measures that both support mitigation implementation and increase our understanding of the impacts of the activity on marine mammals.

During the proposed construction activities, visual monitoring by NMFS-approved PSOs would be conducted before, during, and after all pile driving, drilling, UXO/MEC detonations, and HRG surveys. PAM would also be conducted during all impact and vibratory pile driving, drilling, and UXO/MEC detonations. Observations and acoustic detections by PSOs would be used to support the activity-specific mitigation measures described above. Also, to increase understanding of the impacts of the activity on marine mammals, observers would record all incidents of marine mammal occurrence at any distance from the piling locations (impact, vibratory, or drilling activities), UXO/MEC detonation site, and during active HRG acoustic sources, and monitors would document all behaviors and behavioral changes, in concert with distance from an acoustic source. The required monitoring is described below, beginning with PSO measures that are applicable to all activities or monitoring, followed by activity-specific monitoring requirements.

Protected Species Observer and PAM Operator Requirements

Park City Wind would be required to employ PSOs and PAM operators. PSOs are trained professionals who are tasked with visually monitoring for marine mammals during pile driving, drilling, HRG surveys, and UXO/MEC detonation. The primary purpose of a PSO is to carry out the monitoring, collect data, and, when appropriate, call for the implementation of mitigation measures. In addition to visual observations, NMFS requires Park City Wind to conduct passive acoustic monitoring (PAM) during pile driving, drilling, and UXO/MEC detonations. The inclusion of PAM alongside visual data collection is valuable to provide the most accurate record of species presence as possible and, together, these two monitoring methods are well understood to provide best results when combined together (*e.g.,* Barlow and Taylor, 2005; Clark *et al.,* 2010; Gerrodette *et al.,* 2011; Van Parijs *et al.,* 2021). Acoustic monitoring (in addition to visual monitoring) increases the likelihood of detecting marine mammals within the shutdown and clearance zones of project activities, which when applied in combination of required shutdowns helps to further reduce the risk of marine mammals being exposed to sound levels that could otherwise result in acoustic injury or more intense behavioral harassment. PAM is to be conducted by NMFS-approved PAM operators and should follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind (Van Parijs *et al.,* 2021).

Park City Wind must employ independent, dedicated, trained PSOs, meaning that the PSOs must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort (visual or acoustic), collect data, and communicate with and instruct relevant Park City Wind personnel with regard to the presence of protected species and mitigation requirements, and must have successfully completed an approved PSO training course appropriate for their designated task (visual or acoustic). Acoustic monitoring PSOs (*i.e.,* PAM operators) are required to complete specialized training for operating PAM systems and should have familiarity with the vessel and associated equipment with which they will be working, PSOs can act as acoustic or visual observers (but not simultaneously) as long as they demonstrate that their training and experience are sufficient to perform each task.

Park City Wind would be required to submit names of prospective PSOs and PAM operators for review and confirmation of their approval for specific roles prior to commencement of activity requiring PSOs and/or PAM operators. NMFS must review and approve PSO and PAM operator qualifications. Resumes must include information related to relevant education, experience, and training, including dates, duration, location, and description of prior PSO experience. Resumes must be accompanied by relevant documentation of successful completion of necessary training. NMFS may approve PSOs as conditional or unconditional. A conditionally approved PSO may be one who is trained but has not yet attained the requisite experience. An unconditionally-approved PSO is one who has attained the necessary experience. For unconditional approval, the PSO must have a minimum of 90 days at sea performing the role (either visual or acoustic), with the conclusion of the most recent relevant experience not more than 18 months previous.

NMFS is also proposing requirements to ensure monitoring is conducted effectively. A minimum number of PSOs would be required to be actively observing for the presence of marine mammals during certain project activities with more PSOs required as the mitigation zone sizes increase. PSOs and PAM operators would also be required to limit watches to no more than 4 hours at a time and must not exceed a combined watch schedule of more than 12 hours in any 24-hour time period. The types of equipment required (*e.g.,* Big Eyes on the pile driving vessel) are also designed to increase marine

mammal detection capabilities. Specifics on these types of requirements can be found in the regulations at the end of this document (Requirements for monitoring and reporting). In the case where Park City Wind has not fully identified the manner by which they would conduct monitoring, they would be required to submit a plan to NMFS 180 days in advance of the commencement of work. At this time, NMFS is requiring Park City Wind to submit to NMFS, for review and approval, PSO and PAM Monitoring Plan(s) and, as described previously, a Nighttime Monitoring Plan.

As described above, PSOs and PAM operators are responsible for data collection. The data collected by PSO and PAM operators and subsequent analysis provide the necessary information to inform an estimate of the amount of take that occurred during the project, better understand the impacts of the project on marine mammals, address the effectiveness of monitoring and mitigation measures, and to adaptively manage activities and mitigation in the future. Data reported includes information on marine mammal sightings, activity occurring at time of sighting, monitoring conditions, and if mitigative actions were taken. Specific data collection requirements are contained within the regulations below.

Sound Field Verification

During the installation of at least the first three monopile foundations, all piles associated with installation of the first jacket foundation and during all UXO/MEC detonations, Park City Wind must identify source levels, the ranges to the isopleths corresponding to the Level A harassment and Level B harassment thresholds, and transmission loss coefficient(s). Park City Wind may also estimate ranges to the Level A harassment and Level B harassment isopleths by extrapolating from in situ measurements conducted at several distances from the piles monitored and UXO/MEC detonations. Park City Wind must perform sound field measurements at least three distances from the pile being driven, including, but not limited to, 750 m and the modeled Level A harassment and Level B harassment zones to verify the accuracy of those modeled zones. Sound field measurements should be configured along an unobstructed radial, free of significant bathymetric features, and which represents the most efficient acoustic propagation (*i.e.,* where sound is expected to propagate the furthest), relative to all modeled radials. At each distance from the pile, one hydrophone should be placed at depths no less than one-half the water depth and another should be placed no more than 2 meters from the seabed.

The recordings will be continuous throughout the duration of all foundation installation activities of each pile monitored. The measurement systems will have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile. The frequency range of the system will cover the range of at least 20 Hz to 20 kHz. The system will be designed to have omnidirectional sensitivity and will be designed so that the predicted broadband received level of all impact pile-driving strikes exceed the system noise floor by at least 10 dB. The dynamic range of the system will be sufficient such that at each location, pile driving signals are not clipped and are not masked by noise floor.

If acoustic field measurements collected during installation of foundation piles or UXO/MEC detonations indicate ranges to the isopleths corresponding to Level A harassment and Level B harassment thresholds are greater than the ranges predicted by modeling (assuming 10 dB attenuation), Park City Wind must implement additional noise mitigation measures prior to installing the next foundation installation or UXO/MEC detonation. Initial additional measures may include improving the efficacy of the implemented noise mitigation technology (*e.g.,* bubble curtain, double bubble curtain) and/or modifying the piling schedule to reduce the sound source. Each sequential modification would be evaluated empirically by acoustic field measurements.

In the event that field measurements indicate ranges to thresholds corresponding to Level A harassment and Level B harassment thresholds are greater than the ranges predicted by modeling (assuming 10 dB attenuation), NMFS may expand the relevant harassment, clearance, and shutdown zones and associated monitoring protocols. If harassment zones are expanded, NMFS may require additional PSOs be deployed on additional platforms with each observer responsible for maintaining watch in no more than 180 degrees.

If acoustic measurements indicate that ranges to thresholds corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10 dB attenuation), Park City Wind may request a modification of the clearance and shutdown zones for foundation installation and UXO/MEC detonations if additional acoustic modeling is conducted on subsequent piles. The number of piles that would have to be monitored would be dependent upon site conditions and future turbine placement; however, a minimum of three monopiles and two jacket installations (all pin piles for each jacket) would have to be monitored. In addition, if any subsequent pile installation locations are not represented by the previously monitored locations, SFV would be required. Upon receipt of an interim SFV report, NMFS may adjust zones (*i.e.,* Level A harassment, Level B harassment, clearance, shutdown, and/or minimum visibility zone) as deemed appropriate.

Park City Wind will submit a SFV Plan to NOAA Fisheries for review and approval at least 180 days prior to planned start of pile driving and any UXO/MEC detonations. The plan must describe how Park City Wind would ensure that the first three monopile foundation installation sites and two ESP jacket foundations (all pin piles) sites selected for SFV are representative of the rest of the foundation installation sites. As described above, each UXO/MEC detonation must be acoustically monitored. The plan must also include the methodology for collecting, analyzing, and preparing SFV data for submission to NMFS. The plan must describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. Park City Wind must also provide, as soon as they are available but no later than 48 hours after each foundation installation event or UXO/MEC detonation, the initial results of the SFV measurements to NMFS in an interim report.

In addition to identifying how foundation installation and UXO/MEC detonation noise levels will be monitored, the SFV plan must also include how operational noise of the turbines would be monitored. Operational parameters (*e.g.,* direct drive/gearbox information, turbine rotation rate) as well as sea state conditions and information on nearby anthropogenic activities (*e.g.,* vessels transiting or operating in the area) must be reported.

Reporting

Prior to initiation of project activities, Park City Wind would provide a report to NMFS Office of Protected Resources documenting that all required training for Park City Wind personnel (*i.e.,* vessel crews, vessel captains, PSOs, and PAM operators) has been completed and provide the date that each in-water construction activity considered in this

proposed rule (*i.e.,* foundation installation, cable landfall construction, marina activities, and HRG surveys) would occur.

NMFS would require standardized and frequent reporting from Park City Wind during the life of the proposed regulations and LOA. All data collected relating to the Project would be recorded using industry-standard software installed on field laptops and/or tablets. Park City Wind would be required to submit weekly, monthly and annual reports. For all monitoring efforts and marine mammal sightings, the species, location, time, and many other factors must be reported to NMFS. The specifics of what we require to be reported can be found in the regulatory text at the end of this proposed rule, including for all real-time acoustic detections of marine mammals which also must be reported weekly, monthly, and annually. SFV reporting, as described above, would also be required.

Weekly Report—During foundation installation activities, Park City Wind would be required to compile and submit weekly marine mammals and pile driving activity reports to NMFS Office of Protected Resources that document the daily start and stop of all pile driving activities, drilling, UXO/MEC detonations, and HRG activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) (*e.g.,* bubble rate). Weekly reports would be due on Wednesday for the previous week (Sunday–Saturday). The weekly report would also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, weekly reports would no longer be required.

Monthly Report—Park City Wind would be required to compile and submit monthly reports to NMFS Office of Protected Resources that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, number of UXO/MEC detonations, all detections of marine mammals, and any mitigative actions taken. Monthly reports would be due on the 15th of the month for the previous month. The monthly report would also identify which turbines become operational and when (a map must be provided). Once foundation pile installation is complete, monthly reports would no longer be required.

Annual Reporting—Park City Wind would be required to submit an annual PSO and PAM report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year describing, in detail, all of the information required in the monitoring section above. A final annual report would be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments were received from NMFS Office of Protected Resources within 60 calendar days of NMFS' receipt of the draft report, the report would be considered final.

Final 5-Year Reporting—Park City Wind must submit its draft 5-year report(s) to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report shall be considered final. Information contained within this report is described at the beginning of this section.

Situational Reporting—Specific situations encountered during the development of the Project would require immediate reporting. If a North Atlantic right whale is acoustical detected during PAM, the date, time, and location (*i.e.,* latitude and longitude of recorder) of the detection, as well as the recording platform that had the detection, must be reported to *nmfs.pacmdata@noaa.gov* as soon as feasible, no longer than 24 hours after the detection. Full detection data and metadata, including GPS data records, must be submitted to *nmfs.pacmdata@noaa.gov* monthly on the 15th of every month for the previous month via ISO standard metadata forms available on the NMFS North Atlantic right whale Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates.*

If a North Atlantic right whale is observed at any time by PSOs or Park City Wind personnel, Park City Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System (866–755–6622), to the U.S. Coast Guard via channel 16, and through the WhaleAlert app (*https://www.whalealert/org/*) as soon as feasible but no longer than 24 hours after the sighting. Information reported must include, at a minimum: time of sighting, location, and number of North Atlantic right whales observed. The specifics of what NMFS Office of Protected Resources requires to be reported is listed at the end of this proposed rule in the regulatory text.

If a sighting of a stranded, entangled, injured, or dead marine mammal occurs, the sighting would be reported to NMFS Office of Protected Resources, the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866–755–6622 or the Dolphin and Whale 911 app), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, Park City Wind must immediately cease all activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Park City Wind may not resume their activities until notified by NMFS Office of Protected Resources. The specifics of what NMFS Office of Protected Resources requires to be reported is listed at the end of this proposed rule in the regulatory text.

In the event of a vessel strike of a marine mammal by any vessel associated with the Project, Park City Wind must immediately report the strike incident to the NMFS Office of Protected Resources and the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division (GARFO) within and no later than 24 hours. Park City Wind must immediately cease all on-water activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Park City Wind may not resume their activities until notified by NMFS. The specifics of what NMFS Office of Protected Resources requires to be reported is listed at the end of this proposed rule in the regulatory text.

In the event of any lost gear associated with the fishery surveys, Park City Wind must report to the GARFO as soon as

possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

Sound Field Verification—Park City Wind would be required to submit interim sound field verification reports after each foundation installation and UXO/MEC detonation monitored as soon as possible but within 48-hours. A final SFV report for foundation installation and UXO/MEC detonations would be required within 90 days following completion of acoustic monitoring for each activity.

Adaptive Management

The regulations governing the take of marine mammals incidental to Park City Wind's construction activities would contain an adaptive management component. The monitoring and reporting requirements in this proposed rule are designed to provide NMFS with information that helps us better understand the impacts of the activities on marine mammals and informs our consideration of whether any changes to mitigation or monitoring are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from Park City Wind regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOA. During the course of the rule, Park City Wind (and other LOA-holders conducting offshore wind development activities) would be required to participate in one or more adaptive management meetings convened by NMFS and/or BOEM, in which the above information would be summarized and discussed in the context of potential changes to the mitigation or monitoring measures.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, and Level A harassment or Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

In the Estimated Take of Marine Mammals section, we identified the subset of potential effects that would be expected to qualify as takes under the MMPA, and then identified the maximum number of takes by Level A harassment and Level B harassment that we estimate are likely to occur based on the methods described. The impact that any given take would have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). In this proposed rule, we evaluate the likely impacts of the enumerated harassment takes that are proposed for authorization in the context of the specific circumstances surrounding these predicted takes. We also collectively evaluate this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific discussions that support our negligible impact conclusions for each stock. As described above, no serious injury or mortality is expected or proposed for authorization for any species or stock.

The Description of the Specified Activities section describes the specified activities proposed by Park City Wind that may result in take of marine mammals and an estimated schedule for conducting those activities. Park City Wind has provided a realistic construction schedule although we recognize schedules may shift for a variety of reasons (*e.g.,* weather or supply delays). However, the total amount of take would not exceed the 5-year totals and maximum annual total in any given year indicated in Tables 33 and 34, respectively.

We base our analysis and negligible impact determination on the maximum number of takes that have the potential to occur and are proposed to be authorized annually and across the 5-year LOA, if issued, and extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals and the number and context of the individuals affected. As stated before, the number of takes, both maximum annual and 5-year total, alone are only a part of the analysis.

To avoid repetition, we provide some general analysis in this Negligible Impact Analysis and Determination section that applies to all the species listed in Table 5 given that some of the anticipated effects of Park City Wind's construction activities on marine mammals are expected to be relatively similar in nature. Then, we subdivide into more detailed discussions for mysticetes, odontocetes, and pinnipeds which have broad life history traits that support an overarching discussion of some factors considered within the analysis for those groups (*e.g.,* habitat-use patterns, high-level differences in feeding strategies).

Last, we provide a negligible impact determination for each species or stock, providing species or stock-specific information or analysis, where appropriate, for example, for North Atlantic right whales given their population status. Organizing our analysis by grouping species or stocks that share common traits or that would respond similarly to effects of Park City Wind's proposed activities, and then providing species- or stock-specific information allows us to avoid duplication while ensuring that we have analyzed the effects of the specified activities on each affected species or

stock. It is important to note that in the group or species sections, we base our negligible impact analysis on the maximum annual take that is predicted under the 5-year rule; however, the majority of the impacts are associated with WTG foundation and ESP foundation installation, which would occur largely within the first 3 years. The estimated take in the other years is expected to be notably less, which is reflected in the total take that would be allowable under the rule (see Tables 32, 33, and 34).

As described previously, no serious injury or mortality is anticipated or proposed for authorization in this rule. Any Level A harassment authorized would be in the form of auditory injury (*i.e.,* PTS) and not non-auditory injury (*e.g.,* lung injury or gastrointestinal injury from UXO/MEC detonation). The amount of harassment Park City Wind has requested, and NMFS is proposing to authorize, is based on exposure models that consider the outputs of acoustic source and propagation models and other data such as frequency of occurrence or group sizes. Several conservative parameters and assumptions are ingrained into these models, such as assuming forcing functions that consider direct contact with piles (*i.e.,* no cushion allowances) and application of the highest monthly sound speed profile to all months within a given season. The exposure model results do not reflect any mitigation measures or avoidance response. The amount of take requested and proposed to be authorized also reflects careful consideration of other data (*e.g.,* PSO and group size data) and, for Level A harassment potential of some large whales, the consideration of mitigation measures. For all species, the amount of take proposed to be authorized represents the maximum amount of Level A harassment and Level B harassment that is likely to occur.

Behavioral Disturbance

In general, NMFS anticipates that impacts on an individual that has been harassed are likely to be more intense when exposed to higher received levels and for a longer duration (though this is in no way a strictly linear relationship for behavioral effects across species, individuals, or circumstances) and less severe impacts result when exposed to lower received levels and for a brief duration. However, there is also growing evidence of the importance of contextual factors such as distance from a source in predicting marine mammal behavioral response to sound—*i.e.,* sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (*e.g.,* DeRuiter and Doukara, 2012; Falcone *et al.,* 2017). As described in the Potential Effects to Marine Mammals and their Habitat section, the intensity and duration of any impact resulting from exposure to Park City Wind's activities is dependent upon a number of contextual factors including, but not limited to, sound source frequencies, whether the sound source is moving towards the animal, hearing ranges of marine mammals, behavioral state at time of exposure, status of individual exposed (*e.g.,* reproductive status, age class, health) and an individual's experience with similar sound sources. Southall *et al.* (2021), Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.,* behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources. Harassment of marine mammals may result in behavioral modifications (*e.g.,* avoidance, temporary cessation of foraging or communicating, changes in respiration or group dynamics, masking) or may result in auditory impacts such as hearing loss. In addition, some of the lower level physiological stress responses (*e.g.,* change in respiration, change in heart rate) discussed previously would likely co-occur with the behavioral modifications, although these physiological responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect Park City Wind's activities to produce conditions of long-term and continuous exposure to noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

In the range of behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within 1 day), the less severe end might include exposure to comparatively lower levels of a sound, at a greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time, or breaking off one or a few feeding bouts. More severe effects could occur if an animal gets close enough to the source to receive a comparatively higher level, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response, and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Many species perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than one day or recur on subsequent days (Southall *et al.,* 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans (Baird *et al.,* 2008; Barlow *et al.,* 2020; Henderson *et al.,* 2016; Schorr *et al.,* 2014). It is important to note the water depth in the Project area is shallow (ranging from 2 m in the OECC to 62 m in the lease area) and deep diving species, such as sperm whales, are not expected to be engaging in deep foraging dives when exposed to noise above NMFS harassment thresholds during the specified activities. Therefore, we do not anticipate impacts to deep foraging behavior to be impacted by the specified activities.

It is also important to identify that the estimated number of takes does not necessarily equate to the number of individual animals the Project expects to harass (which is lower), but rather to the instances of take (*i.e.,* exposures above the Level B harassment thresholds) that may occur. These instances may represent either brief exposures of seconds for UXO/MEC detonations, seconds to minutes for HRG surveys, or, in some cases, longer durations of exposure within a day (*e.g.,* pile driving). Some individuals of a species may experience recurring instances of take over multiple days throughout the year, while some members of a species or stock may experience one exposure as they move through an area, which means that the number of individuals taken is smaller than the total estimated takes. In short, for species that are more likely to be migrating through the area and/or for which only a comparatively smaller number of takes are predicted (*e.g.,* some of the mysticetes), it is more likely that each take represents a different

individual, whereas for non-migrating species with larger amounts of predicted take, we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some would be taken across multiple days.

For the Project, impact pile driving of foundation piles is most likely to result in a higher magnitude and severity of behavioral disturbance than other activities (*i.e.,* vibratory pile driving, drilling, UXO/MEC detonations, and HRG surveys). Impact pile driving has higher source levels and longer durations (on an annual basis) than vibratory pile driving, drilling and HRG surveys. HRG survey equipment also produces much higher frequencies than pile driving, resulting in minimal sound propagation. While UXO/MEC detonations may have higher source levels, impact pile driving is planned for longer durations (*i.e.,* a maximum of 10 UXO/MEC detonations are planned, which would result in only instantaneous exposures). While foundation installation impact pile driving is anticipated to be most impactful for these reasons, impacts are minimized through implementation of mitigation measures, including use of a sound attenuation system, soft-starts, the implementation of clearance zones that would facilitate a delay pile driving commencement, and implementation of shutdown zones. All these measures are designed to avoid or minimize harassment. For example, given sufficient notice through the use of soft-start, marine mammals are expected to move away from a sound source that is annoying prior to becoming exposed to very loud noise levels. The requirement to couple visual monitoring and PAM before and during all foundation installation and UXO/MEC detonations would increase the overall capability to detect marine mammals than one method alone. Measures such as the requirement to apply sound attention devices and implement clearance zones also apply to UXO/MEC detonation(s), which also have the potential to elicit more severe behavioral reactions in the unlikely event that an animal is relatively close to the explosion in the instant that it occurs; hence, severity of behavioral responses are expected to be lower than would be the case without mitigation.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe response, if they are not expected to be repeated over numerous or sequential days, impacts to individual fitness are not anticipated. Also, the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present—avoiding biologically important habitats will provide opportunities to compensate for reduced or lost foraging (Keen *et al.,* 2021). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.,* 2018; Harris *et al.,* 2017; King *et al.,* 2015; National Academy of Science (NAS), 2017; New *et al.,* 2014; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015).

Temporary Threshold Shift (TTS)

TTS is one form of Level B harassment that marine mammals may incur through exposure to the Project's activities and, as described earlier, the proposed takes by Level B harassment may represent takes in the form of behavioral disturbance, TTS, or both. As discussed in the Potential Effects to Marine Mammals and their Habitat section, in general, TTS can last from a few minutes to days, be of varying degree, and occur across different frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Impact and vibratory pile driving, drilling, and UXO/MEC detonation are broadband noise sources but generate sounds in the lower frequency ranges (with most of the energy below 1–2 kHz, but with a small amount energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS is higher in low-frequency cetaceans (*i.e.,* mysticetes) than other marine mammal hearing groups and would be more likely to occur in frequency bands in which they communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species given the frequencies produced by these activities do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalizations, the frequency range of TTS from the Project's pile driving, drilling, and UXO/MEC detonation activities would not typically span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. However, the mitigation measures proposed by the Project and proposed by NMFS, further reduce the potential for TTS in mysticetes.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously (refer back to Estimated Take of Marine Mammals). However, source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the proposed mitigation and the nominal speed of the receiving animal relative to the stationary sources such as impact pile driving. The recovery time of TTS is also of importance when considering the potential impacts from TTS. In TTS laboratory studies (as discussed in the Potential Effects of the Specified Activities on Marine Mammals and their Habitat section), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes) and we note that while the pile driving activities last for hours a day, it is unlikely that most marine mammals would stay in the close vicinity of the source long enough to incur more severe TTS. UXO/MEC detonation also has the potential to result in TTS. However, given the duration of exposure is extremely short (milliseconds), the degree of TTS (*i.e.,* the amount of dB shift) is expected to be small and TTS duration is expected to be short (minutes to hours). Overall, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the unlikely scenario that any TTS overlapped the entirety of a critical hearing range, it is unlikely that TTS of the nature expected to result from the project's activities would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Permanent Threshold Shift (PTS)

Park City Wind has requested, and NMFS proposes to authorize, a very small amount of take by PTS to some marine mammal individuals. The numbers of proposed annual takes by Level A harassment are relatively low for all marine mammal stocks and species (Table 34). The only activities incidental to which we anticipate PTS may occur is from exposure to impact pile driving and UXO/MEC detonations, which produce sounds that are both

impulsive and primarily concentrated in the lower frequency ranges (below 1 kHz) (David, 2006; Krumpel *et al.,* 2021).

There are no PTS data on cetaceans and only one instance of PTS being induced in an older harbor seals (Reichmuth *et al.,* 2019). However, available TTS data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds (Southall *et al.,* 2007; NMFS, 2018; Southall *et al.,* 2019)) suggest that most threshold shifts occur in the frequency range of the source up to one octave higher than the source. We would anticipate a similar result for PTS. Further, no more than a small degree of PTS is expected to be associated with any of the incurred Level A harassment, given it is unlikely that animals would stay in the close vicinity of a source for a duration long enough to produce more than a small degree of PTS.

PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving or instantaneous UXO/MEC detonation (*i.e.,* the low-frequency region below 2 kHz) (Cody and Johnstone, 1981; McFadden, 1986; Finneran, 2015), not severe hearing impairment. If hearing impairment occurs from either impact pile driving or UXO/MEC detonation, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Park City Wind estimates 10 UXOs/MECs may be detonated and the exposure analysis assumes the worst-case scenario that all of the UXOs/MECs found would consist of the largest charge weight of UXO/MEC (E12; 454 kg). However, it is highly unlikely that all charges would be this maximum size; thus, the amount of Level A harassment that may occur incidental to the detonation of the UXOs/MECs would likely be less than what is estimated here. In addition, during impact pile driving, given sufficient notice through use of soft-start prior to implementation of full hammer energy during impact pile driving, marine mammals are expected to move away from a sound source that is annoying prior to it resulting in severe PTS.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual are similar to those discussed for TTS (*e.g.,* decreased ability to communicate, forage effectively, or detect predators), but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Also, though, masking can result from the sum of exposure to multiple signals, none of which might individually cause TTS. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Also inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency).

As our analysis has indicated, for this project we expect that impact pile driving foundations have the greatest potential to mask marine mammal signals, and this pile driving may occur for several, albeit intermittent, hours per day, for multiple days per year. Masking is fundamentally more of a concern at lower frequencies (which are pile driving dominant frequencies), because low frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower low frequency calls of mysticetes, as well as many non-communication cues related to fish and invertebrate prey, and geologic sounds that inform navigation. However, the area in which masking would occur for all marine mammal species and stocks (*e.g.,* predominantly in the vicinity of the foundation pile being driven) is small relative to the extent of habitat used by each species and stock. In summary, the nature of the Project's activities, paired with habitat use patterns by marine mammals, does not support the likelihood that the level of masking that could occur would have the potential to affect reproductive success or survival.

Impacts on Habitat and Prey

Construction activities or UXO/MEC detonation may result in fish and invertebrate mortality or injury very close to the source, and all activities (including HRG surveys) may cause some fish to leave the area of disturbance. It is anticipated that any mortality or injury would be limited to a very small subset of available prey and the implementation of mitigation measures such as the use of a noise attenuation system during pile driving, drilling, and UXO/MEC detonation would further limit the degree of impact (again noting UXO/MEC detonation would be limited to 10 events over 2 years). Behavioral changes in prey in response to construction activities could temporarily impact marine mammals' foraging opportunities in a limited portion of the foraging range but, because of the relatively small area of the habitat that may be affected at any given time (*e.g.,* around a pile being driven), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Cable presence and operation are not anticipated to impact marine mammal habitat as these would be buried, and any electromagnetic fields emanating from the cables are not anticipated to result in consequences that would impact marine mammals prey to the extent they would be unavailable for consumption.

The presence and operation of wind turbines within the lease area could have longer-term impacts on marine mammal habitat, as the project would result in the persistence of the structures within marine mammal habitat for more than 30 years. The presence and operation of an extensive number of structures such as wind turbines are, in general, likely to result in local and broader oceanographic effects in the marine environment, and may disrupt dense aggregations and distribution of marine mammal zooplankton prey through altering the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.,* 2021; Johnson *et al.,* 2021; Christiansen *et al.,* 2022; Dorrell *et al.,* 2022). However, the scale of impacts is difficult to predict and may vary from hundreds of meters for local individual turbine impacts (Schultze *et al.,* 2020) to large-scale dipoles of surface elevation changes stretching hundreds of kilometers (Christiansen *et al.,* 2022).

As discussed in the Potential Effects of the Specified Activities on Marine Mammals and their Habitat section, the Project would consist of no more than 132 foundations in the lease area. While there are likely to be oceanographic impacts from the presence and operation of the Project, meaningful oceanographic impacts relative to stratification and mixing that would significantly affect marine mammal habitat and prey over large areas in key foraging habitats during the effective period of the proposed rule are not anticipated (which considers 2–3 years

of turbine operation). For these reasons, if oceanographic features are affected by wind farm operation during the course of the proposed rule, the impact on marine mammal habitat and their prey is likely to be comparatively minor.

Mitigation To Reduce Impacts on All Species

This proposed rulemaking includes a variety of mitigation measures designed to minimize impacts on all marine mammals, with a focus on North Atlantic right whales (the latter is described in more detail below). For pile driving and drilling of foundation piles (*i.e.,* foundation installation), and UXO/MEC detonations, eight overarching mitigation measures are proposed, which are intended to reduce both the number and intensity of marine mammal takes: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection within designated zones triggering delay or shutdown); (3) use of PAM to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering delay or shutdown); (4) implementation of clearance zones; (5) implementation of shutdown zones; (6) use of soft-start (impact pile driving only); (7) use of noise attenuation technology; (8) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Project personnel must be reported to PSOs; and (9) sound field verification monitoring.

When foundation installation or UXO/MEC detonation is conducted, Park City Wind is committed to reducing the noise levels generated to the lowest levels practicable and ensuring that they do not exceed a noise footprint above that which was modeled, assuming a 10-dB attenuation. Use of a soft-start during impact pile driving would allow animals to move away from (*i.e.,* avoid) the sound source prior to applying higher hammer energy levels needed to install the pile (Park City Wind would not use a hammer energy greater than necessary to install piles). Clearance zone and shutdown zone implementation, required when marine mammals are within given distances associated with certain impact thresholds for all activities, would reduce the magnitude and severity of marine mammal take. The use of multiple PSOs, PAM, and maintaining awareness of marine mammal sightings reported in the region would aid in detecting marine mammals triggering the implementation of the mitigation measures. Further, UXO/MEC detonation may only occur when all other possible means of removal have been deemed insufficient. The reporting requirements, including SFV reporting, will assist NMFS in identifying if impacts beyond those analyzed in this proposed rule are occurring, potentially leading to the need to enact adaptive management measures in addition to the proposed mitigation measures.

Mysticetes

Six mysticete species (comprising six stocks) of cetaceans (North Atlantic right whale, humpback whale, fin whale, sei whale, minke whale, and blue whale) may be taken by harassment. These species, to varying extents, utilize coastal New England waters, including the project area, for the purposes of migration, foraging, and socializing. Mysticetes are in the Low-Frequency hearing group.

Behavioral data on mysticete reactions to pile driving noise are scant. Kraus *et al.* (2019) predicted that the three main impacts of offshore wind farms on marine mammals would consist of displacement, behavioral disruptions, and stress. Broadly, we can look to studies that have focused on other noise sources such as seismic surveys and military training exercises, which suggest that exposure to loud signals can result in avoidance of the sound source (or displacement if the activity continues for a longer duration in a place where individuals would otherwise have been staying, which is less likely for mysticetes in this area), disruption of foraging activities (if they are occurring in the area), local masking around the source, associated stress responses, and impacts to prey, as well as TTS or PTS in some cases.

Mysticetes encountered in the Project area are expected to be migrating through and/or foraging within the project area. The extent to which an animal engages in these behaviors in the area is species-specific and varies seasonally. Many mysticetes are expected to predominantly be migrating through the project area towards or from these feeding habitats. While we have acknowledged above that mortality, hearing impairment, or displacement of mysticete prey species may result locally from impact pile driving and UXO/MEC detonations, given the very short duration of and broad availability of prey species in the area and the availability of alternative suitable foraging habitat for the mysticete species most likely to be affected, any impacts on mysticete foraging would be expected to be minor. Whales temporarily displaced from the proposed project area would be expected to have sufficient remaining feeding habitat available to them, and would not be prevented from feeding in other areas within the biologically important feeding habitats. In addition, any displacement of whales or interruption of foraging bouts would be expected to be relatively temporary in nature.

The potential for repeated exposures is dependent upon the residency time of whales, with migratory animals unlikely to be exposed on repeated occasions and animals remaining in the area to be more likely exposed repeatedly. Where relatively low amounts of species-specific proposed Level B harassment are predicted (compared to the abundance of each mysticete species or stock, such as is indicated in Table 34) and movement patterns suggest that individuals would not necessarily linger in a particular area for multiple days, each predicted take likely represents an exposure of a different individual; the behavioral impacts would, therefore, be expected to occur within a single day within a year—an amount that would not be expected to impact reproduction or survival. Alternatively, species with longer residence time in the project area may be subject to repeated exposures across multiple days.

In general, for this project, the duration of exposures would not be continuous throughout any given day and pile driving would not occur on all consecutive days within a given year, due to weather delays or any number of logistical constraints Park City Wind has identified. Species-specific analysis regarding potential for repeated exposures and impacts is provided below. Overall, we do not expect impacts to whales within the project area, including fin whales foraging in the small fin whale feeding BIA that partially overlaps the project area, to affect the fitness of any large whales.

Blue, fin, humpback, minke, and sei whales are the only mysticete species for which PTS is anticipated and proposed to be authorized. As described previously, PTS for mysticetes from some project activities may overlap frequencies used for communication, navigation, or detecting prey. However, given the nature and duration of the activity, the mitigation measures, and likely avoidance behavior, any PTS is expected to be of a small degree, would be limited to frequencies where pile driving noise is concentrated (*i.e.,* only a small subset of their expected hearing range) and would not be expected to impact reproductive success or survival.

North Atlantic Right Whales

North Atlantic right whales are listed as endangered under the ESA and as both Depleted and Strategic under the MMPA. As described in the Effects to Marine Mammals and Their Habitat section, North Atlantic right whales are threatened by a low population abundance, higher than average mortality rates, and lower than average reproductive rates. Recent studies have reported individuals showing high stress levels (*e.g.,* Corkeron *et al.,* 2017) and poor health, which has further implications on reproductive success and calf survival (Christiansen *et al.,* 2020; Stewart *et al.,* 2021; Stewart *et al.,* 2022). As described below, a UME has been designated for North Atlantic right whales. Given this, the status of the North Atlantic right whale population is of heightened concern and, therefore, merits additional analysis and consideration. No serious injury or mortality, nor Level A harassment, is anticipated or proposed for authorization for this species.

The rule would allow for the authorization of up to 293 takes, by Level B harassment only, over the five-year period, with a maximum annual allowable take of 111 (equating to approximately 32.8 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HRG surveys would be occurring). The project area is known as a migratory corridor for North Atlantic right whales and given the nature of migratory behavior (*e.g.* continuous path), we anticipate that many of the instances of take would not represent repeat takes of any individual. However, changing distribution of right whales, and observations of increased residency times in the broader southern New England area indicate that some subset of the individual whales exposed could be taken up to a few times annually.

Southern New England, including the project area, may be a stopover site for migrating North Atlantic right whales moving to or from southeastern calving grounds. Qualitative observations include animals feeding and socializing (Quinatna-Rizzo et al. 2021). The right whales observed during the study period were primarily concentrated in the northeastern and southeastern sections of the MA WEA during the summer (June–August) and winter (December–February). Right whale distribution did shift to the west, closer to the project area, into the RI/MA WEA in the spring (March–May). Quintana-Rizzo et al. (2021) found that approximately 23 percent of the right whale population is present from December through May, and the mean residence time has tripled to an average of 13 days during these months.

In general, North Atlantic right whales in the project area are expected to be engaging in migratory behavior. Given the species' migratory behavior in the project area, we anticipate individual whales would be typically migrating through the area during most months when foundation installation and UXO/MEC detonation would occur (given the seasonal restrictions on foundation installation and UXO/MEC detonation, rather than lingering for extended periods of time). Other work that involves either much smaller harassment zones (*e.g.* HRG surveys) or is limited in amount (cable landfall construction) may also occur during periods when North Atlantic right whales are using the habitat for migration. It is important to note the activities occurring from December through May that may impact North Atlantic right whale would be primarily HRG surveys, which would not result in very high received levels. Across all years, if an individual were to be exposed during a subsequent year, the impact of that exposure is likely independent of the previous exposure given the duration between exposures.

North Atlantic right whales are presently experiencing an ongoing UME (beginning in June 2017). Preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of North Atlantic right whales. Given the current status of the North Atlantic right whale, the loss of even one individual could significantly impact the population. No mortality, serious injury, or injury of North Atlantic right whales as a result of the project is expected or proposed to be authorized. Any disturbance to North Atlantic right whales due to Park City Wind's activities is expected to result in temporary avoidance of the immediate area of construction. As no injury, serious injury, or mortality is expected or authorized, and Level B harassment of North Atlantic right whales will be reduced to the level of least practicable adverse impact through use of mitigation measures, the authorized number of takes of North Atlantic right whales would not exacerbate or compound the effects of the ongoing UME in any way.

As described in the general *Mysticetes* section above, foundation installation is likely to result in the highest amount of annual take and is of greatest concern given loud source levels. This activity would likely be limited to up to 113 days over a maximum of 3 years, during times when, based on the best available scientific data, North Atlantic right whales are less frequently encountered and are likely to be primarily migrating. The potential types, severity, and magnitude of impacts are also anticipated to mirror that described in the general *Mysticetes* section above, including avoidance (the most likely outcome), changes in foraging or vocalization behavior, masking, a small amount of TTS, and temporary physiological impacts (*e.g.,* change in respiration, change in heart rate). Importantly, the effects of the activities proposed by Park City Wind are expected to be sufficiently low-level and localized to specific areas as to not meaningfully impact important behaviors such as migratory behavior of North Atlantic right whales. These takes are expected to result in temporary behavioral reactions, such as slight displacement (but not abandonment) of migratory habitat or temporary cessation of feeding. Further, given these exposures are generally expected to occur to different individual right whales migrating through (*i.e.,* many individuals would not be impacted on more than one day in a year), with some subset potentially being exposed on no more than a few days within the year, they are unlikely to result in energetic consequences that could affect reproduction or survival of any individuals.

Overall, NMFS expects that any harassment of North Atlantic right whales incidental to the specified activities would not result in changes to their migration patterns or foraging success, as only temporary avoidance of an area during construction is expected to occur. As described previously, North Atlantic right whales migrating through and/or foraging in these areas are not expected to remain in this habitat for extensive durations, relative to habitats to nearby or to the north such as Nantucket and Martha's Vineyard or the Great South Channel (known core foraging habitats) (Quintana-Rizzo *et al.,* 2021), and any temporarily displaced animals would be able to return to or continue to travel through and forage in these areas once activities have ceased.

Although acoustic masking may occur in the vicinity of the foundation installation activities, based on the acoustic characteristics of noise associated with pile driving (*e.g.,* frequency spectra, short duration of exposure) and construction surveys (*e.g.,* intermittent signals), NMFS expects masking effects to be minimal

(*e.g.,* impact or vibratory pile driving) to none (*e.g.,* HRG surveys). In addition, masking would likely only occur during the period of time that a North Atlantic right whale is in the relatively close vicinity of pile driving, which is expected to be intermittent within a day, and confined to the months in which North Atlantic right whales are at lower densities and primarily moving through the area, anticipated mitigation effectiveness, and likely avoidance behaviors. TTS is another potential form of Level B harassment that could result in brief periods of slightly reduced hearing sensitivity affecting behavioral patterns by making it more difficult to hear or interpret acoustic cues within the frequency range (and slightly above) of sound produced during impact pile driving; however, any TTS would likely be of low amount, limited duration, and limited to frequencies where most construction noise is centered (below 2 kHz). NMFS expects that right whale hearing sensitivity would return to pre-exposure levels shortly after migrating through the area or moving away from the sound source.

As described in the Potential Effects to Marine Mammals and Their Habitat section, the distance of the receiver to the source influences the severity of response with greater distances typically eliciting less severe responses. NMFS recognizes North Atlantic right whales migrating could be pregnant females (in the fall) and cows with older calves (in spring) and that these animals may slightly alter their migration course in response to any foundation pile driving; however, as described in the Potential Effects to Marine Mammals and Their Habitat section, we anticipate that course diversion would be of small magnitude. Hence, while some avoidance of the pile driving activities may occur, we anticipate any avoidance behavior of migratory North Atlantic right whales would be similar to that of gray whales (Tyack *et al.,* 1983), on the order of hundreds of meters up to 1 to 2 km. This diversion from a migratory path otherwise uninterrupted by the Project's activities is not expected to result in meaningful energetic costs that would impact annual rates of recruitment of survival. NMFS expects that North Atlantic right whales would be able to avoid areas during periods of active noise production while not being forced out of this portion of their habitat.

North Atlantic right whale presence in the project area is year-round. However, abundance during summer months is lower compared to the winter months with spring and fall serving as ''shoulder seasons'' wherein abundance waxes (fall) or wanes (spring). Given this year-round habitat usage, in recognition that where and when whales may actually occur during project activities is unknown as it depends on the annual migratory behaviors, Park City Wind has proposed and NMFS is proposing to require a suite of mitigation measures designed to reduce impacts to North Atlantic right whales to the maximum extent practicable. These mitigation measures (*e.g.,* seasonal/daily work restrictions, vessel separation distances, reduced vessel speed) would not only avoid the likelihood of ship strikes but also would minimize the severity of behavioral disruptions by minimizing impacts (*e.g.,* through sound reduction using attenuation systems and reduced temporal overlap of project activities and North Atlantic right whales). This would further ensure that the number of takes by Level B harassment that are estimated to occur are not expected to affect reproductive success or survivorship by detrimental impacts to energy intake or cow/calf interactions during migratory transit. However, even in consideration of recent habitat-use and distribution shifts, Park City Wind would still be installing foundations when the presence of North Atlantic right whales is expected to be lower.

As described in the Description of Marine Mammals in the Area of Specified Activities section, Park City Wind would be constructed within the North Atlantic right whale migratory corridor BIA, which represent areas and months within which a substantial portion of a species or population is known to migrate. The Project lease area is relatively small compared with the migratory BIA area (approximately 411 km^2 for OCS–A 0534 and 262 km^2 in OCS–A 0501 versus the size of the full North Atlantic right whale migratory BIA, 269,448 km^2). Because of this, overall North Atlantic right whale migration is not expected to be impacted by the proposed activities. There are no known North Atlantic right whale mating or calving areas within the project area. Prey species are mobile (*e.g.,* calanoid copepods can initiate rapid and directed escape responses) and are broadly distributed throughout the project area (noting again that North Atlantic right whale prey is not particularly concentrated in the project area relative to nearby habitats). Therefore, any impacts to prey that may occur are also unlikely to impact marine mammals.

The most significant measure to minimize impacts to individual North Atlantic right whales is the seasonal moratorium on all foundation installation activities from January 1 through April 30 (with no impact pile driving or drilling scheduled in December and no vibratory pile driving in May and December) when North Atlantic right whale abundance in the project area is expected to be highest. NMFS also expects this measure to greatly reduce the potential for mother-calf pairs to be exposed to impact pile driving noise above the Level B harassment threshold during their annual spring migration through the project area from calving grounds to primary foraging grounds (*e.g.,* Cape Cod Bay). UXO/MEC detonations would also be restricted from December through May. Further, NMFS expects that exposures to North Atlantic right whales would be reduced due to the additional proposed mitigation measures that would ensure that any exposures above the Level B harassment threshold would result in only short-term effects to individuals exposed.

Pile driving, drilling, and UXO/MEC detonations may only begin in the absence of North Atlantic right whales (based on visual and passive acoustic monitoring). If pile driving, drilling, or UXO/MEC detonations have commenced, NMFS anticipates North Atlantic right whales would avoid the area, utilizing nearby waters to carry on pre-exposure behaviors. However, foundation installation activities must be shut down if a North Atlantic right whale is sighted at any distance unless a shutdown is not feasible due to risk of injury or loss of life. Shutdown may occur anywhere if North Atlantic right whales are seen within or beyond the Level B harassment zone, further minimizing the duration and intensity of exposure. NMFS anticipates that if North Atlantic right whales go undetected and they are exposed to foundation installation or UXO/MEC detonation noise, it is unlikely a North Atlantic right whale would approach the sound source locations to the degree that they would purposely expose themselves to very high noise levels. These measures are designed to avoid PTS and also reduce the severity of Level B harassment, including the potential for TTS. While some TTS could occur, given the proposed mitigation measures (*e.g.,* delay pile driving upon a sighting or acoustic detection and shutting down upon a sighting or acoustic detection), the potential for TTS to occur is low.

The proposed clearance and shutdown measures are most effective when detection efficiency is maximized, as the measures are triggered by a sighting or acoustic detection. To maximize detection efficiency, Park City

Wind proposed, and NMFS is proposing to require, the combination of PAM and visual observers. Park City Wind proposed, and NMFS is proposing to require, communication protocols with other Project vessels, and other heightened awareness efforts (*e.g.,* daily monitoring of North Atlantic right whale sighting databases) such that as a North Atlantic right whale approaches the source (and thereby could be exposed to higher noise energy levels), PSO detection efficacy would increase, the whale would be detected, and a delay to commencing foundation installation or shutdown (if feasible) would occur. In addition, the implementation of a soft-start for impact pile driving would provide an opportunity for whales to move away from the source if they are undetected, reducing received levels. The UXO/MEC detonations mitigation measures described above would further reduce the potential to be exposed to high received levels.

For HRG surveys, the maximum distance to the Level B harassment threshold is 178 m. The estimated take, by Level B harassment only, associated with HRG surveys is to account for any North Atlantic right whale sightings PSOs may miss when HRG acoustic sources are active. However, because of the short maximum distance to the Level B harassment threshold, the requirement that vessels maintain a distance of 500 m from any North Atlantic right whales, the fact whales are unlikely to remain in close proximity to an HRG survey vessel for any length of time, and that the acoustic source would be shutdown if a North Atlantic right whale is observed within 500 m of the source, any exposure to noise levels above the harassment threshold (if any) would be very brief. To further minimize exposures, ramp-up of sub-bottom profilers must be delayed during the clearance period if PSOs detect a North Atlantic right whale (or any other ESA-listed species) within 500 m of the acoustic source. With implementation of the proposed mitigation requirements, take by Level A harassment is unlikely and, therefore, not proposed for authorization. Potential impacts associated with Level B harassment would include low-level, temporary behavioral modifications, most likely in the form of avoidance behavior. Given the high level of precautions taken to minimize both the amount and intensity of Level B harassment on North Atlantic right whales, it is unlikely that the anticipated low-level exposures would lead to reduced reproductive success or survival.

Given the documented habitat use within the area, the majority of the individuals taken would be impacted on only one day in a year, with a small subset potentially impacted on no more than a few days a year and, further, low level impacts are generally expected from any North Atlantic right whale exposure. The magnitude and severity of harassment are not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival of this stock.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by Level B harassment only) anticipated and proposed for authorization would have a negligible impact on the North Atlantic right whale.

Blue Whale

The blue whale, including the Western North Atlantic stock, is listed as Endangered under the ESA, and as both Depleted and Strategic under the MMPA. There are no known areas of specific biological importance in or around the project area, nor are there any UMEs. The actual abundance of the stock is likely significantly greater than what is reflected in each SAR because, as noted in the SARs, the most recent population estimates are primarily based on surveys conducted in U.S. waters and the stock's range extends well beyond the U.S. EEZ. No serious injury or mortality is anticipated or proposed for authorization for this species.

The rule would allow for the authorization of up to 6 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 1 and 2, respectively (combined, this annual take (n=3) equates to approximately 0.7 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Based on the migratory nature of blue whales and the fact that there are neither feeding nor reproductive areas documented in or near the project area, and in consideration of the very low number of predicted annual takes, it is unlikely that the predicted instances of takes would represent repeat takes of any individual—in other words, each take likely represents one whale exposed on one day within a year.

With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS or TTS would be concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of sei whales. Any hearing ability temporarily impaired from TTS is anticipated to return to pre-exposure conditions shortly after the exposures cease (*e.g.,* if the animal moves away or the source stops). Any avoidance of the project area due to the Project's activities would be expected to be temporary.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Western North Atlantic stock of blue whales.

Fin Whales

The fin whale, including the Western North Atlantic stock, is listed as Endangered under the ESA, and as both Depleted and Strategic under the MMPA. No UME has been designated for this species or stock. No serious injury or mortality is anticipated or proposed for authorization for this species.

The rule would allow for the authorization of up to 1,293 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 20 and 575, respectively (combined, this annual take (n=595) equates to approximately 8.7 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring).

Given the project overlaps a small portion of a fin whale feeding BIA active in the months of the project, and the New England is generally considered a feeding area, it is likely that some subset of the individual whales exposed could be taken several times annually.

Level B harassment is expected to be in the form of behavioral disturbance, primarily resulting in avoidance of the project area where foundation installation is occurring, and some low-level TTS and masking that may limit the detection of acoustic cues for relatively brief periods of time. Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of fin whales.

As described previously, the project area slightly overlaps a small fin whale feeding BIA that is active from March to October. Foundation installations and UXO/MEC detonations have seasonal work restrictions such that the temporal overlap between these project activities and the active BIA timeframe would exclude the months of March or April. We anticipate that if foraging is occurring in the project area and foraging whales are exposed to noise levels of sufficient strength, they could temporarily cease foraging and move elsewhere.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Western North Atlantic stock of fin whales.

Humpback Whales

Humpback whales potentially impacted by the Project's activities do not belong to a DPS that is listed as threatened or endangered under the ESA, but are designated as Strategic under the MMPA. However, humpback whales along the Atlantic Coast have been experiencing an active UME as elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately 40 percent had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts, and take from ship strike and entanglement is not proposed to be authorized. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS of which the Gulf of Maine stock is a part) remains stable at approximately 12,000 individuals.

The rule would allow for the authorization of up to 790 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 16 and 330, respectively (combined, this annual take (n=346) equates to approximately 24.8 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Given that feeding is considered the principal activity of humpback whales in New England waters, it is likely that some subset of the individual whales exposed could be taken several times annually.

Among the activities analyzed, impact pile driving is likely to result in the highest amount of Level A harassment annual take of humpback whales (16 takes by Level A harassment for construction schedule B; 3 annual takes by Level A harassment for UXO/MEC detonations). The maximum amount of annual take proposed to be authorized, by Level B harassment, is highest for vibratory pile driving under construction schedule B (295).

Humpback whales, similar to other baleen whales, use southern New England waters for foraging. Foraging animals tend to remain in the area for extended durations to capitalize on the food sources. For example, Brown *et al.* (2022) examined humpback whale occurrence in the New York Bight area, which is located south of the project area but provides similar foraging grounds, and demonstrated that humpback whales exhibit extended occupancy (mean 37.6 days) in the Bight area and were likely to return from one year to the next (mean 31.3 percent). Whales were also seen at a variety of other sites in the New York Bight within the same year, suggesting that they may occupy this broader area throughout the feeding season. Assuming humpback whales who are foraging in southern New England waters within the project area behave similarly, we expect that the maximum annual instances of predicted take by Level A harassment and Level B harassment, respectively, would consist of individuals exposed on multiple days if they are utilizing the area as foraging habitat. Also similar to other baleen whales, if migrating, we expect that individuals exposed to noise levels from the Project above the harassment thresholds once during migration through the project area.

For all the reasons described in the *Mysticetes* section above, we anticipate any potential PTS and TTS would be concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of baleen whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Gulf of Maine stock of humpback whales.

Minke Whales

The minke whale, including the Canadian East Coast stock, is not listed under the ESA, nor as Depleted under the MMPA. There are no known areas of specific biological importance in or adjacent to the project area, and no UME has been designated for this species or stock. No serious injury or mortality is anticipated or proposed for authorization for this species.

The rule would allow for the authorization of up to 2,612 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 85 and 1,042, respectively (combined, this annual take (n=1,127) equates to approximately 5.1 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Because minke whales are migratory and their known feeding areas are east and north of the project area, they would be more likely to be moving through (with each take representing a separate individual), though it is

possible that some subset of the individual whales exposed could be taken up to a few times annually.

There is a feeding BIA from March through November to the north and east of the project area (Southwestern Gulf of Maine and George's Bank, 54,341 km²). The BIA does not overlap with the project area. Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious diseases. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 21,000 whales.

We anticipate the impacts of this harassment to follow those described in the general *Mysticetes* section above.

Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of minke whales. Level B harassment would be temporary, with primary impacts being temporary displacement of the project area but not abandonment of any migratory or foraging behavior. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Project's activities combined, that the proposed authorized take would have a negligible impact on the Canadian East Coast stock of minke whales.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Canadian Eastern Coastal stock of minke whales.

Sei Whales

The sei whale, including the Nova Scotia stock, is listed as Endangered under the ESA, and as both Depleted and Strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the project area, nor has a UME been designated for this species or stock. No serious injury or mortality is anticipated or proposed for authorization for this species.

The rule would allow for the authorization of up to 146 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 2 and 53, respectively (combined, this annual take (n=55) equates to approximately 0.9 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Because sei whales are migratory and their known feeding areas are east and north of the project area, they would be more likely to be moving through (with each take representing a separate individual), though it is possible that some subset of the individual whales exposed could be taken up to a few times annually.

There is a feeding BIA (Gulf of Maine, 56,609 km²) to the far east and to the north of the project area from May-November, the project area does not overlap with the BIA. There are no UMEs. The actual abundance of this stock is likely significantly greater than what is reflected in each SAR because, as noted in the SARs, the most recent population estimate is primarily based on surveys conducted in U.S. waters and the stock's range extends well beyond the U.S. Exclusive Economic Zone (EEZ).

To a small degree, sei whales may forage in the project area, although the currently identified foraging habitats (BIAs) are significantly further away from the project area by a few hundred kilometers (LaBrecque *et al.,* 2015). With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS and TTS would likely be concentrated at half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of sei whales. Moreover, any TTS would be temporary. Any avoidance of the project area due to the Project's activities would be expected to be temporary.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Nova Scotia stock of sei whales.

Odontocetes

In this section, we include information here that applies to all of the odontocete species and stocks addressed below. Odontocetes include dolphins, porpoises, and all other whales possessing teeth and we further divide them into the following subsections: sperm whales, small whales and dolphins, and harbor porpoise. These sub-sections include more specific information, as well as conclusions for each stock represented.

All of the takes of odontocetes proposed for authorization incidental to the Project's specified activities are by pile driving, drilling, UXO/MEC detonations, and HRG surveys. No serious injury or mortality is anticipated or proposed. We anticipate that, given ranges of individuals (*i.e.,* that some individuals remain within a small area for some period of time), and non-migratory nature of some odontocetes in general (especially as compared to mysticetes), these takes are more likely to represent multiple exposures of a smaller number of individuals than is the case for mysticetes, though some takes may also represent one-time exposures to an individual.

Foundation installation is likely to disturb odontocetes to the greatest extent, compared to UXO/MEC detonations and HRG surveys. While we do expect animals to avoid the area during foundation installation and UXO/MEC detonations, their habitat range is extensive compared to the area ensonified during these activities. In addition, as described above, UXO/MEC detonations are instantaneous; therefore, any disturbance would be very limited in time.

As described earlier, Level B harassment may include direct disruptions in behavioral patterns (*e.g.,* avoidance, changes in vocalizations (from masking) or foraging), as well as those associated with stress responses or TTS. Odontocetes are highly mobile species and, similar to mysticetes, NMFS expects any avoidance behavior to be limited to the area near the sound source. While masking could occur during foundation installation, it would only occur in the vicinity of and during

the duration of the activity, and would not generally occur in a frequency range that overlaps most odontocete communication or any echolocation signals. The mitigation measures (*e.g.,* use of sound attenuation systems, implementation of clearance and shutdown zones) would also minimize received levels such that the severity of any behavioral response would be expected to be less than exposure to unmitigated noise exposure.

Any masking or TTS effects are anticipated to be of low-severity. First, the frequency range of pile driving, the most impactful activity conducted by Park City Wind in terms of response severity, falls within a portion of the frequency range of most odontocete vocalizations. However, odontocete vocalizations span a much wider range than the low frequency construction activities proposed for the Project. As described above, recent studies suggest odontocetes have a mechanism to self-mitigate (*i.e.,* reduce hearing sensitivity) the impacts of noise exposure, which could potentially reduce TTS impacts. Any masking or TTS is anticipated to be limited and would typically only interfere with communication within a portion of an odontocete's range and as discussed earlier, the effects would only be expected to be of a short duration and, for TTS, a relatively small degree.

Furthermore, odontocete echolocation occurs predominantly at frequencies significantly higher than low frequency construction activities. Therefore, there is little likelihood that threshold shift would interfere with feeding behaviors. For HRG surveys, the sources operate at higher frequencies than foundation installation activities and UXO/MEC detonations. However, sounds from these sources attenuate very quickly in the water column, as described above. Therefore, any potential for PTS and TTS and masking is very limited. Further, odontocetes (*e.g.,* common dolphins, spotted dolphins, bottlenose dolphins) have demonstrated an affinity to bow-ride actively surveying HRG surveys. Therefore, the severity of any harassment, if it does occur, is anticipated to be minimal based on the lack of avoidance previously demonstrated by these species.

The waters off the coast of Massachusetts are used by several odontocete species. However, none except the sperm whale are listed under the ESA and there are no known habitats of particular importance. In general, odontocete habitat ranges are far-reaching along the Atlantic coast of the U.S., and the waters off of New York, including the project area, do not contain any particularly unique odontocete habitat features.

Sperm Whales

The sperm whale, including the North Atlantic stock, is listed as endangered under the ESA, and as both Depleted and Strategic under the MMPA. The North Atlantic stock of sperm whales spans the East Coast out into oceanic waters well beyond the U.S. EEZ. Although listed as endangered, the primary threat faced by the sperm whale across its range (*i.e.,* commercial whaling) has been eliminated. Additionally, sperm whales in the western North Atlantic were little affected by modern whaling (Taylor *et al.,* 2008). Current potential threats to the species globally include vessel strikes, entanglement in fishing gear, anthropogenic noise, exposure to contaminants, climate change, and marine debris. There is no currently reported trend for the stock and, although the species is listed as endangered under the ESA, there are no specific issues with the status of the stock that cause particular concern (*e.g.,* no UMEs). There are no known areas of biological importance (*e.g.,* critical habitat or BIAs) in or near the project area. No mortality or serious injury is anticipated or proposed to be authorized for this species.

The rule would allow for the authorization of up to 297 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 2 and 140, respectively (combined, this annual take (n=142) equates to approximately 3.3 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Given sperm whale's preference for deeper waters, especially for feeding, it is unlikely that individuals would remain in the project area for multiple days, and therefore the estimated takes likely represent exposures of different individuals on one day each annually.

If sperm whales do happen to be present in the project area during any activities related to the Project, they would likely be only transient visitors and not engaging in any significant behaviors. Further, the potential for PTS and TSS is low for reasons described in the general Odontocete section but, if it does occur, any hearing shift would be small and, in the case of TTS, would be of a short duration. Because whales are not expected to be foraging in the project area, any TTS is not expected to interfere with foraging behavior.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the North Atlantic stock of sperm whales.

Dolphins and Small Whales (Including Delphinids, Beaked Whales, and Dwarf and Pygmy Sperm Whales)

The twenty-six species and stocks included in this group (which are indicated in Table 5 in the Delphinidae, Ziphiidae, and Kogiidae families) are not listed under the ESA, however, Pantropical spotted dolphins and spinner dolphins are listed as Depleted under the MMPA and Short-finned pilot whales are listed as Strategic under the MMPA. There are no known areas of specific biological importance in or around the project area for any of these species, nor has a UME been designated for any. No serious injury or mortality is anticipated or proposed for authorization for this species.

The eighteen Delphinid species with take proposed for authorization for the Project are Atlantic spotted dolphin, Atlantic white-sided dolphin, bottlenose dolphin, Clymene dolphin, common dolphin, long-finned pilot whale, short-finned pilot whale, Risso's dolphin, false killer whale, Fraser's dolphin, killer whale, melon-headed whale, pantropical spotted dolphin, pygmy killer whale, rough-toothed dolphin, spinner dolphin, striped dolphin, and white-beaked dolphin.

Many of these Delphinid species are rare for the project area and whose preferred habitat is at much deeper water depths or different water temperatures than what are found within the project area. For instance, the Clymene dolphin, false killer whale, Fraser's dolphin, melon-headed whale, pantropical spotted dolphin, pygmy killer whale, rough-toothed dolphin, and spinner dolphin prefer tropical to subtropical waters but have, on occasion, been sighted in deep waters at or beyond the continental shelf break in the New England area during the summer months (Hayes *et al.,* 2019; Hayes *et al.,* 2020). Striped dolphins are found in warm-temperate to tropical waters but prefer continental slope

waters offshore to the Gulf Stream, when in the New England area they have only been sighted at water depths deeper than 900 m (Hayes *et al.,* 2020). White-beaked dolphins prefer colder waters and are found more northerly than the project area in the western Gulf of Maine and around Cape Cod (Hayes et. al, 2020). Killer whales, a rarity in the New England area, prefer much deeper and colder waters than those in the New England area (Waring *et al.,* 2015).

For these eighteen Delphinid species, the rule would allow for the authorization of up to between 10 and 86,316 takes (depending on species), by harassment only, over the five-year period. The maximum annual allowable take for these species by Level A harassment and Level B harassment, would range from 0 to 9 and 4 to 41,230, respectively (combined, this annual take (n= 4 to 41,239) equates to approximately <0.1 to 23.9 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring).

For common dolphins, given the higher number of takes relative to the stock abundance, while some of the takes likely represent exposures of different individuals on one day a year, it is likely that some subset of the individuals exposed could be taken several times annually. For Atlantic spotted dolphin, Atlantic white-sided dolphin, Bottlenose dolphin, Long and Short-finned pilot whale, and Risso's dolphin, given the number of takes, while many of the takes likely represent exposures of different individuals on one day a year, some subset of the individuals exposed could be taken up to a few times annually. For the remaining Delphinids, given they are considered rare or uncommon in the area, it is unlikely that individuals would remain in the project area for multiple days, and therefore the estimated takes likely represent exposures of different individuals on one day each annually.

The six *Ziphiidae* species with take proposed for authorization for the Project are Cuvier's beaked whale, Blainville's beaked whale, Gervais' beaked whale, Sowerby's beaked whale, True's beaked whale, and Northern bottlenose whale. The two species of *Kogiidae* with take proposed for authorization for the Project are the dwarf sperm whale and pygmy sperm whale. These species are rare for the project area and prefer habitat at much deeper water depths than what are found within the project area. For instance, the beaked whales and *Kogiidae* species have been sighted in deep waters at or beyond the continental shelf break in the New England area (Hayes *et al.,* 2020). The Northern bottlenose whales are extremely uncommon or rare in waters of the U.S. and are rarely in waters less than 2,000 m deep (Waring *et al.,* 2015).

For these eight species, the rule would allow for the authorization of up to between 6 and 12 takes for each species, by harassment only, over the 5-year period. The maximum annual allowable take for these species by Level A harassment and Level B harassment, would range from 0 to 2 and 2 to 4, respectively (combined, this annual take (n=3 to 4) equates to approximately <0.1 percent of the stock abundance for each species, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Given this species is considered rare in the area and prefers deeper waters, especially for feeding, it is unlikely that individuals would remain in the project area for multiple days, and therefore the estimated takes likely represent exposures of different individuals on one day each annually.

The number of takes, likely movement patterns of the affected species, and the intensity of any Level A or B harassments, combined with the availability of alternate nearby foraging habitat suggests that the likely impacts would not impact the reproduction or survival of any individuals. Some species, such as the common dolphin, are gregarious in nature (*i.e.,* travel in large groups) with high densities in the project area, which results in a relatively higher amount of take. While delphinids may be taken on several occasions, none of these species are known to have small home ranges within the project area or known to be particularly sensitive to anthropogenic noise. The potential for PTS in dolphins and small whales is very low and, if PTS does occur, would occur to a limited number of individuals, be of small degree, and would be limited to the frequency ranges of the activity which does not span across most of their hearing range. Some TTS can also occur but, again, it would be limited to the frequency ranges of the activity and any loss of hearing sensitivity is anticipated to return to pre-exposure conditions shortly after the animals move away from the source or the source ceases. Beaked whales are known to be particularly sensitive to anthropogenic noise (*e.g.,* Southall *et al.,* 2017; Clowewiak *et al.,* 2017); however, the project area does not contain primary beaked whale habitat and only 2–3 groups of beaked whales could be harassed by Project activities. Further, beaked whales are deep diver foragers and the shallow-water project area does not contain suitable beaked whale foraging habitat. Hence, no foraging impacts are anticipated.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on all of the species and stocks addressed in this section.

Harbor Porpoises

The Gulf of Maine/Bay of Fundy stock of harbor porpoises, which is not listed as Threatened or Endangered under the ESA or as Depleted under the MMPA, is found predominantly in northern U.S. coastal waters (less than 150 m depth) and up into Canada's Bay of Fundy (between New Brunswick and Nova Scotia). Although the population trend is not known, there are no UMEs or other factors that cause particular concern for this stock. No mortality or non-auditory injury are anticipated or proposed for authorization for this stock.

The rule would allow for the authorization of up to 6,549 takes, by harassment only, over the five-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 136 and 2,507, respectively (combined, this annual take (n=2,643) equates to approximately 2.8 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Given the number of takes, while many of the takes likely represent exposures of different individuals on one day a year, some subset of the individuals exposed could be taken up to a few times annually.

Regarding the severity of takes by behavioral Level B harassment, because harbor porpoises are particularly sensitive to noise, it is likely that a fair number of the responses could be of a moderate nature, particularly to pile

driving. In response to pile driving, harbor porpoises are likely to avoid the area during construction, as previously demonstrated in Tougaard *et al.* (2009) in Denmark, in Dahne *et al.* (2013) in Germany, and in Vallejo *et al.* (2017) in the United Kingdom, although a study by Graham *et al.* (2019) may indicate that the avoidance distance could decrease over time. However, foundation installation is scheduled to occur off the coast of Massachusetts and, given alternative foraging areas, any avoidance of the area by individuals is not likely to impact the reproduction or survival of any individuals. Given only 1 UXO/MEC would be detonated on any given day and only up to 10 UXO/MEC could be detonated under the requested LOA, any behavioral response would be brief and of a low severity.

With respect to PTS and TTS, the effects on an individual are likely relatively low given the frequency bands of pile driving (most energy below 2 kHz) compared to harbor porpoise hearing (150 Hz to 160 kHz peaking around 40 kHz). Specifically, TTS is unlikely to impact hearing ability in their more sensitive hearing ranges, or the frequencies in which they communicate and echolocate. We expect any PTS that may occur to be within the very low end of their hearing range where harbor porpoises are not particularly sensitive and any PTS would be of small magnitude. As such, any PTS would not interfere with key foraging or reproductive strategies necessary for reproduction or survival.

While harbor porpoises are likely to avoid the area during any of the Project's construction activities, as demonstrated during European wind farm construction, the time of year in which work would occur is when harbor porpoises are not in highest abundance (May through December), and any work that does occur would not result in the species' abandonment of the waters off of Massachusetts.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on the Gulf of Maine/Bay of Fundy stock of harbor porpoises.

Phocids (Harbor Seals, Gray Seals, Harp Seals, and Hooded Seal)

The harbor seal, gray seal, harp seal, and hooded seal are not listed under the ESA, nor designated as depleted under the MMPA. There are no known areas of specific biological importance in or around the project area. A UME been designated for harbor seals and gray seals and is described further below. No serious injury or mortality is anticipated or proposed for authorization for this species.

For the four seal species, the rule would allow for the authorization of up to between 3 and 24,588 takes for each species, by harassment only, over the 5-year period. The maximum annual allowable take for these species by Level A harassment and Level B harassment, would range from 0 to 17 and 1 to 9,835, respectively (combined, this annual take (n=1 to 9,852) equates to approximately <0.1 to 16.1 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.,* years when only HR surveys would be occurring). Though gray seals and harbor seals are considered migratory and no specific feeding areas have been designated in the area, the higher number of takes relative to the stock abundance suggests that while some of the takes likely represent exposures of different individuals on one day a year, it is likely that some subset of the individuals exposed could be taken several times annually. Similarly, while harp seals are considered migratory and no specific feeding areas have been designated in the area, the comparatively higher number of takes suggests that takes while many of the takes likely represent exposures of different individuals on one day a year, some subset of the individuals exposed could be taken up to a few times annually. For hooded seals, given this species is considered rare in the area, it is unlikely that individuals would remain in the project area for multiple days, and therefore the estimated takes likely represent exposures of different individuals on one day each annually.

Harbor, gray, and harp seals occur in Massachusetts waters most often in winter (December through May), when most foundation installation and UXO/MEC detonations would not occur due to seasonal restrictions on conducting these activities).

Seals are also more likely to be close to shore (*e.g.,* closer to the edge of the area ensonified above NMFS' harassment threshold), such that exposure to foundation installation would be expected to be at comparatively lower levels. Take of these species is noise from pile driving, drilling, UXO/MEC detonations, and HRG surveys. As described in the Potential Effects to Marine Mammals and Their Habitat section, construction of wind farms in Europe resulted in pinnipeds temporarily avoiding construction areas but returning within short time frames after construction was complete (Carroll *et al.,* 2010; Hamre *et al.,* 2011; Hastie *et al.,* 2015; Russell *et al.,* 2016; Brasseur *et al.,* 2010). Effects on pinnipeds that are taken by Level B harassment in the project area would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals would simply move away from the sound source and be temporarily displaced from those areas (Lucke *et al.,* 2006; Edren *et al.,* 2010; Skeate *et al.,* 2012; Russell *et al.,* 2016). Given the low anticipated magnitude of impacts from any given exposure (*e.g.,* temporary avoidance), even repeated Level B harassment across a few days of some small subset of individuals, which could occur, is unlikely to result in impacts on the reproduction or survival of any individuals. Moreover, pinnipeds would benefit from the mitigation measures described in the Proposed Mitigation section.

As described above, noise from UXO/MEC detonation is low frequency and, while any PTS and TTS that does occur would fall within the lower end of pinniped hearing ranges (50 Hz to 86 kHz), PTS and TTS would not occur at frequencies where pinniped hearing is most sensitive. In summary, any PTS and TSS would be of small degree and not occur across the entire, or even most sensitive, hearing range. Hence, any impacts from PTS and TTS are likely to be of low severity and not interfere with behaviors critical to reproduction or survival.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and occurred across Maine, New Hampshire, and Massachusetts until 2020. Based on tests conducted so far, the main pathogen found in the seals belonging to that UME was phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. Currently, the only active UME is occurring in Maine with some harbor and gray seals testing positive for highly pathogenic avian influenza (HPAI) H5N1. Although elevated strandings continue, neither UME (alone or in combination) provide

cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 61,000 and annual M/SI (339) is well below PBR (1,729) (Hayes *et al.,* 2020). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic, as well as in Canada (Hayes *et al.,* 2020). For harp seals (no recent UME), the total U.S. fishery-related mortality and serious injury for this stock is very low relative to the stock size and can be considered insignificant and approaching zero mortality and serious injury rate (Hayes *et al.,* 2022). The harp seal stock abundance appears to have stabilized (Hayes *et al.,* 2022).

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, Park City Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by harassment only) anticipated and proposed for authorization would have a negligible impact on harbor, gray, harp, or hooded seals.

Preliminary Negligible Impact Determination

No mortality or serious injury is anticipated to occur or proposed to be authorized. As described in the preliminary analysis above, the impacts resulting from the Project's activities cannot be reasonably expected to, and are not reasonably likely to, adversely affect any of the species or stocks for which take is proposed for authorization through effects on annual rates of recruitment or survival. 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 mitigation and monitoring measures, NMFS preliminarily finds that the marine mammal take from all of Park City Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS proposes to authorize incidental take (by Level A harassment and/or Level B harassment) of 38 species of marine mammal (with 38 managed stocks). The maximum number of instances of takes by combined Level A and Level B harassments possible within any one year and proposed for authorization relative to the best available population abundance is less than one-third for all species and stocks potentially impacted (Table 34). Specific to North Atlantic right whales, NMFS is proposing to authorize an amount of annual take (n=111), which, if one assumes each estimated instance of take represents a different individual, is close to, but does not exceed small numbers. While migratory behavior in the project area suggests that many of the predicted instances of take of North Atlantic right whales would be to different individual whales (and each of those whales would be taken on one day annually), given changing distribution of right whales, and observations of increased residency times in the broader area, some subset of the individual whales exposed could be taken up to a few times annually, further lower the percentage of the population actually taken.

For five species, there are no current abundance estimates available; hence the percentage of the population taken is unknown. However, these constitute rare species and only a small amount of take is proposed for authorization each year. For three of these species, no more than 5 takes per year are proposed for authorization. For the melon-headed whale and Fraser's dolphin, a maximum of 109 and 192 exposures may occur. This represents one average group size; and it is reasonable to assume that 3 or more groups could occur in the North Atlantic (one group is ⅓ of 3 groups). Hence, the amount of take for all rare species with unknown populations can reasonably be considered a small number.

Based on the analysis contained herein of the proposed activities (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the promulgation of rulemakings, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NMFS Greater Atlantic Regional Field Office (GARFO).

NMFS is proposing to authorize the take of five marine mammal species which are listed under the ESA: the North Atlantic right, sei, fin, blue, and sperm whales. The Permit and Conservation Division requested initiation of Section 7 consultation on May 9, 2023, with GARFO for the issuance of this proposed rulemaking. NMFS will conclude the Endangered Species Act consultation prior to reaching a determination regarding the proposed issuance of the authorization. The proposed regulations and any subsequent LOA(s) would be conditioned such that, in addition to measures included in those documents, Park City Wind would also be required to abide by the reasonable and prudent measures and terms and conditions of a Biological Opinion and Incidental Take Statement, issued by NMFS, pursuant to section 7 of the Endangered Species Act.

Proposed Promulgation

As a result of these preliminary determinations, NMFS proposes to promulgate a LOA to Park City Wind authorizing take, by Level A harassment and Level B harassment, incidental to

construction activities associated with the New England Wind project offshore of Massachusetts for a 5-year period from March 27, 2025, through March 26, 2030, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Request for Additional Information and Public Comments

NMFS requests interested persons to submit comments, information, and suggestions concerning Park City Wind's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare the final rule and make final determinations on whether to issue the requested authorization. This proposed rule and referenced documents provide all environmental information relating to our proposed action for public review.

Recognizing, as a general matter, that this action is one of many current and future wind energy actions, we invite comment on the relative merits of the IHA, single-action rule/LOA, and programmatic multi-action rule/LOA approaches, including potential marine mammal take impacts resulting from this and other related wind energy actions and possible benefits resulting from regulatory certainty and efficiency.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Park City Wind is the sole entity that would be subject to the requirements in these proposed regulations, and Park City Wind is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Under the RFA, governmental jurisdictions are considered to be small if they are governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOA, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS.

The Coastal Zone Management Act (CZMA) requires Federal actions within and outside the coastal zone that have reasonably foreseeable effects on any coastal use or natural resource of the coastal zone be consistent with the enforceable policies of a State's federally approved coastal management program. 16 U.S.C. 1456(c). Additionally, regulations implementing the CZMA require non-Federal applicants for Federal licenses or permits to submit a consistency certification to the State that declares that the proposed activity complies with the enforceable policies of the State's federally approved coastal management program and will be conducted in a manner consistent with such program.

In June 2020, Park City Wind submitted Federal consistency certifications to the Massachusetts Coastal Zone Management's (MA CZM) and to the Rhode Island Coastal Resources Management Council (CRMC) seeking concurrence that the construction, operations, and decommissioning activities of the proposed Project is consistent with the enforceable policies of each State's federally-approved coastal management program. A revised draft of the consistency certifications dated June 2022 were prepared and submitted to the states and is appended into Park City Wind's Construction and Operation Plan.

NMFS has determined that Park City Wind's application for an authorization to allow the incidental, but not intentional, take of small numbers of marine mammals on the outer continental shelf of the Atlantic Ocean is an unlisted activity and, thus, is not, at this time, subject to Federal consistency requirements in the absence of the receipt and prior approval of an unlisted activity review request from the State by the Director of NOAA's Office for Coastal Management. This determination does not excuse Park City Wind from responsibility to seek concurrence from the State on other Federal permits, approvals, or actions that might be subject to consistency review pursuant to the CZMA.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened species, Fish, Fisheries, Marine mammals, Penalties, Reporting and recordkeeping requirements, Wildlife.

Dated: May 30, 2023.

Samuel D. Rauch, III,

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

Accordingly, NOAA proposes to amend 50 CFR part 217 as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart GG, consisting of §§ 217.320 through 217.329, to read as follows:

Subpart GG—Taking Marine Mammals Incidental to the New England Wind Project Offshore of Massachusetts

Sec.

Subpart GG—Taking Marine Mammals Incidental to the New England Wind Project Offshore of Massachusetts

§ 217.320 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the taking of marine mammals that occurs incidental to activities associated with construction of the New England Wind project (hereafter referred to as the ''Project'') by Park City Wind LLC (hereafter referred to as the ''LOA Holder''), and those persons it authorizes or funds to conduct activities on its behalf in the area outlined in paragraph (b) of this section.

(b) The taking of marine mammals by the LOA Holder may be authorized in a Letter of Authorization (LOA) only if it occurs in the Bureau of Ocean Energy Management (BOEM) Lease Area Outer Continental Shelf (OCS)–A 0534 and portions of OCS–A 0501 Commercial

Lease of Submerged Lands for Renewable Energy Development, along export cable routes, and at the sea-to-shore transition points south of Martha's Vineyard and Barnstable, Massachusetts.

(c) The taking of marine mammals by the LOA Holder is only authorized if it occurs incidental to the following activities associated with the Project: installation of up to 129 wind turbine generator (WTG) and up to 5 electrical service platform (ESP) foundations by impact and vibratory pile driving and drilling, 10 unexploded ordnances or munitions and explosives of concern (UXO/MEC) detonations, and high-resolution geophysical (HRG) site characterization surveys.

§ 217.321 Effective dates.

Regulations in this subpart are effective from March 27, 2025, through March 26, 2030.

§ 217.322 Permissible methods of taking.

Under an LOA, issued pursuant to §§ 216.106 of this chapter and 217.326, the LOA Holder, and those persons it authorizes or funds to conduct activities on its behalf, may incidentally, but not intentionally, take marine mammals within the area described in § 217.320(b) in the following ways, provided the LOA Holder is in complete compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA:

(a) By Level B harassment associated with the acoustic disturbance of marine mammals by impact and vibratory pile driving and drilling (foundation installation), UXO/MEC detonations, and HRG site characterization surveys;

(b) By Level A harassment associated with the acoustic disturbance of marine mammals by impact pile driving of WTG and ESP foundations and UXO/MEC detonations;

(c) Take by mortality or serious injury of any marine mammal species is not authorized; and

(d) The incidental take of marine mammals by the activities listed in paragraphs (a) and (b) of this section is limited to the following species:

TABLE 1 TO PARAGRAPH (d)

Marine mammal species	Scientific name	Stock
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic.
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic.
Blainsville's beaked whale	*Mesoplodon densirostris*	Western North Atlantic.
Blue whale	*Balaenoptera musculus*	Western North Atlantic.
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic, offshore.
Clymene dolphin	*Stenella clymene*	Western North Atlantic.
Cuvier's beaked whale	*Ziphius cavirostris*	Western North Atlantic.
Dwarf sperm whale	*Kogia sima*	Western North Atlantic.
False killer whale	*Pseudorca crassidens*	Western North Atlantic.
Fin whale	*Balaenoptera physalus*	Western North Atlantic.
Fraser's dolphin	*Lagenodelphis hosei*	Western North Atlantic.
Gervais' beaked whale	*Mesoplodon europaeus*	Western North Atlantic.
Gray seal	*Halichoerus grypus*	Western North Atlantic.
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy.
Harbor seal	*Phoca vitulina*	Western North Atlantic.
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic.
Hooded seal	*Cystophora cristata*	Western North Atlantic.
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine.
Killer whale	*Orcinus orca*	Western North Atlantic.
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic.
Melon-headed whale	*Peponocephala electra*	Western North Atlantic.
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal.
North Atlantic right whale	*Eubalaena glacialis*	Western North Atlantic.
Northern bottlenose whale	*Hyperoodon ampullatus*	Western North Atlantic.
Pantropical spotted dolphin	*Stenella attenuata*	Western North Atlantic.
Pygmy killer whale	*Feresa attenuata*	Western North Atlantic.
Pygmy sperm whale	*Kogia breviceps*	Western North Atlantic.
Risso's dolphin	*Grampus griseus*	Western North Atlantic.
Rough-toothed dolphin	*Steno bredanensis*	Western North Atlantic.
Sei whale	*Balaenoptera borealis*	Nova Scotia.
Short-beaked common dolphin	*Delphinus delphis*	Western North Atlantic.
Short-finned pilot whale	*Globicephala macrorhynchus*	Western North Atlantic.
Sowerby's beaked whale	*Mesoplodon bidens*	Western North Atlantic.
Sperm whale	*Physeter macrocephalus*	North Atlantic.
Spinner dolphin	*Stenella longirostris*	Western North Atlantic.
Striped dolphin	*Stenella coeruleoalba*	Western North Atlantic.
True's beaked whale	*Mesoplodon mirus*	Western North Atlantic.
White-beaked dolphin	*Lagenorhynchus albirostris*	Western North Atlantic.

§ 217.323 Prohibitions.

Except for the takings described in § 217.322 and authorized by an LOA issued under § 217.326 or § 217.327, it is unlawful for any person to do any of the following in connection with the activities described in this subpart:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 217.326 and 217.327;

(b) Take any marine mammal not specified in § 217.322(d);

(c) Take any marine mammal specified in the LOA in any manner other than as specified in the LOA; or

(d) Take any marine mammal specified in § 217.322(d), after NMFS Office of Protected Resources determines such taking results in more

than a negligible impact on the species or stocks of such marine mammals.

§ 217.324 Mitigation requirements.

When conducting the activities identified in §§ 217.320 and 217.322, the LOA Holder must implement the mitigation measures contained in this section and any LOA issued under §§ 217.326 and 217.327. These mitigation measures include, but are not limited to:

(a) *General conditions.* The following measures apply to the Project:

(1) A copy of any issued LOA must be in the possession of the LOA Holder and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM) operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) The LOA Holder must conduct briefings between construction supervisors, construction crews, and the PSO and PAM team prior to the start of all in-water construction activities and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring and reporting protocols, and operational procedures. A simple guide must be included with the Marine Mammal Monitoring Plan to aid personnel in identifying species if they are observed in the vicinity of the project area;

(3) Prior to and when conducting any in-water activities and vessel operations, the LOA Holder personnel and contractors (*e.g.,* vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the project area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings and/or information associated with any Slow Zones (*i.e.,* Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators, PSO(s), and PAM operators;

(4) The LOA Holder must ensure that any visual observations of an Endangered Species Act (ESA)-listed marine mammal are communicated to on-duty PSOs, PAM operator(s), and vessel captains during the concurrent use of multiple project-associated vessels (of any size; *e.g.,* construction surveys, crew/supply transfers, *etc.*);

(5) The LOA Holder must establish and implement clearance and shutdown zones as described in the LOA;

(6) The LOA Holder must instruct all vessel personnel regarding the authority of the PSO(s). Any disagreement between the Lead PSO and the vessel operator would only be discussed after shutdown has occurred;

(7) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone for a specified activity, pile driving (*e.g.,* impact and vibratory), drilling, and HRG acoustic sources must shut down immediately, unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability, or be delayed if the activity has not commenced. Pile driving, drilling, UXO/MEC detonations, and initiation of HRG acoustic sources must not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or the observation time has elapsed with no further sightings;

(8) Foundation Installation (*i.e.,* impact and vibratory pile driving, drilling), UXO/MEC detonation, and HRG survey activities shall only commence when visual clearance zones are fully visible (*e.g.,* not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of equipment (*i.e.,* vibratory and impact pile driving, drilling, UXO/MEC detonations, and HRG surveys that use boomers, sparkers, and Compressed High-Intensity Radiated Pulses (CHIRPs));

(9) In the event that a large whale is sighted or acoustically detected that cannot be confirmed as a non-North Atlantic right whale, it must be treated as if it were a North Atlantic right whale;

(10) For in-water construction heavy machinery activities other than foundation installation, if a marine mammal is on a path towards or comes within 10 meters (m) of equipment, the LOA Holder must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment;

(11) All vessels must be equipped with a properly installed, operational Automatic Identification System (AIS) device and the LOA Holder must report all Maritime Mobile Service Identify (MMSI) numbers to NMFS Office of Protected Resources prior to initiating in-water activities; and

(12) Confirmation of all required training must be documented on a training course log sheet and reported to NMFS Office of Protected Resources.

(b) *Vessel strike avoidance measures.* The following measures apply to all vessels associated with the Project:

(1) Prior to the start of the Project's activities involving vessels, all vessel operators and crew must receive a protected species identification training that covers, at a minimum:

(i) Identification of marine mammals and other protected species known to occur or which have the potential to occur in the LOA Holder's project area;

(ii) Training on making observations in both good weather conditions (*i.e.,* clear visibility, low winds, low sea states) and bad weather conditions (*i.e.,* fog, high winds, high sea states, with glare);

(iii) Training on information and resources available to the project personnel regarding the applicability of Federal laws and regulations for protected species; and

(iv) Training related to vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of in-water construction activities.

(2) All vessel operators and crews, regardless of their vessel's size, must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course, as appropriate, to avoid striking any marine mammal;

(3) All transiting vessels operating at any speed must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180 degree direction of the forward path of the vessel (90 degrees port to 90 degree starboards) located at the best vantage point for ensuring vessels are maintaining appropriate separation distances from marine mammals. Visual observers must be equipped with binoculars and alternative monitoring technology for periods of low visibility (*e.g.,* darkness, rain, fog, *etc.*). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements. Visual observers may be NMFS-approved PSOs or crew members. Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of vessel use;

(4) Year-round and when a vessel is in transit, all vessel operators must continuously monitor U.S. Coast Guard VHF Channel 16, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting

and at least once every 4 hours, vessel operators and/or trained crew members must monitor the project's Situational Awareness System, WhaleAlert, and the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales. Any observations of any large whale by any of the LOA Holder's staff or contractors, including vessel crew, must be communicated immediately to PSOs, PAM operator, and all vessel captains to increase situational awareness. Conversely, any large whale observation or detection via a sighting network (*e.g.,* Mysticetus) by PSOs or PAM operators must be conveyed to vessel operators and crew;

(5) Any observations of any large whale by any LOA Holder staff or contractor, including vessel crew, must be communicated immediately to on-duty PSOs, PAM operators, and all vessel captains to increase situational awareness;

(6) Nothing in this subpart exempts vessels from applicable speed regulations at 50 CFR 224.105;

(7) All vessels must transit active Slow Zones (*i.e.,* Dynamic Management Areas (DMAs) or acoustically-triggered slow zone), and Seasonal Management Areas (SMAs) at 10 knots or less;

(8) All vessels, regardless of vessel size, must immediately reduce speed to 10 knots or less when any large whale, mother/calf pairs, or large assemblages of non-delphinid cetaceans are observed (within 500 m) of an underway vessel;

(9) All vessels, regardless of size, must immediately reduce speed to 10 knots or less when a North Atlantic right whale is sighted, at any distance, by anyone on the vessel;

(10) All vessels must comply with North Atlantic right whale approach restrictions at 50 CFR 224.103(c).

(11) All vessels must maintain a minimum separation distance of 100 m from sperm whales and baleen whales other than North Atlantic right whales. If one of these species is sighted within 100 m of a transiting vessel, that vessel must shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(12) All vessels must maintain a minimum separation distance of 50 m from all delphinoid cetaceans and pinnipeds with an exception made for those that approach the vessel (*i.e.,* bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of a transiting vessel, that vessel must shift the engine to neutral, with an exception made for those that approach the vessel (*e.g.,* bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(13) When a marine mammal(s) is sighted while a vessel is transiting, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.,* attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If a marine mammal(s) is sighted within the relevant separation distance, the vessel must shift the engine to neutral and not engage the engine(s) until the animal(s) is outside and on a path away from the separation area. This does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (*i.e.,* any situation where the vessel is navigationally constrained);

(14) All vessels underway must not divert or alter course to approach any marine mammal. If a separation distance is triggered, any vessel underway must avoid abrupt changes in course direction and transit at 10 knots or less until the animal is outside the relevant separation distance; and

(15) The LOA Holder must submit a North Atlantic right whale Vessel Strike Avoidance Plan 180 days prior to the commencement of vessel use. This plan must describe, at a minimum, how PAM, in combination with visual observations, would be conducted to ensure the transit corridor is clear of right whales and would also provide details on the vessel-based observer.

(c) *WTG and ESP foundation installation.* The following requirements apply to impact and vibratory pile driving and drilling activities associated with the installation of WTG and ESP foundations:

(1) Impact pile driving, vibratory pile driving, and drilling (*i.e.,* foundation installation) must not occur January 1 through April 30; Vibratory pile driving must not occur in May and December. Impact pile driving and drilling must not be planned in December; however, it may occur in the case of unforeseen circumstances and with approval by NMFS;

(2) Monopiles must be no larger than 13-m in diameter. Pin piles must be no larger than 4 m in diameter. During all monopile and pin pile installation, the minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 6,000 kilojoules (kJ) for monopile installations and 3,500 kJ for pin pile installation. No more than two monopiles or four pin piles may be installed per day;

(3) The LOA Holder must utilize a soft-start protocol for each impact pile driving event of all foundations by performing 4–6 strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes;

(4) Soft-start must occur at the beginning of monopile and pin pile impact driving and at any time following a cessation of impact pile driving of 30 minutes or longer;

(5) At least four PSOs must be actively observing marine mammals before, during, and after installation of foundation piles (*i.e.,* monopiles and pin piles). At least two PSOs must be stationed and observing on the pile driving vessel and at least two PSOs must be stationed on a secondary, PSO-dedicated vessel. Concurrently, at least one PAM operator must be actively monitoring for marine mammals with PAM before, during, and after impact pile driving;

(6) PSOs must visually clear (*i.e.,* confirm no marine mammals are present) the entire minimum visibility zone and the entire clearance zone (when conditions all for visibility of the entire clearance zone) for a full 30 minutes immediately prior to commencing pile driving or drilling;

(7) If a marine mammal is detected, visually or acoustically, within or about to enter the applicable clearance zones, prior pile driving or drilling, activities must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species;

(i) For piles installed between May 1–May 14 and November 1–December 30, if a North Atlantic right whale is observed or acoustically detected within 10 km of the pile being driven, pile driving must be delayed or stopped (unless activities must proceed for human safety or installation feasibility concerns) and may not resume until the following day or until the animal is confirmed to have exited the zone via aerial or additional vessel surveys;

(ii) [Reserved]

(8) The LOA Holder must deploy dual noise abatement systems that are capable of achieving, at a minimum, 10 decibel (dB) of sound attenuation, during all pile driving and drilling of monopiles and pin piles and comply with the following requirements related noise abatement:

(i) A single bubble curtain must not be used unless paired with another noise attenuation device;

(ii) A big double bubble curtain may be used without being paired with another noise attenuation device;

(iii) The bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m^3/(min*m). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must make appropriate adjustments to the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iv) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(v) No parts of the ring or other objects may prevent full seafloor contact;

(vi) Construction contractors must train personnel in the proper balancing of airflow to the ring. Construction contractors must submit an inspection/performance report for approval by the LOA Holder within 72 hours following the performance test. The LOA Holder must then submit that report to NMFS Office of Protected Resources; and

(vii) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (c)(8) must occur prior to impact pile driving of monopiles and pin piles. If the LOA Holder uses a noise mitigation device in addition to the bubble curtain, the LOA Holder must maintain similar quality control measures as described in this paragraph (c)(8).

(9) At least one PAM operator must review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes prior to pile driving. All clearance zones must be acoustically confirmed to be free of marine mammals for 60 minutes before activities can begin immediately prior to starting a soft-start of impact pile driving. PAM operators will continue to monitor for marine mammals for at least 30 minutes after pile driving or drilling concludes;

(10) For North Atlantic right whales, any visual observation or acoustic detection must trigger a delay to the commencement of pile driving. The clearance zone may only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred within the PAM clearance zone during the 60-minute monitoring period. Any large whale sighting by a PSO or detected by a PAM operator that cannot be identified by species must be treated as if it were a North Atlantic right whale;

(11) If a marine mammal is observed entering or within the respective shutdown zone after pile driving has begun, the PSO must call for a shutdown of pile driving or drilling. The LOA Holder must stop pile driving or drilling immediately unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals or the lead engineer determines there is pile refusal or pile instability. In any of these situations, the LOA Holder must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS;

(12) If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale is no longer observed or 30 minutes has elapsed since the last detection;

(13) If pile driving has been shut down due to the presence of a marine mammal other than a North Atlantic right whale, pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time the LOA Holder must use the lowest hammer energy practicable to maintain stability;

(14) The LOA Holder must conduct sound field verification (SFV) during all foundation installation activities:

(i) The LOA Holder must conduct SFV during all activities associated with the first three monopile foundations and the first two jacket foundations installed. Subsequent SFV is required should additional piles be driven that are anticipated to produce louder sound fields than those previously measured;

(ii) The LOA Holder must conduct SFV during drilling the first time it occurs;

(iii) The LOA Holder must determine source levels, spectra, the ranges to the isopleths corresponding to Level A harassment and Level B harassment thresholds, and transmission loss coefficient(s);

(iv) The LOA Holder must perform sound field measurements at a minimum of four distances from the pile being driven in one direction (towards deepest waters), including, but not limited to, 750 m and the modeled Level B harassment zones assuming 10 dB attenuation to verify the accuracy of those modeled zones and contribute to improvement of the models. At least one additional measurement at a different azimuth must be taken to capture sound propagation variability;

(v) The recordings must be continuous throughout the duration of all pile driving and drilling of each foundation monitored;

(vi) The measurement systems must have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile;

(vii) The frequency range of the system must cover the range of at least 20 hertz (Hz) to 20 kilohertz (kHz);

(viii) The system must be designed to have omnidirectional sensitivity and so that the broadband received level of all pile driving and drilling activities exceeds the system noise floor by at least 10 dB. The dynamic range of the system must be sufficient such that at each location, pile driving signals are not clipped and are not masked by noise floor;

(ix) If acoustic field measurements collected during installation of foundation piles indicate ranges to the isopleths, corresponding to Level A harassment and Level B harassment thresholds, are greater than the ranges predicted by modeling (assuming 10 dB attenuation), the LOA Holder must implement additional noise mitigation measures prior to installing the next foundation. Additional acoustic measurements must be taken after each modification;

(x) In the event that field measurements indicate ranges to isopleths, corresponding to Level A harassment and Level B harassment thresholds, are greater than the ranges predicted by modeling (assuming 10 dB attenuation) after implementing additional noise mitigation measures, NMFS Office of Protected Resources may expand the relevant harassment, clearance, and shutdown zones and associated monitoring protocols;

(xi) If acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10 dB attenuation), the LOA Holder may request to NMFS Office of Protected

Resources a modification of the clearance and shutdown zones. For NMFS Office of Protected Resources to consider a modification request for reduced zone sizes, the LOA Holder must have had to conduct SFV on an additional three foundations and that subsequent foundations would be installed under conditions that are predicted to produce smaller harassment zones than those measured;

(xii) The LOA Holder must conduct SFV after construction is complete to estimate turbine operational source levels based on measurements in the near and far-field at a minimum of three locations from each foundation monitored. These data must be used to also identify estimated transmission loss rates; and

(xiii) The LOA Holder must submit an SFV plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of foundation installation activities.

(d) *UXO/MEC detonations.* The following requirements apply to Unexploded Ordnances and Munitions and Explosives of Concern (UXO/MEC) detonations:

(1) Upon encountering a UXO/MEC, the LOA Holder may only resort to high-order removal (*i.e.,* detonation) if all other means of removal are impracticable and this determination must be documented and submitted to NMFS;

(2) UXO/MEC detonations must not occur from December 1 through May 31, annually; however, the LOA Holder may detonate a UXO/MEC in December or May with NMFS' approval on a case-by-case basis;

(3) UXO/MEC detonations must only occur during daylight hours;

(4) No more than one detonation can occur within a 24-hour period;

(5) The LOA Holder must deploy dual noise abatement systems during all UXO/MEC detonations and comply with the following requirements related to noise abatement:

(i) A single bubble curtain must not be used unless paired with another noise attenuation device;

(ii) A big double bubble curtain may be used without being paired with another noise attenuation device;

(iii) The bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 $m^3/(min*m)$. The bubble curtain(s) must surround 100 percent of the UXO/MEC detonation perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must make appropriate adjustments to the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iv) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(v) No parts of the ring or other objects may prevent full seafloor contact;

(vi) Construction contractors must train personnel in the proper balancing of airflow to the ring. Construction contractors must submit an inspection/performance report for approval by the LOA Holder within 72 hours following the performance test. The LOA Holder must then submit that report to NMFS Office of Protected Resources; and

(vii) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (d)(5) must occur prior to UXO/MEC detonations. If the LOA Holder uses a noise mitigation device in addition to the bubble curtain, the LOA Holder must maintain similar quality control measures as described in this paragraph (d)(5);

(6) The LOA Holder must conduct SFV during all UXO/MEC detonations at a minimum of three locations (at two water depths at each location) from each detonation in a direction toward deeper water in accordance with the following requirements:

(i) The LOA Holder must empirically determine source levels (peak and cumulative sound exposure level), the ranges to the isopleths corresponding to the Level A harassment and Level B harassment thresholds in meters, and the transmission loss coefficient(s). The LOA Holder may estimate ranges to the Level A harassment and Level B harassment isopleths by extrapolating from in situ measurements conducted at several distances from the detonation location monitored;

(ii) The measurement systems must have a sensitivity appropriate for the expected sound levels from detonations received at the nominal ranges throughout the detonation;

(iii) The frequency range of the system must cover the range of at least 20 Hz to 20 kHz; and

(iv) The system will be designed to have omnidirectional sensitivity and will be designed so that the predicted broadband received level of all UXO/MEC detonations exceeds the system noise floor by at least 10 dB. The dynamic range of the system must be sufficient such that at each location, pile driving signals are not clipped and are not masked by noise floor.

(7) The LOA Holder must submit an SFV plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of detonation activities;

(8) LOA Holder must establish and implement clearance zones for UXO/MEC detonation using both visual and acoustic monitoring, as described in the LOA;

(9) LOA Holder must use at least two visual PSOs on a platform (*e.g.,* vessels, plane) and one PAM operator to monitor for marine mammals in the clearance zones prior to detonation. If the clearance zone is larger than 2 km (based on charge weight), LOA Holder must deploy a secondary PSO vessel or aircraft. If the clearance is larger than 5 km (based on charge weight), an aerial survey must be conducted;

(10) At least four PSOs must be actively observing marine mammals before and after any UXO/MEC detonation. At least two PSOs must be stationed and observing on a vessel as close as possible to the detonation site and at least two PSOs must be stationed on a secondary, PSO-dedicated vessel or aerial platform. Concurrently, at least one acoustic monitoring PSO (*i.e.,* passive acoustic monitoring (PAM) operator) must be actively monitoring for marine mammals with PAM before, during, and after detonation;

(11) At least one PAM operator must review data from at least 24 hours prior to a detonation and actively monitor hydrophones for 60 minutes prior to detonation. All clearance zones must be acoustically confirmed to be free of marine mammals for 60 minutes prior to commencing a detonation. PAM operators will continue to monitor for marine mammals at least 30 minutes after a detonation;

(12) All clearance zones must be visually confirmed to be free of marine mammals for 30 minutes before a detonation can occur. All PSOs will also maintain watch for 30 minutes after the detonation event;

(13) If a marine mammal is observed entering or within the relevant clearance zone prior to the initiation of a detonation, detonation must be delayed and must not begin until either the marine mammal(s) has voluntarily left the specific clearance zones and have been visually and acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections. The specific time periods are 15 minutes for small odontocetes and 30 minutes for all other marine mammal species; and

(14) For North Atlantic right whales, any visual observation or acoustic

detection must trigger a delay to the detonation of a UXO/MEC. Any large whale sighting by a PSO or detected by a PAM operator that cannot be identified by species must be treated as if it were a North Atlantic right whale.

(e) *HRG surveys.* The following requirements apply to HRG surveys operating sub-bottom profilers (SBPs) (*i.e.,* boomers, sparkers, and CHIRPS):

(1) The LOA Holder is required to have at least one PSO on active duty per HRG vessel during HRG surveys that are conducted during daylight hours (*i.e.,* from 30 minutes prior to civil sunrise through 30 minutes following civil sunset) and at least two PSOs on active duty per vessel during HRG surveys that are conducted during nighttime hours;

(2) The LOA Holder must deactivate acoustic sources during periods where no data are being collected, except as determined to be necessary for testing. Unnecessary use of the acoustic source(s) is prohibited;

(3) The LOA Holder is required to ramp-up SBPs prior to commencing full power, unless the equipment operates on a binary on/off switch, and ensure visual clearance zones are fully visible (*e.g.,* not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to the initiation of survey activities using acoustic sources specified in the LOA;

(4) Prior to a ramp-up procedure starting or activating SBPs, the operator must notify the Lead PSO of the planned start time. This notification time must not be less than 60 minutes prior to the planned ramp-up or activation as all relevant PSOs must monitor the clearance zone for 30 minutes prior to the initiation of ramp-up or activation;

(5) Prior to starting the survey and after receiving confirmation from the PSOs that the clearance zone is clear of any marine mammals, the LOA Holder must ramp-up sources to half power for 5 minutes and then proceed to full power, unless the source operates on a binary on/off switch in which case ramp-up is not required. Ramp-up and activation must be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up and activation may only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species, has elapsed with no further sightings;

(6) The LOA Holder must implement a 30-minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30 minute break in survey activities or PSO monitoring. A clearance period is a period when no marine mammals are detected in the relevant zone;

(7) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up or acoustic surveys may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and seals, and 30 minutes for all other species;

(8) Any large whale sighted by a PSO within 1 km of the SBP that cannot be identified by species must be treated as if it were a North Atlantic right whale and the LOA Holder must apply the mitigation measure applicable to this species;

(9) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (infrared (IR)/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.,* no delay is required) despite periods of inclement weather and/or loss of daylight;

(10) Once the survey has commenced, the LOA Holder must shut down SBPs if a marine mammal enters a respective shutdown zone, except in cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus, Stenella, Lagenorhynchus,* and *Tursiops.* If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in this paragraph (e)(10) is detected in the shutdown zone;

(11) If SBPs have been shut down due to the presence of a marine mammal, the use of SBPs may not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting;

(12) The LOA Holder must immediately shutdown any SBP acoustic source if a marine mammal is sighted entering or within its respective shutdown zones. If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in paragraph (f)(12) is detected in the shutdown zone;

(13) If a SBP is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it would be allowed to be activated again without ramp-up only if:

(i) PSOs have maintained constant observation; and

(ii) No additional detections of any marine mammal occurred within the respective shutdown zones.

(f) *Fisheries monitoring surveys.* The following measures apply to fishery monitoring surveys using trap and trawl gear:

(1) All captains and crew conducting fishery surveys must be trained in marine mammal detection and identification. Marine mammal monitoring will be conducted by the trained captain and/or a member of the scientific crew before (within 1 nautical mile (nmi) and 15 minutes prior to deploying gear), during, and for 15 minutes after haul back;

(2) Survey gear will be deployed as soon as possible once the vessel arrives on station;

(3) The LOA Holder and/or its cooperating institutions, contracted vessels, or commercially-hired captains must implement the following ''move-on'' rule: If marine mammals are sighted within 1 nmi of the planned location and 15 minutes before gear deployment, then the LOA Holder and/or its cooperating institutions, contracted vessels, or commercially-hired captains, as appropriate, must move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, the LOA Holder and/or its cooperating institutions, contracted vessels, or commercially-hired captains must move again or skip the station;

(4) If a marine mammal is deemed to be at risk of interaction after the gear is set, all gear must be immediately removed from the water. If marine mammals are sighted before the gear is fully removed from the water, the vessel will slow its speed and maneuver the

vessel away from the animals to minimize potential interactions with the observed animal;

(5) The LOA Holder must maintain visual monitoring effort during the entire period of time that gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval);

(6) All fisheries monitoring gear must be fully cleaned and repaired (if damaged) before each use;

(7) The LOA Holder's fixed gear must comply with the Atlantic Large Whale Take Reduction Plan regulations at 50 CFR 229.32 during fisheries monitoring surveys;

(8) Trawl tows will be limited to a 20-minute trawl time at 3.0 knots;

(9) All gear, trawl or otherwise, will be emptied immediately after retrieval within the vicinity of the deck;

(10) During trawl surveys, vessel crew will open the codend of the trawl net close to the deck in order to avoid injury to animals that may be caught in the gear;

(11) During any survey that uses vertical lines, buoy lines will be weighted and will not float at the surface of the water and all groundlines will consist of sinking line. All groundlines must be composed entirely of sinking line. Buoy lines must utilize weak links. Weak links must break cleanly leaving behind the bitter end of the line. The bitter end of the line must be free of any knots when the weak link breaks. Splices are not considered to be knots. The attachment of buoys, toggles, or other floatation devices to groundlines is prohibited;

(12) All in-water survey gear will be properly labeled with the scientific permit number or identification as LOA Holder-related research gear. All labels and markings on the buoys and buoy lines will also be compliant with the applicable regulations, and all buoy markings will comply with instructions received by the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division; and

(13) All survey gear will be removed from the water whenever not in active survey use (*i.e.,* no wet storage). All reasonable efforts, that do not compromise human safety, must be undertaken to recover gear. All lost gear must be reported to NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

§ 217.325 Requirements for monitoring and reporting.

(a) *Protected species observer (PSO) and passive acoustic monitoring (PAM) operator qualifications.* The LOA Holder must implement the following measures applicable to PSOs and PAM operators:

(1) The LOA Holder must use independent, dedicated, qualified PSOs and PAM operators, meaning that the PSOs and PAM operators must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements;

(2) PSOs and PAM operators must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO or PAM operator has acquired the relevant skills through a suitable amount of alternate experience. Requests for such a waiver shall be submitted to NMFS Office of Protected Resources and must include written justification containing alternative experience. Alternate experience that may be considered includes, but is not limited to: previous work experience conducting academic, commercial, or government sponsored marine mammal visual and/or acoustic surveys; or previous work experience as a PSO/PAM operator; and the PSO/PAM operator should demonstrate good standing and consistently good performance of PSO/PAM duties;

(3) PSOs and PAM operators must successfully complete the required training within the last 5 years, including obtaining a certificate of course completion;

(4) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable); ability to conduct field observations and collect data according to the assigned protocols; sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations; writing skills sufficient to document observations, including but not limited to, the number and species of marine mammals observed, the dates and times of when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental take of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior; and the ability to communicate orally, by radio, or in-person, with project personnel to provide real-time information on marine mammals observed in the area;

(5) All PSOs and PAM operators must be approved by the NMFS Office of Protected Resources. The LOA Holder must submit PSO resumes for NMFS Office of Protected Resources review and approval at least 90 days prior to commencement of in-water construction activities requiring PSOs and PAM operators. Resumes must include dates of training and any prior NMFS Office of Protected Resources approval, as well as dates and description of last experience, and must be accompanied by information documenting successful completion of an acceptable training course. NMFS Office of Protected Resources shall be allowed 3 weeks to approve PSOs from the time that the necessary information is received by NMFS Office of Protected Resources, after which PSOs meeting the minimum requirements will automatically be considered approved;

(6) All PSOs must be trained in marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations;

(7) At least one PSO on active duty for each activity (*i.e.,* foundation installation, UXO/MEC detonation activities, and HRG surveys) must be designated as the ''Lead PSO''. The Lead PSO must have a minimum of 90 days of at-sea experience working in an offshore environment and is required to have no more than 18 months elapsed since the conclusion of their last at-sea experience;

(8) PAM operators must complete specialized training for operating PAM systems and must demonstrate familiarity with the PAM system on which they must be working; and

(9) PSOs may work as PAM operators and vice versa, pending NMFS-approval; however, they may only perform one role at any one time and must not exceed work time restrictions, which will be tallied cumulatively.

(b) *General PSO and PAM operator requirements.* The following measures apply to PSOs and PAM operators and must be implemented by the LOA Holder:

(1) PSOs must monitor for marine mammals prior to, during, and following pile driving, drilling, UXO/MEC detonation activities, and during HRG surveys that use sub-bottom profilers (with specific monitoring durations and needs described in paragraphs (c) through (e) of this section, respectively).

(2) PAM operator(s) must acoustically monitor for marine mammals prior to, during, and following all pile driving, drilling, and UXO/MEC detonation activities. PAM operators may be located on a vessel or remotely on-shore but must have the appropriate equipment (*i.e.,* computer station equipped with a data collection software system available wherever they are stationed) and be in real-time communication with PSOs and transiting vessel captains;

(3) All PSOs must be located at the best vantage point(s) on any platform, in order to obtain 360 degree visual coverage of the entire clearance and shutdown zones around the activity area, and as much of the Level B harassment zone as possible;

(4) All on-duty visual PSOs must remain in contact with the on-duty PAM operator, who would monitor the PAM systems for acoustic detections of marine mammals in the area, regarding any animal detection that might be approaching or found within the applicable zones no matter where the PAM operator is stationed (*e.g.,* onshore or on a vessel);

(5) During all visual observation periods during the Project, PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During all pile driving and drilling, at least one PSO on the primary pile driving vessel must be equipped with functional Big Eye binoculars (*e.g.,* 25 x 150; 2.7 view angle; individual ocular focus; height control); these must be pedestal mounted on the deck at the best vantage point that provides for optimal sea surface observation and PSO safety;

(6) During all acoustic monitoring periods during the Project, PAM operators must use PAM systems as approved by NMFS;

(7) During periods of low visibility (*e.g.,* darkness, rain, fog, poor weather conditions, *etc.*), PSOs must use alternative technology (*i.e.,* infrared or thermal cameras) to monitor the clearance and shutdown zones as approved by NMFS;

(8) PSOs and PAM operators must not exceed 4 consecutive watch hours on duty at any time, must have a 2-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period;

(9) Any PSO or PAM operator has the authority to call for a delay or shutdown of project activities;

(10) PSOs must remain in real-time contact with the PAM operators and construction personnel responsible for implementing mitigation (*e.g.,* delay to pile driving or UXO/MEC detonation) to ensure communication on marine mammal observations can easily, quickly, and consistently occur between all on-duty PSOs, PAM operator(s), and on-water Project personnel; and

(11) The LOA Holder is required to use available sources of information on North Atlantic right whale presence to aid in monitoring efforts. These include daily monitoring of the Right Whale Sightings Advisory System, consulting of the WhaleAlert app, and monitoring of the Coast Guard's VHF Channel 16 throughout the day to receive notifications of any sightings and information associated with any Dynamic Management Areas, to plan construction activities and vessel routes, if practicable, to minimize the potential for co-occurrence with North Atlantic right whales.

(c) *PSO and PAM operator requirements during WTG and ESP foundation installation.* The following measures apply to PSOs and PAM operators during WTG and ESP foundation installation and must be implemented by the LOA Holder:

(1) If PSOs cannot visually monitor the minimum visibility zone at all times using the equipment described in paragraphs (b)(3) and (4) of this section, pile driving operations must not commence or must shutdown if they are currently active;

(2) All PSOs must begin monitoring 60 minutes prior to pile driving, during, and for 30 minutes after the activity. Pile driving must only commence when the minimum visibility zone is fully visible (*e.g.,* not obscured by darkness, rain, fog, *etc.*) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of pile driving. PAM operators must assist the visual PSOs in monitoring by conducting PAM activities 60 minutes prior to any pile driving, during, and after for 30 minutes for the appropriate size PAM clearance zone (dependent on season). The entire minimum visibility zone must be clear for at least 30 minutes, with no marine mammal detections within the visual or PAM clearance zones prior to the start of pile driving;

(3) The LOA Holder must conduct PAM for at least 24 hours immediately prior to pile driving activities;

(4) During use of any real-time PAM system, at least one PAM operator must be designated to monitor each system by viewing data or data products that would be streamed in real-time or in near real-time to a computer workstation and monitor;

(5) The PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within applicable ranges of interest to the pile driving activity via the data collection software system (*i.e.,* Mysticetus or similar system) who will be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.,* delay or shutdown); and

(6) The LOA Holder must prepare and submit a Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days before the start of any pile driving. The plan must include final pile driving project design (*e.g.,* number and type of piles, hammer type, noise abatement systems, anticipated start date, *etc.*) and all information related to PAM and PSO monitoring protocols for foundation installation activities.

(d) *PSO requirements during UXO/MEC detonations.* The following measures apply to PSOs during HRG surveys using SBPs and must be implemented by the LOA Holder:

(1) All on-duty visual PSOs must remain in contact with the on-duty PAM operator, who would monitor the PAM systems for acoustic detections of marine mammals in the area, regarding any animal detection that might be approaching or found within the applicable zones no matter where the PAM operator is stationed (*e.g.,* onshore or on a vessel);

(2) If PSOs cannot visually monitor the minimum visibility zone at all times using the equipment described in paragraphs (b)(3) and (4) of this section; UXO/MEC operations must not commence or must shutdown if they are currently active;

(3) All PSOs must begin monitoring 60 minutes prior to UXO/MEC detonation, during, and for 30 minutes after the activity. UXO/MEC detonation must only commence when the minimum visibility zone is fully visible (*e.g.,* not obscured by darkness, rain, fog, *etc.*) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of detonation. PAM operators must assist the visual PSOs in monitoring by

conducting PAM activities 60 minutes prior to any UXO/MEC detonation, during, and after for 30 minutes for the appropriate size PAM clearance zone. The entire minimum visibility zone must be clear for at least 30 minutes, with no marine mammal detections within the visual or PAM clearance zones prior to the initiation of detonation;

(4) For North Atlantic right whales, any visual or acoustic detection must trigger a delay to the commencement of UXO/MEC detonation. In the event that a large whale is sighted or acoustically detected that cannot be confirmed by species, it must be treated as if it were a North Atlantic right whale;

(5) The LOA Holder must conduct PAM for at least 24 hours immediately prior to foundation installation and UXO/MEC detonation activities;

(6) During use of any real-time PAM system, at least one PAM operator must be designated to monitor each system by viewing data or data products that would be streamed in real-time or in near real-time to a computer workstation and monitor;

(7) The LOA Holder must use a minimum of one PAM operator to actively monitor for marine mammals before, during, and after UXO/MEC detonation. The PAM operator must assist visual PSOs in ensuring full coverage of the clearance and shutdown zones. The PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within applicable ranges of interest to the activity occurring via the data collection software system (*i.e.,* Mysticetus or similar system) who will be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.,* delay or shutdown);

(8) PAM operators must be on watch for a maximum of 4 consecutive hours, followed by a break of at least 2 hours between watches, and may not exceed a combined watch schedule of more than 12 hours in a single 24-hour period;

(9) The LOA Holder must prepare and submit a Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days before the start of any detonation. The plan must include final UXO/MEC detonation project design (*e.g.,* number and type of UXO/MECs, removal method(s), charge weight(s), anticipated start date, *etc.*) and all information related to PAM and PSO monitoring protocols for UXO/MEC activities; and

(10) A Passive Acoustic Monitoring Plan (''PAM Plan'') must be submitted to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of foundation installation and prior to the start of any UXO/MEC detonation(s). The authorization to take marine mammals would be contingent upon NMFS Office of Protected Resources approval of the PAM Plan.

(e) *PSO requirements during HRG surveys.* The following measures apply to PSOs during HRG surveys using SBPs and must be implemented by the LOA Holder:

(1) Between four and six PSOs must be present on every 24-hour survey vessel and two to three PSOs must be present on every 12-hour survey vessel;

(2) At least one PSO must be on active duty monitoring during HRG surveys conducted during daylight (*i.e.,* from 30 minutes prior to civil sunrise through 30 minutes following civil sunset) and at least two PSOs must be on activity duty monitoring during HRG surveys conducted at night;

(3) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating SBPs during the use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(4) During daylight hours when survey equipment is not operating, the LOA Holder must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports; and

(5) Any acoustic monitoring would complement visual monitoring efforts and would cover an area of at least the Level B harassment zone around each acoustic source.

(f) *Reporting.* The LOA Holder must comply with the following reporting measures:

(1) Prior to initiation of in-water project activities, the LOA Holder must demonstrate in a report submitted to NMFS Office of Protected Resources that all required training for the LOA Holder personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed;

(2) The LOA Holder must use a standardized reporting system during the effective period of the LOA. All data collected related to the Project must be recorded using industry-standard software that is installed on field laptops and/or tablets.

(3) For all monitoring efforts and marine mammal sightings, the following information must be collected and reported:

(i) Date and time that monitored activity begins or ends; Construction activities occurring during each observation period; Watch status (*i.e.,* sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform); PSO who sighted the animal; Time of sighting; Weather parameters (*e.g.,* wind speed, percent cloud cover, visibility); Water conditions (*e.g.,* Beaufort sea state, tide state, water depth); All marine mammal sightings, regardless of distance from the construction activity; Species (or lowest possible taxonomic level possible); Pace of the animal(s); Estimated number of animals (minimum/maximum/high/low/best); Estimated number of animals by cohort (*e.g.,* adults, yearlings, juveniles, calves, group composition, *etc.*); Description (*i.e.,* as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics); Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity; Animal's closest distance and bearing from the pile being driven or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zone(s); Activity at time of sighting (*e.g.,* vibratory installation/removal, impact pile driving, construction survey), use of any noise attenuation device(s), and specific phase of activity (*e.g.,* ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, *etc.*); Marine mammal occurrence in Level A harassment or Level B harassment zones; Description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.,* delay, shutdown, *etc.*) and time and location of the action; and other human activity in the area.

(ii) [Reserved]

(4) If a marine mammal is acoustically detected during PAM monitoring, the following information must be recorded and reported to NMFS Office of Protected Resources:

(i) Location of hydrophone (latitude & longitude; in Decimal Degrees) and site name; Bottom depth and depth of recording unit (in meters); Recorder (model & manufacturer) and platform type (*i.e.,* bottom-mounted, electric glider, *etc.*), and instrument ID of the hydrophone and recording platform (if

applicable); Time zone for sound files and recorded date/times in data and metadata (in relation to Universal Coordinated Time (UTC); *i.e.,* Eastern Standard Time (EST) time zone is UTC–5); Duration of recordings (start/end dates and times; in International Organization for Standardization (ISO) 8601 format, yyyy-mm-ddTHH:MM:SS.sssZ); Deployment/retrieval dates and times (in ISO 8601 format); Recording schedule (must be continuous); Hydrophone and recorder sensitivity (in dB re 1 microPascal (μPa)); Calibration curve for each recorder; Bandwidth/sampling rate (in Hz); Sample bit-rate of recordings; and Detection range of equipment for relevant frequency bands (in meters).

(ii) [Reserved]

(5) Information required for each detection, the following information must be noted:

(i) Species identification (if possible); Call type and number of calls (if known); Temporal aspects of vocalization (date, time, duration, *etc.;* date times in ISO 8601 format); Confidence of detection (detected, or possibly detected); Comparison with any concurrent visual sightings; Location and/or directionality of call (if determined) relative to acoustic recorder or construction activities; Location of recorder and construction activities at time of call; Name and version of detection or sound analysis software used, with protocol reference; Minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and Name of PAM operator(s) on duty.

(ii) [Reserved]

(6) The LOA Holder must compile and submit weekly reports to NMFS Office of Protected Resources that document the daily start and stop of all pile driving, UXO/MEC detonations, and HRG survey associated with the Project; the start and stop of associated observation periods by PSOs; details on the deployment of PSOs; a record of all detections of marine mammals (acoustic and visual); any mitigation actions (or if mitigation actions could not be taken, provide reasons why); and details on the noise attenuation system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday–Saturday) and must include the information required under this section. The weekly report must also identify which turbines become operational and when (a map must be provided). This weekly report must also identify when, what charge weight size, and where UXO/MECs are detonated (a map must also be provided). Once all foundation pile installation and UXO/MEC detonations are completed, weekly reports are no longer required by the LOA Holder;

(7) The LOA Holder must compile and submit monthly reports to NMFS Office of Protected Resources that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). This weekly report must also identify when, what charge weight size, and where UXO/MECs are detonated (a map must also be provided). Once foundation installation and UXO/MEC detonations are completed, monthly reports are no longer required;

(8) The LOA Holder must submit a draft annual report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year. The LOA Holder must provide a final report within 30 days following resolution of comments on the draft report. The draft and final reports must detail the following information:

(i) The total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zone(s) with comparison to authorized take of marine mammals for the associated activity type; Marine mammal detections and behavioral observations before, during, and after each activity; What mitigation measures were implemented (*i.e.,* number of shutdowns or clearance zone delays, *etc.*) or, if no mitigative actions was taken, why not; Operational details (*i.e.,* days and duration of impact and vibratory pile driving, days and duration of drilling, days and number of UXO/MEC detonations, days and amount of HRG survey effort, *etc.*); Any PAM systems used; The results, effectiveness, and which noise attenuation systems were used during relevant activities (*i.e.,* impact and vibratory pile driving, drilling, and UXO/MEC detonations); Summarized information related to situational reporting; Any other important information relevant to the Project, including additional information that may be identified through the adaptive management process; and

(ii) The final annual report must be prepared and submitted within 30 calendar days following the receipt of any comments from NMFS Office of Protected Resources on the draft report. If no comments are received from NMFS Office of Protected Resources within 60 calendar days of NMFS Office of Protected Resources' receipt of the draft report, the report must be considered final.

(9) The LOA Holder must submit its draft 5-year report to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted within 90 calendar days of the completion of activities occurring under the LOA. A 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS Office of Protected Resources comments on the draft report. If no comments are received from NMFS Office of Protected Resources within 60 calendar days of NMFS Office of Protected Resources receipt of the draft report, the report shall be considered final;

(10) The LOA Holder must submit a SFV plan at least 180 days prior to the planned start of vibratory and impact pile driving, drilling, and UXO/MEC detonations. At minimum, the plan must describe how the LOA Holder would ensure that the first three monopile and two jacket (using pin piles) foundation installation sites selected for SFV are representative of the rest of the monopile and pin pile installation sites. In the case that these sites/scenarios are not determined to be representative of all other monopile/pin pile installation sites, the LOA Holder must include information on how additional sites/scenarios would be selected for SFV. The plan must also include methodology for collecting, analyzing, and preparing SFV data for submission to NMFS Office of Protected Resources. The plan must describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. The LOA Holder must also provide, as soon as they are available but no later than 48 hours after each installation, the initial results of the SFV measurements to NMFS Office of Protected Resources in an interim report after each monopile for the first three piles, after two jacket foundation using pin piles are installed, and after each UXO/MEC detonation; and

(i) The SFV plan must also include how operational noise would be monitored. These data must be used to identify estimated transmission loss rates. Operational parameters (*e.g.,* direct drive/gearbox information, turbine rotation rate), characteristics about the UXO/MEC (*e.g.,* charge weight, size, type of charge), as well as sea state conditions and information on nearby anthropogenic activities (*e.g.,*

vessels transiting or operating in the area) must be reported;

(ii) The LOA Holder must provide the initial results of the SFV measurements to NMFS Office of Protected Resources in an interim report after each foundation installation for the first three monopile foundation piles and two jacket foundations (all pin piles), and for each UXO/MEC detonated, as soon as they are available, but no later than 48 hours after each completed installation event and/or detonation. The LOA Holder must also provide interim reports on any subsequent SFV on foundation piles within 48 hours. The interim pile driving SFV report must include hammer energies used during pile driving, peak sound pressure level (SPL_{pk}) and median, mean, maximum, and minimum root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}) and single strike sound exposure level (SEL_{ss}); and

(iii) The final results of SFV of foundation installations and UXO/MEC detonations must be submitted as soon as possible, but no later than within 90 days following completion of all foundation installation of monopiles and jackets (pin piles) and all necessary detonation events. The final report must include, at minimum, the following:

(A) Peak sound pressure level (SPL_{pk}), root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), single strike sound exposure level (SEL_{ss}), integration time for SPL_{rms}, spectrum, and 24-hour cumulative SEL extrapolated from measurements at specified distances (*e.g.,* 750 m) in mean, median, maximum and minimum levels;

(B) The SEL and SPL power spectral density and one-third octave band levels (usually calculated as decidecade band levels) at the receiver locations should be reported; The sound levels reported must be in median and linear average (*i.e.,* average in linear space), and in dB;

(C) Local environmental conditions, such as wind speed, transmission loss data collected on-site (or the sound velocity profile), baseline pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern); A description of depth and sediment type, as documented in the Construction and Operation Plan (COP), at the recording and foundation installation and UXO/MEC detonation locations;

(D) The extents of the Level A harassment and Level B harassment zone(s); Hammer energies required for pile installation and the number of strikes per pile; and Charge weights and other relevant characteristics of UXO/MEC detonations;

(E) Hydrophone equipment and methods (*i.e.,* recording device, bandwidth/sampling rate, distance from the monopile/pin pile and/or UXO/MEC where recordings were made; depth of recording device(s)); Description of the SFV PAM hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, and other relevant information; and

(F) Spatial configuration of the noise attenuation device(s) relative to the pile and/or UXO/MEC charge; A description of the noise abatement system and operational parameters (*e.g.,* bubble flow rate, distance deployed from the pile and/or UXO/MEC, *etc.*) and any action taken to adjust the noise abatement system.

(11) The LOA Holder must submit situational reports if the following circumstances occur:

(i) If a North Atlantic right whale is observed at any time by PSOs or personnel on or in the vicinity of any project vessel, or during vessel transit, the LOA Holder must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System (866) 755–6622, through the WhaleAlert app (*https://www.whalealert.org/*), and to the U.S. Coast Guard via channel 16, as soon as feasible but no later than 24 hours after the sighting. Information reported must include, at a minimum: time of sighting, location, and number of North Atlantic right whales observed;

(ii) When an observation of a large whale occurs during vessel transit, the following information must be recorded and reported to NMFS Office of Protected Resources:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees); The vessel's activity, heading, and speed; Beaufort sea state, water depth (meters), and visibility; Marine mammal identification to the best of the observer's ability (*e.g.,* North Atlantic right whale, whale, dolphin, seal); Initial distance and bearing to marine mammal from vessel and closest point of approach; and Any avoidance measures taken in response to the marine mammal sighting.

(B) [Reserved]

(iii) If a North Atlantic right whale is detected via PAM, the date, time, location (*i.e.,* latitude and longitude of recorder) of the detection as well as the recording platform that had the detection must be reported to *nmfs.pacmdata@noaa.gov* as soon as feasible, but no longer than 24 hours after the detection. Full detection data and metadata must be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic Right Whale Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates;*

(iv) In the event that the personnel involved in the Project discover a stranded, entangled, injured, or dead marine mammal, the LOA Holder must immediately report the observation to the NMFS Office of Protected Resources, the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866–755–6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, the LOA Holder must immediately cease all activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. The LOA Holder may not resume their activities until notified by NMFS Office of Protected Resources. The report must include the following information:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees) 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.

(B) [Reserved]

(v) In the event of a vessel strike of a marine mammal by any vessel associated with the Project, the LOA Holder must immediately report the strike incident to the NMFS Office of Protected Resources and the NMFS Greater Atlantic Regional Fisheries Office within and no later than 24 hours. The LOA Holder must immediately cease all on-water activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources

may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. The LOA Holder may not resume their activities until notified by NMFS Office of Protected Resources. The report must include the following information:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees) of the incident; Species identification (if known) or description of the animal(s) involved; Vessel's speed leading up to and during the incident; Vessel's course/heading and what operations were being conducted (if applicable); Status of all sound sources in use; Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike; Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike; Estimated size and length of animal that was struck; Description of the behavior of the marine mammal immediately preceding and following the strike; If available, description of the presence and behavior of any other marine mammals immediately preceding the strike; Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and to the extent practicable, photographs or video footage of the animal(s).

(B) [Reserved]

(12) LOA Holder must report any lost gear associated with the fishery surveys to the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

§ 217.326 Letter of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, the LOA Holder 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 March 26, 2030, the expiration date of this subpart.

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the LOA Holder must apply for and obtain a modification of the LOA as described in § 217.327.

(d) The LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(e) Issuance of the LOA must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under the regulations of this subpart.

(f) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.327 Modifications of Letter of Authorization.

(a) An LOA issued under §§ 217.322 and 217.326 or this section for the activity identified in § 217.320(a) shall be modified upon request by the LOA Holder, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For a LOA modification request by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations in this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS Office of Protected Resources may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 217.322 and 217.326 or this section for the activities identified in § 217.320(a) may be modified by NMFS Office of Protected Resources under the following circumstances:

(1) Through adaptive management, NMFS Office of Protected Resources may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the LOA Holder regarding the practicability of the modifications), if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA are:

(A) Results from the LOA Holder's monitoring from the previous year(s);

(B) Results from other marine mammals 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 the regulations in this subpart or subsequent LOA.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS Office of Protected Resources shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS Office of Protected Resources determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in the LOA issued pursuant to §§ 217.322 and 217.326 or this section, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.328–217.329 [Reserved]

[FR Doc. 2023–11814 Filed 6–6–23; 8:45 am]

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Part III

Social Security Administration

20 CFR Parts 404 and 416
Revised Medical Criteria for Evaluating Digestive Disorders and Skin Disorders; Final Rule

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2017–0042]

RIN 0960–AG65

Revised Medical Criteria for Evaluating Digestive Disorders and Skin Disorders

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are revising the criteria in the Listing of Impairments (listings) that we use to evaluate claims involving digestive disorders and skin disorders in adults and children under titles II and XVI of the Social Security Act (Act). The revisions reflect our adjudicative experience, advances in medical knowledge, and comments we received from the public in response to a notice of proposed rulemaking (NPRM).

DATES: This rule is effective October 6, 2023.

FOR FURTHER INFORMATION CONTACT: Michael J. Goldstein, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–1020.

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 *http://www.socialsecurity.gov*.

SUPPLEMENTARY INFORMATION:

Background

The listings describe medical conditions that are so severe that we presume any adult who has a medical condition(s) that satisfies the criteria of a listing is unable to perform any gainful activity regardless of their age, education, or work experience and, therefore, is disabled.[1] For children, the listings describe impairments we consider severe enough to cause marked and severe functional limitations.[2] We use the listings at step 3 of the sequential evaluation process to identify claims that we should clearly allow.[3] We do not deny any claim solely because a person's medical condition(s) does not satisfy the criteria of a listing.

We last published final rules that revised the digestive disorders listings on October 19, 2007, and the skin disorders listings on June 9, 2004.[4] We published an Advance Notice of Proposed Rulemaking (ANPRM) for digestive disorders in the **Federal Register** on December 12, 2007.[5] We published an ANPRM for skin disorders in the **Federal Register** on November 10, 2009.[6]

We are making final the rule for evaluating digestive disorders and skin disorders that we proposed in the NPRM published in the **Federal Register** on July 25, 2019.[7] The preamble to the NPRM provides the background for these revisions. You can view the preamble to the NPRM by visiting *http://www.regulations.gov* and searching for document ''SSA–2017–0042.'' There are differences from the NPRM to this final rule in response to public comments to the NPRM, which we explain below.

Why are we revising the listings for evaluating digestive disorders and skin disorders?

We developed this final rule as part of our ongoing review of the listings. We are revising the listings for evaluating digestive disorders and skin disorders to update their medical criteria, and to clarify how we evaluate digestive disorders and skin disorders.

When will we begin to use this final rule?

As we noted in the dates section of this preamble, this final rule will be effective on October 6, 2023. We delayed the effective date of the rule to give us time to update our systems and to provide training and guidance to all of our adjudicators before we implement the final rule. The current rules will continue to apply until the effective date of the final rule. When the final rule becomes effective, we will apply it to new applications filed on or after the effective date of the rule, and to claims that are pending on or after the effective date.[8]

We present a series of tables below. These tables summarize revisions we made to the digestive disorders and skin disorders introductory text and listings. Following the tables, we discuss the changes in detail.

Digestive Disorders

The following table summarizes the current and revised sections of the adult digestive disorders introductory text and listings:

Sections of the Adult Introductory Text and Listings for the digestive system prior to the effective date of this Final Rule	Revised sections of the Adult Introductory Text and Listings for digestive disorders
Introductory Text, 5.00	
A. What kinds of disorders do we consider in the digestive system?	A. Which digestive disorders do we evaluate in this body system?
B. What documentation do we need?	B. What evidence do we need to evaluate your digestive disorder? [5.00 H.]
C. How do we consider the effects of treatment?	C. What is chronic liver disease (CLD), and how do we evaluate it under 5.05?
D. How do we evaluate chronic liver disease?	D. What is inflammatory bowel disease (IBD), and how do we evaluate it under 5.06?
E. How do we evaluate inflammatory bowel disease (IBD)?	E. What is intestinal failure and how do we evaluate it under 5.07?
F. How do we evaluate short bowel syndrome (SBS)?	F. How do we evaluate weight loss due to any digestive disorder under 5.08?
G. How do we evaluate weight loss due to any digestive disorder? [5.00 D.12.]	G. How do we evaluate digestive organ transplantation? [5.00 C.2. and G.]
H. What do we mean by the phrase ''consider under a disability for 1 year''? [5.00 C.6.]	H. How do we evaluate your digestive disorder if there is no record of ongoing treatment?
	I. How do we evaluate your digestive disorder if there is evidence establishing a substance use disorder?
I. How do we evaluate impairments that do not meet one of the digestive disorder listings?	J. How do we evaluate digestive disorders that do not meet one of these listings?

[1] 20 CFR 404.1525(a) and 416.925(a).

[2] 20 CFR 416.925(a).

[3] 20 CFR 404.1520, 416.920, and 416.924.

[4] 72 FR 59398 (2007) and 69 FR 32260 (2004).

[5] 72 FR 70527 (2007).

[6] 74 FR 57972 (2009), with the docket number corrected at 74 FR 62518 (2009).

[7] 84 FR 35936 (2019).

[8] This means that we will use this final rule on and after the effective date in any case in which we make a determination or decision. We expect that Federal courts will review our final decisions using the rules that were in effect at the time we issued the decisions. If a court reverses our final decision and remands a case for further administrative proceedings after the effective date of this final rule, we will apply this final rule to the entire period at issue in the decision we make after the court's remand.

Sections of the Adult Introductory Text and Listings for the digestive system prior to the effective date of this Final Rule	Revised sections of the Adult Introductory Text and Listings for digestive disorders
Listings	
5.01 Category of Impairments, Digestive System	5.01 Category of Impairments, Digestive Disorders
5.02 Gastrointestinal hemorrhaging from any cause, requiring blood transfusion	5.02 Gastrointestinal hemorrhaging from any cause, requiring three blood transfusions
5.03 [Reserved]	5.03 [Reserved]
5.04 [Reserved]	5.04 [Reserved]
5.05 Chronic liver disease (CLD)	5.05 Chronic liver disease (CLD)
5.06 Inflammatory bowel disease (IBD)	5.06 Inflammatory bowel disease (IBD)
5.07 Short bowel syndrome (SBS)	5.07 Intestinal failure
5.08 Weight loss due to any digestive disorder	5.08 Weight loss due to any digestive disorder
5.09 Liver transplantation	5.09 Liver transplantation
	5.10 [Reserved]
	5.11 Small intestine transplantation
	5.12 Pancreas transplantation

The following table summarizes the current and revised sections of the childhood digestive disorders introductory text and listings:

Sections of the Childhood Introductory Text and listings for the digestive system prior to the effective date of this final rule	Revised sections of the Childhood Introductory Text and listings for digestive disorders
Introductory Text, 105.00	
A. What kinds of disorders do we consider in the digestive system?	A. Which digestive disorders do we evaluate in this body system?
B. What documentation do we need?	B. What evidence do we need to evaluate your digestive disorder?
C. How do we consider the effects of treatment?	[105.00 J.]
D. How do we evaluate chronic liver disease?	C. What is chronic liver disease (CLD), and how do we evaluate it under 105.05?
E. How do we evaluate inflammatory bowel disease (IBD)?	D. What is inflammatory bowel disease (IBD), and how do we evaluate it under 105.06?
F. How do we evaluate short bowel syndrome (SBS)?	E. What is intestinal failure, and how do we evaluate it under 105.07?
G. How do we evaluate growth failure due to any digestive disorder?	F. How do we evaluate growth failure due to any digestive disorder under 105.08?
[105.00 D.13.]	G. How do we evaluate digestive organ transplantation?
H. How do we evaluate the need for supplemental daily enteral feeding via a gastrostomy?	H. How do we evaluate the need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy?
I. How do we evaluate esophageal stricture or stenosis?	I. How do we evaluate esophageal stricture or stenosis?
J. What do we mean by the phrase ''consider under a disability for 1 year''?	[105.00 C.2., C.4., and G.]
[105.00 C.6.]	J. How do we evaluate your digestive disorder if there is no record of ongoing treatment?
	K. How do we evaluate your digestive disorder if there is evidence establishing a substance use disorder?
K. How do we evaluate impairments that do not meet one of the digestive disorder listings?	L. How do we evaluate digestive disorders that do not meet one of these listings?
Listings	
105.01 Category of Impairments, Digestive System	105.01 Category of Impairments, Digestive Disorders
105.02 Gastrointestinal hemorrhaging from any cause, requiring blood transfusion.	105.02 Gastrointestinal hemorrhaging from any cause, requiring three blood transfusions
105.03 [Reserved]	105.03 [Reserved]
105.04 [Reserved]	105.04 [Reserved]
105.05 Chronic liver disease	105.05 Chronic liver disease (CLD)
105.06 Inflammatory bowel disease (IBD)	105.06 Inflammatory bowel disease (IBD)
105.07 Short bowel syndrome (SBS)	105.07 Intestinal failure
105.08 Growth failure due to any digestive disorder	105.08 Growth failure due to any digestive disorder
105.09 Liver transplantation	105.09 Liver transplantation
105.10 Need for supplemental daily enteral feeding via a gastrostomy	105.10 Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy
	105.11 Small intestine transplantation
	105.12 Pancreas transplantation

The following table shows our changes to the adult and childhood digestive disorders listings criteria that involve changes to healthcare utilization and condition/episode requirements, the rationale for each change, and supporting resources. The table first summarizes the policy changes that apply to multiple adult and childhood digestive disorders listings and then focuses on changes in specific listings.

ADULT AND CHILDHOOD DIGESTIVE DISORDERS LISTING CRITERIA CHANGE IN HEALTHCARE UTILIZATION THAT APPLIES TO MULTIPLE LISTINGS: CHANGE TO 12-MONTH TIMEFRAME IN LISTING CRITERIA REQUIRING DOCUMENTATION OF FINDINGS ON TWO OR MORE OCCASIONS

Introductory text or listing criteria prior to the effective date of this final rule	Revised listing criteria	Rationale	Resources
5.02/105.02 Gastrointestinal hemorrhaging from any cause, requiring blood transfusion (with or without hospitalization) of at least 2 units of blood per transfusion (or at least 10 cc of blood/kg of body weight per transfusion for children), and occurring at least three times during a consecutive 6-month-period. The transfusions must be at least 30 days apart within the 6-month period.	5.02/105.02 Gastrointestinal hemorrhaging from any cause, requiring three blood transfusions of at least 2 units of blood per transfusion, or at least 10 cc of blood/kg of body weight per transfusion, within a consecutive 12-month period and at least 30 days apart.	The revised text is more consistent with our statutory definition of disability; that is, the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.	Section 223(d)(1)(A) of the Social Security Act.
5.05B/105.05B Chronic liver disease, with: Ascites or hydrothorax not attributable to other causes, despite continuing treatment as prescribed, present on at least 2 evaluations at least 60 days apart within a consecutive 6-month period. Each evaluation must be documented by:	5.05B/105.05B Chronic liver disease (CLD) (see 5.00C) with A, B, C, D, E, F, or G: Ascites or hydrothorax not attributable to other causes (see 5.00C2b and 105.00C2b), present on two evaluations within a consecutive 12-month period and at least 60 days apart. Each evaluation must document the ascites or hydrothorax by 1, 2, or 3:		
5.05F/105.05F Chronic liver disease, with: Hepatic encephalopathy as described in *5.00D10,* with 1 and either 2 or 3: 1. Documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on at least two evaluations at least 60 days apart within a consecutive 6-month period; 3. One of the following occurring on at least two evaluations at least 60 days apart within the same consecutive 6-month period as in F1:	5.05F/105.05F Chronic liver disease (CLD) (see 5.00C) with A, B, C, D, E, F, or G: Hepatic encephalopathy (see 5.00C2f and 105.00C2f) with documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on two evaluations within a consecutive 12-month period and at least 60 days apart and either 1 or 2: 2. One of the following on at least two evaluations at least 60 days apart within the same consecutive 12-month period as in F:		
5.05G/105.05G End stage liver disease with SSA CLD scores of 22 or greater calculated as described in *5.00D11*.	5.05G/105.05G Two SSA CLD scores (see 5.00C3) of at least 20 within a consecutive 12-month period and at least 60 days apart.		
5.06/105.06 Inflammatory bowel disease (IBD) documented by endoscopy, biopsy, appropriate medically acceptable imaging, or operative findings with: A. Obstruction of stenotic areas (not adhesions) in the small intestine or colon with proximal dilatation, confirmed by appropriate medically acceptable imaging or in surgery, requiring hospitalization for intestinal decompression or for surgery, and occurring on at least two occasions at least 60 days apart within a consecutive 6-month period; OR B. Two of the following despite continuing treatment as prescribed and occurring within the same consecutive 6-month period:	5.06/105.06 Inflammatory bowel disease (IBD) (see 5.00D/105.00D) documented by endoscopy, biopsy, imaging, or operative findings, and demonstrated by A, B, or C: A. Obstruction of stenotic areas (not adhesions) in the small intestine or colon with proximal dilatation, confirmed by imaging or in surgery, requiring two hospitalizations for intestinal decompression or for surgery, within a consecutive 12-month period and at least 60 days apart. OR B. Two of the following occurring within a consecutive 12-month period and at least 60 days apart:		
5.08 Weight loss due to any digestive disorder despite continuing treatment as prescribed, with body mass index (BMI) of less than 17.50 calculated on at least two evaluations at least 60 days apart within a consecutive 6-month period.	5.08 Weight loss due to any digestive disorder (see 5.00F), despite adherence to prescribed medical treatment, with BMI of less than 17.50 calculated on at least two evaluations at least 60 days apart within a consecutive 12-month period.		

ADULT AND CHILDHOOD DIGESTIVE DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION INTRODUCTORY TEXT—5.00/105.00

Introductory Text or Listing Criteria Prior to the Effective Date of This Final Rule	Revised Introductory Text or Listing Criteria	Rationale	Resources
5.00D/105.00D (How do we evaluate chronic liver disease) 11. End stage liver disease (ESLD) documented by scores from the SSA Chronic Liver Disease (SSA CLD) calculation (*5.05G/105.05G1*). b. To calculate the SSA CLD score, we use a formula that includes three laboratory values: Serum total bilirubin (mg/dL), serum creatinine (mg/dL), and International Normalized Ratio (INR).	5.00/105.00C (What is chronic liver disease (CLD) and how do we evaluate it?) 3. SSA Chronic Liver Disease (SSA CLD) score (5.05G/105.05G [9]). Listing 5.05G requires two SSA CLD scores, each requiring three or four laboratory values. The ''date of the SSA CLD score'' is the date of the earliest of the three or four laboratory values used for its calculation. The date of the second SSA CLD score must be at least 60 days after the date of the first SSA CLD score and both scores must be within the required 12-month period. If you have the two SSA CLD scores required by 5.05G, we will find that your impairment meets the criteria of the listing from at least the date of the first SSA CLD score. a. We calculate the SSA CLD score using a formula that includes up to four laboratory values: Serum creatinine (mg/dL), total bilirubin (mg/dL), INR, and under certain conditions, serum sodium (mmol/L). The SSA CLD score calculation contains at least one, and sometimes two, parts, as described in (i) and (ii).	The revised introductory text adds serum sodium, to be considered under certain conditions, in the CLD formula. The Model for End-Stage Liver Disease (MELD) formula, from which the CLD formula is based and is the mathematical equivalent to, was updated in 2016 to add the serum sodium levels. We added serum sodium levels because, for individuals with certain liver conditions such as alcoholic hepatitis and cirrhosis, medical research shows serum sodium levels predict negative outcomes more accurately than formulas without it.	Organ Procurement and Transplantation Network & United Network for Organ Sharing. (2015). Changes to OPTN bylaws and policies from actions at OPTN/UNOS Executive Committee meetings July 2015–November 2015 [PDF]. *https://optn.transplant.hrsa.gov/media/1575/policynotice_20151101.pdf.* Vaa, B.E., Asrani, S.K., Dunn, W., Kamath, P.S., & Shah, V.H. (2011). Influence of serum sodium on MELD-based survival prediction in alcoholic hepatitis. Mayo Clinic Proceedings, 86(1), 37–42. Londoño, M.-C., Cárdenas, A., Guevara, M., Quintó, L., de las Heras, D., Navasa, M., Rimola, A., Garcia-Valdecasas, J.-C., Arroya, V., & Ginès, P. (2007). MELD score and serum sodium in the prediction of survival of patients with cirrhosis awaiting liver transplantation. Gut, 56(9), 1283–1290. *https://doi.org/10.1136/gut.2006.102764.*
Listing 5.05/105.05 Chronic Liver Disease (CLD)			
5.05G/105.05G End stage liver disease with SSA CLD scores of 22 or greater calculated as described in *5.00D11*.	5.05G/105.05G Two SSA CLD scores (see 5.00C3) of at least 20 within a consecutive 12-month period and at least 60 days apart.	The revised listing reduces the current listing level end stage liver disease CLD score of 22 to 20. Two scores of at least 20 accurately identify advanced, end stage liver disease that prevents a person from working and, without a liver transplant, will ultimately result in death. The unchanged requirement of a second score at least 60 days after the first score is to confirm chronicity, which is critical for confirming continued severity. We have also modified this score for children above the age of 12 in the childhood listing (see 105.05G2).	Annamalai, A., Harada, M., Chen, M., Tran, T., Ko, A., Ley, E., . . . Noureddin, M. (2016). Predictors of mortality in the critically ill cirrhotic patient: Is the model for end-stage liver disease enough? Journal of the American College of Surgeons, 224(3), 276–282. *https://doi.org/10.1016/j.jamcollsurg.2016.11.005*. Zhiang, E., Zhang, Z., Want, S., Xiao, Z., Gu, J., Xiong, M., . . . Huang, Z. (2016). Predicting the severity of liver cirrhosis through clinical parameters. Journal of Surgical Research, 204(2), 274–281. *https://doi.org/10.1016/j.jss.2016.04.036*. Singal, A.K. & Kamath, P.S. (2013). Model for end-stage liver disease. Journal of Clinical and Experimental Hepatology, 3(1), 50–60. *https://doi.org/10.1016/j.jceh.2012.11.002*. Bittermann, T., Makar, G., & Goldberg, D.S. (2015). Early post-transplant survival: Interaction of MELD score and hospitalization status. Journal of Hepatology, 63(3), 601–608. *https://www.sciencedirect.com/science/article/pii/S0168827815002445?via%3Dihub*.

ADULT AND CHILDHOOD DIGESTIVE DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION INTRODUCTORY TEXT—5.00/105.00—Continued

Introductory Text or Listing Criteria Prior to the Effective Date of This Final Rule	Revised Introductory Text or Listing Criteria	Rationale	Resources
Listing 5.06/105.06 Inflammatory Bowel Disease (IBD)			
5.06B/105.06B Inflammatory bowel disease (IBD) documented by endoscopy, biopsy, appropriate medically acceptable imaging, or operative findings with: Two of the following despite continuing treatment as prescribed and occurring within the same consecutive 6-month period: 3. Clinically documented tender abdominal mass palpable on physical examination with abdominal pain or cramping that is not completely controlled by prescribed narcotic medication, present on at least two evaluations at least 60 days apart; or 4. Perineal disease with a draining abscess or fistula, with pain that is not completely controlled by prescribed narcotic medication, present on at least two evaluations at least 60 days apart; or	5.06B/105.06B Inflammatory bowel disease (IBD) (see 5.00D and 105.00D) documented by endoscopy, biopsy, imaging, or operative findings, and demonstrated by A, B, or C: Two of the following occurring within a consecutive 12-month period and at least 60 days apart: 3. Clinically documented tender abdominal mass palpable on physical examination with abdominal pain or cramping; or 4. Perianal disease with a draining abscess or fistula; or	The revised listing text removes the requirement that pain not be completely controlled by prescribed narcotic medication. If a person is prescribed any medication, including opioid or other narcotic medication, and chooses to not take the medication, we use our rules regarding the need to follow prescribed treatment, which apply to all medical conditions, not just digestive disorders. In subregulatory policy, we also include the ''risk of addiction to opioid medication'' as an example of a ''good cause'' reason for not following prescribed treatment.'' Since it is already our policy that a lack of, or reduction of, opioid or narcotic prescriptions due to the risk of addiction will not adversely affect a person's claim during the adjudication process, we removed consideration of narcotic medication from these listings.	20 CFR 404.1530 and 416.930. Need to follow prescribed treatment. SSR 18–3p: Titles II and XVI: Failure to Follow Prescribed Treatment.
5.06B/105.06B Inflammatory bowel disease (IBD) documented by endoscopy, biopsy, appropriate medically acceptable imaging, or operative findings with: 6 (5 for childhood). Need for supplemental daily enteral nutrition via a gastrostomy or daily parenteral nutrition via a central venous catheter.	5.06B/105.06B Inflammatory bowel disease (IBD) (see 5.00D and 105.00D) documented by endoscopy, biopsy, imaging, or operative findings, and demonstrated by A, B, or C: 5. Need for supplemental daily enteral nutrition via a gastrostomy, duodenostomy, or jejunostomy, or daily parenteral nutrition via a central venous catheter.	The revised listing expands the alternative method of supplemental daily enteral nutrition to meet the listing to include duodenostomy and jejunostomy. We added these two additional methods of tube feeding after we received public comment requesting that we expand tube feedings to those beyond gastric which are often required in patients with digestive disorders.	Public comment: *https://www.regulations.gov/comment/SSA-2017-0042-0008*. Pearce, C.B. & Duncan, H.D. (2002). Enteral feeding. Nasogastric, nasojejunal, percutaneous endoscopic gastrostomy, or jejunostomy: its indications and limitations, Postgraduate Medical Journal, 78, 198–204. *https://doi.10.1136/pmj.78.918.198*. Brett, K. & Argáez, C. (2018). Gastrostomy versus gastrojejunostomy and/or jejunostomy feeding tubes: a review of clinical effectiveness, cost-effectiveness and guidelines. Ottawa (ON): Canadian Agency for Drugs and Technologies in Health. Clinical Nutrition University. (2021, May 25). *Types of Feeding Tubes EXPLAINED*. YouTube. *https://www.youtube.com/watch?v=4Oam1yUHiO8*.

ADULT AND CHILDHOOD DIGESTIVE DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION INTRODUCTORY TEXT—5.00/105.00—Continued

Introductory Text or Listing Criteria Prior to the Effective Date of This Final Rule	Revised Introductory Text or Listing Criteria	Rationale	Resources
No current listing criteria	5.06C Repeated complications of IBD (see 5.00D5a), occurring an average of three times a year, or once every 4 months, each lasting 2 weeks or more, within a consecutive 12-month period, and marked limitation (see 5.00D5c) in one of the following: 1. Activities of daily living (see 5.00D5d); or 2. Maintaining social functioning (see 5.00D5e); or 3. Completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace (see 5.00D5f).	The revised listing combines required medical findings with specific limitations in functioning to identify IBD of listing-level severity. Specifically, the revised listing adds a criterion for repeated complications of IBD that result in marked limitation in at least one area of functioning. This combination of findings accurately characterizes complications of IBD that prevent a person from engaging in any gainful activity. The addition of functional criteria is also consistent with the listings that already include these same functional criteria, which are 7.18 (Repeated complications of hematological disorders), 14.02B (Repeated manifestations of systemic lupus erythematosus), 14.04D (Repeated manifestations of systemic sclerosis), 14.05E (Repeated manifestations of polymyositis or dermatomyositis), 14.06B (Repeated manifestations of undifferentiated or mixed connective tissue disease), 14.07C (Repeated manifestations of an immune deficiency disorder), 14.09D (Repeated manifestations of inflammatory arthritis), 14.10B (Sjögren's syndrome), and 14.11I (Repeated manifestations of HIV infection).	Farraye, F.A., Melmed, G.Y., Lichtenstein, G.R., & Kane, S.V. (2017). ACG clinical guidelines: Preventative care in inflammatory bowel disease. American Journal of Gastroenterology, 112(2), 241–258. Gajendran, M., Loganathan, P., Catinella, A.P., & Hashash, J.G. (2018). A comprehensive review and update on Crohn's disease. Disease-a-Month, 64, 20–57. Rubin, D.T., Ananthakrishnan, A.N., Siegel, C.A., Sauer, B.G., & Long, M.D. (2019). ACG clinical guidelines: Ulcerative colitis in adults. American Journal of Gastroenterology, 114(3), 384–413. Yarur, A.J., Strobel, S.G., Deshpande, A.R., & Abreu, M.T. (2011). Predictors of aggressive inflammatory bowel disease. Gastroenterology & Hepatology, 7(10), 652–659.
Listing 5.07/105.07 Intestinal Failure			
5.07/105.07 Short bowel syndrome (SBS), due to surgical resection of more than one-half of the small intestine, with dependence on daily parenteral nutrition via a central venous catheter (see *5.00F*).	5.07/105.07 Intestinal failure (see 5.00E) due to short bowel syndrome, chronic motility disorders, or extensive small bowel mucosal disease, resulting in dependence on daily parenteral nutrition via a central venous catheter for at least 12 months.	The revised listing more broadly addresses intestinal failure with need for parenteral nutrition and covers a greater range of chronic dysmotility or absent motility disorders. We adopted a public comment requesting this change to account for individuals who have intestinal conditions that may exist without the surgery requirement of short bowel syndrome (the current listing).	Public comment: *https://www.regulations.gov/comment/SSA-2017-0042-0015*. Thompson J.S., Rochling FA, Weseman R.A., Mercer D.F. Current management of short bowel syndrome. *Curr Probl Surg* 49:52–115, 2012. *https://doi.org/10.1067/j.cpsurg.2011.10.002*. Pironi, L., Arends, J., Baxter, J., Bozzetti, F., Peláez, R.B., Cuerda, C., Forbes, A., Gabe, S., Gillanders, L., Holst, M., Jeppesen, P.B., Joly, F., Kelly, D., Klek, S., Irtun, Ø., Olde Damink, S.W., Panisic, M., Rasmussen, H.H., Staun, M., Szczepanek, K., . . . Acute Intestinal Failure Special Interest Groups of ESPEN (2015). ESPEN endorsed recommendations. Definition and classification of intestinal failure in adults. *Clinical nutrition (Edinburgh, Scotland), 34*(2), 171–180. *https://doi.org/10.1016/j.clnu.2014.08.017*.

ADULT AND CHILDHOOD DIGESTIVE DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION INTRODUCTORY TEXT—5.00/105.00—Continued

Introductory Text or Listing Criteria Prior to the Effective Date of This Final Rule	Revised Introductory Text or Listing Criteria	Rationale	Resources
			Pironi, L., Arends, J., Bozzetti, F., Cuerda, C., Gillanders, L., Jeppesen, P.B., Joly, F., Kelly, D., Lal, S., Staun, M., Szczepanek, K., Van Gossum, A., Wanten, G., Schneider, S.M., & Home Artificial Nutrition & Chronic Intestinal Failure Special Interest Group of ESPEN (2016). ESPEN guidelines on chronic intestinal failure in adults. *Clinical nutrition (Edinburgh, Scotland), 35*(2), 247–307. *https://doi.org/10.1016/j.clnu.2016.01.020*. Deutsch, L., Cloutier, A., & Lal, S. (2020). Advances in chronic intestinal failure management and therapies. *Current opinion in gastroenterology, 36*(3), 223–229. *https://doi.org/10.1097/MOG.0000000000000631*. Pierret, A., Wilkinson, J.T., Zilbauer, M., & Mann, J.P. (2019). Clinical outcomes in pediatric intestinal failure: a meta-analysis and meta-regression. *The American journal of clinical nutrition, 110*(2), 430–436. *https://doi.org/10.1093/ajcn/nqz110*.
Listing 105.10 Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy			
105.10 Need for supplemental daily enteral feeding via a gastrostomy due to any cause, for children who have not attained age 3; thereafter, evaluate the residual impairment(s) (see 105.00H).	105.10 Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy (see 105.00H) due to any cause, for children who have not attained age 3; after that, evaluate the residual impairment(s).	The revised listing expands the alternative method of supplemental daily enteral nutrition to meet the listing to include duodenostomy and jejunostomy. We added these two additional methods of tube feeding after we received public comment requesting that we expand tube feedings to those beyond gastric which are often required in patients with digestive disorders.	Public comment: *https://www.regulations.gov/comment/SSA-2017-0042-0008*.

Skin Disorders

The following table summarizes the current and revised sections of the adult skin disorders introductory text and listings.

Sections of the Adult Introductory Text and listings for skin disorders prior to the effective date of this final rule	Revised sections of the Adult Introductory Text and Listings for Skin Disorders
Introductory Text, 8.00	
A. What skin disorders do we evaluate with these listings?	A. Which skin disorders do we evaluate under these listings?
B. What documentation do we need?	[8.00C]
[8.00C]	B. What are our definitions for the following terms used in this body system?
C. How do we assess the severity of your skin disorder(s)?	[8.00D]
[8.00B]	C. What evidence do we need to evaluate your skin disorder?
D. How do we assess impairments that may affect the skin and other body systems?	[8.00H]
[8.00C]	D. How do we evaluate the severity of skin disorders?
E. How do we evaluate genetic photosensitivity disorders?	E. How do we evaluate genetic photosensitivity disorders under 8.07?
F. How do we evaluate burns?	F. How do we evaluate burns under 8.08?
G. How do we determine if your skin disorder(s) will continue at a disabling level of severity in order to meet the duration requirement?.	[8.00D]
[8.00C]	G. How do we evaluate chronic conditions of the skin or mucous membranes under 8.09?
H. How do we assess your skin disorder(s) if your impairment does not meet the requirements of one of these listings?	[8.00I]
[8.00D]	H. How do we evaluate disorders in other body systems that affect the skin?
[8.00H]	I. How do we evaluate skin disorders that do not meet one of these listings?
Listings	
8.01 Category of Impairments, Skin Disorders	8.01 Category of Impairments, Skin Disorders
8.02 Ichthyosis	8.02 [Reserved] [Now evaluated in 8.09]

[9] The childhood digestive disorders listing includes SSA CLD–P scores (see 105.00C3). We are not proposing changes to the SSA CLD–P formula. This table discusses changes to the SSA CLD formula only.

Sections of the Adult Introductory Text and listings for skin disorders prior to the effective date of this final rule	Revised sections of the Adult Introductory Text and Listings for Skin Disorders
8.03 Bullous disease	8.03 [Reserved] [Now evaluated in 8.09]
8.04 Chronic infections of the skin or mucous membranes	8.04 [Reserved] [Now evaluated in 8.09]
8.05 Dermatitis	8.05 [Reserved] [Now evaluated in 8.09]
8.06 Hidradenitis suppurativa	8.06 [Reserved] [Now evaluated in 8.09]
8.07 Genetic photosensitivity disorders	8.07 Genetic photosensitivity disorders
8.08 Burns	8.08 Burns
[8.02–8.06]	8.09 Chronic conditions of the skin or mucous membranes

The following table summarizes the current and revised sections of the childhood skin disorders introductory text and listings.

Sections of the Childhood Introductory Text and listings for skin disorders prior to the effective date of this final rule	Revised sections of the Childhood Introductory Text and listings for skin disorders
Introductory Text, 108.00	
A. What skin disorders do we evaluate with these listings?	A. Which skin disorders do we evaluate under these listings?
B. What documentation do we need?	[108.00C]
[108.00C]	B. What are our definitions for the following terms used in this body system?
C. How do we assess the severity of your skin disorder(s)?	[108.00D]
[108.00B]	C. What evidence do we need to evaluate your skin disorder?
D. How do we assess impairments that may affect the skin and other body systems?.	[108.00H]
[108.00C]	D. How do we evaluate the severity of skin disorders?
E. How do we evaluate genetic photosensitivity disorders?	E. How do we evaluate genetic photosensitivity disorders under 108.07?
F. How do we evaluate burns?	F. How do we evaluate burns under 108.08?
G. How do we determine if your skin disorder(s) will continue at a disabling level of severity in order to meet the duration requirement?.	[108.00D]
[108.00C]	G. How do we evaluate chronic conditions of the skin or mucous membranes under 108.09?
H. How do we assess your skin disorder(s) if your impairment does not meet the requirements of one of these listings?	[108.00I]
[108.00D]	H. How do we evaluate disorders in other body systems that affect the skin?
[108.00H]	I. How do we evaluate skin disorders that do not meet one of these listings?
Listings	
108.01 Category of Impairments, Skin Disorders	108.01 Category of Impairments, Skin Disorders
108.02 Ichthyosis	108.02 [Reserved] [Now evaluated in 108.09]
108.03 Bullous disease	108.03 [Reserved] [Now evaluated in 108.09]
108.04 Chronic infections of the skin or mucous membranes	108.04 [Reserved] [Now evaluated in 108.09]
108.05 Dermatitis	108.05 [Reserved] [Now evaluated in 108.09]
108.06 Hidradenitis suppurativa	108.06 [Reserved] [Now evaluated in 108.09]
108.07 Genetic photosensitivity disorders	108.07 Genetic photosensitivity disorders
108.08 Burns	108.08 Burns
[108.02–108.06]	108.09 Chronic conditions of the skin or mucous membranes

The following table shows our changes to the adult and childhood skin disorders listings criteria that involve changes to healthcare utilization and condition/episode requirements, the rationale for each change, and supporting resources.

ADULT AND CHILDHOOD SKIN DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION AND CONDITION/EPISODE REQUIREMENTS

Introductory text or listing criteria prior to the effective date of this final rule	Revised Introductory text or listing criteria	Rationale	Resources
Introductory Text—8.00/108.00			
No current introductory text	8.00D5/108.00D5 c. Treatment with PUVA (psoralen and ultraviolet A (UVA) light) or biologics. If you receive additional treatment with PUVA or biologics to treat your skin disorder(s), we will defer adjudication of your claim for 6 months from the start of treatment with PUVA or biologics to evaluate the effectiveness of these treatments unless we can make a fully favorable determination or decision on another basis	The revised introductory text about deferment for PUVA treatment is supported by medical research. PUVA treatment involves exposure to UVA light after taking biologic medication called psoralen that increases the skin's sensitivity to ultraviolent light. PUVA is generally used under medical supervision when other conservative treatments for skin disorders have proven to be ineffective. We defer adjudication for 6 months from the start of treatment to assess the effectiveness of PUVA treatment on the skin condition	Farahnik, B., Nakamura, M., Singh, R.K., Abrouk, M., Zhu, T.H., Lee, K.M., . . . Liao, W. (2016). The patient's guide to psoriasis treatment. Part 2: PUVA phototherapy. Dermatology and Therapy, 6(3), 315–324. *https://doi.org/10.1007/s13555-016-0130-9.* Ong, S., & Venning, V. (2014). PUVA treatment information for patients. Retrieved from Oxford University Hospital NHS website: *https://www.ouh.nhs.uk/patient-guide/leaflets/files/120719puva.pdf.* Shenoi, S.D., & Prabhu, S. (2014). Photochemotherapy (PUVA) in psoriasis and vitiligo. Indian Journal of Dermatology, Venereology and Leprology, 80(6), 497–504. *https://doi.org/10.4103/0378-6323.144143.*

ADULT AND CHILDHOOD SKIN DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION AND CONDITION/EPISODE REQUIREMENTS—Continued

Introductory text or listing criteria prior to the effective date of this final rule	Revised Introductory text or listing criteria	Rationale	Resources
8.07/108.07 Genetic photosensitivity disorders			
8.07/108.07 Genetic photosensitivity disorders, established as described in 8.00E *and 108.00E* B. Other genetic photosensitivity disorders, with: 1. Extensive skin lesions that have lasted or can be expected to last for a continuous period of at least 12 months, OR 2. Inability to function outside of a highly protective environment for a continuous period of at least 12 months (see 8.00E2 *and 108.00E2*)	8.07/108.07 Genetic photosensitivity disorders, established as described in 8.00E and 108.00E. The requirements of this listing are met if either paragraph A or paragraph B is satisfied B. Other genetic photosensitivity disorders (see 8.00E2 and 108.00E2) with either 1 or 2: 2. Chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 8.00D2 and 108.00D2), as evidenced by: a. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete work-related activities (or age-appropriate activities in childhood claims) involving fine and gross movements (see 8.00B5 and 108.00B5) due to chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3); or b. Inability to use one upper extremity to independently initiate, sustain, and complete work-related activities (or age-appropriate activities in childhood claims) involving fine and gross movements (see 8.00B5 and 108.00B5) due to chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3), and a documented medical need (see 8.00B4 and 108.00B4) for an assistive device (see 8.00B1 and 108.00B1) that requires the use of the other upper extremity; or c. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete work-related activities (or age-appropriate activities in childhood claims) due to chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3) affecting at least two extremities (including when limitations are due to involvement of the perineum or the inguinal region); or d. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete work-related activities (or age-appropriate activities in childhood claims), due to chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).	The requirement that the claimant's skin disorder results in significant functional limitations lasting a minimum of 12 months dates back to 1979.[10] The language in the revised listing reflects a continuation of this requirement, stating that we must have medically documented evidence of physical limitation(s) of functioning related to the claimant's skin disorder, and that the decrease in physical function resulting from the claimant's skin disorder must have lasted, or can be expected to last, for a continuous period of at least 12 months The revised functional criteria focus on the person's ability to use their upper and lower extremities to perform work-related activities or engage in age-appropriate activities in childhood claims. These revisions reflect our continued focus on the functional limitations that skin disorders may cause and reflect a level of functional limitation similar to the criteria in our current rules. We clarify our policy by providing precise functional criteria rather than examples as in the current skin disorders listings to ensure that adjudicators do not overlook the functional criteria and that we evaluate functional limitations caused by a person's skin impairment in a consistent manner across cases Additionally, the revised requirement that the claimant have significant limitations in the use of two extremities is consistent with the level of functional limitations set forth in other listing criteria, such as in our neurological disorders listings (11.00/111.00), which require ''disorganization of motor function'' in two extremities	44 FR 18170, 18187 (1979), 45 FR 55566, 55607 (1980), and 50 FR 50068, 50098 (1985). Falder, S., Browne, A., Edgar, D., Staples, E., Fong, J., Rea, S., & Wood, F. (2009). Core outcomes for adult burn survivors: A clinical overview. Burns, 35(5), 618–641. *https://doi.org/10.1016/j.burns.2008.09.002*; Haslik, W., Kamolz, L., Manna, F., Hladik, M., Rath, T., & Frey, M. (2010). Management of full-thickness skin defects in the hand and wrist region: First long-term experiences with the dermal matrix Matriderm®. Journal of Plastic, Reconstructive & Aesthetic Surgery, 63(2), 360–364. *https://doi.org/10.1016/j.bjps.2008.09.026*; Wasiak, J., Lee, S., Paul, E., Mahar, P., Pfitzer, B., Spinks, A., . . . Gabbe, B. (2014). Predictors of health status and health-related quality of life 12 months after severe burn. Burns, 40(4), 568–574; 81 FR 43048 (2016).

ADULT AND CHILDHOOD SKIN DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION AND CONDITION/EPISODE REQUIREMENTS—Continued

Introductory text or listing criteria prior to the effective date of this final rule	Revised Introductory text or listing criteria	Rationale	Resources
Listing 8.08/108.08 Burns			
8.08/108.08 Burns, with extensive skin lesions that have lasted or can be expected to last for a continuous period of at least 12 months (see 8.00F *and 108.00F*)	8.08/108.08 Burns (see 8.00F and 108.00F). Burns that do not require continuing surgical management (see 8.00B6 and 108.00B6), or that have been documented by an acceptable medical source to have reached maximum therapeutic benefit and therefore are no longer receiving surgical management, resulting in chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 8.00D2 and 108.00D2), as evidenced by: The functional criteria set forth above in listings 8.07B2a through d and 108.07B2a through d	The requirement that the claimant's skin disorder results in significant functional limitations lasting a minimum of 12 months dates back to 1979.[11] The language in the revised listing reflects a continuation of this requirement, stating that we must have medically documented evidence of physical limitation(s) of functioning related to the claimant's skin disorder, and that the decrease in physical function resulting from the claimant's skin disorder must have lasted, or can be expected to last, for a continuous period of at least 12 months The revised functional criteria, focus on the person's ability to use their upper and lower extremities to perform work-related activities or engage in age-appropriate activities in childhood claims. These revisions reflect our continued focus on the functional limitations that skin disorders may cause and reflect a level of functional limitation similar to the criteria in our current rules. We clarify our policy by providing precise functional criteria rather than examples as in the current skin disorders listings to ensure that adjudicators do not overlook the functional criteria and that we evaluate functional limitations caused by a person's skin impairment in a consistent manner across cases Additionally, the revised requirement that the claimant have significant limitations in the use of two extremities is consistent with the level of functional limitations set forth in other listing criteria, such as in our neurological disorders listings (11.00/111.00), which require ''disorganization of motor function'' in two extremities	44 FR 18170, 18187 (1979), 45 FR 55566, 55607 (1980), and 50 FR 50068, 50098 (1985). Falder, S., Browne, A., Edgar, D., Staples, E., Fong, J., Rea, S., & Wood, F. (2009). Core outcomes for adult burn survivors: A clinical overview. Burns, 35(5), 618–641. *https://doi.org/10.1016/j.burns.2008.09.002*; Haslik, W., Kamolz, L., Manna, F., Hladik, M., Rath, T., & Frey, M. (2010). Management of full-thickness skin defects in the hand and wrist region: First long-term experiences with the dermal matrix Matriderm®. Journal of Plastic, Reconstructive & Aesthetic Surgery, 63(2), 360–364. *https://doi.org/10.1016/j.bjps.2008.09.026*; Wasiak, J., Lee, S., Paul, E., Mahar, P., Pfitzer, B., Spinks, A., . . . Gabbe, B. (2014). Predictors of health status and health-related quality of life 12 months after severe burn. Burns, 40(4), 568–574; 81 FR 43048 (2016).

ADULT AND CHILDHOOD SKIN DISORDERS LISTINGS CRITERIA—CHANGES IN HEALTHCARE UTILIZATION AND CONDITION/EPISODE REQUIREMENTS—Continued

Introductory text or listing criteria prior to the effective date of this final rule	Revised Introductory text or listing criteria	Rationale	Resources
Listing 8.09/108.09 Chronic conditions of the skin or mucous membranes			
No current listing. Note that current listings 8.02/108.02 (Ichthyosis), 8.03/108/03 (Bullous disease), 8.04 (Chronic infections of the skin or mucous membranes), 8.05 (Dermatitis), and 8.06 (Hidradenitis suppurativa) all require extensive skin lesions that persist for at least 3 months despite continued treatment as prescribed. Under the revised skin disorders listings, all of these skin conditions will be evaluated under listing 8.09/108.09.	8.09/108.09 Chronic conditions of the skin or mucous membranes (see 8.00G and 108.00G) resulting in: A. Chronic skin lesions (see 8.00B2 and 108.00B2) or contractures (see 8.00B3 and 108.00B3) causing chronic pain or other physical limitation(s) that persist despite adherence to prescribed medical treatment for 3 months (see 8.00D5b and 108.00D5b AND Impairment-related functional limitations demonstrated by the functional criteria set forth above in listings 8.07B2a through d and 108.07B2a through d.	We consolidated the current listings into one listing for adjudicative ease and to more efficiently capture adults and children with chronic skin conditions of listing-level severity. The requirement that the claimant's skin disorder results in significant functional limitations lasting a minimum of 12 months dates back to 1979.[12] The language in the revised listing reflects a continuation of this requirement, stating that we must have medically documented evidence of physical limitation(s) of functioning related to the claimant's skin disorder, and that the decrease in physical function resulting from the claimant's skin disorder must have lasted, or can be expected to last, for a continuous period of at least 12 months. The revised functional criteria focus on the person's ability to use their upper and lower extremities to perform work-related activities or engage in age-appropriate activities in childhood claims. These revisions reflect our continued focus on the functional limitations that skin disorders may cause and reflect a level of functional limitation similar to the criteria in our current rules. We clarify our policy by providing precise functional criteria rather than examples as in the current skin disorders listings to ensure that adjudicators do not overlook the functional criteria and that we evaluate functional limitations caused by a person's skin impairment in a consistent manner across cases. Additionally, the revised requirement that the claimant have significant limitations in the use of two extremities is consistent with the level of functional limitations set forth in other listing criteria, such as in our neurological disorders listings (11.00/111.00), which require ''disorganization of motor function'' in two extremities.	20 CFR 404.1509 and 416.909. 44 FR 18170, 18187 (1979), 45 FR 55566, 55607 (1980), and 50 FR 50068, 50098 (1985). Falder, S., Browne, A., Edgar, D., Staples, E., Fong, J., Rea, S., & Wood, F. (2009). Core outcomes for adult burn survivors: A clinical overview. Burns, 35(5), 618–641. *https://doi.org/10.1016/j.burns.2008.09.002*; Haslik, W., Kamolz, L., Manna, F., Hladik, M., Rath, T., & Frey, M. (2010). Management of full-thickness skin defects in the hand and wrist region: First long-term experiences with the dermal matrix Matriderm®. Journal of Plastic, Reconstructive & Aesthetic Surgery, 63(2), 360–364. *https://doi.org/10.1016/j.bjps.2008.09.026*; Wasiak, J., Lee, S., Paul, E., Mahar, P., Pfitzer, B., Spinks, A., . . . Gabbe, B. (2014). Predictors of health status and health-related quality of life 12 months after severe burn. Burns, 40(4), 568–574; 81 FR 43048 (2016).

The following table shows our changes to references to BMI in other body systems. Prior to the effective date of this final rule, the formulas for calculating BMI are referenced as appearing in 5.00G and 105.00G2c in various listings, and we are correcting these references to reflect the revised digestive disorders listings.

Listing paragraph	Introductory Text prior to the effective date of this Final Rule	Revised Introductory Text with updated cross-references
6.00C7	*Anorexia (diminished appetite) with weight loss.* Anorexia is a frequent sign of CKD and can result in weight loss. We will use body mass index (BMI) to determine the severity of your weight loss under 6.05B4. (BMI is the ratio of your measured weight to the square of your measured height.) The formula for calculating BMI is in section 5.00G.	*Anorexia (diminished appetite) with weight loss.* Anorexia is a frequent sign of CKD and can result in weight loss. We will use body mass index (BMI) to determine the severity of your weight loss under 6.05B4. (BMI is the ratio of your measured weight to the square of your measured height.) We calculate your BMI using the formulas in the digestive disorders body system (5.00).

[10] The introductory text to our 1979 final rule stated that the claimant's skin lesions ''must be shown to have persisted for a sufficient period of time despite therapy for a reasonable presumption to be made that severe impairment will last for a continuous period of at least 12 months.'' 44 FR at 18787.

[11] *Id.*

[12] *Id.*

Listing paragraph	Introductory Text prior to the effective date of this Final Rule	Revised Introductory Text with updated cross-references
14.00F5	*Measurement of CD4 and either body mass index or hemoglobin (14.11G).* To evaluate your HIV infection under 14.11G, we require one measurement of your absolute CD4 count or your CD4 percentage, *and* either a measurement of your body mass index (BMI) or your hemoglobin. These measurements must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one measurement of your CD4 (absolute count or percentage), BMI, or hemoglobin within this period, we will use the lowest of your CD4 (absolute count or percentage), BMI, or hemoglobin. The date of your lowest CD4 (absolute count or percentage) measurement may be different from the date of your lowest BMI or hemoglobin measurement. We calculate your BMI using the formulas in 5.00G2.	*Measurement of CD4 and either body mass index or hemoglobin (14.11G).* To evaluate your HIV infection under 14.11G, we require one measurement of your absolute CD4 count or your CD4 percentage, and either a measurement of your body mass index (BMI) or your hemoglobin. These measurements must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one measurement of your CD4 (absolute count or percentage), BMI, or hemoglobin within this period, we will use the lowest of your CD4 (absolute count or percentage), BMI, or hemoglobin. The date of your lowest CD4 (absolute count or percentage) measurement may be different from the date of your lowest BMI or hemoglobin measurement. We calculate your BMI using the formulas in the digestive disorders body system (5.00).
100.00C2c	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).
103.00K2c	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).
104.00C3b(iii)	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).
106.00C5b(iii)	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).
114.00F7b(iii)	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in 105.00G2c.	BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

We are making several changes from the NPRM to this final rule for digestive disorders and skin disorders:

- The following is a high-level summary of the major changes from the NPRM to this final rule. Below, in the section titled *Public Comments on the NPRM,* we describe in greater detail our response to questions and public comments, as well as changes from the NPRM to this final rule. Further, these responses provide additional details about our rule changes from our current rules, through the NPRM, and to our final rule for digestive disorders and skin disorders.
- We also made minor, editorial changes from the NPRM for clarity and readability throughout both digestive disorders and skin disorders.

Digestive Disorders

- *Hepatopulmonary syndrome:* We revised the regulatory text for hepatopulmonary syndrome to describe relevant clinical findings associated with this complication of chronic liver disease (CLD) (5.00C2 and 105.00C2 (*Manifestations of CLD*)).
- *SSA Chronic Liver Disease (SSA CLD) and SSA Chronic Liver Disease-Pediatric (SSA CLD–P) scores:* In the introductory text to the listing, we modified the SSA CLD calculation. We added a sentence to clarify that if you have the two SSA CLD scores required by 5.05G (''Two SSA CLD scores'') and 105.05G1 (''For children age 12 and older''), we will find that your impairment meets the criteria of the listing from at least the date of the first SSA CLD score (5.00C3 (*SSA Chronic Liver Disease (SSA CLD) score*) and 105.00C3 (*SSA Chronic Liver Disease (SSA CLD) and SSA Chronic Liver Disease-Pediatric (SSA CLD–P) scores*); 5.05G (''Two SSA CLD scores'') and 105.05G1 (''For children age 12 or older''). We also removed the reference to SSA CLD–P scores in 105.05G1 (''For children age 12 or older'').
- *Inflammatory bowel disease (IBD):* In the listing introductory text, we added perianal disease and extraintestinal manifestations with examples for each. We also clarified the consideration of surgical diversion of the intestinal tract (5.00D and 105.00D (*What is inflammatory bowel disease (IBD), and how do we evaluate it under 5.06/105.06*)). We retained the consideration of anemia and serum albumin from the current criteria in revised listings 5.06B1, 5.06B2, 105.06B1 and 105.06B2.
- *Supplemental nutrition:* We expanded the listing introductory text and criteria for the alternative method of supplemental daily enteral nutrition to meet the listing to include duodenostomy or jejunostomy (5.06B and 105.06B (''Two of the following occurring within a consecutive 12-month period'') and 105.10 (*Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy*)).
- *Intestinal failure:* We expanded the listing introductory text and criteria for short bowel syndrome (SBS) to include intestinal failure and added descriptions of different types of intestinal failure (5.00E and 105.00E (*What is intestinal failure, and how do we evaluate it under 5.07/105.07?*); 5.07 and 105.07 (*Intestinal failure*)).
- *Weight loss due to any digestive disorder:* We retained the current criteria, for weight loss due to any digestive disorder, rather than finalizing the proposed criteria for malnutrition due to any digestive disorder (5.00F (*How do we evaluate weight loss due to any digestive disorder under 5.08?*) and 5.08 (*Weight loss due to any digestive disorder*)). Although it is not a policy change, in this final rule, we also updated the language in the listing text to refer to ''adherence to prescribed medical treatment'' instead of ''continuing treatment as prescribed,'' for consistency with medical terminology and the changes we made to the skin disorders listings. Additionally, we added language to the introductory text in 5.00F (*How do we evaluate weight loss due to any digestive disorder under 5.08?*) and 105.00F (*How do we evaluate growth failure due to any digestive disorder under 105.08?*) to explain how we consider weight loss or growth failure due to impairments other than digestive disorders.
- *Chronic liver disease:* We reorganized the criteria in 5.05A and 105.05A (''Hemorrhaging from esophageal, gastric, or ectopic varices'') to use an outline format rather than text paragraphs. We did this to improve clarity and readability, but there were no substantive changes to the criteria.
- *References to BMI in other body systems:* As we finalize revisions to the

digestive disorders listings, we are revising cross references in other body systems to correct citations to the BMI formula because they will be outdated once this rule is effective. Specifically, we made these revisions to 6.00C7, 14.00F5, 100.00C2c, 103.00K2c, 104.00C3b(iii), 106.00C5b(iii), and 114.00F7b(iii).

Skin Disorders

- *Definitions:* We added assistive devices used in a seated position to the list of examples of assistive devices. We also added a definition for exacerbation (8.00B and 108.00B (*What are our definitions for the following terms used in this body system?*)).
- *Evidence:* We clarified that we consider any available history of familial incidence (8.00C and 108.00C (*What evidence do we need to evaluate your skin disorder?*)).
- *Functional criteria:* We clarified that the inability to perform fine and gross movements is due to chronic skin lesions or contractures, consistent with the other two functional criteria (8.00D2 and 108.00D2 (*Limitation(s) of physical functioning due to skin disorders*)).
- *Adherence to prescribed treatment:* We changed the term ''physician'' to ''medical source'' in 8.00D5b and 108.00D5b (*Despite adherence to prescribed medical treatment for 3 months*) to include treatment prescribed by any medical source.[13]
- *Burns:* We removed the ''third-degree'' qualifier in front of burns (8.00F and 108.00F (*How do we evaluate burns under 8.08/108.08*); 8.08 and 108.08 (*Burns*)).
- *Improving Clarity and Readability:* We revised the language in 8.07B2 and 108.07B2 (''Chronic skin lesions or contractures''), 8.08 and 108.08 (*Burns*), and 8.09 and 108.09 (*Chronic conditions of the skin or mucous membranes*) to remove repetitive language and make the criteria easier to understand and apply.

Public Comments on the NPRM

In the NPRM, we provided the public with a 60-day comment period, which ended on September 23, 2019. We received 14 comments. The comments came from advocacy groups, legal services organizations, a State agency that makes disability determinations for us, medical organizations, and individual commenters. Multiple commenters provided identical (or very similar) comments and recommendations.

We carefully considered all of the comments related to this rulemaking. We have tried to summarize the commenters' views accurately and have responded to all of the significant issues raised by the commenters that were within the scope of this rule. We have not summarized or responded to comments that were outside the scope of the proposed rule. Some commenters noted provisions with which they agreed but did not make suggestions for changes in those provisions. We did not summarize or respond to those comments.

Digestive Disorders

Chronic Liver Disease (CLD)

Comment: Two commenters suggested that we use the Model for End-Stage Liver Disease (MELD) formula rather than the SSA CLD formula. One commenter suggested we use the MELD formula so we could keep pace with changes in the treatment of digestive disorders without having to update our regulations. Another commenter noted that even when SSA CLD scores are available in the medical record, they are not used by SSA adjudicators, and requested that we use the SSA CLD scores when available. The commenter suggested that if the SSA CLD is unavailable, we use the MELD scores when available in the medical record.

Response: We partially adopted this comment. In the 2007 *Revised Medical Criteria for Evaluating Digestive Disorders* final rule, we explained that the MELD is a numerical scale developed for the United Network for Organ Sharing (UNOS) that is used to determine a person's placement on the liver transplant list within the Organ Procurement and Transplant Network (OPTN).[14] The MELD score is based on objective and verifiable medical data and estimates a person's risk of dying while waiting for a liver transplant. In 2016, the MELD formula was modified to take serum sodium levels into account under certain situations.[15] [16]

The SSA CLD calculation under the current rules was the mathematical equivalent to the MELD formula used in 2007, and we initially proposed no changes to this calculation in the NPRM.[17] [18] However, in response to comments that we adopt the MELD formula, we reviewed the updated 2016 MELD formula and assessed its use in our disability program. We learned that for people with certain chronic liver diseases, formulas utilizing serum sodium levels predict negative outcomes more accurately than formulas that do not consider serum sodium levels.[19] [20] As a result, we modified the SSA CLD calculation to also account for serum sodium levels under certain situations, so it remains mathematically equivalent to the new MELD calculation. However, we did not directly adopt the commenters' suggestion that we reference the MELD score in our listing criteria, for reasons explained below.

As demonstrated in the table below, the SSA CLD and the MELD are nearly identical, aside from the placement of a multiplier. Despite this difference, the two formulas yield identical results.

MELD	SSA CLD
[0.378 * $\log_e$(bilirubin)) + (1.120 * $\log_e$(INR[21])) + (0.957 * $\log_e$(creatinine)) + 0.643] * 10.	(3.78 * $\log_e$(bilirubin)) + (11.20 * $\log_e$(INR)) + (9.57 * $\log_e$(creatinine)) + 6.43.
If resulting value (MELD(i)) or SSA CLD(i)) is 12 or greater, the serum sodium value is considered in the following way:	
MELD(i) + 1.32 * (137–Na) − [0.033*MELD(i) * (137–Na)]	SSA CLD(i) + 1.32 * (137–Na) − [0.033*SSA CLD(i) * (137–Na)].

[13] 20 CFR 404.1502(d) and 416.902(i).

[14] 72 FR 59398 (2007).

[15] Organ Procurement and Transplantation Network & United Network for Organ Sharing. (2015). Changes to OPTN bylaws and policies from actions at OPTN/UNOS Executive Committee meetings July 2015–November 2015 [PDF]. *https://optn.transplant.hrsa.gov/media/1575/policynotice_20151101.pdf*.

[16] United Network for Organ Sharing. (2016). Policy and system changes effective January 11, 2016, adding serum sodium to MELD calculation. *https://unos.org/news/policy-and-system-changes-effective-january-11-2016-adding-serum-sodium-to-meld-calculation/*.

[17] 72 FR 59398 (2007).

[18] 84 FR 35936 (2019).

[19] Vaa, B.E., Asrani, S.K., Dunn, W., Kamath, P.S., & Shah, V.H. (2011). Influence of serum sodium on MELD-based survival prediction in alcoholic hepatitis. *Mayo Clinic Proceedings, 86*(1), 37–42. *https://doi.org/10.4065/mcp.2010.0281*.

[20] Londoño, M.-C., Cárdenas, A., Guevara, M., Quintó, L., de las Heras, D., Navasa, M., Rimola, A., Garcia-Valdecasas, J.-C., Arroya, V., & Ginès, P. (2007). MELD score and serum sodium in the prediction of survival of patients with cirrhosis awaiting liver transplantation. *Gut, 56*(9), 1283–1290. *https://doi.org/10.1136/gut.2006.102764*.

[21] International Normalized Ratio (INR) is a common laboratory test that measures the amount of time it takes for the blood to clot.

We modified the SSA CLD formula rather than directly adopting the MELD formula for multiple reasons. First, we use the SSA CLD score for different purposes than the medical community uses the MELD score. Specifically, MELD scores are used to determine a person's placement on the liver transplant list, while SSA CLD scores are used to determine whether a person's chronic liver disease is severe enough to preclude the performance of any gainful activity. While our analysis shows that the new SSA CLD calculation, which is mathematically equivalent to the current MELD calculation, is appropriate for our programmatic use, going forward, our analysis and research may determine that a SSA CLD calculation which differs from the MELD calculation is more appropriate for a determination of listing-level chronic liver disease. Likewise, the MELD calculation may change in a way that precludes us from using it to determine listing-level chronic liver disease. Because the MELD is maintained by an independent entity, we may not know of the change until it is in effect, and therefore would be tied to using an inappropriate formula until we were able to publish a regulatory change. In such instances, it is important that we retain flexibility and use our own calculation, rather than adopt the MELD formula, as the commenter suggests.

Moreover, the SSA CLD has unique testing standards that are consistent with our programmatic requirements. For instance, for the SSA CLD, we require that all laboratory values be obtained within a continuous 30-day period, and we do not use any INR values derived from testing done while the claimant is on anticoagulant treatment. These requirements are not in place for the MELD calculation (see 5.00C3 (*SSA Chronic Liver Disease (SSA CLD) score*) and 105.00C3a (*SSA CLD score*)). Finally, the SSA CLD score is familiar to our adjudicators because we began using it in 2007.

The commenter also misunderstands our use of SSA CLD scores. Because SSA CLD scores result from our regulatory formula, they are generally not available in the medical record, nor do we expect them to be. Instead, adjudicators must calculate the SSA CLD score using a formula that includes up to four laboratory values. The calculation is set forth in our regulations at 5.00C3 (*SSA Chronic Liver Disease (SSA CLD) score*) and 105.00C3a (*SSA CLD score*). Regardless of the formula used, we require the component values be present in the medical evidence of record, and then our adjudicators input those values into a calculator to determine the score based on the regulatory formula.

With regard to our changes to the SSA CLD formula, we describe the modified SSA CLD calculation in the introductory text in this final rule in paragraphs 5.00C3 (*SSA Chronic Liver Disease (SSA CLD) score*) and 105.00C3a (*SSA CLD score*). We reorganized the order of paragraphs 5.00C3b (''For any SSA CLD calculation'') and 5.00C3c (''When we indicate '$\log_e$' '') and 105.00C3a(ii) (''For any SSA CLD calculation'') and 105.00C3a(iii) (''When we indicate '$\log_e$' '') for clarity. We updated the instructions for rounding and limits for maximum and minimum values in paragraphs 5.00C3b and 105.00C3a(ii) (''For any SSA CLD calculation'') to reflect the addition of serum sodium to the CLD formula. Finally, we updated the CLD calculation examples in paragraphs 5.00C3c and 105.00C3a(iii) (''When we indicate '$\log_e$' '') to reflect the change in the formula.

Comment: One commenter stated that we do not provide evidence that SSA CLD scores greater than or equal to 20 are a measure of the ability or inability to engage in substantial gainful activity (SGA).

Response: We disagree. The rule change reflects medical research showing the increased 3-month mortality risk and overall clinical severity indicated by laboratory values resulting in an SSA CLD score of at least 20.[22] [23] [24] For instance, individuals with a MELD score ranging from 10–19 have a 3-month mortality rate of 6%, whereas individuals with a MELD score between 20 and 29 have a 3-month mortality rate of 19.6%, which means they are more than three times more likely to die within 3 months if they do not receive a transplant.[25] As explained above, the MELD score is equivalent to the SSA CLD score. This degree of severity is consistent with liver disease that will prevent an adult from engaging in any gainful activity, result in death, or cause marked and severe limitations in children over the age of 12. Clinical practice uses the MELD formula, which we describe above as equivalent to the SSA CLD, to evaluate liver disease for individuals age 12 and older. However, because the formula that our SSA CLD–P score is based on is only used for individuals under age 12, we removed listing criteria considering an SSA CLD–P score of at least 20 from revised listing 105.05G1 (''For children age 12 and older'') that was initially included in the NPRM.

The SSA CLD–P is based on the Pediatric Model for End Stage Liver Disease (or the PELD), which was also developed by OPTN, and is used for organ transplant allocation for persons under the age of 12. Unlike the MELD, the PELD has not been changed since prior to the publication of our 2007 revisions to the digestive disorders listings, where we created the SSA CLD–P formula, as an equivalent to the PELD, to evaluate liver disease under listing 105.05G2 (''For children who have not attained age 12'').[26] Similar to an SSA CLD score of at least 20, medical research shows an increased 3-month mortality risk and overall clinical severity indicated by laboratory values that result in an SSA CLD–P score of at least 11.[27] This level of severity continues to identify liver disease severe enough to cause marked and severe limitations in children under the age of 12. We therefore did not propose a change to the existing SSA CLD–P formula in the NPRM, nor were there public comments suggesting a revision to our formula based on PELD.

The commenter did not provide any alternatives or suggestions on the revised text. Additionally, the commenter misstates the function of our listings regarding gainful activity by using the phrase ''substantial gainful activity.'' The listings describe impairments that we consider severe enough to prevent an adult from doing any gainful activity.[28] For children, the listings describe impairments we consider severe enough to cause marked and severe functional limitations.[29]

Comment: Several commenters asked us to keep the current listing direction in 5.05G and 105.05G (''End stage liver disease'') or replace it with suggested text. The commenters suggested the

[22] Singal, A.K., & Kamath, P.S. (2012). Model for end-stage liver disease. *Journal of Clinical and Experimental Hepatology, 3*(1), 50–60. *https://doi.org/10.1016/j.jceh.2012.11.002.*

[23] Zhang, E.-L., Zhang, Z.-Y., Wang, S.-P., Xiao, Z.-Y, Gu, J., Xiong, M, Chen, X.-P., & Huang, Z.-Y. (2016). Predicting the severity of liver cirrhosis through clinical parameters. *Journal of Surgical Research, 204*(2), 274–281. *https://doi.org/10.1016/j.jss.2016.04.036.*

[24] Thornton, K. (2021, February 12). Evaluation and Prognosis of Persons with Cirrhosis. *Hepatitis C Online. https://www.hepatitisc.uw.edu/go/evaluation-staging-monitoring/evaluation-prognosis-cirrhosis/core-concept/all.*

[25] Id.

[26] 72 FR 59398 (2007).

[27] Chung-Chou, H.C., Bryce, C.L., Shneider, B.L., Yabes, J.G., Ren, Y., Zenarosa, G.L., Tomko, H., Donnell, D.M., Squires, R.H., & Roberts, M.S. (2018). Accuracy of the pediatric end-stage liver disease score in estimating pretransplant mortality among pediatric liver transplant candidates. JAMA Pediatrics, 172(11), 1070–1077. *https://doi.org/10.1001/jamapediatrics.2018.2541.*

[28] 20 CFR 404.1525(a) and 416.925(a).

[29] 20 CFR 416.925(a).

listing criteria should, ''consider [the person] under a disability no later than the date of the first score'' for the required two SSA CLD scores.

Response: We agree with the commenters. The current listing language states we ''[c]onsider under a disability from at least the date of the first score.'' While we proposed to remove this direction in the NPRM, we did not intend to change our policy in the current rule that we consider an individual under a disability from at least the date of their first score. At the commenters' request and to avoid confusion on this issue, we are no longer making the change proposed in the NPRM and have retained the current listing direction to ''consider under a disability from at least the date of the first score'' in listings 5.05G (''Two SSA CLD scores'') and 105.05G1 (''For children age 12 or older''). We also included applicable corresponding introductory text in the final rule introductory paragraphs 5.00C3 (*SSA Chronic Liver Disease (SSA CLD) score*) and 105.00C3a (*SSA CLD score*).

Comment: One commenter expressed that our proposed change to listing 5.05G (''Two SSA CLD scores'') and 105.05G1 (''For children age 12 or older'') constitutes a new requirement for two SSA CLD scores and would make a finding of disability dependent on access to expensive care instead of medical considerations.

Response: We disagree with the characterization that it is a new requirement that two SSA CLD scores are required to make a finding of disability under the listing. Our current rules, at 5.00D11e (''Listing 5.05G requires two SSA CLD scores'') and 105.00D11a(v) (''Listing 105.05G requires two SSA CLD scores'') state that two SSA CLD scores are required. The language ''[c]onsider under a disability from at least the date of the first score'' does not mean the second SSA CLD score is optional under 5.05G (''Two SSA CLD scores'') or 105.05G1 (''For children age 12 or older'').

Comment: One commenter suggested that we clarify the definition of gastrointestinal hemorrhaging, which is necessary to establish listing-level severity. To that end, the commenter suggested adding information about clinical findings on endoscopy to proposed listing 5.05A (''Hemorrhaging from esophageal, gastric, or ectopic varices'').

Response: We did not adopt this comment, because hemodynamic instability findings, and the need for hospitalization for transfusion of at least two units of blood, are the defining characteristics of hemorrhage of listing-level severity under revised listing 5.05A (''Hemorrhaging from esophageal, gastric, or ectopic varices''). Although the underlying hemorrhage documented by imaging is a requirement under revised listing 5.05A (''Hemorrhaging from esophageal, gastric, or ectopic varices''), this imaging alone does not establish listing-level severity. In addition to hemorrhaging from esophageal, gastric, or ectopic varices, or from portal hypertensive gastropathy documented by imaging, listing 5.05A (''Hemorrhaging from esophageal, gastric, or ectopic varices'') also requires both the finding of hemodynamic instability and hospitalization for transfusion of at least two units of blood. We consider the suggested endoscopic findings when they are present in the medical evidence.

Comment: Several commenters asked us to allow the use of pulse oximetry results to demonstrate hepatopulmonary syndrome in listings 5.05E and 105.05E (''Hepatopulmonary syndrome''). One commenter expressed concern about the appropriateness of arterial blood gas (ABG) testing (as required under proposed 105.05E1 (''Arterial PaO2 measured by an ABG test'')) in young children due to difficulties in administration on young children.

Response: We did not adopt these comments. ABG testing is the widely-accepted standard test for confirmatory diagnosis of hypoxemia in suspected hepatopulmonary syndrome, regardless of the patient's age.[30] Although there can be some difficulties with administering ABG tests on young children, such as bleeding, risks associated with getting an ABG are relatively minor, and ABG testing remains the most valid indicator of listing-level severity.[31] [32] [33] Although pulse oximetry is useful to screen a patient for hepatopulmonary syndrome, it is generally not used as a diagnostic test, due to a risk of false positives.[34] The literature cited by the commenters stated that ABG testing would still be required for final determination of hepatopulmonary syndrome severity after any screening with pulse oximetry.[35] Furthermore, pulse oximetry is not as accurate as ABG tests in cases of very low oxygen saturation, and may also be affected by the use of certain cosmetics, skin pigmentation, or poor peripheral circulation.[36]

We consider all evidence in the case record when we evaluate claims for disability benefits, including laboratory test results as a form of objective medical evidence.[37] If an impairment(s) does not satisfy the listing requirement for an ABG measurement, then we will consider whether the impairment(s) medically equals a listing.[38] If an adult's impairment(s) does not meet or medically equal any listing, they can be found disabled at a later step in the sequential evaluation process.[39] If a child's impairment(s) does not meet or medically equal any listing, including because the medical evidence in the record does not contain necessary laboratory test results, we may find that their impairment(s) functionally equals the listings.[40] It is at this stage that we would use all available medical and non-medical evidence to evaluate whether a child's impairment(s) functionally equals the listings, including pulse oximetry results.

Comment: Several commenters requested that, if we do not permit the use of pulse oximetry results for listings 5.05E and 105.05E (''Hepatopulmonary syndrome''), that we state that we will purchase ABG testing for people with hepatopulmonary syndrome who have pulse oximetry values below 96%.

Response: We did not adopt the comment. We do not require a consultative examination in every case where there is evidence of a pulse oximetry value below 96%. Our regulations governing the purchase of consultative examinations already state that if we cannot obtain the information we need from a claimant's medical sources to make a determination or decision of disability, or when the other available evidence on a claim is

[30] Grilo-Bensusan, I., & Pascasio-Acevedo, J.M. (2016). Hepatopulmonary syndrome: What we know and what we would like to know. *World Journal of Gastroenterology, 22*(5), 5728–5741. *https://doi.org/10.3748/wjg.v22.i25.5728.*

[31] Forde K.A., Fallon M.B., Krowka M.J., Sprys M., Goldberg D.S., Krok K.L., Patel, M., Lin, G., Oh, J.K., Mottram, C.D., Scanlon, P.D., & Kawut S.M. (2019). Pulse oximetry is insensitive for detection of hepatopulmonary syndrome in patients evaluated for liver transplantation. *Hepatology, 69*(1), 270–281. *https://doi.org/10.1002/hep.30139.*

[32] Noli, K., Solomon, M., Golding, F., Charron, M., & Ling, S.C. (2008). Prevalence of hepatopulmonary syndrome in children. *Pediatrics, 121*(3), e522–527. *https://doi.org/10.1542/peds.2007-1075.*

[33] *Arterial Blood Gas (ABG): What It Is, Purpose, Procedure & Levels.* (2022, February 18.). Cleveland Clinic. *https://my.clevelandclinic.org/health/diagnostics/22409-arterial-blood-gas-abg.*

[34] Arguedas, M.R., Singh, H., Faulk, D.K., & Fallon, M.B. (2007). Utility of pulse oximetry screening for hepatopulmonary syndrome. *Clinical Gasteroenterology and Hepatology, 5*(6), 749–754. *https://doi.org/10.1016/j.cgh.2006.12.003.*

[35] Id.

[36] Jubran, A. (2015). Pulse oximetry. *Critical Care, 19,* 272. *https://doi.org/10.1186/s13054-015-0984-8.*

[37] 20 CFR 404.1520, 416.920, and 416.924.

[38] 20 CFR 404.1526 and 416.926.

[39] 20 CFR 404.1520 and 416.920.

[40] 20 CFR 416.924.

insufficient, we may purchase the needed medical examinations or tests, but this is an individualized and fact-specific determination. Therefore, it would be inappropriate, and inconsistent with our regulations, for SSA to purchase ABG testing when there are no inconsistencies in the evidence, or when the evidence in the file is sufficient to make a determination or decision on a claim.[41]

Comment: Commenters requested that we include a statement in listings 5.05E and 105.05E (''Hepatopulmonary syndrome'') that hypoxemia due to hepatopulmonary syndrome may also be evaluated under listing 3.02C2 (*Chronic respiratory disorders*) or the childhood respiratory listings. For proposed criterion in listing 5.05E1 (''Arterial P_aO_2 measured by an ABG test''), one commenter asked us to either use both P_aO_2 and P_aCO_2 values, or the highest favorable P_aO_2 for each altitude range, as noted in tables for P_aO_2/P_aCO_2 measurements in the respiratory listing for hypoxemia.

Response: We did not adopt these comments. Hepatopulmonary syndrome is not the same as hypoxemia caused by a chronic respiratory disorder. Hepatopulmonary syndrome is not a respiratory disease. It is a rare complication of liver disease, characterized by arterial deoxygenation due to intrapulmonary vascular dilation and arteriovenous shunting.[42] [43] Hypoxemia is defined as a below-normal level of oxygen in the blood, specifically in the arteries.[44] The only effective treatment for hepatopulmonary syndrome is liver transplant. Severity grading of hepatopulmonary syndrome is based on measurements of P_aO_2, not P_aCO_2, and 5.05E1 and 105.05E1 consider altitude when determining whether a claimant's hepatopulmonary syndrome is listing-level severity.[45] [46] For these reasons, we are not including a syndrome caused by liver disease in a respiratory listing. However, in the regulatory text of the NPRM and the final rule, we state in paragraphs 5.00J2 and 105.00L2 (''If you have a severe medically determinable impairment(s) that does not meet a listing'') that if a person's impairment(s) does not meet the requirements of a listing in any body system, we may find that the impairment(s) is medically equivalent to another listing. An impairment(s) is medically equivalent to a listed impairment if it is at least equal in severity and duration to the criteria of any listed impairment, including those listed in 5.00 and 105.00 (*Digestive Disorders*).[47]

Comment: One commenter suggested we remove proposed criterion 5.05E2 (''Intrapulmonary arteriovenous shunting'') as it demonstrates only the presence of hepatopulmonary syndrome and not a level of hypoxemia or severity associated with proposed 5.05E1 (''Arterial PaO2 measured by an ABG test''). The commenter stated that it is not clear that arteriovenous shunting as shown by the contrasted echocardiogram or macroaggregated albumin lung scan required in proposed criterion 5.05E2 (''Intrapulmonary arteriovenous shunting'') necessarily equates to the expected severity associated with the required hypoxemia levels in proposed criterion 5.05E1 (''Arterial P_aO_2 measured by an ABG test''). The commenter noted that some of these tests in proposed 5.05E2 (''Intrapulmonary arteriovenous shunting'') are not quantitative, and not all of them are specific for intrapulmonary shunting. The commenter asked us to add these tests to the introductory text along with the symptoms of platypnea (shortness of breath relieved when lying down) and orthodeoxia (low arterial blood oxygen in the upright position) that are highly specific for hepatopulmonary syndrome when present alongside chronic liver disease.

Response: We partially adopted the comment. We updated the introductory text at 5.00C2e and 105.00C2e (*Hepatopulmonary syndrome*) to include the clinical findings suggested by the commenter. While we agree with the commenter that the criteria in 5.05E2 and 105.05E2 demonstrate the presence of hepatopulmonary syndrome and not a level of hypoxemia, we kept the criterion because the presence of hepatopulmonary syndrome, as confirmed by these tests, continues to be indicative of listing-level severity. Hepatopulmonary syndrome is a very serious consequence of chronic liver disease, is a progressive condition, and has a high morbidity and mortality rate associated with it.[48] Currently, the only treatment is a liver transplant.[49]

Inflammatory Bowel Disease

Comment: A number of commenters questioned why ''perineal disease'' was removed from the list of signs and symptoms of inflammatory bowel disease (IBD) in proposed 5.00D2 (''We evaluate your signs and symptoms of IBD'') and urged its inclusion in the final rule.

Response: We adopted this comment. We agree that this is an important complication of IBD; however, the medical community uses the term *perianal* disease to describe the perianal complications that are considered an early sign of IBD.[50] So, we adopted the commenter's suggestion, and changed the terminology to ''perianal disease.'' We added this to the list of signs and symptoms of IBD in the introductory text at 5.00D2 and 105.00D2 (''We evaluate your signs and symptoms of IBD''), and provided examples (''for example, fissure, fistulas, abscesses, and anal canal stenosis'') associated with perianal Crohn's disease.

Comment: Commenters recommended that the final version of the listing include the language from current 5.00E3 (''IBD may be associated with significant extraintestinal manifestations in a variety of body systems'') about extraintestinal manifestations of IBD.

Response: We agree with the commenter and added the language from current paragraph 5.00E3 (''IBD may be associated with significant extraintestinal manifestations in a variety of body systems'') about extraintestinal manifestations of IBD to paragraph 5.00D4 (''IBD may also be associated with significant extraintestinal manifestations in a variety of body systems''). For consistency between adult and child listings, we also added the corresponding language from current paragraph 105.00E3 (''IBD may be associated with significant extraintestinal manifestations in a variety of body systems'') as revised

[41] 20 CFR 404.1519a and 416.919a.

[42] Taber's Cyclopedic Medical Dictionary—23rd Ed. (2017).

[43] Gladwin, M.T., & Levine, A.R. (2020, September). *Hepatopulmonary syndrome.* The Merck Manual Professional Version. *https://www.merckmanuals.com/professional/pulmonary-disorders/pulmonary-hypertension/hepatopulmonary-syndrome.*

[44] Taber's Cyclopedic Medical Dictionary—23rd Ed. (2017).

[45] Rodríguez-Roisin, R., & Krowka, M.J. (1998). Hepatopulmonary syndrome—a liver-induced lung vascular disorder. *The New England Journal of Medicine, 358,* 2378–2387. *https://doi.org/10.1056/NEJMra0707185.*

[46] Grilo-Bensusan, I., & Pascasio-Acevedo, J.M. (2016). Hepatopulmonary syndrome: What we know and what we would like to know. *World Journal of Gastroenterology, 22*(25), 5728–5741. *https://doi.org/10.3748/wjg.v22.i25.5728.*

[47] 20 CFR 404.1526 and 416.926.

[48] SSA has designated hepatopulmonary syndrome as a Compassionate Allowance (CAL) condition. See *Compassionate Allowances website Home Page* (*ssa.gov*).

[49] Bansal, K., Gore, M., & Mittal, S. (2022). Hepatopulmonary Syndrome. In StatPearls. StatPearls Publishing. *https://www.ncbi.nlm.nih.gov/books/NBK562169.*

[50] Galandiuk, S., Kimberling, J., Al-Mishlab, T.G., & Stromberg, A.J. (2005). Perianal Crohn disease: Predictors of need for permanent diversion. *Annals of surgery, 241*(5), 796–802. *https://doi.org/10.1097/01.sla.0000161030.25860.c1.*

paragraph 105.00D4 (''IBD may be associated with significant extraintestinal manifestations in a variety of body systems''), and renumbered proposed paragraph 105.00D4 as revised paragraph 105.00D5.

Comment: One commenter recommended that the tube feeding description be expanded beyond ''gastric'' to other types (that is, duodenal or jejunal) that are often required in patients with digestive disorders.

Response: We adopted this comment because the commenter brought a perspective that we had not considered, which was that types of tube feeding which are similar in purpose should be included in the listing, and our research confirmed that supplemental daily enteral nutrition supplied via duodenostomy or jejunostomy is also representative of listing-level severity.[51] [52] [53] Therefore, we added tube feeding via duodenostomy or jejunostomy to listings 5.06B and 105.06B (''Two of the following occurring within a consecutive 12-month period''), and 105.10 (*Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy*). We also provided guidance about evaluating tube feedings in introductory text sections 5.00D2 and 105.00D2 (''We evaluate your signs and symptoms of IBD'') and 105.00H (*How do we evaluate the need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy?*).

Short Bowel Syndrome and Intestinal Failure

Comment: One commenter agreed with the proposed changes to expand the definition of short bowel syndrome (SBS) to consider ''surgical resection of any amount of the small intestine,'' but suggested we further expand the definition by adding ''the continual need for nutritional intervention such as oral rehydration, enteral tube feeding and/or parenteral nutrition is documented.''

Response: We did not adopt the comment. The listings describe impairments that we consider severe enough to prevent an adult from doing any gainful activity.[54] The commenter's suggestion includes oral rehydration and enteral tube feeding, which, when associated with SBS or intestinal failure, are not indicative of a condition that is listing-level severity.[55] Since, on their own, these nutritional interventions are not dispositive of a disorder that is severe enough to prevent any gainful activity, we did not expand the definition of SBS as the commenter suggested. However, we do consider evidence of nutritional intervention alongside all other relevant information at later steps in our sequential evaluation process.

Comment: One commenter asked us to expand the criteria for listings 5.07 and 105.07 (*Intestinal failure*) to ''support patients who are not completely dependent on parenteral nutrition, but who will experience better quality of life if it is supplementary in some form.''

Response: We did not adopt this comment. The statutory definition of disability concerns a person's ability to do work, not on quality of life.[56] The commenter described alternative, less burdensome, treatment options that assist patients with achieving independence, but these alternatives, on their own, are not indicative of listing-level severity. The listings are designed to identify cases at an early stage of the sequential evaluation process that meet a strict threshold for the statutory definition of disability. They describe impairments that we consider severe enough to prevent an adult from doing any gainful activity.[57] For children, the listings describe impairments we consider severe enough to cause marked and severe functional limitations.[58] If an impairment does not meet a listing, this does not mean that we will deny a claim. If an adult's impairment(s) does not meet or medically equal any listing, we may find that person disabled at a later step in the sequential evaluation process.[59] If a child's impairment(s) does not meet or medically equal any listing, we may find that their impairment(s) functionally equal the listings.[60]

Comment: One commenter suggested we revise the listings for SBS (5.07 and 105.07) or add a new listing to more broadly address intestinal failure with need for parenteral nutrition. They suggested that for children with impaired or absent intestinal motility from an increasing number of congenital and acquired conditions, the same impairments exist without the surgery requirement as with SBS (for example, gastroschisis, omphalocele, long segment Hirschprung's, and increasingly recognized disorders of mitochondria and other cellular functions that severely impair intestinal functioning).

Response: We adopted this comment. Our intent in the proposed expanded listings for SBS was to include individuals whose medical records do not contain documentation of resection of more than one-half of the small intestine, but whose loss of intestinal function is so severe that daily parenteral nutrition is needed to maintain health. Along these lines, the commenters brought a perspective that we had not considered when they suggested the inclusion of other similar intestinal conditions that could cause intestinal failure with the same degree of impairment of gut function, but in the absence of SBS. When we considered these comments, we accepted them, because the research cited in the comments as well as our own supplemental research and review of cases confirmed that other common causes of chronic intestinal failure—specifically, extensive small bowel mucosal disease and chronic motility disorders—can similarly impair intestinal function and prevent absorption of macronutrients or water and electrolytes below that necessary to

[51] Pearce, C.B. & Duncan, H.D. (2002). Enteral feeding. Nasogastric, nasojejunal, percutaneous endoscopic gastrostomy, or jejunostomy: its indications and limitations, Postgraduate Medical Journal, 78, 198–204. *https://doi.10.1136/pmj.78.918.198.*

[52] Brett, K. & Argáez, C. (2018). Gastrostomy versus gastrojejunostomy and/or jejunostomy feeding tubes: a review of clinical effectiveness, cost-effectiveness and guidelines. Ottawa (ON): Canadian Agency for Drugs and Technologies in Health.

[53] Clinical Nutrition University. (2021, May 25). Types of Feeding Tubes EXPLAINED. YouTube. *https://www.youtube.com/watch?v=4Oam1yUHiO8.*

[54] 20 CFR 404.1525(a) and 416.925(a).

[55] Nightingale, J. & Woodward, J.M. (2006). Guidelines for management of patients with a short bowel. *Gut, 55*(Suppl IV), iv1–iv12. *https://doi.10.1136/gut.2006.091108.*

[56] 42 U.S.C. 416(i) and 423(d).

[57] 20 CFR 404.1525(a) and 416.925(a).

[58] 20 CFR 416.925(a).

[59] 20 CFR 404.1520 and 416.920.

[60] 20 CFR 416.924.

maintain life, also requiring daily parenteral nutrition.[61] [62] [63] [64] [65] Therefore, we expanded and renamed listings 5.07 and 105.07 *Intestinal failure* to cover a greater range of chronic dysmotility or absent motility disorders lasting or expected to last at least 12 months and reducing gut function below the minimum necessary for the absorption of macronutrients or water and electrolytes sufficient for health, as we explain in the introductory text in 5.00E1 and 105.00E1 (*What is intestinal failure, and how do we evaluate it under 5.07/105.07?*).

Malnutrition

Comment: A number of commenters expressed concern about and suggestions for our proposed criteria for malnutrition in listing 5.08 (*Weight loss due to any digestive disorder*), particularly the use of laboratory values such as hemoglobin or albumin. Commenters also suggested we remove the requirement that malnutrition be caused by a digestive disorder. However, these commenters supported our proposed change to the period over which the criteria must appear in the medical evidence of record for listing 5.08 (*Weight loss due to any digestive disorder*), as well as multiple other digestive listings, from a period of 6 months to a period of 12 months.

Response: We carefully considered all of the concerns raised by the commenters and concluded that we should not finalize our proposed changes to add measurements of hemoglobin and albumin to this listing. Intending to improve the specificity of the listing, we had proposed these biomarkers in congruence with using the term ''malnutrition'' instead of ''weight loss'' along with proposing that weight loss be the result of malnutrition caused by a digestive disorder. We reviewed the comments and research supporting the comments [66] [67] suggesting that these measurements are not the best indicators of listing-level weight loss in adults and we ultimately agreed with the commenters that malnutrition caused by a digestive disorder does not have a strong enough relationship with those biomarkers to include them in the listing. That is, these biomarkers are not specific to malnutrition and can instead be indicative of other conditions such as cancers, autoimmune disorders, bleeding, and cardiovascular diseases.[68] [69] We concluded that there are not currently biomarkers or other clinical evidence that are both regularly available in medical records and highly specific to severe, listing-level malnutrition. Therefore, after consultation with agency medical experts and reviewing research provided by one of the commenters, we determined that the BMI remains the most specific and readily available documentation of digestive disorders that have caused weight loss so severe that it prevents any gainful activity, and we will retain the current body mass index (BMI) criteria in listing 5.08 (*Weight loss due to any digestive disorder*).

Likewise, consistent with the comments supporting the change from 6 months to 12 months, we kept the proposed revision in the final language for listing 5.08 (*Weight loss due to any digestive disorder*) to require the two BMI calculations to be within a consecutive 12-month period. We made the appropriate related changes to the introductory text, including 5.00A (*Which digestive disorders do we evaluate in this body system?*), 5.00D (*What is inflammatory bowel disease (IBD), and how do we evaluate it under 5.06?*), and 5.00F (*How do we evaluate weight loss due to any digestive disorder under 5.08?*).

Because we are not finalizing our proposal to use laboratory values such as hemoglobin or albumin in listing 5.08, we also retained current 5.06B1 (''Anemia'') and 5.06B2 (''Serum albumin''). We proposed to remove them due to redundancy with the proposed criteria for 5.08 (*Weight loss due to any digestive disorder*). We also retained current 5.00E4 and 105.00E4 (''Surgical diversion of the intestinal tract'') as 5.00D3 and 105.00D3.

We did not adopt the suggestion to omit the words ''due to any digestive disorder'' from listing 5.08 because we define digestive disorders in 5.00A (*Which digestive disorders do we evaluate in this body system?*) as disorders ''that result in severe dysfunction of the liver, pancreas, and gastrointestinal tract.''

Comment: One commenter expressed concern about the proposed change to listings 5.08 (*Weight loss due to any digestive disorder*) and 105.08 (*Growth failure due to any digestive disorder*) from a 6-month period for the two data points (two BMI calculations) to a 12-month period, because of the detrimental effects of malnutrition over time.

Response: We did not adopt the comment, because the commenter's remarks seem to indicate a misunderstanding of our proposal. The commenter seems to believe that the two data points must be taken 12 months apart, but we did not propose a requirement that the two data points be taken 12 months apart. Our proposed requirement, finalized in this final rule, specifies that the two measurements must both be taken during a 12-month period and must be at least 60 days apart from one another during the 12-month period.

Comment: One commenter asked that we consider a higher BMI criterion, such as 20 or 22, for elderly patients under proposed listing 5.08 (*Weight loss due to any digestive disorder*).

Response: We did not adopt this comment. We do not adjust BMI calculations based on an adult person's

[61] Thompson JS, Rochling FA, Weseman RA, Mercer DF. Current management of short bowel syndrome. *Curr Probl Surg* 49:52–115, 2012. *https://doi.org/10.1067/j.cpsurg.2011.10.002.*

[62] Pironi, L., Arends, J., Baxter, J., Bozzetti, F., Peláez, R.B., Cuerda, C., Forbes, A., Gabe, S., Gillanders, L., Holst, M., Jeppesen, P.B., Joly, F., Kelly, D., Klek, S., Irtun, Ø., Olde Damink, S.W., Panisic, M., Rasmussen, H.H., Staun, M., Szczepanek, K., . . . Acute Intestinal Failure Special Interest Groups of ESPEN (2015). ESPEN endorsed recommendations. Definition and classification of intestinal failure in adults. *Clinical nutrition (Edinburgh, Scotland), 34*(2), 171–180. *https://doi.org/10.1016/j.clnu.2014.08.017.*

[63] Pironi, L., Arends, J., Bozzetti, F., Cuerda, C., Gillanders, L., Jeppesen, P.B., Joly, F., Kelly, D., Lal, S., Staun, M., Szczepanek, K., Van Gossum, A., Wanten, G., Schneider, S.M., & Home Artificial Nutrition & Chronic Intestinal Failure Special Interest Group of ESPEN (2016). ESPEN guidelines on chronic intestinal failure in adults. *Clinical nutrition (Edinburgh, Scotland), 35*(2), 247–307. *https://doi.org/10.1016/j.clnu.2016.01.020.*

[64] Deutsch, L., Cloutier, A., & Lal, S. (2020). Advances in chronic intestinal failure management and therapies. *Current opinion in gastroenterology, 36*(3), 223–229. *https://doi.org/10.1097/MOG.0000000000000631.*

[65] Pierret, A., Wilkinson, J.T., Zilbauer, M., & Mann, J.P. (2019). Clinical outcomes in pediatric intestinal failure: a meta-analysis and meta-regression. *The American journal of clinical nutrition, 110*(2), 430–436. *https://doi.org/10.1093/ajcn/nqz110.*

[66] Becker, P., Carney, L.N., Corkins, M.R., Monczka, J., Smith, E., Smith, S.E., Spear, B.A., & White, J.V. (2015). Consensus statement of the Academy of Nutrition and Dietetics/American Society for Parenteral and Enteral Nutrition: Indicators recommended for the identification and documentation of pediatric malnutrition (undernutrition). *Nutrition in Clinical Practice, 30*(1), 147–161. *https://doi.org/10.1177/0884533614557642.*

[67] White, J.V., Guenter, P., Jensen, G., Malone, A., & Schofield, M. (2012). Consensus statement: Academy of Nutrition and Dietetics and American Society for Parenteral and Enteral Nutrition: Characteristics recommended for the identification and documentation of adult malnutrition (undernutrition). *Journal of Parenteral and Enteral Nutrition, 36*(3), 275–283. *https://doi.org/10.1177/0148607112440285.*

[68] Gounden, V., Vashisht, R., & Jialal, I. (2021). Hypoalbuminemia. In *StatPearls [internet].* StatPearls Publishing. *https://www.ncbi.nlm.nih.gov/books/NBK526080/.*

[69] National Heart Lung and Blood Institute. (2011). *Your guide to anemia* (NIH Publication No. 11–7629). US Department of Health and Human Services, National Institutes of Health. *https://www.nhlbi.nih.gov/files/docs/public/blood/anemia-yg.pdf.*

age.[70] The disability program rules, including the listings, end at full retirement age. If the person has not yet reached full retirement age, we will consider age at a later step in the sequential evaluation process, when we consider the person's residual functional capacity, age, education, and work experience.[71]

Comment: One commenter stated that listing 5.08 (*Weight loss due to any digestive disorder*) does not specifically address eating disorders. The commenter asked us to add language to the preamble (listing introductory text) to clarify that adjudicators should utilize listing 12.13 (*Eating disorders*) to address eating disorders in listing 5.08 (*Weight loss due to any digestive disorder*).

Response: We adopted this comment. Listing 5.08 (*Weight loss due to any digestive disorder*) is used to evaluate digestive disorders that result in significant or serious weight loss. We define digestive disorders in 5.00A (*Which digestive disorders do we evaluate in this body system?*) as disorders ''that result in severe dysfunction of the liver, pancreas, and gastrointestinal tract.'' However, severe, listing-level weight loss can occur as a result of impairments other than digestive disorders, such as due to certain genitourinary, immune, or mental disorders. We have added language to the introductory text in 5.00F (*How do we evaluate weight loss due to any digestive disorder under 5.08?*) and 105.00F (*How do we evaluate growth failure due to any digestive disorder under 105.08?*) to provide adjudicators with guidance on how to evaluate weight loss not caused by a digestive disorder. Specifically, we explain that impairments other than digestive disorders that cause weight loss should be evaluated under the appropriate body system for that impairment. If the claimant develops a digestive disorder as the result of another impairment, we will evaluate the acquired digestive disorder under our rules for digestive disorders.

Comment: One commenter recommended that malnutrition be included as a causative factor for each of the digestive disorders, because it results in functional impairments.

Response: We did not adopt this comment. We disagree with the commenter's assertion that malnutrition is a causative factor for each of the digestive disorders. For example, while increased malnutrition risk is associated with IBD, it is not thought to cause IBD.[72] [73]

Growth Failure

Comment: One commenter suggested that we define growth failure as weight-for-height/length or BMI z-scores less than 2. Another commenter requested that we use z-scores for single data points in listing 105.08 (*Growth failure due to any digestive disorder*). The commenter recommended a z-score of < -1 for weight-for-height, BMI-for-age, length/height for age, or mid-arm muscle circumference defining risk of malnutrition and multiple z-score measurements over time demonstrating a deceleration of weight for length/height diagnosing malnutrition. The commenter also proposed looking at weight gain velocity, weight loss, or inadequate nutrient intake to diagnose malnutrition.

Response: We did not adopt these comments. We did not propose to change the requirements in listing 105.08 (*Growth failure due to any digestive disorder*). Our long-standing policy is to use the third percentile, going back to the inception of listing 105.08 (*Growth failure due to any digestive disorder*) in 1977.[74] As we explained in the 2001 NPRM on which the current criteria are based, ''[t]he 3rd percentile is generally accepted as the lower limit of the normal range for most biologic measurements.'' [75] A child whose weight is in the 3rd percentile weighs the same or more than 3 percent of the reference population, and weighs less than 97 percent of the children in the reference population. Percentiles are commonly used to assess the growth of children in the United States. We are continuing our policy that measurements below the third percentile correspond to listing-level severity for children because the Centers for Disease Control and Prevention (CDC) growth tables continues to provide percentiles.[76] The tables included in 105.08 (*Growth failure due to any digestive disorder*) are equivalent [77] to the CDC growth tables.[78] In the development of these tables, the CDC elected to use the third percentile as approximate to a z-score of -2, which is a standard statistical cutoff point to determine the need for nutritional intervention.[79] The CDC explained that ''[p]ercentiles are the most commonly used clinical indicator to assess the size and growth patterns of individual children in the United States.'' [80] The third percentile on the CDC charts identifies the extremes of the distribution and is referenced by pediatric endocrinologists and others who assess the growth of children with special health care requirements.[81] The childhood listings describe impairments that cause marked and severe functional limitations.[82] Listing 105.08 (*Growth failure due to any digestive disorder*) specifically describes growth failure due to a digestive disorder (such as malnutrition) that is severe enough to meet this threshold. Listing 105.08 (*Growth failure due to any digestive disorder*) is not intended to provide diagnostic guidelines for such a disorder generally, or to help identify children who may be at risk of a disorder.

Comment: One commenter stated that we did not provide adequate justification for our selection of using the 3rd percentile values for weight-for length and our selection of albumin and hemoglobin levels in listing 105.08 (*Growth failure due to any digestive disorder*).

Response: The comment reflects a misunderstanding since we did not propose to change the requirements in listing 105.08 (*Growth failure due to any digestive disorder*). The text in this section of the listing is unchanged, and identical to our existing regulatory text, but we chose to republish it for the clarity and continuity of the listing as a whole.

[70] Center for Disease Control. *https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html. The CDC does not alter BMI calculations for adults 20 years and older.*

[71] 20 CFR 404.1520 and 416.920.

[72] Schreiner, P., Martinho-Grueber, M., Studerus, D., Vavricka, S.R., Tilg, H., & Biedermann, L. (2020). Nutrition in inflammatory bowel disease. *Digestion, 101*(Suppl. 1), 120–135. *https://doi.org/10.1159/000505368.*

[73] Ramos, G.P., & Papadakis, K.A. (2019). Mechanisms of disease: Inflammatory bowel diseases. *Mayo Clinic Proceedings, 94*(1), 155–165. *https://doi.org/10.1016/j.mayocp.2018.09.013.*

[74] 42 FR 14705, 14710 (1977).

[75] 66 FR 57009, 57014 (2001).

[76] 66 FR at 57021 (2001).

[77] The values in our table are generally the same as those used by the CDC, but we have rounded to the nearest tenth and grouped same values into a single line on our table. For example: Row 1 on the CDC table for boys age 2 is 14.50347667 and row 2 for boys age 2.1 is 14.46882381. Both of these values round to 14.5, so on the SSA table the value of 14.5 is given for boys age 2–2.1. Furthermore, although the CDC table goes to age 20 for boys, we do not use the values for age 18–20, because we do not use the childhood listings for individuals 18 and older.

[78] National Center for Health Studies. (2002, May). *2000 CDC Growth Charts for the United States: Methods and Development.* United States Department of Health & Human Services *https://www.cdc.gov/nchs/data/series/sr_11/sr11_246.pdf.*

[79] Id.

[80] Id.

[81] National Center for Health Studies. (2017, June). *Clinical Growth Charts.* Centers for Disease Control and Prevention. *https://www.cdc.gov/growthcharts/clinical_charts.htm.*

[82] 20 CFR 416.925.

Other Digestive Disorders Comments

Comment: One commenter asked if we considered expanding the one-year period for which we consider a person to be under a disability following liver (5.09, 105.09 (*Liver transplantation*)), small intestine (5.11, 105.11 (*Small intestine transplantation*)), or pancreas (5.12, 105.12 (*Pancreas transplantation*)) transplant, because post-transplant follow-up, complications, or adverse effects of immunosuppression may persist for longer than a year.

Response: We considered this comment and are not making any changes. The one-year period of disability following liver, small intestine, or pancreas transplant in these listings is consistent with the listings for heart transplant (4.09 (*Heart transplant*)) and kidney transplant (6.04 (*Chronic kidney disease,* with kidney transplant)). Like other organ transplant recipients, liver transplant recipients are at risk of developing post-transplant complications such as organ rejection or infection. The risk of rejection is highest during the first 3–6 months after transplantation and then decreases significantly.[83] Bacterial infections are most common within the first month and viral infections generally occur within the first 6 months.[84] Medical literature for liver transplant recipients indicates that most transplant recipients are able to return to activities of daily living and work within 12 months.[85]

We reevaluate the claim at the end of the one-year period, using updated medical records and any other necessary information to determine if there is continuing disability.[86] Additionally, we do not automatically cease benefits once the one-year period has concluded. As we explain in 5.00G and 105.00G (*How do we evaluate digestive organ transplantation?*), after the one-year period, we evaluate the person's post-transplant function, the frequency and severity of any rejection episodes, complications in other body systems, and adverse treatment effects. A continuation or cessation of disability depends on the evidence found in the medical record at the time of reevaluation.[87]

Comment: One commenter suggested that we revise listing 105.10 (*Need for supplemental daily enteral feeding via a gastrostomy*) ''to include tube feeding by nasogastric or nasojejunal tube feeding, or gastrojejunostomy, as well as by gastrostomy.''

Response: We partially adopted this comment. We revised listing 105.10 (*Need for supplemental daily enteral feeding via a gastrostomy*) to include tube feeding by jejunostomy or duodenostomy, as well as by gastrostomy. We did not include nasogastric or nasojejunal tube feeding. Nasogastric or nasojejunal tube feeding methods are likely to be used for relatively short periods of time and would not meet the durational requirement for disability.[88] [89] We also updated the introductory text at 105.00H (*How do we evaluate the need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy?*) to reflect this additional language.

Comment: One commenter asked that we ''clarify how pancreatic disease would be identified since it is not included as a separate listing.''

Response: We did not make any changes to this rule based on this comment. We do not have a listing for every digestive disorder. However, we evaluate unlisted digestive disorders under the sequential evaluation process, as we explain in 5.00J and 105.00L (*How do we evaluate digestive disorders that do not meet one of these listings?*). We will first consider whether an impairment, such as pancreatic disease, medically equals a listing. If the impairment(s) does not medically equal the criteria of a listing, this does not mean that we will deny the claim. If an adult's impairment(s) does not meet or medically equal any listing, we may find that person disabled at a later step in the sequential evaluation process.[90] If a child's impairment(s) does not meet or medically equal any listing, we may find that their impairment(s) functionally equal the listings.[91]

Comment: Several commenters asked us to add that a lack of opioid or narcotic prescriptions or attempts to reduce or avoid use of such medication should never be considered indicative of the severity of an impairment, nor should it affect an adjudicator's decision about whether an impairment can reasonably be expected to produce a person's symptoms (including pain) or about the intensity and severity of such symptoms.

Response: We did not adopt these comments. The disability program rules require the presence of a medically determinable impairment that can reasonably be expected to produce the symptoms (including pain). Our adjudicators consider all evidence in the record when making this finding, including a description of the person's medications and the effects of those medications on the allegations of pain, as well as factors such as the person's daily activities, the location, duration, frequency, and intensity of their symptoms, treatment other than medication, and any measures other than treatment that the person uses to alleviate their symptoms, such as the need to change positions.[92] If a person is prescribed any medication, including opioid or other narcotic medication, and chooses to not take the medication, we use our rules regarding the need to follow prescribed treatment, which apply to all medical conditions, not just digestive disorders, and are explained in 20 CFR 404.1530 and 416.930 (*Need to follow prescribed treatment*). In conjunction with our regulations, we provide additional guidance on following prescribed treatment in SSR 18–3p (*Titles II and XVI: Failure to Follow Prescribed Treatment*), in which we include the ''risk of addiction to opioid medication'' as an example of a ''good cause'' reason for not following prescribed treatment.'' [93] As such, it is already our policy that a lack of, or reduction of, opioid or narcotic prescriptions due to the risk of addiction will not adversely affect a person's claim during the adjudication process. Consequently, there is no need to specify such within this specific medical listing.

Comment: One commenter stated that we failed to provide evidence that we considered the tolerance of employers when dealing with the issues associated with digestive disorders (for example, diarrhea, fecal incontinence, rectal bleeding, abdominal pain, fatigue, fever, nausea, vomiting, and arthralgia).

Response: We did not make changes in response to the comment, because we follow our statutory requirements. The

[83] Manzarbeitia, C., & Arvelakis, A. (2019, January 11). *Liver transplantation treatment & management.* Medscape. *https://emedicine.medscape.com/article/431783-treatment.*

[84] Roayaie, K., & Feng, S. *Liver transplant.* University of California San Francisco Transplant Surgery Department of Surgery. *https://transplantsurgery.ucsf.edu/conditions--procedures/liver-transplant.aspx.*

[85] Mayo Clinic Staff. (2020, July 15). *Liver transplant.* Mayo Clinic. *https://www.mayoclinic.org/tests-procedures/liver-transplant/about/pac-20384842.*

[86] See 5.00G and 105.00G (*How do we evaluate digestive organ transplantation?*).

[87] 20 CFR 404.1589 and 416.989.

[88] Yi, D.Y. (2018). Enteral nutrition in pediatric patients. *Pediatric Gastroenterology, Hepatology, & Nutrition, 21*(1), 12–19. *https://doi.org/10.5223/pghn.2018.21.1.12.*

[89] 20 CFR 416.906 and 416.909.

[90] 20 CFR 404.1520 and 416.920.

[91] 20 CFR 416.924.

[92] 20 CFR 404.1529(c)(3), 416.929(c)(3), and Social Security Ruling (SSR) 16–3p (2016). Available at: *https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html.*

[93] SSR 18–3p (2018). Available at: *https://www.ssa.gov/OP_Home/rulings/di/02/SSR2018-03-di-02.html.*

Act states a person shall be determined to be under a disability only if the person is unable to do any substantial gainful activity, regardless of whether an employer would hire them.[94] The listings, however, identify impairments we consider severe enough to prevent a person from doing *any gainful activity,* regardless of the person's age, education, or work experience.[95] Consistent with the Act, we do not consider whether employers may be unwilling to hire a person with a particular impairment, such as a digestive disorder. Individual, employer-specific policies vary in scope and so are not appropriate for our national program, which uses a definition of disability that can be uniformly applied throughout the nation. We will consider the effects of an individual's resulting symptoms from their medically determinable digestive disorders, such as those identified by the commenter when we assess and consider the individual's residual functional capacity at later steps in our sequential evaluation process.[96]

Skin Disorders

Comment: Several commenters asked that we add wheeled mobility devices, specifically wheelchairs, adaptive or special needs strollers, and scooters, to our definition of ''assistive device(s)'' in 8.00B1 and 108.00B1 (*Assistive device(s)*).[97] The commenters also noted that while the wheeled mobility devices they requested are not hand-held or worn, they improve stability and mobility, and stated claimants with a documented medical need for these devices have functional limitations at least as significant to those with a need for other assistive devices.

Response: We generally adopted these comments, specifying alternative examples. We incorporated devices used in a seated position into the definition of assistive device(s) in 8.00B1 and 108.00B1 (*Assistive device(s)*). Rather than using the suggested examples of ''wheelchairs, adaptive or special needs strollers, and scooters,'' we used examples such as wheelchair, rollator, and power operated vehicle. We chose these examples because the National Academies of Sciences, Engineering, and Medicine described these types of wheeled and seated mobility devices in a consensus study report on assistive technology.[98] This change is also consistent with the definition of ''assistive device(s)'' used in the recently published final rule, *Revised Medical Criteria for Evaluating Musculoskeletal Disorders.*[99]

Comment: Several commenters stated that the definition of ''fine and gross movements'' in 8.00B5 and 108.00B5 (*Fine and gross movements*) should include ''feeling'' as a fine movement, in keeping with SSR 85–15 (*Titles II and XVI: Capability to Do Other Work—The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.*) [100] In addition, a commenter also referenced SSR 09–6p (*Title XVI: Determining Childhood Disability—The Functional Equivalence Domain of ''Moving About and Manipulating Objects.''*) [101]

Response: We disagree with the comments and did not adopt the suggestion. SSR 85–15 (*Titles II and XVI: Capability to Do Other Work—The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments*) provides guidance to our adjudicators on the capability to do other work, applicable at step 5 of the sequential evaluation process; it is therefore not within the scope of this final rule, which addresses the listings step of the sequential evaluation process. With regard to SSR 09–6p (*Title XVI: Determining Childhood Disability—The Functional Equivalence Domain of ''Moving About and Manipulating Objects*''), this SSR is consolidated guidance for our adjudicators for evaluating the functional equivalence domain of moving about and manipulating objects for children, which is also not within the scope of this final rule. While these SSRs are not within the scope of this final rule, we note that SSR 09–6p (*Title XVI: Determining Childhood Disability—The Functional Equivalence Domain of ''Moving About and Manipulating Objects*'') does not specifically mention feeling in regard to fine and gross movements, only that sensory loss that interferes with motor activities is a limitation we consider under the domain of ''moving about and manipulating objects.'' Moreover, SSR 85–15 (*Titles II and XVI: Capability to Do Other Work—The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments*) discusses ''feeling'' as a manipulative impairment, not as a fine movement as the commenter implies. However, if the claimant's skin condition causes limitations in their ability to feel, which also results in significant deficits in their ability to perform fine and gross movements as defined in 8.00B5 and 108.00B5 (*Fine and gross movements*), their skin condition may be found to meet the listing criteria. If the evidence does not support a finding that the claimant's skin condition meets a listing, any additional impact of the claimant's loss of ability to feel due to a skin condition would be evaluated under our medical equivalence rules (as well as our functional equivalence rules for child claimants) at step 3 of the sequential evaluation, or at steps 4 and 5 of the sequential evaluation process for adult claimants.[102]

Comment: Several commenters stated that it was unclear why proposed sections 8.00C3d and 108.00C3d (*What evidence do we need to evaluate your skin disorder?*) require information about the claimant's ''history of familial incidence'' of a skin impairment.[103] They asserted that the information may be unobtainable (for example, family members may be absent, deceased, not receiving medical treatment, or reluctant to share medical information), and the history does not affect the claimant's level of functioning.

Response: Our changes only reorganized the current guidance into an outline format for easier reading; we did not propose new requirements. Additionally, our guidance in 8.00B and 108.08B (*What documentation do we need?*) applies to the entirety of the skin listings, and as we state in 8.00A and 108.00A (*Which skin disorders do we evaluate under these listings?*) of the current rules, we evaluate skin disorders that result from hereditary, congenital, or acquired pathological processes. Therefore, a history of familial incidence, when available, may help us in evaluating hereditary skin disorders. For example, for many inherited skin disorders, we consider a family history as key information in helping establish a medically determinable

[94] 42 U.S.C. 423(d)(2)(A) and 42 U.S.C. 1382c(a)(3)(B).

[95] 20 CFR 404.1525 and 20 CFR 416.925.

[96] 20 CFR 404.1520 and 20 CFR 416.920.

[97] We note that the commenters referenced 8.00B2 and 108.00B2 (*Chronic skin lesions*), which is not correct. The correct reference for the definition of ''assistive device(s)'' for this comment is 8.00B1 and 108.00B1 (*Assistive device(s)*).

[98] National Academies of Sciences, Engineering, and Medicine. (2017). *The promise of* assistive technology to enhance activity and work participation. The National Academies Press. *https://doi.org/10.17226/24740.*

[99] 85 FR 78164 (2020).

[100] SSR 85–15 (1985). Available at: *https://www.ssa.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html.*

[101] SSR 09–6p (2009). Available at: *https://www.ssa.gov/OP_Home/rulings/ssi/02/SSR2009-06-ssi-02.html.*

[102] 20 CFR 404.1545(d) and 416.945(d).

[103] 84 FR at 35948, 35956 (2019).

impairment.[104] Additionally, other conditions, such as atopic dermatitis, have a high familial occurrence, and therefore a family history is useful information in establishing the presence of a medically determinable impairment.[105] However, for other skin conditions, including acquired conditions such as burn injuries, a familial history is less relevant, and we would not seek information on familial incidence in those cases. Nevertheless, we made minor changes in response to this comment, and acknowledge some claimants will not have a history of familial incidence or access to adequate or any health information about genetic relatives. While familial incidence is useful, we will use other available information and medical evidence to establish the medically determinable impairment in instances where it is not available.

We modified 8.00C3 and 108.00C3 (*What evidence do we need to evaluate your skin disorder?*) and its subparagraphs. In this final rule, we split the requirements from proposed 8.00C3d and 108.00C3d (''Your history of familial incidence; exposure to toxins, allergens or irritants; seasonal variations; and stress factors'') into two paragraphs, and we revised our wording about history of familial incidence to ''Any available history of familial incidence'' in final 8.00C3d and 108.00C3d (''Any available history of familial incidence''). We inserted ''Your exposure to toxins, allergens, or irritants; seasonal variations; and stress factors'' into final 8.00C3e (''Your exposure to toxins, allergens or irritants; seasonal variations; and stress factors'') and 108.00C3e (''Your exposure to toxins, allergens or irritants; seasonal variations; and stress factors'').

We relettered subparagraphs 8.00C3e and 108.00C3e (''Your ability to function outside of a highly protective environment'') through 8.00C3h and 108.00C3h (''Statements you or others make about your disorder(s), your restrictions, and your daily activities'') to 8.00C3f through 8.00C3i and 108.00C3f through 108.00C3i, respectively.

Comment: Several commenters asked that we omit the word ''prescribed'' from 8.00D (*How do we evaluate the severity of skin disorders?*) because some medically necessary treatments recommended by medical providers for skin conditions (for example, medicated baths, frequent bandage changes, or over-the-counter ointments) do not require a prescription. The commenters believe that this change would better align with the statement in 8.00B4 (*Documented medical need*) that assistive devices do not need to be prescribed in order to be considered by adjudicators.

Response: We have partially accepted this comment. As the commenters note, and as is consistent with our other regulations, medical providers other than physicians may ''prescribe'' or recommend treatment. To acknowledge this, we are changing the term ''physician'' in 8.00D5b and 108.00d5b (*Despite adherence to prescribed medical treatment for 3 months*) to ''medical source'' to account for the types of treatments identified by the commenters above.[106] As defined in our regulations, a ''medical source'' means an individual who is licensed as a healthcare worker by a State and working within the scope of practice permitted under State or Federal law, or an individual who is certified by a State as a speech-language pathologist or a school psychologist and acting within the scope of practice permitted under State or Federal law.[107] Prescribed medical treatment means that a medical source has instructed the patient to adhere to a specified treatment, such as any medication, surgery, therapy, the use of durable medical equipment, or the use of assistive devices. Prescribed treatment does not include lifestyle modifications, such as dieting, exercise, or smoking cessation. We will consider any evidence of prescribed treatment, whether it appears on prescription forms or is otherwise indicated within a medical source's records. An assistive device(s), as explained in 8.00B and 108.00B (*What are our definitions for the following terms used in this body system?*) of this final rule, is not a treatment method for a skin disorder. An assistive device(s) is any device used to improve stability, dexterity, or mobility, and does not need to be prescribed for adjudicators to consider its use as long as there is a documented medical need for the assistive device.

Comment: A few commenters stated that proposed 8.00D6b (''If, for any reason, you have not received treatment'') [108] is contrary to the ''spirit'' of SSR 18–3p (*Titles II and XVI: Failure to Follow Prescribed Treatment*).[109] The commenters added that SSR 18–3p provides ''several reasons (including religion, inability to pay, incapacity, intense fear of surgery, risk of opioid addiction, etc.) why noncompliance with prescribed medicine could be excused.'' The commenters state that the same exceptions for excusing medical treatment compliance might be the same reasons why a person has not received treatment. The commenters recommended that if we do not remove proposed 8.00D6b (''If, for any reason, you have not received treatment''), we should state that the reasons from SSR 18–3p are reasons a skin disorder could meet listing 8.09 (*Chronic conditions of the skin or mucous membranes*) without evidence of treatment.

Response: We did not adopt these comments. The commenters misunderstand our policy for failure to follow prescribed treatment in this instance. We only consider our failure to follow prescribed treatment policy and procedures after determining that a person is entitled to disability benefits. Once we determine that a person is entitled to disability benefits, we determine whether the evidence indicates that the person might not have been entitled to disability benefits if they had followed prescribed treatment. Therefore, in the case of listing 8.09 (*Chronic conditions of the skin or mucous membranes*), before we make a failure to follow prescribed treatment determination, we first need to determine that a person's skin disorder meets all of our criteria for listing 8.09 (*Chronic conditions of the skin or mucous membranes*), including listing criteria related to treatment. In the introductory text at 8.00D5b (*Despite adherence to prescribed medical treatment for 3 months*) we state that under listing 8.09 (*Chronic conditions of the skin or mucous membranes*), we require that a person's symptoms persist ''despite adherence to prescribed treatment for 3 months.'' The adherence to prescribed treatment is a part of the listing criteria and must be present in order for a person's skin condition to meet the criteria of the listing. Therefore, it is not possible to find a person disabled under listing 8.09 (*Chronic conditions of the skin or mucous membranes*) without a record of prescribed treatment, which is further explained in paragraph 8.00D6b (''If, for

[104] Tantcheva-Poor, I., Oji, V., & Has, C. (2016) A multistep approach to the diagnosis of rare genodermatoses. *Journal of the German Society of Dermatology, 14*(10), 969–986. *https://doi.org/10.1111/ddg.13140.*

[105] DeStefano, G.M., & Christiano, A.M. (2014) The genetics of human skin disease. *Cold Spring Harbor Perspectives in Medicine, 4*(10), a015172. *https://doi.org/10.1101/cshperspect.a015172.*

[106] 20 CFR 404.1502(d) and 416.902(i).

[107] Id.

[108] Paragraph 8.00D6b (''If, for any reason, you have not received treatment'') of the proposed and final rule states in part, ''If, for any reason, you have not received treatment, your skin disorder cannot meet the criteria for 8.09.''

[109] 83 FR 49616 (2018) and SSR 18–3p (2018). Available at: *https://www.ssa.gov/OP_Home/rulings/di/02/SSR2018-03-di-02.html.*

any reason, you have not received treatment''). This is clarified by our guidance in SSR 18–3p (*Titles II and XVI: Failure to Follow Prescribed Treatment*), where we explain that a failure to follow prescribed treatment determination is not applicable when a listed impairment(s) requires us to consider whether a person was following a specific treatment as part of satisfying the listing analysis.

Moreover, the requirement for prescribed treatment for skin disorders dates back to 1979.[110] We last comprehensively revised the listings for evaluating skin disorders in 2004. In the preamble to that final rule, we explained that the original requirement for extensive lesions ''not responding to prescribed treatment'' was replaced with the more specific requirement that there be ''extensive skin lesions that persist for at least 3 months despite continuing treatment as prescribed.'' [111] We are retaining that requirement with this update; however, with this final rule, we are finalizing our proposal to change the language to ''despite adherence to prescribed medical treatment'' to be more consistent with current medical terminology.

Additionally, we do not deny a claim if a person does not have an impairment that meets a listing. We may find the impairment(s) medically equals a listing (or, in the case of a child seeking Supplemental Security Income (SSI) payments, functionally equals the listings). If an adult claimant's impairment(s) does not meet or medically equal any listing, we may find them disabled at a later step in the sequential evaluation process. A lack of treatment history, as a solitary factor, does not require us to deny a claim. We evaluate a claim, including all record evidence, regardless of whether a person has received treatment for their impairment(s).

Comment: Several commenters asked us not to finalize the proposed changes to the functional criteria because the changes we propose to the skin disorders listings are ''more onerous,'' and they assert that fewer applicants will qualify for disability based on these updated criteria. These commenters believed the updates would prolong the process of applying for disability by necessitating assessment at later steps in the sequential evaluation process and would require vocational information and consideration of a person's age, education, and work experience, to make a determination. The commenters also expressed concern that these updates will ultimately result in more denials of claims at the initial and reconsideration levels. For instance, the commenters suggested that a person's skin disorder would be unable to meet a skin disorders listing if only one side of a groin and an axilla (underarm) was involved instead of both sides of the groin or the axillae (underarms).

Response: We did not adopt these comments. The requirement that the claimant's skin disorder results in significant functional limitations lasting a minimum of 12 months despite adherence to treatment dates back to 1979.[112] The introductory text to our 1979 final rule stated that the claimant's skin lesions ''must be shown to have persisted for a sufficient period of time despite therapy for a reasonable presumption to be made that severe impairment will last for a continuous period of at least 12 months.'' [113] This is a requirement in our current rule as well, which states that we require evidence that the claimant's skin disorder results in a degree of functional limitation such that the claimant is ''unable to do any gainful activity for a continuous period of at least 12 months'' (see current 8.00C2 and 108.00C2 (*Frequency of flare-ups*)). The language in the final rule reflects a continuation of this requirement, stating that we must have medically documented evidence of physical limitation(s) of functioning related to the claimant's skin disorder, and that the decrease in physical function resulting from the claimant's skin disorder must have lasted, or can be expected to last, for a continuous period of at least 12 months (8.00D2 and 108.00D2 (*Limitation(s) of physical functioning due to skin disorders*). Further, this is consistent with our program-wide rules for the Listing of Impairments, which identify impairments that preclude the ability to perform any gainful activity (or, in the case of a child applying for SSI payments based on disability, which identify impairments that result in marked and severe functional limitations) and have lasted or can be expected to last for a continuous period of at least 12 months.[114]

Also consistent with our rules dating back to 1979, our current rule acknowledges that because skin disorders frequently respond to treatment, we must have evidence of treatment for a ''sufficient time'' before we can appropriately assess the impact of the treatment and the resultant effects on the claimant's functional capacity (see current 8.00C4 and 108.00C4 (*Treatment*)). For current adult listings 8.02 (*Ichthyosis*) through 8.06 (*Hidradenitis suppurativa*) and the equivalent current childhood listings 108.02 through 108.06, which have been consolidated into listings 8.09 and 108.09 (*Chronic conditions of the skin or mucous membranes*) in this final rule, the claimant must adhere to prescribed medical treatment for at least three months. The continued presence of the skin disorder despite adherence to prescribed medical treatment for at least three months allows the adjudicator to make a reasonable presumption that the skin disorder will meet the durational requirement for disability.[115] However, medical evidence only showing the continued presence of a skin disorder despite adherence to prescribed treatment is insufficient to find that the claimant's skin disorder meets the listing criteria. In order to find that the claimant's skin impairment meets a listing, we must have evidence of listing-level functional limitation that has lasted, or can be expected to last, for a continuous period of at least 12 months.

Addressing the commenters' concern that our new functional criteria are more onerous, we specifically refer to certain areas of the body in the current and in this final rule. Generally, skin disorders that affect these areas, such as ichthyosis and bulbous diseases, result in functional limitations. This is not a change from our current criteria. In our current criteria at 8.00C1 and 108.00C1 (*Extensive skin lesions*), we define ''extensive skin lesions,'' which we require in current adult listings 8.02 (*Ichthyosis*) through 8.06 (*Hidradenitis suppurativa*) and current childhood listings 108.02 (*Ichthyosis*) through 108.06 (*Hidradenitis suppurativa*), 8.07B and 108.07B (''Other genetic photosensitivity disorders''), and 8.08 and 108.08 (*Burns*), as lesions that ''involve multiple body sites or critical body areas, and result in a very serious limitation.'' We provide examples of ''extensive skin lesions,'' to include conditions such as ''skin lesions that interfere with the motion of your joints and that very seriously limit your use of more than one extremity,'' ''skin lesions on the palms of both hands that very seriously limit your ability to do fine and gross motor movements,'' and ''skin lesions on the soles of both feet, the perineum, or both inguinal areas that very seriously limit your ability to ambulate.''

[110] 44 FR 18170, 18187 (1979).

[111] 69 FR 32260, 32264 (2004).

[112] 44 FR 18170, 18187 (1979), 45 FR 55566, 55607 (1980), and 50 FR 50068, 50098 (1985).

[113] 44 FR at 18787.

[114] 20 CFR 404.1525 and 416.925.

[115] 20 CFR 404.1509 and 416.909.

The updated functional criteria for skin disorders reflect our continued focus on the functional limitations skin disorders may cause and reflect a level of functional limitation similar to the criteria in our current rules. In order to clarify that focus, we have moved from providing examples of listing-level limitations caused by skin disorders, as we do in the current introductory text, to the use of precise and functional criteria set forth in this final rule at 8.00D2 and 108.00D2 (*Limitation(s) of physical functioning due to skin disorders*). The articulation of these specific functional criteria prompts adjudicators to focus on the resultant functional limitations caused by the claimant's skin impairment in a consistent manner across cases. In the proposed rule, and in this final rule, we specify that a medically determinable skin impairment will generally meet a listing when it has or can be expected to last for a continuous period of at least 12 months and is medically documented by one of the functional limitations in these listings. This means that the updated rule will not necessarily result in a denial. To use the example cited by the commenter, a person's skin impairment resulting in lesions on an axilla and one side of the groin may still meet one of these listings, because there may be medical documentation that the chronic skin lesions or contractures result in limitations that satisfy at least one of the functional criteria provided.

If an adult's impairment(s) does not meet or medically equal any listing, we may find that person disabled at a later step in the sequential evaluation process.[116] If a child's impairment(s) does not meet or medically equal any listing, we may find that their impairment(s) functionally equal the listings.[117]

Comment: A few commenters asked us to remove the words ''third-degree'' from proposed 8.08 and 108.08 (*Burns*). The commenters stated that fourth-degree burns, which go beyond the skin and underlying tissue to muscles and bones, are at least as detrimental to functioning as third-degree burns, and that second-degree burns, especially, but not only in combination with higher-degree burns, can cause scarring that causes pain and limits function.

Response: We adopted this comment and removed the qualifier ''third-degree'' from listings 8.08 and 108.08 (*Burns*). The comment brought a perspective that we hadn't considered. We adopted the comment and removed the qualifier ''third degree'' from listing 8.08 and 108.08 because skin lesions and contractures that affect function, although often caused by third-degree burns, can also be caused by deep partial thickness (deep second degree) burns or fourth-degree burns.[118] Additionally, the measurement of burn depth in the medical record is not always precise because many providers have difficulty accurately assessing burn depth, there is a need for development of adequate methods of precisely measuring burn depth, and burns often progress to a greater depth than initially documented.[119] [120] [121] [122]

Comment: One commenter asked us to reorder the proposed listings in a more manageable and understandable fashion. Specifically, the commenter stated that by eliminating listings 8.02 (*Ichthyosis*) through 8.09 (*Chronic conditions of the skin or mucous membranes*) and 108.02 (*Ichthyosis*) through 108.09 (*Chronic conditions of the skin or mucous membranes*) we made these listings more complicated to read and administer. The commenter stated that for the relatively unusual skin conditions, cross-referencing and placing all of the examples of skin conditions in the current listings into proposed listings 8.09 and 108.09 (*Chronic conditions of the skin or mucous membranes*) made these listings confusing for adjudicators, advocates, and lay people.

Response: We have partially adopted these comments. We did not adopt the commenter's suggestion to reorder the skin disorders listings; contrary to the commenter's assertion, we did not eliminate listings 8.09 and 108.09 (*Chronic conditions of the skin and mucous membranes*). These are new listings in the proposed rule. Similarly, we did not eliminate listings 8.02 (*Ichthyosis*) through 8.08 (*Burns*) and 108.02 (*Ichthyosis*) through 108.08 (*Burns*). Rather, we removed adult listings 8.02 (*Ichthyosis*) through 8.06 (*Hidradenitis suppurativa*) and childhood listings 108.02 (*Ichthyosis*) through 108.06 (*Hidradenitis suppurativa*), and consolidated their current repetitive criteria into one listing for chronic conditions of the skin or mucous membranes (revised 8.09 and 108.09 (*Chronic conditions of the skin and mucous membranes*)), regardless of whether the condition is commonly known or relatively rare, to strengthen adjudicative ease and more efficiently identify adults and children with skin disorders of listing-level severity. As we explained in the NPRM, the criteria in the current listings are identical for each type of skin disorder, and all of the named disorders are chronic conditions of the skin or mucous membranes.[123] For instance, adjudicators will not need to search examples of skin conditions in various skin disorders listings to locate a person's listed medically determinable skin impairment. If ''relatively unusual skin conditions'' are not in the listed examples of skin disorders, the adjudicator will no longer need to determine which listed impairment(s) is most comparable to a person's medically determinable impairment of the skin or mucous membranes to proceed with evaluating the claim.

As for the commenter's assertion that the revised skin listings are confusing and more complicated to read, we addressed the commenter's concerns by revising the language in 8.07B2 and 108.07B2 (''Chronic skin lesions or contractures''), 8.08 and 108.08 (*Burns*), and 8.09 and 108.09 (*Chronic conditions of the skin or mucous membranes*), to improve the clarity and readability of these listings. Specifically, we removed repetitive language related to impairment-related limitations. In addition to revising the language in these listings to make the criteria easier to understand and apply, we moved the 8.00D2 and 108.00D2 (*Limitation(s) of physical functioning due to skin disorders*) cross references from 8.09A to 8.09B and from 108.09A to 108.09B, respectively, to align with the terms they describe. We did not make any other changes to the cross references. Regarding the use of cross references in revised listing 8.09 (*Chronic conditions of the skin or mucous membranes*), we use cross references throughout the listings for body systems to assist adjudicators, advocates, and lay people with understanding and locating terms

[116] 20 CFR 404.1520 and 416.920.

[117] 20 CFR 416.924.

[118] Jeschke, M.G., van Baar, M.E., Choudhry, M.A., Chung, K.K., Gibran, N.S., & Logsetty, S. (2020). Burn injury. *Nature reviews. Disease primers, 6*(1), 11. *https://doi.org/10.1038/s41572-020-0145-5.*

[119] Id.

[120] Bettencourt, A.P., Romanowski, K.S., Joe, V., Jeng, J., Carter, J.E., Cartotto, R., Craig, C.K., Fabia, R., Vercruysse, G.A., Hickerson, W.L., Liu, Y., Ryan, C.M., & Schulz, J.T. (2020). Updating the Burn Center Referral Criteria: Results From the 2018 eDelphi Consensus Study. *Journal of burn care & research: official publication of the American Burn Association, 41*(5), 1052–1062. *https://doi.org/10.1093/jbcr/iraa038.*

[121] Burgess, M., Valdera, F., Varon, D., Kankuri, E., & Nuutila, K. (2022). The Immune and Regenerative Response to Burn Injury. *Cells, 11*(19), 3073. *https://doi.org/10.3390/cells11193073.*

[122] Markiewicz-Gospodarek, A., Kozioł, M., Tobiasz, M., Baj, J., Radzikowska-Büchner, E., & Przekora, A. (2022). Burn Wound Healing: Clinical Complications, Medical Care, Treatment, and Dressing Types: The Current State of Knowledge for Clinical Practice. *International journal of environmental research and public health, 19*(3), 1338. *https://doi.org/10.3390/ijerph19031338.*

[123] 84 FR 35936 (2019).

and phrases specific to the evaluation of certain listing criteria. We also use cross references to assist readers with recalling other listings or rules that affect how we evaluate specific impairments.

Comment: One commenter asked that we not replace the plain language term ''flare-ups'' with the medical term ''exacerbations.''

Response: We did not adopt the suggestion to remove the term ''exacerbations,'' but we did add language to reflect the commenter's request to see ''flare-ups'' reflected as well. In the final rule, we clarified the definition of the term ''exacerbation.'' [124] We must use appropriate, modern medical terminology to specify the medical criteria we use to evaluate skin disorders, and our research indicates that ''exacerbation'' is the preferred term among professionals in the field of dermatology.[125] Additionally, we use the term ''exacerbation'' and not ''flare-up'' throughout the rules for numerous body systems, so adding the word in the listing for skin disorders will allow for consistency across the multiple body systems.[126] In this final rule, we added a definition to 8.00B and 108.00B (*What are our definitions for the following terms used in this body system?*) based on the medical definition for ''exacerbation''; [127] however, we also mentioned alternative terms such as ''flare'' and ''flare-up,'' to reflect the commenter's desire to see the historical term ''flare-up'' in the listing.

Comment: One commenter stated that many of the terms used in these rules are not defined well enough for adjudicators and the public. The commenter provided the examples of ''inability,'' ''maintain an upright position,'' ''fine and gross motor movements,'' ''picking,'' ''pinching,'' ''manipulating and ''fingering,'' ''handling,'' ''gripping and grasping,'' ''holding,'' ''turning,'' ''reaching,'' ''lifting and carrying,'' ''seriously,'' ''marked,'' and ''prescribed treatment.''

Response: We disagree with this comment. This rule uses ''fine and gross movements'' (not ''fine and gross motor movements''), which is a term defined in 8.00B5 and 108.00B5 (*Fine and gross movements*). The majority of the terms identified by this commenter are examples of fine movements [128] and gross movements.[129] We use these terms, as well as ''inability,'' ''maintain,'' ''upright position,'' ''prescribed,'' and ''treatment'' in this rule as they are defined in common English usage. As we explained in the NPRM, we replaced the current term ''continuing treatment as prescribed'' with ''adherence to prescribed medical treatment'' to be consistent with current medical terminology. We changed ''prescribed treatment'' in 8.00D2 and 108.00D2 (*Limitation(s) of physical functioning due to skin disorders*) to ''prescribed medical treatment'' to be consistent with current medical terminology. Further, throughout this rule we provide numerous examples of what we will consider as ''marked'' limitation(s).

Other Comments

Comment: One commenter expressed concern that we do not provide quantitative data to show the ''validity'' of these listings and noted that many people engage in work even though their impairments meet the listing requirements. The commenter opined that this ''challenges the credibility'' of using the listings to determine whether a person is disabled, and that the listings conflict with the statutory definition of disability. Several other commenters expressed concern that we do not provide any justification for making what they characterize as substantial changes.

Response: We did not make any changes in this final rule based on these comments. Contrary to the commenters' assertion, we provided justification and sources for our changes. In the NPRM, we included an extensive list of references that we relied on in proposing this rule.[130] We also invited the public to comment on these references and the data contained within them. The listings help ensure that determinations and decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that we can readily identify a significant number of people who meet our definition of disabled. The level of severity described in the listings is such that we consider a person who is not engaging in SGA, and who has an impairment that meets or medically equals all of the criteria of the listing, to generally be unable to do any gainful activity because of the medical impairment alone at step 3 of the sequential evaluation process. When such impairment or combination of impairments meets or medically equals the level of severity described in the listing for the required duration, we will find the person disabled on the basis of medical facts alone in the absence of evidence to the contrary (for example, the actual performance of SGA).

Comment: Two commenters opined that our proposed revisions discriminate against the poor because the criteria in the listings depend on specific diagnoses that, in turn, require medical tests that many people cannot afford and that we will not purchase. The commenters noted that these tests are not specifically required by the listings, but that they still help establish disability for those people who are able to afford them.

Response: We did not make any changes in this final rule based on these comments. The Act and our regulations require a claimant to submit medical evidence to establish a medically determinable impairment. We use medical evidence generally accepted in the medical community and available in medical records to establish and determine the severity of an impairment. We consider all available evidence about a claimant's impairments, not just information about a particular allegation, such as a skin or digestive condition. If we determine a medical source cannot or will not give us sufficient medical evidence about a person's impairment for us to determine whether a person is disabled, we may also purchase medical examinations or tests to obtain the evidence that we need.[131] We can also find a person disabled even if they do not have a medical diagnosis for their impairment(s) when applying for benefits, as long as we are able to establish a medically determinable severe physical or mental impairment or combination of impairments that meets the duration requirements.

Comment: One commenter stated that the number of combinations of disorders

[124] Paragraphs 8.00B7 and 108.00B7 (*Exacerbation*) of the final rule define exacerbation as ''an increase in the signs or symptoms of the skin disorder.''

[125] A review of the website for the Journal of the American Medical Association (JAMA), a peer-reviewed medical journal published 48 times a year by the American Medical Association, found that the term ''exacerbation'' was used more than twice as often as the term ''flare-up.''

[126] We use the term ''exacerbations'' throughout our respiratory listings (3.00E2, 3.00J, 3.02D, 3.03B, 3.04B, 3.04G, and 3.07, as well as their childhood equivalents), in our current and revised digestive listings (5.00E and 105.00E in the current rules and 5.00D and 105.00D in the revised rule), as well as in the hematological (7.00G), neurological (11.00G, 11.00N1, and 111.00O), mental (12.00F4, 12.00G, 112.00F4, and 112.00G), and the immune listings (14.00I and 114.00I). We do not use the term ''flare-up'' in any other body system.

[127] Taber's Cyclopedic Medical Dictionary—23rd Ed. (2017).

[128] Fine movement examples include picking, pinching, manipulating, and fingering.

[129] Gross movement examples include handling, gripping, grasping, holding, turning, lifting, and carrying.

[130] 84 FR 35936 (2019).

[131] 20 CFR 404.1517, 404.1519, 404.1519a–404.1519f, 404.1519k, 416.917, 416.919, 416.919a–419.919f, and 416.919k.

from different body systems far exceeds the number of disorders in any single body system. For example, if there are 100 different digestive disorders and 100 different skin disorders, there are 10,000 combinations of digestive and skin disorders. The commenter added that our proposed listings only include single disorders and leave out many important combinations of disorders. The commenter stated that we have only covered a tiny fraction of the possible disorders two at a time. The commenter alleged that proposed listings discriminate in favor of those with severe single body system disorders and against those with combinations of disorders.

Response: We did not adopt this comment. We recognize that digestive disorders and skin disorders may co-occur with impairments in other body systems. In some cases, the impairment in another body system results from a digestive disorder or a skin disorder. In other cases, the impairment in another body system is not related to the digestive disorder or the skin disorder. We intend the listings for digestive disorders to address digestive disorders and the complications of those disorders. We intend the listings for skin disorders to address skin disorders and the complications of those disorders. When the co-occurring condition or complication is due to a digestive disorder or skin disorder, we evaluate it under the digestive disorders listings or skin disorders listings, as appropriate. However, when the co-occurring impairments are unrelated, we evaluate the combination under our medical equivalence rules (as well as our functional equivalence rules for child claimants) at step 3 of the sequential evaluation, or at steps 4 and 5 of the sequential evaluation process for adult claimants. We evaluate unrelated co-occurring impairments at these steps because adjudicators can account for specific combinations of impairments, complications of those impairments, and limitations of functioning on an individual case basis. We address this in the introductory text of the digestive disorders listings at 5.00J and 105.00L (*How do we evaluate digestive disorders that do not meet one of these listings?*) and in the introductory text of the skin disorders listings at 8.00I and 108.00I (*How do we evaluate skin disorders that do not meet one of these listings?*).

What is our authority to make rules and set procedures for determining whether a person is disabled under our statutory definition?

Under the Act, we have authority to make rules and regulations and to establish necessary and appropriate procedures to carry out such provisions.[132]

How long will this final rule be in effect?

This final rule will remain in effect for 5 years after the date it becomes effective, unless we extend, revise, or issue it again. We will continue to monitor this rule to ensure that it continues to meet program purposes and may revise it before the end of the 5-year period if warranted.

How we will implement this final rule?

We will begin to apply this final rule to new applications, pending claims, and continuing disability reviews (CDR), as appropriate, as of the effective date of this final rule.[133]

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order (E.O.) 12866, as supplemented by E.O. 13563 and is subject to OMB review. Therefore, OMB reviewed the rule. Details about the economic impacts of this rule follow.

Anticipated Costs to Our Programs

In 2018, we conducted a case study covering about 500 initial Disability Determination Service (DDS)-level decisions within the digestive and skin body systems, based on the proposed rule as developed at that time. The case study sample was stratified by specific diagnosis categories and included both listing-level allowances as well as denials at the medical-vocational stage of the disability determination process. Implementation of this final rule would result in decisional changes relative to decisions in these body systems both from allowance to denial and from denial to allowance.

Estimates presented below reflect some changes to the final rule from the NPRM. The NPRM was used to develop and conduct the original case study. We conducted several different analyses of the original case study to determine the potential effects of the changes in this final rule on the original case study results. Only one of the changes in this final rule affected the case study results, which was the reversion of changes proposed in the NPRM in the digestive listing for weight loss due to any disorder to the criteria used under current rules. Therefore, we expect no decisional changes under this particular weight loss listing in the final rule relative to current policy. Of the other cases found to be affected by the changes in the proposed rule, we concluded that none of them in the case study would have a different decision under the final rule compared to the evaluation under the proposal as they stood at the time of the original case study.

Therefore, based on the results from the case study, we estimate that the combined additional allowances and additional denials under these listings together will likely result in a small net decrease in total allowances for the Old-Age, Survivors and Disability Insurance (OASDI) and SSI programs combined, but different effects for each program separately. For the OASDI program, we estimate net changes from the digestive and skin listings individually that are opposite in effect, a net annual average increase in allowances under the digestive listings of about 100 allowances, and a net annual average decrease under the skin listings of about 95 allowances, with the combined net effect being an increase of about five allowances on an annual average basis. This small net increase results in an estimated net increase of $15 million in scheduled OASDI benefit payments for the listings combined over the projection period fiscal years (FY) 2024–33. For the SSI program, we estimate net reductions for each of the digestive and skin listings individually, with a net annual average decrease in allowances under the digestive listings of about five allowances, and a net annual average decrease in allowances under the skin listings of about 155 allowances, with the net combined effect being a net decrease of about 160 allowances per year on average.

These estimated effects are based on a stratified random case study of approximately 425 cases, 175 of which were allowed under the listings in effect prior to publication of this rule, and 250

[132] See sections 205(a), 702(a)(5), and 1631(d)(1) (42 U.S.C. 405(a), 902(a)(5), 1383(d)(1)).

[133] We will use the final rule beginning on its effective date. We will apply the final rule to new applications filed on or after the effective date, and to claims that are pending on and after the effective date. This means that we will use the final rule on and after its effective date in any case in which we make a determination or decision, including CDRs, as appropriate. See 20 CFR 404.902 and 416.1402.

denials. Approximately two-thirds of these cases involved the changes to the digestive listings, and the remaining involved the skin listings. The results of that case study indicated that for each of these listings there would be decisional changes in both directions: some allowances would be denied under these rules, and some denials would be allowed under these rules. The net effects of these changes for the skin listings indicated that the number of cases allowed would be slightly reduced under these new rules for both the OASDI and SSI programs. For the changes to the digestive listings, however, the case study results indicated differing net effects for OASDI and SSI. This is primarily a result of differences in current allowance rates under OASDI and SSI for the specific digestive listings that would be modified by publication of these new rules. OASDI applicants involving digestive impairment have a much lower current allowance rate than similar SSI applicants. Because the case study results indicate changes in both directions, the net effects depend in part on current allowance rates for the listings specifically modified by the changes to the digestive rules.

Our actuarial analysis based on these estimated net changes in SSI allowances indicates a net reduction in Federal SSI payments of $51 million for the listings combined over the projection period FY 2024–33. Estimates are based on the assumption that the new rule would apply to all disability determinations completed beginning October 1, 2023.

Anticipated Administrative Costs to the Social Security Administration

In calculating whether the implementation of this final rule will result in administrative costs or savings to the agency, we examined two sources: (1) Work-years and (2) direct financial administrative costs.

We define work-years as a measure of the SSA employee work time this final rule will cost or save during implementation of its policies. We calculate one work-year as 2,080 hours of labor, which represents the amount of hours one SSA employee works per year based on a standard 40-hour workweek.

The Office of Budget, Finance, and Management estimates net administrative costs of less than 15 work-years and $2 million annually, which we consider to be a non-significant amount.

Anticipated Costs to the Public

We do not believe there are any more than de minimis costs to the public associated with this rulemaking. As discussed earlier in our responses to comments on the Notice of Proposed Rulemaking as well as in the Paperwork Reduction Action section below, the requirements contained in this rulemaking will not impose new additional costs outside of the normal course of business for applicants or change how the public interacts with our disability programs. Most of the revisions made to the digestive and skin listings improve clarity, readability, and application of the listings as well as consistency among the listings as a whole. We do not believe the requirements contained in the new digestive and skin disorders listings will impose additional costs or documentation requirements to applicants or cause the affected applicants to pursue a different course of treatment than they otherwise would have done under our existing rules.

Congressional Review Act

This final rule is not a major rule as defined by the Congressional Review Act.[134]

Executive Order 13132 (Federalism)

We analyzed this final rule in accordance with the principles and criteria established by E.O. 13132, and determined that it will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that the final rule will not preempt any State law or State regulations or affect the States' abilities to discharge traditional State governmental functions.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

This final rule only updates the criteria in the Listing of Impairments (listings) that we use to evaluate disability claims involving both digestive and skin disorders under titles II and XVI of the Social Security Act but does not create any new or affect any existing collections. Accordingly, it does not impose any burdens under the Paperwork Reduction Act and does not require further OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

[134] 5 U.S.C. 801 *et seq.*

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind, Disability benefits; Old-age, survivors, and disability insurance; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability cash payments; Public assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

The Acting Commissioner of Social Security, 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.

For the reasons set out in the preamble, we are amending subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart P—Determining Disability and Blindness

■ 1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a) and (h)–(j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)–(b) and (d)–(h), 416(i), 421(a) and (h)–(j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend appendix 1 to subpart P of part 404 as follows:
■ a. In the introductory text before part A, revise paragraphs 6 and 9;
■ b. In part A:
■ i. Amend the table of contents for part A by revising the entry for section 5.00;
■ ii. Revise section 5.00;
■ iii. Amend section 6.00 by revising paragraph 6.00C7;
■ iv. Revise section 8.00;
■ v. Amend section 14.00 by revising paragraph 14.00F5;
■ c. In part B:

■ i. Amend the table of contents for part B by revising the entry for section 105.00;
■ ii. Amend section 100.00 by revising paragraph 100.00C2c;
■ iii. Amend section 103.00 by revising paragraph 103.00K2c;
■ iv. Amend section 104.00 by revising paragraph 104.00C3b(iii);
■ v. Revise section 105.00;
■ vi. Amend section 106.00 by revising paragraph 106.00C5b(iii);
■ vi. Revise section 108.00; and
■ viii. Amend section 114.00 by revising paragraph 114.00F7b(iii).

The revisions read as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

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6. Digestive Disorders (5.00 and 105.00): October 6, 2028.

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9. Skin Disorders (8.00 and 108.00): October 6, 2028.

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Part A

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Sec.

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5.00 Digestive Disorders

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5.00 Digestive Disorders

A. *Which digestive disorders do we evaluate in this body system?* We evaluate digestive disorders that result in severe dysfunction of the liver, pancreas, and gastrointestinal tract (the large, muscular tube that extends from the mouth to the anus, where the movement of muscles, along with the release of hormones and enzymes, allows for the digestion of food) in this body system. Examples of these disorders and the listings we use to evaluate them include chronic liver disease (5.05), inflammatory bowel disease (5.06), and intestinal failure (5.07). We also use this body system to evaluate gastrointestinal hemorrhaging from any cause (5.02), weight loss due to any digestive disorder (5.08), liver transplantation (5.09), small intestine transplantation (5.11), and pancreas transplantation (5.12). We evaluate cancers affecting the digestive system under the listings in 13.00.

B. *What evidence do we need to evaluate your digestive disorder?* 1. *General.* To establish that you have a digestive disorder, we need medical evidence about the existence of your digestive disorder and its severity. Medical evidence should include your medical history, physical examination findings, operative reports, and relevant laboratory findings.

2. *Laboratory findings.* We need laboratory reports such as results of imaging (see 5.00B3), endoscopy, and other diagnostic procedures. We may also need clinical laboratory and pathology results. 3. *Imaging* refers to medical imaging techniques, such as x-ray, ultrasound, magnetic resonance imaging, and computerized tomography. The imaging must be consistent with the prevailing state of medical knowledge and clinical practice as a proper technique to support the evaluation of the disorder.

C. *What is chronic liver disease (CLD), and how do we evaluate it under 5.05?*

1. *General.* CLD is loss of liver function with cell necrosis (cell death), inflammation, or scarring of the liver that persists for more than 6 months. Common causes of CLD in adults include chronic infection with hepatitis B virus or hepatitis C virus, and prolonged alcohol abuse.

a. We will evaluate your signs of CLD, such as jaundice, changes in size of the liver and spleen, ascites, peripheral edema, and altered mental status. We will also evaluate your symptoms of CLD, such as pruritus (itching), fatigue, nausea, loss of appetite, and sleep disturbances when we assess the severity of your impairment(s) and how it affects your ability to function. In the absence of evidence of a chronic liver impairment, episodes of acute liver disease do not meet the requirements of 5.05.

b. *Laboratory findings* of your CLD may include decreased serum albumin, increased International Normalized Ratio (INR), arterial deoxygenation (hypoxemia), increased serum creatinine, oliguria (reduced urine output), or sodium retention. Another laboratory finding that may be included in the evidence is a liver biopsy. If you have had a liver biopsy, we will make every reasonable effort to obtain the results; however, we will not purchase a liver biopsy.

2. *Manifestations of CLD.*

a. *Gastrointestinal hemorrhaging* (5.05A), as a consequence of cirrhosis and high pressure in the liver's portal venous system, may occur from varices (dilated veins in the esophagus or the stomach) or from portal hypertensive gastropathy (abnormal mucosal changes in the stomach). When gastrointestinal hemorrhaging is due to a cause other than CLD, we evaluate it under 5.02. The phrase ''consider under a disability for 1 year'' in 5.02 and 5.05A does not refer to the date on which your disability began, only to the date on which we must reevaluate whether your impairment(s) continues to meet a listing or is otherwise disabling. We determine the onset of your disability based on the facts of your case.

b. *Ascites or hydrothorax* (5.05B) is a pathologic accumulation of fluid in the peritoneal cavity (ascites) or pleural space (hydrothorax). Ascites or hydrothorax may be diagnosed by removing some of the fluid with needle aspiration (paracentesis or thoracentesis), physical examination, or imaging. The most common causes of ascites are portal hypertension and low serum albumin resulting from CLD. We evaluate other causes of ascites and hydrothorax that are unrelated to CLD, such as congestive heart failure and cancer, under the listings in the affected body systems.

c. *Spontaneous bacterial peritonitis (SBP)* (5.05C) is an acute bacterial infection of peritoneal fluid and is most commonly associated with CLD. SBP is diagnosed by laboratory analysis of peritoneal fluid (obtained by paracentesis) that contains a neutrophil count (also called absolute neutrophil count) of at least 250 cells/mm^3. 5.05C is satisfied with one evaluation documenting peritoneal infection. We evaluate other causes of peritonitis that are unrelated to CLD, such as tuberculosis, malignancy, and perforated bowel, under the listings in the affected body systems.

d. *Hepatorenal syndrome* (5.05D) is renal failure associated with CLD in the absence of underlying kidney pathology. Findings associated with hepatorenal syndrome include elevation of serum creatinine, sodium retention with low urinary sodium excretion, and oliguria. We evaluate renal dysfunction with known underlying kidney pathology, such as glomerulonephritis, tubular necrosis, and renal infections, under the listings in 6.00.

e. *Hepatopulmonary syndrome* (5.05E) is arterial deoxygenation due to intrapulmonary vascular dilation and arteriovenous shunting associated with CLD. Clinical findings of hepatopulmonary syndrome include platypnea (shortness of breath relieved when lying down) and orthodeoxia (low arterial blood oxygen while in the upright position), when presenting in the context of CLD. We evaluate pulmonary dysfunction with known underlying respiratory pathology, such as asthma, pneumonia, and pulmonary infections, under the listings in 3.00.

(i) Under 5.05E1, we require a resting arterial blood gas (ABG) measurement obtained while you are breathing room air; that is, without oxygen supplementation. The ABG report must include the P_aO_2 value, your name, the date of the test, and either the altitude or both the city and State of the test site.

(ii) We will not purchase the specialized imaging techniques described in 5.05E2; however, if you have had the test(s) at a time relevant to your claim, we will make every reasonable effort to obtain the report.

f. *Hepatic encephalopathy* (5.05F), also known as portosystemic encephalopathy, is a recurrent or chronic neuropsychiatric disorder associated with CLD.

(i) Under 5.05F2, we require documentation of a mental impairment associated with hepatic encephalopathy. A mental impairment can include abnormal behavior, changes in mental status, or an altered state of consciousness. Reports of abnormal behavior may show that you are experiencing delusions, paranoia, or hallucinations. Reports of changes in mental status may show change in sleep patterns, personality or mood changes, poor concentration, or poor judgment or cognitive dysfunction (for example, impaired memory, poor problem-solving ability, or attention deficits). Reports of altered state of consciousness may show that you are experiencing confusion, delirium, or stupor.

(ii) Signs and laboratory findings that document the severity of hepatic encephalopathy when not attributable to other causes may include a ''flapping tremor'' (asterixis), characteristic abnormalities found on an electroencephalogram (EEG), or abnormal serum albumin or coagulation values. We will not purchase an EEG; however, if you have had this test at a time relevant to your claim, we will make every reasonable effort to obtain the report for the

purpose of establishing whether your impairment meets the criteria of 5.05F.

(iii) We will not evaluate acute encephalopathy under 5.05F if it results from conditions other than CLD. For example, we will evaluate acute encephalopathy caused by vascular events under the listings in 11.00 and acute encephalopathy caused by cancer under the listings in 13.00.

3. *SSA Chronic Liver Disease (SSA CLD) score* (5.05G). Listing 5.05G requires two SSA CLD scores, each requiring three or four laboratory values. The ''date of the SSA CLD score'' is the date of the earliest of the three or four laboratory values used for its calculation. The date of the second SSA CLD score must be at least 60 days after the date of the first SSA CLD score and both scores must be within the required 12-month period. If you have the two SSA CLD scores required by 5.05G, we will find that your impairment meets the criteria of the listing from at least the date of the first SSA CLD score.

a. We calculate the SSA CLD score using a formula that includes up to four laboratory values: Serum creatinine (mg/dL), total bilirubin (mg/dL), INR, and under certain conditions, serum sodium (mmol/L). The SSA CLD score calculation contains at least one, and sometimes two, parts, as described in (i) and (ii).

(i) The initial calculation is:

$$\text{SSA CLD}_i = 9.57 \times [\log_e(\text{serum creatinine mg/dL})] + 3.78 \times [\log_e(\text{serum total bilirubin mg/dL})] + 11.2 \times [\log_e(\text{INR})] + 6.43$$

rounded to the nearest whole integer.

(ii) If the value from the initial calculation is 11 or below, the SSA CLD score will be the SSA CLD_i value. If the value from the initial calculation is greater than 11, the SSA CLD score will be re-calculated as:

$$\text{SSA CLD} = \text{SSA CLD}_i + 1.32 \times (137 - \text{serum sodium mmol/L}) - [0.033 \times \text{SSA CLD}_i \times (137 - \text{serum sodium mmol/L})]$$

(iii) We round the results of your SSA CLD score calculation to the nearest whole integer to arrive at your SSA CLD score.

b. For any SSA CLD score calculation, all of the required laboratory values (serum creatinine, serum total bilirubin, INR, and serum sodium) must have been obtained within a continuous 30-day period.

(i) We round values for serum creatinine (mg/dL), serum total bilirubin (mg/dL), or INR less than 1.0 up to 1.0 to calculate your SSA CLD score.

(ii) We round values for serum creatinine (mg/dL) greater than 4.0 down to 4.0 to calculate your SSA CLD score.

(iii) If there are multiple laboratory values within the 30-day interval for serum creatinine (mg/dL), serum total bilirubin (mg/dL), or INR, we use the *highest* value to calculate your SSA CLD score. We will not use any INR values derived from testing done while you are on anticoagulant treatment in our SSA CLD calculation.

(iv) If there are multiple laboratory values within the 30-day interval for serum sodium (mmol/L), we use the *lowest* value to calculate your SSA CLD score.

(v) If you are in renal failure or on renal dialysis within a week of any serum creatinine test in the period used for the SSA CLD calculation, we will use a serum creatinine value of 4.0, which is the maximum serum creatinine level allowed in the calculation, to calculate your SSA CLD score.

(vi) If your serum sodium is less than 125 mmol/L, we will set your serum sodium to 125 mmol/L for purposes of calculation of the SSA CLD score. If your serum sodium is higher than 137 mmol/L, we will set your serum sodium to 137 mmol/L for purposes of calculation of the SSA CLD score.

c. When we indicate ''$\log_e$'' (also abbreviated ''ln'') in the formula for the SSA CLD score calculation, we mean the ''base e logarithm'' or ''natural logarithm'' of the numerical laboratory value, not the ''base 10 logarithm'' or ''common logarithm'' (log) of the laboratory value, and not the actual laboratory value. For example, if a person has laboratory values of serum creatinine 1.4 mg/dL, serum total bilirubin 1.3 mg/dL, INR 1.32, and serum sodium 119 mmol/L, we compute the SSA CLD score as follows:

$$\text{SSA CLD}_i = 9.57 \times [\log_e(\text{serum creatinine 1.4 mg/dL}) = 0.336] + 3.78 \times [\log_e(\text{serum total bilirubin 1.3 mg/dL}) = 0.262] + 11.2 \times [\log_e(\text{INR 1.32}) = .278] + 6.43 = 3.22 + 0.99 + 3.11 + 6.43 = 13.75,$$

which we round to an SSA CLD_i score of 14.

Because the SSA CLD_i score is over 11, we then move to the second step of calculating the SSA CLD:

$$\text{SSA CLD} = 14 + 1.32 \times (137 - \text{serum sodium 125 mmol/L}) - [0.033 \times \text{SSA CLD}_i\ 14 \times (137 - \text{serum sodium 125 mmol/L}) = 14 + 15.84 - 5.54 = 24.3,$$

which we round to an SSA CLD score of 24.

D. *What is inflammatory bowel disease (IBD), and how do we evaluate it under 5.06?*

1. IBD is a group of inflammatory conditions of the small intestine and colon. The most common IBD disorders are Crohn's disease and ulcerative colitis. Remissions and exacerbations of variable duration are a hallmark of IBD.

2. We evaluate your signs and symptoms of IBD, such as diarrhea, fecal incontinence, rectal bleeding, abdominal pain, fatigue, fever, nausea, vomiting, arthralgia, abdominal tenderness, palpable abdominal mass (usually inflamed loops of bowel), and perianal disease (for example, fissure, fistulas, abscesses, or anal canal stenosis), when we assess the severity of your impairment(s). You may require supplemental daily nutrition due to IBD. There are two forms of supplemental daily nutrition we consider under 5.06B5: enteral nutrition (delivered directly to a part of your digestive system) via a gastrostomy, duodenostomy, or jejunostomy, and parenteral nutrition delivered via a central venous catheter. Enteral tube feedings delivered via nasal or oral tubes do not satisfy the requirement in 5.06B5.

3. Surgical diversion of the intestinal tract, including ileostomy and colostomy, does not preclude the ability to perform any gainful activity if you are able to maintain adequate nutrition and function of the stoma. However, if you are not able to maintain adequate nutrition, we will evaluate your impairment under 5.08.

4. IBD may also be associated with significant extraintestinal manifestations in a variety of body systems. These include, but are not limited to, involvement of the eye (for example, uveitis, episcleritis, or iritis); hepatobiliary disease (for example, gallstones or primary sclerosing cholangitis); urologic disease (for example, kidney stones or obstructive hydronephrosis); skin involvement (for example, erythema nodosum or pyoderma gangrenosum); or non-destructive inflammatory arthritis. You may also have associated thromboembolic disorders or vascular disease. These manifestations may not correlate with the severity of your IBD. If your impairment does not meet any of the criteria of 5.06, we will consider the effects of your extraintestinal manifestations in determining whether you have an impairment(s) that meets or medically equals another listing, and when we assess your residual functional capacity.

5. *Repeated complications of IBD.*

a. Examples of complications of IBD include abscesses, intestinal perforation, toxic megacolon, infectious colitis, pyoderma gangrenosum, ureteral obstruction, primary sclerosing cholangitis, and hypercoagulable state (which may lead to thromboses or embolism). When we evaluate repeated complications of IBD, we consider all relevant information in your case record to determine the effects of your IBD on your ability to function independently, appropriately, effectively, and on a sustained basis. Factors we consider include, but are not limited to: your symptoms, the frequency and duration of your complications, periods of exacerbation and remission, and the functional effects of your treatment, including the side effects of your medication. Your impairment will satisfy this criterion regardless of whether you have the same kind of complication repeatedly, all different complications, or any other combination of complications; for example, two of the same kind of complication and a different one.

b. To satisfy the requirements described under 5.06C, your IBD must result in repeated complications and marked limitation in one of three areas of functioning: activities of daily living; maintaining social functioning; or completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace. If the complications do not last as long or occur as frequently as required under 5.06C, we will consider whether your IBD medically equals the listing.

c. *Marked* limitation means that the signs and symptoms of your IBD interfere *seriously* with your ability to function. Although we do not require the use of such a scale, ''marked'' would be the fourth point on a five-point rating scale consisting of no limitation, mild limitation, moderate limitation, marked limitation, and extreme limitation. We do not define ''marked'' by a specific number of

activities of daily living or different behaviors in which your social functioning is impaired, or a specific number of tasks that you are able to complete, but by the nature and overall degree of interference with your functioning. You may have marked limitation when several activities or functions are impaired, or when only one is impaired. Additionally, you need not be totally precluded from performing an activity to have marked limitation, as long as the degree of limitation interferes seriously with your ability to function independently, appropriately, and effectively. The term ''marked'' does not imply that you must be confined to bed, hospitalized, or in a nursing home.

d. *Activities of daily living* include, but are not limited to, such activities as doing household chores, grooming and hygiene, using a post office, taking public transportation, or paying bills. We will find that you have ''marked'' limitation in activities of daily living if you have a serious limitation in your ability to maintain a household or take public transportation because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, caused by your IBD (including complications of the disorder) or its treatment, even if you are able to perform some self-care activities.

e. *Maintaining social functioning* includes the capacity to interact independently, appropriately, effectively, and on a sustained basis with others. It includes the ability to communicate effectively with others. We will find that you have ''marked'' limitation in maintaining social functioning if you have a serious limitation in social interaction on a sustained basis because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, or a pattern of exacerbation and remission, caused by your IBD (including complications of the disorder) or its treatment, even if you are able to communicate with close friends or relatives.

f. *Completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace* involves the ability to sustain concentration, persistence, or pace to permit timely completion of tasks commonly found in work settings. We will find that you have ''marked'' limitation in completing tasks if you have a serious limitation in your ability to sustain concentration or pace adequate to complete work-related tasks because of symptoms, such as pain, severe fatigue, anxiety, or difficulty concentrating, caused by your IBD (including complications of the disorder) or its treatment, even if you are able to do some routine activities of daily living.

E. *What is intestinal failure, and how do we evaluate it under 5.07?*

1. *Intestinal failure* is a condition resulting in gut function below the minimum necessary for the absorption of macronutrients or water and electrolytes, resulting in a requirement for intravenous supplementation (*i.e.,* parenteral nutrition) to maintain health. Examples of conditions that may result in intestinal failure include short bowel syndrome, extensive small bowel mucosal disease, and chronic motility disorders.

2. *Short bowel syndrome* is a malabsorption disorder that occurs when ischemic vascular insults (caused, for example, by volvulus or necrotizing enterocolitis), trauma, or IBD complications require(s) surgical resection of any amount of the small intestine, resulting in chronic malnutrition.

3. *Extensive small bowel mucosal disease* means that the mucosal surface of the small bowel does not efficiently absorb nutrients or loses nutrients. Common causes of small bowel mucosal disease include microvillous inclusion disease and tufting enteropathy.

4. *Chronic motility disorder* refers to a chronic disorder of the propulsion of gut content without fixed obstructions, causing intolerance to oral nutrition and inadequate nutritional intake. This type of disorder may also be known as a chronic intestinal pseudo-obstruction (CIPO), because the gut dysfunction mimics that of an obstructed intestine, but without evidence of an actual obstruction. Primary CIPO may have an unknown underlying cause. Chronic motility disorders may also result from congenital, neuromuscular, or autoimmune conditions, such as gastroschisis, omphalocele, long segment Hirschprung's disease, Crohn's disease, and mitochondrial disorders.

5. For short bowel syndrome, we require a copy of the operative report that includes details of the surgical findings, or postoperative imaging indicating a resection of the small intestine. If we cannot get one of these reports, we need other medical reports that include details of the surgical findings. For other chronic motility disorders or extensive small bowel mucosal disease, we need medical reports that include details of your intestinal dysfunction. For any impairment evaluated under 5.07, we also need medical documentation that you are dependent on daily parenteral nutrition to provide most of your nutritional requirements.

F. *How do we evaluate weight loss due to any digestive disorder under 5.08?*

1. In addition to the impairments specifically mentioned in these listings, other digestive disorders, such as esophageal stricture, pancreatic insufficiency, and malabsorption, may result in significant weight loss. Impairments other than digestive disorders that cause weight loss should be evaluated under the appropriate body system for that impairment. For instance, weight loss as a result of chronic kidney disease should be evaluated under our rules for genitourinary disorders (see 6.00), and weight loss as the result of an eating disorder should be evaluated under our rules for mental disorders (see 12.00). However, if you develop a digestive disorder as the result of your other impairment, we will evaluate the acquired digestive disorder under our rules for digestive disorders. We evaluate weight loss due to any digestive disorder under 5.08 by using the body mass index (BMI).

2. BMI is the ratio of your weight to the square of your height. Calculation and interpretation of the BMI are independent of gender in adults.

a. We calculate BMI using inches and pounds, meters and kilograms, or centimeters and kilograms. We must have measurements of your weight and height without shoes for these calculations.

b. We calculate BMI using one of the following formulas:

English Formula

BMI = [Weight in Pounds/(Height in Inches × Height in Inches)] × 703

Metric Formulas

BMI = Weight in Kilograms/(Height in Meters × Height in Meters)

BMI = [Weight in Kilograms/(Height in Centimeters × Height in Centimeters)] × 10,000

G. *How do we evaluate digestive organ transplantation?* If you receive a liver (5.09), small intestine (5.11), or pancreas (5.12) transplant, we will consider you disabled under the listing for 1 year from the date of the transplant. After that, we evaluate your residual impairment(s) by considering the adequacy of your post-transplant function, the frequency and severity of any rejection episodes you have, complications in other body systems, and adverse treatment effects. People who receive digestive organ transplants generally have impairments that meet our definition of disability before they undergo transplantation. The phrase ''consider under a disability for 1 year'' in 5.09, 5.11, and 5.12 does not refer to the date on which your disability began, only to the date on which we must reevaluate whether your impairment(s) continues to meet a listing or is otherwise disabling. We determine the onset of your disability based on the facts of your case.

H. *How do we evaluate your digestive disorder if there is no record of ongoing treatment?* If there is no record of ongoing treatment despite the existence of a severe impairment(s), we will assess the severity and duration of your digestive disorder based on the current medical and other evidence in your case record. If there is no record of ongoing treatment, you may not be able to show an impairment that meets a digestive disorders listing, but your impairment may medically equal a listing, or be disabling based on consideration of your residual functional capacity, age, education, and work experience.

I. *How do we evaluate your digestive disorder if there is evidence establishing a substance use disorder?* If we find that you are disabled and there is medical evidence in your case record establishing that you have a substance use disorder, we will determine whether your substance use disorder is a contributing factor material to the determination of disability. See §§ 404.1535 and 416.935 of this chapter. Digestive disorders resulting from drug or alcohol use are often chronic in nature and will not necessarily improve with cessation in drug or alcohol use.

J. *How do we evaluate digestive disorders that do not meet one of these listings?*

1. These listings are only examples of common digestive disorders that we consider severe enough to prevent you from doing any gainful activity. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether

your impairment(s) medically equals a listing. See §§ 404.1526 and 416.926 of this chapter. Digestive disorders may be associated with disorders in other body systems, and we consider the combined effects of multiple impairments when we determine whether they medically equal a listing. If your impairment(s) does not meet or medically equal a listing, you may or may not have the residual functional capacity to engage in substantial gainful activity. We proceed to the fourth step and, if necessary, the fifth step of the sequential evaluation process in §§ 404.1520 and 416.920 of this chapter. We use the rules in §§ 404.1594 and 416.994 of this chapter, as appropriate, when we decide whether you continue to be disabled.

5.01 Category of Impairments, Digestive Disorders

5.02 *Gastrointestinal hemorrhaging from any cause, requiring three blood transfusions* of at least 2 units of blood per transfusion, within a consecutive 12-month period and at least 30 days apart. Consider under a disability for 1 year following the last documented transfusion; after that, evaluate the residual impairment(s).

5.03–5.04 [Reserved]

5.05 *Chronic liver disease (CLD)* (see 5.00C) with A, B, C, D, E, F, or G:

A. Hemorrhaging from esophageal, gastric, or ectopic varices, or from portal hypertensive gastropathy (see 5.00C2a), documented by imaging (see 5.00B3); resulting in 1 and 2:

1. Hemodynamic instability indicated by signs such as pallor (pale skin), diaphoresis (profuse perspiration), rapid pulse, low blood pressure, postural hypotension (pronounced fall in blood pressure when arising to an upright position from lying down), or syncope (fainting); and

2. Requiring hospitalization for transfusion of at least 2 units of blood. Consider under a disability for 1 year following the documented transfusion; after that, evaluate the residual impairment(s).

OR

B. Ascites or hydrothorax not attributable to other causes (see 5.00C2b), present on two evaluations within a consecutive 12-month period and at least 60 days apart. Each evaluation must document the ascites or hydrothorax by 1, 2, or 3:

1. Paracentesis; or

2. Thoracentesis; or

3. Imaging or physical examination with a or b:

a. Serum albumin of 3.0 g/dL or less; or

b. INR of at least 1.5.

OR

C. Spontaneous bacterial peritonitis (see 5.00C2c) documented by peritoneal fluid containing a neutrophil count of at least 250 cells/mm^3.

OR

D. Hepatorenal syndrome (see 5.00C2d) documented by 1, 2, or 3:

1. Serum creatinine elevation of at least 2 mg/dL; or

2. Oliguria with 24-hour urine output less than 500 mL; or

3. Sodium retention with urine sodium less than 10 mEq per liter.

OR

E. Hepatopulmonary syndrome (see 5.00C2e) documented by 1 or 2:

1. Arterial P_aO_2 measured by an ABG test, while at rest, breathing room air, less than or equal to:

a. 60 mm Hg, at test sites less than 3,000 feet above sea level; or

b. 55 mm Hg, at test sites from 3,000 through 6,000 feet above sea level; or

c. 50 mm Hg, at test sites over 6,000 feet above sea level; or

2. Intrapulmonary arteriovenous shunting as shown by contrast-enhanced echocardiography or macroaggregated albumin lung perfusion scan.

OR

F. Hepatic encephalopathy (see 5.00C2f) with documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on two evaluations within a consecutive 12-month period and at least 60 days apart and either 1 or 2:

1. History of transjugular intrahepatic portosystemic shunt (TIPS) or other surgical portosystemic shunt; or

2. One of the following on at least two evaluations at least 60 days apart within the same consecutive 12-month period as in F:

a. Asterixis or other fluctuating physical neurological abnormalities; or

b. EEG demonstrating triphasic slow wave activity; or

c. Serum albumin of 3.0 g/dL or less; or

d. INR of 1.5 or greater.

OR

G. Two SSA CLD scores (see 5.00C3) of at least 20 within a consecutive 12-month period and at least 60 days apart. Consider under a disability from at least the date of the first score.

5.06 *Inflammatory bowel disease (IBD)* (see 5.00D) documented by endoscopy, biopsy, imaging, or operative findings, *and* demonstrated by A, B, or C:

A. Obstruction of stenotic areas (not adhesions) in the small intestine or colon with proximal dilatation, confirmed by imaging or in surgery, requiring two hospitalizations for intestinal decompression or for surgery, within a consecutive 12-month period and at least 60 days apart.

OR

B. Two of the following occurring within a consecutive 12-month period and at least 60 days apart:

1. Anemia with hemoglobin of less than 10.0 g/dL, present on at least two evaluations at least 60 days apart; or

2. Serum albumin of 3.0 g/dL or less, present on at least two evaluations at least 60 days apart; or

3. Clinically documented tender abdominal mass palpable on physical examination with abdominal pain or cramping; or

4. Perianal disease with a draining abscess or fistula; or

5. Need for supplemental daily enteral nutrition via a gastrostomy, duodenostomy, or jejunostomy, or daily parenteral nutrition via a central venous catheter.

OR

C. Repeated complications of IBD (see 5.00D5a), occurring an average of 3 times a year, or once every 4 months, each lasting 2 weeks or more, within a consecutive 12-month period, and marked limitation (see 5.00D5c) in one of the following:

1. Activities of daily living (see 5.00D5d); or

2. Maintaining social functioning (see 5.00D5e); or

3. Completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace (see 5.00D5f).

5.07 *Intestinal failure* (see 5.00E) due to short bowel syndrome, chronic motility disorders, or extensive small bowel mucosal disease, resulting in dependence on daily parenteral nutrition via a central venous catheter for at least 12 months.

5.08 *Weight loss due to any digestive disorder* (see 5.00F), despite adherence to prescribed medical treatment, with BMI of less than 17.50 calculated on at least two evaluations at least 60 days apart within a consecutive 12-month period.

5.09 *Liver transplantation* (see 5.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

5.10 [Reserved]

5.11 *Small intestine transplantation* (see 5.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

5.12 *Pancreas transplantation* (see 5.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

6.00 Genitourinary Disorders

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C. * * *

7. *Anorexia (diminished appetite) with weight loss.* Anorexia is a frequent sign of CKD and can result in weight loss. We will use body mass index (BMI) to determine the severity of your weight loss under 6.05B4. (BMI is the ratio of your measured weight to the square of your measured height.) We calculate your BMI using the formulas in the digestive disorders body system (5.00).

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8.00 Skin Disorders

A. *Which skin disorders do we evaluate under these listings?* We use these listings to evaluate skin disorders that result from hereditary, congenital, or acquired pathological processes. We evaluate genetic photosensitivity disorders (8.07), burns (8.08), and chronic conditions of the skin or mucous membranes such as ichthyosis, bullous disease, dermatitis, psoriasis, and hidradenitis suppurativa (8.09) under these listings.

B. *What are our definitions for the following terms used in this body system?*

1. *Assistive device(s):* An assistive device, for the purposes of these listings, is any device used to improve stability, dexterity, or mobility. An assistive device can be hand-held, such as a cane(s), a crutch(es), or a walker; used in a seated position, such as a wheelchair, rollator, or power operated

vehicle; or worn, such as a prosthesis or an orthosis.

2. *Chronic skin lesions:* Chronic skin lesions can have recurrent exacerbations (see 8.00B7). They can occur despite prescribed medical treatment. These chronic skin lesions can develop on any part of your body, including upper extremities, lower extremities, palms of your hands, soles of your feet, the perineum, inguinal (groin) region, and axillae (underarms). Chronic skin lesions may result in functional limitations as described in 8.00D2.3. *Contractures:* Contractures are permanent fibrous scar tissue resulting in tightening and thickening of skin that prevents normal movement of the damaged area. They can develop on any part of your musculoskeletal system, including upper extremities, lower extremities, palms of your hands, soles of your feet, the perineum, inguinal (groin) region, and axillae (underarms). Contractures may result in functional limitations as described in 8.00D2.

4. *Documented medical need:* When we use the term ''documented medical need,'' we mean that there is evidence (see §§ 404.1513 and 416.913 of this chapter) from your medical source(s) in the medical record that supports your need for an assistive device (see 8.00B1) for a continuous period of at least 12 months. The evidence must include documentation from your medical source(s) describing any limitation(s) in your upper or lower extremity functioning that supports your need for the assistive device and describing the circumstances for which you need it. The evidence does not have to include a specific prescription for the device.

5. *Fine and gross movements:* Fine movements, for the purposes of these listings, involve use of your wrists, hands, and fingers; such movements include picking, pinching, manipulating, and fingering. Gross movements involve use of your shoulders, upper arms, forearms, and hands; such movements include handling, gripping, grasping, holding, turning, and reaching. Gross movements also include exertional activities such as lifting, carrying, pushing, and pulling.

6. *Surgical management:* For the purposes of these listings, surgical management includes the surgery(ies) itself, as well as various post-surgical procedures, surgical complications, infections or other medical complications, related illnesses, or related treatments that delay a person's attainment of maximum benefit from surgery.

7. *Exacerbation:* For the purposes of these listings, exacerbation means an increase in the signs or symptoms of the skin disorder. Exacerbation may also be referred to as flare, flare-up, or worsening of the skin disorder.

C. *What evidence do we need to evaluate your skin disorder?*

1. To establish the presence of a skin disorder as a medically determinable impairment, we need objective medical evidence from an acceptable medical source (AMS) who has examined you for the disorder.

2. We will make every reasonable effort to obtain your medical history, treatment records, and relevant laboratory findings, but we will not purchase genetic testing.

3. When we evaluate the presence and severity of your skin disorder(s), we generally need information regarding:

a. The onset, duration, and frequency of exacerbations (see 8.00B7);

b. The prognosis of your skin disorder;

c. The location, size, and appearance of lesions and contractures;

d. Any available history of familial incidence;

e. Your exposure to toxins, allergens or irritants; seasonal variations; and stress factors;

f. Your ability to function outside of a highly protective environment (see 8.00E4);

g. Laboratory findings (for example, a biopsy obtained independently of Social Security disability evaluation or results of blood tests);

h. Evidence from other medically acceptable methods consistent with the prevailing state of medical knowledge and clinical practice; and

i. Statements you or others make about your disorder(s), your restrictions, and your daily activities.

D. *How do we evaluate the severity of skin disorders?*

1. *General.* We evaluate the severity of skin disorders based on the site(s) of your chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), functional limitations caused by your signs and symptoms (including pain) (see 8.00D2), and how your prescribed treatment affects you. We consider the frequency and severity of your exacerbations (see 8.00B7), how quickly they resolve, and how you function between exacerbations (see 8.00B7), to determine whether your skin disorder meets or medically equals a listing (see 8.00D3). If there is no record of ongoing medical treatment for your disorder, we will follow the guidelines in 8.00D6. We will determine the extent and kinds of evidence we need from medical and non-medical sources based on the individual facts about your disorder. For our basic rules on evidence, see §§ 404.1512, 404.1513, 404.1520b, 416.912, 416.913, and 416.920b of this chapter. For our rules on evaluating your symptoms, see §§ 404.1529 and 416.929 of this chapter.

2. *Limitation(s) of physical functioning due to skin disorders.*

a. Skin disorders may be due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), and may cause pain or restrict movement, which can limit your ability to initiate, sustain, and complete work-related activities. For example, skin lesions in the axilla may limit your ability to raise or reach with the affected arm, or lesions in the inguinal region may limit your ability to ambulate, sit, or lift and carry. To evaluate your skin disorder(s) under 8.07B, 8.08, and 8.09, we require medically documented evidence of physical limitation(s) of functioning related to your disorder. The decrease in physical function must have lasted, or can be expected to last, for a continuous period of at least 12 months (see §§ 404.1509 and 416.909 of this chapter). Xeroderma pigmentosum is the only skin disorder that does not include functional criteria because the characteristics and severity of the disorder itself are sufficient to meet the criteria in 8.07A.

b. The functional criteria require impairment-related physical limitations in using upper or lower extremities that have lasted, or can be expected to last, for a continuous period of at least 12 months, medically documented by one of the following:

(i) Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3); or

(ii) Inability to use one upper extremity to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), and a documented medical need (see 8.00B4) for an assistive device (see 8.00B1) that requires the use of the other upper extremity; or

(iii) Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

(iv) Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

3. *Frequency of exacerbations due to chronic skin lesions.* A skin disorder resulting in chronic skin lesions (see 8.00B2) may have frequent exacerbations (see 8.00B7) severe enough to meet a listing even if each individual skin lesion exacerbation (see 8.00B7) did not last for an extended amount of time. We will consider the frequency, severity, and duration of skin lesion exacerbations (see 8.00B7), how quickly they resolve, and how you function in the time between skin lesion exacerbations (see 8.00B7), to determine whether your skin disorder meets or medically equals a listing.

4. *Symptoms (including pain).* Your symptoms may be an important factor in our determination of whether your skin disorder(s) meets or medically equals a listing, or whether you are otherwise able to work. We consider your symptoms only when you have a medically determinable impairment that could reasonably be expected to produce the symptoms. See §§ 404.1529 and 416.929 of this chapter.

5. *Treatment.*

a. *General.* Treatments for skin disorders may have beneficial or adverse effects, and responses to treatment vary from person to person. Your skin disorder's response to treatment may vary due to treatment resistance or side effects that can result in functional limitations. We will evaluate all of the effects of treatment (including surgical treatment, medications, and therapy) on the symptoms, signs, and laboratory findings of

your skin disorder, and on your ability to function.

b. *Despite adherence to prescribed medical treatment for 3 months.* Under 8.09, we require that your symptoms persist ''despite adherence to prescribed medical treatment for 3 months.'' This requirement means that you must have taken prescribed medication(s) or followed other medical treatment prescribed by a medical source for 3 consecutive months. Treatment or effects of treatment may be temporary. In most cases, sufficient time must elapse to allow us to evaluate your response to treatment, including any side effects. For our purposes, ''sufficient time'' means a period of at least 3 months. If your treatment has not lasted for at least 3 months, we will follow the rules in 8.00D6a. The 3 months adherence to prescribed medical treatment must be within the period of at least 12 months that we use to evaluate severity.

c. *Treatment with PUVA (psoralen and ultraviolet A (UVA) light) or biologics.* If you receive additional treatment with PUVA or biologics to treat your skin disorder(s), we will defer adjudication of your claim for 6 months from the start of treatment with PUVA or biologics to evaluate the effectiveness of these treatments unless we can make a fully favorable determination or decision on another basis.

6. *No record of ongoing treatment.*

a. Despite having a skin disorder, you may not have received ongoing treatment, may have just begun treatment, may not have access to prescribed medical treatment, or may not have an ongoing relationship with the medical community. In any of these situations, you will not have a longitudinal medical record for us to review when we evaluate your disorder. In some instances, we may be able to assess the severity and duration of your skin disorder based on your medical record and current evidence alone. We may ask you to attend a consultative examination to determine the severity and potential duration of your skin disorder (see §§ 404.1519a and 416.919a of this chapter).

b. If, for any reason, you have not received treatment, your skin disorder cannot meet the criteria for 8.09. If the information in your case record is not sufficient to show that you have a skin disorder that meets the criteria of one of the skin disorders listings, we will follow the rules in 8.00I.

E. *How do we evaluate genetic photosensitivity disorders under 8.07?* Genetic photosensitivity disorders are disorders of the skin caused by an increase in the sensitivity of the skin to sources of ultraviolet light, including sunlight.

1. *Xeroderma pigmentosum (XP) (8.07A).* XP is a genetic photosensitivity disorder with lifelong hypersensitivity to all forms of ultraviolet light. Laboratory testing confirms the diagnosis by documenting abnormalities in the body's ability to repair DNA (deoxyribonucleic acid) mutations after ultraviolet light exposure. Your skin disorder meets the requirements of 8.07A if you have clinical and laboratory findings supporting a diagnosis of XP (see 8.00E3).

2. *Other genetic photosensitivity disorders (8.07B).* The effects of other genetic photosensitivity disorders may vary and may not persist over time. To meet the requirements of 8.07B, a genetic photosensitivity disorder other than XP must be established by clinical and laboratory findings (see 8.00C) and must result either in chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) that result in functional limitations (see 8.00D2), or must result in the inability to function outside of a highly protective environment (see 8.00E4). Some genetic photosensitivity disorders can have very serious effects on other body systems, especially special senses and speech, neurological, mental, and cancer. We will evaluate your disorder(s) under the listings in 2.00, 11.00, 12.00, or 13.00, as appropriate.

3. *What evidence do we need to document that you have XP or another genetic photosensitivity disorder?* We will make a reasonable effort to obtain evidence of your disorder(s), but we will not purchase genetic testing. When the results of genetic tests are part of the existing evidence in your case record, we will evaluate the test results with all other relevant evidence. We need the following clinical and laboratory findings to document that you have XP or another genetic photosensitivity disorder:

a. A laboratory report of a definitive genetic test documenting appropriate chromosomal changes, including abnormal DNA repair or another DNA abnormality specific to your type of photosensitivity disorder, signed by an AMS; or

b. A laboratory report of a definitive test that is not signed by an AMS, and a report from an AMS stating that you have undergone definitive genetic laboratory studies documenting appropriate chromosomal changes, including abnormal DNA repair or another DNA abnormality specific to your type of photosensitivity disorder; or

c. If we do not have a laboratory report of a definitive test, we need documentation from an AMS that an appropriate laboratory analysis or other diagnostic method(s) confirms a positive diagnosis of your skin disorder. This documentation must state that you had the appropriate definitive laboratory test(s) for diagnosing your disorder and provide the results, or explain how another diagnostic method(s), consistent with the prevailing state of medical knowledge and clinical practice, established your diagnosis.

4. *Inability to function outside of a highly protective environment* means that you must avoid exposure to ultraviolet light (including sunlight passing through windows and light from similar unshielded light sources), wear protective clothing and eyeglasses, and use opaque broad-spectrum sunscreens in order to avoid skin cancer or other serious effects.

F. *How do we evaluate burns under 8.08?*

1. Electrical, chemical, or thermal burns frequently affect other body systems, for example, musculoskeletal, special senses and speech, respiratory, cardiovascular, genitourinary, neurological, or mental. We evaluate burns in the same way we evaluate other disorders that can affect the skin and other body systems, using the listing for the predominant feature of your disorder. For example, if your soft tissue injuries resulting from burns are under surgical management (as defined in 8.00B6), we will evaluate your disorder under the listings in 1.00.

2. We evaluate burns resulting in chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) that have been documented by an AMS to have reached maximum therapeutic benefit and therefore are no longer receiving surgical management, under 8.08. To be disabling, these burns must result in functional limitation(s) (see 8.00D2) that has lasted or can be expected to last for a continuous period of at least 12 months.

G. *How do we evaluate chronic conditions of the skin or mucous membranes under 8.09?* We evaluate skin disorders that result in chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) under 8.09. These disorders must result in chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) that continue to persist despite adherence to prescribed medical treatment for 3 months (see 8.00D5b) and cause functional limitations (see 8.00D2). Examples of skin disorders evaluated under this listing are ichthyosis, bullous diseases (such as pemphigus, epidermolysis bullosa, and dermatitis herpetiformis), chronic skin infections, dermatitis, psoriasis, and hidradenitis suppurativa.

H. *How do we evaluate disorders in other body systems that affect the skin?* When your disorder(s) in another body system affects your skin, we first evaluate the predominant feature of your disorder(s) under the appropriate body system. Examples of disorders in other body systems that may affect the skin include the following:

1. *Diabetes mellitus.* Diabetes mellitus that is not well controlled, despite treatment, can cause chronic hyperglycemia resulting in serious, long-lasting or recurrent exacerbations (see 8.00B7) or complications. We evaluate those exacerbations (see 8.00B7) or complications under the affected body system(s). If the complication involves soft tissue or amputation(s), we evaluate these features under the listings in 1.00. If the exacerbations (see 8.00B7) or complications involve chronic bacterial or fungal skin lesions resulting from diabetes mellitus, we evaluate your limitations from the skin disorder under listing 8.09.

2. *Tuberous sclerosis.* The predominant functionally limiting features of tuberous sclerosis are seizures and intellectual disorder or other mental disorders. We evaluate these features under the listings in 11.00 or 12.00, as appropriate.

3. *Malignant tumors of the skin.* Malignant tumors of the skin (for example, malignant melanomas) are cancers, or malignant neoplastic diseases, that we evaluate under the listings in 13.00.

4. *Immune system disorders.* We evaluate skin manifestations of immune system disorders such as systemic lupus erythematosus, scleroderma, psoriasis, and human immunodeficiency virus (HIV) infection under the listings in 14.00.

5. *Head or facial disfigurement or deformity, and other physical deformities caused by skin disorders.* A head or facial disfigurement or deformity may result in loss of your sight, hearing, speech, or ability to chew. In addition to head and facial disfigurement and deformity, other physical

deformities may result in associated psychological problems (for example, depression). We evaluate the effects of head or facial disfigurement or deformity, or other physical deformities caused by skin disorders under the listings in 1.00, 2.00, 5.00, or 12.00, as appropriate.

I. *How do we evaluate skin disorders that do not meet one of these listings?*

1. These listings are only examples of common skin disorders that we consider severe enough to prevent you from doing any gainful activity. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. See §§ 404.1526 and 416.926 of this chapter. If your impairment(s) does not meet or medically equal a listing, you may or may not have the residual functional capacity to engage in substantial gainful activity. We proceed to the fourth step and, if necessary, the fifth step of the sequential evaluation process in §§ 404.1520 and 416.920 of this chapter. We use the rules in §§ 404.1594 and 416.994 of this chapter, as appropriate, when we decide whether you continue to be disabled.

8.01 Category of Impairments, Skin Disorders

8.02–8.06 [Reserved]

8.07 *Genetic photosensitivity disorders,* established as described in 8.00E. The requirements of this listing are met if either paragraph A or paragraph B is satisfied.

A. Xeroderma pigmentosum (see 8.00E1).

OR

B. Other genetic photosensitivity disorders (see 8.00E2) with either 1 or 2:

1. Chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) that cause an inability to function outside of a highly protective environment (see 8.00E4); or

2. Chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 8.00D2), as evidenced by:

a. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3); or

b. Inability to use one upper extremity to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), and a documented medical need (see 8.00B4) for an assistive device (see 8.00B1) that requires the use of the other upper extremity; or

c. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

d. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete work-related activities, due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

8.08 *Burns* (see 8.00F). Burns that do not require continuing surgical management (see 8.00B6), or that have been documented by an acceptable medical source to have reached maximum therapeutic benefit and therefore are no longer receiving surgical management, resulting in chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 8.00D2), as evidenced by:

A. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3).

OR

B. Inability to use one upper extremity to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), and a documented medical need (see 8.00B4) for an assistive device (see 8.00B1) that requires the use of the other upper extremity.

OR

C. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

OR

D. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

8.09 *Chronic conditions of the skin or mucous membranes* (see 8.00G) resulting in:

A. Chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) causing chronic pain or other physical limitation(s) that persist despite adherence to prescribed medical treatment for 3 months (see 8.00D5b).

AND

B. Impairment-related functional limitations (see 8.00D2) demonstrated by 1, 2, 3, or 4:

1. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3); or

2. Inability to use one upper extremity to independently initiate, sustain, and complete work-related activities involving fine and gross movements (see 8.00B5) due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3), and a documented medical need (see 8.00B4) for an assistive device (see 8.00B1) that requires the use of the other upper extremity; or

3. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

4. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete work-related activities due to chronic skin lesions (see 8.00B2) or contractures (see 8.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

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14.00 Immune System Disorders

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F. * * *

5. *Measurement of CD4 and either body mass index or hemoglobin (14.11G).* To evaluate your HIV infection under 14.11G, we require one measurement of your absolute CD4 count or your CD4 percentage, *and* either a measurement of your body mass index (BMI) or your hemoglobin. These measurements must occur within the period we are considering in connection with your application or continuing disability review. If you have more than one measurement of your CD4 (absolute count or percentage), BMI, or hemoglobin within this period, we will use the lowest of your CD4 (absolute count or percentage), BMI, or hemoglobin. The date of your lowest CD4 (absolute count or percentage) measurement may be different from the date of your lowest BMI or hemoglobin measurement. We calculate your BMI using the formulas in the digestive disorders body system (5.00).

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Part B

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Sec.

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105.00 Digestive Disorders

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100.00 Low Birth Weight and Failure to Thrive

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C. * * * 2. * * *

c. BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

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103.00 Respiratory Disorders

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K. * * *

2. * * *

c. BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

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104.00 Cardiovascular System

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C. * * *

3. * * *

b. * * *

(iii) BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

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105.00 Digestive Disorders

A. *Which digestive disorders do we evaluate in this body system?* We evaluate digestive disorders that result in severe dysfunction of the liver, pancreas, and gastrointestinal tract (the large, muscular tube that extends from the mouth to the anus, where the movement of muscles, along with the release of hormones and enzymes, allows for the digestion of food) in this body system. Examples of these disorders and the listings we use to evaluate them include chronic liver disease (105.05), inflammatory bowel disease (105.06), and intestinal failure (105.07). We also use this body system to evaluate gastrointestinal hemorrhaging from any cause (105.02), growth failure due to any digestive disorder (105.08), liver transplantation (105.09), need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy due to any cause for children who have not attained age 3 (105.10), small intestine transplantation (105.11), and pancreas transplantation (105.12). We evaluate cancers affecting the digestive system under the listings in 113.00.

B. *What evidence do we need to evaluate your digestive disorder?*

1. *General.* To establish that you have a digestive disorder, we need medical evidence about the existence of your digestive disorder and its severity. Medical evidence should include your medical history, physical examination findings, operative reports, and relevant laboratory findings.

2. *Laboratory findings.* We need laboratory reports such as results of imaging (see 105.00B3), endoscopy, and other diagnostic procedures. We may also need clinical laboratory and pathology results.

3. *Imaging* refers to medical imaging techniques, such as x-ray, ultrasound, magnetic resonance imaging, and computerized tomography. The imaging must be consistent with the prevailing state of medical knowledge and clinical practice as a proper technique to support the evaluation of the disorder.

C. *What is chronic liver disease (CLD), and how do we evaluate it under 105.05?*

1. *General.* CLD is loss of liver function with cell necrosis (cell death), inflammation, or scarring of the liver that persists for more than 6 months. Common causes of CLD in children include chronic infection with hepatitis B virus or hepatitis C virus, autoimmune hepatitis, and metabolic disease.

a. We will evaluate your signs of CLD, such as jaundice, changes in size of the liver and spleen, ascites, peripheral edema, and altered mental status. We will also evaluate your symptoms of CLD, such as pruritus (itching), fatigue, nausea, loss of appetite, and sleep disturbances when we assess the severity of your impairment(s) and how it affects your ability to function. In the absence of evidence of a chronic liver impairment, episodes of acute liver disease do not meet the requirements of 105.05.

b. *Laboratory findings* of your CLD may include decreased serum albumin, increased International Normalized Ratio (INR), arterial deoxygenation (hypoxemia), increased serum creatinine, oliguria (reduced urine output), or sodium retention. Another laboratory finding that may be included in the evidence is a liver biopsy. If you have had a liver biopsy, we will make every reasonable effort to obtain the results; however, we will not purchase a liver biopsy.

2. *Manifestations of CLD.*

a. *Gastrointestinal hemorrhaging* (105.05A), as a consequence of cirrhosis and high pressure in the liver's portal venous system, may occur from varices (dilated veins in the esophagus or the stomach) or from portal hypertensive gastropathy (abnormal mucosal changes in the stomach). When gastrointestinal hemorrhaging is due to a cause other than CLD, we evaluate it under 105.02. The phrase ''consider under a disability for 1 year'' in 105.02 and 105.05A does not refer to the date on which your disability began, only to the date on which we must reevaluate whether your impairment(s) continues to meet a listing or is otherwise disabling. We determine the onset of your disability based on the facts of your case.

b. *Ascites or hydrothorax* (105.05B) is a pathologic accumulation of fluid in the peritoneal cavity (ascites) or pleural space (hydrothorax). Ascites or hydrothorax may be diagnosed by removing some of the fluid with needle aspiration (paracentesis or thoracentesis), physical examination, or imaging. The most common causes of ascites are portal hypertension and low serum albumin resulting from CLD. We evaluate other causes of ascites and hydrothorax that are unrelated to CLD, such as congestive heart failure and cancer, under the listings in the affected body systems.

c. *Spontaneous bacterial peritonitis (SBP)* (105.05C) is an acute bacterial infection of peritoneal fluid and is most commonly associated with CLD. SBP is diagnosed by laboratory analysis of peritoneal fluid (obtained by paracentesis) that contains a neutrophil count (also called absolute neutrophil count) of at least 250 cells/mm^3. 105.05C is satisfied with one evaluation documenting peritoneal infection. We evaluate other causes of peritonitis that are unrelated to CLD, such as tuberculosis, malignancy, and perforated bowel, under the listings in the affected body systems.

d. *Hepatorenal syndrome* (105.05D) is renal failure associated with CLD in the absence of underlying kidney pathology. Findings associated with hepatorenal syndrome include elevation of serum creatinine, sodium retention with low urinary sodium excretion, and oliguria. We evaluate renal dysfunction with known underlying kidney pathology, such as glomerulonephritis, tubular necrosis, and renal infections, under the listings in 106.00.

e. *Hepatopulmonary syndrome* (105.05E) is arterial deoxygenation due to intrapulmonary vascular dilation and arteriovenous shunting associated with CLD. Clinical findings of hepatopulmonary syndrome include platypnea (shortness of breath relieved when lying down) and orthodeoxia (low arterial blood oxygen while in the upright position), when presenting in the context of CLD. We evaluate pulmonary dysfunction with known underlying respiratory pathology, such as asthma, pneumonia, and pulmonary infections, under the listings in 103.00.

(i) Under 105.05E1, we require a resting arterial blood gas (ABG) measurement obtained while you are breathing room air; that is, without oxygen supplementation. The ABG report must include the P_aO_2 value, your name, the date of the test, and either the altitude or both the city and State of the test site.

(ii) We will not purchase the specialized imaging techniques described in 105.05E2; however, if you have had the test(s) at a time relevant to your claim, we will make every reasonable effort to obtain the report.

f. *Hepatic encephalopathy* (105.05F), also known as portosystemic encephalopathy, is a recurrent or chronic neuropsychiatric disorder associated with CLD.

(i) Under 105.05F2, we require documentation of a mental impairment associated with hepatic encephalopathy. A mental impairment can include abnormal behavior, changes in mental status, or an altered state of consciousness. Reports of abnormal behavior may show that you are experiencing delusions, paranoia, or hallucinations. Reports of changes in mental status may show change in sleep patterns, personality or mood changes, poor concentration, or poor judgment or cognitive dysfunction (for example, impaired memory, poor problem-solving ability, or attention deficits). Reports of altered state of consciousness may show that you are experiencing confusion, delirium, or stupor.

(ii) Signs and laboratory findings that document the severity of hepatic encephalopathy when not attributable to other causes may include a ''flapping tremor'' (asterixis), characteristic abnormalities found on an electroencephalogram (EEG), or abnormal serum albumin or coagulation values. We will not purchase an EEG; however, if you have had this test at a time relevant to your claim, we will make every reasonable effort to obtain the report for the purpose of establishing whether your impairment meets the criteria of 105.05F.

(iii) We will not evaluate acute encephalopathy under 105.05F if it results from conditions other than CLD. For example, we will evaluate acute encephalopathy caused by vascular events under the listings in 111.00 and acute encephalopathy caused by cancer under the listings in 113.00.

3. *SSA Chronic Liver Disease (SSA CLD) and SSA Chronic Liver Disease-Pediatric (SSA CLD–P) scores* (105.05G). Listing 105.05G1 requires two SSA CLD scores, each requiring three or four laboratory values. Listing 105.05G2 requires one SSA CLD–P score, which requires four parameters (three laboratory values and growth failure). The ''date of the SSA CLD score'' is the date of the earliest of the three or four laboratory values used for its calculation. The ''date of the SSA CLD–P score'' is the date of the earliest of the three laboratory values used for its calculation. For 105.05G1, the date of the second SSA CLD score must be at least 60 days after the date of the first SSA CLD score and both scores must be within the required 12-month period. If you have the two SSA CLD scores required by 105.05G1, we will find that your impairment meets the criteria of the listing from at least the date of the first SSA CLD score.

a. *SSA CLD score.*

(i) If you are age 12 or older, we will calculate the SSA CLD score using a formula that includes up to four laboratory values: Serum creatinine (mg/dL), total bilirubin (mg/dL), INR, and under certain conditions, serum sodium (mmol/L). The SSA CLD score calculation contains at least one, and sometimes two, parts, as described in (a) and (b).

(a) The initial calculation is:

$SSA\ CLD_i =$
$+ 3.78 \times [\log_e (\text{serum total bilirubin mg/dL})]$
$+ 11.2 \times [\log_e (\text{INR})]$
$+ 6.43$
rounded to the nearest whole integer.

(b) If the value from the initial calculation is 11 or below, the SSA CLD score will be the $SSA\ CLD_i$ value. If the value from the initial calculation is greater than 11, the SSA CLD score will be re-calculated as:

$SSA\ CLD =$
$SSA\ CLD_i$
$+ 1.32 \times (137 - \text{serum sodium mmol/L})$
$- [0.033 \times SSA\ CLD_i \times (137 - \text{serum sodium mmol/L})]$

(c) We round the results of your SSA CLD score calculation to the nearest whole integer to arrive at your SSA CLD score.

(ii) For any SSA CLD score calculation, all of the required laboratory values (serum creatinine, serum total bilirubin, INR, and serum sodium) must have been obtained within a continuous 30-day period.

(a) We round values for serum creatinine (mg/dL), serum total bilirubin (mg/dL), or INR less than 1.0 up to 1.0 to calculate your SSA CLD score.

(b) We round values for serum creatinine (mg/dL) greater than 4.0 down to 4.0 to calculate your SSA CLD score.

(c) If there are multiple laboratory values within the 30-day interval for serum creatinine (mg/dL), serum total bilirubin (mg/dL), or INR, we use the *highest* value to calculate your SSA CLD score. We will not use any INR values derived from testing done while you are on anticoagulant treatment in our SSA CLD calculation.

(d) If there are multiple laboratory values within the 30-day interval for serum sodium (mmol/L), we use the *lowest* value to calculate your SSA CLD score.

(e) If you are in renal failure or on renal dialysis within a week of any serum creatinine test in the period used for the SSA CLD calculation, we will use a serum creatinine value of 4.0, which is the maximum serum creatinine level allowed in the calculation, to calculate your SSA CLD score.

(f) If your serum sodium is less than 125 mmol/L, we will set your serum sodium to 125 mmol/L for purposes of calculation of the SSA CLD score. If your serum sodium is higher than 137 mmol/L, we will set your serum sodium to 137 mmol/L for purposes of calculation of the SSA CLD score.

(iii) When we indicate ''$\log_e$'' (also abbreviated ''ln'') in the formula for the SSA CLD score calculation, we mean the ''base e logarithm'' or ''natural logarithm'' of the numerical laboratory value, not the ''base 10 logarithm'' or ''common logarithm'' (log) of the laboratory value, and not the actual laboratory value. For example, if a person has laboratory values of serum creatinine 1.4 mg/dL, serum total bilirubin 1.3 mg/dL, INR 1.32, and serum sodium 119 mmol/L, we compute the SSA CLD score as follows:

$SSA\ CLD_i =$
$9.57 \times [\log_e(\text{serum creatinine 1.4 mg/dL}) = 0.336]$
$+ 3.78 \times [\log_e(\text{serum total bilirubin 1.3 mg/dL}) = 0.262]$
$+ 11.2 \times [\log_e(\text{INR 1.32}) = .278]$
$+ 6.43$
$= 3.22 + 0.99 + 3.11 + 6.43$
$= 13.75$, which we round to an $SSA\ CLD_i$ score of 14.

Because the $SSA\ CLD_i$ score is over 11, we then move to the second step of calculating the SSA CLD:

$SSA\ CLD =$
14
$+ 1.32 \times (137 - \text{serum sodium 125 mmol/L})$
$- [0.033 \times SSA\ CLD_i\ 14 \times (137 - \text{serum sodium 125 mmol/L})$
$= 14 + 15.84 - 5.54$
$= 24.3$, which we round to an SSA CLD score of 24.

b. *SSA CLD–P score*

(i) We calculate the SSA CLD–P score using a formula that includes four parameters: Serum total bilirubin (mg/dL), INR, serum albumin (g/dL), and whether you have growth failure. The formula for the SSA CLD–P score calculation is:

$4.80 \times [\log_e(\text{serum total bilirubin mg/dL})]$
$+ 18.57 \times [\log_e(\text{INR})]$
$- 6.87 \times [\log_e(\text{serum albumin g/dL})]$
$+ 6.67$ if you have growth failure (< -2 standard deviations for weight or height)

(ii) When we indicate ''$\log_e$'' in the formula for the SSA CLD–P score calculation, we mean the ''base *e* logarithm'' or ''natural logarithm'' ($\log_e$) of a numerical laboratory value, not the ''base 10 logarithm'' or ''common logarithm'' (log) of the laboratory value, and not the actual laboratory value. For example, if a female child is 4.0 years old, has growth failure, and has laboratory values of serum total bilirubin 2.2 mg/dL, INR 1.0, and serum albumin 3.5 g/dL, we compute the SSA CLD–P score as follows:

$4.80 \times [\log_e(\text{serum total bilirubin 2.2 mg/dL}) = 0.788]$
$+ 18.57 \times [\log_e(\text{INR 1.0}) = 0]$
$- 6.87 \times [\log_e(\text{serum albumin 3.5 g/dL}) = 1.253]$
$+ 6.67$
$= 3.78 + 0 - 8.61 + 6.67$
$= 1.84$, which we round to an SSA CLD–P score of 2.

(iii) For an SSA CLD–P score calculation, all of the required laboratory values (serum total bilirubin, INR, and serum albumin) must have been obtained within a continuous 30-day period. We round any of the required laboratory values less than 1.0 up to 1.0 to calculate your SSA CLD–P score. If there are multiple laboratory values within the 30-day interval for any given laboratory test, we use the *highest* serum total bilirubin and INR values and the *lowest* serum albumin value to calculate the SSA CLD–P score. We will not use any INR values derived from testing done while you are on anticoagulant treatment in our SSA CLD–P calculation. We will not purchase INR values for children who have not attained age 12. If there is no INR value for a child under 12 within the applicable period, we will use an INR value of 1.1 to calculate the SSA CLD–P score. We round the results of your SSA CLD–P score calculation to the nearest whole integer to arrive at your SSA CLD–P score.

(iv) The weight and length/height measurements used for the calculation must be obtained within the same 30-day period as the laboratory values.

4. *Extrahepatic biliary atresia* (105.05H) presents itself in the first 2 months of life with persistent jaundice. To satisfy 105.05H, the diagnosis of extrahepatic biliary atresia must be confirmed by liver biopsy or intraoperative cholangiogram that shows obliteration of the extrahepatic biliary tree. Biliary atresia is usually treated surgically by portoenterostomy (for example, Kasai procedure). If this surgery is not performed in the first months of life or is not completely successful, liver transplantation is indicated. If you have received a liver transplant, we will evaluate your impairment under 105.09. The phrase ''consider under a disability for 1 year'' in 105.05H does not refer to the date on which your disability began, only to the date on which we must reevaluate whether your impairment(s) continues to meet a listing or is otherwise disabling. We determine the onset of your disability based on the facts of your case.

D. *What is inflammatory bowel disease (IBD), and how do we evaluate it under 105.06?*

1. *IBD* is a group of inflammatory conditions of the small intestine and colon. The most common IBD disorders are Crohn's disease and ulcerative colitis. Remissions and exacerbations of variable duration are a hallmark of IBD.

2. We evaluate your signs and symptoms of IBD, such as diarrhea, fecal incontinence, rectal bleeding, abdominal pain, fatigue, fever, nausea, vomiting, arthralgia, abdominal tenderness, palpable abdominal mass (usually inflamed loops of bowel), and perianal disease (for example, fissure, fistulas, abscesses, or anal canal stenosis), when we assess the severity of your impairment(s). You may require supplemental daily nutrition due to IBD. There are two forms of supplemental daily nutrition we consider under 105.06B5: enteral nutrition (delivered directly to a part

of your digestive system) via a gastrostomy, duodenostomy, or jejunostomy, and parenteral nutrition delivered via a central venous catheter. Enteral tube feedings delivered via nasal or oral tubes do not satisfy the requirement in 105.06B5.

3. Surgical diversion of the intestinal tract, including ileostomy and colostomy, does not very seriously interfere with age-appropriate functioning if you are able to maintain adequate nutrition and function of the stoma. However, if you are not able to maintain adequate nutrition, we will evaluate your impairment under 105.08.

4. IBD may be associated with significant extraintestinal manifestations in a variety of body systems. These include, but are not limited to, involvement of the eye (for example, uveitis, episcleritis, or iritis); hepatobiliary disease (for example, gallstones or primary sclerosing cholangitis); urologic disease (for example, kidney stones or obstructive hydronephrosis); skin involvement (for example, erythema nodosum or pyoderma gangrenosum); or non-destructive inflammatory arthritis. You may also have associated thromboembolic disorders or vascular disease. These manifestations may not correlate with the severity of your IBD. If your impairment does not meet any of the criteria of 105.06, we will consider the effects of your extraintestinal manifestations in determining whether you have an impairment(s) that meets or medically equals another listing, and when we determine whether your impairment(s) functionally equals the listings.

5. Examples of complications of IBD that may result in hospitalization include abscesses, intestinal perforation, toxic megacolon, infectious colitis, pyoderma gangrenosum, ureteral obstruction, primary sclerosing cholangitis, and hypercoagulable state (which may lead to thromboses or embolism).

E. *What is intestinal failure, and how do we evaluate it under 105.07?*

1. *Intestinal failure* is a condition resulting in gut function below the minimum necessary for the absorption of macronutrients or water and electrolytes, resulting in a requirement for intravenous supplementation (*i.e.,* parenteral nutrition) to maintain health. Examples of conditions that may result in intestinal failure include short bowel syndrome, extensive small bowel mucosal disease, and chronic motility disorders.

2. *Short bowel syndrome* is a malabsorption disorder that occurs when ischemic vascular insults (caused, for example, by volvulus or necrotizing enterocolitis), trauma, or IBD complications require(s) surgical resection of any amount of the small intestine, resulting in chronic malnutrition.

3. *Extensive small bowel mucosal disease* means that the mucosal surface of the small bowel does not efficiently absorb nutrients or loses nutrients. Common causes of small bowel mucosal disease include microvillous inclusion disease and tufting enteropathy.

4. *Chronic motility disorder* refers to a chronic disorder of the propulsion of gut content without fixed obstructions, causing intolerance to oral nutrition and inadequate nutritional intake. This type of disorder may also be known as a chronic intestinal pseudo-obstruction (CIPO), because the gut dysfunction mimics that of an obstructed intestine, but without evidence of an actual obstruction. Primary CIPO may have an unknown underlying cause. Chronic motility disorders may also result from congenital, neuromuscular, or autoimmune conditions, such as gastroschisis, omphalocele, long segment Hirschprung's disease, Crohn's disease, and mitochondrial disorders.

5. For short bowel syndrome, we require a copy of the operative report that includes details of the surgical findings, or postoperative imaging indicating a resection of the small intestine. If we cannot get one of these reports, we need other medical reports that include details of the surgical findings. For other chronic motility disorders or extensive small bowel mucosal disease, we need medical reports that include details of your intestinal dysfunction. For any impairment evaluated under 105.07, we also need medical documentation that you are dependent on daily parenteral nutrition to provide most of your nutritional requirements.

F. *How do we evaluate growth failure due to any digestive disorder under 105.08?*

1. To evaluate growth failure due to any digestive disorder, we require documentation of the laboratory findings of chronic nutritional deficiency described in 105.08A and the growth measurements in 105.08B within the same consecutive 12-month period. The dates of laboratory findings may be different from the dates of growth measurements. Impairments other than digestive disorders that cause weight loss should be evaluated under the appropriate body system. For instance, weight loss as a result of chronic kidney disease should be evaluated under our rules for genitourinary disorders (see 106.00), and weight loss as the result of an eating disorder should be evaluated under our rules for mental disorders (see 112.00). However, if you develop a digestive disorder as the result of your other impairment, we will evaluate the acquired digestive disorder under our rules for digestive disorders.

2. Under 105.08B, we evaluate a child's growth failure by using the appropriate table for age and gender.

a. For children from birth to attainment of age 2, we use the weight-for-length table (see Table I or Table II).

b. For children age 2 to attainment of age 18, we use the body mass index (BMI)-for-age table (see Table III or Table IV).

c. BMI is the ratio of your weight to the square of your height. We calculate BMI using one of the following formulas:

English Formula

BMI = [Weight in Pounds/(Height in Inches × Height in Inches)] × 703

Metric Formulas

BMI = Weight in Kilograms/(Height in Meters × Height in Meters)

BMI = [Weight in Kilograms/(Height in Centimeters × Height in Centimeters)] × 10,000

G. *How do we evaluate digestive organ transplantation?* If you receive a liver (105.09), small intestine (105.11), or pancreas (105.12) transplant, we will consider you disabled under the listing for 1 year from the date of the transplant. After that, we evaluate your residual impairment(s) by considering the adequacy of your post-transplant function, the frequency and severity of any rejection episodes you have, complications in other body systems, and adverse treatment effects. People who receive digestive organ transplants generally have impairments that meet our definition of disability before they undergo transplantation. The phrase ''consider under a disability for 1 year'' in 105.09, 105.11, and 105.12 does not refer to the date on which your disability began, only to the date on which we must reevaluate whether your impairment(s) continues to meet a listing or is otherwise disabling. We determine the onset of your disability based on the facts of your case.

H. *How do we evaluate the need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy?* We evaluate the need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy in children who have not attained age 3 under 105.10 regardless of the medical reason for the stoma. Enteral tube feedings delivered via nasal or oral tubes do not satisfy the requirement in 105.10. After a child attains age 3, we evaluate growth failure due to any digestive disorder under 105.08, IBD requiring supplemental daily enteral or parenteral nutrition under 105.06, or other medical or developmental disorders under another digestive disorders listing or under a listing in an affected body system(s).

I. *How do we evaluate esophageal stricture or stenosis?* Esophageal stricture or stenosis (narrowing) from congenital atresia (absence or abnormal closure of a tubular body organ) or destructive esophagitis may result in malnutrition or the need for gastrostomy placement, which we evaluate under 105.08 or 105.10. Esophageal stricture or stenosis may also result in complications such as pneumonias due to frequent aspiration, or difficulty in maintaining nutritional status short of listing level severity. While these individual complications usually do not meet the listing criteria, a combination of your impairments may medically equal a listing or functionally equal the listings.

J. *How do we evaluate your digestive disorder if there is no record of ongoing treatment?* If there is no record of ongoing treatment despite the existence of a severe impairment(s), we will assess the severity and duration of your digestive disorder based on the current medical and other evidence in your case record. If there is no record of ongoing treatment, you may not be able to show an impairment that meets a digestive disorders listing, but your impairment may medically equal a listing, or be disabling based on our rules for functional equivalence.

K. *How do we evaluate your digestive disorder if there is evidence establishing a substance use disorder?* If we find that you are disabled and there is medical evidence in your case record establishing that you have a substance use disorder, we will determine whether your substance use disorder is a contributing factor material to the

determination of disability. See § 416.935 of this chapter. Digestive disorders resulting from drug or alcohol use are often chronic in nature and will not necessarily improve with cessation in drug or alcohol use.

L. *How do we evaluate digestive disorders that do not meet one of these listings?*

1. These listings are only examples of common digestive disorders that we consider severe enough to result in marked and severe functional limitations. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. See § 416.926 of this chapter. Digestive disorders may be associated with disorders in other body systems, and we consider the combined effects of multiple impairments when we determine whether they medically equal a listing. If your impairment(s) does not meet or medically equal a listing, we will also consider whether it functionally equals the listings. See § 416.926a of this chapter. We use the rules in § 416.994a of this chapter when we decide whether you continue to be disabled.

105.01 Category of Impairments, Digestive Disorders

105.02 *Gastrointestinal hemorrhaging from any cause, requiring three blood transfusions* of at least 10 cc of blood/kg of body weight per transfusion, within a consecutive 12-month period and at least 30 days apart. Consider under a disability for 1 year following the last documented transfusion; after that, evaluate the residual impairment(s).

105.03–105.04 [Reserved]

105.05 *Chronic liver disease (CLD)* (see 105.00C) with A, B, C, D, E, F, G, or H:

A. Hemorrhaging from esophageal, gastric, or ectopic varices, or from portal hypertensive gastropathy (see 105.00C2a), documented by imaging (see 105.00B3); resulting in 1 and 2:

1. Hemodynamic instability indicated by signs such as pallor (pale skin), diaphoresis (profuse perspiration), rapid pulse, low blood pressure, postural hypotension (pronounced fall in blood pressure when arising to an upright position from lying down), or syncope (fainting); and 2. Requiring hospitalization for transfusion of at least 10 cc of blood/kg of body weight. Consider under a disability for 1 year following the documented transfusion; after that, evaluate the residual impairment(s).

OR

B. Ascites or hydrothorax not attributable to other causes (see 105.00C2b), present on two evaluations within a consecutive 12-month period and at least 60 days apart. Each evaluation must document the ascites or hydrothorax by 1, 2, or 3:

1. Paracentesis; or

2. Thoracentesis; or

3. Imaging or physical examination with a or b:

a. Serum albumin of 3.0 g/dL or less; or

b. INR of at least 1.5.

OR

C. Spontaneous bacterial peritonitis (see 105.00C2c) documented by peritoneal fluid containing a neutrophil count of at least 250 cells/mm^3.

OR

D. Hepatorenal syndrome (see 105.00C2d) documented by 1, 2, or 3:

1. Serum creatinine elevation of at least 2 mg/dL; or

2. Oliguria with 24-hour urine output less than 1 mL/kg/hr; or

3. Sodium retention with urine sodium less than 10 mEq per liter.

OR

E. Hepatopulmonary syndrome (see 105.00C2e) documented by 1 or 2:

1. Arterial P_aO_2 measured by an ABG test, while at rest, breathing room air, less than or equal to:

a. 60 mm Hg, at test sites less than 3,000 feet above sea level; or

b. 55 mm Hg, at test sites from 3,000 through 6,000 feet above sea level; or

c. 50 mm Hg, at test sites over 6,000 feet above sea level; or

2. Intrapulmonary arteriovenous shunting as shown on contrast-enhanced echocardiography or macroaggregated albumin lung perfusion scan.

OR

F. Hepatic encephalopathy (see 105.00C2f) with documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on two evaluations within a consecutive 12-month period and at least 60 days apart and either 1 or 2:

1. History of transjugular intrahepatic portosystemic shunt (TIPS) or other surgical portosystemic shunt; or

2. One of the following on at least two evaluations at least 60 days apart within the same consecutive 12-month period as in F:

a. Asterixis or other fluctuating physical neurological abnormalities; or

b. EEG demonstrating triphasic slow wave activity; or

c. Serum albumin of 3.0 g/dL or less; or

d. INR of 1.5 or greater.

OR

G. SSA CLD or SSA CLD–P scores (see 105.00C3):

1. For children age 12 or older, two SSA CLD scores of at least 20 within a consecutive 12-month period and at least 60 days apart. Consider under a disability from at least the date of the first score; or

2. For children who have not attained age 12, one SSA CLD–P score of at least 11.

OR

H. Extrahepatic biliary atresia as diagnosed on liver biopsy or intraoperative cholangiogram (see 105.00C4). Consider under a disability for 1 year following diagnosis; after that, evaluate the residual impairment(s).

105.06 *Inflammatory bowel disease (IBD)* (see 105.00D) documented by endoscopy, biopsy, imaging, or operative findings *and* demonstrated by A or B:

A. Obstruction of stenotic areas (not adhesions) in the small intestine or colon with proximal dilatation, confirmed by imaging or in surgery, requiring two hospitalizations for intestinal decompression or for surgery, within a consecutive 12-month period and at least 60 days apart.

OR

B. Two of the following occurring within a consecutive 12-month period and at least 60 days apart:

1. Anemia with hemoglobin less than 10.0 g/dL, present on at least two evaluations at least 60 days apart; or

2. Serum albumin of 3.0 g/dL or less, present on at least two evaluations at least 60 days apart; or

3. Clinically documented tender abdominal mass palpable on physical examination with abdominal pain or cramping; or

4. Perianal disease with a draining abscess or fistula; or

5. Need for supplemental daily enteral nutrition via a gastrostomy, duodenostomy, or jejunostomy, or daily parenteral nutrition via a central venous catheter (see 105.10 for children who have not attained age 3).

105.07 *Intestinal failure* (see 105.00E) due to short bowel syndrome, chronic motility disorders, or extensive small bowel mucosal disease, resulting in dependence on daily parenteral nutrition via a central venous catheter for at least 12 months.

105.08 *Growth failure due to any digestive disorder* (see 105.00F), documented by A and B:

A. Chronic nutritional deficiency present on two evaluations within a consecutive 12-month period and at least 60 days apart documented by 1 or 2:

1. Anemia with hemoglobin less than 10.0 g/dL; or

2. Serum albumin of 3.0 g/dL or less.

AND

B. Growth failure as required in 1 or 2:

1. *For children from birth to attainment of age 2,* three weight-for-length measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile values in Table I or Table II; or

TABLE I—MALES BIRTH TO ATTAINMENT OF AGE 2

[Third percentile values for weight-for-length]

Length (centimeters)	Weight (kilograms)	Length (centimeters)	Weight (kilograms)	Length (centimeters)	Weight (kilograms)
45.0	1.597	64.5	6.132	84.5	10.301
45.5	1.703	65.5	6.359	85.5	10.499
46.5	1.919	66.5	6.584	86.5	10.696
47.5	2.139	67.5	6.807	87.5	10.895
48.5	2.364	68.5	7.027	88.5	11.095
49.5	2.592	69.5	7.245	89.5	11.296
50.5	2.824	70.5	7.461	90.5	11.498
51.5	3.058	71.5	7.674	91.5	11.703
52.5	3.294	72.5	7.885	92.5	11.910
53.5	3.532	73.5	8.094	93.5	12.119
54.5	3.771	74.5	8.301	94.5	12.331
55.5	4.010	75.5	8.507	95.5	12.546
56.5	4.250	76.5	8.710	96.5	12.764
57.5	4.489	77.5	8.913	97.5	12.987
58.5	4.728	78.5	9.113	98.5	13.213
59.5	4.966	79.5	9.313	99.5	13.443
60.5	5.203	80.5	9.512	100.5	13.678
61.5	5.438	81.5	9.710	101.5	13.918
62.5	5.671	82.5	9.907	102.5	14.163
63.5	5.903	83.5	10.104	103.5	14.413

TABLE II—FEMALES BIRTH TO ATTAINMENT OF AGE 2

[Third percentile values for weight-for-length]

Length (centimeters)	Weight (kilograms)	Length (centimeters)	Weight (kilograms)	Length (centimeters)	Weight (kilograms)
45.0	1.613	64.5	5.985	84.5	10.071
45.5	1.724	65.5	6.200	85.5	10.270
46.5	1.946	66.5	6.413	86.5	10.469
47.5	2.171	67.5	6.625	87.5	10.670
48.5	2.397	68.5	6.836	88.5	10.871
49.5	2.624	69.5	7.046	89.5	11.074
50.5	2.852	70.5	7.254	90.5	11.278
51.5	3.081	71.5	7.461	91.5	11.484
52.5	3.310	72.5	7.667	92.5	11.691
53.5	3.538	73.5	7.871	93.5	11.901
54.5	3.767	74.5	8.075	94.5	12.112
55.5	3.994	75.5	8.277	95.5	12.326
56.5	4.220	76.5	8.479	96.5	12.541
57.5	4.445	77.5	8.679	97.5	12.760
58.5	4.669	78.5	8.879	98.5	12.981
59.5	4.892	79.5	9.078	99.5	13.205
60.5	5.113	80.5	9.277	100.5	13.431
61.5	5.333	81.5	9.476	101.5	13.661
62.5	5.552	82.5	9.674	102.5	13.895
63.5	5.769	83.5	9.872	103.5	14.132

2. *For children age 2 to attainment of age 18,* three BMI-for-age measurements that are:

a. Within a consecutive 12-month period; and

b. At least 60 days apart; and

c. Less than the third percentile value in Table III or Table IV.

TABLE III—MALES AGE 2 TO ATTAINMENT OF AGE 18

[Third percentile values for BMI-for-age]

Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI
2.0 to 2.1	14.5	10.11 to 11.2	14.3	14.9 to 14.10	16.1
2.2 to 2.4	14.4	11.3 to 11.5	14.4	14.11 to 15.0	16.2
2.5 to 2.7	14.3	11.6 to 11.8	14.5	15.1 to 15.3	16.3
2.8 to 2.11	14.2	11.9 to 11.11	14.6	15.4 to 15.5	16.4
3.0 to 3.2	14.1	12.0 to 12.1	14.7	15.6 to 15.7	16.5
3.3 to 3.6	14.0	12.2 to 12.4	14.8	15.8 to 15.9	16.6
3.7 to 3.11	13.9	12.5 to 12.7	14.9	15.10 to 15.11	16.7
4.0 to 4.5	13.8	12.8 to 12.9	15.0	16.0 to 16.1	16.8

TABLE III—MALES AGE 2 TO ATTAINMENT OF AGE 18—Continued

[Third percentile values for BMI-for-age]

Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI
4.6 to 5.0	13.7	12.10 to 13.0	15.1	16.2 to 16.3	16.9
5.1 to 6.0	13.6	13.1 to 13.2	15.2	16.4 to 16.5	17.0
6.1 to 7.6	13.5	13.3 to 13.4	15.3	16.6 to 16.8	17.1
7.7 to 8.6	13.6	13.5 to 13.7	15.4	16.9 to 16.10	17.2
8.7 to 9.1	13.7	13.8 to 13.9	15.5	16.11 to 17.0	17.3
9.2 to 9.6	13.8	13.10 to 13.11	15.6	17.1 to 17.2	17.4
9.7 to 9.11	13.9	14.0 to 14.1	15.7	17.3 to 17.5	17.5
10.0 to 10.3	14.0	14.2 to 14.4	15.8	17.6 to 17.7	17.6
10.4 to 10.7	14.1	14.5 to 14.6	15.9	17.8 to 17.9	17.7
10.8 to 10.10	14.2	14.7 to 14.8	16.0	17.10 to 17.11	17.8

TABLE IV—FEMALES AGE 2 TO ATTAINMENT OF AGE 18

[Third percentile values for BMI-for-age]

Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI	Age (yrs. and mos.)	BMI
2.0 to 2.2	14.1	10.8 to 10.10	14.0	14.3 to 14.5	15.6
2.3 to 2.6	14.0	10.11 to 11.2	14.1	14.6 to 14.7	15.7
2.7 to 2.10	13.9	11.3 to 11.5	14.2	14.8 to 14.9	15.8
2.11 to 3.2	13.8	11.6 to 11.7	14.3	14.10 to 15.0	15.9
3.3 to 3.6	13.7	11.8 to 11.10	14.4	15.1 to 15.2	16.0
3.7 to 3.11	13.6	11.11 to 12.1	14.5	15.3 to 15.5	16.1
4.0 to 4.4	13.5	12.2 to 12.4	14.6	15.6 to 15.7	16.2
4.5 to 4.11	13.4	12.5 to 12.6	14.7	15.8 to 15.10	16.3
5.0 to 5.9	13.3	12.7 to 12.9	14.8	15.11 to 16.0	16.4
5.10 to 7.6	13.2	12.10 to 12.11	14.9	16.1 to 16.3	16.5
7.7 to 8.4	13.3	13.0 to 13.2	15.0	16.4 to 16.6	16.6
8.5 to 8.10	13.4	13.3 to 13.4	15.1	16.7 to 16.9	16.7
8.11 to 9.3	13.5	13.5 to 13.7	15.2	16.10 to 17.0	16.8
9.4 to 9.8	13.6	13.8 to 13.9	15.3	17.1 to 17.3	16.9
9.9 to 10.0	13.7	13.10 to 14.0	15.4	17.4 to 17.7	17.0
10.1 to 10.4	13.8	14.1 to 14.2	15.5	17.8 to 17.11	17.1
10.5 to 10.7	13.9	.....	.....	.....	.....

105.09 *Liver transplantation* (see 105.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

105.10 *Need for supplemental daily enteral feeding via a gastrostomy, duodenostomy, or jejunostomy* (see 105.00H) due to any cause, for children who have not attained age 3; after that, evaluate the residual impairment(s).

105.11 *Small intestine transplantation* (see 105.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

105.12 *Pancreas transplantation* (see 105.00G). Consider under a disability for 1 year from the date of the transplant; after that, evaluate the residual impairment(s).

106.00 Genitourinary Disorders

C. * * *

5. * * *

b. * * *

(iii) BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

* * * * *

108.00 Skin Disorders

A. *Which skin disorders do we evaluate under these listings?* We use these listings to evaluate skin disorders that result from hereditary, congenital, or acquired pathological processes. We evaluate genetic photosensitivity disorders (108.07), burns (108.08), and chronic conditions of the skin or mucous membranes such as ichthyosis, bullous disease, dermatitis, psoriasis, and hidradenitis suppurativa (108.09) under these listings.

B. *What are our definitions for the following terms used in this body system?*

1. *Assistive device(s):* An assistive device, for the purposes of these listings, is any device used to improve stability, dexterity, or mobility. An assistive device can be hand-held, such as a cane(s), a crutch(es), or a walker; used in a seated position, such as a wheelchair, rollator, or power operated vehicle; or worn, such as a prosthesis or an orthosis.

2. *Chronic skin lesions:* Chronic skin lesions can have recurrent exacerbations (see 108.00B7). They can occur despite prescribed medical treatment. These chronic skin lesions can develop on any part of your body, including upper extremities, lower extremities, palms of your hands, soles of your feet, the perineum, inguinal (groin) region, and axillae (underarms). Chronic skin lesions may result in functional limitations as described in 108.00D2.

3. *Contractures:* Contractures are permanent fibrous scar tissue resulting in tightening and thickening of skin that prevents normal movement of the damaged area. They can develop on any part of your musculoskeletal system, including upper extremities, lower extremities, palms of your hands, soles of your feet, the perineum, inguinal (groin) region, and axillae (underarms). Contractures may result in functional limitations as described in 108.00D2.

4. *Documented medical need:* When we use the term ''documented medical need,'' we mean that there is evidence (see § 416.913 of this chapter) from your medical source(s) in the medical record that supports your need for an assistive device (see 108.00B1) for a continuous period of at least 12 months. The evidence must include documentation from your medical source(s) describing any limitation(s) in your upper or lower extremity functioning that supports your need for the assistive device and describing the circumstances for which you need it. The evidence does not have to include a specific prescription for the device.

5. *Fine and gross movements:* Fine movements, for the purposes of these listings, involve use of your wrists, hands, and fingers; such movements include picking, pinching, manipulating, and fingering. Gross

movements involve use of your shoulders, upper arms, forearms, and hands; such movements include handling, gripping, grasping, holding, turning, and reaching. Gross movements also include exertional activities such as lifting, carrying, pushing, and pulling. Evaluation of fine and gross movements is dependent on your age.

6. *Surgical management:* For the purposes of these listings, surgical management includes the surgery(ies) itself, as well as various post-surgical procedures, surgical complications, infections or other medical complications, related illnesses, or related treatments that delay a person's attainment of maximum benefit from surgery.

7. *Exacerbation:* For the purposes of these listings, exacerbation means an increase in the signs or symptoms of the skin disorder. Exacerbation may also be referred to as flare, flare-up, or worsening of the skin disorder.

C. *What evidence do we need to evaluate your skin disorder?*

1. To establish the presence of a skin disorder as a medically determinable impairment, we need objective medical evidence from an acceptable medical source (AMS) who has examined you for the disorder.

2. We will make every reasonable effort to obtain your medical history, treatment records, and relevant laboratory findings, but we will not purchase genetic testing.

3. When we evaluate the presence and severity of your skin disorder(s), we generally need information regarding:

a. The onset, duration, and frequency of exacerbations (see 108.00B7);

b. The prognosis of your skin disorder;

c. The location, size, and appearance of lesions and contractures;

d. Any available history of familial incidence;

e. Your exposure to toxins, allergens or irritants; seasonal variations; and stress factors;

f. Your ability to function outside of a highly protective environment (see 108.00E4);

g. Laboratory findings (for example, a biopsy obtained independently of Social Security disability evaluation or results of blood tests);

h. Evidence from other medically acceptable methods consistent with the prevailing state of medical knowledge and clinical practice; and

i. Statements you or others make about your disorder(s), your restrictions, and your daily activities.

D. *How do we evaluate the severity of skin disorders?* 1. *General.* We evaluate the severity of skin disorders based on the site(s) of your chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), functional limitations caused by your signs and symptoms (including pain) (see 108.00D2), and how your prescribed treatment affects you. We consider the frequency and severity of your exacerbations (see 108.00B7), how quickly they resolve, and how you function between exacerbations (see 108.00B7), to determine whether your skin disorder meets or medically equals a listing (see 108.00D3). If there is no record of ongoing medical treatment for your disorder, we will follow the guidelines in 108.00D6. We will determine the extent and kinds of evidence we need from medical and non-medical sources based on the individual facts about your disorder. For our basic rules on evidence, see §§ 416.912, 416.913, and 416.920b of this chapter. For our rules on evaluating your symptoms, see § 416.929 of this chapter.

2. *Limitation(s) of physical functioning due to skin disorders.*

a. Skin disorders may be due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), and may cause pain or restrict movement, which can limit your ability to initiate, sustain, and complete age-appropriate activities. For example, skin lesions in the axilla may limit your ability to raise or reach with the affected arm, or lesions in the inguinal region may limit your ability to ambulate, sit, or lift and carry. To evaluate your skin disorder(s) under 108.07B, 108.08, and 108.09, we require medically documented evidence of physical limitation(s) of functioning related to your disorder. The decrease in physical function must have lasted, or can be expected to last, for a continuous period of at least 12 months (see § 416.909 of this chapter). Xeroderma pigmentosum is the only skin disorder that does not include functional criteria because the characteristics and severity of the disorder itself are sufficient to meet the criteria in 108.07A.

b. The functional criteria require impairment-related physical limitations in using upper or lower extremities that have lasted, or can be expected to last, for a continuous period of at least 12 months, medically documented by one of the following:

(i) Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3); or

(ii) Inability to use one upper extremity to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), and a documented medical need (see 108.00B4) for an assistive device (see 108.00B1) that requires the use of the other upper extremity; or

(iii) Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

(iv) Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

3. *Frequency of exacerbations due to chronic skin lesions.* A skin disorder resulting in chronic skin lesions (see 108.00B2) may have frequent exacerbations (see 108.00B7) severe enough to meet a listing even if each individual skin lesion exacerbation (see 108.00B7) did not last for an extended amount of time. We will consider the frequency, severity, and duration of skin lesion exacerbations (see 108.00B7), how quickly they resolve, and how you function in the time between skin lesion exacerbations (see 108.00B7), to determine whether your skin disorder meets or medically equals a listing.

4. *Symptoms (including pain).* Your symptoms may be an important factor in our determination of whether your skin disorder(s) meets or medically equals a listing. We consider your symptoms only when you have a medically determinable impairment(s) that could reasonably be expected to produce the symptoms. See § 416.929 of this chapter.

5. *Treatment.*

a. *General.* Treatments for skin disorders may have beneficial or adverse effects, and responses to treatment vary from person to person. Your skin disorder's response to treatment may vary due to treatment resistance or side effects that can result in functional limitations. We will evaluate all of the effects of treatment (including surgical treatment, medications, and therapy) on the symptoms, signs, and laboratory findings of your skin disorder, and on your ability to function.

b. *Despite adherence to prescribed medical treatment for 3 months.* Under 108.09, we require that your symptoms persist ''despite adherence to prescribed medical treatment for 3 months.'' This requirement means that you must have taken prescribed medication(s) or followed other medical treatment prescribed by a medical source for 3 consecutive months. Treatment or effects of treatment may be temporary. In most cases, sufficient time must elapse to allow us to evaluate your response to treatment, including any side effects. For our purposes, ''sufficient time'' means a period of at least 3 months. If your treatment has not lasted for at least 3 months, we will follow the rules in 108.00D6a. The 3 months adherence to prescribed medical treatment must be within the period of at least 12 months that we use to evaluate severity.

c. *Treatment with PUVA (psoralen and ultraviolet A (UVA) light) or biologics.* If you receive additional treatment with PUVA or biologics to treat your skin disorder(s), we will defer adjudication of your claim for 6 months from the start of treatment with PUVA or biologics to evaluate the effectiveness of these treatments unless we can make a fully favorable determination or decision on another basis.

6. *No record of ongoing treatment.*

a. Despite having a skin disorder, you may not have received ongoing treatment, may have just begun treatment, may not have access to prescribed medical treatment, or may not have an ongoing relationship with the medical community. In any of these situations, you will not have a longitudinal medical record for us to review when we

evaluate your disorder. In some instances, we may be able to assess the severity and duration of your skin disorder based on your medical record and current evidence alone. We may ask you to attend a consultative examination to determine the severity and potential duration of your skin disorder (see § 416.919a of this chapter).

b. If, for any reason, you have not received treatment, your skin disorder cannot meet the criteria for 108.09. If the information in your case record is not sufficient to show that you have a skin disorder that meets the criteria of one of the skin disorders listings, we will follow the rules in 108.00I.

E. *How do we evaluate genetic photosensitivity disorders under 108.07?* Genetic photosensitivity disorders are disorders of the skin caused by an increase in the sensitivity of the skin to sources of ultraviolet light, including sunlight.

1. *Xeroderma pigmentosum (XP) (108.07A).* XP is a genetic photosensitivity disorder with lifelong hypersensitivity to all forms of ultraviolet light. Laboratory testing confirms the diagnosis by documenting abnormalities in the body's ability to repair DNA (deoxyribonucleic acid) mutations after ultraviolet light exposure. Your skin disorder meets the requirements of 108.07A if you have clinical and laboratory findings supporting a diagnosis of XP (see 108.00E3).

2. *Other genetic photosensitivity disorders (108.07B).* The effects of other genetic photosensitivity disorders may vary and may not persist over time. To meet the requirements of 108.07B, a genetic photosensitivity disorder other than XP must be established by clinical and laboratory findings (see 108.00C) and must result either in chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) that result in functional limitations (108.00D2), or must result in the inability to function outside of a highly protective environment (see 108.00E4). Some genetic photosensitivity disorders can have very serious effects on other body systems, especially special senses and speech, neurological, mental, and cancer. We will evaluate your disorder(s) under the listings in 102.00, 111.00, 112.00, or 113.00, as appropriate. 3. *What evidence do we need to document that you have XP or another genetic photosensitivity disorder?* We will make a reasonable effort to obtain evidence of your disorder(s), but we will not purchase genetic testing. When the results of genetic tests are part of the existing evidence in your case record, we will evaluate the test results with all other relevant evidence. We need the following clinical and laboratory findings to document that you have XP or another genetic photosensitivity disorder:

a. A laboratory report of a definitive genetic test documenting appropriate chromosomal changes, including abnormal DNA repair or another DNA abnormality specific to your type of photosensitivity disorder, signed by an AMS; or

b. A laboratory report of a definitive test that is not signed by an AMS, and a report from an AMS stating that you have undergone definitive genetic laboratory studies documenting appropriate chromosomal changes, including abnormal DNA repair or another DNA abnormality specific to your type of photosensitivity disorder; or

c. If we do not have a laboratory report of a definitive test, we need documentation from an AMS that an appropriate laboratory analysis or other diagnostic method(s) confirms a positive diagnosis of your skin disorder. This documentation must state that you had the appropriate definitive laboratory test(s) for diagnosing your disorder and provide the results, or explain how another diagnostic method(s), consistent with the prevailing state of medical knowledge and clinical practice, established your diagnosis.

4. *Inability to function outside of a highly protective environment* means that you must avoid exposure to ultraviolet light (including sunlight passing through windows and light from similar unshielded light sources), wear protective clothing and eyeglasses, and use opaque broad-spectrum sunscreens in order to avoid skin cancer or other serious effects.

F. *How do we evaluate burns under 108.08?*

1. Electrical, chemical, or thermal burns frequently affect other body systems; for example, musculoskeletal, special senses and speech, respiratory, cardiovascular, genitourinary, neurological, or mental. We evaluate burns in the same way we evaluate other disorders that can affect the skin and other body systems, using the listing for the predominant feature of your disorder. For example, if your soft tissue injuries resulting from burns are under surgical management (as defined in 108.00B6), we will evaluate your disorder under the listings in 101.00.

2. We evaluate burns resulting in chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) that have been documented by an AMS to have reached maximum therapeutic benefit and therefore are no longer receiving surgical management, under 108.08. To be disabling, these burns must result in functional limitation(s) (see 108.00D2) that has lasted or can be expected to last for a continuous period of at least 12 months.

G. *How do we evaluate chronic conditions of the skin or mucous membranes under 108.09?* We evaluate skin disorders that result in chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) under 108.09. These disorders must result in chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) that continue to persist despite adherence to prescribed medical treatment for 3 months (see 108.00D5b) and cause functional limitations (see 108.00D2). Examples of skin disorders evaluated under this listing are ichthyosis, bullous diseases (such as pemphigus, epidermolysis bullosa, and dermatitis herpetiformis), chronic skin infections, dermatitis, psoriasis, and hidradenitis suppurativa.

H. *How do we evaluate disorders in other body systems that affect the skin?* When your disorder(s) in another body system affects your skin, we first evaluate the predominant feature of your disorder(s) under the appropriate body system. Examples of disorders in other body systems that affect the skin include the following:

1. *Tuberous sclerosis.* The predominant functionally limiting features of tuberous sclerosis are seizures and intellectual disorder or other mental disorders. We evaluate these features under the listings in 111.00 or 112.00, as appropriate.

2. *Malignant tumors of the skin.* Malignant tumors of the skin (for example, malignant melanomas) are cancers, or malignant neoplastic diseases, that we evaluate under the listings in 113.00.

3. *Immune system disorders.* We evaluate skin manifestations of immune system disorders such as systemic lupus erythematosus, scleroderma, psoriasis, and human immunodeficiency virus (HIV) infection under the listings in 114.00.

4. *Head or facial disfigurement or deformity, and other physical deformities caused by skin disorders.* A head or facial disfigurement or deformity may result in loss of your sight, hearing, speech, or ability to chew. In addition to head and facial disfigurement and deformity, other physical deformities may result in associated psychological problems (for example, depression). We evaluate the effects of head or facial disfigurement or deformity, or other physical deformities caused by skin disorders under the listings in 101.00, 102.00, 105.00, or 112.00, as appropriate.

5. *Porphyria.* We evaluate erythropoietic protoporphyria under the listings in 107.00.

6. *Hemangiomas.* We evaluate hemangiomas associated with thrombocytopenia and hemorrhage (for example, Kasabach-Merritt syndrome) involving coagulation defects under the listings in 107.00. When hemangiomas impinge on vital structures or interfere with functioning, we evaluate their primary effects under the listings in the appropriate body system.

I. *How do we evaluate skin disorders that do not meet one of these listings?*

1. These listings are only examples of common skin disorders that we consider severe enough to result in marked and severe limitations. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. See § 416.926 of this chapter. If your impairment(s) does not meet or medically equal a listing, we will also consider whether your impairment(s) functionally equals the listings. See § 416.926a of this chapter. We use the rules in § 416.994a of this chapter when we decide whether you continue to be disabled.

108.01 Category of Impairments, Skin Disorders

108.02–108.06 [Reserved]

108.07 *Genetic photosensitivity disorders,* established as described in 108.00E. The requirements of this listing are met if either paragraph A or paragraph B is satisfied.

A. Xeroderma pigmentosum (see 108.00E1).

OR

B. Other genetic photosensitivity disorders (see 108.00E2) with either 1 or 2:

1. Chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) that cause an

inability to function outside of a highly protective environment (see 108.00E4); or

2. Chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 108.00D2), as evidenced by:

a. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3); or

b. Inability to use one upper extremity to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), and a documented medical need (see 108.00B4) for an assistive device (see 108.00B1) that requires the use of the other upper extremity; or

c. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

d. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

108.08 *Burns* (see 108.00F). Burns that do not require continuing surgical management (see 108.00B6), or that have been documented by an acceptable medical source to have reached maximum therapeutic benefit and are no longer receiving surgical management, resulting in chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) causing chronic pain or other physical limitation(s) that result in impairment-related functional limitations (see 108.00D2), as evidenced by:

A. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3).

OR

B. Inability to use one upper extremity to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), and a documented medical need (see 108.00B4) for an assistive device (see 108.00B1) that requires the use of the other upper extremity.

OR

C. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

OR

D. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

108.09 *Chronic conditions of the skin or mucous membranes* (see 108.00G) resulting in:

A. Chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) causing chronic pain or other physical limitation(s) that persist despite adherence to prescribed medical treatment for 3 months (see 108.00D5b).

AND

B. Impairment-related functional limitations (see 108.00D2) demonstrated by 1, 2, 3, or 4:

1. Inability to use both upper extremities to the extent that neither can be used to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3); or

2. Inability to use one upper extremity to independently initiate, sustain, and complete age-appropriate activities involving fine and gross movements (see 108.00B5) due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3), and a documented medical need (see 108.00B4) for an assistive device (see 108.00B1) that requires the use of the other upper extremity; or

3. Inability to stand up from a seated position and maintain an upright position to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting at least two extremities (including when the limitations are due to involvement of the perineum or the inguinal region); or

4. Inability to maintain an upright position while standing or walking to the extent needed to independently initiate, sustain, and complete age-appropriate activities due to chronic skin lesions (see 108.00B2) or contractures (see 108.00B3) affecting both lower extremities (including when the limitations are due to involvement of the perineum or the inguinal region).

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114.00 Immune System Disorders

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F. * * *

7. * * *

b. * * *

(iii) BMI is the ratio of a child's weight to the square of his or her height. We calculate BMI using the formulas in the digestive disorders body system (105.00).

* * * * *

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FEDERAL REGISTER

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Part IV

The President

Memorandum of May 31, 2023—Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

Federal Register
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Thursday, June 8, 2023

Presidential Documents

Title 3—

The President

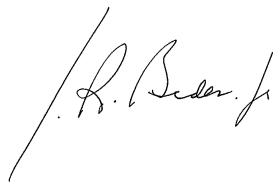
Memorandum of May 31, 2023

Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State the authority under section 506(a)(1) of the FAA to direct the drawdown of up to $300 million in defense articles and services of the Department of Defense, and military education and training, to provide assistance to Ukraine and to make the determinations required under such section to direct such a drawdown.

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



THE WHITE HOUSE,
Washington, May 31, 2023

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